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1-1-1982

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#### **Recommended Citation**

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## “WITH MALICE TOWARD NONE”: A SOLUTION TO AN ILLINOIS HOMICIDE QUANDARY

TIMOTHY P. O'NEILL\*

The scene is a tavern in Chicago on a sultry evening in June, 1981. Two friends, Kane and Abel, begin to argue. Suddenly, the argument erupts into a physical altercation. After ten minutes of intense fighting, Kane strangles Abel, breaking the latter's neck. Soon thereafter, the police arrive and arrest Kane. Abel is rushed to the hospital and placed in intensive care.

After he is booked, Kane calls his lawyer. Kane voices his concern about the possibility of being charged with murder since he definitely intended to kill Abel. His lawyer responds: “Don't worry about murder. There is no question that your actions were performed under a sudden and intense passion resulting from serious provocation. Such an action constitutes voluntary manslaughter,<sup>1</sup> which is a Class Two felony in Illinois.<sup>2</sup> If you are convicted, the worst you can get is seven years;<sup>3</sup> with good time you'll be out in three and one-half years.<sup>4</sup> Moreover, because you have no prior criminal record, there is a possibility you could even be given probation.”<sup>5</sup> An hour later, Kane's lawyer comes to visit him.

“I'm afraid I have some bad news.”

“You mean Abel died?”

“No, the bad news is that Abel did not die.”

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1. For the purposes of this Article, voluntary manslaughter is divided into two categories: “provocation” voluntary manslaughter and “unreasonable belief” voluntary manslaughter. Provocation voluntary manslaughter is defined as an “unlawful killing committed while under a sudden and intense passion resulting from serious provocation.” ILL. REV. STAT. ch. 38, § 9-2(a) (1981). Serious provocation is conduct which is sufficient to excite an intense passion in a reasonable person. *Id.* Unreasonable belief manslaughter is defined as an intentional or knowing killing made under the unreasonable belief that circumstances were such that, if they existed, would justify or exonerate the killing. *Id.* § 9-2(b). Both statutory provisions are set forth *infra* at text accompanying notes 31-32.

2. ILL. REV. STAT. ch. 38, § 9-2(c) (1979) (amended January 1, 1982). Voluntary manslaughter has since been made a Class One felony. ILL. REV. STAT. ch. 38, § 9-2(c) (1981).

3. The sentence for a Class Two felony shall be no less than 3 years and no more than 7 years. ILL. REV. STAT. ch. 38, § 1005-8-1(a)(5) (1981). The sentence for a Class One felony shall be no less than 4 years and no more than 15 years. *Id.* § 1005-8-1(a)(4).

4. Section 1003-6-3(a)(2) of the Illinois Revised Statutes provides that a prisoner shall receive one day of good conduct credit for each day served in prison. ILL. REV. STAT. ch. 38, § 1003-6-3(a)(2) (1981). This potentially reduces the period of incarceration set by the court by one-half and applies to all felonies except those where a sentence of natural life has been imposed. *Id.*

5. Except where specifically prohibited by other provisions of the Illinois Criminal Code, the court is to impose a sentence of probation upon an offender, unless after reviewing the nature and circumstances of the offense, along with the history, character, and condition of the offender, the court believes that imprisonment is necessary for the protection of the public or probation would deprecate the seriousness of the offense. ILL. REV. STAT. ch. 38, § 1005-6-1(a)(1)-(2) (1981).

"I don't understand."

"If he had died, there is no question that you would have been charged with voluntary manslaughter. He's alive, however, and there is no such crime as attempt<sup>6</sup> voluntary manslaughter in Illinois.<sup>7</sup> You admitted you tried to kill Abel and that is attempt murder,<sup>8</sup> a Class X felony punishable by up to thirty years in the penitentiary.<sup>9</sup> Moreover, because it is a Class X crime, there is no possibility of probation.<sup>10</sup> Frankly, you made a terrible mistake by not making sure that you actually killed Abel."

The above example illustrates a conceptual difficulty which has long bedeviled Illinois homicide law. Ironically, the source of this confusion is a legal term which continues to be used by Illinois courts despite the fact that it was expressly removed from the Illinois criminal statutes over twenty years ago. That term is "malice aforethought."

At common law, the presence of the element of malice aforethought<sup>11</sup> distinguished murder from manslaughter.<sup>12</sup> Unfortunately, malice aforethought is a legal term of art which bears no relation to the literal meaning of those

6. A person commits an attempt when "with intent to commit a specific offense, he does any act which constitutes a substantial step towards the commission of that offense." ILL. REV. STAT. ch. 38, § 8-4(a) (1981).

7. See *People v. Weeks*, 86 Ill. App. 2d 480, 230 N.E.2d 12 (2d Dist. 1967). In *Weeks*, the court held that the "sudden and intense passion" formulation of voluntary manslaughter, see ILL. REV. STAT. ch. 38, § 9-2(a) (1981), was inconsistent with the intent required for attempt offenses. 86 Ill. App. 2d at 485, 230 N.E.2d at 14. For a further discussion of the *Weeks* case, see *infra* notes 49-69 and accompanying text.

In a case of first impression, it was recently held that there could be no attempt under the "unreasonable belief" formulation of voluntary manslaughter as well. *People v. Reagan*, 111 Ill. App. 3d 945, 444 N.E.2d 742 (3d Dist. 1982), *leave to appeal allowed*, No. 57914 (April 12, 1983). For a further discussion of the *Reagan* case, see *infra* note 69.

8. Attempt murder occurs when an actor performs an act which constitutes a substantial step toward the commission of murder with the intent to kill. ILL. REV. STAT. §§ 8-4(a), 9-1(a)(1) (1981). See *People v. Jones*, 81 Ill. 2d 1, 8-9, 405 N.E.2d 343, 345-46 (1979); *People v. Trinkle*, 68 Ill. 2d 198, 201, 369 N.E.2d 888, 890 (1977). *But see* *People v. Barker*, 83 Ill. 2d 319, 326-27, 415 N.E.2d 404, 407 (1980) (intent to commit murder is sufficient). See *infra* note 69.

9. ILL. REV. STAT. ch. 38, § 8-4(c)(1) (1981). The sentence for a Class X felony shall not be less than 6 years nor more than 30 years. *Id.* § 1005-8-1(a)(3).

10. The Code provides that the court "shall sentence the offender to not less than the minimum term of imprisonment." *Id.* § 1005-5-3(c)(2)(B) (1981). Thus, if found guilty, Kane will be sentenced to a minimum of six years imprisonment.

11. Malice aforethought has been defined as "an unjustifiable, inexcusable and unmitigated person-endangering-state of mind." R. PERKINS & R. BOYCE, *CRIMINAL LAW* 75 (3d ed. 1982) [hereinafter cited as PERKINS & BOYCE]. Person-endangering-states-of-mind include the intents to kill or commit great bodily injury, to commit acts in wanton and willful disregard of unreasonable risks of human injury, or to commit dangerous felonies. *Id.* at 73. For the statutory definition of malice prior to its elimination from the Criminal Code in 1961, see *infra* notes 20-24 and accompanying text.

