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## Murder Plus Mitigation: The Lesser Mitigated Offense Arrives in Illinois, 27 J. Marshall L. Rev. 61 (1993)

Daniel B. Shanes

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# MURDER PLUS MITIGATION: THE “LESSER MITIGATED OFFENSE” ARRIVES IN ILLINOIS

DANIEL B. SHANES\*

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I would like to thank my wife Diane for her unending endurance, support, and faith.

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## I. INTRODUCTION

In 1987, Illinois repealed its murder and voluntary manslaughter statutes and replaced them with the new laws of first and second degree murder. Since that time, courts have been grappling with the new laws, trying to adjust their thinking and reach a "just result."

Central to this struggle has been the shift in the burden of proving mitigation in order to reduce the degree of murder. Under the old statute, the State carried the burden to prove all the elements of each offense beyond a reasonable doubt, including the mitigation necessary for a voluntary manslaughter conviction.<sup>1</sup> Under

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1. However, it was the State that often argued the evidence was insufficient to warrant a voluntary manslaughter conviction, seeking instead to convict the defendant of murder. See *infra* notes 23-45 and accompanying text for

the new first and second degree scheme, however, after the State has proven all the elements of first degree murder beyond a reasonable doubt, the defendant must prove, by a preponderance of the evidence, one of the specified factors of mitigation in order to be found guilty of second degree murder. This shift in the placement of the burden of proof for the mitigation has radically changed the state of homicide law in Illinois. It has also left much of the judiciary behind, still trying to apply old concepts to new law.

Any change in statutory law obviously requires judicial adjustment. The difficulty arising from the current statute brings to mind the adage that "hard cases make bad law."<sup>2</sup> There is no case harder to try, for the accused, counsel or court, than a murder case. Judges have a well-developed sense as to justice and fairness of results. However, faced with these new and rather unique<sup>3</sup> statutes, judges appear to be searching for, and finding, varied approaches to reach these outcomes. This has led to a few conflicting ideas. In the process, many courts seem compelled to turn the statute upside down, destroying its clear meaning and distorting its intent. On the other hand, some courts have found a way to reach similar outcomes without torturing the statute or logic in the process.

Under the old statutes, a defendant whose voluntary manslaughter conviction was reversed and remanded for a new trial could not be retried for murder. Many judges considered voluntary manslaughter as a lesser included offense of murder. Therefore, retrying the defendant for murder seemed to clearly violate double jeopardy principles.

Many courts today simply paste these same notions onto the new first and second degree murder statutes. These familiar concepts, however, do not apply. Second degree murder is not a lesser included offense of first degree murder. As such, a court should never even reach the double jeopardy analysis. One court found a new way to characterize the relationship between first and second degree murder, tagging second degree murder as a "lesser mitigated offense"<sup>4</sup> of first degree murder. This description works, and works well.

Once properly understood to be a lesser mitigated offense of first degree murder, courts can easily apply the second degree murder statute at trial and on appeal. At retrial, collateral estoppel

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a discussion of the State's confused role under the murder and voluntary manslaughter statutes in the Criminal Code of 1961.

2. *E.g.*, *Hilton v. South Carolina Pub. Ry. Comm'n*, 112 S. Ct. 560, 566 (1991) (O'Connor, J., dissenting).

3. The only other statute in Illinois which places the burden of proof on the defendant at trial is the insanity provision. *See* 720 ILCS 5/6-2(e) (1992) (requiring the defendant to prove his insanity by a preponderance of the evidence).

4. *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

prevents a second degree murder defendant from facing a first degree murder conviction. Double jeopardy, familiar and reliable as it may be, is unnecessary and indeed inappropriate. Nonetheless, courts can reach the same desired goal within the bounds of the law.

First, this Article briefly discusses Illinois' predecessor laws regarding what the State referred to as murder and manslaughter.<sup>5</sup> Second, the Article describes the new homicide law which shifts the burden of proving mitigation to the defendant. Third, the Article explores the various constitutional challenges to the new law.<sup>6</sup> Fourth, the Article discusses the doctrine of the lesser included offense, and it analyzes the doctrine's application in several different cases.<sup>7</sup> Fifth, the Article briefly discusses the doctrines of implied acquittal and double jeopardy.<sup>8</sup> Sixth, the Article explores the doctrine of collateral estoppel and its application in a murder case.<sup>9</sup>

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5. In 1987, Illinois codified these homicides as first and second degree murder. 1984 Ill. Laws 4221, PA 84-1450. See *infra* notes 46-63 and accompanying text for a discussion of first and second degree murder statutes. Up to that point, they were known as murder and voluntary manslaughter. See *infra* notes 17-45 and accompanying text for a discussion of Illinois' murder and voluntary manslaughter statutes before and after the adoption of the Criminal Code of 1961. The similarities and differences between the various statutory schemes are important in murder cases tried under the new statutes.

6. In particular the Article focuses on the Due Process Clause, the Equal Protection Clause and the separation of powers doctrine. See *infra* notes 67-97 and accompanying text for a discussion of the due process challenges to the new statutes. See *infra* notes 98-127 and accompanying text for a discussion of the Equal Protection challenges to the new statutes. See *infra* notes 128-151 and accompanying text for a discussion of the separation of powers challenges to the new statutes. Furthermore, this section addresses some of the interesting tangential issues. See, e.g., *infra* notes 132-151 and accompanying text addressing whether the State can initially charge the defendant with second degree murder.

7. See *infra* notes 171-205 and accompanying text. Some Illinois courts find that second degree murder is a lesser included offense within first degree murder. See *infra* notes 171-181 and accompanying text for a discussion of decisions finding second degree murder to be lesser included in first degree murder. Other Illinois courts vigorously reject this hypothesis. See *infra* notes 206-227 and accompanying text for a discussion of decisions rejecting the lesser included offense analysis in the first and second degree murder context.

The Article analyzes the propriety of this lesser included offense doctrine and concludes that second degree murder cannot be a lesser included offense of first degree murder. See *infra* notes 206-227 and accompanying text.

8. See *infra* notes 229-239 and accompanying text. The Article explains why these theories do not apply in the context of the first and second degree murder statutes. See *infra* notes 240-245 and accompanying text for a discussion of the inapplicability of double jeopardy theory in the first and second degree murder context. The article highlights two Illinois Appellate Court cases which misapply the lesser included offense and double jeopardy doctrines in the first and second degree murder context. See *infra* notes 246-271 and accompanying text for a discussion of *People v. Collins*, 572 N.E.2d 1005 (Ill. App. Ct. 1991), *appeal denied*, 580 N.E.2d 122 (Ill. 1991), and *People v. Godina*, 584 N.E.2d 523 (Ill. App. Ct. 1991), *appeal denied*, 581 N.E.2d 26 (Ill. 1992).

9. See *infra* notes 272-307 and accompanying text for a discussion of the operation of collateral estoppel. As the Article makes clear, collateral estoppel

Seventh, the Article examines the lesser mitigated offense characterization, and discusses how that nomenclature aptly applies to the second degree murder statute.<sup>10</sup> Eighth, the Article examines whether the State may use collateral estoppel against a defendant.<sup>11</sup> Ninth, the Article highlights two cases docketed before the Illinois Supreme Court this term, and addresses their challenges to one type of second degree murder and its interplay with self-defense.<sup>12</sup> The Article concludes that Illinois should follow the clear intent in the murder statutes and classify second degree murder as a lesser mitigated offense of first degree murder instead of continuing the confusion surrounding the murder statutes.

## II. THE OLD LAWS

Since early statehood, Illinois divided "intentional homicide" into two major types. For most of that time, the State classified an intentional homicide as either murder or voluntary manslaughter.<sup>13</sup> Originally, the murder and voluntary manslaughter configurations depended on the presence or absence of malice

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properly precludes a first degree murder conviction against a second degree murder defendant facing a new trial.

10. See *infra* notes 309-332 and accompanying text for a discussion of second degree murder as a lesser mitigated offense of first degree murder.

11. See *infra* notes 333-335 and accompanying text for a discussion of the potential application of collateral estoppel against a first degree murder defendant. This issue would arise when a defendant, found guilty of first degree murder at his initial trial, is similarly remanded for a new trial. The question becomes whether the State could estop the defendant from relitigating mitigation at the new trial.

12. See *infra* notes 336-353 and accompanying text for a discussion of a second degree murder case based on self-defense which leads to issues involving the defendant's unreasonable belief.

13. Illinois gained statehood in 1818. ROBERT P. HOWARD, ILLINOIS: A HISTORY OF THE PRAIRIE STATE 97 (1972). Soon thereafter, the state adopted its homicide laws. See, e.g., 1827 Ill. Laws 127, § 22 (defining murder as "the unlawful killing of a human being . . . with malice aforethought, either express or implied"); 1827 Ill. Laws 128, §§ 25, 26 (disregarding malice aforethought and requiring "some actual assault upon the person killing, or an attempt by the person killed, to commit a serious personal injury on the person killing"); ILL. REV. STAT. ch. 38, para. 358 (1959) (defining the elements of murder prior to the adoption of the Criminal Code of 1961); ILL. REV. STAT. ch. 38, paras. 361, 362 (1959) (defining the elements of voluntary manslaughter prior to the adoption of the Criminal Code of 1961).

