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SECOND DEGREE MURDER AND ATTEMPTED MURDER: CLEAR'S EFFORTS TO MANEUVER THE SLIPPERY SLOPE

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Over a period of nearly two years, the CLEAR Initiative was engaged in the complex and daunting task of clarifying, simplifying and streamlining the Illinois Criminal Code.¹ As noted elsewhere in the Symposium, the final product, as introduced by CLEAR Commissioner, Senator John Cullerton, implemented the numerous recommendations of the Commission and now reposes with the General Assembly.²

One aspect of the Criminal Code warranting the attention and remedial efforts of the Commission addressed the 1986 legislation discarding the crime of voluntary manslaughter and creating, in its stead, the offense of second degree murder. The Commission also focused upon the perceived legal oddity in the penalty provided for the substantive offense of second degree murder and the inchoate crime of attempt murder currently on the books. Consideration was given to the anomaly that allows a defendant who succeeds in intentionally killing his victim to be found guilty of second degree murder, with a penalty of four to twenty years or probation,³ whereas the offender whose efforts do not bear fruition may be found guilty of attempt first degree murder, a non-probationable offense with a penalty of six to thirty years.⁴

With regard to the offense of second degree murder, this article will identify some of the pitfalls created by this legislation

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1. 720 ILL. COMP. STAT. 5/1-1 to 5/47-25 (2007).

2. See S.B. 100, 95th General Assem. (Ill. 2007) (encompassing the CLEAR Commission's recommendations).

3. See 720 ILL. COMP. STAT. 5/9-2 (2007) (describing the elements of second degree murder).

4. See 720 ILL. COMP. STAT. 5/8-4 (2007) (providing the elements of attempt).

as well the remedial measures later undertaken by the judiciary. CLEAR's response to remaining problematic areas will also be discussed, as well as concerns that were addressed by the Commission, but at the end of the day, left unresolved. Proposed legislation will also be provided in the hope of alleviating these concerns, as well as drafts of jury instructions necessary to implement such changes. However, it should be understood that the commentary and accompanying proposals are offered solely by the author, rather than CLEAR.

Finally as to the perceived anomaly resulting from the disparity of punishment for second degree murder and attempt first degree murder, the article will address the competing principles informing our understanding as well CLEAR's proposal offered as a meaningful response to the problem.

I. SECOND DEGREE MURDER

A. Some Background

In 1986, the legislature sought to address the confusion that had developed in some quarters in regard to Illinois statutes proscribing murder and voluntary manslaughter. At that time, murder was defined as follows:

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.⁵

Voluntary manslaughter, on the other hand, was defined as follows:

- (a) a person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or
- (b) a person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he

5. ILL. REV. STAT. ch.38, § 9-1 (1984), amended by ILL. REV. STAT. ch.38, § 9-1 (1987).

believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.⁶

These problematic areas had earlier been identified by Professor Timothy P. O'Neill in his scholarly article, "*Murder Least Foul: A Proposal to Abolish Voluntary Manslaughter in Illinois*."⁷ His first concern addressed the situation where a defendant on trial for murder had established entitlement to a voluntary manslaughter instruction. There, the jury would be told it could return a verdict of guilty on the lesser offense only if the jurors found that the State had proven the defendant's unreasonable belief of justification beyond a reasonable doubt. The paradox, as Professor O'Neill noted, was that the State, generally seeking only a murder conviction, would seldom desire to prove or would prove any such thing.⁸ O'Neill's second concern focused upon situations where the jury, having received separate instructions of murder and voluntary manslaughter, returned verdicts finding the defendant guilty of both crimes.⁹ Recognizing that such a result was both legally and logically possible under prevailing law, the professor's proposed solution was to discard the abiding practice of tendering separate instructions for murder and voluntary manslaughter and instead adopt a unified instruction stressing the relation between the two offenses.¹⁰ Finally, reasoning that voluntary manslaughter was only a less serious form of murder, O'Neill opined that it would help both courts and juries to jettison the entire manslaughter terminology in favor of what he reasoned a more accurate term, "murder in the second degree."¹¹

As we know, Professor O'Neill's suggestions were favorably received in Springfield. The legislative response was Public Act 84-1450, which replaced the offense of murder with first degree murder and voluntary manslaughter with second degree murder.¹² By this enactment, its author, Judge Robert J. Steigmann proclaimed:

The legislature has rescued trial courts and criminal law practitioners from the legal morass in which they were floundering. Without exception, the problems in Illinois homicide law should be

6. ILL. REV. STAT. ch. 38, § 9-2 (1984), amended by ILL. REV. STAT. ch. 38, § 9-2 (1987).

7. Timothy P. O'Neill, "*Murder Least Foul: A Proposal to Abolish Voluntary Manslaughter in Illinois*," 72 ILL. B.J. 306 (1984).

8. *Id.* at 307.

9. *Id.* at 308.

10. *Id.*

11. *Id.*

12. S.B. 522, 84th Gen. Assem., Public Act 84-1450 (Ill. 1986).

resolved by the new Act.¹³

Notwithstanding Judge Steigmann's bold pronouncement, from today's vantage point the optimism and predictions heralding this legislation have simply failed to endure. Particularly with respect to the offense of second degree murder, hindsight instructs that the confusion and uncertainty which existed under the predecessor offense of voluntary manslaughter has hardly abated.

B. Some of the Problems

Although the redesignation and replacement of murder with first degree murder was simply a semantic change incorporating the identical language of the former statute, the legislative enactment of second degree murder not only repealed the crime of voluntary manslaughter, but also brought obvious and profound change. This conclusion is inescapable today, notwithstanding Judge Steigmann's testimony before the House and Senate Judiciary Committees:

The statute defining second degree murder was written with the specific intention of retaining all of the substantive law, both statutory and case law, previously applicable to the statute defining the offense of voluntary manslaughter.¹⁴

The newly created offense of second degree murder provided:

A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or

At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence

13. Robert J. Steigmann, *First and Second Degree Murder in Illinois*, 75 ILL. B.J. 494, 511 (1987).

14. *Id.* at 495.

before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.

Sentence: Second Degree Murder is a Class 1 felony.¹⁵

While perhaps not envisioned in 1986, but clearly so today, is a recognition the enactment not only conflicted with both existing procedural and substantive law,¹⁶ but also contained additional flaws that have now been exposed. Six critical areas of concern impact upon this appraisal:

The statute infringed upon the powers delegated to the executive branch by creating an offense which, according to its author, could not be charged by a prosecutor;

The enactment usurped judicial power by foreclosing a jury from considering the offense as an alternative to first degree murder, unless sought by the defendant;

The statute was also in derogation of the judicial power by precluding a court from entering a guilty finding of second degree murder in a bench trial, notwithstanding the presence of mitigating factors warranting that result;

The enactment further compromised the judicial power by

15. ILL. REV. STAT. ch. 38, § 9-2 (1987).

16. "Substantive law ... establishes the rights whose invasion may be redressed through a particular procedure." *Rivard v. Chi. Fire Fighters Union Local No. 2*, 522 N.E.2d 1195, 1199 (1988). A substantive law is "[t]he part of the law that creates, defines, and regulates the rights, duties and powers of parties." BLACK'S LAW DICTIONARY 1470 (8th ed. 2004). A procedural law is "that which prescribes the method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a suit." *People v. Ruiz*, 479 N.E.2d 922, 924 (1985). In *People v. Atkins*, 838 N.E.2d 943, 947 (2005), the court noted "examples of amendments this court has held to be procedural include one allowing substituted service on the Secretary of State for a former resident of Illinois (*Ogdon v. Gianakos*, 114 N.E.2d 686, 689 (1953)), and one changing a statute of limitations (*Orlicki v. McCarthy*, 122 N.E.2d 513, 518-519 (1954)). Substantive amendments include those that alter the scope or the elements of a crime." (citing *People v. Glisson*, 782 N.E.2d 251, 256-57 (Ill. 2002); *People v. DiGirolamo*, 688 N.E.2d 116, 128 (1997)).

mandating the order of the deliberations to be followed by the jury;

The statute substantively restructured Illinois homicide law by requiring proof of additional elements or factors to sustain a lesser grade of homicide; and

The statute diminished the defendant's expectation for consideration of the lesser offense by abrogating the former requirement of "some evidence" and replacing it with a "preponderance of the evidence" standard.

As will be shown, the first three problematic areas have been addressed and remedied through judicial decisions. Accordingly, CLEAR proposed that the language of the second degree murder statute be amended to reflect those changes. In addressing the fourth concern, the Commissioners recommended that the legislature discard the requirement that the jury must first conclude that the State has proven each of the elements of first degree murder before it may consider whether the defendant has established entitlement to the less culpable offense of second degree murder. Although some aspects of the fifth and sixth areas of concern were considered by CLEAR, given a lack of consensus as to remedial measures, those flaws remain and will be the highlighted during the course of this article.

C. Analysis

As regards the first and second problematic areas, the intention of those who drafted the second degree murder statute was expressed with bold candor:

Subsection (c) of section 9-2 indicates that the option of having the jury instructed on second degree murder remains solely with the defendant. Since second degree murder exists only when the defendant requests the trier of fact to consider it, the prosecutor cannot charge that offense.¹⁷

Absent any intent to cast aspersions, while no doubt novel, the concept of a criminal offense that cannot be charged by the sovereign would appear to be without precedent in our annals of criminal jurisprudence. Indeed, under prior law the State's power to charge the offense of voluntary manslaughter was never questioned.¹⁸ It is therefore not surprising that the drafter's conceptual interpretation was challenged by arguments that the curtailment of the State's Attorney's discretion to bring the charge constituted an encroachment upon the executive branch, thereby violating the separation of powers clause of the Illinois

17. Steigmann, *supra* note 13, at 496.

18. *People v. Ellis*, 437 N.E.2d 409, 411 (Ill. App. Ct. 1982); *People v. Millet*, 208 N.E.2d 670, 675-76 (Ill. App. Ct. 1965); *People v. Bailey*, 201 N.E.2d 756, 763-64 (Ill. App. Ct. 1965).

Constitution.¹⁹ Predictably, the limitation on the prosecutor's right to charge the offense championed by the drafters was ultimately rejected on appellate review.²⁰ In *People v. Burks*, the court recognized:

The statute does not, however, prohibit the State from initially charging a defendant with second degree murder. By charging a defendant with second degree murder, the State is alleging that it can prove the elements of first degree murder, but is conceding the presence of mitigating factors. Under these circumstances the defendant bears no burden to prove any mitigating factor.²¹

Addressing CLEAR's second concern, as noted it was the expressed intent of the drafters that the jury be afforded the option of considering the charge of second degree murder only at the request of the defendant. Yet, that pronouncement marked a clear departure from decisional law holding that a request for a voluntary manslaughter instruction could be made at the request of the State or defense, or could be given *sua sponte* by the court if warranted by the evidence.²² Indeed, for well over fifty years Illinois courts adhered to the abiding principle that an instruction which correctly states the law and is based on competent evidence is not erroneous even though it is not in consonance with the theories of either party.²³

It is further apparent that this unbroken line of precedent survived the advent of second degree murder, notwithstanding the novel interpretation of the drafters to the contrary. The issue was first raised in the First District, where the defendant challenged the trial court's decision to instruct the jury on second degree murder, asserting that she was entitled to pursue an all-or-nothing defense requiring the jury to find her guilty of first degree

19. See *People v. Davis*, 583 N.E.2d 64, 67 (Ill. App. Ct. 1991) (noting in dicta that the statute does not violate separation of powers because the State's Attorney continues to have the power to charge second degree murder); *People v. Willis*, 577 N.E.2d 1215, 1226 (Ill. App. Ct. 1991) (holding that the defendant did not have standing to challenge whether the statute prohibited prosecutors from charging second degree murder).