12. Perkins, *A Re-Examination of Malice Aforethought*, 43 *YALE L.J.* 537, 544 (1934). See also *People v. Pappas*, 381 Ill. 90, 44 N.E.2d 896 (1942) (element that distinguishes murder from manslaughter is malice); *People v. Lewis*, 375 Ill. 330, 31 N.E.2d 795 (1940) (same), *cert. denied*, 314 U.S. 628 (1941).

two words.<sup>13</sup> Consequently, the use of this concept has obscured the true relation between murder and manslaughter.<sup>14</sup>

In an attempt to solve this problem, the drafters of the Illinois Criminal Code of 1961 excised all reference to malice aforethought in all statutes dealing with homicide.<sup>15</sup> Nevertheless, the last twenty years of Illinois appellate decisions illustrate that while old statutes may die, legal jargon rarely fades away. Instead of embracing the demise of malice aforethought, Illinois courts continue to use this term, further obfuscating an already murky area.<sup>16</sup>

This Article examines several current problems in Illinois homicide law resulting from the legal system's failure to understand the significance of the elimination of the concept of malice aforethought. It is shown that Illinois courts continue to view voluntary manslaughter as "murder *minus* malice aforethought," even though a far more helpful perspective—and one consonant with the current statute—would recognize voluntary manslaughter as simply being "murder *plus* extenuating circumstances." Moreover, this Article contends that many of the difficulties plaguing Illinois trial judges and juries in the field of voluntary manslaughter can be attributed to the total failure of the Illinois Pattern Jury Instructions (IPI)<sup>17</sup> to reflect the profound changes in the relation between murder and voluntary manslaughter brought about by the elimination of malice aforethought. Therefore, this Article proposes a new instruction to remedy the problem.

#### ILLINOIS HOMICIDE LAW PRIOR TO THE CRIMINAL CODE OF 1961

Prior to the enactment of the 1961 Criminal Code,<sup>18</sup> Illinois homicide law strongly reflected common law.<sup>19</sup> Section 358 of the previous Criminal Code had defined murder as "the unlawful killing of a human being . . . *with*

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13. See PERKINS & BOYCE, *supra* note 11 at 57-58 (premeditation, in the sense of formulating a plan or scheme, is an unnecessary part of the "aforethought" requirement; as long as malice does not occur as an afterthought, the time interval between the idea and the act can be so short as to render them almost simultaneous); Comment, *Proposed Revisions in Illinois Criminal Code*, 48 NW. U.L. REV. 198, 212 (1953) (malice does not require a feeling of personal ill will toward the victim; rather, an actual or implied intent to kill will suffice) [hereinafter cited as *Proposed Revisions*].

14. See generally, W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 67, at 528-30 (3d ed. 1972) [hereinafter cited as LAFAVE & SCOTT]. *Accord infra* notes 24-29 and accompanying text.

15. Compare ILL. REV. STAT. ch. 38, §§ 9-1 to 9-4 (1961) with ILL. REV. STAT. ch. 38, §§ 358, 363 (1959). See also *People v. Davis*, 35 Ill. 2d 55, 60, 219 N.E.2d 468, 471 (1966) (in attempt to express crimes in simple language, draftsmen of the Criminal Code sought to avoid any reference to malice aforethought).

16. For a list of recent cases insisting that malice is an essential element to be proven in a murder case, see *infra* note 47.

17. ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL (2d ed. 1981).

18. ILL. REV. STAT. ch. 38 (1961).

19. For a summary of the common law development of murder, see L. HALL & S. GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 37-39 (2d ed. 1958).

*malice aforethought*, either express or implied.”<sup>20</sup> Manslaughter, on the other hand, was defined as “the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever.”<sup>21</sup> Express malice was defined as “the deliberate intention unlawfully to take away the life of a fellow creature.”<sup>22</sup> When no provocation appeared or when the killing showed an abandoned or malignant heart, malice was implied.<sup>23</sup> Thus, through 1961, malice aforethought was treated by Illinois courts as a necessary element of murder.<sup>24</sup>

At early common law it was helpful to consider malice aforethought as an element of murder because, at that time, the law recognized only one type of murder—the unlawful killing of another with a premeditated intent to kill.<sup>25</sup> Malice aforethought succinctly described this state of mind. Yet the concept of malice became confusing when the common law began to recognize new types of murder not requiring a premeditated intent to kill, while continuing to ascribe malice aforethought to each new kind. For example, common law judges began to characterize unintentional killings committed in the course of a felony as murder.<sup>26</sup> Similarly, an unintentional killing resulting from conduct evincing a “depraved heart” constituted murder.<sup>27</sup> An unintentional killing caused by a person who was acting with intent to do serious bodily injury was likewise found to be murder.<sup>28</sup>

In all these situations, the actor lacked an express intent to kill. Nevertheless, the courts referred to these killings as “murder with malice aforethought.”<sup>29</sup> Consequently, rather than requiring that malice aforethought be established in every murder, the reverse became true: any act found to be murder was automatically endowed with the characteristic of malice aforethought. What began as a descriptive phrase for a necessary element of murder was reduced to a mere talisman.

#### HOMICIDE LAW UNDER THE CRIMINAL CODE OF 1961

The drafters of the Criminal Code of 1961 recognized the obsolescence

20. ILL. REV. STAT. ch. 38, § 358 (1959) (emphasis added).

21. *Id.* § 361 (emphasis added). Furthermore, to be classified as manslaughter the killing had to be “voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection.” *Id.*

22. *Id.* § 358. This intention had to be manifested by external circumstances capable of proof. *Id.*

23. *Id.*

24. See *People v. Bush*, 414 Ill. 441, 111 N.E.2d 326 (1953); *People v. Jones*, 384 Ill. 407, 51 N.E.2d 543 (1943); *People v. Pappas*, 381 Ill. 90, 444 N.E.2d 896 (1942); *People v. Brown*, 288 Ill. 489, 123 N.E. 515 (1919); *People v. Curtright*, 258 Ill. 430, 101 N.E. 551 (1910).

25. LAFAYE & SCOTT, *supra* note 14, at 529.

26. *Id.*

27. *Id.*

28. *Id.*

29. The malice aforethought was found to be “implied,” as distinguished from intentional

of malice aforethought. The Committee Comments acknowledged that "[t]he 'malice aforethought' concept has undergone in Illinois the same reduction to actual intent, regardless of the time available for deliberation, which it has undergone elsewhere."<sup>30</sup> The Committee noted Illinois cases dating back to 1872 which had held that the requirement of malice aforethought did not prevent an intentional killing, preceded by only a short period of deliberation, from being considered murder.<sup>31</sup>

The real obituary for malice aforethought in Illinois appeared in *People v. Slaughter*,<sup>32</sup> one of the last murder cases decided under the old law. Although insisting that malice aforethought was a separate element which must be proved in any murder prosecution, the Illinois Supreme Court proceeded to define it simply as any state of mind sufficient to constitute murder under the statute.<sup>33</sup> It was obvious that malice aforethought had become a rubber stamp mindlessly applied to every situation in which murder was otherwise found to exist.

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killings, where malice aforethought was "express". *Id.* For burden of proof problems concerning implied malice, see *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

30. ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979) Committee Comments—1961, at 16-17 (revised 1972). See also *Patterson v. New York*, 432 U.S. 197, 217 (1977) (Powell, J., dissenting) (finding that killing was committed with malice has come to mean simply that heat of passion was absent).

31. ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979) Committee Comments-1961, at 17 (revised 1972). The Committee, quoting *Peri v. People*, 65 Ill. 17, 18 (1872), stated:

To constitute malice, it is not necessary that the party should brood over and meditate upon the performance of the act for a considerable space of time; but it is sufficient if it were deliberate and intentional, without apparently well founded danger of great bodily harm, or where there is not such provocation as in law reduces the homicide to manslaughter.

*Id.* at 23-24.

32. 29 Ill. 2d 384, 194 N.E.2d 193 (1963). In *Slaughter*, the defendant was convicted of murdering his wife. Although maintaining that his wife's death was the result of an accident, defendant changed his version of the shooting several times. The court determined the defendant's failure to provide a credible explanation of the shooting, coupled with evidence of an earlier threat by him against his wife's life, was sufficient to imply malice. *Id.* at 390-91, 194 N.E.2d at 196.

33. The *Slaughter* court stated that:

While it is beyond question that malice is an essential element of the crime of murder, and equally certain that it must be proved beyond a reasonable doubt, it is likewise established that malice is implied where no considerable provocation appears or when all of the circumstances of the killing show an abandoned and malignant heart. Hence, malice is implied from any deliberate or cruel act against another, however sudden, and if a person uses a deadly weapon against another, resulting in his death, it may be implied that the killing was malicious. It is not necessary, to justify a conviction of murder, that the party charged may have brooded over the intent to kill or that he entertained it for any considerable length of time, but it is sufficient if, at the instant of the assault, he intended to kill the person assaulted, or it will be enough if he is actuated in making the assault by that wanton and reckless disregard of human life which denotes malice. And while required to be proved beyond a reasonable doubt, malice may be established by circumstantial as well as direct evidence.

*Id.* at 389-90, 194 N.E.2d 195-96 (citations omitted).

In response to the deterioration of malice aforethought, the Committee eliminated any reference to it in the new Code. Instead, murder is now defined:

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

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

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

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.<sup>34</sup>

In addition, voluntary manslaughter is no longer described merely as a killing without malice aforethought, but rather:

(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion. . . .<sup>35</sup>

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing . . . but his belief is unreasonable.<sup>36</sup>

It is important to observe the symmetry between these new definitions of murder and voluntary manslaughter. Putting aside felony murder,<sup>37</sup> the statute prescribes that a murder is committed when a person acts intentionally or knowingly.<sup>38</sup> These two states of mind mirror precisely those required under unreasonable belief voluntary manslaughter.<sup>39</sup> Provocation manslaughter, on the other hand, mentions no mental state.<sup>40</sup> Where a statute does not prescribe a mental state, proof of intent, knowledge, or recklessness

34. ILL. REV. STAT. ch. 38, § 9-1 (1981).

35. *Id.* § 9-2(a).

36. *Id.* § 9-2(b). This unreasonable-use-of-force voluntary manslaughter was not recognized prior to the adoption of the Criminal Code of 1961. See *People v. Lockett*, 82 Ill. 2d 546, 554-55, 413 N.E.2d 378, 383 (1980).

37. Under the felony murder rule, a person is guilty of murder if he kills an individual during the attempt or commission of a forcible felony other than voluntary manslaughter. ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1981). For a thorough discussion of the felony murder rule, see PERKINS & BOYCE, *supra* note 11, at 61-71. This Article's analysis is inapplicable to felony murder.

38. ILL. REV. STAT. ch. 38, § 9-1 (1981). Under the Code, a person intends to accomplish a certain result if "his conscious objective or purpose is to accomplish that result or engage in that conduct." *Id.* § 4-4. A person acts with knowledge of the nature or attendant consequences of his conduct when he is "consciously aware that his conduct is of such nature or that such circumstances exist." *Id.* § 4-5(a). Knowledge of a material fact includes awareness of the substantial probability that such fact exists. *Id.* "A person acts with knowledge of the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct." *Id.* § 4-5(b).

39. Compare *id.* §§ 9-1(a)(1), (2) with *id.* § 9-2(b).

40. See *id.* § 9-2(a).

generally is sufficient.<sup>41</sup> Killings caused by recklessly performed acts, however, come within the purview of involuntary manslaughter.<sup>42</sup> Therefore, murder and voluntary manslaughter require identical mental states—intent or knowledge—as well as an identical result—the unjustified killing of a human being.<sup>43</sup>

The significance of this symmetry lies in the fact that, prior to the 1961 Code, requiring proof of malice aforethought presumed that murder contained a discrete mental element not present in manslaughter.<sup>44</sup> This relation may be expressed in the following syllogism:

1. If the elements of murder are proven, then, *a fortiori*, malice exists.
2. Malice is not present in manslaughter.
3. Therefore, a finding that murder has been proven precludes a finding of manslaughter.

Consequently, voluntary manslaughter could have been described as “murder *minus* malice aforethought.”

The elimination of malice aforethought from the Criminal Code, however, greatly simplifies the murder/voluntary manslaughter dichotomy. Under the prior law, a finding of murder foreclosed the possibility of manslaughter. Implicit in a finding of murder was a finding of malice aforethought, and therefore the homicide could not have been manslaughter. Under the new law, however, voluntary manslaughter can be proved only if all the elements of murder are proved. Like murder, voluntary manslaughter involves an unjustified homicide performed intentionally or knowingly. Unlike murder, voluntary manslaughter contains mitigating circumstances. With the elimination of malice aforethought, voluntary manslaughter has become “murder *plus* extenuating circumstances.” Consequently, murder and voluntary manslaughter no longer need to be viewed as different crimes. Instead, they should be characterized as *different degrees* of the *same* crime—an unjustified killing performed intentionally or knowingly.<sup>45</sup>

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41. *Id.* § 4-3(b). This rule does not apply to offenses which involve absolute liability. *Id.*

42. Illinois defines involuntary manslaughter as an unintentional killing where the acts which cause the death are likely to cause death or great bodily harm to some individual, and those acts are performed recklessly. *Id.* § 9-3. A person acts recklessly when he “consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow . . . and such failure constitutes a substantial deviation from the standard of care which a reasonable person would exercise in the situation.” *Id.* § 4-6.

43. It must be emphasized that the felony murder theory is not subject to this analysis. Even accidental homicides may constitute murder under this theory. The only requisite intent is the defendant's intent to commit the underlying felony. *See* *People v. Jeffrey*, 94 Ill. App. 3d 455, 460, 418 N.E.2d 880, 885-86 (5th Dist. 1981); *People v. Miner*, 46 Ill. App. 3d 273, 282, 360 N.E.2d 1141, 1148 (5th Dist. 1977).

44. *See supra* note 12 and accompanying text.

45. Professor Perkins, a staunch supporter of the use of malice aforethought, contends that it is a useful concept if properly understood. PERKINS & BOYCE, *supra* note 11, at 73-75. He defines it as “an unjustifiable, inexcusable and unmitigated person-endangering-state-of-



## IMPACT OF THE ELIMINATION OF "MALICE AFORETHOUGHT" ON ILLINOIS COURTS

Few Illinois decisions have expressly recognized that malice aforethought is no longer an element of murder in Illinois.<sup>46</sup> Moreover, a considerable number of cases have continued to discuss murder in terms of malice aforethought.<sup>47</sup> In short, it is apparent that the elimination of malice aforethought by the Illinois legislature has had little effect on the day-to-day workings of the judiciary.