Illinois has also categorized homicide as involuntary manslaughter and reckless homicide, 720 ILCS 5/9-3 (1992), feticide, ILL. REV. STAT. ch. 38, para. 9-1.1 (1985) (repealed 1986), as well as the related offenses of concealment of a homicidal death, 720 ILCS 5/9-3.1 (1992), and concealment of the death of a bastard, ILL. REV. STAT. ch. 38, para. 9-4 (1985) (repealed 1988). Illinois replaced the feticide statute with the offenses of intentional homicide of an unborn child, 720 ILCS 5/9-1.2 (1992), voluntary manslaughter of an unborn child, 720 ILCS 5/9-2.1 (1992), and involuntary manslaughter and reckless homicide of an unborn child, 720 ILCS 5/9-3.2 (1992). In addition, the Legislature has also recently added the crime of drug induced homicide. 720 ILCS 5/9-3.3 (1992).

aforethought.<sup>14</sup> With the adoption of the Criminal Code of 1961, Illinois replaced the concept of malice aforethought with the requisite mental states of intent and knowledge.<sup>15</sup> In 1987, the Illinois Legislature abandoned the murder/voluntary manslaughter scheme in favor of the current first and second degree murder statutes; however, the basic elements of the two offenses have been retained from the 1961 codification.<sup>16</sup> This section addresses the homicide laws prior to the Criminal Code of 1961. It then discusses the interpretation of the Criminal Code of 1961 and the Code's importance to the current homicide laws in Illinois.

### A. Homicide Laws Prior to the Criminal Code of 1961

From the Middle Ages until comparatively recent times, murder was the sole homicide offense.<sup>17</sup> Prior to the adoption of the

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14. Compare ILL. REV. STAT. ch. 38, para. 358 (1959) (requiring malice aforethought as an element of murder) with ILL. REV. STAT. ch. 38, paras. 361, 362 (1959) (requiring the absence of malice aforethought as an element in voluntary manslaughter cases). See *infra* note 23 and accompanying text for a discussion of malice aforethought after the adoption of the Criminal Code of 1961.

15. *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986).

16. See *People v. Clark*, 565 N.E.2d 1373, 1379 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 918 (Ill. 1991) ("[T]he elements of first degree murder under the current statute are identical to the offense of murder under the prior statute. . . . The mitigating factors of second degree murder are identical to the factors which would have reduced murder to voluntary manslaughter under the prior law."); see also 1986 Ill. Laws 4221, PA 84-1450 (demonstrating the changes in the statutes). Compare ILL. REV. STAT. ch. 38, para. 9-1(a) (1985) (defining murder) with 720 ILCS 5/9-1(a) (1992) (defining first degree murder); compare ILL. REV. STAT. ch. 38, para. 9-2 (1985) (defining voluntary manslaughter) with 720 ILCS 5/9-2 (1992) (defining second degree murder).

17. PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 779 (2d ed. 1986). By the sixteenth century, manslaughter had evolved into a lesser, non-capital homicide offense. Low, *supra*, at 779. As it matured, the dividing line between murder and manslaughter became the concept of malice aforethought. *Id.* at 780. According to one commentator during this period, murder exists "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." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 195 (1854) (quoting Lord Coke). Blackstone defined manslaughter as "the unlawful killing of another, without malice either express or implied . . . ." *Id.* The difference between the two crimes was "that manslaughter arises from the sudden heat of the passions, murder from the wickedness of the heart." *Id.* at 190. In other words, manslaughter was defined as a homicide committed without malice aforethought but which lacked justification or excuse. Low, *supra*, at 780.

Early English authorities held that once the prosecution proved the accused had committed the homicide, it was incumbent upon the defendant to prove the mitigation to reduce the severity of the punishment. At common law, therefore, the burden of proving the heat of passion for mitigation appeared to rest on the defense. *Mullaney v. Wilbur*, 421 U.S. 684, 694 (1975). Early on, Illinois adopted this principle statutorily. In a homicide trial, once the prosecution established an unlawful killing, "the burthen [sic] of proving circumstances of mitigation, or that justify or excuse the homicide, [would] devolve on the accused . . . ." 1827 Ill. Laws 130, § 40. See generally JOHN F. DECKER, ILLINOIS

Criminal Code of 1961, Illinois utilized a statutory scheme that categorized "intentional" homicide as either murder or voluntary manslaughter.<sup>18</sup>

Illinois' prior homicide laws reflected the common law definition of murder as "the unlawful killing of a human being . . . with malice aforethought, either express or implied."<sup>19</sup> In contrast to murder, voluntary manslaughter was "the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever."<sup>20</sup> Thus, through 1961, Illinois treated malice aforethought as an element of murder.<sup>21</sup> On the other hand, voluntary manslaughter was essentially murder without malice.<sup>22</sup>

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CRIMINAL LAW 187-88 (1986) (discussing the murder and voluntary manslaughter statutes under the 1961 Criminal Code); Low, *supra*, at 779-81 (providing a history of criminal homicide).

18. ILL. REV. STAT. ch. 38, para. 358 (1959); ILL. REV. STAT. ch. 38, paras. 361, 362 (1959)

19. ILL. REV. STAT. ch. 38, para. 358 (1959). The law implied malice "when no considerable provocation appear[ed], or when all the circumstances of the killing show[ed] an abandoned and malignant heart." *Id.*

20. ILL. REV. STAT. ch. 38, para. 361 (1959). The statute demanded the killing be "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible." *Id.* Illinois required the following for a voluntary manslaughter conviction:

[T]here must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder.

ILL. REV. STAT. ch. 38, para. 362 (1959).

21. See *People v. Bush*, 111 N.E.2d 326, 328 (Ill. 1953) (finding no malice where defendant slashed with knife at taunting crowd); *People v. Jones*, 51 N.E.2d 543, 545 (Ill. 1943) (holding that the defendant acted in the heat of passion, and without malice, at sight of husband with another woman); *People v. Papas*, 44 N.E.2d 896, 898-99 (Ill. 1942) (holding that the defendant might not have seen the deceased and therefore did not have the requisite malice); *People v. Brown*, 123 N.E. 515, 516 (Ill. 1919) (seeing no malice aforethought in killing while the defendant resisted an unlawful arrest); *People v. Curtright*, 101 N.E. 551, 555 (Ill. 1913) (holding that the court should imply malice aforethought when a defendant displayed an "abandoned and malignant heart" in killing his wife).

22. See *People v. Harris*, 134 N.E.2d 315, 317-18 (Ill. 1956) (holding that a severe beating with a nightstick and fracturing defendant's jaw could constitute sufficient provocation for reducing a charge to manslaughter); *People v. Sain*, 51 N.E.2d 557, 560 (Ill. 1943) (finding that throwing hot water into defendant's face and partially blinding him was a mitigating circumstance); *People v. Rice*, 184 N.E. 894, 896 (Ill. 1933) (finding that the jury properly found mitigation when the deceased slapped the defendant's child and started a fight); *People v. Ortiz*, 150 N.E. 708, 711 (Ill. 1926) (noting that verbal utterance was not sufficient provocation to reduce a murder charge to manslaughter); *Davis v. People*, 29 N.E. 192, 195-96 (Ill. 1885) (finding mitigation in a quarrel and prolonged physical struggle).



*B. The Initial Homicide Statutes Under the Criminal Code of 1961 (1962-1987)*

In 1961, Illinois' legislature reworked the homicide laws. First, the legislature eliminated any reference to malice aforethought.<sup>23</sup> Instead, the statute recognized only four mental states: intent, knowledge, recklessness and negligence.<sup>24</sup> Thus, the statute prescribed that an individual committed murder when he or she, either intentionally or knowingly, unlawfully killed another person.<sup>25</sup>

Second, the legislature altered the statute so that voluntary manslaughter was not simply a killing without malice aforethought, but rather separated into two types.<sup>26</sup> Voluntary manslaughter could be (1) a killing "under sudden and intense passion," or (2) a killing which the defendant actually, but unreasonably, believed was justified as self-defense.<sup>27</sup> Therefore, with the elimina-

23. *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986); *Taylor v. Gilmore*, 954 F.2d 441, 449 (7th Cir. 1992) ("The question, then, is whether malice was an element of murder in Illinois at the time of Taylor's conviction."), *rev'd on other grounds sub nom.*, 113 S. Ct. 2112 (1993); *see also* S. 522, 83d Ill. Gen. Ass'y 38 (May 23, 1985) (quoting Senator Sangmeister: "[T]his all comes about because of . . . [sic] back in 1961 when we revised the Criminal Code . . . there is no more reference to malice of forethought [sic], and with that being gone, therein rises the confusion"). *Compare* ILL. REV. STAT. ch. 38, para. 358 (1959) (requiring malice aforethought in a murder case) *with* ILL. REV. STAT. ch. 38, para. 9-1(a) (1985) (excluding malice from consideration); *compare* ILL. REV. STAT. ch. 38, paras. 361, 362 (1959) (including the absence of malice in the voluntary manslaughter definition) *with* ILL. REV. STAT. ch. 38, para. 9-2 (1985) (excluding any reference to malice in the voluntary manslaughter definition).

