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defendant, the burden should be on him to bring out those facts that tend to negate the presence of the guilty mind which is necessary to convict. The presumption of consciousness deduced from the doing of the proscribed act is controlling, and the defendant should show and prove that at the time the act was committed, he was not conscious and thus did not possess the intent requisite to the crime. Finally, in view of the consequences of a plea of unconsciousness—acquittal and outright release—the decision rightly embodies the judicial dislike for the defense that has been categorized as "the refuge of guilty minds." Thus, by making automatism an affirmative defense with burden of satisfaction on the defendant, the court is simply hoping to close off an avenue of outright release for the guilty defendant. In the long run, however, the problems raised by this defense cannot be solved in one case; therefore it remains the job of the General Assembly to awaken from its own automatous state and to clear the confusion surrounding the defense of unconsciousness.61

JAMES M. ISEMAN, JR.

Criminal Procedure—North Carolina Rejects a Retroactive Application of Mullaney

Homicide defendants in North Carolina who asserted that they had acted in self-defense or in the heat of passion upon sudden provocation were long required to "satisfy the jury" of the truth of their assertions.1

61: Several variances on the theme and solutions to the problems have been proposed. See State v. Sikora, 44 N.J. 453, 210 A.2d 193 (1965) (in which an expert witness psychiatrist proposed that the mens rea element be abolished because, in his opinion, the "conscious is always the unwitting and unsuspecting puppet of the unconscious." Id. at 458, 210 A.2d at 198); Beck, supra note 49 (in which Beck proposes that the fault lies in a criminal code giving outright acquittal and that the legislature should require some sort of compulsory treatment after the trial if an automatism defense is asserted); Fingarette, Diminished Mental Capacity as a Criminal Law Defense, 37 Modern L. Rev. 264 (1974) (in which the author says that the defense of automatism is not unconsciousness but is an "altered state" of conscious action where defendant has lost "rational control of his conduct" and that the confusion can be alleviated by treating the defense as such.); and Sullivan, supra note 49 (in which he suggests that a solution lies in making the unconscious defendant criminally negligent if he had a previous history of black-outs and the jury found that a reasonable man would have anticipated the unconscious state which occurred).

But in *Mullaney v. Wilbur* the United States Supreme Court held that the State must prove beyond a reasonable doubt that a criminal defendant did not act in the heat of passion upon sudden provocation when that issue is presented.\(^2\) The North Carolina Supreme Court, in *State v. Hankerson*, concluded that the *Mullaney* standard of proof also applied to homicide defendants who raised the issue of self-defense,\(^3\) but the court declined to give retroactive effect to the new *Mullaney* rule.\(^4\)

In *Hankerson* the court used a balancing test that the United States Supreme Court has sometimes employed in deciding the retroactivity of a new constitutional doctrine.\(^5\) This test involves balancing three factors: the purpose to be served by the new rule, reliance by enforcement officials on previous decisions inconsistent with the new doctrine, and the potential impact of retroactive application of the new doctrine on the administration of justice. In applying the balancing formula, the North Carolina court found that the purpose of the *Mullaney* rule was to provide for a more "reliable" determination of innocence or of the degree of guilt.\(^6\) Against this concededly important purpose the court balanced the two other factors. It found that North Carolina and other states had justifiably relied on an earlier Supreme Court pronouncement in *Leland v. Oregon* that states could constitutionally place the burden of persuasion on defendants, at least for the affirmative defense of insanity.\(^7\) Giving *Mullaney* retroactive application also raised the specter of a tremendous burden on the administration of justice in North Carolina.\(^8\) After balancing these interests, the court concluded that the burden on judicial administration and prior justified reliance were sufficient to outweigh the possibility that the fact-finding process had been tainted by the pre-*Mullaney* standard and, thus, that *Mullaney* should not apply retroactively.\(^9\)

During the last two decades, the United States Supreme Court has

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4. *Id.* at 652, 220 S.E.2d at 589.
5. *See* text accompanying notes 12-14 *infra*.
7. 343 U.S. 790 (1952) (holding that a state could require a defendant to prove himself sane *beyond a reasonable doubt*).
8. 288 N.C. at 654-55, 220 S.E.2d at 591.
9. *Id.* at 652, 220 S.E.2d at 589.
used the due process clause of the fourteenth amendment to revolutionize criminal procedure in state courts. Because some of the Court's decisions during this period were unforeseeable and also because some decisions required procedures fundamentally different from those previously used, the Court has on occasion held that a new rule is to be applied prospectively only. Thus, the Court has sometimes avoided unfairness to states, which had relied on previous constitutional doctrine, by refusing to require them to choose between "emptying the jails" and investing enormous amounts of time and resources in retrials.