One commentator discussing the meaning of "malice" and "aforethought" stated that "[it] is impossible to establish empirically that the use of [malice aforethought] has resulted in either injustice to defendants or the subversion of state policy. . . ."<sup>48</sup> If this were true, the retention or demise of malice aforethought would be merely of academic interest. Unfortunately, several homicide problems currently facing Illinois courts can be resolved only if courts consistently acknowledge that malice aforethought is no longer an element of murder in Illinois.

mind." *Id.* at 75. But note the two discrete mental elements running through this allegedly unified state of mind. First, it concerns *what* the defendant wishes to do to the victim; that is, perform a "person-endangering" act. Second, it concerns *why* he is acting in such a manner; that is, it is concerned with the possibility of justification, excuse, or mitigation. These are two very different concerns. Malice aforethought is thus a particularly clumsy element to include in murder because it forces the state to prove not only the effects intended by the actor vis-a-vis the victim (the "what" prong), but also to prove that the acts were unlawful, unjustifiable, inexcusable, and accompanied by no mitigating circumstances (the "why" prong). Perkins's contention that the prosecution is aided by the presumption that every homicide has been committed with malice aforethought only makes the concept seem even more irrelevant. *Id.* at 77.

The Illinois Criminal Code simplifies homicide by defining unlawful killings as murder when accompanied by a specific state of mind vis-a-vis the victim. ILL. REV. STAT. ch. 38, § 9-1(1981). Section 9-2 then sets forth those mitigating circumstances which will reduce those unlawful killings to voluntary manslaughter. The finder of fact need not consider these mitigating circumstances unless there is some evidence introduced at trial which, if believed, would reduce the crime to voluntary manslaughter. *People v. Lockett*, 82 Ill. 2d 546, 550, 413 N.E.2d 378, 381 (1980).

46. See *People v. Lowe*, 122 Ill. App. 2d 197, 208-09, 258 N.E.2d 370, 376 (4th Dist. 1970) (Illinois Supreme Court has stated its approval of definitions of homicide which avoid the common law language of malice aforethought); *People v. Ruel*, 120 Ill. App. 2d 374, 380, 256 N.E.2d 672, 675 (2d Dist. 1970) (under Illinois statute, actual malice need not be proven). *But see* *People v. Davis*, 35 Ill. 2d 55, 60, 219 N.E.2d 468, 471 (1966) (although court acknowledged change, it proceeded to discuss murder instruction in terms of implied malice).

47. A number of recent cases have held that proof of malice is an essential element in a murder case. See *People v. Barney*, 111 Ill. App. 3d 669, 676, 444 N.E.2d 518, 523 (1st Dist. 1982); *People v. Evans*, 92 Ill. App. 3d 874, 879, 416 N.E.2d 377, 380 (2d Dist. 1981); *People v. Cowen*, 68 Ill. App. 3d 437, 441, 386 N.E.2d 435, 438 (1st Dist. 1979); *People v. Tiller*, 61 Ill. App. 3d 785, 794, 378 N.E.2d 282, 290 (5th Dist. 1978); *People v. McCord*, 46 Ill. App. 3d 389, 392, 361 N.E.2d 13, 17 (1st Dist. 1977); *People v. Walden*, 43 Ill. App. 3d 744, 752, 357 N.E.2d 232, 239 (1st Dist. 1976); *People v. Muldrow*, 30 Ill. App. 3d 209, 217, 332 N.E.2d 664, 669 (1st Dist. 1971).

Similarly, several cases have defined murder in terms of malice. See, e.g., *People v. Forrest*, 133 Ill. App. 2d 70, 72, 272 N.E.2d 813, 815 (1st Dist. 1971); *People v. Spagnola*, 123 Ill. App. 2d 171, 186, 260 N.E.2d 20, 27 (1st Dist. 1970).

48. *Proposed Revisions, supra* note 13, at 213.

*Problem One: Is There Such a Crime as "Attempt Voluntary Manslaughter?"*

As the scenario at the beginning of this Article illustrates, Illinois does not recognize attempt voluntary manslaughter as a crime. The leading case in this area, *People v. Weeks*,<sup>49</sup> merits some discussion.

Michael Weeks and his wife separated in March, 1966. During the next few months Weeks made repeated efforts to reconcile his marriage. On May 11th he discovered his wife with a man named Omar Joel. Following a sleepless night and a half-day of work, Weeks purchased a .22 caliber revolver. After informing a service station attendant that he was "going to the gas chamber," Weeks went to his wife's residence and told her that Joel soon would be dead.<sup>50</sup>

Weeks—a man apparently not given to subtlety—then proceeded to Joel's apartment, pointed the gun at him, and asked "[H]ow would you like to die?" The two began to struggle and Joel was shot in the shoulder. When Weeks saw blood, he dropped his gun and helped take Joel downstairs to transport him to the hospital. The police, alerted by Weeks' father-in-law, apprehended Weeks outside Joel's apartment.<sup>51</sup>

Weeks was tried on three counts: two counts of attempt murder and one count of attempt voluntary manslaughter based upon a sudden and intense passion.<sup>52</sup> The jury returned a verdict of guilty only on the latter charge.

Weeks appealed his conviction, contending that an attempt must involve a specific intent to commit a crime. Asserting that voluntary manslaughter based upon a sudden and intense passion can exist only when there is no such specific intention, Weeks maintained that an attempt to commit voluntary manslaughter was a logical and legal impossibility. Accepting this argument, the Illinois Appellate Court reversed Weeks' conviction.

Noting that this was a case of first impression in Illinois, the *Weeks* court looked to *Moore v. People*,<sup>53</sup> an 1893 Illinois Supreme Court case found to be applicable by analogy. *Moore* involved a statute which made it a crime to perpetrate "an assault with intent to commit murder, rape, mayhem, robbery, larceny, or other felony."<sup>54</sup> At issue in *Moore* was whether this statute could support a conviction for assault with intent to commit manslaughter. In a brief opinion, the court noted that all the felonies enumerated in the statute required deliberation or premeditation.<sup>55</sup> Additionally, manslaughter was defined as the "unlawful killing of a human being without malice, express

49. 86 Ill. App. 2d 480, 230 N.E.2d 12 (2d Dist. 1967).

50. *Id.* at 482, 230 N.E.2d at 13.

51. *Id.*

52. *Id.* at 481, 230 N.E.2d at 12.

53. 146 Ill. 600, 35 N.E. 166 (1893). In addition to relying on *Moore*, the *Weeks* court looked to several New York decisions which had concluded that there is no attempt manslaughter in New York. See *People v. Foster*, 19 N.Y.2d 150, 225 N.E.2d 200, 278 N.Y.S.2d 603 (1967); *People v. Brown*, 21 A.D.2d 738, 249 N.Y.S.2d 922 (1964). The New York decisions were not applicable to the *Weeks* court's analysis, however, because the New York manslaughter statute applied in those cases provided that manslaughter could be committed with no intent.

