

December 1982

Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach

James B. Haddad

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 Chi.-Kent L. Rev. 23 (1982).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol59/iss1/3>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

ALLOCATION OF BURDENS IN MURDER-VOLUNTARY MANSLAUGHTER CASES: AN AFFIRMATIVE DEFENSE APPROACH

JAMES B. HADDAD*

I. INTRODUCTION

In Illinois today, as at common law, and under most modern American statutes, the only difference between voluntary manslaughter and murder is the presence of mitigating circumstances that suffice to reduce the grade of the homicide.¹ The drafters of the 1961 Illinois Criminal Code created confusion in attempting to make this distinction. They defined the offense of murder without reference to the absence of circumstances which reduce the offense to voluntary manslaughter.² They included as an element of voluntary manslaughter the *presence* of those mitigating circumstances which distinguish voluntary manslaughter from murder.³

* B.A. University of Notre Dame; J.D., LL.M. Northwestern University. Professor of Law, Northwestern University. The author has served as a member of the Illinois Pattern Jury Instructions (Criminal) Committee since 1974. The views expressed are his own and not that of the Committee.

1. See ILL. REV. STAT. ch. 38, §§ 9-1, 9-2 (1981), *infra* notes 2 and 3. See generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 75-77, at 571-86 (1972) and *Patterson v. New York*, 432 U.S. 197 (1977).

2. ILL. REV. STAT. ch. 38, § 9-1(a) (1981) defines murder:

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

3. ILL. REV. STAT. ch. 38, § 9-2 defines voluntary manslaughter:

(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Occasionally decisions declare that intoxication can reduce the offense of murder to the offense of voluntary manslaughter (but not lower to the offense of involuntary manslaughter). See, e.g., *People v. Proper*, 68 Ill. App. 3d 250, 385 N.E.2d 882 (1979). Thus, there appears to be a third

Literally adhering to these statutory definitions, with little guidance from the judiciary, the drafters of the Illinois Pattern Jury Instructions have prepared jury instructions which make it irrelevant to a charge of murder whether the killing was accompanied by the statutory mitigating circumstances specified in the voluntary manslaughter statute.⁴ These instructions also direct the jury to find the defendant guilty of voluntary manslaughter only if it determines that the prosecution has proved beyond a reasonable doubt every element of murder plus the presence of the statutorily defined mitigating circumstances.⁵ Thus, if juries obeyed these instructions when both murder and voluntary

type of mitigating circumstance (in addition to passion-provocation and imperfect justification) which reduces murder to voluntary manslaughter. However, there is no statutory basis for such a category under the 1961 Criminal Code. Decisions like *Proper* are anachronisms which have a true place only in an earlier era when a certain level of intoxication was thought to negate the "malice" necessary for murder. See generally note 108 *infra*.

4. See I.P.I. §§ 7.02, 7.04, 7.06 (Crim.) (2d ed. 1981), carefully comparing the propositions essential for murder and those essential for voluntary manslaughter of either the passion-provocation type or the imperfect justification type. Note that proof of voluntary manslaughter necessarily establishes every proposition needed for a murder conviction.

7.02 Issues in Murder

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____
—; and

Second: That when the defendant did so,

[1] he intended to kill or do great bodily harm to _____;

or

[2] he knew that his act would cause death or great bodily harm to _____;

or

[3] he knew that his acts created a strong probability of death or great bodily harm to _____;

or

[4] he [(was attempting to commit) (was committing)] the offense of _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

5. See I.P.I. (Crim.) (2d ed. 1981) §§ 7.04, 7.06

7.04 Issues in Voluntary Manslaughter—Provocation

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____
—; and

Second: That when the defendant did so,

[1] he intended to kill or do great bodily harm to _____;

or

[2] he knew that such acts would cause death or great bodily harm to _____;

or

[3] he knew that such acts created a strong probability of death or great bodily harm to _____; and

manslaughter were in issue, they would never find a defendant guilty of voluntary manslaughter without also finding him guilty of murder.⁶

The statutory definitions of murder and voluntary manslaughter also have engendered confusion in the Illinois case law. Although some very able appellate jurists have commented upon the problem, none has given extended treatment to or fully identified the contradictory propositions of law which appear in Illinois decisions concerning murder and voluntary manslaughter.⁷ This article identifies the numerous anomalies and tensions in Illinois concerning the relationship between murder and manslaughter. It then treats the practical consequences of the anomalies as they emerge in a typical trial where the jury is directed to consider both murder and voluntary manslaughter.

Third: That when the defendant did so,

[1] he acted under a sudden and intense passion resulting from serious provocation by another;

or

[2] he acted under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

7.06 Issues in Voluntary Manslaughter-Intentional-Belief of Justification

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of —
_____; and

Second: That when defendant did so,

[1] he intended to kill or do great bodily harm to _____
—;

or

[2] he knew that his acts would cause death or great bodily harm to _____;

or

[3] he knew that his acts created a strong probability of death or great bodily harm to _____; and

Third: That when the defendant did so he believed that circumstances existed which would have justified killing _____; and

Fourth: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

6. If a jury adheres to the pattern instructions, a voluntary manslaughter conviction signifies proof beyond a reasonable doubt of each of the three propositions of § 7.04 or each of the four propositions of § 7.06. Proof of the first two propositions of § 7.04 or of § 7.06 is all that is required to support a murder conviction under § 7.02. See notes 4 and 5 *supra*.

7. See *infra* text accompanying notes 20-24.

The article next discusses the problems which arise in a bench trial where the charge is murder but the court also considers the lesser offense of voluntary manslaughter. It then treats issues arising in that rare bench or jury trial where the sole homicide charge is voluntary manslaughter.

As a solution to the problems encountered during trial, and as a means of ridding Illinois case law of contradictory principles, the article proposes that the statutory mitigating circumstances be treated as a partial affirmative defense which reduces murder to voluntary manslaughter. The article then addresses the difficult issue of how to adopt this reallocation of burdens while still allowing prosecutors the important option of charging voluntary manslaughter, rather than murder, when fairness so requires.

The article suggests a statutory amendment which would facilitate its proposed solutions. Nevertheless, after reviewing the case law concerning allocation of burdens, it also argues that the judiciary can and should fill the present legislative vacuum. The article proposes that the drafters of the Illinois Pattern Instructions serve as a catalyst for judicial consideration of the issues by modifying the present instructions. It concludes by providing sample jury instructions which reflect the proposed reallocation of burdens and which may be used whether that reallocation is achieved through the judicial or the legislative process.

II. THEORETICAL ANOMALIES IN THE MURDER-VOLUNTARY MANSLAUGHTER RELATIONSHIP

Scores of Illinois decisions declare that the offense of voluntary manslaughter is included in the offense of murder.⁸ Until 1981, no appellate opinion questioned this proposition.⁹ Nevertheless, this principle conflicts with the statutory definition of "included offense" and with a line of decisions that declare that sometimes proof sufficient to support a finding of murder fails to establish the elements of voluntary manslaughter.

According to the statutory definition,¹⁰ one offense is included in

8. See, e.g., *People v. Speed*, 52 Ill. 2d 141, 284 N.E.2d 636 (1972), *People v. Pierce*, 52 Ill. 2d 7, 284 N.E.2d 279 (1972), and cases cited in those opinions. See also *People v. Korycki*, 45 Ill. 2d 87, 256 N.E.2d 798 (1970).

9. In *People v. March*, 95 Ill. App. 3d 46, 60, 419 N.E.2d 1212, 1222 (1981) (Green, J., concurring), Justice Fred Green briefly and tentatively suggested that voluntary manslaughter is not included in murder. See *infra* text accompanying notes 132-33.

10. ILL. REV. STAT. ch. 38, § 2-9 (1981) reads:

"included offense" means an offense which

(a) Is established by proof of the same or less than all of the facts or a less culpable

another only if the first offense has no element which is not also an element of the second offense. In Illinois, under this definition, voluntary manslaughter is not included in murder. According to the 1961 Illinois Criminal Code, the presence of either of two types of mitigating circumstances is an element of voluntary manslaughter.¹¹ To sustain a conviction of "subsection A" voluntary manslaughter, the prosecution must establish circumstances summarized by the expression "passion-provocation."¹² To sustain conviction of "subsection B" voluntary manslaughter, the prosecution must establish circumstances summarized by the expression "imperfect justification."¹³

On the other hand, the statutory definition of murder makes no reference to such circumstances.¹⁴ Accordingly, to sustain a murder conviction, the prosecution need not prove the presence of such circumstances.¹⁵ Their presence or absence is irrelevant to a murder charge. Voluntary manslaughter, containing an element which is not also an element of murder, is therefore not included within murder.

Additionally, Illinois opinions often declare that sometimes the evidence would support either a conviction of murder, or an acquittal, but would not support a conviction of voluntary manslaughter.¹⁶ These

mental state (or both), than that which is required to establish the commission of the offense charged, or

(b) Consists of an attempt to commit the offense charged or an offense included therein.

This article is not concerned with § 2-9(b). Nor does the author find it necessary to treat the variety of meanings of "included offense" which are discussed in *People v. Mays*, 91 Ill. 2d 251, 437 N.E.2d 633 (1982). Voluntary manslaughter is not included in murder under any of the interpretations of § 2-9 treated in *Mays* because (1) the abstract statutory definition of voluntary manslaughter includes an element not included in the abstract definition of murder, (2) a murder indictment does not include an allegation of facts sufficient to allege that element of voluntary manslaughter, and (3) the proof introduced to establish murder ordinarily does not establish the added element of voluntary manslaughter.

11. See *supra* note 3. See also *People v. Bailey*, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965), and other decisions which, in holding or dictum, accept the proposition that some evidence will suffice to support a murder conviction but will not support a voluntary manslaughter conviction for want of proof of passion-provocation or imperfect justification. The author treats these decisions in the text accompanying notes 73-95 *infra*.

12. See *supra* notes 3 and 5.

13. *Id.*

14. See *supra* note 2.

15. See *supra* note 4. See also *People v. Barney*, No. 80-2321 (Ill. App. Dec. 16, 1982) which rejects the claim that voluntary manslaughter contains an element which murder does not, relying on pre-1962 decisions and not analyzing the present statute or recent decisions.

16. See, e.g., *People v. Fausz*, 107 Ill. App. 3d 558, 437 N.E.2d 702 (1982), *aff'd*, No. 56940 (Ill. Mar. 25, 1983), *petition for reh'g pending* (*Fausz* is discussed *infra* in the addendum to this article); *People v. Towers*, 17 Ill. App. 3d 467, 308 N.E.2d 223 (1974); *People v. Thompson*, 11 Ill. App. 3d 752, 297 N.E.2d 592 (1973); *People v. Dodson*, 11 Ill. App. 3d 709, 297 N.E.2d 367 (1973); *People v. Bailey*, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965) (decisions in which the appellants have prevailed). See also *People v. Odum*, 3 Ill. App. 3d 538, 279 N.E.2d 12 (1972); *People v. Tucker*, 3 Ill. App. 3d 152, 278 N.E.2d 516 (1971); *People v. Barnett*, 125 Ill. App. 2d 70, 260

“murder-or-nothing” decisions reason that the prosecution’s evidence, if believed, would establish a knowing or intentional unjustified killing; but they say that, no matter how credibility issues were resolved, the evidence would not support a finding of the statutorily defined mitigating circumstances of passion-provocation or of imperfect justification.¹⁷

It is impossible, however, to prove the “inclusive offense” without proving the “included offense.” To prove the former is, by definition, to establish every element of the latter.¹⁸ If voluntary manslaughter were included within murder, it would be impossible for the evidence to establish every element of murder without also establishing every element of voluntary manslaughter. Thus, the “murder-or-nothing” decisions belie the notion that voluntary manslaughter is included within murder.

Perhaps a declaration that voluntary manslaughter is included within murder is innocuous if that proposition merely serves notice upon a murder defendant that, depending upon the evidence, the trier of fact may be allowed to decide whether the accused is guilty of voluntary manslaughter.¹⁹ If the proposition means more than is indicated by such a limited functional definition, however, it simply is erroneous to declare that voluntary manslaughter is included within murder.

One can assert more accurately that, under Illinois law, the offense of murder is included within voluntary manslaughter. Assuming that voluntary manslaughter, like murder, requires an unjustified inten-

N.E.2d 303 (1970); *People v. Millet*, 60 Ill. App. 2d 22, 208 N.E.2d 670 (1965) (decisions in which courts accept the proposition that proof of murder is inadequate to establish voluntary manslaughter, but then find proof of the elements of voluntary manslaughter).

17. *Id.* Under recent decisions it is unlikely that a “murder-or-nothing” argument can succeed if self-defense is in issue. Courts have reasoned that if there is enough evidence to justify a self-defense instruction and verdict (signifying a *reasonable* mistaken belief that the facts justified a killing), there is enough evidence to justify a voluntary manslaughter-imperfect justification instruction and verdict (signifying an *unreasonable* mistaken belief that the facts justified a killing). See *People v. Lockett*, 82 Ill. 2d 546, 413 N.E.2d 378 (1980). See also *People v. Wright*, 24 Ill. App. 3d 536, 321 N.E.2d 52 (1974); *People v. Zertuche*, 5 Ill. App. 3d 303, 282 N.E.2d 201 (1972).