The Court has established two lines of analysis in holding new constitutional doctrine either fully retroactive or merely prospective. One line states that new rules intended primarily to insure an accurate determination of facts are automatically to be enforced retroactively:

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Conversely, if the major purpose of the new doctrine is perceived not to be to enhance the judicial truth-finding function, retroactivity is typically denied.

In a second line of analysis, the Court does not consider the purpose of the new rule dispositive. Rather, a balancing test is used to examine the probability that past trials have resulted in inaccurate guilty verdicts. Using this balancing approach "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of

11. See, e.g., cases cited notes 16-18 infra. It may be that the Court would have been less willing to extend notions of due process had all of its rulings been automatically retroactive.
12. Hereinafter referred to as the "automatically retroactive" cases.
degree." The Court reasons that the old rule may not have been the cause of a guilty verdict: it rejects "the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of [the Constitution]." In this line of cases the Court considers the question whether the old rule infected the fact-finding process as a "question of probabilities" and thus avoids the "automatically retroactive" line of analysis. Once this analysis is chosen the Court uses a "balancing approach," weighing three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

The Court has been inconsistent in deciding which test to apply. For rules intended primarily and perhaps solely to insure a more just determination of facts, the Court has sometimes invoked the "matter of degree" formula rather than the ostensibly more appropriate "automatically retroactive" analysis. Such was the case in DeStefano v. Woods in which the Court held nonretroactive the Duncan v. Louisiana rule, which incorporated the right to a jury trial for serious criminal offenses. DeStefano also made Bloom v. Illinois, which required a right to jury trial for serious criminal contempts, valid prospectively only. The rationale for holding a new rule which changes the trier of fact retroactive must be that a different fact-finder might arrive at a more just result. In denying retroactivity, the Court assumed that many trials by judges were as fair as if tried by juries, and concluded that since the results might have been identical, an analysis of the other factors affecting retroactivity was in order. On the other hand, the Court has ignored the "matter of degree" formula in other cases where the trier of

20. Stovall v. Denno, 388 U.S. 293, 297 (1967). In this line of cases, "the purpose to be served by the new constitutional rule" will not automatically decide retroactivity, but is merely "[f]oremost among these factors." Desist v. United States, 394 U.S. 244, 249 (1969).
24. 391 U.S. at 158.
25. 392 U.S. at 633-34.
fact might or might not have reached a different result had the new standard been in force. In *Ivan V. v. City of New York*, for example, the Court noted an obvious fact-finding purpose for the substitution of the reasonable doubt standard for a preponderance of the evidence test. Consequently, the Court disposed of the matter with a recital of the "automatically retroactive" line of cases. Such inconsistencies provoked one commentator to conclude that the Court may be "basing its decisions on a pragmatic political assessment of the consequences."27

When the Court uses the balancing approach, it finds that the factors of reliance and burden on judicial administration work together against retroactivity. The reliance factor often seems merely a make-weight argument. In *Daniel v. Louisiana*, for instance, the Court's refusal to hold its ban on sexually exclusive juries retroactive was probably based almost exclusively on the potentially staggering impact on the administration of justice of retroactive application of the rule (at least in Louisiana). The Court emphasized, however, that Louisiana had been entitled to rely on a fourteen-year-old decision finding such procedure constitutional. Similarly, when the potential burden on judicial administration seems minor, the Court may claim that reliance on prior inconsistent rules was unjustified because a recent case "clearly foreshadowed ... [or] preordained" the overruling of prior law and thus the advent of the new constitutional doctrine. The relative insignificance of this reliance factor is illustrated by the fact that retroactivity has never been limited by the Court to the time when the new rule was "foreshadowed."28