54. ILL. REV. STAT. ch. 38, § 23 (1891).

55. 146 Ill. at 602, 35 N.E. at 166.

or implied, and without any mixture of deliberation whatever.”<sup>56</sup> Because the crime in question required intent to commit a felony involving deliberation, the court reasoned it would be a contradiction to say that one could have intended to commit a crime which by definition includes no deliberation. Therefore, the *Moore* court held that an individual could not be convicted of an assault with intent to commit manslaughter.<sup>57</sup> The existence of any intent to take life would make the act an assault with intent to murder.<sup>58</sup>

Applying the reasoning set forth in *Moore*, the *Weeks* court maintained that an act which constitutes an attempt must result from some calculation concerning the act.<sup>59</sup> The nature of provocation voluntary manslaughter, however, precludes any calculation.<sup>60</sup> Because an act cannot be both the result of a sudden and intense passion and calculation, the *Weeks* court concluded that there could be no attempt voluntary manslaughter.<sup>61</sup>

The *Moore* decision evolved from the traditional view that manslaughter lacks an element that murder possesses, namely, malice aforethought.<sup>62</sup> Section 140 of the Criminal Code defined express malice as the “deliberate intention to unlawfully take away the life of a fellow creature.”<sup>63</sup> By equating absence of malice with absence of premeditated, deliberate intent to kill, the *Moore* court reasoned that one could not deliberately intend to commit manslaughter because it is an offense motivated by irresistible passion—an offense not involving premeditation or deliberation.<sup>64</sup> In other words, one could not deliberately intend to commit a crime which, by definition, could not be committed with a deliberate intent.

The dichotomy drawn between murder and manslaughter by the *Moore* court was inspired by the concept of malice aforethought. The court’s analysis, however, was flawed. In determining whether one could intend to commit manslaughter, the inquiry should not have been whether one could *deliberately intend* to commit the crime of manslaughter *per se*. Rather, in keeping within the definition of manslaughter, the court should have asked whether one could intend to kill under circumstances *negating deliberation*, thus rendering the intent non-malicious and reducing the crime from murder to manslaughter.<sup>65</sup> Engaging in an analysis involving malice aforethought,

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56. ILL. REV. STAT. ch. 38, § 143 (1891).

57. 146 Ill. at 602, 35 N.E. at 167.

58. *Id.* See *infra* note 65.

59. 86 Ill. App. 2d at 485, 230 N.E.2d at 14 (1967).

60. *Id.*

61. *Id.*

62. See *supra* note 10 and accompanying text.

63. ILL. REV. STAT. ch. 38, § 140 (1891).

64. 146 Ill. 600, 602, 35 N.E. 166, 167 (1893).

65. This should not have been a novel idea to the *Moore* court. Ironically, on the very same day the *Moore* decision was filed in Springfield, the Illinois Supreme Court sitting in Mount Vernon declared “[m]alicious intent is a necessary element of the crime of assault with intent to commit murder, for *if the killing would have been less than murder, if death had resulted, the act cannot be deemed an assault with intent to commit murder.*” *Friederich v.*

however, encouraged viewing murder and manslaughter as two totally different crimes rather than as two degrees of the same basic crime—the unjustified killing of a human being performed with knowledge or intent.

By relying on *Moore*, the *Weeks* court ignored the fact that malice aforethought had been eliminated from Illinois law several years earlier.<sup>66</sup> The change was more than cosmetic. Specifically, murder no longer possessed an element which provocation manslaughter did not. Therefore, voluntary manslaughter was no longer to be considered as murder *minus* malice, but rather murder *plus* extenuating circumstances. Voluntary manslaughter incorporated the entire physical act and intent of murder, but possessed something more—namely, mitigating circumstances. In other words, murder and voluntary manslaughter merely occupied different locations on the homicide continuum.

The elimination of the malice terminology makes it easier to determine whether there can be attempt voluntary manslaughter. The question of whether one can attempt or deliberately intend to commit an offense under sudden passion is simply irrelevant. Because voluntary manslaughter can be viewed as “murder plus extenuating circumstances,” attempt voluntary manslaughter simply means “attempt murder plus extenuating circumstances.”

The above interpretation solves the riddle posed by the opening scenario of this Article in which one acting under sudden passion is punished more severely if his victim lives rather than dies. In this situation, Kane should have been charged with attempt voluntary manslaughter rather than attempt murder. Although Kane attempted murder, his actions resulted from serious provocation and thereby constituted attempt voluntary manslaughter. Viewing murder and manslaughter as merely different degrees of the same crime—an approach discouraged by the malice aforethought distinction—solves the problem and yields a more logical and just result.

The *Weeks* court's holding that there can be no attempt voluntary manslaughter in Illinois<sup>67</sup> has been criticized by legal commentators.<sup>68</sup> Despite

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People, 147 Ill. 310, 315, 35 N.E. 472, 473 (1893) (emphasis added). This language suggests that assault with intent to commit manslaughter is indeed a crime.

Several years later, the Illinois Supreme Court emphasized that the sudden passion of manslaughter did not mean the actor lacked an intent to kill, but such passion merely mitigated the gravity of his crime. *Hammond v. People*, 199 Ill. 173, 180, 64 N.E. 980, 982 (1902). Neither *Friederich* nor *Hammond* were cited by the *Weeks* court.

66. See *supra* note 15 and accompanying text.

67. 86 Ill. App. 2d 480, 230 N.E.2d 12 (2d Dist. 1967). It should be noted that the narrow result reached by the *Weeks* court—that *Weeks* was not guilty of attempt voluntary manslaughter—was probably correct. Based on the facts, it appears that a struggle occurred once *Weeks* pointed the gun at Joel. It could be argued that *Weeks* merely possessed a reckless state of mind, insufficient for a finding of voluntary manslaughter. Thus, the *Weeks* court could have achieved the same result had it decided this case narrowly on the evidence presented rather than the broad basis it chose.

68. See LAFAYE & SCOTT, *supra* note 14, at 430 p.86 (*Weeks* court was in error in maintaining that because voluntary manslaughter can result only from serious provocation, it can-

this criticism, *Weeks* continues to be followed in Illinois.<sup>69</sup> Malice aforethought thus continues its maddening hold on the Illinois judicial mind.

*Problem Two: Instructing the Jury on "Provocation"  
Voluntary Manslaughter—"Did I Confuse You?"*

Although the term malice aforethought has been expressly removed from the Illinois homicide statutes, the malady lingers. Consider the plight of the

not be committed with intent to kill); Sachs, *Is Attempt to Commit Voluntary Manslaughter a Possible Crime?*, 71 ILL. BAR. J. 166 (1982) (*Weeks* rule that there cannot be attempt provocation voluntary manslaughter is not logically or legally persuasive, and has been rejected in most other states).

69. See *People v. Gibson*, 99 Ill. App. 3d 1068, 425 N.E.2d 1208 (1st Dist. 1981); *People v. Rodriguez*, 96 Ill. App. 3d 431, 421 N.E.2d 323 (1st Dist. 1981); *People v. Hill*, 53 Ill. App. 3d 280, 368 N.E.2d 714 (1st Dist. 1977); *People ex rel. Bassin v. Israel*, 31 Ill. App. 3d 744, 335 N.E.2d 53 (5th Dist. 1975); *People v. Ross*, 103 Ill. App. 2d 430, 243 N.E.2d 697 (1st Dist. 1968).