20. See *People v. Smallwood*, 586 N.E.2d 636, 647-48 (Ill. App. Ct. 1991) (upholding the State's power to charge a defendant with second degree murder under the statute); *People v. Clark*, 565 N.E.2d 1373, 1379 (Ill. App. Ct. 1991) (affirming that the statute does not bar State's Attorneys from charging a defendant with second degree murder).

21. 545 N.E.2d 782, 785 (Ill. App. Ct. 1989).

22. See *People v. Pierce*, 284 N.E.2d 279, 282 (Ill. 1972) (finding no error in the trial court's instructing the jury on voluntary manslaughter over defendant's objection); see also *People v. Faulkner*, 475 N.E.2d 964, 967 (Ill. App. Ct. 1985) (noting that "[i]t is well settled on murder cases that if there is evidence which, if believed by the jury, would reduce the crime to manslaughter, an instruction defining manslaughter should be given).

23. *People v. Preston*, 173 N.E. 383, 389 (Ill. 1930).

murder or simply not guilty.²⁴ Her position relied upon the language of section 9-2 (c) of the Code, providing that where evidence of a mitigating factor has been presented, "*and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed . . .*"²⁵ The appellate court, however, found defendant's argument to be unconvincing:

Bearing in mind the context in which Section 9-2 (c) was enacted, the legislature's use of the language "and the defendant has requested" that the jury be instructed on second degree murder does not take on the connotation that *only* the defendant may request an instruction on second degree murder and that the state is foreclosed from seeking such an instruction. If we were to accept defendant's reasoning, the result would be that a defendant who proceeded by way of a jury trial would have the absolute right to pursue an all-or-nothing defense, but a defendant who elected to proceed by way of a bench trial would not have such a right. We do not believe this result was intended by the legislature.²⁶

An identical result obtained with regard to CLEAR's third area of concern, that absent the defendant's request, a judge was without authority to enter a guilty finding of second degree murder in a bench trial even in the presence of proof of mitigating factors warranting that result. As noted, it was the express intention of the proponents of this legislation that the principles espoused in Section 9-2(c) of the Code, although not articulated, would likewise apply to non-jury trials:

Even in a bench trial . . . it should still remain the option of the defendant to have the trial judge consider second degree murder as a possible verdict.²⁷

Yet, once again, the result envisioned by the drafters was in sharp conflict with the touchstone for judging lesser included findings. Notably, in *People v. Taylor*,²⁸ the Supreme Court of Illinois concluded that a defendant being tried for murder in a bench trial had absolutely no right to restrict the court from entering a guilty finding for voluntary manslaughter. Earlier, the court rejected the all-or-nothing position advanced by the defendant, reasoning that where the record contained evidence supporting a manslaughter verdict, the fact that the evidence would also have supported a finding that the defendant was guilty of murder was not a matter of which he could complain.²⁹

24. *People v. Kauffman*, 719 N.E.2d 275, 280-81 (Ill. App. Ct. 1999).

25. 720 ILL. COMP. STAT. 5/9-2(c) (1998) (emphasis added).

26. *Kauffman*, 719 N.E.2d at 280.

27. Steigmann, *supra* note 13, at 497.

28. 224 N.E.2d 266, 271 (Ill. 1967).

29. *People v. Green*, 179 N.E.2d 644, 647 (Ill. 1962).

Similarly, in *People v. Franklin*, no error attached to the trial court's ruling that the circumstances appearing from the defendant's testimony, while not sufficient to justify or excuse the killing, were sufficient to reduce the crime to manslaughter.³⁰

The drafters' interpretation was also shown to be in derogation of the underlying rationale of other cases where the defendant urged that because he was either guilty of murder or nothing at all, the manslaughter finding could not stand. Rejecting that view, our supreme court, in reliance upon long-standing precedent, observed:

It was the province of the trial judge, a jury having been waived, to settle the conflict in the evidence and determine whether defendant acted in self-defense, or, if not in self-defense, whether the circumstances attending the assault were such that her death at defendant's hands constituted murder, manslaughter or justifiable homicide.³¹

Moreover, notwithstanding Judge Steigmann's assessment, case law since the arrival of second degree murder is consistent with earlier holdings overwhelmingly upholding the trial judge's rubric to enter guilty findings for the lesser mitigated offense. Judge Steigmann had prophesized that because a defendant has the right to preclude a jury's consideration of second degree murder, he must also have the correlative right to similarly curtail a judge in a bench trial. However, Professor James B. Haddad, in a thought provoking article, not only found this premise to be false, but also questioned whether the conclusion necessarily followed from the premise:

If a court announces a judgment of second degree murder after the defendant has objected to that alternative, it is hard to see how the defendant is going to complain successfully. By definition, the judge has found all essential elements of first degree murder. A reviewing court likely will not find any prejudice. If the reviewing court reverses, it will be because the evidence, as a matter of law, failed to establish the elements necessary for first degree murder; these elements also are necessary for second degree murder.³²

Professor Haddad's rationale was mirrored in *People v. Swanson*,³³ where the defendant submitted that the language of section 9-2 (c) providing that a jury may be given the option of entering a guilty verdict of second degree murder only if requested by the defendant, arguably supported the proposition that a

30. 60 N.E.2d 870, 872 (Ill. 1945).

31. *People v. Sain*, 51 N.E.2d 557, 560 (Ill. 1943) (citing *Hammond v. People*, 199 Ill. 173 (Ill. 1902)).

32. James B. Haddad, *Second Degree Murder Replaces Voluntary Manslaughter in Illinois: Problems Solved, Problems Created*, 19 LOY. U. CHI. L.J. 995, 1019 (1988).

33. 570 N.E.2d 503 (Ill. App. Ct. 1991).

defendant alone could make that election in a bench trial. Rejecting that view, the appellate court found that because section 9-2 (c) by its unambiguous language applied only to jury trials, its provisions had no application to bench trials. The court further commented upon what it viewed as the paradoxical nature of defendant's argument:

He argues that he should be allowed to "roll the dice." Clearly, we understand why a defendant would take that position under the old law, but we fail to see why he would do it presently. In effect, defendant is saying that if he should be found guilty of first degree murder, he does not want the judge to consider second degree murder³⁴

CLEAR's fourth area of concern stemmed from a key aspect of the statute structuring the order of deliberations to be followed by the jury. As section 9-2 (c) expressly provides:

. . . the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.³⁵

Although the mandate structuring the order of deliberations at first glance might seem rather innocuous, the CLEAR Commissioners recognized that the potential mischief and, moreover, the injustice that could flow from this directive was disturbing. CLEAR considered the following scenario, not merely an assemblage of hypothetical facts, but rather a reality experienced by judges who have presided over murder cases in the Criminal Division of the Circuit Court of Cook County.

PRE-TRIAL CONFERENCE – In chambers, at the onset of jury selection in a first degree murder trial:

Defense Counsel: Judge, we could avoid all of this if my client could just plead to second degree. What happened here is that after work my guy, who is an electrician, gets into a tavern pool game with a guy he'd just met. An argument breaks out between them followed by some shoving. It briefly subsides, but then, as my client is lining up a shot, this guy whacks him over his head with a pool cue. My client is stunned, knocked to his knees. As he straightens up, he is taken out the rear door; the other guy is taken out front. Now, the other guy has what appears to be a beer bottle. As they draw near, my client removes a small electrician's knife from his tool belt to protect himself. They close and somehow the knife goes into the other guy's chest. My client was just trying to defend himself.

State's Attorney: We don't agree with that rendition. We believe the

34. *Id.* at 506.

35. 720 ILL. COMP. STAT. 5/9-2(c) (2007).

evidence supports what we've charged, first degree murder, and that's what we're going on.

Defense Counsel: Judge, this was a bar room brawl. You know, the take in the building has always been that any stabbing within thirty feet of a pool table was voluntary manslaughter. My client will plead blind to second degree and take whatever weight you give him.

State's Attorney: I'm sure he will. That pool table business may have been the name of the game under Jack O'Malley, but it surely was put to rest when Dick Devine got down here.

Judge: Well pool table or not, it looks like we're going to have a nice jury trial.

POST-TRIAL – Judge meets with jurors following a verdict of not guilty:

Foreperson: Judge, honestly we feel real bad about this. This truly was a case of second degree murder. But you told us not to consider second degree unless we'd agreed that the State had proved first degree. Two jurors didn't buy that, so we followed your instructions and never got past first degree.

Judge: Well, the instructions track the statute. I had no choice but to give them the way I did.

Foreperson: Just doesn't seem right. I sat on a case like this some years ago and we had a choice, murder or voluntary manslaughter. Is this something new? Is this some kind of an improvement?

Judge: Well, we've had it since 1987; I really can't say it's an improvement.

The foregoing scenario does not represent a mythical situation, but rather a reality experienced by the author and colleagues who sit in the criminal courts. Less egregious, but also disturbing, are cases where jurors, following the express command of the instruction, have been unable to come to any resolution of the issues. Perhaps armed with a crystal ball, Professor Haddad had cryptically predicted:

Additionally, the number of hung juries might escalate if juries conscientiously adhere to instructions purporting to structure their order of deliberations. By telling a jury that it can consider second degree murder only if it unanimously has concluded that the state has proved every element of first degree murder, a judge may discourage the kind of give and take that historically has had a role in jury deliberations.³⁶

36. Haddad, *supra* note 32, at 1006. Haddad further observed:

Professor Haddad also identified other problems flowing from legislative efforts to dictate the order of jury deliberations:

An additional criticism of the new provision is that the legislature has mandated instructions that give greater emphasis to the more serious offense of first degree murder and retard discussion of second degree murder, even when the court has determined that the evidence supports consideration of both. Some case law suggests that courts should not tell the jury to first consider the greater offense and only later to consider the lesser offense.³⁷

Professor Haddad also envisioned how this provision would lengthen and complicate the instructions traditionally given by the court:

When the legislature directs the order in which juries shall consider issues in a criminal case, it effectively mandates lengthy, complex jury instructions, unlike those typically employed in Illinois cases. By requiring that the jury be told that it must consider first degree murder rather than second degree murder, the legislature requires that issue instructions for the two offenses be combined. The matter becomes even more complex when insanity and guilty but mentally ill verdicts are possibilities in a case in which the jury is being charged on first degree and second degree murder. . .³⁸

As Professor Haddad keenly observed, when only first degree murder and “passion-provocation” second degree murder are at issue, the instruction is approximately 435 words long. Add issues of insanity and guilty but mentally ill and the instruction is now 880 words. And, if you factor in the “unreasonable belief” form of

The problem is exemplified when a judge orders completion of first degree murder deliberations before consideration of involuntary manslaughter. A jury evenly divided about whether the state has proved the requisite mental state for murder would end its deliberations hung instead of considering the less culpable alternative mental state required for involuntary manslaughter. The purists might see nothing wrong with discouraging “compromise” verdicts. Pragmatists would hope that the jurors would disregard the judge’s instruction and use their common sense, unanimously agreeing on either the greater or the lesser offense rather than declaring themselves hung as to the greater offense and going no farther. Accordingly, if they do reach a verdict, it will only be because the jurors have disregarded the court’s instructions as to the order of deliberations.