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   An additional factor that the Court weighs is the availability of post-conviction remedies for unfairness if the new doctrine is made prospective only. See, e.g., Stovall v. Denno, 388 U.S. 293, 299 (1967).
31. Berger v. California, 393 U.S. 314, 315 (1969) (per curiam). The Court held the rule in *Barber v. Page*, 390 U.S. 719 (1968), that a state must make a good faith effort to bring in a missing witness, retroactive. The Court reasoned that *Pointer v. Texas*, 380 U.S. 400 (1965), which incorporated the sixth amendment's right of confrontation into the fourteenth, made the *Barber* rule follow. But *Pointer* overruled a series of cases from *West v. Louisiana*, 194 U.S. 258, 264 (1904), to *Stein v. New York*, 346 U.S. 156, 195-96 (1953), on which states were no doubt relying.
32. Berger v. California, 393 U.S. 314 (1969), made *Barber* retroactive not just to the time at which *Pointer* was decided, but for all time. See Ostrager, *supra* note 27, at 294-95.
The Court is also hesitant to put great burdens on any state's judicial administration. The prospect of numerous retrials in any state weighs against retroactivity, even if such retrials would be necessary in only a small minority of states. Retroactivity under these circumstances would impose an enormous burden on those states, since witnesses and evidence that a state had presented at the first trial might no longer be available. The Court's analysis of this potential impact of retroactivity on the judicial system has usually been non-quantitative, because in few instances will a state's records indicate in how many cases a formerly constitutional procedure was followed. In rare instances, however, the Court is able to use statistics to evaluate the havoc that retroactivity might wreak. For example, in Wolff v. McDonnell the Court refused to require the expunction of facts in prison records that had been determined without such minimum standards of due process as the rights to see written notice of charges and to be furnished a written statement of the evidence relied on. The Court in Wolff identified the burden on prison administration quantitatively: misconduct hearings in the federal system alone were proceeding at the rate of 19,000 per year in 1973. Reasoning that it had earlier held other due process standards non-retroactive for parole revocation proceedings for which the federal government had held only 1,173 hearings in 1973, the Court concluded that non-retroactivity should obtain in Wolff "a fortiori."

In other cases the Court's quantitative analysis of the impact of retroactivity on the administration of justice has been less sophisticated. For instance, in Halliday v. United States, the Court refused to make retroactive the rule that a guilty plea is invalid if the judge who accepted it failed to comply with the applicable Federal Rule. The Court noted that "over 85% of all convictions in the federal courts are obtained

pursuant to guilty pleas." It failed, however, to explore how many of those convictions would have been voided by giving retroactive effect to the ruling. The percentage actually voided would have been far less than the Court’s figure because the new rule was “substantially a restatement of existing law and practice.”

At first glance the North Carolina decision in Hankerson, holding Mullaney non-retroactive, seems to be a likely candidate for reversal in the federal courts. Mullaney, which held that the State must prove beyond a reasonable doubt that a defendant did not act in the heat of passion upon sudden provocation, relied heavily on In re Winship, which requires proof beyond a reasonable doubt in juvenile proceedings. Winship was held retroactive in Ivan V. v. City of New York, a fact that the Court noted in a footnote to Mullaney. On its face, that footnote suggests that Mullaney might also require retroactive application. The footnote’s position, however, is a clue to its importance: it appears in the middle of a sentence in which the Court rejected the lower court’s refusal to extend the Winship requirement that the State shoulder the burden of proof for all essential elements of a crime to the defense of heat of passion upon sudden provocation. Therefore, taken in context, the footnote seems designed to buttress the Court’s conclusion that the lower court in Mullaney had misinterpreted Winship. Despite its decision that this footnote was not controlling on the issue of retroactivity, the North Carolina Supreme Court recognized