To the author, these latter decisions depend upon abstract analysis of language rather than consideration of real situations. If the prosecution witness testifies that the alleged victim was unarmed and made no threats, while the defendant testifies that the alleged victim pointed a gun at the defendant and said the defendant was about to die, the court is faced with a situation which could be murder or could be self-defense, depending upon an evaluation of credibility, but could not be voluntary manslaughter. Older cases, ignored by those cited above, accepted a “murder-or-nothing” argument in such situations. See, e.g., *People v. Hall*, 118 Ill. App. 2d 160, 254 N.E.2d 793 (1970).

18. See *supra* note 10.

19. *People v. Speed*, 52 Ill. 2d 141, 284 N.E.2d 636 (1972), rejected a claim that a murder indictment does not serve as adequate notice of the charge of voluntary manslaughter. The appellant’s claim was predicated upon the fact that voluntary manslaughter has an element (passion-provocation or imperfect justification) which is not an element of murder.

tional or knowing killing, one must conclude that there is no element of murder which is not also an element of voluntary manslaughter.²⁰ The sole difference between the two offenses is that voluntary manslaughter has an additional element: the presence of passion-provocation or of imperfect justification. According to the statutory definition of included offense, therefore, murder is included within voluntary manslaughter.²¹

The Illinois Pattern Jury Instructions also bear witness to the unorthodox proposition that the offense of voluntary manslaughter includes the offense of murder. The issues instruction for murder requires the prosecution to prove two elements.²² The issues instructions for voluntary manslaughter require proof of these same two elements plus the additional element of passion-provocation or imperfect justification.²³ Under these instructions, to sustain a murder conviction, the prosecution need prove no proposition which it will not have proved by establishing what is essential for a voluntary manslaughter conviction.²⁴ Thus, the issues instructions for murder and voluntary manslaughter imply that murder is included within voluntary manslaughter.

The proposition that murder is included within voluntary manslaughter, however, conflicts not only with the judicial declaration that voluntary manslaughter is included within murder; it also contradicts two other lines of Illinois decisions. One series of cases declares that, in reviewing a murder conviction, a court sometimes can rule that the evidence is inadequate to support a murder finding, but will support a voluntary manslaughter judgment.²⁵ These decisions may assume that

20. The voluntary manslaughter statute, *see supra* note 3, does not appear to require that the passion-provocation homicide be either intentional or knowing (as is required under ILL. REV. STAT. ch. 38, § 9-1 (1981), *see supra* note 2) for all murders except felony murder. It seems absurd, however, that a reckless act of homicide would constitute involuntary manslaughter, a Class 3 felony, while a reckless homicide performed in the heat of passion would be voluntary manslaughter, a Class 1 felony. Accordingly, the drafters of the Second Edition of the Illinois Pattern Jury Instructions modified the voluntary manslaughter issue instruction to require the same mental element as for murder. *See supra* note 5 and compare I.P.I. (Crim.) §§ 7.04, 7.06 (1st ed. 1970). *See also* *People v. Simpson*, 57 Ill. App. 3d 442, 373 N.E.2d 809, *aff'd* 74 Ill. 2d 497, 384 N.E.2d 373 (1978), and Committee Comments, ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1981), suggesting that intent is an element of voluntary manslaughter.

21. *See supra* note 10.

22. *See supra* note 4.

23. *See supra* note 5.

24. Compare the text of § 7.02 (*supra* note 4) with the text of § 7.04 and § 7.06 (*supra* note 5).

25. *See, e.g.*, *People v. Ellis*, 107 Ill. App. 3d 603, 437 N.E.2d 409 (1982); *People v. Hudson*, 71 Ill. App. 3d 504, 390 N.E.2d 5 (1979); *People v. Walker*, 55 Ill. App. 2d 292, 204 N.E.2d 594 (1965). *See also* the unusual case of *People v. Goolsby*, 45 Ill. App. 3d 441, 359 N.E.2d 871 (1977), *aff'd after remand*, 70 Ill. App. 3d 832, 388 N.E.2d 894 (1979). In *Goolsby* the jury signed verdicts finding the defendant guilty of murder and not guilty of voluntary manslaughter. The appellate

murder contains at least one element which voluntary manslaughter does not. However, under the statutory definitions and the pattern instructions for the two offenses, this is not so.²⁶ Because close analysis reveals that murder is included within voluntary manslaughter, it is not surprising that appellate decisions which reduce a murder conviction to voluntary manslaughter do not identify the element of murder which the evidence has failed to establish. Such decisions perhaps assume that if the evidence fails to establish the *absence* of mitigating circumstances, then a court may not sustain a murder verdict. Under a literal reading of the murder statute,²⁷ and under the clear language of the pattern instructions,²⁸ however, this is not so. The presence or absence of such mitigating circumstances is irrelevant to prove murder.

Another line of decisions also conflicts with the pattern instructions and with the proposition that to prove voluntary manslaughter is necessarily to prove every element of murder. These opinions declare that when a jury signs only a voluntary manslaughter verdict form after also receiving a murder verdict form, it has impliedly acquitted the accused of murder.²⁹ Yet if proof of voluntary manslaughter requires proof of every element of murder, as it does under the pattern instructions, a verdict of voluntary manslaughter should not be read as an implicit acquittal of murder. A conviction of the inclusive offense (armed robbery, for example) is not an acquittal of the included offense (robbery, for example). On the contrary, a conviction of the inclusive offense implies a finding of guilty as to the included offense, for the finding on the inclusive offense necessarily establishes the presence of every element of the included offense.³⁰ Thus, according to the pattern instructions, a conviction of voluntary manslaughter implies a finding of every element of murder. If this is so, it cannot be reconciled with

court, nevertheless, reduced the grade of the offense to voluntary manslaughter. The court, in its second opinion, justified its action by saying that the jury had acquitted the accused of imperfect-justification manslaughter, but the court was reducing the murder to passion-provocation manslaughter.

26. See *supra* notes 2-5.

27. See *supra* note 2.

28. See *supra* note 4.

29. See *People v. Adams*, 113 Ill. App. 2d 205, 252 N.E.2d 35 (1969) (bench trial) and cases cited therein. The rule that a manslaughter jury verdict is an implied acquittal of murder dates at least to *Brennan v. People*, 15 Ill. 511 (1854). *Brennan*, like *Price v. Georgia*, 398 U.S. 323 (1970), decided a century later, prohibited re-trial on a murder charge following a manslaughter conviction which had been reversed because of trial error.

30. Entry of a judgment and a sentence on both the including offense and the included offense, however, would be prohibited. See, e.g., *People v. Jones*, 89 Ill. App. 3d 1030, 412 N.E.2d 683 (1980).

the proposition that a conviction of voluntary manslaughter is an implied acquittal of murder.

III. PRACTICAL CONSEQUENCES

The relationship between murder and voluntary manslaughter under the Illinois Criminal Code of 1961 creates problems for those who demand intellectual consistency. Even more importantly, the conceptual inconsistencies in the law have practical manifestations in homicide trials and appeals. This section of the article traces the problems which arise in the various settings in which the trier of fact is to determine whether the accused is guilty of voluntary manslaughter: (A) the jury trial in which the court instructs on both murder and voluntary manslaughter; (B) the bench trial in which the court chooses between a murder finding and a voluntary manslaughter finding; and (C) the bench or jury trial where the sole intentional homicide charge is voluntary manslaughter. It also considers appeals from convictions where voluntary manslaughter and murder had been at issue in the trial court.

A. Cases in Which the Jury is to Consider Both Murder and Voluntary Manslaughter

For reasons discussed below, prosecutors usually charge murder rather than voluntary manslaughter, even if they believe that the mitigating circumstances of passion-provocation or of imperfect justification were present at the time of the homicide.³¹ At trial on a murder charge, the defense often attempts to establish mitigating circumstances. With "subsection A" voluntary manslaughter in mind, for example, the defense tries to prove that the accused acted under a sudden and intense passion upon being seriously provoked. The prosecution attempts to disprove the presence of such mitigating circumstances.

Under the Illinois Pattern Jury Instructions, the court then tells the jury, in effect, that the lawyers were wrong in suggesting that proof of murder turns upon what the evidence shows with respect to passion-provocation. The court defines murder and sets forth the issues as to murder without referring to the presence or absence of such mitigating circumstances.³² Next, in defining voluntary manslaughter and the issues on that charge, the court effectively tells the jurors that they erred in their notion of the law gathered from the flow of the evidence and

31. See *infra* text accompanying notes 62-67.

32. See *supra* note 4.

the arguments. It is the *prosecution* which must prove the *presence* of passion-provocation beyond a reasonable doubt if the jury is to return a voluntary manslaughter verdict.³³

A similar scenario occurs when the prosecution charges murder and the defense claims imperfect justification. It is typical for defense counsel to argue self-defense (a reasonable belief that facts existed which would justify the killing), or, alternatively, voluntary manslaughter (an honest but unreasonable belief that circumstances were such that the law permitted the accused to kill in his own defense). The prosecution argues that the defendant could not have possibly believed, reasonably or unreasonably, that such perilous conditions existed. The court, however, then defines murder without reference to the presence of such an actual but reasonable mistake.³⁴ Next, it tells the jury that the offense is not voluntary manslaughter unless the *prosecution* proves beyond a unreasonable doubt the *presence* of such an unreasonable mistake of circumstances.³⁵

These instructions are counterintuitive to anyone with knowledge of the historical difference between murder and voluntary manslaughter.³⁶ Moreover, they are surprising to a reader of the celebrated United States Supreme Court decisions of the past decade concerning burden of proof in murder-manslaughter cases. *Mullaney v. Wilbur*³⁷ and *Patterson v. New York*³⁸ suggest two possible allocations: either the prosecution must prove the *absence* of mitigating circumstances to obtain a murder conviction, or the defense must establish the presence of such circumstances in order to reduce murder to manslaughter. Illinois has chosen a peculiar third alternative: the prosecution must prove the *presence* of mitigating circumstances to obtain a manslaughter determination, but it may obtain a murder verdict regardless of who proves what about the presence or absence of mitigating circumstances.³⁹

If Illinois juries simply followed the flow of the evidence and the arguments, ignored the courts' instructions, and allocated the burden concerning mitigating circumstances as they saw fit (as apparently most Illinois juries do in murder-voluntary manslaughter cases), those who are concerned only with the practical would be untroubled. Some ju-

33. See § 7.04, *supra* note 5.

34. See *supra* note 4.

35. See § 7.06, *supra* note 5.

36. See *supra* note 1 and accompanying text.

37. 421 U.S. 684 (1975).

38. 432 U.S. 197 (1977).

39. See *supra* notes 2-5 and accompanying text.

ries, however, when the charge is a single count of murder, have found an accused guilty of both murder and voluntary manslaughter.⁴⁰ The possibility of such multiple verdicts apparently is so real that one seasoned trial jurist, in the absence of a broad legislative or reviewing court reconsideration of the burden issue, has devised a method of avoiding multiple verdicts. Judge James Bailey of Cook County tells juries first to consider the murder charge and not even to consider the voluntary manslaughter charge if they find the accused guilty of murder.⁴¹ Whether his approach is correct under the current law⁴² is beside the point made here: experienced judges realize that multiple verdicts are a real possibility under the current Illinois jury instructions.

With the 1981 adoption of the second edition of the Illinois Pattern Instructions, multiple verdicts of murder and voluntary manslaughter are likely to increase. In the earlier edition, a sample set of instructions, prepared by the Honorable Prentice Marshall, had placed the burden of proof on the prosecution to prove the absence of mitigating circumstances in order to obtain a murder conviction.⁴³ The second edition eliminated this sample, bringing the sample into conformity with the pattern instructions in the I.P.I. homicide chapter. Thus, the second edition's sample makes the presence of mitigating circumstances irrelevant to a charge of murder.⁴⁴ At the same time, the new sample instructions require the prosecution to prove an additional element for voluntary manslaughter—the statutorily established mitigating circumstances.⁴⁵ The sample thus impliedly instructs the jury to find the accused guilty of murder whenever it finds him guilty of voluntary manslaughter.

40. Two instances in which juries have found a defendant guilty of murder and voluntary manslaughter (as to the same homicide) are reflected in reviewing court reports. See *People v. Stuller*, 71 Ill. App. 3d 118, 389 N.E.2d 593 (1979); *People v. Taylor*, 36 Ill. App. 3d 898, 344 N.E.2d 742 (1976). At a recent meeting of the Illinois Pattern Jury Instruction Committee (Criminal) meeting, however, the judges and lawyers spoke of four additional Cook County cases in which such verdicts had been returned recently. The author's conversations with several judges suggest that in additional cases juries have returned verdicts of both murder and voluntary manslaughter. Because such multiple verdicts are rare, one must conclude that juries ordinarily do not adhere to those instructions which would yield multiple verdicts.