Id.

37. *Id.* at 1005; see also Jay M. Zitter, Annotation, *When Should Jury’s Deliberations Proceed From Charged Offense to Lesser-Included Offense*, 26 A.L.R. 5TH 603 (1995) (discussing how different courts have handled jury instructions regarding lesser included offenses). Interestingly, and contrary to the prevailing practice in Illinois, a number of courts have found the converse of the situation equally problematic, that is, where the jury is told that it should not consider the lesser included offense unless it is unable to determine or has determined that the defendant is not guilty of the greater charge. *Id.* at 34.

38. Haddad, *supra* note 32, at 1003.

second degree, the instruction is lengthened by an additional 45 words. Professor Haddad was led to conclude the instructions drafted for this provision:

...are foreign to the system of criminal instructions in Illinois, where simplicity ordinarily has prevailed. Illinois has a modern criminal code, with crisp definitions of offenses that require little judicial interpolation.³⁹

Haddad's final area of criticism addressed separation of powers concerns under the Illinois Constitution:

...the legislature's role is to define offenses and to provide penalties. But is it within the legislative purview to mandate the order in which jurors shall conduct their deliberations? Because of the strong line of Illinois decisions vindicating judicial prerogatives as to trial court procedures, it is possible that Illinois courts would strike down this aspect of the new statute.⁴⁰

Professor Haddad's critique clearly resonates to this day. Although our Constitution does not specifically delineate which powers belong to the separate branches, the Illinois Supreme Court has construed the concept of judicial power as including the adjudication and application of law and the procedural administration of the courts.⁴¹ Moreover, while the legislature is vested with the power to enact laws, it may not enact laws that unduly infringe upon the power of the judiciary.⁴²

Decisions addressing the issue of whether the legislature has encroached upon a fundamentally judicial prerogative are instructive. In *People v. Joseph*,⁴³ the court determined a provision in the Post Conviction Hearing Act directing that all proceedings be conducted by a judge not involved in the original proceeding directly interfered with the judicial authority governing assignment of judicial duties. Similarly, in *People v. Davis*,⁴⁴ our supreme court found that a statute which purported to require judges to state their reasons for imposing a particular sentence violated the separation of powers clause. Likewise, in *People v. Jackson*,⁴⁵ a statute providing that counsel had the right to directly examine jurors upon the *voir dire* was held to unduly infringe upon the judicial power. Finally, in *People v. Colclasure*,⁴⁶ in rejecting defendant's reliance upon a statute affording him ten peremptory challenges, the appellate court determined that jury

39. *Id.* at 1004.

40. *Id.* at 1007.

41. *People v. Bainter*, 533 N.E.2d 1066, 1070 (Ill. 1989).

42. *People v. Walker*, 519 N.E.2d 890, 892-93 (Ill. 1988).

43. 495 N.E.2d 501, 507 (Ill. 1986).

44. 442 N.E.2d 855, 858 (Ill. 1982).

45. 371 N.E.2d 602, 606 (Ill. 1977).

46. 558 N.E.2d 705, 708 (Ill. App. Ct. 1990).

selection, being a matter of trial detail, was controlled by the Illinois Supreme Court rather than the legislature.

Although the constitutionality of this aspect of second degree murder has yet to be raised, precedent might well signal the death knell of the legislature's mandate structuring the order of jury deliberations. In Illinois, jury instructions traditionally are within the domain of the judicial power, rather than being within the ambit of the legislature. Instructions are drafted and promulgated by the Illinois Supreme Court Committee on Pattern Instructions and are recognized as having the full force of the law unless or until modified or abrogated by judicial authority.⁴⁷ Recognizing that legislative efforts to channel the order of juror deliberations could well contravene the judicial power, CLEAR recommended the provision be laid to rest.

D. Clear's Response

It was the sense of the Commission that a portion of the language of subsection (c) be eliminated to accomplish two specific goals: first, consistent with existing case law, to clarify that the State indeed may charge second degree murder; second, to alleviate concerns that the existing language improperly structures the order of jury deliberations. Accordingly, part of the first sentence and the final sentence of subsection (c) was eliminated to accomplish this clarification.⁴⁸ The proposed modification also eliminated language foreclosing a jury from considering the offense as an alternative to first degree murder unless requested by the defendant.

Thus, CLEAR's recommendation to modify second degree murder provided:

47. See, e.g., ILL. SUP. CT., R. 451(a) *Use of IPI Criminal Instructions; Requirements of Other Instructions* (explaining the preference for using the IPI, and rules for the use and construction of non-IPI instructions). Rule 451(a) states:

Whenever Illinois Pattern Jury Instructions, Criminal (4th ed. 2000) (IPI Criminal 4th), contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal 4th instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI Criminal 4th does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument.

Id.

48. CLEAR Initiative, Criminal Law Edit, Alignment and Reform ("CLEAR"), *Proposed Combined Commentary, Article 9, Second Degree Murder*, 19 (Meeting VIII, September 13, 2006).

(c) ~~When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.~~⁴⁹

E. Remaining Concerns

Unfortunately, CLEAR's final product did not address the remaining concerns identified earlier in this article. Notably, the 1986 statutory change substantively restructured Illinois homicide law by requiring proof of additional elements or factors to sustain the lesser offense of second degree murder. That change, as will be shown, profoundly impacted upon judicial interpretation of the superceding statute likewise raising questions as to the nature of the animal created by the legislature.

Some historical perspective may provide insight into the problem. Prior to the adoption of the Criminal Code of 1961, Illinois adhered to the common law definition of murder articulated by Blackstone as "when a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied."⁵⁰ The distinction between express and implied malice was drawn long ago in *Davison v. People*:⁵¹

The word malice is defined to be "A formed design of doing mischief to another, technically called *malitia proecognitata*, or malice prepense. It is either express, as, where one with a sedate and deliberate mind and formed design kills another, which formed design is evidenced by certain circumstances discovering such intention, as in laying in wait, antecedent menaces, former grudges and concerted schemes to do him some bodily harm, or implied, as,

49. CLEAR, *Proposed CLEAR Meetings 1-7, Article 9, Second Degree Murder*, 9 (Meeting VIII, September 13, 2006).

50. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 195 (1769).

51. 90 Ill. 221 (1878).

where one wilfully poisons another; in such a deliberate act the law presumes malice though no particular enmity can be proved."⁵²

Conversely, manslaughter at common law was described as "the voluntary killing of another without malice either express or implied, and differs not in substance of the fact from murder, but only differs in these ensuing circumstances"⁵³ Under the former Code, voluntary manslaughter was defined as "the unlawful killing of a human being, without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible."⁵⁴ While both murder and manslaughter shared a common factor arising from the killing of a human being, it was the presence or absence of malice that distinguished the offenses.⁵⁵

The 1961 Code, seeking to avoid the use of the difficult "malice" language, replaced the *mens rea* requirement in murder with intent or knowledge.⁵⁶ As a result of that omission, the mental states required for voluntary manslaughter were rendered identical to those required for murder, each offense requiring intent or knowledge.⁵⁷ The new Code also broadened the offense of voluntary manslaughter to include the unjustifiable use of deadly force, or what practitioners today regard as "imperfect self-defense."⁵⁸ Yet, our courts of review continued to view voluntary manslaughter, as well as second degree murder that replaced it, as a lesser included offense of murder.⁵⁹ Similarly, in an earlier

52. *Id.* at 229.

53. 1 MATTHEW HALE, PLEAS OF THE CROWN 466 (Robert H. Small 1847).

54. ILL. REV. STAT. ch. 38, par. 361 (1961).

55. *People v. Tillman*, 187 N.E.2d 731, 733 (Ill. 1963).

56. ILL. ANN. STAT., ch. 38, par. 9-1 Committee Comments at 17 (Smith-Hurd 1961). "Subsection (a) (1) is intended to define the two most culpable types of conduct, which are within the older definition of 'express malice' — acting either with actual intent to kill or do great bodily harm, or with knowledge that death or great bodily harm will (or is practically certain to) result." *Id.*

57. *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986). The Illinois Supreme Court observed that:

The definition of voluntary manslaughter in our criminal code does not contain language distinguishing it from murder in regard to the defendant's intention or mental state. Voluntary manslaughter is in relevant part defined simply as criminal homicide committed by one "acting under a sudden and intense passion resulting from serious provocation" or "acting in the mistaken belief that self-defense justified the use of deadly force." There cannot be a judgment of voluntary manslaughter in the absence of one of these mitigating factors. Thus, murder cannot be reduced to manslaughter unless one of the two statutory conditions is present.

Id. (citation omitted).

58. ILL. REV. STAT. ch. 38, par. 9-2 (1963).

59. *See, e.g., People v. Fausz*, 449 N.E.2d 78, 80 (Ill. 1983) (identifying that

article, Professor O'Neill likewise reasoned that "because voluntary manslaughter requires a less culpable mental state than murder it is unquestionably a lesser included offense of murder."⁶⁰ An included offense as defined by Illinois law, is an offense which is "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. . . ."⁶¹

Consistent with that analysis, in *People v. Hoffer*⁶² our supreme court later concluded:

The offenses of murder, voluntary manslaughter and involuntary manslaughter are distinguished only by the diminishing degree of mental culpability necessary to sustain each. While murder and voluntary manslaughter (unreasonable belief) both require proof of intent or knowledge . . . the offense of voluntary manslaughter is committed only when the defendant acts with an unreasonable belief that the killing was justified. This mental state is considered less culpable, and, as such, voluntary manslaughter is considered an included offense of murder.⁶³

Professor Haddad had earlier acknowledged how scores of Illinois decisions concurred in the lesser included conceptual analysis, observing that until 1981, no appellate opinion questioned the proposition.⁶⁴ He nonetheless concluded that the principle conflicted with the statutory definition of an included offense, reasoning that because the statutory definition of murder makes no reference to mitigating circumstances, their presence or absence is irrelevant to a murder charge.⁶⁵ He further maintained that because voluntary manslaughter contains an element which

while voluntary manslaughter is a lesser included offense of murder, the elements of voluntary manslaughter must be present for conviction on voluntary manslaughter); *Pierce*, 284 N.E.2d at 282 (holding that a manslaughter instruction is necessary when evidence of the elements of manslaughter are present in the record); *People v. Parker*, 632 N.E.2d 214, 217 (Ill. App. Ct. 1994) (noting that voluntary manslaughter is a lesser included offense of murder and is in essence a "compromise between murder and exoneration"); *People v. Swanson*, 570 N.E.2d 503, 506 (Ill. App. Ct. 1991) (ruling against defendant's argument that second degree murder is not an included offense of first degree murder).