41. 394 U.S. at 833.
42. Id. at 834 (Harlan, J., concurring).
44. 407 U.S. 203 (1972) (per curiam).
45. 421 U.S. at 688 n.8.
46. The per curiam decision in Ivan V. used the “automatically retroactive” test, finding that the “major purpose” of the Winship rule “was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function.” 407 U.S. at 205. Thus, the Court failed to examine the other two factors which would have been weighed in the balancing approach. However, its failure to invoke the balancing line of cases in Ivan V. is not dispositive of the Hankerson situation. Two earlier cases that seem to belong in one category were treated oppositely: the Court’s use of the absolutist approach in 1968 to hold the right to counsel at the imposition of a deferred sentence retroactive, McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam), did not preclude use of the balancing approach in 1972 to hold the requirement of counsel at preliminary hearing non-retroactive. Adams v. Illinois, 405 U.S. 278 (1972). A shift in the make-up of the Court may explain to some extent the recent rise of the balancing approach. At any rate, the way that the Supreme Court decides to treat the purpose factor “seems sometimes to depend on analysis of the other two factors.” 288 N.C. at 653; 220 S.E.2d at 590.
the importance of distinguishing *Ivan V.* from *Hankerson* throughout its analysis of retroactivity.\textsuperscript{47}

In its analysis of whether to give retroactive effect to *Mullaney*, the North Carolina Supreme Court employed the United States Supreme Court's balancing approach. The North Carolina court was as unclear as the United States Supreme Court in articulating why it chose to use the balancing approach rather than the "automatically retroactive" line of cases, since it conceded that "the purpose of the *Mullaney* rule [is] to insure a reliable determination of the question of guilt."\textsuperscript{48} The court invoked the balancing test by calling the possibility of an inaccurate verdict of guilty a "question of probabilities."\textsuperscript{49} However, the court failed to examine what the probabilities of an incorrect determination were, and, incidentally, lost an opportunity to distinguish *Hankerson* from *Ivan V.*\textsuperscript{50} Prejudice by the finder of fact was less inherent in *Hankerson* than in *Ivan V.* Presumably all of the juvenile defendants made eligible for retrial in *Ivan V.* were tried before judges.\textsuperscript{51} Many if not all homicide trials are before juries, as was the case in *Hankerson*.\textsuperscript{52} The complicated pre-*Mullaney* set of instructions in North Carolina\textsuperscript{53} might well, as Justice Lake suggested in a concurring opinion in *Hankerson*, have resulted in harmless error.\textsuperscript{54} Unable to follow the shifting burden in the homicide instructions, the jury might well have heeded the apparently overriding instruction to convict only if convinced of guilt beyond a reasonable doubt.\textsuperscript{55} Unwilling to convict without proof beyond a reasonable doubt, the jury might have refused to do so, thus nullifying the instruction.\textsuperscript{56} An exhaustive study has shown that juries often

\textsuperscript{47} See, e.g., 288 N.C. at 654; 220 S.E.2d at 590. The court couches its distinction of *Hankerson* from *Ivan V.* in terms of the differences between *Mullaney* and *Winship*.

\textsuperscript{48} Id. at 655, 220 S.E.2d at 591.

\textsuperscript{49} Id. at 655, 220 S.E.2d at 591-92.

\textsuperscript{50} See text accompanying note 47 supra.

\textsuperscript{51} See text accompanying note 64 infra.

\textsuperscript{52} See note 72 infra.

\textsuperscript{53} See 288 N.C. at 642-43, 220 S.E.2d at 583-84.

\textsuperscript{54} Id. at 659-60, 220 S.E.2d at 594. However, for a constitutional error to be harmless "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

\textsuperscript{55} Even in a simple case, "the average juror usually does not understand the rules of law applicable to the case, or often is not able to apply them appropriately if he does understand them." Gordon & Temerlin, Forensic Psychology: The Judge and the Jury, 52 Judicature 328, 332 (1969). In a sampling of over 300 jurors conducted by federal judges, "over one-third reported not having understood the judge's instructions; and an unknown number . . . did not understand but did not say so." Id.

\textsuperscript{56} H. KALVAN & H. ZEISEL, THE AMERICAN JURY, 182-90 (1966) (juries have a higher standard of "beyond a reasonable doubt" than do judges and are less likely to convict).

It would be extremely interesting to compare conviction rates (when self-defense or
disregard the harshness of rules of law especially in judging self-defense claims.\(^\text{57}\) The probability of misunderstanding or of nullification of the pre-\textit{Mullaney} instruction by a jury seems much higher than that of a judge confusing the standards in pre-\textit{Winship} cases. Thus, there seems to be a lower probability that a defendant was wrongfully convicted in the \textit{Mullaney} situation than in the \textit{Winship} situation.

