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Voluntary Manslaughter after Patterson: An Analysis of Ohio Law

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I. INTRODUCTION

FEW tragedies have as great an impact on both individuals and society as the criminal act. This impact has been “measured by the vital social interest the system is intended to serve [and] by the impact of the system on the individual caught within its toils.” A criminal indictment marks the initiation of the process by which society imposes sanctions on an individual who has failed to meet established standards of behavior. Not only must the accused face the possible loss of reputation and freedom, but so he must also confront the state's prosecutorial machine. In the face of such prospects, the American criminal justice system has sought to equip the criminally accused with the wherewithal to protect

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1 "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." In re Winship, 397 U.S. 358, 363 (1970).

2 A crime is an act believed to be of such serious consequence to the well-being of society or of the public at large, and to affect so adversely the interests or the life of the state, that it has been brought within the cognizance of the law and there specifically prohibited—generally with a penalty prescribed for its commission.

H. BEST, CRIME AND THE CRIMINAL LAW IN THE UNITED STATES 3 (1930).

not only his own interests but those of society as well.  

With the possible exception of "innocent until proven guilty" there are no more familiar words in criminal law than "proof beyond a reasonable doubt." The fundamental importance of the reasonable doubt standard in promoting the interests of society and the accused cannot be understated. The reasonable doubt standard sets the threshold of guilt which must be met before criminal sanctions attach. Based upon a traditional concept, the standard was granted constitutional protection under the due process clause of the fourteenth amendment by the Supreme Court in 1970. This protection would seem only natural considering the supreme importance of the interests at stake. In light of the standard's entrenchment in our criminal justice system, the application and limits of this protection should have been relatively simple. This, however, has not been the case.

Nowhere have the limits of the reasonable doubt standard been as sorely tested with little or no resolution as in the area of voluntary manslaughter. On two separate occasions, the Supreme Court has considered the implications of "reasonable doubt," and on each occasion it reached two seemingly inconsistent conclusions. There was little difference between the two laws that were the subject of judicial scrutiny; nevertheless, the Court distinguished the two statutes, validated one, and rejected the other. The ultimate result has been a lack of adequate guidelines by which the constitutionality of manslaughter laws may be judged. In fact, each state has been left to find its own way first in determining the standards developed by the Supreme Court's decisions and, second, developing an approach to meet those standards.

Ohio courts have struggled to divine the constitutional mandate of the reasonable doubt standard while simultaneously attempting to give a viable interpretation to the state's relatively new manslaughter law. Their approach has resulted in an unusual definition of manslaughter which has proven particularly unworkable. In addition, several other problems have developed as a result of the enactment of the manslaughter law. First, the policy espoused by the Supreme Court in its decisions has been abrogated under Ohio law. Second, Ohio law nearly abandons the distinction be-

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1 Society has an interest in protecting the integrity of its criminal justice system by doing its utmost to prevent erroneous convictions. See Winship, 397 U.S. at 383-64.

2 "The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798." McCORMICK ON EVIDENCE § 341, at 962 (E. Cleary 3d ed. 1984)(footnote omitted).


6 See Patterson, 432 U.S. at 205-11; Mullaney, 421 U.S. at 696-704.

tween murder and manslaughter. This is especially dangerous in light of the presumption of criminal intent in Ohio law. Finally, Ohio's present definition of manslaughter relegates much of the language describing the offense to the status of excess verbiage. This has resulted in confusion at the trial court level. This Note will examine the development of Ohio's present manslaughter law, the framework against which its constitutionality must be judged, and the problems which develop under Ohio's approach.

II. THE DEVELOPMENT OF OHIO MANSLAUGHTER LAW

A. English Common Law

During the early stages of the common law, all killings were deemed unlawful and as such were capital offenses. The sole exception was those killings committed during war or pursuant to the enforcement of justice. Gradually, the concepts of excusable and justifiable homicide developed, bringing a recognition of accidental death and self-defense. Slowly, the practice of imposing of capital punishment for offenses which resulted in death eventually disappeared. This was primarily accomplished through the expansion of ecclesiastical jurisdiction. This expansion was achieved through the use of "benefit of clergy," a procedural device that effected the transfer of a case from secular jurisdiction to ecclesiastical jurisdiction. Such a move had very practical implications. Under secular law, a finding of guilt in a case involving homicide resulted in capital punishment. Under ecclesiastical law, the same acts were punishable by imprisonment for one year, branding, and forfeiture of goods. It is no wonder that many chose to transfer their cases to ec-

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10 For a discussion of the growth of the early common law crimes of murder and manslaughter, see Kaye, The Early History of Murder and Manslaughter - (pt. 2), 83 LAW Q. REV. 569 (1967).

11 A "capital" crime is presently defined as "[o]ne in or for which death penalty may, but need not necessarily, be imposed." BLACK'S LAW DICTIONARY 189 (5th ed. 1979). At early common law, a capital offense was punishable by death. Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J. CRIM. L. & CRIMINOLOGY 421, 422-23 (1982).

12 See Dressler, supra note 11, at 425.

13 See BLACK'S LAW DICTIONARY 144 (5th ed. 1979)(discussing "benefit of clergy"); Kaye, supra note 10, at 569.

14 Benefit of clergy originated as an exemption afforded to clergymen from the jurisdiction of secular courts. It later came to be an exemption from capital punishment for all individuals who could read. The defendant claimed the privilege after conviction by what was known as "praying his clergy." The convicted person's ability to read was tested by requiring him to read a psalm. If the psalm was read correctly, he was turned over to church authorities. The privilege thus operated to mitigate the rigor of the criminal laws. When the privilege came to involve abuse (probably due to the fact that the accused was always given the same psalm to read) Parliament began to limit its use. It was eventually abolished in 1927. BLACK'S LAW DICTIONARY 144 (5th ed. 1979).

15 The church was not allowed to impose death as a penalty which accounts for the
clesiastical courts and avoid the rigors of the secular courts.

The increasing power of ecclesiastical courts prompted English rulers to reassert their authority. A series of statutes was enacted which eliminated the "benefit of clergy" in murder cases involving "malice aforethought." The distinction was based on the conclusion that a premeditated killing arising from prior hostility and animosity was more heinous than one which, although intentional, occurred when the perpetrator's mind was inflamed with anger. Thus, by the late sixteenth century, unlawful killings were divided into two substantive offenses, murder and manslaughter.17

The distinction was one of great import. Manslaughter, as a first offense, retained "benefit of clergy" while murder was relegated to the secular courts. Even after ecclesiastic jurisdiction was eliminated, the difference in treatment of the two offenses remained. Malice aforethought distinguished the two crimes. Manslaughter was said to "arise from the sudden heat of the passions, while murder is occasioned by the wickedness of the heart." Malice could be proven by evidence or implied in law from the circumstances of the killing. Any unlawful killing was presumed to be "malicious" absent proof that it arose from "sudden and sufficiently violent provocation." Once the prosecution had proven that the accused had committed an unlawful killing, the defendant was required to establish any excusing, justifying, or alleviating circumstances. Much of this common law framework was assimilated into Ohio law and was eventually incorporated into a statutory formulation.

B. Under the Ohio Criminal Code

Under the Ohio Criminal Code, murder was defined: "No person shall
purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

"Purposely" was construed as an act of will, an intention, or a design to do the act. Malice was an essential element of murder in the second degree, but the presence of deliberation and premeditation elevated the offense to murder in the first degree. Thus it was said "simple malice" resulted in a second-degree murder conviction; "premeditated and deliberate malice" resulted in a first.

Manslaughter under the Criminal Code was defined: "No person shall unlawfully kill another." The statute did not differentiate between voluntary and involuntary manslaughter; rather, it created a catchall category for those killings which did not meet the legal criteria for malice. By judicial innovation manslaughter later developed three separate meanings. First, the offense covered those situations where a person unlawfully killed "without thought or intent to kill, and without malice." Second, manslaughter included intentional killings arising from a sudden quarrel where no malice was involved. Finally, manslaughter encompassed those killings, currently labeled as involuntary manslaughter, done during the commission of unlawful acts.

Ohio courts also held that the presence of provocation mitigated an intentional killing and reduced it to manslaughter. Evidence of provocation served to negate the essential element of murder, "malice aforethought." Though provocation need not be present at the exact moment of the killing, a showing that "there was no[t] time for the blood to cool"

22 See Clark v. State, 12 Ohio 483, 495 (1849).
23 See Ohio Crim. Code Ann. § 2901.05 (Schneider 1963)(repealed 1974). One court described malice as follows:
Malice is the dictate of a wicked, depraved and malignant heart. It is not necessary that the malignity should be confined to a particular ill will toward the person injured. It is evidenced by any act which springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty, and bent on mischief.
State v. Turner, Ohio (Wright's) 20, 27-28 (1831).
24 Ohio Crim. Code Ann. § 2901.01 (Schneider 1963)(repealed 1974). In State v. Cook, 2 Ohio Dec. Reprint 36 (C.P. Hamilton County 1858), rev'd on other grounds, 3 Ohio Dec. Reprint 136 (Hamilton Dist. Ct. 1859), the court differentiated between deliberation and premeditation: "To deliberate is to weigh and consider—premeditate is to think of before, in their original and true meaning. The killing may be a fact; the will or purpose to kill may be present; malice may be in the act; and yet deliberation and premeditation may be absent." 2 Ohio Dec. Reprint at 40.
25 State v. Turner, Ohio (Wright's) at 30-31.
27 State v. Kingcade, 20 Ohio N.P. (n.s.) 97, 104 (C.P. Franklin County 1917).
28 Davis v. State, 25 Ohio St. 369, 373 (1874).
30 State v. McCoy, 14 Ohio L. Abs. 363 (C.P. Crawford County 1933).
31 E.g., Thurman v. State, 4 Ohio C.C. 141 (Hamilton County Cir. Ct. 1889).
was required. Sufficient provocation was characterized as that which was "so great as to produce a transport of passion which for the time being renders the person deaf to the voice of reason." During this period, all the circumstances tending to justify, excuse, or extenuate criminal liability were to be established by the accused. However, a distinction was made between the burden of proof assigned to an affirmative defense and that assigned to a mitigating circumstance. It should be understood that the concept of burden of proof involves two components. The first is the burden of production (or the burden of going forward) which requires only that some evidence be produced to raise an issue at trial. The second component is the burden of persuasion which requires that a particular amount of evidence be produced before the trier of fact is persuaded that an alleged fact is true. Under the Criminal Code, defendant's burden of proving an affirmative defense could only be met by a preponderance of the evidence. To establish a mitigating circumstance the defendant only had to produce evidence of extenuation.