60. Timothy P. O'Neill, "With Malice Toward None": A Solution To An Illinois Homicide Quandary, 32 DEPAUL L. REV. 107, 125 (1982-83).

61. 720 ILL. COMP. STAT. 5/2-9(a) (West 2007); see also, *Schmuck v. United States*, 489 U.S. 705, 716 (1989) (stating generally that an offense qualifies as a lesser included offense only if the elements of the included offense are a subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense).

62. 478 N.E.2d 335 (Ill. 1985).

63. *Id.* at 340.

64. James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 CHI. KENT L. REV. 23, 26 (1982).

65. *Id.* at 27.

is not also an element of murder, it therefore is not included within murder.⁶⁶ Haddad's analysis led to the anomalous conclusion that under Illinois law, the offense of murder is actually included within voluntary manslaughter.⁶⁷ Although both offenses require an intentional or knowing killing, voluntary manslaughter requires an additional element: the presence of passion-provocation or of imperfect self-defense.⁶⁸

Haddad's perceived anomaly in the murder-voluntary manslaughter relationship led him to urge that voluntary manslaughter instead be treated as a partial affirmative defense to murder.⁶⁹ Under that approach, voluntary manslaughter would not be in issue until the defense came forward with a certain quantum of evidence establishing the statutory mitigating circumstances.⁷⁰ The threshold adopted in earlier cases had placed the initial burden of going forward with "some evidence" upon a defendant seeking to assert the voluntary manslaughter defense.⁷¹ Once the defense produced that evidence, the prosecution would be required to prove beyond a reasonable doubt the absence of mitigating circumstances.⁷² If the State failed to do so, but simply proved the other elements of murder, the defendant would be entitled to a verdict or finding of guilty of voluntary manslaughter.⁷³

Professor Haddad rationally posited that the affirmative defense approach would bring consistency to the "included offense" argument.⁷⁴ Voluntary manslaughter would truly be included in a charge of murder because the proof required for murder would

66. *Id.*

67. *Id.* at 28.

68. *Id.* at 28-29.

69. *Id.* at 45.

70. *See id.* (recognizing that there was a split of authority as to how much evidence the defense must introduce to shift the burden to the prosecution to negate an affirmative defense).

71. *People v. Leonard*, 415 N.E.2d 358, 364 (Ill. 1980). "We believe that the evidence in the present case presents some evidence of mutual combat and that the State's argument concerning the adequacy of provocation under these circumstances should be addressed by the jury." *Id.*; *see also People v. Handley*, 282 N.E.2d 131, 136 (Ill. 1972) (noting the well settled rule that "if there is evidence in the record which, if believed by a jury, would reduce the crime to manslaughter, a manslaughter instruction tendered by the defendant must be given"); *People v. Canada*, 187 N.E.2d 243, 243-44 (Ill. 1962) (observing that where the evidence would allow the jury to find manslaughter rather than murder, it is reversible error to deny a manslaughter instruction); and *People v. Neal*, 446 N.E.2d 270, 273 (Ill. App. Ct. 1983) (recognizing the Illinois rule that voluntary manslaughter instructions are properly denied where the circumstances fail to show even "some evidence").

72. Haddad, *supra* note 64, at 45.

73. *Id.*

74. *Id.* at 46.

necessarily address every element of voluntary manslaughter.⁷⁵ The mitigating circumstances would not be viewed as elements of voluntary manslaughter, but rather would constitute an affirmative defense to murder.⁷⁶

The affirmative defense approach had earlier been upheld by the United States Supreme Court in *Patterson v. New York*.⁷⁷ *Patterson* validated a statute which required a defendant charged with second degree murder to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence in order to reduce the homicide to manslaughter.⁷⁸ In so doing, the High Court noted with approval, that since the advent of the Model Penal Code in 1962, at least twelve jurisdictions had employed the concept of affirmative defenses which exculpate or mitigate, but which must be established by the defendant to be operative.⁷⁹ Moreover, later, in *Martin v. Ohio*, the Supreme Court found no constitutional infirmity attached to a statutory scheme that allocated to the defendant the burden of establishing his affirmative defense of self-defense after the State had proved all of the elements of aggravated murder.⁸⁰

Significantly, the Illinois Supreme Court employed an identical analysis in *People v. Reddick*,⁸¹ holding that the issues of unreasonable belief and heat of passion being issues that the People's evidence in a murder trial would not raise, reasonably fell within the realm of affirmative defenses.⁸² As the *Reddick* court noted:

75. *Id.*

76. *Id.*

77. 432 U.S. 197, 210 (1977).

78. *Id.* at 206.

79. *Id.* at 207.

80. 480 U.S. 228, 233 (1987). The *Martin* Court held:

We agree with the State and its Supreme Court that this conviction did not violate the Due Process Clause. The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation or design. It did not seek to shift to Martin the burden of proving any of those elements, and the jury's verdict reflects that none of her self-defense evidence raised a reasonable doubt about the State's proof that she purposefully killed with prior calculation and design. She nevertheless had the opportunity under state law and the instructions given to justify the killing and show herself to be blameless by proving that she acted in self-defense. The jury thought she had failed to do so, and Ohio is as entitled to punish Martin as one guilty of murder as New York was to punish Patterson.

Id.

81. 526 N.E.2d 141 (Ill. 1988).

82. *Id.* at 145-46.

Thus, under the 1961 Code, if a defendant in a murder trial presents sufficient evidence to raise issues which would reduce the charge of murder to voluntary manslaughter, then to sustain the murder conviction, the People must prove beyond a reasonable doubt that those defenses are meritless, and must also prove beyond a reasonable doubt the statutory elements of murder.⁸³

Over the years, analytical hindsight demonstrates that the conceptual relationship between first degree murder and second degree murder has continued to remain subject to differing interpretations. The issue was finally laid to rest in *People v. Jeffries*,⁸⁴ where our supreme court reaffirmed its holding in *Wright*.⁸⁵ By eliminating the requirement of malice from the 1961 Criminal Code, "the drafters . . . removed the element that distinguished the crimes of murder and voluntary manslaughter."⁸⁶ Reasoning that because both offenses now required the same mental state – that the killing be intentional and knowing – "voluntary manslaughter was transformed from *murder minus malice to murder plus mitigation*."⁸⁷ The same rationale led the court to reject the claim that second degree murder was a lesser included offense: "[h]aving determined that the mental states for murder and second degree murder are identical, it is evident that second degree murder is not a lesser included offense of first degree murder. Rather, second degree murder is more accurately described as a *lesser mitigated offense* of first degree murder."⁸⁸

The *Jeffries* court thus adopted Judge Steigmann's reasoning articulated in *People v. Newbern*.⁸⁹ Second degree murder is a lesser offense because its penalties upon conviction are lesser, and it is a mitigated offense because it is first degree murder plus

83. *Id.* at 146. The court additionally found that the issue was controlled by Section 3-2 of the Criminal Code of 1961, which provides:

Affirmative defense:

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

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

Id. at 145-46.

84. 646 N.E.2d 587 (Ill. 1995).

85. *Wright*, 488 N.E.2d at 978.

86. *Jeffries*, 646 N.E.2d at 594.

87. *Id.* at 595.

88. *Id.*

89. See 579 N.E.2d 583, 596 (Ill. App. Ct. 1991) (holding second degree murder to be a lesser mitigated offense of first degree murder because the penalties are lower and because it is first degree murder plus defendant's mitigating factor).

defendant's proof by a preponderance of the evidence that a mitigating factor is present.⁹⁰ In *Jeffries*, the court also candidly acknowledged its part in contributing to the confusion that had developed over the years, recognizing its prior decisions had not been exacting in the phraseology used to describe the mitigating factors of voluntary manslaughter and second degree murder:

For instance, the mitigating factors of "serious provocation" or "unreasonable belief in justification" have been improperly referred to as "mental states . . . of lesser culpability" (*Reddick*, 123 Ill.2d at 195) or "mitigating mental states" (*People v. Flowers* (1990), 138 Ill.2d 218, 241). Such terminology is inconsistent with our decision today and should therefore no longer be followed.⁹¹

The foregoing discussion is offered in support of the view that the nature of the animal created by the legislature in 1986 rests upon a questionable foundation. As we have seen, under the former Code, voluntary manslaughter was viewed in its traditional sense as a lesser included offense of murder. That view continued even after 1961, up to the eve of the enactment of second degree murder when the *Reddick* court embraced the affirmative defense approach in its analysis of murder and voluntary manslaughter. Finally culminating in *Jeffries*, the court determined that second degree murder was in theory, "murder plus;" that is, first degree murder plus mitigating circumstances.

Given this remarkable transformation, it nonetheless remains the opinion of this author that the present relationship between first and second degree murder most strongly resembles the affirmative defense approach advanced in *Reddick*. This is readily apparent from the requirement that to inject the mitigating factors of provocation or imperfect self-defense into the equation the defendant must raise the issue by a preponderance of the evidence. If the defense succeeds, the burden then shifts to the State to disprove the mitigating factor by proof beyond a reasonable doubt. Moreover, the affirmative defense approach has been reinforced, albeit perhaps unwittingly, by CLEAR's proposed amendment eliminating the structuring of jury deliberations and the concomitant requirement that the jury first resolve the issue of first degree murder before considering the effect of mitigating factors. Additional modifications to be proposed will hopefully bring further clarity to this problematic area.

However, before reaching those proposals, consideration should be given to the final problematic area of change resulting from the enactment of second degree murder. As noted, the statute diminished the defendant's expectation for consideration of the lesser offense by abrogating the former requirement of *some*

90. *Jeffries*, 646 N.E.2d at 595.

91. *Id.*

evidence and replacing it with a *preponderance of the evidence* standard. This clearly represented a substantive change in the law previously applicable to the offense of voluntary manslaughter.⁹²

Under former law, entitlement to consideration of the lesser offense was satisfied where there was evidence in the record that, if believed by the jury, would reduce a crime from murder to manslaughter.⁹³ Traditionally, a defendant seeking to assert the manslaughter defense had the initial burden of going forward with some evidence of serious provocation that would warrant such instruction.⁹⁴ Although the defendant's theory of defense might rest upon a very tenuous evidentiary foundation, it must be of such a nature that, if believed by the jury, would reduce the crime of murder to manslaughter.⁹⁵ Essentially, the defendant was entitled to the benefit of any defense supported by the evidence, notwithstanding its inconsistency with his own testimony.⁹⁶ The decision to allow the lesser offense to be submitted to the jury clearly hinged upon a question of law. By so instructing the jury and providing verdict forms for the lesser offense, the trial judge had clearly concluded as a matter of law that the requisite quantum of evidence had been placed before the jury.

In allocating the burden of proof, the pertinent language of the second degree murder statute initially suggests that it follows the established rule recognizing that *some evidence* of the mitigating factors be presented either by the prosecution or the defense. The statute then deviates from the traditional standard by providing that when such evidence has been presented the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can avoid a conviction for first degree murder.⁹⁷ Our pattern jury

92. See, e.g., *People v. Shumpert*, 533 N.E.2d 1106, 1109 (Ill. 1989) (holding the new homicide statute to be an *ex post facto* law if applied retroactively because it increased defendant's burden regarding mitigation from "some evidence" to preponderance of the evidence).