Justice Exum's analysis of the reliance element of the Supreme Court's balancing test is the strongest part of the court's opinion. He distinguishes \textit{Hankerson} from \textit{Ivan V.} by noting that the reasonable doubt standard required in \textit{Winship} has long been an essential part of criminal proceedings, with no exception ever made for juveniles.\(^\text{58}\) Yet an exception to the reasonable doubt standard for affirmative defenses had been clearly carved out by the Supreme Court itself. In \textit{Leland v. Oregon}\(^\text{59}\) the Court held that placing the burden on defendant for an insanity defense comported with due process. Before \textit{Mullaney}, it was "believed that there [was] no general federal constitutional barrier" to shifting the burden on "affirmative defenses."\(^\text{60}\) Consequently, the reliance factor clearly militates in favor of non-retroactivity.

The North Carolina Supreme Court's analysis of the potential burden of holding \textit{Mullaney} retroactive on the administration of justice in North Carolina and elsewhere is incomplete. The court failed to explain why the impact of \textit{Winship}'s retroactivity on the administration of justice in one state (New York) "would obviously be less than the \textit{Mullaney} rule which applies to all homicide cases."\(^\text{61}\) But explanation

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\(^\text{57}\) In their classic work, \textit{The American Jury}, supra note 56, Kalven and Zeisel conducted a study of cases in which judges disagreed with jury verdicts when self-defense or provocation were issues. In each of the fifty-five disagreements studied, the judge thought the law and the evidence required more severity (conviction rather than acquittal or conviction of a more serious offense) than the verdict allowed. \textit{Id.} at 239, 221-41 (Chapter 16, the Boundaries of Self-Defense). In their study of 1063 disagreements of all kinds between judge and jury, in 143 of the cases, or thirteen percent, the judge thought the law and the evidence required less severity than the verdict reflected. \textit{Id.} at 110. The authors concluded that "[i]n the end the jury protest reflected in this long sequence of cases speaks for itself: an impatience with the nicety of the law's boundaries hedging the privilege of self-defense." \textit{Id.} at 240-41. Nine years before \textit{Mullaney}, the authors found that "[i]n many ways the jury is the law's most interesting critic." \textit{Id.} at 219.

\(^\text{58}\) 288 N.C. at 654, 220 S.E.2d at 590-91.

\(^\text{59}\) 343 U.S. 790 (1952).


is possible. First, many of the juveniles who suffered from improper trials before Winship must have been released before Ivan V. was decided two years later because the typical length of stay in New York's juvenile correctional facilities in fiscal 1971 was under one year. There is obviously much less turnover among those convicted of murder and manslaughter. Secondly, since there is no right to jury trial in juvenile proceedings, the burden on New York in Ivan V. was further reduced; expensive and time-consuming jury trials were not required of the state.

In considering the potential burden on the administration of justice in North Carolina, the court could have used a more complete quantitative analysis. The court identified 997 persons then incarcerated for first and second degree murder as potential beneficiaries of Mullaney retroactivity in North Carolina. That figure is both underinclusive and overinclusive. Only those convicted murderers who did not plead guilty and who satisfied the burden of coming forward with a self-defense or a heat of passion defense should be eligible for retrial. Perhaps only fifteen percent of the 997 convicted murderers would meet this test of eligibility for retrial.

On the other hand, the court failed to


63. The typical length of incarceration for assault (see text accompanying notes 71-72 infra) must also be substantial. For example, the penalty for assault in Pennsylvania can reach ten years, Pa. STAT. ANN. tit. 18, §§ 1103(2), 2702 (1973), and occasionally twenty years, id. tit. 18, §§ 1103(1), 2502, 2704 (1973, Spec. Pamphlet 1975).


65. 288 N.C. at 654, 220 S.E.2d at 591.

66. Those who pleaded guilty should not be allowed to raise such a defense now. Tollett v. Henderson, 411 U.S. 258 (1973); Brady v. United States, 397 U.S. 742 (1970). Where evidence and witnesses have disappeared and memories have faded, the State would have no record upon which to base its case. Many convicted murderers would win their freedom by now putting the State to its proof.