24. ILL. REV. STAT. ch. 38, paras. 4-3 to 4-7 (1985).

25. ILL. REV. STAT. ch. 38, para. 9-1 (a) (1985). In Illinois:

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

- (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
- (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
- (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

*Id.*

26. ILL. REV. STAT. ch. 38, para. 9-2 (1985).

27. *Id.* The statute states in part:

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

- (1) The individual killed, or
- (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

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

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

tion of malice aforethought from the language of the statutes, Illinois converted voluntary manslaughter from "murder minus malice aforethought" to "murder plus mitigating circumstances."<sup>28</sup> The resulting confusion motivated Justice Blackmun to write: "The relation between murder and voluntary manslaughter in Illinois . . . was a complicated one."<sup>29</sup>

Under the murder/voluntary manslaughter dichotomy, the State carried the burden of proving all the elements of murder.<sup>30</sup> If the defendant introduced evidence of mitigation, the State technically bore the burden of proving the mitigation necessary to reduce the conviction from murder to voluntary manslaughter.<sup>31</sup> Yet, despite the fact that the State carried the burden of proof, it was the defendant who wished to establish the mitigation. "[I]n cases in which the jury was instructed on both murder and voluntary manslaughter, it was often the prosecutor who argued the evidence failed to show the presence of [mitigating circumstances], while the defendant argued one or both [was] present."<sup>32</sup>

Indeed, the then-existing Illinois Pattern Jury Instructions<sup>33</sup> mandated that the State must prove the mitigation for voluntary manslaughter beyond a reasonable doubt. The State had to estab-

*Id.*

28. *Taylor v. Gilmore*, 954 F.2d 441, 443 (7th Cir. 1992) (stating: "Illinois homicide law provided that murder had two elements . . . . Voluntary manslaughter had three elements. The first two were, for all relevant purposes, the same as both elements of murder. The third was a mitigating [factor] . . . ."), *rev'd on other grounds sub. nom.* 113 S. Ct. 2112 (1993).

29. *Gilmore v. Taylor*, 113 S. Ct. 2112, 2125 (1993) (Blackmun, J., dissenting).

30. *People v. Reddick*, 526 N.E.2d 141, 145-46 (Ill. 1988).

31. *People v. Brown*, 578 N.E.2d 1168, 1172 (Ill. App. Ct. 1991) (noting that under the voluntary manslaughter statute "an unreasonable belief in self-defense had to be proved beyond a reasonable doubt by the State"), *appeal denied*, 591 N.E.2d 25 (Ill. 1992); *see also* DECKER, *supra* note 17, at 19 (Supp. 1990) (stating that the voluntary manslaughter statute "was criticized on grounds that it required the state to prove murder plus mitigation in order to convict") (emphasis in original).

32. *People v. Newbern*, 579 N.E.2d 583, 593 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); *see also* S. 522, 84th Ill. Gen. Ass'y 71 (June 23, 1986) (containing the remarks of Representative Homer: "[T]he state is required to prove beyond a reasonable doubt all of the elements of the offense [of voluntary manslaughter], including the mitigating circumstances, which, in many cases, the state does not wish to prove."); *id.* at 72 (quoting Representative Cullerton: "[N]ormally, the defendant is the one who wishes to bring to the attention of the jury or a Judge [*sic*] those extenuating circumstances, but the way the law works now is that the . . . [*sic*] the state has the burden of proving this . . . .").

33. ILLINOIS SUPREME COURT COMMITTEE, ILLINOIS PATTERN JURY INSTRUCTIONS — CRIMINAL (2d ed. 1981) [hereinafter I.P.I.—CRIMINAL (1981)]. If applicable, the judge must use these instructions. ILL. SUP. CT. R. 451(a) (1991); *People v. Bosek*, 569 N.E.2d 551, 567 (Ill. App. Ct. 1991) (stating that "a non-IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject upon which the jury should be instructed"), *appeal denied*, 580 N.E.2d 121 (Ill. 1991), *cert. denied*, 112 S. Ct. 1180 (1992).

lish the "sudden and intense passion" to obtain a conviction for voluntary manslaughter involving provocation.<sup>34</sup> If it was a case of voluntary manslaughter involving unreasonable belief, the State needed to prove that although the defendant had a subjective belief in self-defense, the belief was unreasonable.<sup>35</sup> However, the prosecution could prove murder without actually disproving subjective belief.<sup>36</sup> This anomalous result did not go unnoticed.<sup>37</sup> It was in

34. I.P.I.—CRIMINAL (1981), *supra* note 33, No. 7.04 at 62. The instruction provided:

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

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

*Second:* That when the defendant did so, (1) he intended to kill or do great bodily harm to \_\_\_\_\_; or (2) he knew that such acts would cause death or great bodily harm to \_\_\_\_\_; or (3) he knew that such acts created a strong probability of death or great bodily harm to \_\_\_\_\_; and

*Third:* That when the defendant did so, (1) he acted under a sudden and intense passion resulting from serious provocation by another; or (2) he acted under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed \_\_\_\_\_.

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

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

*Id.*

35. I.P.I.—CRIMINAL (1981), *supra* note 33, No. 7.06 at 65. The instruction provided:

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

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

*Second:* That when the defendant did so, (1) he intended to kill or do great bodily harm to \_\_\_\_\_; or (2) he knew that such acts would cause death or great bodily harm to \_\_\_\_\_; or (3) he knew that such acts created a strong probability of death or great bodily harm to \_\_\_\_\_; and

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

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

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

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

*Id.*

36. I.P.I.—CRIMINAL (1981), *supra* note 33, Nos. 7.02, 24-25.06A. No. 7.02 provided:

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

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

this context that the Illinois legislature, through PA 84-1450, eliminated murder and voluntary manslaughter and created the crimes of first and second degree murder.<sup>38</sup>

Some practitioners argue that under the original 1961 Code, voluntary manslaughter was not a lesser included offense of murder.<sup>39</sup> Illinois defines a lesser included offense as an offense "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 es-

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*Second:* That when the defendant did so, (1) he intended to kill or do great bodily harm to \_\_\_\_\_; or (2) he knew that such acts would cause death or great bodily harm to \_\_\_\_\_; or (3) he knew that such acts created a strong probability of death or great bodily harm to \_\_\_\_\_; and

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

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

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

*Id.*

37. See, e.g., Timothy P. O'Neill, "Murder Least Foul": A Proposal to Abolish Voluntary Manslaughter in Illinois, 72 ILL. B.J. 306, 307 (1984) (discussing the mitigating circumstances within a voluntary manslaughter jury instruction versus a murder instruction); James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 CHI.-KENT L. REV. 23, 31-35 (1982) (discussing the mitigating circumstances mentioned in the jury instructions); Timothy P. O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DEPAUL L. REV. 107, 112-13 (1982); see also, e.g., S. 522, 84th Ill. Gen. Ass'y 71 (June 23, 1986) (noting Rep. Homer's comment that members proposed PA 84-1450 to "avoid the anomaly that's found in the current statutes").

38. *People v. Newbern*, 579 N.E.2d 583, 594 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992). "[T]he legislative intent in the enactment of the second degree murder statute was clearly to eliminate the confusion and problems of the old law. . . ." *Id.* at 592.

39. Timothy P. O'Neill, *An Analysis of Illinois' New Offense of Second Degree Murder*, 20 J. MARSHALL L. REV. 209, 214 (1986). Professor O'Neill also notes, however, that some Illinois courts have disagreed. *Id.* at 214, n.40 (citing *People v. Hoffer*, 478 N.E.2d 335 (1985)). However, the Illinois Supreme Court has since rejected the notion of the inconsistent mental states discussed in *Hoffer*. *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986). In *Wright*, a unanimous Court found that murder and voluntary manslaughter statutorily required proof of the same mental state. *Id.* The Court said voluntary manslaughter required proof of the additional element of mitigation. *Id.*; see Robert J. Steigmann, *First and Second Degree Murder in Illinois*, 75 ILL. BAR. J. 494, 495-96 (1987). Nonetheless, some courts maintained voluntary manslaughter was a lesser included offense of murder. E.g., *People v. Thomas*, 576 N.E.2d 1020, 1022 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991). Other courts have taken the opposite view. E.g., *United States ex rel. Fleming v. Gramley*, 735 F. Supp. 302, 308 (C.D. Ill. 1990) (citing *People v. Shumpert*, 533 N.E.2d 1106 (Ill. 1989), and finding that voluntary manslaughter was not a lesser included offense of murder), *rev'd on other grounds sub. nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991).

establish the commission of the offense charged. . . .<sup>40</sup> Professor Timothy P. O'Neill argues voluntary manslaughter could not have been a lesser included offense under the "elements" test because it required more elements than murder.<sup>41</sup> Voluntary manslaughter was murder *plus* either of the mitigating factors.<sup>42</sup> To be a lesser offense included under this test, voluntary manslaughter should have required fewer elements of murder, not more. Illinois law recognizes only the four mental states specified in the Criminal Code: intent, knowledge, recklessness, and negligence.<sup>43</sup> Voluntary manslaughter did not have a less culpable mental state than murder because proof of each crime required a showing of either intent or knowledge.<sup>44</sup> However, rather than classifying voluntary manslaughter as a lesser included offense of murder, some argue voluntary manslaughter was more properly "a less culpable kind of murder—'murder with mitigating circumstances'" thereby deserving a lesser penalty.<sup>45</sup> Eventually, the legislature responded to the problems created by the 1961 statutes and changed Illinois murder laws.