41. See *People v. Pastorino*, 90 Ill. App. 3d 921, 414 N.E.2d 54 (1980), *rev'd* 91 Ill. 2d 178, 435 N.E.2d 1144 (1982). Although no official statistics are published, Bailey has presided over several hundred felony jury trials and, according to experienced Cook County prosecutors, he probably has presided at more such jury trials than any of the other forty or so judges presently assigned to the Cook County felony trial calendar on a full-time basis.

42. The Supreme Court of Illinois in *Pastorino*, *supra* note 41, withheld judgment on Bailey's method, vacating on other grounds the appellate court opinion which had criticized the approach. See also *People v. Barney*, No. 80-2321 (Ill. App. Dec. 16, 1982).

43. See *infra* note 114 and accompanying text.

44. See *infra* note 137 and accompanying text.

45. *Id.*

Additionally, before adoption of the second edition, many judges provided the jury with only three verdict forms: "Guilty of Murder," "Guilty of Voluntary Manslaughter," or "Not Guilty." They would either orally instruct the jury to sign only one of these forms, or the jury usually would infer that it was to choose only one form.⁴⁶ The second edition urges judges to provide a "Not Guilty" verdict form corresponding to every "Guilty" verdict form.⁴⁷ A jury that finds a defendant guilty of voluntary manslaughter is now called upon to find the defendant either guilty of murder or not guilty of murder. If the jurors conscientiously follow the court's instructions in making this decision, they must find the accused guilty of murder whenever they find him guilty of voluntary manslaughter.⁴⁸ As discussed previously, the voluntary manslaughter finding impliedly establishes the presence of every element of murder.⁴⁹

What judgment should a judge enter when the jury has found the accused guilty of both murder and voluntary manslaughter in a case involving only one death? In four recent unreported Cook County cases, the trial judges have been divided equally, two sentencing for murder, and two sentencing for voluntary manslaughter.⁵⁰ The sparse appellate rulings are of little help.⁵¹

If the current pattern instructions represent true law, it appears that the courts should sentence for murder. As discussed previously,

46. See, e.g., *People v. Lewis*, 5 Ill. App. 3d 109, 366 N.E.2d 446 (1977) (defendant not prejudiced by failure to give fourth verdict form). The practice of giving a "guilty" form corresponding to each possible guilty verdict but only a single "not guilty" form apparently was common and frequently had been upheld. See *People v. Pavic*, 104 Ill. App. 3d 436, 432 N.E.2d 1074 (1982) (and cases cited therein). But see *People v. Rollins*, 108 Ill. App. 3d 480, 438 N.E.2d 1322 (1982) (verdicts required on each offense charged).

47. See I.P.I. (Crim.) § 26.01 (2d ed. 1981), and Committee Note thereto. See also the reference to verdict forms at the conclusion of sample instruction § 27.01. Whether one "not guilty" form or multiple "not guilty" forms should be used is an issue with significance beyond murder-voluntary manslaughter cases. This article takes no position on the actions of the I.P.I. Committee in seeking to modify Illinois practice.

48. See *People v. Owens*, 109 Ill. App. 3d 1150, 441 N.E.2d 908 (1982). See also *supra* notes 20-24 and accompanying text.

49. *Id.*

50. See *supra* note 40 for reference to these four unreported decisions.

51. In *People v. Taylor*, 36 Ill. App. 3d 898, 344 N.E.2d 742 (1976), the trial judge had entered a voluntary manslaughter judgment after the jury had found the defendant guilty of both murder and voluntary manslaughter. This decision was not before the reviewing court. In a similar situation, the trial judge had entered a murder judgment in *People v. Stuller*, 71 Ill. App. 3d 118, 389 N.E.2d 593 (1979). The *Stuller* court on review allowed a judgment only for voluntary manslaughter. *Stuller* is of dubious authority, however, because it is based upon the assumption that to secure a murder verdict, the prosecution must prove the absence of passion-provocation and imperfect justification when such mitigating circumstances are in issue. This proposition is contrary to the present pattern instructions. See *supra* note 4. See also the discussion of *Stuller* in the text which accompanies notes 127-59 *infra*.

under those instructions the voluntary manslaughter finding establishes every element of murder and is not inconsistent with a murder finding.⁵² Ordinarily, punishment is imposed on the more serious charge where a defendant has been convicted of two crimes arising from a single act.⁵³

Nevertheless, a decision to sentence for murder where the jury has also found the accused guilty of voluntary manslaughter highlights the most remarkable of all anomalies in the relationship between murder and voluntary manslaughter. If the jury acquits the accused of murder, it cannot logically convict him of voluntary manslaughter, because the acquittal of murder necessarily implies the absence of proof as to at least one element of voluntary manslaughter.⁵⁴ If the jury convicts him of murder, a voluntary manslaughter conviction is surplusage.⁵⁵ Accordingly, the logic which underlies the current Illinois instructions makes it pointless for the court to instruct the jury as to voluntary manslaughter in any case where the court instructs the jury as to murder. If juries obeyed the instructions now given in murder-voluntary manslaughter cases, courts would never have occasion in such cases to sentence for voluntary manslaughter. Consequently, the manslaughter instructions would be surplusage. This conclusion clearly demonstrates a state of confusion in Illinois law in the typical case where a jury is directed to consider both murder and voluntary manslaughter verdicts.

B. The Non-Jury Trial on a Charge of Murder

In a bench trial on a charge of murder, the judge need not articulate views as to what proof establishes murder and what proof establishes voluntary manslaughter. With no jury to instruct, he or she can avoid addressing the subject of burdens. The burdens, nevertheless, must be the same as in a jury trial.

If the trial court adhered to the principles underlying the pattern instructions, it would decide whether the accused was guilty of murder without considering the issue of passion-provocation or of imperfect justification.⁵⁶ Moreover, it would find the defendant guilty of voluntary manslaughter only if the prosecution proved every element of murder plus the element of passion-provocation or of imperfect justifi-

52. See *infra* text accompanying note 127.

53. See *People v. Jones*, 93 Ill. App. 3d 475, 417 N.E.2d 647 (1981).

54. Compare § 7.02, *supra* note 4 with § 7.04 and § 7.06, *supra* note 5.

55. It is surplusage if, as the author concludes, conviction and sentence can be entered only on the more serious charge of murder.

56. See § 7.02, *supra* note 4.

cation.⁵⁷ Thus, it would never find the accused guilty of voluntary manslaughter without also finding him guilty of murder.⁵⁸

Not surprisingly, however, there appears to be no reported decision in which a trial judge found the defendant guilty of both voluntary manslaughter and murder on a single count of murder. Even if not appealed, such a finding would be the subject of widespread commentary among lawyers and judges. Yet no such finding has come to the attention of the experienced lawyers and judges with whom the author has conversed on the subject.

Something must be amiss if judges in bench trials do not adhere to the principles of law which they set forth to guide the triers of fact in jury trials. Like most juries, judges must adopt the common sense notion that the crime is not murder if the killing was accompanied by passion-provocation or imperfect justification. As in cases where juries find the accused guilty of voluntary manslaughter and not guilty of murder, a court's finding of voluntary manslaughter ordinarily gives no hint as to how the trier of fact viewed the burden of proof: did it require the defense to prove the presence of mitigating circumstances to reduce the offense to manslaughter, or did it require the prosecution to disprove the presence of mitigating circumstances to establish murder? Nor does such a finding reflect the quantum of that burden, whether a preponderance, a clear preponderance, or beyond a reasonable doubt.

If a trial judge finds a murder defendant guilty of voluntary manslaughter without requiring proof beyond a reasonable doubt of the presence of passion-provocation or of imperfect justification, the judge is inviting a "murder-or-nothing" argument on appeal.⁵⁹ There is a tension fraught with the potential for reversal, if the reviewing court, true to the I.P.I. homicide instructions, insists upon proof beyond a reasonable doubt of the statutory mitigating circumstances to sustain a voluntary manslaughter conviction. In the next subsection, this article discusses the manner in which reviewing courts react to "murder-or-nothing" claims.⁶⁰ It treats the lesson which that reaction illustrates concerning the proper allocation of burdens in cases where both murder and voluntary manslaughter are at issue.⁶¹

57. See §§ 7.04, 7.06, *supra* note 5.

58. See *supra* text accompanying notes 20-24.

59. See *supra* note 16 and accompanying text. See also *infra* text accompanying notes 73-95.

60. See *infra* text accompanying notes 76-92.

61. *Id.*

C. Voluntary Manslaughter as the Sole Charge

When the prosecution charges voluntary manslaughter, it must prove beyond a reasonable doubt either passion-provocation or imperfect justification whenever the defendant has pleaded not guilty.⁶² The Supreme Court of Illinois requires such proof even as to elements which the defendant does not strenuously contest.⁶³ The United States Supreme Court also has declared that due process mandates such proof.⁶⁴ As long as the presence of passion-provocation or imperfect justification is viewed as an element of voluntary manslaughter, the prosecution cannot escape its burden of proving that element when it chooses to charge voluntary manslaughter, unless the defense stipulates to the presence of that element. Even if the evidence shows murder, the jury must acquit the accused where the charge is voluntary manslaughter but the evidence does not establish passion-provocation or imperfect justification.⁶⁵ Furthermore, double jeopardy principles prohibit the prosecution from charging murder after the defendant has been tried for voluntary manslaughter.⁶⁶

Accordingly, experienced prosecutors rarely charge voluntary manslaughter even when they believe that the statutory mitigating circumstances were present.⁶⁷ Prosecutors do not wish to be in a position where they charge voluntary manslaughter and then suffer an acquittal

62. See *People v. Bailey*, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965), discussed in text accompanying note 110 *infra*.

63. See *People v. Rogers*, 415 Ill. 343, 114 N.E.2d 398 (1953); *People v. Scheck*, 356 Ill. 56, 190 N.E. 108 (1934).

64. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

65. This principle is stated in *Bailey*, *supra* note 62 and in the "murder-or-nothing" decision cited *supra* note 16.

66. *Brown v. Ohio*, 432 U.S. 161 (1977), holds that, absent a defense waiver, the accused cannot be tried separately for the "included" offense and the "including" offense. Even if voluntary manslaughter is not truly included in murder, see *supra* text accompanying notes 10-19, ILL. REV. STAT. ch. 38, § 3-3 (1981) would prohibit successive trials arising from the same homicide.

67. The reviewing court opinions reveal very few instances in which voluntary manslaughter was the sole charge. In *People v. Bailey*, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965), discussed in text accompanying note 110 *infra*, while charging voluntary manslaughter and involuntary manslaughter, the prosecutor created difficulties for himself by not charging murder. In a few other cases prosecutors have charged both murder and voluntary manslaughter. See, e.g., *People v. Ellis*, 107 Ill. App. 3d 120, 437 N.E.2d 409 (1982); *People v. Millet*, 60 Ill. App. 2d 22, 208 N.E.2d 670 (1965); *People v. Jones*, 131 Ill. App. 2d 647, 264 N.E.2d 299 (1970); *People v. Barnett*, 125 Ill. App. 2d 70, 260 N.E.2d 303 (1970); *People v. Gajda*, 87 Ill. App. 2d 316, 232 N.E.2d 49 (1967). Under Illinois pleading rules, when murder alone is charged, the trier of fact can consider voluntary manslaughter if the evidence would support such a finding. See *supra* note 19 and accompanying text. Thus the additional charge of voluntary manslaughter is superfluous. A prosecutor who, nevertheless, charges both murder and voluntary manslaughter seems to be saying "I think there were mitigating circumstances, but I refuse to get into the murder-or-nothing trap by charging only voluntary manslaughter."

where the court or jury believes that the evidence shows an unjustified intentional homicide *not* accompanied by mitigating circumstances.

The problem is that sometimes prosecutors should charge voluntary manslaughter rather than murder. If the difference between the two crimes is the presence of mitigating circumstances, there are situations in which it is clear from the outset that the defendant was so seriously provoked that the appropriate verdict would be voluntary manslaughter.⁶⁸ A charge of murder under such circumstances has adverse consequences besides the inherent unfairness in charging murder where the authorities themselves concede that the offense is less serious. Overcharging may cause the accused to be incarcerated before trial when the proper charge of voluntary manslaughter would permit his or her release on bond or recognizance.⁶⁹ Moreover, if the accused is charged with voluntary manslaughter and convicted of that crime despite the absence of much evidence of passion-provocation or imperfect justification, a reviewing court, as discussed in the next subsection, straining to affirm, may seriously dilute the concept of passion-provocation or imperfect justification, lest it be required to set a murderer free.⁷⁰

The challenge is to devise a system which permits the prosecution to charge voluntary manslaughter without risking an acquittal if it proves an intentional unjustified homicide but does not establish beyond a reasonable doubt the presence of mitigating circumstances. The proposal presented below would do this while forever ridding Illinois law of "murder-or-nothing" claims.⁷¹

D. Review of Voluntary Manslaughter Convictions and of Murder Convictions

1. Review of Voluntary Manslaughter Convictions

When the court or jury finds the accused guilty of voluntary manslaughter, without also finding him guilty of murder, according to Illi-

68. The author has in mind, for example, the parent who, immediately upon learning of a violent attack upon his or her child, goes to the police station and shoots the suspect who is in custody. Illinois juries have been known to reduce murder charges to manslaughter in the absence of either instructions or a formal verdict form for that offense. See *People v. Garippo*, 321 Ill. 157, 151 N.E. 584 (1926).