If a defendant did not meet the burden of going forward with a self-defense or heat of passion defense at trial, he either did not have one to present then or was wrongfully determined not to have met the initial burden. In the former case, justice and good sense should preclude his raising the defense at a later date. In the latter case, if he has failed to use available appellate remedies for the wrongful determination, holding Mullaney retroactive should not change his situation.

67. With the cooperation of the North Carolina Department of Corrections, I sampled, at random, the records of 207 murderers convicted before Mullaney. Each file contained a “Crime Story—Inmate's Version” as well as an indication of whether the inmate pled guilty or was tried. My purpose was to determine in how many cases a self-defense or heat of passion upon sudden provocation instruction would have been required under North Carolina law. In the self-defense category are those inmates who indicated that they thought it necessary to kill in order to save themselves from death or great
note that untold numbers of the 695 prisoners convicted of manslaughter who pleaded self-defense would also be potential beneficiaries. In addition, many parolees might willingly seize upon an opportunity to have their cases retried and to establish their innocence.

But the burden on the North Carolina courts would be less than that on those of some other jurisdictions. Justice Exum lists fourteen jurisdictions that required homicide defendants to carry the burden of persuasion for self-defense or heat of passion. Two of those fourteen, Ohio and Pennsylvania, and three others not included in the fourteen, bodily harm, and who claimed that they were without fault in bringing about the alteration. See State v. Smith, 268 N.C. 659, 151 S.E.2d 596 (1966), cert. denied, 386 U.S. 1032 (1967). 4 J. Strong, N.C. Index Homicide, § 9 (1968). In the heat of passion upon sudden provocation category are defendants who claimed that they were struck or assaulted by the victims immediately prior to the killing, but who did not claim fear of death or great bodily harm. See State v. McLawhorn, 270 N.C. 622, 155 S.E.2d 198 (1967). Other legal provocations such as sexual act with a female relative and defense of one's habitation or place of business are recognized in North Carolina, id. at 628-29, 155 S.E.2d at 203, but no inmate claimed that he killed because of them. It should be noted that the "Crime Story—Inmate's Version" may not necessarily correspond to what defendant claimed at trial.

The primary explanations I found were:

<table>
<thead>
<tr>
<th>First degree murder</th>
<th>Second degree murder</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of files examined</td>
<td>100</td>
</tr>
<tr>
<td>Number that pled guilty or nolo contendere</td>
<td>37</td>
</tr>
</tbody>
</table>

Explanations of inmates pleading not guilty:
- Self-defense: 9
- Heat of passion upon sudden provocation: 7
- Did not commit crime: 17
- Intoxicated (alcohol or drugs): 12
- Accident during felony: 8
- Don't remember: 2
- Insane: 1
- Guilty—law prevented guilty plea: 4
- Fifth Amendment: 3
- Child beating: 0
- Guilty—law prevented guilty plea: 4
- Fifth Amendment: 3
- Child beating: 0

68. These prisoners should be eligible for retrial only if they received a self-defense instruction at trial. See note 66 supra. A substantial number of those imprisoned for manslaughter (695 at the end of 1974, N.C. Dept. of Corrections, supra note 35, at 29) may well be eligible for retrial. To be convicted of voluntary manslaughter in North Carolina, one must prevail upon a heat of passion defense, or be adjudged to have used excessive force in defending one's self. 4 J. Strong, supra note 67, at § 6; see State v. Watson, 222 N.C. 672, 24 S.E.2d 540 (1943); State v. Mosely, 213 N.C. 304, 195 S.E. 830 (1938). In the latter, the relevant situation, the burden was on defendant to show that his use of force was reasonable. State v. McDonald, 249 N.C. 419, 106 S.E.2d 477 (1959). Were Mullaney retroactive, those inmates who claimed reasonable force would be entitled to retrials. See State v. Calloway, 1 N.C. App. 150, 160 S.E.2d 501 (1968) (erroneous instruction about intensity of proof on justification not cured by manslaughter verdict, because defendant's self-defense plea could have resulted in acquittal).