93. See, e.g., *People v. Austin*, 549 N.E.2d 331, 333-34 (Ill. 1989) (affirming the circuit court's rejection of defendant's tendered jury instruction on voluntary manslaughter where there was "no evidence" of mutual combat); *People v. Harris*, 134 N.E.2d 315, 317 (Ill. 1956) (upholding the state's tendered jury instruction on voluntary manslaughter where there was evidence of provocation); *People v. Brown*, 112 N.E.2d 122, 125 (Ill. 1953) (affirming a voluntary manslaughter conviction where the jury apparently believed the defendant was intoxicated to the point that his power of reasoning was suspended).

94. *People v. Seaberry*, 380 N.E.2d 511, 514 (Ill. App. Ct. 1978).

95. *People v. Dortch*, 314 N.E.2d 324, 325-26 (Ill. App. Ct. 1974).

96. *People v. Scalisi*, 154 N.E.2d 715, 721 (Ill. 1926).

97. 720 ILL. COMP. STAT. 5/9-2 (2007). The Illinois Supreme Court observed:

Under the new Act, the State still bears the burden to prove beyond a

instructions mirror those requirements by directing the jury to consider all of the evidence bearing on this question and additionally provide that where the only evidence of second degree murder has come out during the prosecution's side of the case, at the defendant's option the jury is to be told that the defense is not required to present any evidence in order to establish the existence of a mitigating factor.⁹⁸

Recognizing, that in many cases the sole evidence of provocation or imperfect self-defense comes from the State's case-in-chief, the potential for confusion is readily apparent. Adhering to the mandate of the statute, the judge first tells the jurors that they are to determine whether evidence of a mitigating factor has been presented, regardless of the source. Next, the jurors are admonished that it is the defendant's burden to prove the mitigating factor by a preponderance of the evidence, yet in the same breath the judge cautions that the defense need not present any evidence to establish that a mitigating factor has indeed been presented. Under this scenario, one that is familiar to experienced judges and practitioners alike, one could well express amazement that the average lay juror is able to conclude that the defendant has proved the mitigating factor by the requisite burden or for that matter, has proved anything at all.

Professor Haddad voiced additional concerns over the potential for confusion when jurors must be instructed as to differing burdens of persuasion. On some issues, the burden is on the State to prove those propositions beyond a reasonable doubt, but as to others the burden is now on the defendant to establish those factors by the preponderance standard. As Haddad noted, the complexity is aggravated when the "unreasonable belief" type of second degree murder is in issue:

... the court must instruct the jury that to establish elements of first degree murder the state has the burden of proving *beyond a reasonable doubt* the absence of a reasonable belief in the existence of justifying facts, but that to reduce the offense to second degree murder, the defendant has the burden of proving *by a preponderance of the evidence* the presence of an unreasonable belief in the existence of justifying facts.⁹⁹

reasonable doubt, the elements of first degree murder. However, the defendant now bears the burden to prove, by a preponderance of the evidence, one of the factors in mitigation which must be present to reduce an offense of first degree murder to second degree murder. Thus, the new Act not only requires the defendant to come forward with some evidence of a factor in mitigation; it requires the defendant to prove, by a *preponderance of the evidence*, a factor in mitigation.

Shumpert, 533 N.E.2d at 1109 (citations omitted).

98. ILL. SUP. CT. COMM., ILLINOIS PATTERN JURY INSTRUCTIONS: IPI CRIMINAL, § 2.03A (4th ed. 2000).

99. Haddad, *supra* note 32, at 1002; *see also Ill. Sup. Ct. Comm., Illinois*

As noted, the allocation of burdens in our present enactment was patterned in part after a New York statute providing that the defendant had the burden of affirmatively establishing the existence of extreme emotional distress to reduce the grade of homicide to manslaughter.¹⁰⁰ The United States Supreme Court found that statute to conform to due process requirements notwithstanding the claim that it placed an unconstitutional burden upon the defendant.¹⁰¹ Although the constitutionality of this aspect of our own statute has also been upheld,¹⁰² recognition that the requirement is constitutional does not support the view that it was borne of necessity or otherwise of merit.

F. Other Jurisdictions

Having developed some understanding of the problems created by the advent of second degree murder in Illinois, further insight might be gleaned from the teaching of other states. Interestingly, a survey of other jurisdictions reveals that the majority of states, even today, continue to view second degree murder or voluntary manslaughter as a lesser included offense of first degree murder.¹⁰³

Pattern Jury Instructions: IPI Criminal, § 7.06 (4th ed. 2000) (instructing the jury on the burdens involved with second degree murder: the state has to prove its case beyond a reasonable doubt while the defendant has to prove a mitigating factor by a preponderance of the evidence).

100. Steigmann, *supra* note 13, at 495.

101. *Patterson*, 432 U.S. at 210.

102. *People v. Buckner*, 561 N.E.2d 335, 341 (Ill. App. Ct. 1990).

103. See, e.g., ALA. CODE § 13A-6-3 (2007) (defining manslaughter as “recklessly caus[ing] the death of another person”); ARIZ. REV. STAT. § 13-1103 (2007) (classifying as second degree murder a death resulting from a “heat of passion” killing); ARK. CODE ANN. § 5-10-104 (2007) (defining manslaughter as an “emotional killing”); CAL. PENAL CODE § 187, 192(a) (2008) (stating that voluntary manslaughter is the result of a “sudden quarrel or heat of passion”); COLO. REV. STAT. § 18-3-103(3)(b) (2007) (explaining second degree murder as “heat of passion” killing); DEL. CODE ANN. § 632 (2007) (categorizing second degree murder as “intentionally caus[ing] the death of another person under circumstances which do not constitute murder”); GA. CODE ANN. § 16-5-2 (2007) (defining voluntary manslaughter as “murder resulting from sudden provocation”); IDAHO CODE ANN. § 18-4006 (2007) (characterizing voluntary manslaughter as a “heat of passion” killing); IOWA CODE ANN. § 707.4 (2008) (defining voluntary manslaughter as a passion killing); KAN. STAT. ANN. §21-3403 (2006) (portraying voluntary manslaughter as killing with intent as a result of sudden passion); KY. REV. STAT. ANN. § 507.020 (2008) (explaining that a person will not be guilty of murder if the person acted under extreme emotional circumstances); LA. REV. STAT. ANN. § 14:31 (2008) (defining manslaughter as sudden provocation killing); MD. CODE ANN. § 2-204 (2007) (ratifying second degree murder as “murder that is not in the first degree”); MICH. COMP. LAWS ANN. § 750.321 (2008) (stating that anyone who commits manslaughter will be “guilty of a felony”); MINN. STAT. ANN. § 609.20 (West 2007) (formulating manslaughter as causing the death of another person “in the heat of passion”); MISS. CODE ANN. § 97-3-35 (2007) (defining

In those states, the lesser included approach understandably flows from the *mens rea* distinguishing the greater degrees of murder from the lesser grades of homicide. Thus, in some fourteen states “malice” or “malice aforethought” continues to be the mental state required for the most serious grades of murder.¹⁰⁴

Another grouping, consisting of fourteen jurisdictions, contains a similar requirement of “deliberation,” “premeditation” or “purposefulness.”¹⁰⁵ Only eight states require proof that the

manslaughter as a “heat of passion” killing); MO. REV. STAT. § 565.025 (2007) (classifying second degree murder as a lesser degree offense of first degree murder); MONT. CODE ANN. § 45-5-103 (2007) (defining second degree murder as “mitigated deliberate homicide”); NEB. REV. STAT. § 28-305 (2007) (stating that manslaughter is the killing of another person due to a “sudden quarrel”); NEV. REV. STAT. ANN. § 200.040 (2007) (requiring that manslaughter be a result of a “sudden heat of passion”); N.J. STAT. ANN. § 2c:14-4 (2007) (defining criminal homicide as manslaughter if a person acts recklessly and kills another); N.M. STAT. ANN. § 30-2-3 (2007) (defining manslaughter as killing due to “heat of passion”); N.C. GEN. STAT. § 14-18 (2007) (reporting that voluntary manslaughter is a class D felony); N.D. CENT. CODE § 12.1-16-01 (2007) (finding a person guilty of murder as a class AA felony if done under extreme emotional distress); OHIO REV. CODE ANN. § 2903.03 (West 2007) (explaining voluntary manslaughter to be a “sudden passion” killing); OR. REV. STAT. § 163.118 (2007) (killing in a reckless manner while under extreme emotional distress constitutes manslaughter in the first degree); PA. CONS. STAT. ANN. § 2503 (West 2007) (stating that voluntary manslaughter is the result of a sudden passion killing); R.I. GEN. LAWS § 11-23-3 (2007) (defining the prison term for manslaughter); S.C. CODE ANN. § 16-3-50 (2006) (stating that the prison term for manslaughter should not exceed thirty years); S.D. CODIFIED LAWS § 22-16-20.1 (2008) (characterizing second degree murder as a lesser included offense of first degree murder); TENN. CODE ANN. § 39-13-211 (2007) (killing in the heat of passion is voluntary manslaughter); TEX. PENAL CODE ANN. § 19.02 (Vernon 2007) (defining sudden passion as “provocation by the individual killed”); VA. CODE ANN. § 18-2-35 (2007) (defining non-premeditated killing as second degree murder); VT. STAT. ANN. § 13-2301 (2007) (classifying second degree murder as non-premeditated killing); W. VA. CODE ANN. § 61-2-1 (2007) (describing second degree murder as “non-willful killing”); WYO. STAT. ANN. § 6-2-105 (2007) (formulating voluntary manslaughter as “sudden heat of passion” killing).

104. CAL. PENAL CODE § 192(a) (2008); GA. CODE ANN. § 16-5-2 (2007); IDAHO CODE ANN. § 18-4006 (2007); IOWA CODE ANN. § 707.4 (2008); MISS. CODE ANN. § 97-3-35 (2007); NEB. REV. STAT. § 28-305 (2007); NEV. REV. STAT. ANN. § 200.040 (2007); N.M. STAT. ANN. § 30-2-3 (2007); N.C. GEN. STAT. § 14-18 (2007); R.I. GEN. LAWS § 11-23-3 (2007); S.C. CODE ANN. § 16-3-50 (2006); VA. CODE ANN. § 18-2-32 (2007); W. VA. CODE ANN. § 61-2-1 (2007); WYO. STAT. ANN. § 6-2-105 (2007).