C. Under the Ohio Revised Code

The Ohio Code revision of 1974 worked numerous changes in the law of homicide. The drafters of the new law were heavily influenced by the Model Penal Code as evidenced by the incorporation of the Model's scheme of culpable mental states. First-degree murder was changed to

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32 Id. at 145. In Thurman, the court held that a jury charge to the effect that the act of killing must be directly caused by the passion arising out of the provocation offered at the time of the affray was erroneous. Id. The issue which the jury should have considered was whether there had been sufficient time to "cool off." However, where the only evidence concerning provocation was of an event which took place some months before the killing, the failure to give proper jury instructions was harmless. Id. at 145-46.

33 Kingcade, 20 Ohio N.P. (n.s.) at 104.

34 For example, in Davis v. State, 25 Ohio St. 369 (1874), the court refused to find error where the jury had been charged that "where the fact of the killing has been proved, malice must be intended, and all the circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him." Id. at 372.


36 Id.

37 The Ohio Supreme Court consistently held that proof of a defense, such as self-defense, was the defendant's burden by a preponderance of the evidence. See State v. Vancak, 90 Ohio St. 211, 214, 107 N.E. 511, 512 (1914); State v. Weaver, 24 Ohio St. 584, 589 (1874); Silvus v. State, 22 Ohio St. 90, 101 (1871).

38 E.g., State v. Adin, 7 Ohio Dec. Reprint 25, 29 (C.P. Cuyahoga County 1876) (where the state had proved a deliberate and premeditated killing, the duty of introducing evidence to prove manslaughter rested on the defendant).


40 See, e.g., Goldsmith, Involuntary Manslaughter: Review and Commentary on Ohio Law, 40 Ohio St. L.J. 569 (1979) (discussing the effect of the revision on Ohio's involuntary manslaughter law).

41 See Symposium - The Proposed Ohio Criminal Code - Reform and Regression, 33
aggravated murder, now the highest form of homicide.\textsuperscript{42} The offense of murder encompassed all those killings\textsuperscript{43} which failed to meet the “prior calculation and design” standard requisite for aggravated murder.\textsuperscript{44} Murder was defined as “purposely caus[ing] the death of another.”\textsuperscript{45} Some of the greatest changes wrought in the law, however, involved manslaughter. The first and most obvious change was that the new law divided manslaughter into two categories: voluntary and involuntary.\textsuperscript{46} Although this distinction had been made judicially,\textsuperscript{47} this was the first time that it had been codified in this bifurcated form. To differentiate between intentional and unintentional killings, the legislature assigned “knowingly” as the requisite intent for voluntary manslaughter and required no intent for involuntary manslaughter.\textsuperscript{48}

A second change incorporated the concept of provocation into the voluntary manslaughter statute. That statute read: “No person, while under

Ohio St. L.J. 351, 361-62 (1972). Many of the older codes, including Ohio’s, had incorporated “malice aforethought” and its derivatives into their homicide statutes. See supra notes 21 - 25 and accompanying text. The Model Penal Code abandoned this practice, delineating only four culpable mental states: purposely, knowingly, recklessly, and negligently. \textit{Model Penal Code} § 2.02 (Proposed Official Draft 1962)[hereinafter cited as MPC (P.O.D.)].

\textsuperscript{42} See \textit{Ohio Rev. Code Ann} § 2903.01 (Page 1982).

\textsuperscript{43} The Model Penal Code had established a trend of eliminating a plethora of statutes dealing with specific kinds of murder. See MPC § 210.2 (P.O.D). For example, Ohio, prior to the revision, had separate statutes for murder by obstructing a railroad, for killing a guard, and for taking the life of a police officer. \textit{Ohio Crim. Code Ann} § 2901.02-.04 (Schneider 1963)(repealed 1974). Under the Revised Code’s incorporation of the Model Penal Code approach, there are only three categories of homicide: murder, manslaughter, and negligent homicide. \textit{Ohio Rev. Code Ann} §§ 2903.01-.05 (Page 1982 & Supp. 1983). These offenses encompass all unlawful killings with the exception of vehicular homicide which is codified in §§ 2903.06 and 2903.07.

\textsuperscript{44} Ohio’s definition of aggravated murder now incorporates the classic concept of planned, coldblooded killing. Formerly, courts had held that murder could be premeditated even though the plan was conceived of and executed on the spur of the moment. See State v. Schaffer, 113 Ohio App. 125, 128-29, 177 N.E.2d 534, 537 (4th Dist. 1960)(Lawrence County); State v. Ross, 92 Ohio App. 29, 42, 108 N.E.2d 77, 85 (8th Dist. 1952)(Cuyahoga County). The new statute rejects this proposition and requires some indicia of care in planning. \textit{Ohio Rev. Code Ann} § 2903.01 committee comment (Page 1982).

\textsuperscript{45} \textit{Ohio Rev. Code Ann} § 2903.02 (Page 1982).

\textsuperscript{46} \textit{Ohio Rev. Code Ann} §§ 2903.03-.04 (Page Supp. 1983).

\textsuperscript{47} See State v. McDaniel, 103 Ohio App. 163, 167, 144 N.E.2d 683, 686 (2d Dist. 1956)(Montgomery County) (acknowledging a distinction between an unlawful but voluntary killing and an unintentional killing during an unlawful act although both acts constituted manslaughter); State v. McCoy, 14 Ohio L. Abs. 363, 364 (C.P. Crawford County 1933)(“There are two types of manslaughter possible under the Ohio statutes, namely: voluntary and involuntary.”).

\textsuperscript{48} See \textit{Ohio Rev. Code Ann} § 2903.03(A) (Page 1982)(amended 1983); \textit{id.} § 2903.04. This was a departure from the Model Penal Code. The Model Code assigned “recklessly” as the requisite intent for voluntary manslaughter; “knowingly” was reserved for murder. MPC §§ 210.2-3 (P.O.D.).
extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another." The introduction of provocation into the language of the offense itself triggered several immediate questions: 1) whether extreme emotional stress was an element of the offense; 2) if it was not, then could the defendant be required to carry the burden of its proof; and 3) if the defendant had the burden of proof, what was its standard?

The General Assembly also changed the definition of extreme emotional stress during which a killing may constitute manslaughter. The new voluntary manslaughter law was intended to include the traditional killings done in a sudden fit of rage or passion. Additionally, the statute was designed to expand the traditional scope of heat of passion and included killings "done while under extreme emotional stress which may be the result of a build-up of stress over a period of time." This expanded version of traditional provocation had previously been endorsed by the Model Penal Code. Subsequent judicial developments have largely emasculated this original intent, as will be discussed in greater detail.

Finally, the legislature codified the existing law regarding the presumption of innocence and the burden of proof. The statute enacted in 1974, section 2901.05, stated in pertinent part: "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." Although this version of section 2901.05 changed little of the substance of previous Ohio law on presumptions and burden of proof, it did introduce a new definition of reasonable doubt. The 1978 amend-

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49 See Ohio Rev. Code Ann. § 2903.03 committee comment (Page 1982).
50 Id.
51 The Model Code defined one category of manslaughter as "a homicide which would otherwise be murder [which was] committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." MPC § 210.03(1)(b) (P.O.D.). According to the drafters of the section: "This formulation effects substantial changes in the traditional notion of provocation. By eliminating any reference to provocation in the ordinary sense of improper conduct by the deceased, the Model Code avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter." American Law Inst., Model Penal Code and Commentaries - Part II § 210.3 comment, at 60-61 (1980).
52 See infra notes 151-53 and accompanying text.
54 Under the Ohio Criminal Code, reasonable doubt had been defined. It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Ohio Crim. Code Ann. § 2945.04 (Schneider 1963)(repealed 1974).
ment of the section brought an additional change—a radical shift in the burden of proof as to affirmative defenses placing that burden on the defendant.\textsuperscript{66}

These four changes in the law of manslaughter brought it into the center of the controversy that surrounded the constitutionality of similar laws. Shortly after Ohio's new manslaughter laws became effective, the Supreme Court began to scrutinize the constitutionality of similar manslaughter laws in Maine and New York. The decisions rendered in those cases provided the constitutional framework against which Ohio has judged its law.

III. **The Constitutional Framework**

A. In Re Winship

The 1960's and 1970's marked a massive revolution in substantive and procedural criminal law. In an unparalleled period of judicial activism, the Supreme Court expanded the constitutional protection afforded to criminal defendants.\textsuperscript{67} In some cases, this meant that constitutional rights were created where none had previously existed.\textsuperscript{68} In others, constitutional protection was extended to legal rights and concepts which had existed since the eighteenth century.\textsuperscript{59} *In re Winship*\textsuperscript{60} represented an in-

Section 2901.05 of the Revised Code defines reasonable doubt as follows:

"Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

*Ohio Rev. Code Ann.* § 2901.05(D)(Page 1982). The contention that this new definition dilutes the concept of "reasonable doubt" was rejected in State v. Nabozny, 54 Ohio St. 2d 195, 202-03, 375 N.E.2d 784, 790-91 (1978).