69. The number of murderers and manslayers on parole is unknown. 70. 288 N.C. at 654-55; 220 S.E.2d at 591.
Illinois, Kentucky, and Missouri, put the burden on defendants for one or both issues in assault cases. The number of persons who would benefit from retroactive application of Mullaney in Ohio and Pennsylvania might be significantly higher than in North Carolina, which has never shifted the burden in assault cases. Furthermore, if the Mullaney principle is to be extended to other affirmative defenses, other states might face retrial of substantial numbers of convicted felons.

If Mullaney were made retroactive, however, and if only prisoners who had not pleaded guilty and who had sustained their burden of producing evidence on issues of self-defense or heat of passion were permitted retrials, the position of the states affected would not be impossible. Retrials for that limited class of prisoners would not impose on the states some of the burdens normally associated with retrials. The disappearance of evidence and witnesses and the fading of witnesses' memories should not unduly prejudice the State. Normally, in order to meet his burden of production in the original trial, the defendant


72. The North Carolina rule of placing the burden on defendants in homicide cases but not in assault cases was a rational one. When defense lawyers seek to "try the victim wherever possible," Katz, Defense of a Homicide Case, 1 Nat'l J. of Crim. Defense, 235, 248 (1975), and when defendant is shown beyond a reasonable doubt to have eliminated any possible rebuttal by the victim, there is a reason for making defendant explain which does not exist in the assault situation. See note 66 supra.

However, fewer persons were in North Carolina prisons for non-sexual assault (728) than for homicide (1661) at the end of 1974. N.C. Dept. of Corrections, supra note 35, at 29. On the other hand, if the incorrect placement of the burden of proof had a significant effect, the ratio of convicted assaulters might well be higher in the jurisdictions using the improper standard. Furthermore, there would be administrative difficulty in states that allow felony trials without a jury. North Carolina does not permit waiver of jury trial except for petty misdemeanors. N.C. Const. art. I, § 24; State v. Hill, 209 N.C. 53, 182 S.E. 716 (1935); State v. Holt, 90 N.C. 749 (1884). In other states, if there were no instruction on heat of passion or self-defense, the courts would have to determine from perhaps sketchy records whether such a defense was properly raised from all the evidence.

73. Mullaney could conceivably be extended to reach numerous affirmative defenses on which some defendants have borne the burden of persuasion, including insanity, duress, intoxication, and entrapment. See W. LaFave & A. Scott, Criminal Law 46-51 (1972). But cf. State v. Shepherd, 288 N.C. 346, 351, 218 S.E.2d 176, 179 (1975) (Mullaney does not apply to insanity).

74. There appears to be little precedent for a criminal retrial limited to only certain questions. Cf. Brown v. United States, 483 F.2d 116 (4th Cir. 1973) (remand to review record to determine whether invalid prior convictions affected prisoner's sentence). Arguably, however, such a procedure would seem ideal were Mullaney to be held retroactive. No relitigation of the fact that defendant committed the homicide or assault should be permitted. That fact has been properly proved, beyond a reasonable doubt.
himself testified about the act. That testimony, when introduced at retrial, should serve practically to preclude assertion of a defense that the defendant did not commit the act. Thus, the issue will normally be only the existence of a self-defense or heat of passion defense. Those are questions about the defendant's state of mind and the reasonableness of that state of mind at the time of the alleged crime. The re-creation of the circumstances by other witnesses will be secondary; the credibility of the defendant will be central to determination of the issue. That practical limitation on the issues to be resolved will normally make the burden on the states one of time and expense only. Because the State is not likely to dismiss cases of convicted murderers, grossly incorrect results should be exceptional.