69. Most homicides which seem to be accompanied by passion-provocation or imperfect self-defense, probably, under any view of the evidence, would not qualify as capital under ILL. REV. STAT. ch. 38, § 9-1 (1981). Accordingly, the court must set bond in some amount. *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74, 322 N.E.2d 837 (1975). However, the bond in a non-capital murder case will typically be higher than the bond in a manslaughter case.

70. See *infra* text accompanying notes 78-82.

71. See *infra* text accompanying notes 103-04 and 168-73.

nois decisions, it has acquitted him of murder.⁷² Thereafter, the accused may argue that the offense was “murder-or-nothing,” so that, already acquitted of murder, he must go free because the evidence does not support a voluntary manslaughter conviction.⁷³

Frequently, this argument will merely renew a claim that the defendant made earlier when he objected to the trial court’s instructing the jury concerning voluntary manslaughter. The accused’s claim that the evidence does not support a voluntary manslaughter verdict is the equivalent of an argument that the jury should not have been instructed on that subject.

If passion-provocation or imperfect justification is an element of voluntary manslaughter, then the trial court should not instruct concerning that offense unless the evidence could support a determination, beyond a reasonable doubt, that such mitigating circumstances accompanied the homicide. However, the reviewing court opinions do not make this point. On the contrary, they seem to suggest that “some evidence” of such circumstances will justify voluntary manslaughter instructions and will suffice to uphold a voluntary manslaughter conviction.⁷⁴ The reviewing court approach seems inappropriate if the prosecution must prove the presence of mitigating circumstances beyond a reasonable doubt in order to obtain a manslaughter verdict. The “some evidence” standard for instructing on voluntary manslaughter would make more sense if the crime were deemed voluntary manslaughter unless the prosecution proved beyond a reasonable doubt the *absence* of such circumstances.⁷⁵

Reviewing courts have a natural aversion to the “murder-or-nothing” argument, even when the defendant is merely renewing a claim which he made prior to the voluntary manslaughter finding.⁷⁶ When

72. See *supra* note 29 and accompanying text.

73. For examples of such arguments, see the case cited in note 25 *supra*.

74. See *People v. Purrazzo*, 95 Ill. App. 3d 886, 420 N.E.2d 461 (1981) (“some evidence” test); *People v. Strong*, 79 Ill. App. 3d 17, 398 N.E.2d 216 (1979) (“very slight” evidence upon defense theory justifies an instruction). See also *People v. Hammock*, 68 Ill. App. 3d 34, 385 N.E.2d 796 (1979); *People v. Odum*, 3 Ill. App. 3d 538, 279 N.E.2d 12 (1972).

75. This, of course, is what the article proposes in Section IV, *infra*.

76. See the cases cited in note 81 *infra* in which such claims were rejected. Opinions written by two extraordinarily able appellate judges illustrate the substantial nature of the aversion. To avoid reversing on “murder-or-nothing” grounds, Justice Edward Egan wrote that a voluntary manslaughter conviction could be sustained even without proof of one of the elements of voluntary manslaughter. See *People v. Young*, 11 Ill. App. 3d 609, 297 N.E.2d 298 (1973), discussed in text accompanying note 121 *infra*. Justice Daniel McNamara invoked an estoppel principle to uphold a voluntary manslaughter conviction without regard to whether one of the elements of voluntary manslaughter had been established. See *People v. Curwick*, 33 Ill. App. 3d 757, 338 N.E.2d 468 (1975), *infra* note 83.

the evidence of passion-provocation or imperfect justification is slight or non-existent, it is natural to conclude that the jury or the trial court returned a voluntary manslaughter verdict out of sympathy to the accused or bias against the deceased. This is especially so in bench trials where the court may have desired to avoid the high mandatory minimum sentence for murder even though the statutory mitigating circumstances were absent.⁷⁷ Under these circumstances, when it would have sustained a murder conviction, the reviewing court is most reluctant to allow the defendant to go free for want of proof of mitigating circumstances.

Thus, appellate panels stretch the statutory mitigating circumstances to uphold voluntary manslaughter convictions where proof of passion-provocation or of imperfect justification is very weak. Several decisions, for example, ignore the proposition, expressed elsewhere in Illinois opinions, that the crime is not voluntary manslaughter if the accused's reaction was grossly disproportionate to the provocation.⁷⁸ One court held that a reasonable jury could have found passion-provocation sufficient to reduce murder to manslaughter when the provocation was the bending of an automobile antenna.⁷⁹ Other cases dilute the proposition that "mere words" do not constitute sufficient provocation.⁸⁰

Such decisions, by loosening the standard for judicially cognizable provocation, adversely affect the law. In other cases where the prosecution argues that the evidence would not justify a voluntary manslaughter instruction, defense counsel can urge upon the court the diluted standard of provocation found in opinions which reject the "murder-

77. The mandatory minimum penalty for murder is twenty years. ILL. REV. STAT. ch. 38, §§ 9-1, 1005-8-1 (1981). The mandatory minimum penalty for voluntary manslaughter recently was raised from three years to four years. ILL. REV. STAT. ch. 38, §§ 9-2, 1005-8-1 (1981). The names of trial judges whose findings of voluntary manslaughter have been followed by defense claims of "murder-or-nothing" read like a partial "Who's Who" of jurists known for compassion and a desire to avoid sentences which appear to them to be unnecessarily harsh: the Hon. Warren Wolfson in *People v. Smith*, 58 Ill. App. 3d 784, 374 N.E.2d 1285 (1978); the Hon. Kenneth Wendt in *People v. Beathea*, 24 Ill. App. 3d 460, 321 N.E.2d 458 (1974); the Hon. Daniel Ryan in *People v. Thompson*, 11 Ill. App. 3d 752, 297 N.E.2d 592 (1973); the Hon. Louis Garippo in *People v. Smith*, 16 Ill. App. 3d 553, 306 N.E.2d 606 (1973), *People v. Dodson*, 11 Ill. App. 3d 709, 297 N.E.2d 367 (1973), and *People v. Stowers*, 133 Ill. App. 2d 627, 273 N.E.2d 493 (1971); the Hon. Kenneth Wilson in *People v. Young*, 11 Ill. App. 3d 609, 297 N.E.2d 298 (1973).

78. Cases which uphold murder convictions and exemplify the requirement of proportionality include *People v. Dowdell*, 84 Ill. App. 3d 707, 406 N.E.2d 123 (1980), and *People v. Matthews*, 21 Ill. App. 3d 249, 314 N.E.2d 15 (1974).

79. See *People v. Tucker*, 3 Ill. App. 3d 152, 278 N.E.2d 516 (1971).

80. See, e.g., *People v. Pierce*, 52 Ill. 2d 7, 284 N.E.2d 279 (1972); *People v. Newberry*, 127 Ill. App. 2d 322, 262 N.E.2d 282 (1970); *People v. Stepheny*, 76 Ill. App. 2d 131, 221 N.E.2d 798 (1966).

or-nothing" claim. Of course, Illinois reviewing courts can maintain two distinct lines of cases concerning the quantum of evidence which creates an issue for the trier of fact regarding whether the offense is voluntary manslaughter. They can invoke a strict standard of mitigating circumstances when the prosecution is trying to uphold a murder verdict after the trial judge has refused a voluntary manslaughter instruction. They can use a loose standard of mitigating circumstances when the defendant uses "murder-or-nothing" reasoning to attack a voluntary manslaughter finding. The cases suggest exactly such a double standard.⁸¹ The challenge, as discussed below, is to find an approach which makes this intellectual dishonesty unnecessary.⁸²

It is even more difficult for a defendant to prevail with a "murder-or-nothing" argument when he had sought or acquiesced in consideration of a voluntary manslaughter finding at the trial court level. The murder defendant may have urged the trial judge to instruct the jury concerning voluntary manslaughter or may have failed to object to such instructions. In a bench trial, defense counsel, faced with a murder charge, may have argued that, at most, the evidence would support a finding of voluntary manslaughter. After an acquittal of murder and a conviction of voluntary manslaughter, can such a defendant successfully argue that the crime was "murder-or-nothing"?

One decision suggests that the accused is estopped under such circumstances.⁸³ Other courts perhaps have been reluctant to assert that, where the plea was not guilty, the accused can be estopped from arguing that the evidence did not establish the elements of the offense of

81. Among the decisions which uphold voluntary manslaughter convictions by stretching the concept of passion-provocation are *People v. Jones*, 384 Ill. 407, 51 N.E.2d 543 (1943) (victim seen in tavern with another woman); *People v. Binion*, 132 Ill. App. 2d 257, 267 N.E.2d 715 (1971) (victim threw pursue, hitting defendant, and used bad language); *People v. Hough*, 102 Ill. App. 2d 287, 243 N.E.2d 520 (1968) (lone black victim allegedly fought caucasian youth with radio antenna, beaten to death in Cicero by four caucasian youths using baseball bat). See also the *Tucker* case, discussed in text accompanying note 79 *supra*.

Many decisions uphold murder convictions where the trial judge refused to instruct concerning voluntary manslaughter although the provocation was as great as or greater than the provocation in the previously cited cases where the courts found sufficient evidence of provocation to reject "murder-or-nothing" claims. See, e.g., *People v. Handley*, 51 Ill. 2d 229, 282 N.E.2d 131, *cert. denied*, 409 U.S. 914 (1972) (facts were similar to *Hough*, but the court held that any provocation was insignificant because victim was greatly outnumbered). See also *People v. Toth*, 106 Ill. App. 3d 27, 435 N.E.2d 748 (1982) (victim hit defendant with paint brush, pulled serrated steak knife, cut defendant on arm; court held evidence insufficient to warrant voluntary manslaughter instruction).

82. See *infra* text accompanying notes 103-04.

83. *People v. Curwick*, 33 Ill. App. 3d 757, 338 N.E.2d 468 (1975), upheld a voluntary manslaughter verdict without denying the appellant's assertion that there had been no evidence of adequate provocation to make the crime voluntary manslaughter. The court merely stated that the appellant had sought and obtained a voluntary manslaughter instruction.

which he was convicted. At any rate, without declaring the accused estopped, most courts simply stretch the concept of passion-provocation or imperfect justification as far as is necessary to defeat a "murder-or-nothing" claim.⁸⁴

Under present law, such claims may also be made in a third situation—where the original charge was voluntary manslaughter rather than murder and the court or jury found the accused guilty of voluntary manslaughter. The defendant then argues that while the evidence could have supported a murder conviction, it cannot support a voluntary manslaughter conviction for want of proof beyond a reasonable doubt of either passion-provocation or of imperfect justification. Such arguments have occasionally succeeded.⁸⁵ They rarely arise, however, because prosecutors rarely charge voluntary manslaughter, lest they face the possibility of just such a "murder-or-nothing" claim.⁸⁶ As indicated below, there is a scheme which would permit the prosecution to charge voluntary manslaughter when fairness dictates, without losing the possibility of obtaining either a murder or a voluntary manslaughter conviction, if its evidence shows an intentional or knowing unjustified homicide but does not establish, beyond a reasonable doubt, the presence of mitigating circumstances.⁸⁷

On those few occasions when a defendant prevails with a claim that while the evidence would support a murder conviction, it will not support a voluntary manslaughter conviction, he usually had been charged with murder.⁸⁸ This infrequent result has occurred after a jury trial in which the defendant objected to a voluntary manslaughter instruction or after a bench trial in which the defense did not urge the court to consider a voluntary manslaughter finding.⁸⁹ Ironically, the more that the trial judge or the jury stretches the concept of mitigating circumstances to benefit the accused and avoid a murder conviction, the more likely is it that the accused, acquitted at trial of murder, will win reversal of the voluntary manslaughter conviction.⁹⁰ Perhaps it is

84. Some of the cases cited in note 81 *supra* are of this type.

85. See *People v. Bailey*, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965).

86. See *supra* note 67 and accompanying text.

87. See *supra* text accompanying notes 62-67.

88. See the decisions cited in the first paragraph of note 25 *supra*.

89. *Id.* Under Illinois law, a judge is allowed but not required to give a voluntary manslaughter instruction *sua sponte* if the evidence warrants such an instruction. See, e.g., *People v. Taylor*, 36 Ill. 2d 483, 224 N.E.2d 266 (1967); *People v. Lewis*, 51 Ill. App. 3d 109, 366 N.E.2d 446 (1977); *People v. Hall*, 25 Ill. App. 3d 992, 324 N.E.2d 50 (1975); *People v. Hough*, 102 Ill. App. 2d 287, 243 N.E.2d 520 (1968).