### III. ILLINOIS LAW UNDER THE NEW STATUTES: THE 1987 AMENDMENTS

In 1986, Illinois' General Assembly amended the homicide statutes.<sup>46</sup> Effective July 1, 1987, Illinois eliminated voluntary man-

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40. 720 ILCS 5/2-9(a) (1992). These tests are known as the "elements" test and the "mental state" test.

41. O'Neill, *supra* note 38, at 214.

42. *Id.*

43. 720 ILCS 5/4-3 5/4-7 (1992); see O'Neill, *supra* note 38 at 214 (discussing the requisite states of mind).

44. See O'Neill, *supra* note 38, at 214 (stating that "voluntary manslaughter involved an unjustified homicide performed intentionally or knowingly"). Also see *supra* notes 25-27 setting forth the text of the murder and voluntary manslaughter statutes under the Criminal Code of 1961.

45. O'Neill, *supra* note 38, at 214.

46. 1986 Ill. Laws 4221, PA 84-1450. The Illinois first degree murder statute provides in pertinent part:

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

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

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

(3) he is attempting or committing a forcible felony other than second degree murder.

720 ILCS 5/9-1(a) (1992).

Illinois' second degree murder statute states:

(a) 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:

slaughter and replaced it with second degree murder.<sup>47</sup> While retaining all the substantive language of the old murder statute by merely renaming it "first degree murder"<sup>48</sup>, the new legislation discarded those provisions regarding voluntary manslaughter and replaced them with the new law of second degree murder.<sup>49</sup>

The new crime of second degree murder retains the elements of mitigation used in the two types of voluntary manslaughter: provo-

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(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 [self-defense] of this Code, but his belief is unreasonable.

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

(d) Sentence. Second Degree Murder is a Class 1 felony.

720 ILCS 5/9-2 (1992).

47. *People v. Cook*, 576 N.E.2d 1242 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 133 (Ill. 1991); *see also* S. 522, 84th Ill. Gen. Ass'y 71 (June 23, 1986) (noting Rep. Homer's comment: "This Bill . . . creates [the] new offenses of first and second degree murder . . . [I]nstead of voluntary manslaughter, this Bill suggests that we have a second degree murder . . .").

48. *People v. Deason*, 584 N.E.2d 829, 832 (Ill. App. Ct. 1991) ("The only change in section 9-1 of the Code brought about by Public Act 84-1450 was the title of the offense—changing it from 'murder' to 'first degree murder.' Substantively, the offense of murder was defined no differently than is the offense of first degree murder."); *see also* S. 522, 84th Ill. Gen. Ass'y 71 (June 23, 1986) (noting the remark by Rep. Homer that "[T]he elements required for murder . . . would be the identical elements that would be in the proposed first degree murder [statute] . . ."); Steigmann, *supra* note 39, at 494-95 (explaining the elements of murder before and after the 1987 revision). Compare 720 ILCS 5/9-1(a) (1992) (setting forth the elements of first degree murder) with ILL. REV. STAT. ch. 38., para. 9-1 (a) (1985) (defining the elements of murder prior to PA 84-1450).

49. *People v. Newbern*, 579 N.E.2d 583, 589 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); Steigmann, *supra* note 39, at 494.

cation and unreasonable belief.<sup>50</sup> However, it clearly places the burden of proving the requisite mitigation on the defendant.<sup>51</sup> In a murder trial, the prosecution must establish all the elements of first degree murder<sup>52</sup> beyond a reasonable doubt<sup>53</sup> before the jury can consider the mitigation issue.<sup>54</sup> In other words, the prosecution must satisfy its burden first. If it fails to do so, the court should acquit the defendant.<sup>55</sup>

Once the jury determines the State has proven the elements of first degree murder beyond a reasonable doubt, it can then consider the mitigation issue to determine which degree of murder is appli-

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50. *People v. Clark*, 656 N.E.2d 1373, 1379 (Ill. App. Ct.) ("The mitigating factors of second degree murder are identical to the factors which would have reduced murder to voluntary manslaughter under the prior law"), *appeal denied*, 575 N.E.2d 918 (Ill. 1991). See *supra* notes 26-29 and accompanying text for a discussion of the two types of voluntary manslaughter under the 1961 Criminal Code.

51. 720 ILCS 5/9-2(c) (1992); see *People v. Shumpert*, 533 N.E.2d 1106, 1109 (Ill. 1989) ("[T]he defendant now bears the burden to prove, by a preponderance of the evidence, one of the factors in mitigation. . . ."); see also S. 522, 84th Ill. Gen. Ass'y 72 (June 23, 1986) (quoting Rep. Cullerton: "And what we're doing, however, is not to change the elements of the offense of voluntary manslaughter, but we're basically changing the burden of proof to the defendant"); *Id.* at 71 (noting the comment by Rep. Homer: "[T]he defendant, and not the state, would bear the burden of proving the mitigating circumstance").

Illinois' Pattern Jury Instructions state:

If the State proves beyond a reasonable doubt that the defendant is guilty of first degree murder, the defendant then 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.

ILLINOIS SUPREME COURT COMMITTEE, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL, No. 2.03A (3d ed. 1992) [hereinafter I.P.I.—CRIMINAL (1992)].

This shift is not new to Illinois jurisprudence, however. As far back as the early nineteenth century the defendant had the burden of proving mitigation in a homicide case. *E.g.*, 1827 Ill. Laws 130, § 40.

52. The elements are: (1) death; (2) causation; and (3) intent or knowledge. 720 ILCS 5/9-1(a) (1992).

53. The State must always prove each element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

54. 720 ILCS 5/9-1(a), 5/9-2(c) (1992); see *People v. Brown*, 578 N.E.2d 1168, 1172 (Ill. App. Ct. 1991) (requiring the State to satisfy the elements of first degree murder before giving the defendant an opportunity to admit evidence of mitigating circumstances), *appeal denied*, 591 N.E.2d 25 (Ill. 1992); *People v. Hrobowski*, 575 N.E.2d 1306, 1320 (Ill. App. Ct.) (noting that the defendant can prove up his mitigating circumstances after the State makes its case for first degree murder), *appeal denied*, 584 N.E.2d 134 (Ill. 1991).

55. 720 ILCS 5/9-2(c) (1992); see *People v. Newbern*, 579 N.E.2d 583, 598 (Ill. App. Ct. 1991) ("[I]f the evidence is insufficient to prove the elements of first degree murder beyond a reasonable doubt, no murder conviction of any kind can be permitted.") (emphasis in original), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

Illinois' Pattern Jury Instructions provide: "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." I.P.I.—CRIMINAL (1992), *supra* note 51, Nos. 7.04A & 7.06A.

cable.<sup>56</sup> To succeed in reducing first degree murder to second degree murder, the defendant must prove, by a preponderance of the evidence,<sup>57</sup> either of the following two mitigating factors: (1) he or she had an unreasonable belief in self-defense;<sup>58</sup> or (2) he or she was acting under sudden and intense passion resulting from serious provocation.<sup>59</sup> Thus, second degree murder mimics its prede-

56. 720 ILCS 5/9-2(c) (1992); *People v. Jerome*, 564 N.E.2d 221, 226 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 152 (Ill. 1991); *cf. People v. Bosek*, 569 N.E.2d 551, 565 (Ill. App. Ct.) ("In order for the jury to reach the issue of whether the defendant is guilty of second degree murder, it must already have found him guilty of first degree murder beyond reasonable doubt.") (emphasis added), *appeal denied*, 580 N.E.2d 121 (Ill. 1991), *cert. denied*, 112 S. Ct. 1180 (1992).

Illinois' Pattern Jury Instructions require the judge to instruct the jury: If the State proves beyond a reasonable doubt that the defendant is guilty of first degree murder, the defendant then 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.

I.P.I.—CRIMINAL (1992), *supra* note 51, No. 2.03A.

57. 720 ILCS 5/9-2(c) (1992).

The Illinois Pattern Jury Instructions provide: "The phrase 'preponderance of the evidence' means whether, considering all the evidence in the case, the proposition on which the defendant has the burden of proof is probably more true than not true." I.P.I.—CRIMINAL (1992), *supra* note 51, No. 4.18.

58. *People v. Johnson*, 592 N.E.2d 345, 350 (Ill. App. Ct. 1992) (requiring a belief "that force was necessary to prevent death or great bodily harm, even though that belief was unreasonable"); *see, e.g., People v. Doss*, 574 N.E.2d 806, 809 (Ill. App. Ct. 1991) (denying claim of shock and fear of family disgrace as a basis for a mother's claim that she unreasonably believed killing her secretly-born baby was justifiable; mother was not acting in self-defense); *Jerome*, 564 N.E.2d at 224 (holding the trial court properly refused to instruct the jury on second degree murder based on an unreasonable belief in self-defense because the defendant's claimed fear of falling down stairs due to the victim's pushing him did not support a finding that defendant unreasonably believed his resort to using a knife was necessary).