The considerations in Hankerson are fairly evenly balanced. The burden on the administration of justice would be substantial, but at least in North Carolina, not catastrophic unless Mullaney is extended. Reliance on Leland, which allowed the State to shift the burden of persuasion on the affirmative defense of insanity, seemed to justify the

76. There remains the rare situation when defendant's burden was met by evidence other than his own testimony. In that situation, the State may well be harmed by retrial. But normally, the record of the State's evidence, combined with that of the evidence that defendant produced, should be sufficient to convince the jury that defendant committed the act, so that practically the only questions raised will be those on which the defendant wrongly bore the burden of persuasion.
77. In an assault retrial, the State's case is more likely to be severely prejudiced if the victim has disappeared or died than in a homicide retrial. In the typical assault trial, there is a contest of credibility between the accused and the victim. In the homicide situation, there may or may not be witnesses who actually saw the event.
78. Paradoxically, since the State will presumably fail to retry few defendants, the burden in terms of time and expense will be even more extensive.
79. This Note's analysis makes the decision in State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975), which held that Mullaney does not apply to the affirmative defense of insanity, seem unwise. Hankerson seems correct only if (1) the shift in the burden of proof mandated by Mullaney is merely of minor importance, and (2) the retrials of prisoners create serious problems for the State. Shepherd's insistence that the burden remain with the defendant for an insanity defense seems to belie the first contention. Furthermore, the Shepherd result creates a serious risk of many retrials. It seems far from clear that Shepherd will survive Supreme Court scrutiny. See The Supreme Court, 1974 Term, 89 Harv. L. Rev. 1, 53 (1975). If the Court reverses Shepherd, it will have to decide whether to make that extension of Mullaney retroactive. Like the Hankerson question, the question of the retroactivity of future extensions of Mullaney seems to admit of no easy answer. Therefore, prisoners who raise insanity defenses at post-Mullaney trials may well gain new trials because of a future Supreme Court decision.

The decision in Shepherd is understandable, however, given that once courts extend the concept of due process, they rarely renege on the extension. See text accompanying note 10 supra. As a stop-gap procedure, until the appeals in Shepherd are exhausted,
court's decision to hold *Mullaney* non-retroactive. Although the *Mullaney* rule does relate to truth-finding, the probability in most cases that facts were wrongfully found at trial may be quite low.

Although it is a close question, the decision in *Hankerson* seems correct. The benefits of the more equitable rule of *Mullaney* for future defendants should not be outweighed by the costs of its retroactive application. For the last two decades the United States Supreme Court has been seeking to refine American criminal procedure. *Mullaney* represents a technical readjustment, a proper refinement. Frequent relitigation does not serve the Supreme Court's goal. Retrials cost money and take time; they result in incorrect verdicts because evidence and witnesses are missing; they make prosecutors spread themselves too thinly. Most importantly, they tend to diminish the confidence of the public in the judicial process. The citizenry can quickly grasp the fact that a trial without a lawyer may have been unfair, but it will have more trouble finding that a person who has been fairly proved beyond a reasonable doubt to have killed another was unfairly tried because he had to show that he was provoked and angered or that his life was threatened.80

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North Carolina prosecutors might voluntarily request a misstatement of the law in jury instructions on the affirmative defense of insanity: they could request a charge making the State prove sanity beyond a reasonable doubt. If conviction resulted, that instruction would seem harmless to defendant. Then, the verdict would be unassailable in future years. This procedure, if not uniform, might be subject to equal protection challenge.

80. In other jurisdictions, the question of *Mullaney's* retroactivity is closer than in North Carolina. Had the North Carolina court held *Mullaney* retroactive, the most important interest, life itself, would be protected, since some convicted murderers in North Carolina face the death penalty. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803, *cert. granted*, 419 U.S. 963 (1974). *Ivan V.* protected liberty only. Although the due process clause does not establish a hierarchy among the protected interests of "life, liberty, [and] property," the United States Supreme Court seems unanxious to affirm death sentences even for persons *properly* convicted. *Furman v. Georgia*, 408 U.S. 238 (1972). It is important to consider that some North Carolina prisoners face execution after trials that would not presently pass constitutional scrutiny. Yet the United States Supreme Court has always given special consideration to those states whose procedures most grievously offended due process in deciding retroactivity. See text accompanying note 33 *supra*. Although the burden on the administration of justice might vary substantially among states, a retroactivity decision would apply equally to all. Although the burden may not be great in North Carolina, other states face a more substantial burden. Therefore, the *Hankerson* result should ultimately prevail in the United States Supreme Court.

Perhaps a better procedure would be to let each state arrive at its own balance, articulating the factors, balanced, with an empirical determination of the potential burden on the administration of justice. Results that the federal courts found offensive to due process could be reversed.