90. Former Judge Louis Garippo has related to the author the story of a defendant whom Garippo very properly could have found guilty of murder in a case where the evidence revealed an unjustified, intentional homicide, accompanied by little evidence of passion-provocation or

for this reason that some outstanding appellate judges have shown such antipathy for the "murder-or-nothing" claim.⁹¹ It is also for this reason that the article suggests below an approach which would prevent "murder-or-nothing" claims from arising.⁹²

Currently, when courts feel compelled to accept the argument that a voluntary manslaughter conviction must be reversed for want of proof of mitigating circumstances, some salvage a lesser conviction for the prosecution. These courts reduce the voluntary manslaughter judgment to an involuntary manslaughter judgment.⁹³ Such a result can be justified if involuntary manslaughter is viewed as included within the offense charged (usually murder) and also within the offense of which the accused was convicted (voluntary manslaughter).⁹⁴ Because of the relatively light punishment for involuntary manslaughter, as compared to that for murder and voluntary manslaughter,⁹⁵ this approach is not as satisfactory as the one proposed below.

2. *Review of Murder Convictions*

Appellate review of murder convictions can also generate issues concerning allocation of burdens in murder-voluntary manslaughter cases. This article previously discussed the analytical problems arising from the occasional reduction of a murder conviction to a voluntary manslaughter conviction in a system where the offense of murder includes no element which is not also an element of voluntary manslaughter.⁹⁶ The article also discussed use of the "some evidence" test to determine whether the trial court erred in refusing to instruct concerning voluntary manslaughter, a standard that seems inconsistent

imperfect justification. After giving the defendant the break of a lifetime by finding him guilty of voluntary manslaughter, Garippo listened as the defendant asked him, "Judge, shouldn't it have been murder or nothing?"

91. See *supra* note 76.

92. See *infra* text accompanying notes 103-04.

93. See *People v. Towers*, 17 Ill. App. 3d 467, 308 N.E.2d 223 (1974); *People v. Dodson*, 11 Ill. App. 3d 709, 297 N.E.2d 367 (1973); *People v. Bailey*, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965) (reducing offense to involuntary manslaughter). The other decisions cited herein which accept "murder-or-nothing" claims (see *supra* note 16 and *infra* note 108) merely vacate the murder conviction and acquit the defendant.

94. Involuntary manslaughter is an unjustified homicide performed recklessly. ILL. REV. STAT. ch. 38, § 9-3 (1981). Because involuntary manslaughter requires no proof of any conduct, circumstances, or result not also required for murder or for voluntary manslaughter, and because recklessness is a less culpable mental state than is required for murder or for voluntary manslaughter (see *supra* note 20), involuntary manslaughter appears to be included within both murder and voluntary manslaughter. See the statutory definition of "included," *supra* note 10.

95. The ordinary range for murder is twenty to forty years, and for voluntary manslaughter it is four to twenty years. See *supra* note 77. For involuntary manslaughter, the ordinary range is two to five years. See ILL. REV. STAT. ch. 38, §§ 9-3 and 1005-8-1 (1981).

96. See *supra* text accompanying notes 25-28.

with the proposition that voluntary manslaughter requires proof beyond a reasonable doubt of either passion-provocation or imperfect justification.⁹⁷

Appellate review of murder convictions most directly poses the issue of allocation of burdens when a defendant who has been convicted of murder argues that the court erred in refusing to instruct the jury that, to obtain a murder conviction, the prosecution must prove beyond a reasonable doubt the *absence* of mitigating circumstances.⁹⁸ Such an argument is a direct challenge to the present Illinois Pattern Jury Instructions.⁹⁹ It, in effect, urges that voluntary manslaughter be treated as a partial affirmative defense to murder.

In the next section, this article explains the nature and the virtue of the affirmative defense approach. It does so in the context of a discussion of a proposed statute implementing the approach. The following section, however, after treating those Illinois decisions which discuss burdens of proof in murder-voluntary manslaughter cases, argues that the judiciary can and should adopt the affirmative defense approach even if the language of the present statutes remains unchanged.

IV. LEGISLATING AN AFFIRMATIVE DEFENSE APPROACH

The source of most problems and uncertainties discussed in this article is that by defining voluntary manslaughter as including, as an element, passion-provocation or imperfect justification, the legislature seemingly has cast upon the prosecution the burden of proving the presence of that element in order to sustain a voluntary manslaughter conviction.¹⁰⁰ At the same time, by defining murder without any reference to passion-provocation or imperfect justification, the legislature has seemingly made the presence or absence of such mitigating circumstances irrelevant to a charge of murder.¹⁰¹

There are two means of rectifying the situation. One would define murder as an unjustified knowing or intentional homicide performed in the absence of circumstances heretofore indicated by the shorthand phrases "passion-provocation" and "imperfect justification." Voluntary manslaughter would be defined simply as the unjustified knowing or intentional homicide. The problem with this approach is that, under

97. See *supra* text accompanying notes 73-75.

98. Section V of this article treats several cases in which the appellant made such an argument.

99. See *supra* notes 4 and 5.

100. See *supra* note 5 and accompanying text.

101. See *supra* note 3 and accompanying text.

Illinois law, if not under the United States Constitution, the prosecution would have to prove beyond a reasonable doubt the absence of these mitigating circumstances in order to sustain a murder conviction, even if the defendant came forward with no evidence of mitigating circumstances.¹⁰² The law should not require the prosecution to prove a negative in the absence of some evidence supporting a specific claim of mitigating circumstances.

Under an affirmative defense approach, voluntary manslaughter would not be in issue until the defense came forward with a certain quantum of evidence of the statutory mitigating circumstances. This quantum might be "some evidence" or enough evidence to raise a reasonable doubt about the absence of such circumstances, depending upon which line of Illinois affirmative defense cases is followed.¹⁰³

Once the defense came forward with the required quantum of evidence of either passion-provocation or of imperfect justification, according to the fairly atypical allocation of burdens of persuasion under the Illinois definition of "affirmative defense," the prosecution would be required to prove beyond a reasonable doubt the absence of the statutory mitigating circumstances.¹⁰⁴ If it failed to do so, but proved the other elements of murder, namely an unjustified knowing or intentional killing, it would be entitled to a voluntary manslaughter finding.

This article sets forth, in an appendix, a proposed statute and corresponding proposed instructions designed to implement the affirma-

102. It appears that under *Mullaney v. Wilbur*, 421 U.S. 684, 702-03 nn.31-32 (1975), the command of due process does not prohibit a state from requiring the defense to come forward with some evidence of mitigating circumstances before shifting the burden to the prosecution of proving the absence of such circumstances, even if the state defines the absence of such circumstances as an element of the offense. Under the Illinois Supreme Court decisions cited in note 63 *supra*, however, once something is defined as an element of the offense, the prosecution must establish its presence without regard to whether the accused offers evidence of its absence. *But compare* *People v. Wilson*, 131 Ill. App. 2d 731, 264 N.E.2d 492 (1970) (prosecution need show male was above age fourteen for rape only if there is evidence that he was not); *People v. Brown*, 11 Ill. App. 3d 67, 296 N.E.2d 77 (1973) (prosecution need only prove homicide was "unjustified" if there is some evidence of justification). These latter cases may simply stand for the proposition that, despite reference to them in the statute defining the crime, the age of the offender in a rape case and the justified or unjustified nature of a killing in a murder case are to be treated as affirmative defenses.

103. There is a split of authority in Illinois as to how much evidence the defense must introduce to shift the burden to the prosecution to negate an affirmative defense. The quantum seems to vary with the type of affirmative defense. *See* I.P.I. (Crim.) Introduction to 24-25.00, at 547-48 (2d ed. 1981). The I.P.I. drafters took the position that it was not their job to determine when an affirmative defense instruction is required but only to draft such instructions for use when appropriate. This article adopts the same position.

104. A majority of recently revised penal codes place the burden of proving an affirmative defense upon the accused. *See generally* *Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 *YALE L.J.* 1327, 1354-55 (1979).

tive defense approach to voluntary manslaughter. The approach has several advantages:

1. The affirmative defense approach would end the anomaly of requiring the prosecution to prove the presence of mitigating circumstances to sustain a voluntary manslaughter conviction when the original charge was murder and when at the trial the prosecution sought to disprove the presence of mitigating circumstances.

2. It would make relevant to a determination of whether murder has been established the presence or absence of those mitigating circumstances which traditionally have been thought to reduce murder to manslaughter.

3. It would not require the prosecution in a murder case to prove a negative (the absence of mitigating circumstances) until enough evidence was presented to raise an issue as to whether the crime was voluntary manslaughter.

4. It would clearly allocate burdens of coming forward and burdens of proof in murder-voluntary manslaughter cases.¹⁰⁵

5. It would guide the trier of fact to avoid multiple verdicts of both murder and voluntary manslaughter.

6. When murder is the charge, it would end claims of "murder-or-nothing" and the stretching of the concept of passion-provocation to meet such arguments. There never would be a situation where the accused could argue that, although the evidence established murder, a verdict of voluntary manslaughter could not stand. In a murder trial, a voluntary manslaughter conviction could result from successful use of an affirmative defense without proof beyond a reasonable doubt of the presence of passion-provocation or of imperfect justification.¹⁰⁶

7. The affirmative defense approach would make consistent the meaning of "included offense." Voluntary manslaughter truly would be included in murder. In a murder-voluntary manslaughter prosecution, proof of murder would necessarily establish every element of voluntary manslaughter. This is because the mitigating circumstances would not be an element of voluntary manslaughter, but rather, would constitute an affirmative defense to murder.¹⁰⁷

105. But, as recognized in note 103 *supra* and accompanying text, Illinois courts would be left to decide how much evidence of mitigating circumstances would suffice to put voluntary manslaughter in issue and to shift the burden of proof to the prosecution.

106. See *infra* text accompanying note 123 for a further explanation of this statement.

107. See *infra* text accompanying notes 121-23. The statute as drafted would have another advantage which is not directly related to the problems discussed in this article. It would spell out the mental state requirement for voluntary manslaughter (acting knowingly or intentionally) in the same terms used in the murder statute. See *supra* note 20.

V. JUSTIFICATION FOR JUDICIAL ADOPTION OF THE AFFIRMATIVE DEFENSE APPROACH

A. *Actions of the Pattern Instructions Committee in Light of Illinois Appellate Court Decisions*

In the absence of a statutory amendment, the issue remains whether the judiciary can and should treat passion-provocation and imperfect justification as a partial affirmative defense which would reduce a charge of murder to the lesser offense of voluntary manslaughter. A distinct question is whether the drafters of the pattern instructions can properly adopt that approach without departing from principles embodied in the present Illinois case law. Both questions require some examination of Illinois decisions which have expressly discussed burden of proof issues in murder-voluntary manslaughter cases and consideration of the actions of the pattern instructions committee.

Before adoption of the 1961 Code of Criminal Law, the Illinois decisions interpreting the former statute reflected some of the same anomalies and contradictions as exist under current law.¹⁰⁸ A few deci-

108. Murder was the "unlawful killing of a human being, in peace of the people, with malice aforethought, either express or implied." The murder statute specified that malice "shall be implied when no considerable provocation appears. . . ." ILL. REV. STAT. ch. 38, § 358 (1959). The manslaughter statute read, in part: "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. . . ." ILL. REV. STAT. ch. 38, § 361 (1959).

It is an oversimplification to state, however, that to obtain a murder conviction the prosecution had the burden of proving malice, that is, the absence of provocation. ILL. REV. STAT. ch. 38, § 373 (1959), stated:

The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.

Thus, a reading of the statutes suggests that the burden of proving provocation to reduce murder to manslaughter was on the defendant. The matter was clouded, however, by decisions which prohibited trial judges from instructing the jury as to the burden by quoting the statutory language setting forth the presumption. *See, e.g.*, *People v. Sterankovich*, 313 Ill. 556, 145 N.E. 172 (1924); *People v. Durand*, 307 Ill. 611, 139 N.E. 70 (1923). *See also infra* text accompanying note 109.

A return to the old law would be unsatisfactory for several reasons:

(1) If the statute, as it appears, defined murder as including as an element the absence of provocation, and then shifted to the defendant the burden of proving the presence of provocation, the shift of burden would violate due process under *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

(2) If the statute did not control as to the allocation of burdens, it would be impossible to determine from the Illinois case law where the burdens were under pre-1962 Illinois law and what a trial judge was supposed to tell a jury about those burdens in murder and manslaughter cases.

(3) Despite judicial proclamations to the contrary, under former law voluntary manslaughter was not truly included in murder any more than it is today. Long before 1962, Illinois courts agreed that in some cases evidence which was satisfactory to establish murder could be

sions mentioned the allocation of burdens and suggested that when there was a doubt whether the evidence showed murder or manslaughter, the doubt should be resolved in favor of a manslaughter verdict.¹⁰⁹ Such decisions can be read as support for the requirement that the prosecution negate beyond a reasonable doubt the presence of mitigating circumstances in order to obtain a murder verdict.