105. ARIZ. REV. STAT. ANN. § 13-1103 (2007); ARK. CODE ANN. § 5-10-104 (2007); COLO. REV. STAT. § 18-3-103(3)(b) (2007); KAN. STAT. ANN. § 21-3403 (2006); MD. CODE ANN., CRIM. LAW § 2-204 (West 2008); MICH. COMP. LAWS ANN. § 750.321 (West 2008); MINN. STAT. ANN. § 609.20 (West 2007); MO. REV. STAT. § 565.025 (2007); MONT. CODE ANN. § 45-5-103 (2007); N.J. STAT. ANN. § 2C:11-4 (West 2007); OHIO REV. CODE ANN. § 2903.03 (West 2007); S.C. CODE ANN. § 16-3-50 (2006); TENN. CODE ANN. § 39-13-211 (2007); V.T. STAT. ANN. tit. 13, § 2301 (2007).

defendant's acts were performed intentionally or knowingly.¹⁰⁶ Thus, in the majority of these states manslaughter is viewed as a lesser included offense because the *mens rea* of the mitigating factors is less than the premeditation, deliberation or design traditionally encompassed within the concept of malice. Hence, the conceptual framework essentially follows the common law definition of manslaughter as an unlawful killing of another, without malice.¹⁰⁷

Interestingly, in allocating the burden of raising the issue of mitigating factors, a number of states utilize the affirmative defense approach. Some also have adopted what Professor O'Neill earlier advocated as a "free-floating burden."¹⁰⁸ Under this approach, *some evidence* of mitigating factors may come from the prosecution's case in chief or be presented on the defense side of the case. If the mitigating factors do indeed appear from the evidence, as with affirmative defenses, they must then be disproved by the state.¹⁰⁹ Thus, in Michigan, provocation must be "raised by the evidence."¹¹⁰ Missouri simply requires a "basis in the evidence,"¹¹¹ while in Kentucky, the requirement is "something in the evidence" sufficient to raise a reasonable doubt whether defendant is guilty of murder or manslaughter.¹¹² Still, some states like Alabama and Mississippi place the burden of injecting the issue on the defendant.¹¹³

As to the quantum of evidence required to warrant submission of the lesser included verdict, considerable disparity exists. In South Carolina, to warrant eliminating an instruction for manslaughter there should be no evidence tending to reduce the crime from murder.¹¹⁴ Nevada holds that the jury should receive a lesser included instruction as long as there is some

106. ALA. CODE § 13A-6-3 (2007); DEL. CODE ANN. tit. 11, § 637 (2007); KY. REV. STAT. ANN. § 507.020 (West 2008); LA. REV. STAT. ANN. § 14:31 (2007); N.D. CENT. CODE § 12.1-16-01 (2007); OR. REV. STAT. § 163.118 (2005); 18 PA. CONS. STAT. ANN. § 2503 (West 2007); TEX. PENAL CODE ANN. § 19.02 (Vernon 2007).

107. HALE, *supra* note 53, at 466; *Tillman*, 187 N.E.2d at 733.

108. Timothy P. O'Neill, *An Analysis of Illinois New Offense of Second Degree Murder*, 20 J. MARSHALL L. REV. 209, 221 (1986).

109. *See, e.g.*, CAL. CRIM. JURY INSTR. 571 (2007); GA. JURY INSTR.—CRIM. 2.10.40 (2007); MINN. STAT. ANN. § 609.20 (2007); MONT. CODE ANN. § 45-5-103 (2007); NEB. JURY INSTRUCTIONS 2D. 3.1; NEV. REV. STAT. ANN. § 200.050 (2007); N.J. STAT. ANN. § 2C:11-4(b)(2) (2007); N.M. UNIFORM INSTR. 14-220 (2007); N.C. JURY INSTR. CRIM. 206.10; S.D. PATTERN JURY INSTR. 3-24-26 (demonstrating that the "free-floating burden" has been adopted in these nine lesser-included jurisdictions).

110. MICH. CRIM. JUR. INSTR. Ed. 16.1.

111. MO. ANN. INSTR. CRIM. 3d. 313.04.

112. KY REV. STAT. ANN. § 507.030, cmt. 14 (2007).

113. ALA. CODE § 13A-6-2 (2007); MISS. CODE ANN. § 97-3-35 (2007).

114. *State v. Cole*, 525 S.E.2d 511, 513 (S.C. 2000).

evidence, no matter how weak or incredible to support it.¹¹⁵ California judges have a *sua sponte* duty to instruct on the lesser offense if evidence is substantial enough to warrant consideration.¹¹⁶ And, in other states the defendant must prove by the preponderance of the evidence the presence of the mitigating factor.¹¹⁷

A second group of jurisdictions treat mitigating factors within the rubric of affirmative defenses.¹¹⁸ Professor LaFave observes that the proper analytical approach views affirmative defenses as substantive defenses which negate guilt by canceling out the existence of some required element of the crime.¹¹⁹ As to the burden of production of evidence, LaFave notes that it is uniformly held that the defendant is obliged to raise the issue by putting in some evidence in support of the defense.¹²⁰

Once raised, allocation of the burden of persuasion appears to be split into distinctive camps.¹²¹ Some jurisdictions place the burden of persuasion on the defendant to prove the existence of the affirmative defense by a preponderance of the evidence. For example, in Connecticut the defendant may mitigate the charge of murder by injecting extreme emotional disturbance as an affirmative defense on which the burden is on the defendant to establish the defense by a preponderance of the evidence.¹²² Washington likewise utilizes the preponderance standard,¹²³ as

115. *Williams v. State*, 665 P.2d 260, 261 (Nev. 1983).

116. *People v. Breverman*, 960 P.2d 1094, 1106 (Cal. 1995).

117. ARK. CODE ANN. § 5-10-104 (2007); LA. REV. STAT. ANN. § 14:31 (2007); 4 OHIO JURY INSTR. 503.02; OR. REV. STAT. § 161.055 (2007); TEX. PENAL CODE ANN. § 19.02 (Vernon 2007), W. VA. CODE ANN. § 61-2-1 (2007).

118. Alaska, Connecticut, Hawaii, Indiana, Maine, Massachusetts, New Hampshire, New York, Oklahoma, Utah, Washington and Wisconsin.

119. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW*, § 1.8(c) 82-83 (2d ed. 2003).

120. *Id.*; Another commentator observed that:

A significant procedural difference is also present when a litigant is forced to bear a burden of production – the judge, rather than the jury will determine whether the burden has been met. If a judge decides that the burden of production on an issue has not been satisfied, he will not instruct the jury on that issue. Accordingly, the defendant will not receive a jury determination of the issue because, in effect, the judge has directed a verdict on it.

Ronald J. Allen, *Structuring Jury Decision Making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 329 (1980).

121. LAFAVE, *supra* note 119, at 83-84.

122. CONN. GEN. STAT. ANN. § 53a – 55 (West 2007).

123. WASH. REV. CODE. ANN. § 9A 32.050 (West 2007); *see also* *State v. Gallagher*, 103 P.2d 1100, 1105 (Wash. 1940) (stating that when a defendant admits to killing, it is presumed to be second degree murder and the defendant then has the burden of proving that his charge should be reduced to manslaughter).

does New York.¹²⁴ In Maine, the defendant also has the burden of proving by a preponderance of the evidence that he caused death while under the influence of extreme anger or extreme fear brought about by adequate provocation.¹²⁵ And, in New Hampshire, a defendant seeking to invoke the affirmative defense of extreme mental or emotional disturbance must carry the burden on a "balance of probabilities."¹²⁶

Other states provide that where the defendant has raised the issue by the required quantum of evidence, the prosecution has the burden of disproving the defense by proof beyond a reasonable doubt. Thus, in Alaska, where the defendant has injected issue of provocation by some evidence, the State must negate that defense beyond a reasonable doubt.¹²⁷ Connecticut similarly provides that extreme emotional disturbance is an affirmative defense and, when raised by some evidence, the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all the elements of the offense.¹²⁸ Hawaii requires the defendant to raise the defense of extreme mental disturbance by the preponderance standard and then places the burden upon State to prove beyond a reasonable doubt that he was not so acting.¹²⁹ In Indiana, where the defendant raises the mitigating circumstance of sudden heat by some evidence, it is the State's burden to disprove its existence beyond a reasonable doubt.¹³⁰ Massachusetts likewise provides that where there is some evidence of provocation, the Commonwealth has the burden of proving the absence of this mitigating factor in order to sustain the murder charge.¹³¹ And finally, in Wisconsin, where mitigating circumstances have been placed in issue by the trial evidence, the State must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilty of intentional homicide.¹³²

G. Lessons Learned

The foregoing survey of jurisdictions highlights Illinois' unique and anomalous relationship between first and second

124. N.Y. PENAL LAW § 125.20 (McKinney 2004).'

125. ME. REV. STAT. ANN. tit. 17A, § 203(1)(B) (2007).

126. *State v. Soucy*, 653 A.2d 561, 564 (N.H. 1995).

127. *LaPierie v. State*, 734 P.2d 997, 999 (Alaska Ct. App. 1987).

128. CONN. GEN. STAT. ANN. § 53(a)–12(b) (West 2007); *see also* *Taylor v. Commissioner*, 895 A.2d 246, 249 (Conn. 2006), *rev'd in part on other grounds*, 936 A.2d 611 (Conn. 2007) (providing that the defendant has the burden of proving the elements of the affirmative defense of extreme emotional disturbance by a preponderance of the evidence).

129. *State v. Tyquingco*, 723 P.2d 186, 187 (Haw. Ct. App. 1986).

130. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002).

131. *Commonwealth v. Dempsey*, 729 N.E.2d 293, 294 (Mass. App. Ct. 2000).

132. WIS. STAT. ANN. § 940.01 (West 2007).

degree murder. Unique, in that no state, other than ours, has structured its homicide offenses in such manner as to require proof of additional elements or factors to sustain a lesser degree or grade of murder. The anomaly, being a recognition that in theory as well as practice, second degree murder in Illinois is "murder plus" or first degree murder plus mitigating circumstances.¹³³ As we have seen, the genesis for that determination was the structuring of Criminal Code of 1961, transforming voluntary manslaughter from a lesser included offense to an offense having an identical mental state with murder.

In reality, second degree murder offered no solution to the problem. Rather, the preferred alternative proposed by Professor Haddad and ultimately by the *Reddick* court, was to treat mitigating circumstances like provocation and imperfect self-defense as affirmative defenses. Had the Illinois Supreme Court spoken earlier we would have been spared the anomaly and confusion inherent in the illogical and unworkable concept of "murder-plus." As is often said, this trip would have been unnecessary. The simplicity of the affirmative defense framework will become apparent from the statutory and instructional proposals which follow.

As noted, the final area of concern not remedied by the CLEAR Commission concerns the allocation of the burden to raise the issue of second degree murder. Should it be *some evidence* as the *Reddick* court concluded, or should the preponderance standard now utilized prevail. Here, the survey of other jurisdictions is not instructive as the results are rather evenly divided. However it is the opinion of the author, as well as a number of his judicial brethren, that sound reason compels re-adoption of the *some evidence* standard.

First, when a judge is called upon to decide whether a claim of self-defense is to be placed before the jury, the question to be resolved simply is that the record reflect some evidence to warrant the proposition requiring the State to prove the absence of justification. Yet, when a defendant seeks to inject the issue of imperfect self-defense, he must satisfy the higher preponderance standard. The differing burdens make no sense at all and are simply unfair. Utilizing the *some evidence* standard would restore symmetry between the burden employed in second degree murder and the statute controlling affirmative defenses.