\textsuperscript{66} *Ohio Rev. Code Ann.* § 2901.05(A)(Page 1982)

\textsuperscript{67} See, e.g., Faretta v. California, 422 U.S. 806 (1975)(the sixth amendment, applicable to the states through the fourteenth amendment, guaranteed that a defendant in a state criminal trial had a right to represent himself which he might exercise if he voluntarily and intelligently elected to do so); Mapp v. Ohio, 367 U.S. 643 (1961)(all evidence obtained by searches and seizures conducted in violation of the Constitution is inadmissible in a criminal trial in a state court).

\textsuperscript{68} E.g., Gideon v. Wainwright, 372 U.S. 355 (1963)(the right of an indigent criminal defendant to have the assistance of counsel is a fundamental right essential to a fair trial, and a trial without such assistance violates the fourteenth amendment).

\textsuperscript{59} The presumption of innocence granted protection in Estelle v. Williams, 425 U.S. 501 (1976), was one of these. In *Estelle*, the Court referred to the long history of the presumption and quoted from an early case which stated: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." 425 U.S. at 503 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

\textsuperscript{60} 397 U.S. 358 (1970).
stance of the latter. At issue in Winship was whether the time-honored reasonable doubt standard was required by the due process clause of the fourteenth amendment as among the “essentials of due process and fair treatment” necessary in a juvenile proceeding.61 The Court determined that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.62

The reasonable-doubt standard has been present in the American criminal justice system almost from its inception.63 The Court itself has stated on several occasions that proof of a criminal charge beyond a reasonable doubt is required.64 Perhaps the earliest and best expression of the importance of this concept is found in Davis v. United States:65

No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.66

The reasonable doubt standard serves the vital function of preventing erroneous convictions.67 “[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”68

The preeminence of the reasonable doubt standard may be easily understood. The stakes involved in a criminal prosecution are unquestionably high. The defendant has his personal liberty, as well as his reputation, at risk. Moreover, the stigma that accompanies a criminal conviction is not to be underestimated: “[A] society that values the good name and

61 The Supreme Court had earlier stated the constitutional requirements of such proceedings in In re Gault, 387 U.S. 1 (1967).
   We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.
387 U.S. at 30 (emphasis added).
62 Winship, 397 U.S. at 361-68.
63 See supra note 5.
65 160 U.S. 469 (1895).
66 Id. at 493.
freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.”69 The Court’s position in Winship was hardly novel. The immense importance of the interests at stake and the role of the reasonable doubt standard in safeguarding those interests had already been articulated by the Court.70 The truly unusual aspect of Winship, however, was the express holding that the due process clause protected the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime.71

Although Winship was decided in the context of a juvenile delinquency hearing, its impact was far-reaching. It has provided the constitutional basis for challenges in a diversity of criminal cases.72 In addition, the case has provided the foundation for subsequent appeals based upon the constitutionality of state voluntary manslaughter statutes.73 However, the application of Winship to such statutes has proven problematical, resulting in widely differing results in markedly similar circumstances.74

B. Mullaney v. Wilbur

The first appeal of a manslaughter conviction based on Winship to reach the Supreme Court came in Mullaney v. Wilbur.75 At issue was a Maine statute which required a defendant charged with murder to prove

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69 Winship, 397 U.S. at 363-64. The tremendous importance attached to reputation and liberty is not unique to this decision. See Gault, 387 U.S. at 23-24.

70 Twelve years before Winship, the Court in Speiser v. Randall, 357 U.S. 513 (1958), stated:

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.

Id. at 525-26.

71 Winship, 397 U.S. at 364.


73 The principles of Winship are integral in the Court’s analysis of the statutes in question in both Patterson v. New York, 432 U.S. 197 (1977), and Mullaney v. Wilbur, 421 U.S. 684 (1975).

74 E.g., Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980), rev’d on other grounds, 456 U.S. 107 (1982). “But while its principle is clear, the application of Winship has proved somewhat difficult in determining to what extent the prosecution must prove the absence of any affirmative defenses raised by a defendant.” 646 F.2d at 1134.

that he acted "in the heat of passion on sudden provocation" in order to reduce a homicide to manslaughter.\textsuperscript{76} The question was whether the statute complied with the due process requirements of \textit{Winship}—that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

The defendant, who had been charged with murder, contended at trial that he did not have the requisite intent and that, consequently, he should have been charged with manslaughter not murder.\textsuperscript{77} This contention was founded on the assertion that the homicide occurred in the heat of passion.\textsuperscript{78} The jury had been instructed that malice aforethought was an essential element of the crime of murder; however, if the prosecution established that the killing was both intentional and unlawful, malice could be implied.\textsuperscript{79} Once malice had been implied, the defendant was required to prove by a preponderance of the evidence that he acted in the heat of passion in order to rebut the presumption of malice and reduce the charge from murder to manslaughter.\textsuperscript{80} Under these instructions, Wilbur was convicted of murder.

On appeal to the Maine Supreme Judicial Court, the defendant argued that the Supreme Court's decision in \textit{Winship} required the prosecution to prove beyond a reasonable doubt all the elements of the crime, and therefore, Maine's practice of requiring the defendant to negate implied malice by a showing of heat of passion was an infringement of his due process rights.\textsuperscript{81} The Maine court refused to find a denial of due process in the state's practice despite the requirement that the defendant negate the existence of an element of the crime. The court upheld the conviction on the ground that Maine courts had, for more than a century, repeatedly held that the prosecution could rely on the presumption of implied malice. The decision in \textit{Winship} should not be applied retroactively to a trial

\textsuperscript{76} Maine law defined murder: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." \textit{Me. Rev. Stat. Ann.} tit. 17, § 2651 (1984) (repealed 1976). It defined manslaughter: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . ." \textit{Id.} § 2551.

\textsuperscript{77} \textit{Mullaney}, 421 U.S. at 685.

\textsuperscript{78} \textit{Id.} The defendant, Stillman Wilbur, Jr., had been charged with the beating death of Claude Hebert. At trial, the accused asserted that he had been swayed by a frenzy brought on by the victim's homosexual advances. The trial court, however, refused to reduce the offense to manslaughter. \textit{Id.} at 685-86. The Maine Supreme Judicial Court suggested on appeal that the failure to reduce may have been due to either a disbelief that the evidence supported a claim of sudden provocation or that the nature and severity of the beating was inconsistent with the claim of ungovernable passion. State \textit{v. Wilbur}, 278 A.2d 139, 141 (Me. 1971).

\textsuperscript{79} \textit{Mullaney}, 421 U.S. at 686.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.} at 687.
that occurred before that decision.\textsuperscript{62}

After a successful petition for a writ of habeas corpus to the district court, this ruling was reversed. The federal court held that \textit{Winship} required the prosecution to prove beyond a reasonable doubt malice aforethought, the distinguishing element between murder and manslaughter.\textsuperscript{63} Although this decision was affirmed by the First Circuit Court of Appeals,\textsuperscript{64} the Maine Supreme Judicial Court later attacked the validity of the federal court decisions in \textit{State v. Lafferty}.\textsuperscript{65} The Lafferty court disputed the authority of the federal courts to make an independent determination of Maine law and rejected the courts’ conclusions.\textsuperscript{66} Adhering “without reservation” to Maine’s traditional concept of felonious homicide, the court limited the application of \textit{Winship}:

\begin{quote}
We do not understand In Re Winship to hold that, in order to prove guilt beyond a reasonable doubt the prosecution must not only so prove each essential element of the crime charged but also must negate beyond a reasonable doubt all mitigating circumstances, even those fully subjective in nature, knowledge of which can only exist in the mind of the accused. Wilbur v. Mullaney places such a burden on the State of Maine because it completely misconceives our traditional concept of “malice aforethought.” In so doing, it installs itself as the final arbiter of the internal law of the State of Maine... in defiance of the Supreme Judicial Court of Maine. ... \textsuperscript{67}
\end{quote}

Thus, according to \textit{Lafferty}, the state courts’ application of Maine law in the Wilbur trial and appeal was correct and the conviction proper.

As a result, the United States Supreme Court which had granted certiorari in \textit{Mullaney v. Wilbur} remanded the case to the court of appeals for reconsideration.\textsuperscript{68} That court found that significant differences in penalties and stigma result from the presence or absence of “heat of passion.” These differences required the application of \textit{Winship} to place the burden on the prosecution to prove the absence of heat of passion beyond a reasonable doubt.\textsuperscript{69} In light of such diverging results and applications of

\textsuperscript{62} \textit{Id.} at 688 & n.8.
\textsuperscript{64} Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), \textit{aff’d}, 421 U.S. 684 (1975).
\textsuperscript{65} 309 A.2d 647 (Me. 1973).
\textsuperscript{66} \textit{Id.} at 662.
\textsuperscript{67} \textit{Id.} at 664.
\textsuperscript{68} Mullaney v. Wilbur, 414 U.S. 1139 (1974).
\textsuperscript{69} 496 F.2d 1303, 1306-07 (1st Cir. 1974), \textit{aff’d}, 421 U.S. 684 (1975). As the court stated: Placing the burden on a defendant to reduce murder to manslaughter may be sound public policy if the state’s purpose is to facilitate convictions... at the cost of imposing a burden of proof upon the defendant. The burden of proof must be on the state throughout; not sometimes on the state, and sometimes on the defendant.
Winship, the Supreme Court again granted certiorari.\textsuperscript{10}

The Court supported Maine's interpretation of its laws and held that murder and manslaughter are degrees of the same offense rather than two separate offenses.\textsuperscript{11} However, the Court diverged from the supreme judicial court's position on whether the requirement that the defendant must prove heat of passion to reduce a murder charge to manslaughter violated due process. The Court considered a variety of factors. Throughout the history of the manslaughter offense, the presence or absence of "heat of passion" has been the pivotal factor between manslaughter and murder, and the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving that fact.\textsuperscript{12} The Court rejected outright the argument that the existence of heat of passion did not come into play until after the defendant was found guilty, when theoretically the defendant's stake in liberty and reputation were no longer important.\textsuperscript{13} The Court was concerned that if Winship were limited to only those facts which a state defined as elements of the crime, a state "could undermine many of the interests that decision sought to protect without effecting a substantive change in [the] law."\textsuperscript{14} In turn, meeting the requirements of due process would become a matter of semantics, a game of statutory draftsmanship.\textsuperscript{15} The Court did not intend Winship to be relegated to

\textsuperscript{10} 496 F.2d at 1307.