Recently, the Third District squarely faced the issue of whether there can be a crime of attempt voluntary manslaughter based on "unreasonable belief." The court in *People v. Reagan*, 111 Ill. App. 3d 945, 444 N.E.2d 742 (3d Dist. 1982), *leave to appeal allowed*, No. 57914 (April 12, 1983), held that such an offense was a legal impossibility. The *Reagan* court is clearly wrong; the analysis used for "provocation" attempt voluntary manslaughter is equally applicable to "unreasonable belief" voluntary manslaughter.

In *Reagan*, the State argued that the only intent necessary for attempt voluntary manslaughter was an intent to kill. The *Reagan* court, citing dictum from *People v. Barker*, 83 Ill. 2d 319, 415 N.E.2d 404 (1980), stated that an intent to kill was *per se* insufficient to prove attempt murder because such an intent was not necessarily unlawful. The *Reagan* court held that the intent necessary for attempt murder was a "specific intent to kill without lawful justification." 111 Ill. App. 3d at 950-51, 444 N.E.2d at 745. Thus, the court asserted that the intent needed to commit attempt voluntary manslaughter was a "specific intent to kill with unreasonable belief in the need to use deadly force in self defense." 111 Ill. App. 3d at 951, 444 N.E.2d at 746. Finding this to be a legal impossibility, the *Reagan* court determined that there could be no offense of attempt voluntary manslaughter based on the "unreasonable belief" theory.

The *Reagan* court's suggestion that attempt murder requires a "specific intent to kill without lawful justification" is erroneous. Consider a defendant who sincerely believes it is justified to kill people with blue eyes. He shoots the first blue-eyed person he sees, fully intending to kill him. Fortunately, the victim does not die. According to the *Reagan* court, this is not attempt murder because that crime requires a "specific intent to kill without lawful justification," and here the defendant had no intention to kill unjustifiably. This is preposterous.

An intent to kill is the only mental state necessary for either attempt murder or attempt voluntary manslaughter. The reason for this can best be explained in the following schema:

1. If defendant acts with an intent to kill and the victim lives, defendant may be guilty of attempt murder, attempt voluntary manslaughter, or neither offense.

2A. Defendant's act can be justified only if one of the statutory justifications in Article 7 of the Criminal Code is objectively present—that is, if it actually exists or a reasonable person could believe, under the circumstances, that it exists. ILL. REV. STAT. ch. 38, §§ 7-1 to 7-14 (1981). If none of these justifications is objectively present, defendant is guilty of attempt murder without any further inquiry concerning defendant's mental state. Thus, simple intent to kill will support an attempt murder conviction. See *People v. Barker*, 83 Ill. 2d 319, 334, 415 N.E.2d 404, 411 (1980) (Moran, J., dissenting).

2B. If one of the statutory justifications is objectively present, then it is necessary to inquire whether defendant subjectively believed he was thus justified. If he did not possess this subjective belief, he is guilty of attempt murder. Proceed to Part 3.

trial judge instructing a jury on murder and provocation voluntary manslaughter. In *People v. Pastorino*,<sup>70</sup> the jury was instructed on murder, provocation voluntary manslaughter, and aggravated battery. The trial judge further advised the jury that it should consider voluntary manslaughter only if the defendant was first found not guilty of murder.<sup>71</sup>

2C. If one of the statutory justifications is objectively present, and if, and only if, defendant also subjectively believed he was thus justified, then defendant is not guilty of either attempt murder or attempt voluntary manslaughter. This ends the inquiry.

3A. If defendant is guilty of attempt murder, it must then be determined if "serious provocation" objectively existed. ILL. REV. STAT. ch. 38, § 9-2(a) (1981). If it did not objectively exist, defendant is guilty of attempt murder without any further inquiry into the defendant's mental state.

If serious provocation did objectively exist, however, it is necessary to inquire into defendant's subjective state of mind. If he did not act under a "sudden and intense passion," he is still guilty of attempt murder. If, and only if, he is seriously provoked *and* he acted under a sudden and intense passion, he is guilty of attempt voluntary manslaughter under the "provocation" theory. The mitigating circumstances make this a less culpable form of attempt murder, that is, attempt voluntary manslaughter.

3B. If defendant is guilty of attempt murder and the "provocation" theory of attempt voluntary manslaughter is inapplicable, it is necessary to inquire whether defendant nevertheless believed himself to be justified in his actions. If he had no such belief, he is guilty of attempt murder and the inquiry is over.

If defendant did have such a belief, the analysis must continue. Recall that defendant at this point is guilty of attempt murder—no Article 7 justification existed nor could a reasonable man have believed one to exist. Thus, defendant's belief is *per se* unreasonable. The issue then is whether the way in which defendant unreasonably perceived the circumstances would have constituted justification under Article 7. If defendant's perception of the situation was included in Article 7 (e.g., he unreasonably believed he was being attacked with deadly force), he is guilty of attempt voluntary manslaughter. If defendant's perception would not constitute Article 7 justification (e.g., he believed he could justifiably kill people with blue eyes), he is guilty of attempt murder.

The Illinois Supreme Court, by agreeing to review *Reagan*, has a valuable opportunity to correct its erroneous rulings in *Moore* and *Barker*.

70. 90 Ill. App. 3d 921, 414 N.E.2d 54 (1st Dist. 1980), *rev'd*, 91 Ill. 2d 178, 435 N.E.2d 1145 (1982).

71. The confusion in this area is eloquently borne out by the trial judge's additional comments:

I will go back and explain this to you in a very slow manner so you won't get confused. . . . [Y]ou have a voluntary manslaughter and you have a murder. An individual cannot be guilty of both of them, so what you will have to do is consider the murder verdict. When you have reached your verdict as far as the murder is concerned, it's either guilty or not guilty. If you find the defendant not guilty of murder, you may—you do not have to do anything else. *If you find her guilty of murder, then you don't have to consider the voluntary manslaughter because you have already found her guilty of murder.* So, you will come back just with the guilty of murder filled out.

If you find her not guilty of murder, then you will consider the voluntary manslaughter. If you consider the voluntary manslaughter, then you will have to come back with guilty of voluntary manslaughter or not guilty of voluntary manslaughter. In other words, you may come back with two verdicts filled out or with three verdicts filled out.

. . . [N]ow between the murder count, if you find her not guilty of murder,

On appeal, defendant argued that the judge's comments directing the jury to consider murder before manslaughter nullified, or at least deemphasized, the voluntary manslaughter instruction.<sup>72</sup> Accepting this argument, the appellate court described the situation as "analogous to one in which the judge failed to instruct the jury on voluntary manslaughter."<sup>73</sup> The court reasoned that the judge's comments effectively removed from the jury the necessary element of choice,<sup>74</sup> thereby depriving defendant of her right to have the jury choose between murder and voluntary manslaughter.<sup>75</sup> The Illinois Supreme Court subsequently reversed without discussing the propriety of the judge's comments, holding that any issue concerning the instructions had been waived due to defense counsel's lack of timely objection.<sup>76</sup> The dissent, however, maintained that the comments served to circumscribe the jury's right to choose which offense, if any, defendant had committed.<sup>77</sup> This, the dissent asserted, resulted in a substantial defect which was not waived by failure to object.<sup>78</sup>

Notwithstanding the validity of the dissent's remarks, the vague talk of deemphasis and circumscribing the jury's choice fails to articulate the true reason why the instructions were objectionable. Observe that the trial judge told the jury, "If you find her guilty of murder, then you don't have to consider the voluntary manslaughter because you have already found her guilty of murder."<sup>79</sup> Implicit in this language is the syllogism discussed earlier—a finding that the defendant is guilty of murder includes a finding

then you do not consider voluntary manslaughter. And if you find her not guilty of murder, then you must consider voluntary manslaughter, guilty or not guilty.