The Illinois Pattern Jury Instructions provide:

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.

I.P.I.—CRIMINAL (1992), *supra* note 51, No. 7.05A.

59. 720 ILCS 5/9-2(a), 9-2(c) (1992). The statute defines serious provocation as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (1992).

Illinois' Pattern Jury Instructions require the judge to tell the jury: "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 acts under a sudden and intense passion resulting from serious provocation . . . ." I.P.I.—CRIMINAL (1992), *supra* note 51, No. 7.03A.

Illinois recognizes only four categories of provocation as sufficiently exciting to reduce a homicide to second degree murder: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse. *People v. Tenner*, No. 6998, 1993 WL 421591, at \*12 (Ill. Oct. 21, 1993); *People v. Chevalier*, 544 N.E.2d 942, 944 (Ill. 1989); *People v. Elder*, 579 N.E.2d 420, 423 (Ill. App. Ct. 1991); *People v. Doss*, 574 N.E.2d 806, 809 (Ill. App. Ct. 1991). However, words alone are insufficient provocation "no matter how aggravated, abusive, opprobrious or indecent the language."



cessor's formulation of mitigation factors.

Other theories of mitigation are not sufficient to reduce the potential conviction from first to second degree murder.<sup>60</sup> Furthermore, there must be some evidence to warrant a second degree murder instruction to the jury.<sup>61</sup> Either the prosecution or the de-

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*Chevalier*, 544 N.E.2d at 944; *accord* *Freddo v. State*, 155 S.W. 170, 172 (Tenn. 1913) (stating the Tennessee common law that "the law regards no mere epithet or language, however violent or offensive, as sufficient provocation for taking life"). Similarly, mere trespass is insufficient provocation. *Tenner*, 1993 WL 421591, at \*12. Also, a young child cannot cause the serious provocation required. *People v. Crews*, 231 N.E.2d 451, 453 (Ill. 1967). The same is true of an infant. *Doss*, 574 N.E.2d at 809.

However, modern Illinois statutory law explicitly prohibits a person from resisting arrest, whether lawful or unlawful. 720 ILCS 5/7-7 (1992). *But cf.* *People v. Brown*, 123 N.E. 515, 516 (Ill. 1919) (finding that killing a police officer while resisting an unlawful arrest could constitute sufficient provocation and citing *Rafferty v. People*, 69 Ill. 111 (1873), for the same proposition). As such, the passionate value of a killing provoked by an illegal arrest may no longer be sufficient. *See DECKER, supra* note 17, at 214 (writing that "[b]ecause of the state legislature's posture on this subject, it is doubtful that the Illinois courts would be receptive to the adequate-provocation argument if an arrestee took an officer's life"). To succeed on a claim of provocation due to adulterous behavior, the defendant must discover the parties immediately before, during or after the adulterous act, and the killing must immediately follow the discovery. *Chevalier*, 544 N.E.2d at 944. Simply hearing about it, even a confession by the spouse, is insufficient. *Id.*; *see* *People v. Jones*, 51 N.E.2d 543, 545-46 (Ill. 1943) (holding that the defendant acted in the heat of passion at the sight of her husband with another woman). *But see* *Commonwealth v. Schnopps*, 417 N.E.2d 1213, 1215 (Mass. 1981) (holding that a sudden admission of adultery is equivalent to a discovery of the act itself, and is sufficient evidence of provocation).

Mutual combat exists where the parties willingly enter into combat upon equal terms in the heat of passion. *People v. Johnson*, 575 N.E.2d 1247, 1256 (Ill. App. Ct. 1991). However, courts will not find provocation when the defendant instigated the fight. *People v. Banks*, 592 N.E.2d 107, 116 (Ill. App. Ct. 1992). Also, the defendant's reaction must be to conduct "serious enough to unleash an intense passion in a reasonable person". *People v. Smalley*, No. 1-89-0950, 1991 WL 274553 at \*3 (Ill. App. Ct. 1991) (unpublished opinion). Slight provocation will not suffice to reduce the crime from a charge of first-degree murder. *Id.* Finally, when provocation results from physical injury, the assault must have been sufficiently substantial. *Compare* *People v. Stowers*, 273 N.E.2d 493, 497 (Ill. App. Ct. 1971) (holding that the deceased hitting the defendant on the head with a beer can constituted serious provocation) *with* *People v. Simpson*, 384 N.E.2d 373, 375 (Ill. 1978) (finding no serious provocation when the deceased scratched the defendant).

60. *See, e.g.,* *People v. Doss*, 574 N.E.2d 806, 809 (Ill. App. Ct. 1991) (holding that the defense of compulsion is unavailable to accused charged with first degree murder).

61. *People v. Vargas*, 587 N.E.2d 1217, 1219 (Ill. App. Ct. 1992) (finding no evidence in the record on which to base an instruction on second degree murder); *Doss*, 574 N.E.2d at 809-10 (finding no evidence of a mitigating factor and holding that it was legally impossible for the defendant to commit second degree murder); *People v. Jerome*, 564 N.E.2d 221, 224 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 152 (Ill. 1991) (noting that "[e]ven a slight amount of evidence will raise the issues and justify an instruction," but cautioning that a court may refuse a second degree murder instruction when the evidence does not support the defense), *appeal denied*, 571 N.E.2d 152 (Ill. 1992).

fense may provide the mitigation evidence.<sup>62</sup> Before convicting an individual of second degree murder, the jury must find that either statutorily specified mitigating factor exists by a preponderance of the evidence. If the jury does not find enough evidence of mitigating circumstances, it must convict the defendant for first degree murder.<sup>63</sup> These legislative changes resulted in numerous challenges to the new second degree murder statute.

#### IV. CONSTITUTIONALITY OF THE NEW STATUTE: CHALLENGES AND DEFENSES

Foremost among the statutory changes was the transfer of the burden of establishing mitigation. Under the 1961 provisions, the State realistically had to disprove the existence of mitigation beyond a reasonable doubt.<sup>64</sup> The new legislation, however, shifts the burden to the defense and requires it to prove by a preponderance of the evidence one of the specified mitigating factors. Since the change, murder defendants have launched an assault on the constitutionality of the shift in the burden of proof.<sup>65</sup> Courts and scholars, however, have uniformly rejected these challenges.<sup>66</sup>

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62. While the defendant carries the burden of proof regarding the establishment of mitigation to reduce the crime to second degree murder, the trier of fact can consider any evidence introduced at trial, by either the defense or prosecution. *People v. Golden*, 614 N.E.2d 444, 450 (Ill. App. Ct. 1993).

The Illinois Pattern Jury Instructions provide: "In deciding whether a mitigating factor is present, you should consider all of the evidence bearing on this question". I.P.I.—CRIMINAL (1992), *supra* note 51, No. 2.03A. Indeed, the defendant need not introduce any evidence supporting a claim of mitigation, although clearly it would be in his best interests to do so. O'Neill, *supra* note 39, at 222. In fact, the judge should instruct the jury that the defendant need not present any evidence of mitigating factors if such evidence appeared during the prosecution's case. I.P.I.—CRIMINAL (1992), *supra* note 51, No. 2.03A, Committee Note.

63. 720 ILCS 5/9-2(c) (1992); *People v. Newbern*, 579 N.E.2d 583, 598 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992). *But see* *People v. Collins*, 572 N.E.2d 1005, 1011 (Ill. App. Ct.) (holding that while the evidence was insufficient to support a conviction for first degree murder, the evidence was sufficient for a second degree murder conviction), *appeal denied*, 580 N.E.2d 122 (Ill. 1991). See *infra* notes 263-71 and accompanying text for a discussion of *Collins* and its poor authority.

64. *People v. Reddick*, 526 N.E.2d 141, 146 (Ill. 1988) (discussing the 1961 law and holding, under that provision, that if a defendant raises some evidence of mitigation the prosecution must disprove it beyond a reasonable doubt). See *supra* notes 23-45 and accompanying text for a discussion of the murder and voluntary manslaughter statutes under the 1961 Criminal Code.

65. One writer has also hinted at a challenge based on Illinois' proportionality requirement. See Larry R. Wells, *Presumed Guilty: Curing the Defects in the Second Degree Murder Statute*, 80 ILL. B.J. 230, 232 (1992). However, while criminal sanctions must be proportional to the crime, the "legislature has wide discretion in prescribing penalties for defined criminal offenses." *People v. Reed*, 591 N.E.2d 455, 459 (Ill. 1992). No court has accepted the proportionality argument.

66. See *People v. Johnson*, 592 N.E.2d 345, 350 (Ill. App. Ct. 1992) (affirming the constitutionality of the Illinois murder statute) (citations omitted);

This section addresses the various challenges to the new statute. First, it analyzes the due process arguments raised by defendants. Second, this section discusses the unsuccessful challenges made by defendants based on the equal protection. Third, this section addresses the statute in the context of the doctrine of separation of powers and considers whether the State can initially charge a defendant with second degree murder.