\textsuperscript{11} 419 U.S. 823 (1974).

\textsuperscript{12} To hold otherwise would be contrary to a history of decisions premised on the principle "that state courts are the ultimate expositors of state law." Mullaney, 421 U.S. at 691. See Winters v. New York, 333 U.S. 507 (1948); Murdock v. City of Memphis, 87 U.S. 590 (1875).

\textsuperscript{13} Mullaney, 421 U.S. at 696.

\textsuperscript{14} "This [argument] fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." Id. at 697-98. The tremendous difference in the degree of culpability attached to the two crimes was emphasized later in the opinion:

The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Id. at 698.

\textsuperscript{15} Id. All that needs to be done, then, would be to redefine the elements of the crimes and characterize them as mitigating factors. Id.

An extreme but illustrative example:

\textsuperscript{1} Whoever is present in any private or public place is guilty of a felony punishable by up to five years imprisonment.

\textsuperscript{2} It shall be an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank.

such position for, "Winship is concerned with substance rather than this kind of formalism."\(^{96}\)

In addition, on at least one level, the ultimate effect of the state's characterization of the burden of proof in Mullaney was far greater than that in Winship. In Winship, the ultimate burden of persuasion, even though reduced to a preponderance, remained with the prosecution.\(^{97}\) In Mullaney, the state affirmatively shifted the burden to the defendant.\(^{98}\) The result was that the defendant had to prove the critical fact in dispute, heat of passion. Ultimately, there was a greatly increased risk of an erroneous murder conviction. To place the burden of proving the absence of passion on the state would not levy too heavy a burden of proof upon it. Such evidence could be adduced from the circumstances surrounding the killing.\(^{99}\)

Under these circumstances, the Court found "no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability."\(^{100}\) The "intolerable result" of sentencing as a murderer one person guilty of manslaughter, compelled the Court to hold that due process required the prosecution to prove beyond a reasonable doubt the absence of heat of passion when the issue was properly presented in a homicide case.\(^{101}\)

C. Patterson v. New York

Two years after Mullaney, the Court confronted Patterson v. New York,\(^{102}\) a case which required a definitive statement of what "properly presented" actually meant.

In Patterson, a New York second-degree murder statute was challenged as violative of due process because it placed the burden of proving the affirmative defense of extreme emotional disturbance on the defendant.\(^{103}\)

\(^{96}\) Mullaney, 421 U.S. at 699.
\(^{97}\) In re Winship, 397 U.S. 358, 360 (1970).
\(^{98}\) 421 U.S. at 686-87.
\(^{99}\) Id. at 701-02.
\(^{100}\) Id. at 702.
\(^{101}\) Id. at 704.
\(^{103}\) Id. at 198. According to New York law:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death [of another]; except that in any prosecution under this subdivision, it is an affirmative defense:
   a. The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation . . . .

N.Y. Penal Law § 125.25 (McKinney 1975).

A person is guilty of manslaughter in the first degree when:
At Patterson's trial\textsuperscript{104} the jury was instructed, pursuant to New York law, that the defendant had the burden of proving this affirmative defense by a preponderance of the evidence before the jury could find him guilty of the lesser offense of manslaughter.\textsuperscript{105} Since the defense in \textit{Patterson} failed to make this showing, the jury found the defendant guilty of second-degree murder.\textsuperscript{106} 

While the appeal of Patterson's conviction was pending, the Supreme Court rendered its decision in \textit{Mullaney}. The New York Court of Appeals, affirming the conviction, distinguished \textit{Mullaney} on the ground that the New York murder statute entailed no shifting of the burden to the defendant to \textit{disprove} or \textit{negate} any fact essential to the crime of murder.\textsuperscript{107} The Supreme Court granted certiorari and, noting that \textit{Mullaney} was to be applied retroactively, held that Patterson's case was not insulated from its principles.\textsuperscript{108} 

\begin{quote}
2. With intent to cause the death of another person, he causes the death [of another] . . . under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision . . .
\end{quote}

\textsc{N.Y. Penal Law} § 125.20(2)(\textsc{McKinney} 1975). Although the New York second degree murder law specifically labeled emotional stress as an affirmative defense to murder, the Maine manslaughter statute involved in \textit{Mullaney} incorporated the concept of provocation directly into the statute. \textit{See supra} note 76.

\textsuperscript{104} Patterson was tried for the murder of his estranged wife's lover. He sought to establish at trial that he was laboring under "extreme emotional disturbance" when he killed the victim and, thus, had only committed manslaughter. 432 U.S. at 199.

\textsuperscript{105} \textit{Id.} at 200.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{State v. Patterson}, 39 N.Y.2d 288, 301-02, 347 N.E.2d 898, 907-08, 383 N.Y.S.2d 573, 582 (1976). The distinction was that Maine required the defendant to \textit{disprove} malice, an element of murder, which was \textit{presumed} by virtue of an intentional and illegal homicide while New York placed the burden of \textit{proving} all of the elements of murder on the state at all times. \textit{Id.}


The Court recognized the potential adverse impact that retroactivity may have on state criminal justice systems. In order to prevent nullification of past convictions by retroactive Supreme Court rulings, the \textit{Hankerson} Court suggested that a state could implement a procedural rule that failure to object to a jury instruction waived any claim of error. 432 U.S. at 244 n.8. A later decision, \textit{Wainwright v. Sykes}, 433 U.S. 72 (1977), required a criminal defendant to show both "cause" and "prejudice" to justify raising on appeal what had not been objected to at trial. However, this suggestion loses its effectiveness in the face of approaches like that adopted by the Sixth Circuit Court of Appeals. The absence of any plausible ground for objecting provides the necessary "cause." "Prejudice" can be presumed if the burden of proof as to a defense was shifted to the defendant after he had produced sufficient evidence to raise the defense. \textit{See Carter v. Jago}, 637 F.2d 449, 454 (6th Cir. 1980),
The decision in Patterson was based predominantly on the state's power to regulate the procedures under which its laws are carried out. Unless the regulation offended some principle "so rooted in the traditions and conscience of our people as to be ranked as fundamental," it would be upheld under the due process clause. The Court's analysis of the New York statute relied on an earlier decision, Leland v. Oregon, in which the Court upheld an Oregon practice which required the defendant to prove insanity beyond a reasonable doubt. Since the Leland holding had withstood the constitutional tests of both Winship and Mullaney, the majority was able to use it as authority for the proposition that burdening the defendant with proof of an affirmative defense did not in and of itself deprive him of due process.

According to Leland, once all the facts constituting the crime were established, including the requisite mental state, the state had no burden of proving sanity. Likewise, under New York law, once the state proved the three essential elements of second-degree murder, intent to kill, death, and causation, it could refuse to negate the existence of extreme emotional disturbance. Such a refusal under Leland was constitutional.

This New York law dramatically expanded the common law concept of "heat of passion" at the expense of burdening the defendant with proof of its existence. This burden-shifting was not unique to the defense of extreme emotional disturbance. At the time, there were approximately twenty-five affirmative defenses in the New York criminal code, and the Patterson Court refused to apply Mullaney in such a way that it would require the abandonment of such defenses. In the words of the Court, such a result was not necessary for "due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." To mandate that the jury con-

106 Patterson, 432 U.S. at 202 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
107 343 U.S. 790 (1952).
111 Id. at 795-800. This ruling was contrary to an earlier decision, Davis v. United States, 160 U.S. 469 (1895). Davis had abandoned the common law view which burdened the defendant with proof of all mitigating circumstances in federal prosecutions. The Leland Court held that Davis was not a constitutional mandate. 343 U.S. at 798-99.
112 See Rivera v. Delaware, 429 U.S. 877 (1976)(dismissing a murder conviction appeal based on the argument that Leland had been overruled by Winship and Mullaney).
113 Patterson, 432 U.S. at 206-07.
114 343 U.S. at 794-96.
115 See N.Y. PENAL LAW § 125.25 (McKinney 1975) quoted supra note 103.
116 432 U.S. at 208. This position has been heralded by some as a means of safeguarding flexibility and innovation in legislative reform. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325, 1397 (1979) ("Both the majority and the dissent in Patterson showed a sensitive appreciation of the potentialities of legislative reform and a determination not to thwart that process by a rigid and pointless rule of procedural formality.").
117 432 U.S. at 208. But see supra text accompanying notes 95-96.
sider a mitigating circumstance if the state fails to prove its nonexistence "would be too cumbersome, too expensive, and too inaccurate."118

The risk, well recognized by the Court, was that state legislatures could reallocate burdens of proof by labeling as affirmative defenses at least some of the present elements of criminal offenses.119 However, the Court summarily dismissed this concern as sufficiently limited by the Constitution stating: "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."120

The Supreme Court premised its distinction between Mullaney and Patterson on the fact that the Maine statute shifted the burden of proof of one of the elements of the offense.121 Once the prosecution established an intentional, unlawful killing, malice, an essential element of the offense, could be presumed. Then, the burden of disproving the element of malice shifted to the defendant. To overcome the presumption and negate the element of malice, the defendant had to establish that he acted in the heat of passion.122 Thus, in Mullaney, the Court appeared to have isolated two violations of Winship. First, by the operation of the presumption, the prosecution was no longer required to prove malice beyond a reasonable doubt. Second, the presumption shifted the burden to the defendant to disprove an essential element of the crime. Both violations were given equal weight.