Reviewing court discussion of burdens under the 1961 Code has been confined exclusively to Illinois Appellate Court opinions. In 1965, in *People v. Bailey*,¹¹⁰ the defendant had been charged with voluntary manslaughter rather than murder. The court struck down the voluntary manslaughter conviction after it found that the prosecution had failed to prove the presence of passion-provocation or imperfect justification. Writing for the court, Justice McCormick stated that placing the burden on the prosecution to prove the presence of mitigating circumstances lacked logic, but he added that the legislature had done so in cases where the prosecutor brought a charge of voluntary manslaughter. The *Bailey* opinion vaguely implies that where the original charge is murder, the allocation of burdens is different and more logical.¹¹¹ Carefully read, *Bailey* is consistent with the proposition that where the charge is murder, the prosecution must try to establish the absence of mitigating circumstances to obtain a murder verdict and the defense must try to establish the presence of mitigating circumstances to obtain a manslaughter verdict. Justice McCormick did not indicate which side he believed would bear the burden of proof nor what quantum that burden would be when the original charge was murder.

Next came the first edition of the pattern instructions. The defini-

inadequate to prove voluntary manslaughter for want of proof of a requisite element of voluntary manslaughter, namely adequate provocation.

See, e.g., *People v. Newman*, 360 Ill. 226, 195 N.E. 645 (1935) (murder defendant found guilty of manslaughter, then freed when reviewing court held that the proof showed a "cooling" and the absence of passion-provocation at the time of the killing). *See also* *People v. Smith*, 404 Ill. 350, 88 N.E. 834 (1949); *People v. Marsh*, 403 Ill. 81, 85 N.E.2d 715 (dictum), *cert. denied*, 338 U.S. 837 (1949); *People v. Jones*, 384 Ill. 407, 51 N.E.2d 543 (1943) (dictum). As they do today, *see supra* note 81 and accompanying text, Illinois courts upheld manslaughter verdicts, rejecting "murder-or-nothing" claims, by stretching the concept of passion-provocation. *See, e.g.*, *People v. Jones*, 384 Ill. 407, 51 N.E.2d 543 (1943) (defendant "provoked" by seeing victim in tavern with another woman). One case rejected the "murder-or-nothing" argument in an unusual situation. In *Barnett v. People*, 54 Ill. 325 (1870), the accused had been acquitted of murder but convicted of manslaughter. After a reversal for error, the accused was again convicted of manslaughter. He argued that the evidence showed malice (including the absence of passion-provocation), so that the manslaughter verdict could not stand. The court said that under these limited circumstances a manslaughter verdict could be upheld even if the evidence demonstrated the presence of malice.

109. *See, e.g.*, *People v. Jones*, 313 Ill. 335, 145 N.E. 110 (1924).

110. 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965).

111. *Id.* at 275-76, 205 N.E.2d at 764.

tional and the issues instructions in the homicide chapter merely tracked the statute.¹¹² These instructions thus made it wholly irrelevant to the charge of murder whether mitigating circumstances were present. They required prosecution proof beyond a reasonable doubt of mitigating circumstances to obtain a voluntary manslaughter conviction.¹¹³

The drafters, however, also prepared two sets of sample instructions based upon hypothetical cases. In one hypothetical, the facts called for consideration of murder, self-defense, and voluntary manslaughter of the imperfect justification type.¹¹⁴ The Honorable Prentice Marshall, who prepared these samples, apparently was dissatisfied with use of the homicide chapter pattern instructions in a case where the jury was to consider both murder and voluntary manslaughter.¹¹⁵ Thus, without explanation or citation of authority, the sample instructions of the first edition placed upon the prosecution the burden of proving beyond a reasonable doubt the absence of imperfect justification.¹¹⁶ In other words, sample instruction 27.01 treats the statutory mitigating circumstances as an affirmative defense to murder.

In one respect, however, sample instruction 27.01 departed from an affirmative defense approach. Although it told the jurors that to obtain a murder conviction, the prosecution must prove beyond a reasonable doubt the absence of imperfect justification, it also instructed the jury that, to obtain a voluntary manslaughter conviction, the prosecution must prove beyond a reasonable doubt the presence of imperfect justification.¹¹⁷ A true affirmative defense approach would allow a con-

112. I.P.I. (Crim.) §§ 7.01-7.06 (1st ed. 1970).

113. Except for inclusion of a mental state requirement for voluntary manslaughter (*see supra* note 20), the issues instructions for murder and voluntary manslaughter were in substance identical to those of the second edition. *See supra* notes 4 and 5.

114. I.P.I. (Crim.) § 27.01 (1st ed. 1970).

115. Members of the committee which prepared the first edition have informed me that the task of preparing the sample instructions fell entirely to Judge Marshall and that the rest of the committee did not review the sample instructions.

116. In pertinent part, § 27.01 read:

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of John Smith;

Second: That when the defendant did so, he intended to kill or do great bodily harm to John Smith, or he knew that his acts created a strong probability of death or great bodily harm to John Smith; and

Third: That the defendant was not justified in using the force which he used; and

Fourth: That the defendant did not believe that circumstances existed which justified the use of the force which he used.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of murder.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

117. In other words, in setting forth what was necessary for a voluntary manslaughter conviction,

viction of voluntary manslaughter whenever the jury found beyond a reasonable doubt an unjustified intentional or knowing homicide without finding, beyond a reasonable doubt, the absence of imperfect justification.¹¹⁸ More importantly, sample 27.01 left a large gap: if the evidence as to imperfect justification was fairly evenly divided, under 27.01, the defendant was guilty of neither murder nor voluntary manslaughter, despite proof beyond a reasonable doubt of an unjustified intentional or knowing homicide.¹¹⁹ By contrast, the affirmative defense approach outlined in this article would be "partial," because the prosecution's failure to prove the absence of mitigating circumstances would reduce the grade of the homicide to voluntary manslaughter, rather than dictating an acquittal.

The next development came in 1973, when the appellant in *People v. Bergeron*¹²⁰ argued that the court erred in his murder prosecution by failing to give the 27.01 issues instruction that required the prosecution to negate imperfect justification in order to obtain a murder conviction. The reviewing court, apparently not apprehending the argument, simply said that the jury was adequately instructed as to self-defense. The appellant, of course, was addressing imperfect justification, which distinguishes voluntary manslaughter from murder, and was not speaking of self-defense, which merits acquittal.

Later in 1973, the Illinois Appellate Court decided another case which has significant bearing on the burden of proof issue, although it does not discuss jury instructions. In *People v. Young*,¹²¹ the appellant argued "murder or nothing" following his bench trial conviction of voluntary manslaughter. Justice Edward Egan declared that the court would not reverse a voluntary manslaughter conviction where the evidence sustained a finding that the accused had committed an unjustified knowing or intentional homicide. Egan's opinion was different from others that responded to "murder-or-nothing" claims: it did not, as an additional requirement for affirmance of a voluntary manslaugh-

tion, I.P.I. (Crim.) § 27.01 (1st ed. 1970) conformed to the issues instruction of I.P.I. (Crim.) § 7.06 (1st ed. 1970). See *supra* note 5 for the text of the substantially similar § 7.06 of the second edition.

118. See *infra* text accompanying note 123.

119. Under the first edition's § 27.01, a murder conviction required proof beyond a reasonable doubt of the absence of imperfect justification. A voluntary manslaughter conviction required proof beyond a reasonable doubt of the presence of imperfect justification. A jury following these instructions could not convict of either crime if the evidence did not meet the reasonable doubt standard. Although no case has so held, the author believes that this deficiency in the first edition's § 27.01 is sufficient reason for a court to refuse to instruct in the language of I.P.I. (Crim.) § 27.01 (1st ed. 1970).

120. 10 Ill. App. 3d 762, 295 N.E.2d 228 (1973).

121. 11 Ill. App. 3d 568, 297 N.E.2d 298 (1973).

ter conviction, mandate proof or the element of imperfect justification or passion-provocation.¹²² In other words, where the charge was murder, the *Young* opinion concluded that a voluntary manslaughter conviction could be sustained in the absence of proof of one of the elements of voluntary manslaughter.

The *Young* opinion makes sense only if voluntary manslaughter is viewed as a partial affirmative defense to murder, rather than as a crime which has as an element the presence of passion-provocation or imperfect self-defense. Once mitigating circumstances are in issue in a murder prosecution, it is as if the elements of murder are: (1) an unjustified knowing or intentional homicide (2) in the absence of passion or provocation, while the elements of voluntary manslaughter are merely an unjustified knowing or intentional homicide.¹²³ As long as the prosecution proves beyond a reasonable doubt the unjustified knowing or intentional homicide, it can sustain a voluntary manslaughter finding without regard to what the evidence shows concerning passion-provocation or imperfect justification. Unfortunately, later opinions rejected *Young* and returned to the older approach, which treated the presence of passion-provocation or imperfect justification as an element of voluntary manslaughter, even where the charge was murder.¹²⁴

In 1976, in a single footnote sentence of dictum in *People v. Diaz*,¹²⁵ Justice Stamos noted the proposition in sample instruction 27.01 which requires the prosecution to negate imperfect justification in order to obtain a murder conviction where imperfect justification is in issue. He called it a mystery proposition that had no basis in the murder instruction found in the I.P.I. homicide chapter. Because the defendant had not been found guilty of murder and was not complaining about the failure to give sample 27.01, Stamos had no occasion to analyze whether the affirmative defense approach of 27.01 was more appropriate than that embodied in the instructions of the homicide chapter.

122. *People v. Thompson*, 11 Ill. App. 3d 752, 297 N.E.2d 592 (1973), noted this dissimilarity between *Young* and other decisions rejecting "murder-or-nothing" claims.

123. One commentator has argued that the word "element" has no meaning other than "that which the prosecution must prove beyond a reasonable doubt." See Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 342-45 (1980). Using this analysis, one can conclude that once the burden shifts to the prosecutor to prove fact *X* (here the absence of passion-provocation or imperfect justification), fact *X* has become an element of the offense.

124. See, e.g., *People v. Thompson*, 11 Ill. App. 3d 752, 297 N.E.2d 592 (1973) and the other post-1973 "murder-or-nothing" decisions cited *supra* note 16.

125. 38 Ill. App. 3d 447, 348 N.E.2d 199 (1976).

Next came *People v. Seaberry*,¹²⁶ in which Justice Seidenfeld stated unequivocally that where the issue is properly raised in a murder trial, the burden is on the state to prove beyond a reasonable doubt that the defendant did not act in a heat of passion. He further stated that this obligation only arises where the defense has introduced some evidence of heat of passion in asserting the "voluntary manslaughter defense." The *Seaberry* statement is the clearest treatment of voluntary manslaughter as a partial affirmative defense to murder in any Illinois case. It would fully support use of the first edition's 27.01 proposition that requires the state to prove the absence of mitigating circumstances in order to secure a murder conviction. At the same time, the *Seaberry* statement was mere dictum, which cited no Illinois decision in support of its affirmative defense treatment of voluntary manslaughter.

One year later, in *People v. Stuller*,¹²⁷ the appellate court expressly endorsed the 27.01 affirmative defense approach. In *Stuller*, the defendant was convicted of both murder and voluntary manslaughter. The jury had been instructed in accordance with the I.P.I. homicide chapter instructions. As indicated previously, a jury should return such multiple verdicts whenever it finds beyond a reasonable doubt an unjustified knowing and intentional homicide plus either passion-provocation or imperfect justification. The appellate court nevertheless vacated the murder conviction. Justice Kasserman's opinion for the court said that the trial judge should have used sample instruction 27.01. He correctly noted that by requiring the prosecution to prove beyond a reasonable doubt the absence of mitigating circumstances, the instruction would avoid multiple verdicts. *Stuller* indicates that the "manifest purpose of the murder instruction is to make the jury aware of the distinction between murder and voluntary manslaughter," and it explained that the homicide is not murder if accompanied by the mitigating circumstances specified in the voluntary manslaughter statute.

Stuller further stated that it is the duty of the court, even where the defense tenders no such instruction, to utilize 27.01 where both murder and manslaughter are in issue. *Stuller* did not mention *Young*, *Seaberry*, or older Illinois decisions which would have supported the affirmative defense approach to the murder-voluntary manslaughter issue. Nor did it note *People v. Diaz*'s accurate observation that 27.01 departed from the I.P.I. homicide chapter instructions.

126. 63 Ill. App. 3d 718, 380 N.E.2d 511 (1978).

127. 71 Ill. App. 3d 118, 389 N.E.2d 593 (1979).