Did I confuse you or did you understand that?

All right. During the course of deliberations, if you get a little confused on it, send a note out to the deputy that you need clarification. That's basically what it is. Okay. You come back either with two verdicts filled out or three verdicts. If you find her not guilty on everything, of course you come back with three. If you find her guilty or not guilty on the aggravated battery, of course not guilty or guilty on the murder. Of course, *if you find her guilty of murder, then you do not consider voluntary manslaughter*. Okay.

91 Ill. 2d 178, 186-87, 435 N.E.2d 1144, 1148-49 (1982) (emphasis added).

72. 90 Ill. App. 3d 921, 925, 414 N.E.2d 54, 58 (1st Dist. 1980).

73. *Id.*

74. When evidence that would support both a murder verdict and a verdict of voluntary manslaughter is presented, the jury must be allowed to choose which crime actually was disclosed by the evidence. *See, e.g.,* *People v. Canada*, 26 Ill. 2d 491, 491-92, 187 N.E.2d 243, 243 (1962) (refusal to give manslaughter instruction in murder prosecution where evidence would permit jury to return a verdict of guilty of manslaughter rather than murder constitutes reversible error); *People v. Pappas*, 381 Ill. 90, 94, 44 N.E.2d 896, 898 (1942) (it is province of jury to determine whether accused is guilty of murder or manslaughter if there is any evidence which tends to prove the lesser rather than the greater offense).

75. 90 Ill. App. 3d at 925, 414 N.E.2d at 58.

76. 91 Ill. 2d 178, 188, 435 N.E.2d 1145, 1149 (1982).

77. *Id.* at 194, 435 N.E.2d at 1152 (Goldenherhsh & Simon, JJ., dissenting).

78. *Id.*

79. *See supra* note 71.

of malice and this automatically precludes a finding of manslaughter.<sup>80</sup> Analysis of the Illinois Pattern Jury Instructions, however, demonstrates that this logic is fallacious.

Assuming felony murder is not involved, a comparison of the revised IPI jury instructions for murder<sup>81</sup> and voluntary manslaughter<sup>82</sup> reaffirms the argument that provocation manslaughter should be viewed as simply murder plus extenuating circumstances.<sup>83</sup> With the abolition of malice aforethought,

80. For a discussion of this syllogism, see *supra* notes 44-45 and accompanying text.

81. The issues instruction for murder provides:

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

*First:* That the defendant performed the acts which caused the death of \_\_\_\_\_; and

*Second:* That when the defendant did so,

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

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

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

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

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

ILL. PATTERN JURY INSTRUCTIONS—CRIMINAL No. 7.02 (2d ed. 1981).

82. The issues instruction for provocation voluntary manslaughter provides:

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

*First:* That the defendant performed the acts which caused the death of \_\_\_\_\_; and

*Second:* That when the defendant did so,

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

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

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

*Third:* That when the defendant did so,

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

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

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

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

*Id.* No. 7.04.

83. For a discussion of this concept, see *supra* notes 37-45 and accompanying text. It should be noted that this idea applies to both provocation manslaughter and unreasonable belief manslaughter. The application of this concept to unreasonable belief manslaughter is further developed *infra* notes 93-95 and accompanying text.



the acts and basic mental state of both crimes are identical.<sup>84</sup> Thus, a finding that the State has proved the elements of murder should *begin*, rather than preclude, the jury's consideration of provocation voluntary manslaughter. After finding the elements of murder to be satisfied, the jury should then determine whether the extenuating circumstances of provocation voluntary manslaughter exist. The error in the *Pastorino* instruction is that it prevents the conscientious jury from considering a verdict of voluntary manslaughter in cases where every element of that crime is present. If the *Pastorino* jury had followed the judge's instructions scrupulously, it would have returned a verdict of guilty on the murder charge without ever considering the issue of whether any evidence of mitigating circumstances was presented at trial.

As a postscript to the plight of the trial judge in *Pastorino*, there would have been no need for him to offer his impromptu oral instruction had the Illinois Pattern Jury Instructions been adequate. Unfortunately, the Pattern Instructions provide insufficient guidance to a jury faced with verdict forms for both murder and provocation voluntary manslaughter. Instead of the separate instructions now provided for in the IPI, a unified instruction should be adopted stressing the relationship between the two offenses. The following jury instruction would provide guidance for a jury faced with a decision of whether a defendant was guilty of murder, provocation voluntary manslaughter, or neither:

In considering the charges of murder and voluntary manslaughter, you should examine each of the following propositions:

*One:* That the defendant performed the acts which caused the death of \_\_\_\_\_; and

*Two:* That when the defendant did so, he intended to kill or do great bodily harm to \_\_\_\_\_; or he knew that his act would cause death or great bodily harm to \_\_\_\_\_; or he knew that his acts created a strong probability of death or great bodily harm to \_\_\_\_\_; and

*Three:* That when the defendant did so,

[A] That the defendant was acting under a sudden and intense passion resulting from serious provocation by another;

or

[B] That the defendant was acting under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed \_\_\_\_\_.<sup>85</sup>

If you should find from your consideration of all the evidence that the State has proved all three of these propositions beyond

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84. See *supra* notes 37-43 and accompanying text. Note that this argument does not apply to felony murder.

85. In an unreasonable belief manslaughter case, the instruction should read:

*Three:* That the defendant was not justified in using the force he used; and

*Four:* That when the defendant did so, he believed that circumstances existed which

a reasonable doubt, you should find the defendant guilty of voluntary manslaughter.

If you should find from your consideration of all the evidence that the State has proved only Propositions One and Two beyond a reasonable doubt, you should find the defendant guilty of murder.

If you should find from your consideration of all the evidence that the State has failed to prove either of the first two propositions beyond a reasonable doubt, you should find the defendant not guilty of either offense.<sup>86</sup>

The use of such an instruction would eliminate the problem of whether the jury first should consider murder or voluntary manslaughter. Instead, the instruction orders the jury to consider all of the evidence before deciding whether murder, voluntary manslaughter, or neither has been proven. The failure to include such an instruction in the current pattern jury instructions leads to a troublesome result: it is possible for a jury to return a guilty verdict for both voluntary manslaughter and murder.

*Problem Three: A Verdict of "Guilty of Murder" and  
"Guilty of Voluntary Manslaughter"*

Consider a murder trial in which the jury is instructed on both murder and unreasonable belief manslaughter. Under the newly revised Illinois Pattern Jury Instructions,<sup>87</sup> the jury would be directed as follows:

would have justified killing \_\_\_\_ but that defendant's belief that such circumstances existed was unreasonable.