### A. Due Process Challenges

Defendants routinely challenge the shift of the mitigation burden by classifying it as a violation of the Due Process Clause.<sup>67</sup> While it is unconstitutional for a State to require a defendant to disprove an element of the crime charged,<sup>68</sup> the new statute does not require this.<sup>69</sup> Instead, it merely shifts to the defendant the burden of establishing sufficient mitigation that will reduce the already proven charge of first degree murder.<sup>70</sup> Thus, there is no overlap between any element that the prosecution must prove and the facts the defense must establish.<sup>71</sup>

The United States Supreme Court, in *Patterson v. New York*,<sup>72</sup>

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*People v. Banks*, 592 N.E.2d 107, 114 (Ill. App. Ct. 1992) (rejecting a defendant's challenges to Illinois' first degree murder statute based on due process, equal protection and separation of powers grounds) (citations omitted); *see also* O'Neill, *supra* note 39, at 221-22 (discussing the constitutionality of the homicide laws); Steigmann, *supra* note 39, at 497. *But see* Wells, *supra* note 65, at 230.

67. *E.g.*, *People v. Horton*, 598 N.E.2d 452, 454 (Ill. App. Ct. 1992); *People v. Brown*, 578 N.E.2d 1168, 1172-73 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 25 (Ill. 1992); *People v. Cook*, 576 N.E.2d 1242, 1243 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 133 (Ill. 1991); *People v. Hrobowski*, 575 N.E.2d 1306, 1320 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 134 (Ill. 1991); *People v. Newbern*, 579 N.E.2d 583, 594 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

68. *E.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Sandstrom v. Montana*, 442 U.S. 510, 527 (1979) (Rehnquist, J., concurring).

69. *See Brown*, 578 N.E.2d at 1172 (approving of the statute since it does not force the defendant to negate any elements of first degree murder and noting that the defendant confused self-defense with second degree murder's mitigating factors); *Cook*, 576 N.E.2d at 1245 (declaring the statute constitutional because it does not require the defendant to prove any element of first degree murder).

70. In *Martin v. Ohio*, 480 U.S. 228, 231, *reh'g denied*, 481 U.S. 1024 (1987) the United States Supreme Court held the Due Process Clause of the Fourteenth Amendment permits a state to require the defendant to prove self-defense. Under *Martin*, the less-burdensome Illinois scheme merely concerning grades of murder should clearly be constitutional. *Cf. Patterson v. New York*, 432 U.S. 197 (1977) (holding that the Due Process Clause does not prohibit a State from requiring the defendant to prove an affirmative defense or mitigation in order to reduce the degree of a homicide charge).

71. *See Cook*, 576 N.E.2d at 1245 (holding, specifically, that since "[t]he existence of provocation or an unreasonable belief in justification . . . will not diminish or negate any of the proved elements of first degree murder[,] [t]he mitigating factor is a separate issue . . ."); O'Neill, *supra* note 39, at 221.

72. 432 U.S. 197 (1977).

held that the Due Process Clause of the Fourteenth Amendment does not forbid a State from requiring a defendant to prove, by a preponderance of the evidence, the mitigation necessary to reduce the severity of a homicide charge.<sup>73</sup> At issue in *Patterson* was a New York statute requiring a defendant charged with second degree murder to prove by a preponderance of the evidence an affirmative defense of emotional disturbance in order to reduce the homicide to manslaughter.<sup>74</sup> The Supreme Court found that the "prosecution was required to prove all the elements of the crime charged," but the burden then could shift to the defendant to prove the affirmative defense.<sup>75</sup>

Defendants argue that rather than *Patterson*, the United States Supreme Court decision in *Mullaney v. Wilbur*<sup>76</sup> should control.<sup>77</sup> In *Mullaney*, the Supreme Court struck down Maine's homicide statute which defined murder as the unlawful killing of a

73. *Id.* at 201.

74. *Patterson*, 432 U.S. at 201; *People v. Gore*, 571 N.E.2d 1041, 1046 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 124 (Ill. 1991).

The New York law provided in relevant part:

A person is guilty of manslaughter in the first degree when:

....

(2) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (2) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

N.Y. PENAL LAW § 125.20(2) (McKinney 1975).

New York's crime of "second degree murder" was not identical to Illinois' version of the homicide bearing that name. Compare 720 ILCS 5/9-1, 9-2 (1992) (setting forth the elements of second degree murder in Illinois) with N.Y. PENAL LAW § 125.20(2) (McKinney 1975) (setting forth the elements of second degree murder in New York). These schemes are also similar to Montana's "mitigated deliberate homicide," which requires proof by the defendant of mental or emotional stress to reduce the crime from deliberate homicide. MONT. CODE ANN. § 45-5-103 (1991). See *infra* notes 319-325 and accompanying text for a discussion of the Montana statute.

75. *Patterson*, 432 U.S. at 201. The Supreme Court, citing *Patterson*, recently reaffirmed that principle in another context, stating: "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged . . . a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona*, 497 U.S. 639, 650 (1990) (discussing the defendant's burden to prove mitigation to avoid the death penalty); see also *Martin v. Ohio*, 480 U.S. 288 (1987) (finding that Due Process does not prohibit a State from placing on the defendant the burden of proving self-defense). Illinois courts follow this reasoning as well. *Gore*, 571 N.E.2d at 1046.

76. 421 U.S. 684 (1975).

77. *E.g.*, Defendant's Brief at 29, *People v. Newbern*, 579 N.E.2d 583 (Ill. App. Ct. 1991) (No. 4-90-0568).

human being with malice aforethought.<sup>78</sup> However, the Maine statute implied malice aforethought unless the defendant proved the killing occurred in the heat of passion.<sup>79</sup> If the defendant proved the passion, the conviction would be for the reduced charge of voluntary manslaughter.<sup>80</sup> The Supreme Court, like the trial court, "emphasized that 'malice aforethought and heat of passion on sudden provocation are two inconsistent things.'"<sup>81</sup> Thus, Maine defined voluntary manslaughter as murder *minus* malice, with the burden to prove the absence of malice resting upon the defendant. Therefore, the defendant had the burden to prove or negate an element of the offense. The Supreme Court held this practice to be violative of due process.<sup>82</sup> As malice aforethought was an element of murder, and as the statute required the defendant to prove its absence for a voluntary manslaughter conviction, the Maine statute impermissibly shifted the burden of proof to the defendant.

Defendants premise their arguments on the belief that Illinois' first and second degree murder statutes require different mental states.<sup>83</sup> They argue that the mental state required by the first degree murder statute is really malice aforethought, and that proving the mitigation for second degree murder is tantamount to proving the absence of malice.<sup>84</sup> These defendants regularly rely upon *Mullaney*. This, of course, was the formula for murder and voluntary manslaughter both at common law and under Illinois' statutes prior to the adoption of the Criminal Code of 1961.<sup>85</sup> Despite the change in the statutory language, defendants argue that malice aforethought is still the underlying mental state for first degree murder. Since second degree murder would be first degree murder without malice, the defendant would be negating an element of the offense.<sup>86</sup> Illinois courts distinguish *Mullaney*, noting that the second degree murder statute does not require the defendant to negate

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78. *Mullaney*, 421 U.S. at 703-04.

79. *Id.* at 686.

80. *Id.* at 686-87.

81. *Id.* (quoting from the trial transcript).

82. *Id.* at 704.

83. *E.g.*, Defendant's Brief at 29, *People v. Newbern*, 579 N.E.2d 583 (Ill. App. Ct. 1991) (No. 4-90-0568); Defendant's Brief at 11, *People v. Timberson*, 573 N.E.2d 374 (Ill. App. Ct. 1991) (No. 5-90-0482).

84. *See, e.g.*, Defendant's Brief at 35, *People v. Newbern*, 579 N.E.2d 583 (Ill. App. Ct. 1991) (No. 4-90-0568) ("[I]t necessarily follows that if first degree murder is a killing with malice aforethought [and] . . . second degree murder is a killing without malice aforethought. . . ."); *cf.* Defendant's Brief at 17, *Patterson v. New York*, 432 U.S. 197 (1977) (No. 75-1861) ("On their face, the defense invalidated in *Mullaney* and the challenged New York defense are functionally identical.").

85. *See supra* notes 17-22 and accompanying text for a discussion of the elements of murder and voluntary manslaughter prior to the adoption of the Criminal Code of 1961.

86. Defendant's Brief at 35, *People v. Newbern*, 579 N.E.2d 583 (Ill. App. Ct. 1991) (No. 4-90-0568).

any element of first degree murder.<sup>87</sup> Instead, Illinois courts rely upon *Patterson* and its progeny.<sup>88</sup> In finding the Illinois scheme more reflective of *Patterson* than *Mullaney*, courts hold that the defendant's burden to establish mitigation constitutes a partial defense to, rather than a negation of, an element of first degree murder.<sup>89</sup> This distinction arises from the conclusion that the mental states required by the two statutes are not inconsistent. With the adoption of the Criminal Code of 1961, Illinois rejected malice aforethought as a mental state.<sup>90</sup> In 1986, the Illinois Supreme Court found no inconsistency between the mental states of the murder and voluntary manslaughter statutes.<sup>91</sup> Thus, Illinois courts reject defense attempts to analogize the Illinois scheme with the problems identified in *Mullaney*. Instead they noted the similarity to the approved system in *Patterson*.