Since the statute that defined second-degree murder in Patterson operated without a presumption, it did not fall prey to the first of the due process violations in Mullaney. The burden of proof as to the elements of the crime remained on the state and was unaided by a presumption. The easing of the state's burden (by presuming malice) made the Maine law constitutionally infirm. Since New York law did not relieve the state of the duty to prove one of the elements of the crime, there was no violation of due process, and the statute passed constitutional muster. Examining the New York law in light of the second due process violation in Mullaney fails to produce such a clear result. The Court found that New York had not shifted the burden to the defendant to disprove an element of the crime. The statute required the defendant to prove emotional

118 432 U.S. at 209.
119 Id. at 210. See supra note 96 for an example of such a reallocation.
120 432 U.S. at 210 (quoting McFarland v. American Sugar Ref. Co., 241 U.S. 79, 88 (1916)). See Note, Mullaney and Patterson: Due Process Protections and the Defendant's Burden of Proving Affirmative Defenses, 15 WILLAMETTE L. REV. 85, 93 (1978) ("The Court seems to be attempting to alleviate any fears its opinion might create as to the continued vitality of Winship, but there is little comfort in knowing that even after Patterson, the presumption of innocence is safe.") [hereinafter cited as Note, Due Process Protections]; see also Note, The Current Role of the Presumption of Innocence in the Criminal Justice System, 31 S.C.L. REV. 357 (1980) (The author contends that the presumption of innocence has been greatly diminished in the federal criminal justice system.).
121 Patterson, 432 U.S. at 215-16.
122 Id. at 216.
stress as an affirmative defense. The Court viewed the defense as a separate issue which did not serve to negate an element of the offense. Thus, technically speaking, since the defendant was not required to disprove an element of the offense, Patterson's conviction did not violate due process and was valid. Yet, the Court ignored the reality that, in effect, both laws worked in the same way. Before the defendant in either Mullaney or Patterson could gain the benefit of a reduced charge of manslaughter, he was required to prove extreme emotional stress or heat of passion. The only real difference was the language of the statutes. Since the New York statute was the functional equivalent of Maine's, the variation in Supreme Court holdings makes clear guidelines all but impossible to draw.

D. Constitutional Guidelines after Patterson

The Patterson decision has come under vehement attack. On one hand, the Supreme Court has been accused of totally abrogating the principles of Winship. On the other, the Court has been criticized for creating an imaginary constitutional distinction. Criticism stems from three inherently divisive characteristics of the decisions.

First, the distinction drawn in Patterson is exceedingly narrow. In substance, the New York and the Maine statutes operated in much the same way. In both situations, the presence of "heat of passion" served to reduce a homicide from murder to manslaughter. New York merely cloaked the old "heat of passion" in the new garb of "extreme emotional disturbance." In reality, the difference between the statutes at issue was that Maine labeled the absence of heat of passion as malice aforethought, and New York did not.

The New York statute specifically labeled "extreme emotional disturbance" as a mitigating circumstance, something Maine's law failed to do. This, the most easily discernible distinction between the two statutes, has become the focus of much of the Patterson criticism. From this viewpoint, it seems as though the Court is encouraging that which it expressly prohibited—clever statutory draftsmanship. Thus, Patterson in essence denigrates Winship to the "formalism" that that decision was designed to


125 E.g., id. at 221. ("The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's.").


127 See, e.g., Note, supra note 9, at 404-07.
guard against.128

Second, the Court's reasoning in Patterson is widely divergent from that enunciated in Mullaney. In fact, the decisions represent the two classic competing interests of criminal law. Mullaney exemplifies the judiciary's deep-rooted concern with protecting the constitutional rights of the accused through due process. Patterson, on the other hand, emphasizes the state's concern with the prevention and punishment of crime which is best served through the implementation and enforcement of its criminal law.

The contrasting rationales underlying the decisions have done little to clarify constitutional standards in the area.129 The holding in Patterson narrowed those of Mullaney and Winship, but its precise effect on these decisions has not been easy to discern. Despite the hue and cry following Patterson, the Supreme Court has refused to clarify or reconsider the issue. As a result, the paradox that remains is the seeming abandonment of Mullaney and Winship principles.

Finally, many of the problems encountered in implementing the Mullaney-Patterson doctrine have been due to the lack of clear constitutional guidelines. The unenviable task of reconciling the two decisions and drawing from them a practicable standard has fallen to the lower courts.130 In Ohio, the implementation of the Mullaney-Patterson doctrine has proven particularly unworkable, and the resulting controversy has yet to be resolved. The judicial analysis of Ohio's current voluntary manslaughter law illustrates the difficulties that have developed as courts attempt to reconcile the conflicting results of Mullaney and Patterson.

IV. ANALYSIS OF OHIO LAW

Ohio's voluntary manslaughter law131 received its first scrutiny under Mullaney-Patterson in State v. Muscatello.132 Muscatello had been indicted for aggravated murder under section 2903.01 of the Ohio Revised

128 See supra text accompanying notes 93-96.
129 See Note, supra note 9, at 417: "Thus, Patterson leaves the tension between these interests [the federal interest in protecting the defendant's due process rights and the state's interest in defining and controlling crime] unresolved . . . ."
130 As one commentator stated:

The absence of a clear constitutional rule for application of the reasonable doubt standard could have been remedied by the Patterson decision. By declining to specify the proper implementation of that standard, the Court left lower courts the task of balancing the state and federal interests at stake in criminal proceedings.

Note, supra note 9, at 408.
131 OHIO REV. CODE ANN. § 2903.03(A)(Page 1977)(amended 1983), provided: "(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another."
The charge was the result of the shooting death of Richard Rauscher. Rauscher and the defendant had been friends at one time. On the night of the shooting, the defendant entered a bar to confront Rauscher. Soon after Rauscher entered, Muscatello accused him of being responsible for a gunshot wound he had received. An altercation ensued, and Muscatello departed. He returned some time later and shot Rauscher in the back.

Muscatello was tried and convicted of aggravated murder. On appeal, the court of appeals reversed on the basis that the jury instructions were erroneous. The court's analysis went directly to the heart of the Mullane-Patterson controversy: the issue of whether extreme emotional stress constituted an element of voluntary manslaughter. The trial court's instructions had assumed that emotional stress was an element incorporated into the definition of the crime. The court of appeals acknowledged that the statute gave the impression that proof of extreme emotional stress was essential to a voluntary manslaughter conviction. However, it held, contrary to this reading, that emotional stress was not an element, but rather was a mitigating circumstance. Thus, instructions which required proof of stress beyond a reasonable doubt were erroneous.

This conclusion was based on three considerations. First, the state's former manslaughter law, section 2901.06 of the Ohio Criminal Code, did not include "heat of passion" within its statutory definition; including it as a definitional element of the crime had been a judicial development. The court of appeals' ruling that emotional stress was not a stat-

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132 Id. at 202, 378 N.E.2d at 739. Aggravated murder was defined by Ohio Rev. Code Ann. § 2903.01 (Page 1977)(amended 1981), which at that time provided: "(A) No person shall purposely, and with prior calculation and design, cause the death of another."

134 Muscatello, 55 Ohio St. 2d at 202, 378 N.E.2d at 739.

135 State v. Muscatello, 57 Ohio App. 2d 231, 387 N.E.2d 627 (8th Dist. 1977)(Cuyahoga County). The instructions given provided in relevant part:

Before you can find the [d]efendant guilty of voluntary manslaughter, you must find beyond a reasonable doubt: . . . [T]hat Richard Rauscher was a living person and his death was caused by the [d]efendant . . . and that the killing was done knowingly, and that the act causing the death of the victim was performed while the [d]efendant . . . was under extreme emotional stress . . . .

Id. at 236, 387 N.E.2d at 633.

136 Id. at 243, 387 N.E.2d at 637. The wording of the statute could easily lead one to assume, such as the trial court in Muscatello, that emotional stress was a part of the definition of voluntary manslaughter and therefore was an element. Id.

137 Id. at 245-50, 387 N.E.2d at 638-41.

138 Id. at 245-46, 387 N.E.2d at 638-39.

139 See supra note 26 and accompanying text.

140 See supra notes 28, 31-33 and accompanying text. This development had an earlier origin. In Johnson v. State, 66 Ohio St. 59, 63 N.E. 607 (1902), the court held that to ascertain the elements of the crime of manslaughter whose statutory definition did not include provocation:

[W]e look to the original [definition which contained an element of provocation] as it stood before codification or revision. Therefore, to convict of manslaughter, it
utory element of the crime was consistent with this past practice. Second, manslaughter is frequently tried as a lesser offense of murder. At trial, the prosecution seeks a murder conviction by proving that the defendant committed the killing “purposely.” Such a showing necessarily entails disproving that the defendant acted under emotional stress. If stress was considered as an element of manslaughter, the evidence adduced to prove murder would disprove an element of manslaughter. The prosecution would have effectively disproved manslaughter by trying to prove murder. Placing the prosecution in this position would destroy the practical advantage of including manslaughter as a lesser offense.