Then came *People v. March*,¹²⁸ a 1981 decision which confronted the claim that the trial court erred in failing to use the affirmative defense approach of 27.01 where both murder and voluntary manslaughter were in issue. Justice Craven's opinion for the court declared: "The question this issue presents is whether the jury must be instructed that the State has to negate the elements of voluntary manslaughter beyond a reasonable doubt before it can convict this defendant of murder."¹²⁹

Because the court remanded for a new trial on other grounds, Craven declared that the court should not discuss "these complex questions of constitutional law and statutory interpretation."¹³⁰ He noted that Justices Green and Trapp disagreed, and thus declared the sentiment of the majority: "The trial court is not required to instruct the jury that the State must negate the elements of voluntary manslaughter beyond a reasonable doubt before they could convict him of murder."¹³¹

Justice Green's concurring opinion states his support for that conclusion. He acknowledged that the instructions of the homicide I.P.I. chapter do not seem to be sensible.¹³² He explained that under these instructions, the unjustified intentional or knowing homicide is murder, even if the evidence shows, by a preponderance of evidence, the presence of mitigating circumstances specified in the voluntary manslaughter statute. He added that the affirmative defense approach advocated by the appellant was logical, and noted that under that approach, voluntary manslaughter would be truly included in murder.

Green, however, said that he could find no support in Illinois law, at least since the adoption of the 1961 Code, for use of the affirmative defense approach.¹³³ Neither his opinion, nor the others in *March*, cited either *Stuller* or *Seaberry*, which definitely do support the affirmative defense approach. Moreover, none of the *March* opinions refer to other post-1961 decisions previously treated in this article which are consistent with such an approach.

Justice Trapp also concurred in *March*, agreeing that Illinois decisions do not support use of the affirmative defense approach.¹³⁴ He also emphasized that the homicide chapter decisions did not violate

128. 95 Ill. App. 3d 46, 419 N.E.2d 1212 (1981).

129. *Id.* at 55-56, 419 N.E.2d at 1219.

130. *Id.*

131. *Id.*

132. *People v. March*, 95 Ill. App. 3d 46, 61-62, 419 N.E.2d 1212, 1223 (1981) (Green, J., concurring).

133. *Id.*

134. *People v. March*, 95 Ill. App. 3d 46, 419 N.E.2d 1212, 1220-22 (1981) (Trapp, J., concurring).

United States Supreme Court decisions because they did not require the defense to prove the absence of an element of murder in order to avoid a murder conviction.¹³⁵

March was the latest word when the drafters of the second edition of the I.P.I. finalized their instructions. As with the first edition, the sample instructions were the work of a single person and were not presented for review by the full committee.¹³⁶ However, the committee did approve, in advance, the modification of sample instruction 27.01 to delete the affirmative defense approach.¹³⁷ The committee concluded that it could not overrule an appellate court decision (*March*) which apparently settled the issue. It was also aware of the accurate observation that Justice Stamos had made in *Diaz*: 27.01 appears inconsistent with the I.P.I. homicide chapter instructions. The committee fully concurred with Justice Trapp's observation in *March* that rejection of the 27.01 approach would violate no constitutional principle. As memory serves, the committee was not aware of *Stuller* or *Seaberry* when it made its decision.¹³⁸

After adoption of the revised 27.01, *People v. Perez*¹³⁹ was the first decision to discuss the allocation of burdens in murder-voluntary manslaughter cases. As had appellants Bergeron and March, appellant Perez argued that the jury should have been instructed that a murder conviction required the prosecution to prove beyond a reasonable doubt the absence of imperfect justification. In affirming his murder conviction, the *Perez* court mentioned neither *March* nor the revised 27.01, both of which would have supported its result.

Instead, the court concentrated on distinguishing *Stuller*, which had approved the affirmative defense approach of the earlier version of 27.01. The *Perez* court said that *Stuller* applies only where the jury has found the defendant guilty of both murder and voluntary manslaughter. It contended that by signing a guilty verdict as to murder and a not guilty verdict as to voluntary manslaughter, the *Perez* jury had found that imperfect justification had been absent.¹⁴⁰ This is not so, however. Under the I.P.I. murder instructions, as indicated previously, a murder conviction requires no determination concerning imperfect justifica-

135. *Id.*

136. The Hon. Warren Wolfson assumed this responsibility.

137. The author's notes and his memory of committee meetings are the basis for the statements made in this paragraph.

138. *Id.*

139. 100 Ill. App. 3d 901, 427 N.E.2d 229 (1981).

140. *Id.* at 908, 427 N.E.2d at 234.

tion.¹⁴¹ A voluntary manslaughter acquittal indicates only that the jury did not find that the prosecution had proved beyond a reasonable doubt the *presence* of mitigation.¹⁴² Thus, *Perez* did not answer the appellant's claim that, where both murder and voluntary manslaughter are in issue, the prosecution must prove beyond a reasonable doubt the absence of mitigation in order to obtain a murder verdict.

Finally, in *People v. Vega*,¹⁴³ the appellate court again confronted the claim that the trial judge had erred in refusing to adopt the affirmative defense approach of the first edition's 27.01. The *Vega* court observed that this sample instruction correctly stated the law when it required the prosecution to prove beyond a reasonable doubt the absence of imperfect justification in order to obtain a murder conviction when voluntary manslaughter also was in issue.¹⁴⁴

The *Vega* opinion then changed directions. It observed that the second edition's 27.01 did not require such proof. It also said that the other I.P.I. instructions adequately stated the law as embodied in the first edition's version of 27.01, citing *Bergeron*. The court concluded that giving the first edition's version of 27.01 was unnecessary.¹⁴⁵ The *Vega* court's premise is simply wrong: no other I.P.I. instructions tell the jury that a murder conviction requires proof of the absence of imperfect justification.

The *Vega* opinion then changed directions again. It said that *Stuller* seemed to require reversal because of the trial court's failure to require the prosecution to negate imperfect justification in order to obtain a murder conviction. The court, however, ended by distinguishing *Stuller* and following *Perez*. Even though the *Vega* jury, unlike the *Perez* jury, had not signed a not guilty verdict as to voluntary manslaughter, the court found that the murder verdict implied that the jury had found that imperfect justification had been absent.¹⁴⁶ As indicated previously, however, a murder conviction under the current I.P.I. instructions requires no determination as to imperfect justification or passion-provocation.¹⁴⁷ Under those same instructions, a jury's decision not to sign a voluntary manslaughter guilty verdict at most signifies its belief that the prosecution failed to prove the presence of mitigating

141. See *supra* note 4 and accompanying text.

142. See *supra* note 5 and accompanying text.

143. 107 Ill. App. 3d 289, 292, 437 N.E.2d 919, 923 (1982).

144. *Id.*

145. *Id.*

146. *Id.*

147. See *supra* note 4 and accompanying text.

circumstances beyond a reasonable doubt.¹⁴⁸

In sum, the *Vega* court said that the affirmative defense approach of the first edition's 27.01 was correct, it erroneously concluded that such an approach was embodied in other I.P.I. instructions, and it erroneously contended that a murder conviction, in the absence of a voluntary manslaughter conviction, implies that the prosecution has proved everything required by the affirmative defense approach of the first edition's 27.01. *Vega* did not cite *March* nor concur in the *March* view that Illinois law has not embodied the affirmative defense approach where murder and voluntary manslaughter are both in issue.

B. The Proposal's Conformity with Present Illinois Case Law

Earlier, this article demonstrated the wisdom of treating voluntary manslaughter as a partial affirmative defense to murder.¹⁴⁹ This is not enough to justify an I.P.I. adoption of that approach. In shaping issue instructions, the I.P.I. drafters must be true to the judiciary's interpretation of Illinois law.

As a recital of the decisions indicates, however, Illinois courts have not clearly rejected the treatment of voluntary manslaughter as a partial affirmative defense to murder. On the contrary, *Seaberry*¹⁵⁰ and *Stuller*¹⁵¹ expressly approve such an approach. In refusing to reverse for failure to give the first edition's version of 27.01, the courts in *Bergeron*,¹⁵² *Perez*,¹⁵³ and *Vega*¹⁵⁴ did not conclude that it was erroneous to require the prosecution to prove the absence of mitigating circumstances. *Vega* even stated that such a requirement reflected Illinois law. *Diaz*¹⁵⁵ did no more than comment that the first edition's version of 27.01 was not true to the I.P.I. homicide chapter instructions.

Thus, *People v. March*¹⁵⁶ is the only decision to hold that where murder and voluntary manslaughter are in issue, the prosecution need not prove the absence of mitigating circumstances beyond a reasonable doubt. It may be irrelevant to the present discussion that the two justices who concurred in the *March* dictum based their conclusions upon

148. See *supra* note 5 and accompanying text.

149. Section IV *supra*.

150. See *supra* note 126 and accompanying text.

151. See *supra* note 127 and accompanying text.

152. See *supra* note 120 and accompanying text.

153. See *supra* note 139 and accompanying text. As this article went to print, *Perez* was followed, in *People v. McGee*, 110 Ill. App. 3d 766, 443 N.E.2d 1057 (1983).

154. See *supra* note 143 and accompanying text.

155. See *supra* note 125.

156. See *supra* note 129 and accompanying text.

the erroneous assumption that no Illinois decision supported the affirmative defense approach. It is highly relevant, however, that *Seaberry* and *Stuller* do indicate that, in Illinois, voluntary manslaughter is a partial affirmative defense to a charge of murder. Because of these decisions, one must conclude that among the Illinois decisions which have directly considered the burden of proof issue, *March* represents the minority view.

The affirmative defense approach is also consistent with several of the contradictory lines of decisions treated in Section II of this article. As noted by Justice Green in *March*, Illinois cases which declare that voluntary manslaughter is included within murder are logical only if the affirmative defense approach is utilized.¹⁵⁷ Additionally, as previously noted, if reviewing courts have the power to reduce a murder conviction to voluntary manslaughter, the latter must be viewed as a partial affirmative defense to murder.¹⁵⁸ If the power to reduce exists, when murder is charged, voluntary manslaughter cannot be treated as a separate crime with either passion-provocation or imperfect justification as an element which must be proved beyond a reasonable doubt.¹⁵⁹

C. *The Judiciary's Freedom to Adopt the Affirmative Defense Approach*

If the I.P.I. drafters were to adopt the approach suggested in this article, or if a trial judge were to use the instructions suggested in this appendix, the judiciary would pass judgment upon the correctness of the affirmative defense treatment of voluntary manslaughter. If a reviewing court were to agree that the affirmative defense approach was sensible, as even Judge Green in *March* concluded, it will still have to determine whether such an approach was consistent with legislative intent. (See Addendum, page 62 of this article.)

The key objection is that the legislature has defined voluntary manslaughter as a separate crime having as one of its elements passion-provocation or imperfect justification. Under the suggested approach, the accused, when charged with murder, could be found guilty of voluntary manslaughter without proof that such mitigating circumstances were present.¹⁶⁰ (See Addendum, page 62 of this article.)

157. *People v. March*, 95 Ill. App. 3d 46, 61-62, 419 N.E.2d 1212, 1223 (Green, J., concurring).

158. *See supra* text accompanying notes 25-28.

159. *Id.*

160. *See supra* text accompanying note 123.

An adequate response is that the courts must construe the murder statute and the voluntary manslaughter statute together. In determining what is necessary for a murder conviction when there is evidence of passion-provocation or of imperfect justification, courts cannot focus solely on the murder statute as if there were no voluntary manslaughter statute, as the I.P.I. homicide instructions now do. Similarly, in determining what is necessary to sustain a voluntary manslaughter conviction when murder is also in issue, courts cannot focus exclusively on the voluntary manslaughter statute.

There is no room for the conclusion that the legislature intended to punish as murder homicides accompanied by passion-provocation or imperfect justification. It is hardly a radical approach to say that if the offense is voluntary manslaughter, it is not also murder. Traditionally, Illinois law has considered voluntary manslaughter as something between murder and a lawful act—an intermediate verdict which takes into account human imperfection to avoid the extreme penalty for murder without exonerating the accused for an unjustified intentional or knowing killing.¹⁶¹

If voluntary manslaughter is viewed as an affirmative defense to murder, additional issues remain: (1) Should the prosecution bear the burden of proving the absence of mitigating circumstances to obtain a murder conviction or should the defense bear the burden of proving the presence of mitigating circumstances to obtain a voluntary manslaughter conviction, and (2) what should be the quantum of the burden?

The answer is found in the Illinois statutes. Once an affirmative defense is in issue, the burden is on the prosecution to negate the defense beyond a reasonable doubt.¹⁶² The partial affirmative defense of voluntary manslaughter should be treated like any other. Otherwise great confusion could result. For example, in a jury trial where murder, self-defense, and imperfect justification were at issue, it would be very confusing to require the prosecution to negate self-defense evidence beyond a reasonable doubt to obtain a conviction while requiring the defense to establish imperfect justification to reduce the crime from murder to voluntary manslaughter.

161. See, e.g., *People v. Leonard*, 83 Ill. 2d 411, 415 N.E.2d 358 (1981).

162. ILL. REV. STAT. ch. 38, § 3-2 (1981) reads:

(a) "Affirmative defense" means that unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon.