Second, traditionally the preponderance of evidence standard has been a burden utilized in civil proceedings. To intertwine that

133. *Jeffries*, 646 N.E.2d at 595; see also O'Neill, *supra* note 60, at 109 (providing that under the Illinois Criminal Code of 1961, voluntary manslaughter was viewed by the courts as murder minus malice aforethought, although it was more consistent with the statute to recognize it as murder plus extenuating circumstances).

standard within the context of criminal burdens taxes the comprehension of lay jurors. A cursory analysis of the pattern instruction utilized in first and second degree murder where imperfect self-defense is at issue highlights the problem.¹³⁴ The jurors are first instructed that the State must prove beyond a reasonable doubt that the defendant intentionally, knowingly and unjustifiably killed the victim. Next, the jurors are told that the defendant must prove by a preponderance of the evidence that he reasonably believed he acted justifiably, but that his belief was unreasonable.¹³⁵ Then, the jurors are told that the State has the burden of disproving beyond a reasonable doubt what the defendant has offered in justification. In reading these instructions, many judges have expressed wonder that the jurors as well as themselves could be anything but confused. A return to the *some evidence* standard in the manner which follows would eliminate this conflicting and confusing verbiage.

II. ADDITIONAL STATUTORY AND INSTRUCTION CHANGES PROPOSED BY THE AUTHOR

§9-2. Second Degree Murder

(a) A person who kills an individual without lawful justification commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and with of the following mitigating factors are present:

(1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or

(2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

(b) Serious provocation is conduct sufficient to excite an intense

134. ILL. SUP. CT. COMM., ILLINOIS PATTERN JURY INSTRUCTIONS: IPI CRIMINAL, § 7.06 (4th ed. 2000).

135. ILL. SUP. CT. COMM., ILLINOIS PATTERN JURY INSTRUCTIONS: IPI CRIMINAL, § 7.05 (4th ed. 2000). Regarding "belief in justification" in Illinois, the instructions state:

A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable.

Id.

passion in a reasonable person.

~~(c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of mitigating circumstances at the time of the killing establishing that the defendant acted under a sudden and intense passion resulting from serious provocation by the individual killed or another, or that he reasonably believed the circumstances to be such that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.~~

ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL)

7.04 Issues Where Jury Instructed On Both First Degree Murder And Second Degree Murder—Provocation

To sustain either the charge of first degree murder or the charge of second degree murder, the State must prove the following propositions:

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

Second Proposition: 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 to ____;

[or]

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

Third Proposition: That when the defendant did so,

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

[or]

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

[1] If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should find the defendant ~~go on with your deliberations to decide whether a mitigating factor has been proved so that the defendant is guilty of the lesser offense of second degree murder instead of first degree murder.~~

[2] If you find from your consideration of all the evidence that the first two propositions have been proved beyond a reasonable doubt, but any one of these the third proposition has not been proved beyond a reasonable doubt, ~~your deliberations [on these charges] should end, and you should return a verdict of not guilty [of first degree murder] of second degree murder.~~

[3] If you find from your consideration of all the evidence that either the first or second propositions have not been proved beyond a reasonable doubt you should find the defendant not guilty.

~~You may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have first determined that the State has proved beyond a reasonable doubt each of the previously stated propositions.~~

~~The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder. By this I mean that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true that the following mitigating factor is present: that the defendant, at the time he performed the acts which caused the death of, acted under a sudden and intense passion resulting from serious provocation by [(the deceased) (some other person he endeavors to kill, but he negligently or accidentally kills the deceased)].~~

~~If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of second degree murder.~~

~~If you find from your consideration of all the evidence that the defendant has not proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of first degree murder.~~

7.06 Issues Where Jury Instructed On Both First Degree Murder And Second Degree Murder—Belief In Justification

To sustain either the charge of first degree murder or the charge of second degree murder, the State must prove the following propositions:

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

Second Proposition: 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 to ____;

[or]

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

and

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

and

Fourth Proposition: That the defendant did not reasonably believe that circumstances existed which would have justified the killing.

[1] If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should find the defendant ~~go on with your deliberations to decide whether a mitigating factor has been proved so that the defendant is guilty of the lesser offense of second degree murder instead of first degree murder.~~

[2] If you find from your consideration of all the evidence that the first three propositions have been proved a reasonable doubt, but any one of these the fourth propositions has not been proved beyond a reasonable doubt, your deliberations [on these charges] should end, and you should return a verdict of not guilty [of first degree murder] of second degree murder.

[3] If you find from your consideration of all the evidence that either the first, second or third proposition has not been proved beyond a reasonable doubt you should find the defendant not guilty.

~~You may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have first~~

determined that the State has proved beyond a reasonable doubt each of the previously stated propositions.

The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder. By this I mean that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true that the following mitigating factor is present: that the defendant, at the time he performed the acts which caused the death of _____, believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of second degree murder.

If you find from your consideration of all the evidence that the defendant has not proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of first degree murder.

III. ATTEMPT SECOND DEGREE MURDER

A. *The Problem*

The mandate of the CLEAR Commission also encompassed what authors and legal commentators have widely perceived as the disparate treatment of offenders resulting from judicial interpretation of our inchoate and substantive homicide offenses.¹³⁶ A classic hypothetical serves to highlight the anomaly confronting a defendant who, having found his significant other *flagrante delicto*, fires a handgun at her paramour. If his marksmanship fails and the paramour lives, the defendant may be subject to a greater penalty than had he died. The irony proceeds from the near certainty that the accused will be charged with attempt murder, a Class X felony, and, if found guilty will face a non-probational sentence of six to thirty years imprisonment. However, if his aim is true and the paramour is dispatched, a jury may be inclined to find the provocation sufficient to mitigate the homicide to second degree murder, a Class 1 felony with a potential

136. See *infra* notes 152-55 (citing commentators who recognize the anomaly created by the fact that there is no offense of attempted second degree murder in Illinois).

sentence of four to twenty years, or probation.¹³⁷

This disparate result stems from a line of precedent holding that the crime of attempt second degree murder does not exist in Illinois. Although the initial focus of the courts concerned the predecessor offense of voluntary manslaughter, the underlying rationale of the decisions remained constant; that is, an attempt to commit voluntary manslaughter or second degree murder is a logical and legal impossibility.

B. The Background

The notion that an attempt to commit an offense was in itself a crime came relatively late in Anglo-American jurisprudence. The early history of attempts was traced by the Maryland Court of Special Appeals in *Gray v. State*.¹³⁸

It had its origins in the Court of Star Chamber during Tudor and early Stuart times. Its crystallization into its present form, however, is generally traced to the case of *Rex v. Scofield*, Cald. 397, in 1784 . . . The doctrine was locked into its modern mold by 1801 with the case of *Rex. v. Higgins*, 2 East 5. . . In the wake of *Scofield* and *Higgins*, it was clear that an attempt to commit any felony or misdemeanor of common law origin or created by statute, was itself a misdemeanor.¹³⁹

At common law, the crime of attempt consisted of: (1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which as it is most commonly put, goes beyond mere preparation.¹⁴⁰ Our Criminal Code mirrors the common law definition:

A person commits an attempt when, with intent to commit a specific offense, he does an act which constitutes a substantial step toward the commission of that offense.¹⁴¹

Since the adoption of our 1961 Code, Illinois judges have endeavored to resolve the question of whether the crime of attempt embraced lesser grades of homicide such as voluntary manslaughter. Over forty years ago in *People v. Weeks*,¹⁴² the defendant challenged such a verdict asserting that because an attempt must involve a specific intention to commit the crime

137. See *Fausz*, 449 N.E.2d at 80 (delineating the circumstances recognized to constitute serious provocation under Illinois law as substantial physical injury or assault, mutual quarrel or combat, illegal arrest and adultery with the defendant's spouse).

138. 403 A.2d 853, 854 (Md. Ct. Spec. App. 1979).

139. *Id.* at 854-55.

140. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW*, § 11.3, at 211 (West 2003).

141. 720 ILL. COMP. STAT. 5/8-4(a) (2007).

142. 230 N.E.2d 12, 13 (Ill. App. Ct. 1967).

whereas voluntary manslaughter can exist where there is no such intention, an attempt to commit voluntary manslaughter is a logical and legal impossibility. The Second District agreed:

... An act cannot be both the result of a "sudden and intense passion" and a calculated goal of prior deliberation. It is either one or the other but it cannot be both. Consequently, we agree that there can be no such crime as an Attempt to Commit a Voluntary Manslaughter.¹⁴³

An identical result followed in *People v. Reagan*,¹⁴⁴ where the court endeavored to determine whether there existed a crime of attempt voluntary manslaughter based on imperfect self defense. In support of the existence of the offense, the State offered that a logical interpretation of the statute was that although a defendant must specifically intend to kill, his intent must be accompanied by the subjective, yet unreasonable belief that the killing was justified. In rejecting the State's argument, our supreme court reasoned:

"As the State concedes, it is impossible to intend an unreasonable belief. If a defendant intended to kill with the knowledge that such action was unwarranted, he has intended to kill without lawful justification and could be prosecuted for attempted murder. In the case at bar, the defendant intended to defend himself. Although his belief in the need to defend himself or in the need to use deadly force was unreasonable, his intent was not to commit a crime. His intent was to engage in self-defense which is not a criminal offense."¹⁴⁵

The landscape changed albeit temporarily following the enactment of second degree murder in 1986. Thus, in *People v. Moore*,¹⁴⁶ the Third District, in reviewing a conviction for attempt second degree based upon provocation, observed that the recently enacted statute required a finding that the defendant had a specific intent to kill, but that her conduct was mitigated by provocation. Reasoning that the intent element was now unrelated to the mitigating factor of provocation, the court determined that the defendant could indeed be convicted of attempt second degree murder.¹⁴⁷ Similarly, in *People v. Austin*,¹⁴⁸ the Second District concluded that the offense of attempt second degree murder based upon imperfect self-defense likewise existed.

143. *Id.* at 14.

144. 457 N.E.2d 1260, 1261-62 (Ill. 1983).

145. *Id.* at 1262.

146. 562 N.E.2d 215, 217 (Ill. App. Ct. 1990).

147. *Id.* But cf. *People v. Aliwoli*, 606 N.E.2d 347, 360 (Ill. App. Ct. 1992) (finding that attempted second degree murder was not a crime in Illinois, the court rejected the view that the legislature had transformed voluntary manslaughter into a specific intent offense or diminished the applicability of *Reagan*).

148. 574 N.E.2d 1297, 1303-04 (Ill. App. Ct. 1991).

The key, as the court explained, was an understanding that the new statute required a two-step process. The jury must first find the defendant intended to kill without lawful justification, and, having so concluded, could still determine that the defendant actually thought the need to act in self-defense, but that he was mistaken.¹⁴⁹

The issue eventually was laid to rest in *People v. Lopez*,¹⁵⁰ where our supreme court rejected the argument that the crime of attempt second degree murder based upon provocation or imperfect self-defense existed in Illinois. Although the court recognized that in *Jeffries* it had concluded that first and second degree murder are similar in that they have the same mental states, what distinguishes the two offenses is presence of mitigating circumstances which reduce first degree murder to second degree murder. The court then analyzed the *mens rea* of attempt, accepting the State's argument that the intent required for attempted second degree murder, if it existed, would be the intent to kill without lawful justification and with either a sudden passion or an unreasonable belief in the need for self-defense. However, as the court concluded,

...one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force. Moreover, concerning the mitigating factor of an imperfect self-defense, one cannot intend to unlawfully kill while at the same time intending to justifiably use deadly force. Thus, the offense of attempted second degree murder does not exist in this State.¹⁵¹

Some legal commentators have suggested that the holding and rationale of *Lopez* is contradicted by the plain language of the statute as well as the intent of the legislature. Well before the advent of second degree murder, Professor LaFave disagreed with the basic premise of *Weeks* that because voluntary manslaughter

149. *Id.* But see *People v. Williams*, 581 N.E.2d 113, 116 (Ill. App. Ct. 1991); *People v. Cruz*, 618 N.E.2d 591, 595 (Ill. App. Ct. 1993); *People v. Fletcher*, 625 N.E.2d 1185, 1186-87 (Ill. App. Ct. 1993) (rejecting the Austin rationale, these courts concluded instead that attempted second degree murder based on imperfect self defense did not exist in Illinois).