Beyond that, if “extreme emotional stress” were an element of voluntary manslaughter, the crime could no longer be a lesser included offense of murder. According to the test for determining lesser included offenses:

[I]f all the elements of a separate offense are present with others in an offense charged in an indictment, such separate offense is a lesser included offense; or, where all the elements of an offense are included among the elements of a charged offense, the former is a lesser included offense.\textsuperscript{141}

Since emotional stress is not an element of murder, its inclusion as an element of manslaughter would invalidate the historical tradition of including manslaughter as a lesser offense of both murder and manslaughter.\textsuperscript{142} Based upon these grounds, the court of appeals substantiated its holding that emotional stress was not an element of manslaughter.

Having held that extreme emotional stress was a mitigating factor, the question then became to what extent could the defendant be required to

\begin{quote}
is incumbent upon the state to establish that the killing was done “either upon a sudden quarrel, or, unintentionally while the slayer was (is) in the commission of some unlawful act.”
\end{quote}

\textit{Id.} at 63, 63 N.E. at 608.

\textsuperscript{141} States v. Kuchmak, 159 Ohio St. 363, 366, 112 N.E.2d 371, 373 (1953). The Ohio Supreme Court more recently enunciated the circumstances under which a crime may be a lesser included offense. This occurs:

- only if (i) the offense is a crime of lesser degree than the other, (ii) the offense of the greater degree cannot be committed without the offense of the lesser degree also being committed and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.

State v. Wilkins, 64 Ohio St. 2d 382, 384, 415 N.E.2d 303, 306 (1980). This is merely a restatement of the law as expressed in \textit{Kuchmak}.

\textsuperscript{142} But see State v. Butler, 11 Ohio St. 2d 23, 29-30, 227 N.E.2d 627, 632 (1967)(voluntary manslaughter arising from a killing in the “heat of passion” is a lesser included offense of murder). In this respect, the \textit{Muscatello} court’s reasoning falters. Historically, “heat of passion” had been included as an element of manslaughter through judicial interpretation, and according to \textit{Butler} this had not prevented the inclusion of manslaughter as a lesser included offense of murder. Thus, it is difficult to see why the inclusion of emotional stress as an element would command the result the \textit{Muscatello} court suggests especially when the inclusion of “heat of passion” had not.
prove stress.\footnote{Muscatello, 57 Ohio App. 2d at 248-50, 387 N.E.2d at 639-41.} The statute governing the allocation of the burden of proof at the time placed the burden of going forward with evidence of an affirmative defense upon the accused.\footnote{Ohio Rev. Code Ann. \S\ 2901.05 (Page 1977)(amended 1978), provided in part: "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." See State v. Robinson, 47 Ohio St. 2d 103, 106-13, 351 N.E.2d 88, 91-95 (1976)(holding that the statute imposed a burden of going forward with evidence of an affirmative defense upon defendant but did not require him to prove the defense by a preponderance of the evidence). A 1978 amendment to \S\ 2901.05 (A) changed the rule in Robinson so as to require a defendant to prove an affirmative defense by a preponderance of the evidence. This amendment survived constitutional challenge in State v. Newell, No. 40470 (Ohio 8th Dist. Ct. App. Dec. 28, 1979)(Cuyahoga County). The law now reads:

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

Ohio Rev. Code Ann. \S\ 2901.05(A)(Page 1982). For an extensive discussion of the effect of this change in \S\ 2901.05, see Note, Shifting the Burden of Proving Self-Defense - With Analysis of Related Ohio Law, 11 Akron L. Rev. 717 (1978).} By analogy, this section was held equally applicable to mitigating circumstances.\footnote{It is questionable whether this analogy is appropriate since extreme emotional stress is not an affirmative defense. It does not meet the criteria of \S\ 2901.05(C) which defines an affirmative defense in two ways: 1) a defense expressly designated as affirmative; or 2) a defense involving excuse or justification. As a mitigating circumstance, emotional stress meets neither of the criteria and should not come under the purview of \S\ 2901.05(C). See State v. Lockett, 49 Ohio St. 2d 48, 65-66, 358 N.E.2d 1062, 1074 (1976)(a mitigating circumstance does not negate criminal culpability for an act, as does an affirmative defense, rather it reduces culpability), modified, 438 U.S. 586 (1978). Later cases appear to agree with this reasoning. See State v. Solomon, 66 Ohio St. 2d 214, 219, 421 N.E.2d 139, 143 (1981)(emotional stress as a mitigating factor need not be proven beyond a reasonable doubt or by a preponderance by the defendant).} Thus the jury instruction in Muscatello was necessarily violative of the defendant's due process rights in that he was required to prove the existence of emotional stress, a "defense," beyond a reasonable doubt.

The court of appeals' discussion of the origin of emotional stress is also central to an analysis of Ohio manslaughter law under Mullaney-Patterson. At trial, Muscatello had introduced evidence that Rauscher's death had been the culmination of a prolonged period of stress.\footnote{57 Ohio App. 2d at 233, 387 N.E.2d at 631. At trial, defense witnesses testified that a feud had developed between the defendant and victim as a result of a fight between their respective brothers. The ill-will had escalated to threats against the life of the defendant. After a shooting incident at the defendant's home in which he was wounded by an unknown gunman, there was a final confrontation between the two men. Evidence at trial also indicated that, as a result of this prolonged period of stress, the defendant's lifestyle drastically changed. He ended all social activity, traveled in disguises, resorted to tranquilizers, and was hospitalized for a nervous condition. Id.} Formerly,
voluntary manslaughter had been limited to killings resulting from "a sudden affray or in heat of blood or passion, without time for reflection or for passions to cool." The court concluded that the new statute contemplated a change in law; voluntary manslaughter now included homicides committed under extreme emotional stress that had been augmenting over a period of time. The court also determined that a refusal to instruct the jury to consider evidence of an accumulation of emotional stress was prejudicial error necessitating reversal of the conviction. It was this conception of the origin of emotional stress that provoked an appeal by the state.

The Ohio Supreme Court affirmed the decision made by the court of appeals and held in part that emotional stress was a circumstance which, when established, mitigated criminal culpability. Emphasizing that the defendant was not required to establish stress beyond a reasonable doubt, the court concluded that the defendant only needs to elicit some evidence on the issue to warrant an instruction on voluntary manslaughter.

The supreme court refused to endorse the court of appeals' stance on the origin of emotional stress and soundly rejected the proposition that the General Assembly intended to change former law. The court reasoned that the acts described in section 2903.03(A) were those performed under the influence of sudden passion without time to "cool off." To allow proof of the build-up of stress over a period of time to mitigate criminal culpability would foster exactly that behavior which homicide statutes were designed to discourage. According to the court: "The General As-

148 The court arrived at this conclusion as a result of the committee comment which accompanies Ohio's voluntary manslaughter law. The comment provides:

[T]he former offense of voluntary manslaughter contemplated killings done in a sudden fit of rage or passion. The section includes such killings, but also includes homicides done while under extreme emotional stress which may be the result of a build-up of stress over a period of time. Both the former law and this section require that the offender's emotional state be the result of sufficient provocation.

Ohio Rev. Code Ann. § 2903.03 committee comment (Page 1982).
149 State v. Muscatello, 55 Ohio St. 2d 201, 203, 378 N.E.2d 738, 740 (1978). The court specifically repudiated language found in State v. Toth, 52 Ohio St. 2d 206, 218, 371 N.E.2d 831, 838 (1977), which held that the fact that extreme emotional stress may reduce the seriousness of the offense charged from murder to manslaughter did not make the "element" of stress an affirmative defense or mitigating factor to be proved by the defendant.
Id. at 204 n.3, 378 N.E.2d at 740 n.3.
150 Id. at 203-04, 378 N.E.2d at 740.
151 Id. at 205, 378 N.E.2d at 741.
152 Id. The court reaffirmed its position in State v. Pierce, 64 Ohio St. 2d 281, 414 N.E.2d 1038 (1980), in which it held that the lesser included offense of voluntary manslaughter does not embrace a deliberate and calculated homicide merely because extreme emotional stress brought on by requisite provocation caused the laying of plans for the killing, as well as the killing itself. The court quoted Muscatello stating: "It is upon just such fact-patterns that defendants enjoy the opportunity of obtaining relief by means other than a resort to deadly force." 64 Ohio St. 2d at 284, 414 N.E.2d at 1040 (quoting Muscatello, 55 Ohio St. 2d at 205,
seemly could not have intended to allow mitigation of the criminal culpability of a defendant who, during weeks of vile harassment, calculates and designs his tormentor-victim’s subsequent homicide.\(^{133}\) The court’s decision effectively relegated the new statutory language of “extreme emotional stress” to the old patterns of “heat of passion.” Consequently, the 1974 Code revision did little substantively to change Ohio’s stance on provocation.

This “elements” approach when applied to Ohio’s voluntary manslaughter statute has proved problematical in three areas.\(^{134}\) First, it has eroded the express policy considerations on which Patterson was founded, while offering little deference to the concerns expressed by the Patterson court. Second, the judicial redefinition of manslaughter has effected a substantive change in the traditional concept of manslaughter. The distinction between murder and manslaughter, under this new definition, has been all but destroyed. Third, the judicial treatment of the manslaughter statute has created confusion as to the effect that should be given to the mitigating language of the statute, particularly when a defendant is only charged with manslaughter.

The first problem is that the Muscatello ruling strikes the very underpinnings of Patterson. The policy extolled in Patterson was the encouragement of innovation and flexibility in the structuring of affirmative defenses by state legislatures.\(^{135}\) By relaxing rigid constitutional standards of proof, the Court hoped to promote new approaches to old criminal law problems. Allowing legislatures to be more responsive to the particular

\(^{133}\) Muscatello, 55 Ohio St. 2d at 205, 378 N.E.2d at 741.