Typical of due process challenges are defense arguments that the second degree murder statute "is unconstitutional in that it impermissibly places the burden of proof upon the defendant to prove mitigating factors sufficient to reduce first degree murder to second degree murder."<sup>92</sup> Defendants argued this due process challenge in *People v. Cook*<sup>93</sup> and *People v. Hrobowski*.<sup>94</sup> Both courts began

87. See, e.g., *People v. Cook*, 576 N.E.2d 1242, 1245 (Ill. App. Ct.) (finding no infirmity in the murder statute), *appeal denied*, 584 N.E.2d 133 (Ill. 1991); *People v. Hrobowski*, 575 N.E.2d 1320, 1320 (Ill. App. Ct.) (refusing to reconsider *People v. Jerome*, 564 N.E.2d 221, 226 (Ill. App. Ct. 1990), which held mitigating factors do not negate first degree murder's elements), *appeal denied*, 584 N.E.2d 134 (Ill. 1991); see also Steigmann, *supra* note 39, at 495 (denying that a defendant must "prove a factor which would be inconsistent with an element of first degree murder in order to prove by a preponderance the existence of a mitigating factor to reduce first degree murder to second degree murder").

88. E.g., *People v. Smallwood*, 586 N.E.2d 636, 647-48 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 28 (1992); *People v. Manley*, 584 N.E.2d 477, 492 (Ill. App. Ct. 1991); *People v. Davis*, 583 N.E.2d 64, 67 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1018 (Ill. 1992). The Supreme Court has arguably expanded *Patterson* in subsequent cases. See, e.g., *Martin v. Ohio*, 480 U.S. 228, 233 (forcing the defendant to carry the burden of affirmatively proving self-defense to a homicide charge), *reh'g denied*, 481 U.S. 1024 (1987); *Walton v. Arizona*, 497 U.S. 639, 649-50 (1990) (discussing the constitutionality of the defendant's burden to prove mitigation to avoid the death penalty at a sentencing hearing).

89. *People v. Newbern*, 579 N.E.2d 583, 594-95 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

90. *Taylor v. Gilmore*, 954 F.2d 441, 449 (7th Cir. 1992), *rev'd on other grounds sub num.* 113 S. Ct. 2112 (1993).

91. *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986) (finding nothing in the definition of voluntary manslaughter that contains language "distinguishing it from murder in regard to the defendant's intention or mental state"); see also *Newbern*, 579 N.E.2d at 594 (rejecting the defendant's contention "that the legislature . . . intended to retain the notion that the definition of first degree murder included 'malice aforethought,' whereas the definition of second degree murder did not").

92. *Cook*, 576 N.E.2d at 1320-21; *Hrobowski*, 575 N.E.2d at 1320.

93. 576 N.E.2d 1242 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 133 (Ill. 1991).

94. 575 N.E.2d 1306 (Ill. App. Ct. 1991).

their analysis stating that the Due Process Clause precludes convictions unless there is "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."<sup>95</sup> The *Cook* court then noted, however, "[T]he [Illinois Criminal] Code does not require the [second degree murder] defendant to prove any elements of first degree murder. . . ."<sup>96</sup> Relying on *Patterson*, courts like the *Cook* court point out that it is permissible for the State to require the defendant to prove mitigation.<sup>97</sup> Using *Patterson* as authority, they reject defendants' Due Process claims, finding that requiring the defense to establish a mitigating factor does not impermissibly shift any burden to the defendant.

### B. Equal Protection Challenges

Along with Due Process claims, courts also reject arguments that the statute violates defendants' equal protection rights.<sup>98</sup> There is no distinction between the analysis for assessing violations of the Equal Protection Clauses of the United States<sup>99</sup> and Illinois<sup>100</sup> Constitutions.<sup>101</sup> The Equal Protection Clause requires the government to treat similarly situated individuals similarly.<sup>102</sup> However, no constitutional provision prohibits the government from treating dissimilar individuals or dissimilar classes of individuals differently.<sup>103</sup>

Under Equal Protection analysis, the court first must determine the proper level of scrutiny it will apply to the challenged classification, action or statute.<sup>104</sup> When the statute in question affects a fundamental right<sup>105</sup> or discriminates against a suspect class,<sup>106</sup>

95. *Cook*, 576 N.E.2d at 1244 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (emphasis added).

96. *Id.*

97. *Id.* (citing *Patterson v. New York*, 432 U.S. 197 (1977)).

98. *E.g.*, *People v. Thomas*, 576 N.E.2d 1020, 1021-23 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991); *People v. Gore*, 571 N.E.2d 1041, 1047-48 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 124 (Ill. 1991); *People v. Clark*, 565 N.E.2d 1373, 1376-79 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 918 (Ill. 1991).

99. U.S. CONST. amend. XIV, § 2 ("No State . . . [shall] deny to any person within its jurisdiction the equal protection of the laws").

100. ILL. CONST. of 1970, art. I, § 2 ("No person shall . . . be denied the equal protection of the laws").

101. *People v. Reed*, 591 N.E.2d 455, 457 (Ill. 1992).

102. *Id.*

103. *Id.*

104. *Id.*

105. There is an abundance of authority discussing what rights are fundamental. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973) (guaranteeing a woman's right to make specific choices regarding her body); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (guarding the fundamental right to interstate travel); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (protecting the freedom to marry spouse of one's own choice); *Douglas v. California*, 372 U.S. 353, 356-57 (1963) (paving the way for free access to the courts); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667-68 (1963) (invalidating poll tax which violated the fundamental right to vote); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)

courts will apply a strict scrutiny test and uphold the statute only if the State proves the statute is necessarily related to a compelling State interest.<sup>107</sup> If the statute affects neither a fundamental right nor a suspect class, courts apply a rational basis test.<sup>108</sup> Under this minimal scrutiny, a statutory scheme need only rationally relate to a legitimate state interest to be found constitutional.<sup>109</sup>

Requiring the defense to prove the mitigation to a homicide does not discriminate against a suspect class or involve a fundamental right. Therefore, courts analyze the second degree murder statute with the lesser, rational basis test.<sup>110</sup> Under this minimal scrutiny, the statute carries a presumption of rationality which the defendant must overcome.<sup>111</sup> Hence, defendants must convince the court that the statute does not relate to any legitimate state interests.<sup>112</sup> This extremely difficult task overcomes most opponents to

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(preserving a couple's right to procreate). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973) (finding that education is not a fundamental right); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (stating there is no fundamental right to "decent shelter").

106. Many cases have also discussed the application of the suspect class rationale. *E.g.*, Anderson v. Martin, 375 U.S. 399, 402 (1964) (finding an impermissible practice where an election board noted the race of candidates on the ballot); Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) (finding the separate but equal doctrine to be inherently discriminatory and holding that it is impermissible to discriminate by race in public schools). *But see* Harris v. McRae, 448 U.S. 297, 322 (1980) (holding that wealth classifications do not trigger strict scrutiny analysis); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (finding that age qualifications do not require strict scrutiny).

107. *People v. Reed*, 591 N.E.2d 455, 457 (Ill. 1992). Governmental action rarely survives the strict scrutiny test. Such analysis has been described as "strict in theory and fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Indeed, at least two Supreme Court Justices expressed their "unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling state interests' and 'least drastic or restrictive means.'" *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 233-34 (1989) (Stevens, J., concurring) (citations omitted). Justice Blackmun described the terms themselves as "too convenient and result oriented." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (concurring). He thus reiterated his belief that the test "merely announc[e] an inevitable result, and the [test is] no test at all." *Id.*

108. *Reed*, 591 N.E.2d at 457; *People v. Simmons*, 583 N.E.2d 484, 485 (Ill. 1991).

109. *Reed*, 591 N.E.2d at 457.

110. *People v. Davis*, 583 N.E.2d 64, 67 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1018 (Ill. 1992); *People v. Clark*, 565 N.E.2d 1373, 1376 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 918 (Ill. 1991).

111. *Clark*, 565 N.E.2d at 1378; *People v. Gore*, 571 N.E.2d 1041, 1048 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 124 (Ill. 1991); *cf.* *People v. Fabing*, 570 N.E.2d 329, 332 (Ill. 1991) (presuming the statute's constitutionality and forcing the challenging party to clearly establish the constitutional defect).

112. *Clark*, 565 N.E.2d at 1378; *Gore*, 571 N.E.2d at 1048.



laws alleged to violate the Equal Protection Clause.<sup>113</sup>

Defendants argue that Illinois' statute deters those convicted of second degree murder from appealing their convictions, because on retrial, they may face a charge of first degree murder.<sup>114</sup> The argument notes that second degree murder is not a lesser included offense of first degree murder,<sup>115</sup> then jumps to the conclusion that if a defendant had his second degree murder conviction reversed and remanded for a new trial, he subsequently could be retried for first degree murder.<sup>116</sup> Courts, however, have rejected this view, based upon either double jeopardy or collateral estoppel principles. Courts which find second degree murder to be a lesser included offense of first degree murder automatically conclude double jeopardy precludes a retrial for first degree murder.<sup>117</sup> Courts which find collateral estoppel prevents the relitigation of the mitigation issue also say it precludes the trial court from convicting a defendant for first degree murder when the court initially convicted him or her of second degree murder.<sup>118</sup> Therefore, both lines of cases reach the

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113. *E.g., Clark*, 565 N.E.2d at 1379; *Gore*, 571 at 1048. Several courts have even found the State's interest here to be compelling, thereby suggesting the second degree murder statute would survive the rigors of strict scrutiny analysis. *E.g., Davis*, 583 N.E.2d at 67; *People v. Wright*, 578 N.E.2d 1090, 1099 (Ill. App. Ct. 1991).