(b) If the issue involved in an affirmative defense is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.

Critics might raise two other objections. First, they might suggest that allowing a voluntary manslaughter conviction without proof beyond a reasonable doubt of the element of passion-provocation or imperfect justification violates due process. But, as previously explained, under the suggested approach, where murder is charged, voluntary manslaughter would not be viewed as a separate crime, but rather as the result of the successful interposition of a partial affirmative defense to murder.¹⁶³ In *Patterson v. New York*,¹⁶⁴ the United States Supreme Court recognized that an affirmative defense approach in murder-voluntary manslaughter cases is consistent with the requirement that the prosecution prove every element of an offense beyond a reasonable doubt. The approach suggested for Illinois is even more favorable to the accused than the New York approach in *Patterson*. In New York, the accused had to establish the presence of mitigating circumstances in order to reduce murder to voluntary manslaughter. Under this article's suggested approach for Illinois, the prosecution would be required to prove the absence of mitigating circumstances beyond a reasonable doubt once voluntary manslaughter was in issue.

Second, there is the objection that if the Illinois legislature had intended an affirmative defense approach, it would have used that label for voluntary manslaughter. The Supreme Court of Illinois, in a different context, has said that it would not find that the legislature intended an affirmative defense approach unless the legislature used the affirmative defense terminology.¹⁶⁵ However, an affirmative defense merely reflects a particular allocation of burdens which is not always labeled as such.¹⁶⁶ If there are signs that such allocation is consistent with the letter and the spirit of the statutes, it is not proper to conclude that the legislature did not intend this allocation of burdens simply because it did not provide an affirmative defense label. Thus, in 1979, the Supreme Court of Illinois effectively adopted an affirmative defense approach in another context where the legislature had not used the affirmative defense label.¹⁶⁷

163. See *supra* text accompanying note 123.

164. 432 U.S. 197 (1977).

165. *People v. Smith*, 71 Ill. 2d 95, 106, 374 N.E.2d 472, 476 (1978).

166. See generally the excellent analysis in Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980).

167. See *In re Greene*, 76 Ill. 2d 204, 390 N.E.2d 884 (1979). There the prosecution was required to prove that the accused committed a delinquent act, which was defined as commission of a crime before the respondent's seventeenth birthday. See ILL. REV. STAT. ch. 37, §§ 702-2, 704-6 (1973). The *Greene* court decided that the prosecution did not have to prove that the respondent was under seventeen unless he offered evidence suggesting that he had been seventeen or older on the date of the alleged offense.

VI. VOLUNTARY MANSLAUGHTER AS A SEPARATELY CHARGED OFFENSE

The treatment of voluntary manslaughter as a partial affirmative defense to a charge of murder leaves one remaining problem. As previously indicated, sometimes justice requires that the prosecution charge voluntary manslaughter rather than murder.¹⁶⁸ This will remain true under the present proposal, for there will be situations where the prosecutor knows in advance that he will be unable to prove the absence of the statutory mitigating circumstances beyond a reasonable doubt.

Under such circumstances, the prosecutor must have the option of charging the offense of voluntary manslaughter. Such a crime must exist, with its elements specified in a statute. Voluntary manslaughter cannot exist solely as the result of an affirmative defense to murder. If voluntary manslaughter is defined as including the element of passion-provocation or of imperfect justification, the prosecution must prove the presence of such an element beyond a reasonable doubt. Under state and federal decisions, there appears to be no escape from this dilemma.¹⁶⁹ As previously indicated, this burden discourages prosecutors from ever charging voluntary manslaughter, lest they run a risk of losing to a "murder-or-nothing" claim. If the author's suggested affirmative defense approach is adopted, another problem would arise. The allocation of the burden of proof as to voluntary manslaughter would differ depending upon whether the original charge was murder or voluntary manslaughter. If the charge was murder, the prosecutor would have to prove the absence of mitigating circumstances. If the charge was voluntary manslaughter, he must prove the presence of such circumstances.

The solution is to allow the prosecution to charge voluntary manslaughter as a separate crime, but also to allow a withdrawal of that charge in favor of a murder charge if the accused refuses to stipulate to the presence of those mitigating circumstances which distinguish voluntary manslaughter from murder.¹⁷⁰ In this way, the prosecution would never be required to introduce evidence to establish the presence of mitigating circumstances. If the defense stipulated to such circumstances, the prosecution could proceed on a voluntary manslaughter charge without risking a "murder-or-nothing" claim. If the defense re-

168. See *supra* text accompanying notes 68-71.

169. See *supra* notes 62-64 and accompanying text.

170. The author's suggested statutory language appears in the Appendix *infra*.

fused to "admit" that there were mitigating circumstances, the prosecutor could resort to a charge of murder.

The only defense argument is that cases forbidding prosecutorial vindictiveness would prohibit elevation of the charge if the defense refused to admit to the presence of one of the elements of the lesser offense.¹⁷¹ Because the statute provides fair notice that the charge will be raised if the defense does not agree to "plead" to one of the elements of the lesser charges, the decided cases indicate that the prosecutorial decision to enhance the charges would be proper.¹⁷² Moreover, the whole tenor of the scheme would be benign. Its purpose would be to encourage a charge of voluntary manslaughter where today a prosecutor would charge murder in order to avoid the possibility of a "murder-or-nothing" claim if he charged voluntary manslaughter.

Finally, if a court invalidated a statute which called upon the accused to "admit" the presence of mitigating circumstances or face a murder charge, under the proposal in the appendix, the state would be left without a separate chargeable offense called voluntary manslaughter. Voluntary manslaughter would exist solely as an affirmative defense to a charge of murder. Nothing in the United States Constitution requires a state to provide a statute under which a prosecutor can charge voluntary manslaughter, thereby casting upon himself the burden of proving the presence of mitigating circumstances. A state is free to treat voluntary manslaughter solely as an affirmative defense to a murder charge.¹⁷³

CONCLUSION

Illinois decisions are confused and inconsistent in their treatment of burdens in murder and voluntary manslaughter cases. This confusion creates significant practical problems, particularly in jury trials where both forms of verdict are submitted. The best solution would be a legislative enactment which treats voluntary manslaughter as an af-

171. The prosecutorial vindictiveness argument had its origin in *Blackledge v. Perry*, 417 U.S. 21 (1974). There the Court held that it was impermissible for the prosecution to respond to a defendant's invocation of his statutory right to a trial *de novo* by bringing a more serious charge against him prior to the new trial.

172. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), where the Court allowed the prosecutor to increase the charge, as he had warned the accused that he might, after the accused refused to plead guilty to the pending charge. See also *Corbitt v. New Jersey*, 439 U.S. 212 (1978) (statutory scheme which gave fair notice that greater penalty could be imposed only if the accused exercised his right to trial was upheld), and *United States v. Goodwin*, 102 S. Ct. 2485 (1982) (refusing to create presumption of vindictiveness whenever prosecutor increases charges after the accused has asserted a right in pre-trial proceedings).

173. *Patterson v. New York*, 432 U.S. 197 (1977).

firmative defense while still allowing the prosecution the option of charging voluntary manslaughter as a separate crime. If the legislature does not act, the drafters of the Illinois Pattern Jury Instructions and the judiciary can and should adopt the affirmative defense approach.

ADDENDUM

On March 25, 1983, the Illinois Supreme Court decided *People v. Fausz*, No. 56940. A petition for rehearing is pending as this article goes to print. A jury had convicted Fausz of voluntary manslaughter and had acquitted him of murder. On appeal, Fausz argued that because there was no evidence of either provocation or imperfect justification, the court should vacate the voluntary manslaughter conviction. The prosecution responded that where the evidence would sustain a murder conviction, a reviewing court should uphold a voluntary manslaughter conviction, even in the absence of proof of either provocation or imperfect justification. The Illinois Supreme Court rejected the prosecution argument, holding that such mitigating circumstances must be established to sustain a voluntary manslaughter conviction, even where the original charge was murder.

Fausz makes it improper for a lower court or for the Illinois Pattern Jury Instructions Committee to adopt the jury instructions which have been suggested in this article. Absent either a statutory amendment (as has been proposed in the current Illinois legislative session) or Illinois Supreme Court reconsideration of *Fausz*, the jury must be instructed that proof of passion-provocation or imperfect justification is essential to a voluntary manslaughter conviction. It remains an open question whether proof of the *absence* of such mitigating circumstances is essential to a murder conviction.

APPENDIX

A. RECOMMENDED TEXT OF VOLUNTARY MANSLAUGHTER STATUTE

9.2 Voluntary Manslaughter. When the State proves beyond a reasonable doubt the elements of murder, as defined in Section 9-1, it shall be a partial affirmative defense, reducing the grade of the offense to voluntary manslaughter, if, at the time of the killing, the offender

(a) was acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed, or

(2) another whom the offender endeavored to kill, but he negligently or accidentally caused the death of the individual killed; or

(b) believed the circumstances to be such that, if they existed, they would have justified or exonerated the killing under the principles stated in Article 7 of this Code, but his belief was unreasonable.

(c) For the purposes of subsection (a), serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(d) Voluntary manslaughter is a Class 1 felony.

(e) When the charging authority is satisfied that, at the time of the killing, there existed circumstances under Section 9-2(a) or Section 9-2(b), such as to reduce the offense of murder to voluntary manslaughter, that authority may file a charge of voluntary manslaughter. In such case, the indictment, information, or complaint shall allege the elements of murder as defined in Section 9-1 and shall specify the existence of circumstances under Section 9-2(a) or 9-2(b) sufficient to reduce the grade of the offense to voluntary manslaughter. The accused, at arraignment on a charge of voluntary manslaughter, or before trial, shall be called upon to enter a plea of "nolo contendere" or "denial" as to the existence of those specified circumstances. If the plea is "nolo contendere" as to those circumstances, the prosecution, to sustain a charge of voluntary manslaughter, need not prove the specified circumstances under Section 9-2(a) or 9-2(b), and need only prove the elements of the offense under Section 9-1. If the plea as to the specified circumstances is "denial," the prosecution must also prove beyond a reasonable doubt the existence of the specified circumstances. Nothing shall prohibit the charging authority, after a plea of "denial" to the special circumstances, from reconsidering its decision to charge voluntary manslaughter rather than murder, or from thereafter charging murder by indictment, information, or complaint, as otherwise provided by law.

(f) The provisions of Section 9-2(e) shall be deemed severable from the rest of Section 9-2. If Section 9-2(e) is invalidated, the charge of voluntary manslaughter shall not be brought as a separate offense. If Section 9-2(e) is invalidated, a defendant may be deemed guilty of voluntary manslaughter only when he is charged with murder under Section 9-1 and he successfully raises a partial affirmative defense under Section 9-2(a) or Section 9-2(b).

B. RECOMMENDED TEXT OF PATTERN INSTRUCTIONS

7.02-A Murder Issues Where Jury Is To Consider Both Murder and Voluntary Manslaughter-Provocation

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____; and

Second: That when the defendant did so,

[1] he intended to kill or do great bodily harm to _____;

or

[2] he knew that his act would cause death or great bodily harm to _____;

or

[3] he knew that his acts created a strong probability of death or great bodily harm to _____;

or

[4] he [(was attempting to commit) (was committing)] the offense of _____.

Third: That when the defendant did so,

[1] he did not act under a sudden and intense passion resulting from serious provocation by another;

[and]

[2] he did not act under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty of murder.

If you find from your consideration of all the evidence that any

one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of murder.

7.02-B Murder Issues Where Jury Is To Consider Both Murder and Voluntary Manslaughter-Intentional-Belief of Justification

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____; and

Second: That when the defendant did so,

[1] he intended to kill or do great bodily harm to _____;

or

[2] he knew that his acts would cause death or great bodily harm to _____;

or

[3] he knew that his acts created a strong probability of death or great bodily harm to _____;

or

[4] he [(was attempting to commit) (was committing)] the offense of _____;

Third: That when the defendant did so he did not believe that circumstances existed which would have justified the killing of _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty of murder.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of murder.

7.04-A Voluntary Manslaughter Issues Where Jury Is to Consider Both Murder and Voluntary Manslaughter-Provocation

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____; and

Second: That when the defendant did so,

[1] he intended to kill or do great bodily harm to _____;

or

- [2] he knew that his acts would cause death or great bodily harm to _____;
 or

- [3] he knew that his acts created a strong probability of death or great bodily harm to _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty of voluntary manslaughter.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of voluntary manslaughter.

7.06-A Voluntary Manslaughter Issues Where Jury Is To Consider Both Murder and Voluntary Manslaughter-Imperfect Justification

To sustain the charge of voluntary manslaughter the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____; and

Second: That when the defendant did so,

- [1] he intended to kill or do great bodily harm to _____;
 _____;

or

- [2] he knew that his acts would cause death or great bodily harm to _____;

or

- [3] he knew that his acts created a strong probability of death or great bodily harm to _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty of voluntary manslaughter.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of voluntary manslaughter.