\(^{134}\) Courts interpreting this law have consistently held that the thrust of an inquiry under Mullaney and Patterson is how the state has defined the elements of a crime and whether the burden of proof to establish such elements has remained on the prosecution. Where a state does not presume a fact essential to guilt and, then, compel the defendant to negate that element, a state law will pass constitutional muster. In Carter v. Jago, 637 F.2d 449 (6th Cir. 1980), cert. denied, 456 U.S. 980 (1982), the court held Ohio’s law constitutional under the foregoing analysis; as the three elements: homicide, causation, and intent are not presumed. 637 F.2d at 455-56. Consistent with this case is Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980), rev’d on other grounds, 456 U.S. 107 (1982) in which the Court of Appeals for the Sixth Circuit had earlier construed Mullaney and Patterson to hold that due process requires a state to prove all the elements of a crime as the state has defined it. 646 F.2d at 1134. Although there are limits on the extent to which a state may shift the burden to the defendant by the way it defines crimes, a state may, consistent with due process, place the burden on defendants to prove defenses. Id. at 1135. The holding was limited to those “defenses which have traditionally been treated as affirmative defenses if such defense does not negate an element of the crime.” Id. See also Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir.) (a state may properly place the burden of proving self-defense or extreme emotional stress on the defendant in a murder trial as long as there is no presumption that an element of the offense exists because the defendant acted in a particular manner), cert. denied, 449 U.S. 866 (1980).

circumstances of a criminal situation through statutory drafting would promote a more effective criminal justice system on the state level. The tradeoff adopted in *Patterson* was a broader concept of "emotional stress" at the expense of burdening the defendant with proof of this more expansive defense.\(^\text{166}\) In the post-*Mullaney* period, the great fear was that its strict enforcement would stifle legislative ventures in creating new affirmative defenses. Too broad an application might even serve to undermine existing defenses or, at the very least, function as a basis for an ever increasing number of constitutional challenges. *Patterson* was designed to stave off these possibilities.

The *Muscatello* decision destroyed any possible innovative effect that the 1974 revision of the Ohio Criminal Code might have had. The supreme court's refusal to grant any credence to the legislative intent expressed in the legislative service commission's analysis of the state's voluntary manslaughter statute threw Ohio law back to its prerevision status but with a new twist. Not only is the defendant restricted to the old concepts of "provocation" and "heat of passion," but he may be required to establish the defense by a preponderance of the evidence. The Ohio defendant loses in two ways. First, he receives none of the benefits of *Patterson*; e.g., an expanded version of "heat of passion."\(^\text{167}\) He is also denied grounds upon which he may challenge the allocation of the burden of proof of his defense under *Mullaney* and the due process clause. In truth, under Ohio's version of *Mullaney-Patterson*, little vitality remains in the doctrine's policy foundation.

Second, the judicial redefinition of Ohio's manslaughter law has effected a substantive change in the traditional concept of voluntary manslaughter. The crime historically has incorporated the notions of "heat of passion" and "provocation."\(^\text{158}\) Under Ohio's present formulation, voluntary manslaughter is defined as knowingly causing the death of another. The definition contains no reference to "provocation."\(^\text{159}\) This departure

\(^\text{166}\) See supra notes 115-18 and accompanying text.

\(^\text{167}\) This has been reinforced by the legislature's 1982 amendment to § 2903.03. The voluntary manslaughter statute now reads: "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another." *Ohio Rev. Code Ann.* § 2903.03(A)(Page 1982)(emphasis added)(amended 1985). The 1982 amendment evidences a repudiation of any innovation that might have developed under the "emotional stress" doctrine and a return to the rigid standards of "heat of passion."

\(^\text{158}\) See supra notes 31-33 and accompanying text.

\(^\text{159}\) Under *Muscatello* most of the present voluntary manslaughter statute becomes surplusage. The language of *Ohio Rev. Code Ann.* § 2903.03(A)(Page Supp. 1983) "while under the influence of a sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force" merely describes a mitigating circumstance. See *Muscatello*, 55 Ohio St. 2d at 203, 378 N.E.2d at 739-40. The remaining language defines the offense.
from the traditional concept of manslaughter has resulted in the virtual adoption of some higher form of homicide as manslaughter. Ohio's distinction between murder and manslaughter has come to rest solely on the difference between "purposely" and "knowingly," the requisite mental states for each of the respective crimes. These levels of culpability have been characterized as follows: "The discrimination between acting purposely and knowingly is very narrow. Knowledge that the requisite external, attendant circumstances exist is a common element in both conceptions." This is a slim difference indeed when one considers the tremendous stakes involved. As the Mullaney court stated: "The consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly." This may be attributed to the statutory penalties which accompany each offense.

In Ohio, a murder conviction carries a penalty of imprisonment for an indefinite term of fifteen years to life, and can carry an additional fine of $15,000. Voluntary manslaughter, on the other hand, is an aggravated felony of the first degree carrying an indefinite term of imprisonment which extends from a five-year minimum term to a maximum term of twenty-five years. At the very least, the disparity between the two sanctions entails ten years of incarceration. Moreover, the possibility of receiving a greatly heightened sentence, then, can rest entirely on the jury's grasp of the distinction between "knowingly" and "purposely," a distinction which, as mentioned above, has been described as "very narrow" by one of its strongest proponents.

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160 These culpable mental states are defined in Ohio Rev. Code Ann. § 2901.22 (Page 1982):

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.


163 Ohio Rev. Code Ann. § 2929.02(B)(Page 1982), provides:

Whoever is convicted of, pleads guilty to, or pleads no contest and is found guilty of murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

164 A fine for murder or aggravated murder is only to be imposed where "the crime was committed for hire or profit, or in support of organized crime." Id. committee comment.


166 See supra note 161 and accompanying text. Weschler was a member of the American Law Institute which formulated the Model Penal Code. It was he who crystallized the Code's objective and approach. Weschler, supra note 161, at 1427.
To allow such high stakes of liberty and reputation to rest on this distinction alone runs contrary to any sense of justice. To many minds the mere thought of homicide is incomprehensible. To expect a jury to command the precision of thought necessary to discern the purposely/knowingly distinction is at best unrealistic. Although this analysis contemplates the extreme, it illustrates that Ohio's present course treads dangerously near the ultimate end of relinquishing the distinction between the two crimes altogether.

This destruction of the traditional idea of manslaughter has also been promoted by the similarity between the present statutory formulation of provocation and self-defense. While not expressed in precisely the same terms as the test for self-defense,\textsuperscript{167} the standard of sufficient provocation under section 2903.03 translates into essentially the same thing. Short of the threat of death or serious bodily harm, little provocation in today's society is "reasonably sufficient to incite" the use of deadly force. Since the statute fails to define behavior which constitutes sufficient provocation, a jury is left without guidance in making that finding. As a result of this failure to provide a standard defining sufficient provocation, circumstances that once established a complete defense to an unlawful killing now merely serve to mitigate.\textsuperscript{168}

To further complicate matters, Ohio law recognizes a presumption of intent. A person is presumed to intend the natural, reasonable, and probable consequences of his voluntary acts. This presumption comes in to play when an unlawful death results as a natural consequence of a voluntary act.\textsuperscript{170} Under such circumstances, intent is presumed from the consequences of the act; e.g., intent to kill from an unlawful death. The prac-

\textsuperscript{167} The test for self-defense was laid down in State v. Robbins, 58 Ohio St. 2d 74, 388 N.E.2d 755 (1979).

To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray, (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. \textit{Id.} at 80, 388 N.E.2d at 758.

\textsuperscript{168} An illustration of the similarity between the two concepts is found in State v. Thomas, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981). The defendant, charged with the murder of her husband, presented evidence that she had been the victim of prolonged periods of abuse and had killed in self-defense. The case, however, presented the "perfect" question of whether the defendant acted in self-defense or upon provocation. Unfortunately, the defendant's refusal to accept an instruction on voluntary manslaughter alleviated the need to address the issue. \textit{Id.} at 522, 423 N.E.2d at 140.


\textsuperscript{170} Although one may be presumed to intend results which are natural, reasonable, and probable, there is no presumption that one intended results which are not natural, reasonable, or probable. See State v. Farmer, 156 Ohio St. 214, 222-23, 102 N.E.2d 11, 16 (1952).
tical effect of the presumption is to shift the burden to the defendant to disprove the presence of intent.

The use of this presumption clearly violates Mullaney, because it operates as did Maine's presumption of malice. The employment of this presumption has not been challenged in Ohio, but it nevertheless contravenes even the strictest reading of Mullaney. The presumption of such an integral element of the offense charged deprives the defendant of the fundamental protection of due process of law. The presumption can allow the jury to find a higher level of intent than it would otherwise upon the facts. Where the defendant has committed an unlawful act, he can be presumed to have intended the act. Since manslaughter requires knowledge that death would probably result, the presumption of intent can provide the requisite culpability, a purpose or specific intent to cause the death. A crime can, thus, be escalated from manslaughter to murder and from murder to aggravated murder. Such an abrogation of due process should not be countenanced.

Finally, the unworkability of Ohio's definition comes sharply into focus at the trial court level when the sole crime charged is manslaughter. The problem is that manslaughter has been redefined by judicial redrafting. A large portion of the statute's language has been designated as a mitigating circumstance unrelated to the definition of the offense. When a defendant is solely charged with manslaughter, the indictment frequently mirrors the language of the statute. But the statutory language does not reflect the elements of the crime charged.

This was precisely the problem encountered in State v. Calhoun.