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

If you should find from your consideration of all the evidence that the State has proved only Propositions One, Two and Three beyond a reasonable doubt, you should find the defendant guilty of murder.

If you should find from your consideration of all the evidence that the State has failed to prove any of the first three propositions beyond a reasonable doubt, you should find the defendant not guilty of either offense.

It should be noted that in Illinois, whenever there is an instruction on self-defense, there also must be an instruction on unreasonable belief voluntary manslaughter, and vice versa. *People v. Lockett*, 82 Ill. 2d 546, 552, 413 N.E.2d 378, 381 (1980).

86. Although criticism of the burden of proof used for voluntary manslaughter in Illinois is beyond the scope of this Article, it should be noted that there are problems with the current scheme. Currently, a defendant cannot be convicted of voluntary manslaughter unless the State proves all the elements beyond a reasonable doubt. Consider the situation in which a defendant is charged with murder and the State concerns itself solely with proving that he is guilty of murder. Defendant, however, presents sufficient evidence of mitigation to justify an instruction on voluntary manslaughter as well. The conscientious jury will note that it can return a verdict of guilty of voluntary manslaughter *only* if the State has proved mitigation beyond a reasonable doubt. See ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL Nos. 7.04, 7.06 (2d ed. 1981). Because the State in the above scenerio has produced no such evidence, the jury would be precluded from finding the defendant guilty of voluntary manslaughter. Changes in this area should come from the legislature.

87. The Illinois Pattern Jury Instructions were revised in 1981.

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

*First:* That the defendant performed the acts which caused the death of \_\_\_\_\_; and

*Second:* That when the defendant did so, he intended to kill or do great bodily harm to \_\_\_\_\_; or he knew that his acts would cause death or great bodily harm to \_\_\_\_\_; or he knew that his acts created a strong probability of death or great bodily harm to \_\_\_\_\_; or

*Third:* That the defendant was not justified in using the force which he used.

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

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.<sup>88</sup>

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

*First:* That the defendant performed the acts which caused the death of \_\_\_\_\_; and

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

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

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

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

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.<sup>89</sup>

A conscientious jury will notice that determining the existence beyond a reasonable doubt of all the propositions necessary for murder will in no way preclude an additional finding of guilty of voluntary manslaughter. If a jury finds that the state proved the three elements of murder beyond a reasonable doubt, and also determines that the defendant possessed an unreasonable belief of justification, it should return two verdicts—guilty of murder and guilty of voluntary manslaughter. This anomaly is caused by the failure of the revised Illinois Pattern Jury Instructions to inform the jury of the proper procedure for deliberation. This problem would be eliminated by the adoption of the unified instruction proposed in this Article.

Until the pattern instructions are amended, however, a trial judge must

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88. ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL NO. 7.02 & 24-25.06A (2d ed. 1981).

89. *Id.* at 7.06.

determine which verdict to render when he is confronted with guilty verdicts for both murder and voluntary manslaughter.<sup>90</sup> The facile answer to the judge's quandary is that the more-inclusive offense incorporates every element of the lesser-included offense; therefore, the court should merely enter a verdict for the more inclusive offense.<sup>91</sup> Because voluntary manslaughter is undoubtedly a lesser-included offense of murder,<sup>92</sup> so the answer goes, the judge would enter judgment on the murder verdict.

The flaw in this reasoning, however, is that it confuses two different concepts associated with the idea of lesser-included offenses. In the majority of cases, lesser-included crimes share two characteristics: first, fewer elements are needed to prove these offenses than to prove the more-inclusive offenses; and second, lesser-included offenses are punished less severely than more-inclusive offenses.<sup>93</sup> Despite these general characteristics, the elimination of "malice aforethought" by the Illinois legislature had a unique effect on the relationship between murder and voluntary manslaughter—voluntary manslaughter became "murder *plus*." The jury instructions make it clear that voluntary manslaughter is composed of all the elements of murder *plus* mitigating circumstances.<sup>94</sup> Yet, because voluntary manslaughter requires a less culpable mental state than murder, it is unquestionably a lesser-included offense of murder.<sup>95</sup> Thus, murder/voluntary manslaughter is the rare example in which the offense which requires proof of a greater number of elements is the less serious, lesser-included crime.

Interestingly, judicial recognition of the elimination of malice aforethought

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90. The trial judge faced this situation in *People v. Stuller*, 71 Ill. App. 3d 118, 389 N.E.2d 593 (5th Dist. 1979). This situation arose because the instruction for murder erroneously failed to include the section of the former Pattern Instruction informing the jury that to prove murder, the State had the burden of proving that the defendant did not believe that circumstances existed which justified the use of deadly force. See ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL 7.02 & 25.05 (1st ed. 1968). The trial judge entered judgment on the murder count. On appeal, the decision was reversed and judgment was entered on the voluntary manslaughter count. The appellate court reasoned that the defective instruction gave rise to plain error affecting substantial rights. 71 Ill. App. 3d at 122, 389 N.E.2d at 596.

It should be noted that the 1981 edition of the Illinois Pattern Jury Instructions has eliminated the requirement that where murder and unreasonable belief voluntary manslaughter are both in issue, the State can obtain a murder conviction only if it disproves voluntary manslaughter beyond a reasonable doubt. See *supra* note 81.

91. See *People v. Bailey*, 391 Ill. 149, 154, 62 N.E.2d 796, 798-99 (1945); *People v. Bell*, 328 Ill. 446, 453, 159 N.E. 807, 810 (1928).

92. See *People v. Pierce*, 52 Ill. 2d 7, 11, 284 N.E.2d 279, 282 (1972); *People v. Pratt*, 44 Ill. 2d 96, 102, 262 N.E.2d 898, 900 (1970).

93. For example, robbery, see ILL. REV. STAT. ch. 38 § 18-1 (1981), is a Class 2 felony while armed robbery, see ILL. REV. STAT. ch. 38 § 18-2 (1981), is a Class X felony.

94. See *supra* notes 87-89 and accompanying text.

95. The Code provides that an included offense is one that "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." ILL. REV. STAT. ch. 38, § 2-9 (a) (1981). Here the mitigation can be said in a broad sense to make the mental state "less culpable."

would solve the dilemma imposed on a judge when guilty verdicts on both voluntary manslaughter and murder are returned. By returning a guilty verdict on voluntary manslaughter, the jury indicates that it has found all of the elements of murder *plus* the presence of mitigating circumstances. Thus, when guilty verdicts of both murder and voluntary manslaughter are returned, the judge should enter a judgment of guilty of voluntary manslaughter.<sup>96</sup> This would ensure a just and accurate result.

#### CONCLUSION

The elimination of malice aforethought was a significant step in clarifying homicide law in Illinois. Yet over twenty years later, this outmoded concept continues to haunt the legal community. A proper starting point for correcting the problem would be the revision of the Illinois Pattern Jury Instructions to reflect the correct relation between murder and voluntary manslaughter in Illinois. It is time to finally lay to rest the concept of malice aforethought. Surely "malice toward none" would guarantee "clarity for all."

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96. See *People v. Stuller*, 71 Ill. App. 3d 118, 121-22, 389 N.E.2d 593, 595 (5th Dist. 1979); *People v. Taylor*, 36 Ill. App. 3d 898, 900, 344 N.E.2d 742, 744 (1st Dist. 1976).