150. 655 N.E.2d 864, 867 (Ill. 1995).

151. *Id.* Conversely, the dissent concluded that attempted second degree murder is simply attempted first degree murder plus mitigating circumstances. *Id.* at 870-71 (McMorrow, J., dissenting). Relying upon *Jeffries*, the dissent reasoned that in enacting the new statute the legislature separated the mitigating factors for second degree murder from the elements which were required to be proven by the prosecution. *Id.* at 870 (McMorrow, J., dissenting). Under that analysis, the co-existence of attempted second degree analysis with the present homicide statute does not require the impossible situation that the defendant intended to act under one of the mitigating circumstances. *Id.* at 870-71 (McMorrow, J. dissenting).

can result only from serious provocation, it cannot be committed with an intent to kill.¹⁵² Likewise, in an earlier edition of his authoritative treatise, Professor John F. Decker noted that while the specific intent required of criminal attempt clashes with the offense of involuntary manslaughter, it would be logical to have a crime of attempted voluntary manslaughter.¹⁵³ Moreover, the authors of the new statute weighed in early in favor of attempt second degree murder asserting that the specific intent required is simply the intent to kill, rather than the intent to commit a specific offense.¹⁵⁴ Professor Haddad, however, parted company from the proponents, announcing that the same reasons the supreme court used to deny recognition of attempted voluntary manslaughter likewise foreclosed recognition of attempted second degree murder.¹⁵⁵

The debate engendered over this controversial question is further heightened by the fact that the crime of attempted voluntary manslaughter or second degree murder has been recognized in a number of jurisdictions.¹⁵⁶ In states such as Indiana, Louisiana, Nebraska and Pennsylvania, as in Illinois, the crime of attempt requires an intent to commit a specific offense.¹⁵⁷

152. 2 LAFAVE & SCOTT, *supra* note 140, at § 6.2 p. 27 n. 88. Or, as articulated by another writer: "It is inability to restrain an unlawful intent, not inability to form the intent in the first place, which is the true hallmark of heat-of-passion manslaughter." Joshua Sacks, *Is Attempt to Commit Voluntary Manslaughter a Possible Crime?*, 71 ILL. B.J. 166, 170 (1982).

153. JOHN F. DECKER, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES 167 (1986). Regarding attempted voluntary manslaughter:

[I]t would seem that if a defendant was faced with such a provocation but failed to take the life of the person he or she was provoked to kill, it would be attempted voluntary manslaughter in the same way that it would be voluntary manslaughter if the defendant actually killed the person. Similarly, if the defendant tried unsuccessfully to take a person's life while subjectively thinking that it was justified by self-defense, it would appear proper to hold the defendant for attempted voluntary manslaughter in the same way he or she would be held for voluntary manslaughter if the effort to take a life was successful. In both cases, the mitigating factor that the courts take cognizance of for purposes of the consummated crime could conceptually be vital where the effort to take a life failed.

Id.

154. See Steigmann, *supra* note 13, at 498 (stating that one reason the legislature changed the name of the crime of voluntary manslaughter to second degree murder was so that the Illinois Supreme Court would recognize the crime of attempted second degree murder); see also O'Neill, *supra* note 108, at 223 (arguing that second degree murder will allow for attempted second degree murder while voluntary manslaughter would not).

155. Haddad, *supra* note 32, at 1023.

156. Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Mexico, Nevada, Pennsylvania, Texas and Utah.

157. IND. CODE § 35-41-5-1 (2007); LA. REV. STAT. ANN. § 14:27 (2007); NEB.

Although not codified in Maryland, its common law adaptation likewise requires a specific intent.¹⁵⁸ Florida has also recognized the crime, but requires only a general intent to commit the inchoate as well as the completed offense.¹⁵⁹

As perhaps anticipated, in states upholding the existence of the inchoate offense the rationale differs markedly from the logic articulated by Illinois courts. For example, in *Comm. v. Burns*,¹⁶⁰ the Pennsylvania court reasoned that a conviction for attempted voluntary manslaughter was proper where the defendant was operating under an unreasonable mistaken belief that the attempted killing was justifiable under a self-defense claim.¹⁶¹ A similar result obtained in *State v. Norman*,¹⁶² a Utah case where the defendant's attempted manslaughter conviction based upon conduct while under the influence of extreme mental or emotional disturbance was upheld as an included offense of criminal homicide.¹⁶³ Moreover, the logic employed by a California court in *People v. Van Ronk*,¹⁶⁴ while in sharp contrast to the rationale articulated by our *Lopez* court is equally persuasive.

It is true that a person cannot plot in advance to kill in the heat of passion. Such a calculated plan is logically inconsistent with a spontaneous act committed in a moment of passion. But an assailant can form an intent to kill even under a paroxysm of passion. And this is true regardless of whether he is successful or unsuccessful in carrying out his intent. There is nothing illogical or absurd in a finding that a person who unsuccessfully attempted to kill another did so with the intent to kill which arose out of an honest but unreasonable belief in the necessity of self-defense. Under those circumstances, the less culpable person is guilty of attempted voluntary manslaughter rather than attempted murder.¹⁶⁵

C. Clear's Analysis And Response

In its initial appraisal of the problem the CLEAR Commission logically recognized that the heart of the controversy stemmed from the Illinois Supreme Court's construction of the attempt statute and more particularly its interplay with second degree murder. The Commissioners understood that since at least 1983, in *People v. Reagan*,¹⁶⁶ the court had rejected the notion that under

REV. STAT. § 28-201(1)(b) (2007); 18 PA. CONS. STAT. ANN. § 901(a) (2007).

158. *Cox v. State*, 534 A.2d 1333, 1335 (Md. 1988).

159. *Gentry v. State*, 437 So.2d 1097, 1099 (Fla. 1983).

160. 765 A.2d 1144, 1150 (Pa. Super. Ct. 2000).

161. *Id.*

162. 580 P.2d 237, 240 (Utah 1978).

163. *Id.*

164. 217 Cal. Rptr. 581 (Cal. Ct. App. 1985).

165. *Id.* at 585.

166. 457 N.E.2d 1260, 1261 (Ill. 1983).

the structure of our attempt statute it was logically possible to recognize the offense of attempt voluntary manslaughter, a belief reaffirmed in *People v. Lopez*¹⁶⁷ in rejecting the existence of attempt second degree murder. CLEAR debated the court's interpretation of the statute as requiring a specific intent with regard to the elements of the underlying crime. Carried to its logical conclusion, to commit the offense of attempt second degree murder, the person must have an intent to commit murder resulting from *heat of passion or imperfect self-defense*, which the court found to be logically impossible.

In the hope of crafting a workable remedy several proposals were drafted and reviewed. One simply amended Section 8-4 to clarify the existence of attempt second degree murder:

Sec. 8-4. Attempt.

(a) Elements of the Offense. A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of the offense. A person commits attempt second degree murder when, with the intent to commit first degree murder, he does any act which constitutes a substantial step toward the commission of that offense and either of the mitigating factors set forth in the statute defining second degree murder are present.¹⁶⁸

Next followed a proposal to codify the crime of attempt second degree murder, expressly removing Section 8-4 from the offense:

§720 ILCS 5/9-XX. Attempt second degree murder

Sec. 9-XX. Attempt second degree murder. (a) A person commits Attempt second degree murder when, with the intent to kill an individual, he does any act which constitutes a substantial step toward the commission of the homicide, and either of the following mitigating factors are present:

(1) he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or

(2) he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

(b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

167. 655 N.E.2d 864, 866 (Ill. 1995).

168. CLEAR, *Recommendation #20, Attempted Second Degree Murder* (Meeting III, July 28, 2005).

(c) When a defendant is on trial for attempt first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of attempt second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of attempt first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of the Code.

(d) The attempt statute, Section 8-4, does not apply to this offense.

(e) Sentence. Attempt Second Degree Murder is a Class 1 felony.¹⁶⁹

When neither of these proposals carried the day the Commission focused on a somewhat different approach of amending the attempt statute or the Uniform Code of Corrections, allowing for mitigation in sentencing upon a conviction for the subject offense.¹⁷⁰ It was believed that this proposal would eliminate the intent issues previously identified because the State would still be required to prove the elements of attempt first degree murder, from which the sentence would be mitigated. Comporting with decisional law, the offense of attempt second degree murder would remain undefined and unrecognized at law. At the same time, defendants would have the opportunity to provide mitigating factors consistent with the rationale of second degree murder. The proposed change simply added the following paragraph to the sentencing provisions of Section 8-4:

(1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that . . .

(E) if the defendant proves by a preponderance of the evidence at sentencing that at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony.¹⁷¹

169. CLEAR, *Recommendation #345*, Codifies the Offense of Attempt Second Degree Murder (Meeting VII, date July 27, 2006).

170. See 730 Ill. Comp. Stat. 5/5 to 5/5-3 (West 2007) (as amended by P.A. 94-1035, effective July 1, 2007) (providing classification of offenses for sentencing purposes), and 730 Ill. Comp. Stat. 5/5 to 5/3.1 (West 2007) (outlining grounds for according weight in mitigating sentences).

171. CLEAR, *Proposed CLEAR Meetings 1-7 Bill*, § 8-4 (Meeting VIII, date September 13, 2006).

In adopting this proposal, it was the consensus of the Commission that rather than create an entirely new offense, a virtual impossibility, the proposal provided a better way to address the sentencing concerns previously identified. Accordingly, a defendant found guilty of attempt first degree murder could present provocation evidence at sentencing, and if proved by the preponderance standard would be sentenced as a Class 1 offender.

Commentators and practitioner alike may question why CLEAR's proposal did not also encompass imperfect self defense. Dictates of logic as well as symmetry could well argue for inclusion of this mitigating factor. As with the substantive offense of second degree murder, a defendant might well entertain a belief that the use of deadly force was warranted, but be mistaken in that belief. However, in rejecting suggestions to include imperfect self defense, CLEAR relied upon the teaching of *Lopez*, a defendant who actually believed that he was acting in self defense should be acquitted of attempt first degree murder as he did not intend to kill without lawful justification.¹⁷²

IV. CONCLUSION

This article understandably addresses but two aspects of the formidable challenges confronted by the CLEAR Initiative. From the breadth of background material, historical development and present concerns, the complex and daunting task of CLEAR in identifying and addressing these two concerns, as well as countless others, should be apparent. As the Symposium demonstrates, many problems were identified and many were remedied. Yet, as also shown, concerns remain warranting the attention of the legislature. Hopefully, they will be addressed as we move onward.

172. *Lopez*, 655 N.E.2d at 867-68.