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171 See supra note 79 and accompanying text.
172 A similar presumption was challenged in Sandstrom v. Montana, 442 U.S. 510 (1978), on the ground that "the instruction has the effect of shifting the burden of proof on the issue of purpose or knowledge to the defense, and that 'that is impermissible under . . . due process of law.'" Id. at 513. The Court held that the presumption was unconstitutional as either a burden-shifting device or a conclusive presumption. Id. at 521-24. Under this extension of Mullaney, Ohio's presumption should be eliminated as unconstitutional.
173 This is precisely what occurred in Sandstrom. The introduction of the presumption of intent allowed the jury to convict the defendant of "deliberate homicide," that is of "knowingly or purposely" killing the victim, although the prosecution had not directly proved beyond a reasonable doubt that the defendant had such intent. Id. at 523-24.
174 This was the effect of the presumption in State v. Johnson, 56 Ohio St. 2d 35, 381 N.E.2d 637 (1978). Johnson admitted at trial that he assaulted the victim but denied the intent to kill. He appealed his conviction for aggravated murder, contending that, while he was armed with a shotgun, he did not intend to kill. This was evidenced by the fact that he did not shoot the victim. Id. at 38-39, 381 N.E.2d at 639. The court held that "the mere fact that the shotgun was not fired at [the victim] does not negate the presumption of an intent to kill since such a weapon is capable of causing death by either [shooting or clubbing]." Id. 39, 381 N.E.2d at 640. Under this proposition of law that one intends the consequences of his voluntary acts, the appellant could not "escape liability for the fatal consequences of his criminal assault on the deceased." Id.
The wording forced the trial court to dismiss the indictment under a pronouncement that the statute was unconstitutionally vague. The indictment charged that the defendant "did while under extreme emotional stress, brought on by serious provocation, reasonably sufficient to incite him into using deadly force, knowingly cause the death," mirroring the language of the statute.\textsuperscript{176} The defendant entered a plea of not guilty, admitted the killing but denied having done so "knowingly while under extreme emotional stress." The prosecution admitted that their evidence would not establish that the defendant acted knowingly under extreme emotional stress.\textsuperscript{177}

The trial court resolved the controversy by dismissing the indictment and stated:

This Court's view is that a normal interpretation of the statute under the rules of construction would make this [extreme emotional stress] a necessary element to be proved by the Prosecutor. The impact of Muscatello seems to indicate that this is not an element, which renders the statute vague and uncertain as not informing the defendant precisely with what he is charged, and is therefore unconstitutional.\textsuperscript{178}

The court of appeals, holding that the statute was not unconstitutionally vague, reversed but acknowledged that "the impasse reached at the trial of this case suggests that State v. Muscatello . . . might be subject to reconsideration where voluntary manslaughter is the most serious crime alleged in the indictment."\textsuperscript{179} The court of appeals then confronted the gist of the problem; how to treat the mitigating language when manslaughter is the only crime charged. By the Muscatello definition, a defendant is guilty of committing manslaughter when he causes a death knowingly. The language of mitigation is treated strictly as excess verbiage. The court suggested that, perhaps, proof of emotional stress could reduce voluntary manslaughter to negligent homicide.\textsuperscript{180} The evidence of emotional stress would serve to mitigate criminal culpability from knowingly to negligently. This approach would give effect to the total language of the statute.

\textsuperscript{176} Id. slip op. at 1.

\textsuperscript{177} Id. at 2.

\textsuperscript{178} Id. at 3. Besides Muscatello, the court also examined the impact of State v. Solomon, 66 Ohio St. 2d 214, 421 N.E.2d 139 (1981), which reaffirmed the holding in Muscatello and explicitly held that voluntary manslaughter, defined as knowingly causing the death of another, is a lesser included offense of aggravated murder and murder. The Ohio Supreme Court in Solomon had stated: "It is clear that if one purposely causes the death of another, he also knowingly causes the death of another." 66 Ohio St. 2d at 219, 421 N.E.2d at 143.


\textsuperscript{180} Id.
A similar problem was encountered in *State v. Ross*.\(^1\) The defendant had been charged with murder, but at the close of the evidence the trial court dismissed the murder charge and submitted the case to the jury on the basis of voluntary manslaughter and its lesser included offenses.\(^2\) After a guilty verdict of voluntary manslaughter was returned, the defendant appealed. She alleged that the charge to the jury which encapsulated the *Muscatello* ruling was erroneous.\(^3\) She contended that when the case is submitted to a jury and the highest offense charged is manslaughter, the state should be required to prove that the defendant acted under extreme emotional stress.\(^4\) The court of appeals found that regardless of the difficulty in applying the *Muscatello* rule, as laid down by the Ohio Supreme Court, it must be strictly followed.\(^5\) However, the court later suggested a more sensible approach than that taken in *Muscatello*:

[S]ince purposely is a greater degree of culpability, if one acts purposely he necessarily also acts knowingly, meet that culpability mental state. The statutory scheme is such that it would be argued that, if one purposely kills another, he is guilty of murder irrespective of extreme emotional stress, whereas, if he acts under such extreme emotional stress to such an extent that he cannot, or does not, act purposely but instead knowingly kills another, then he is guilty of voluntary manslaughter.\(^6\)

Nevertheless, the court followed the Ohio Supreme Court's holding in *Muscatello*. Emotional stress was not an element; therefore, the instructions which required only a finding of knowingly causing the death of another were proper.\(^7\)

These cases acutely illustrate that lower courts are struggling to reconcile competing forces in Ohio law. The first conflict is that between the *Muscatello* definition of manslaughter, knowingly causing death, and the traditional concept interwoven with provocation and heat of passion. The lower courts balk at the premise that a mere showing of a "knowing"

\(^2\) Id. slip op. at 3.
\(^3\) Id. at 9. The jury was charged that extreme emotional stress was not an element of the crime of voluntary manslaughter but merely a mitigating circumstance. Id. at 9-11.
\(^4\) Id. at 11-12.
\(^5\) Id. at 10. The court stated:
While such rule is somewhat difficult to apply in a case such as this where the trial court directs a verdict in favor of defendant upon the crime of murder, or in a similar case where only voluntary manslaughter is charged, nevertheless, this court, as well as the trial court, is bound by the decisions of the Supreme Court and must follow them.
\(^6\) Id.
\(^7\) Id. Both possibilities are discussed in *State v. Calhoun*, No. 8049, slip op. at 4 (Ohio 2d Dist. Ct. App. Apr. 28, 1983) (Montgomery County).
\(^8\) Id. at 11.
state of mind and death is sufficient to sustain a conviction. The second
collision is that between the judicial interpretation of the manslaughter
statute and its statutory language. In effect, Muscatello ignores a portion
of the statute and dismisses it as a mitigating circumstance. This is func-
tionally sound as long as manslaughter is a lesser included offense of
murder and evidence of "a sudden fit of rage or passion" can reduce the
offense to manslaughter. However, when manslaughter is the highest of-
fense charged, lower courts struggle to find an appropriate application of
Muscatello. Trial courts are uncertain as to how to give effect to the miti-
gation language of the statute under such circumstances.

Two approaches come to mind. The mitigation language ought to be
disregarded entirely when the prosecution establishes the requisite
mental state of voluntary manslaughter. This certainly would follow the
premise set forth in Muscatello by treating the language as excess verbi-
age unless the defendant raises stress as an issue. Alternatively, to give
some effect to the statute as drafted, a court could treat evidence of ex-
treme emotional stress as mitigating manslaughter to negligent homi-
cide.\textsuperscript{188} The latter approach seems to follow more closely the nature of a
mitigating circumstance, that is to reduce the crime to an offense of lesser
severity. Be that as it may, the area remains nebulous and in need of
some judicial standard. The continued absence of guidelines will force a
continuation of challenges to the law under such situations.

V. Conclusion

In Ohio's struggle to interpret its manslaughter statute under constitu-
tional law, it has given little heed to the values espoused in Patterson.
Ohio has burdened the defendant with the obligation to present proof of
the mitigating circumstance of emotional stress without the benefit of ex-
panding Ohio's traditional stance on heat of passion. While it is true that
the United States Supreme Court's failure to lay down clear standards
has placed a heavy burden on state courts, that burden need not force an
abandonment of the principles of Patterson. Were Ohio courts to give
some viability to an expanded version of sudden fit of rage or passion, not
only would the Constitution allow its burden of proof to be placed on the
defendant, but such a course would also preserve the vitality of the policy
considerations of Patterson and effectuate the original intent of the legisla-
ure.

Ohio courts have indulged in judicial redrafting of the manslaughter
statute in both its actual language and its meaning. As manslaughter is
now defined, the possibility of a conviction for the higher crime of murder
hinges on a narrow distinction. The great disparity between the two sanc-

\textsuperscript{188} Statre v. Ross, No. 80AP-356, slip op. at 10 (Ohio 10th Dist. Ct. App. July 28,
1981)(Franklin County).
tions, the increased likelihood of jury confusion, and the abrogation of the historical tradition of manslaughter all argue against the continuation of the present system. The stakes involved are too high and the risks are too great. Our society has never placed a greater value on insuring convictions than on the protection of individual rights.

Resolution could be achieved by the adoption of a murder/manslaughter scheme similar to New York's. Such a scheme would allow a return to traditional manslaughter, a murder mitigated by heat of passion, while incorporating a broader concept of heat of passion. This approach would clarify the distinction between murder and manslaughter by mirroring the common understanding of the crime and also would evidence an adherence to the policy considerations of Patterson.

One thing is patently clear; the presumption of intent in Ohio law should be abandoned. Its continued presence should not be tolerated, especially in view of Ohio's narrow distinction between murder and manslaughter. The strictures of Mullaney dictate such a course in furtherance of protecting a criminal defendant's fourteenth amendment rights.

Although the present state of Ohio law may not be laid entirely at the door of Ohio courts, it is the shared responsibility of both the courts and the legislature to correct matters. The absence of clear guidelines from the Supreme Court is unlikely to change at this juncture. Perhaps it is time, then, for Ohio to overcome its apparent fear of the innovation that Patterson was designed to encourage and reevaluate its manslaughter law in light of its current problems.

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