114. *E.g., People v. Thomas*, 576 N.E.2d 1020, 1022 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991). This argument is unusual to hear from the defense, as it would seemingly place a defendant in a worse than desirable position on remand. Of course, those convicted of second degree murder must assume that posture in order to claim the statute deterred them from appealing their convictions.

115. If second degree murder were a lesser included offense of first degree murder, a conviction for second degree murder would constitute an implied acquittal of first degree murder. Therefore a retrial for first degree murder would be impossible due to constitutional prohibitions on double jeopardy. *See, e.g., People v. Timberson*, 573 N.E.2d 374, 376 (Ill. App. Ct. 1991). In order to create the appearance that a retrial places the defendant at risk, this defense theory accepts the premise that second degree murder is not lesser included in first degree murder. *E.g., Thomas*, 576 N.E.2d at 1022. This argument, however, ignores the effects of collateral estoppel in precluding a retrial for first degree murder. *See infra* notes 272-307 and accompanying text for a discussion of the effects of collateral estoppel on subsequent retrials in this context. Defendants argue that second degree murder is not a lesser included offense of first degree murder for other purposes as well. *See, e.g., People v. Swanson*, 570 N.E.2d 503, 505 (Ill. App. Ct. 1991) (rejecting the argument that if second degree murder is not a lesser included offense of first degree murder, the defendant must request consideration of the lesser offense before a court in a bench trial may do so).

116. *Thomas*, 576 N.E.2d at 1022.

117. *E.g., Timberson*, 573 N.E.2d at 376. *See infra* notes 206-227 and accompanying text for a discussion of the lesser included offense relationship and the first and second degree murder statutes.

118. *E.g., Thomas*, 576 N.E.2d at 1022; *People v. Newbern*, 579 N.E.2d 583, 597 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992). *See infra* notes 293-307 and accompanying text for a discussion of the effects of collateral estoppel on a retrial after an appellate court reverses and remands a second degree murder conviction.

same conclusion.

In examining this issue, the court in *People v. Thomas* discussed the relationships between the murder and voluntary manslaughter statutes under the old system, as well as between the first and second degree murder statutes under the current law.<sup>119</sup> The trial court convicted the defendant of second degree murder, but the appellate court reversed and remanded his case for a new trial.<sup>120</sup> On retrial, the defendant argued that under the new first and second degree murder formulation, a second degree murder defendant could face a first degree murder conviction at retrial. As second degree murder is not a lesser included offense of first degree murder, he claimed double jeopardy cannot protect a second degree murder defendant from facing a conviction for first degree murder at retrial.<sup>121</sup>

The *Thomas* court found that the Criminal Code<sup>122</sup> protects the second degree murder defendant from a retrial for first degree murder.<sup>123</sup> Rather than double jeopardy, Section 3-4(b)(2) embodies the common law doctrine of collateral estoppel.<sup>124</sup> When a prosecutor charges first degree murder and the jury finds the defendant guilty of second degree murder, the trier of fact necessarily determined the defendant proved the existence of a mitigating factor.<sup>125</sup> As a result, courts cannot allow relitigation of the mitigation issue in any subsequent trial, and the trier of fact may only convict the defendant of second degree murder.<sup>126</sup> Thus, the *Thomas* court concluded, the law treats defendants convicted of second degree murder no differently from other criminal defendants, and it does not discourage them from appealing their convictions any more

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119. 576 N.E.2d 1020, 1022 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991).

120. *Id.*

121. *Id.* See *infra* notes 156-167 and accompanying text for a discussion of the lesser included offense doctrine.

122. Illinois law provides:

....  
(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

....  
(2) Was terminated by a final order or judgement, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution . . . .  
720 ILCS 5/3-4(b)(2) (1992).

123. *Thomas*, 576 N.E.2d at 1022. The *Thomas* court adopted the view that collateral estoppel, rather than double jeopardy, prevents a court from retrying the defendant for first degree murder. *Id.*

124. *Id.* at 1022.

125. *Id.* at 1023.

126. *Id.* See *infra* notes 293-307 and accompanying text for a discussion of the effects of collateral estoppel on a defendant facing retrial after an appellate court reverses and remands his second degree murder conviction.

than other defendants.<sup>127</sup>

### C. Separation of Powers Challenges and the State Charging Second Degree Murder

Illinois' separation of powers doctrine provides the most interesting constitutional challenge.<sup>128</sup> Under this argument, the second degree murder statute, by empowering the defendant to elect the second degree instruction to the jury and requiring him to prove the mitigation,<sup>129</sup> implicitly restricts the prosecution to charging him only with first degree murder. Proponents of this argument claim this would be a legislative infringement upon the Executive's discretion to charge an individual with a particular crime.<sup>130</sup> No court has yet agreed. In fact, courts have specifically rejected this argument.<sup>131</sup>

Indeed, after initial confusion on this point,<sup>132</sup> courts now conclude the State can initially charge a defendant with second degree murder.<sup>133</sup> Beginning with *People v. Burks*,<sup>134</sup> courts noted that no language in the statute explicitly prevents a charging instrument from alleging second degree murder,<sup>135</sup> and the General Assembly

127. *Thomas*, 576 N.E.2d at 1023.

128. ILL. CONST. of 1970, art. II, § 1 (mandating that "[t]he legislative, executive and judicial branches are separate" and that "[n]o branch shall exercise powers belonging to another").

129. 720 ILCS 5/9-2(c) (1992).

130. *E.g.*, *People v. Davis*, 583 N.E.2d 64, 67 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1018 (Ill. 1992); *People v. Gore*, 571 N.E.2d 1041, 1048 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 124 (Ill. 1991); *People v. Clark*, 565 N.E.2d 1373, 1379 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 918 (Ill. 1991).

131. *See, e.g.*, *Davis*, 583 N.E.2d at 67 (noting that the State may charge a defendant with second degree murder); *Gore*, 571 N.E.2d at 1048 (stating that the statute does not prohibit the State from charging a defendant with second degree murder); *Clark*, 565 N.E.2d at 1379 (stating that the State may use its discretion to charge a defendant with second degree murder); *People v. Burks*, 545 N.E.2d 782, 783 (Ill. App. Ct. 1989) (holding the State can initially charge a defendant with second degree murder).

132. One of the statute's authors originally argued that the State would be precluded from charging a defendant with second degree murder. Steigmann, *supra* note 38, at 496. He has since adopted the logic of *People v. Burks*, 545 N.E.2d 782, 783 (Ill. App. Ct. 1989), and argues that the State, by charging second degree murder, simply concedes the mitigation issue in favor of the defendant. Telephone Interview with Hon. Robert J. Steigmann, Justice of the Illinois Appellate Court (Oct. 3, 1992).

133. *E.g.*, *Davis*, 583 N.E.2d at 67; *Gore*, 571 N.E.2d at 1048; *Clark*, 565 N.E.2d at 1379; *Burks*, 545 N.E.2d at 784.

134. 545 N.E.2d 782 (Ill. App. Ct. 1989).

135. *Davis*, 583 N.E.2d at 67; *Gore*, 571 N.E.2d at 1048; *Burks*, 545 N.E.2d at 784; *see* 720 ILCS 5/9-2 (1992) (providing the elements of second degree murder). Courts additionally note that the language in the statute also treats jury and bench trials differently. *See, e.g.*, *People v. Swanson*, 570 N.E.2d 503, 506 (Ill. App. Ct. 1991) (noting the varied application of the statute in jury and bench trials). In a jury trial, the defendant must elect to have the jury consider convicting him of second degree murder. *Id.* He may prevent the jury from considering second degree murder as an option and "roll the dice" in the hope

did not intend such a result.<sup>136</sup> They note the procedure requiring the defendant to prove mitigation outlined in Subsection (c) of the second degree murder statute speaks only to the situation in which the prosecution initially charges the defendant with first degree murder.<sup>137</sup>

By charging a defendant with second degree murder, the State alleges it can prove the elements of first degree murder, but concedes the presence of mitigation.<sup>138</sup> As such, if the State charges a defendant with second degree murder and proves the elements of first degree murder, the trier of fact can only find the defendant guilty of second degree murder.<sup>139</sup> This places the defendant in exactly the same position as a second degree murder defendant when a court reverses and remands his conviction.<sup>140</sup> In both instances, the prosecution must prove beyond a reasonable doubt all the elements of first degree murder.<sup>141</sup> Should it do so, the presence of mitigation is no longer an issue, and the only appropriate guilty verdict would be second degree murder.<sup>142</sup>

In response to *Burks*, the new Illinois Pattern Jury Instructions contain directions for the jury when the State initially charges second degree murder.<sup>143</sup> The Committee Note to Instruction 7.01S acknowledges the peculiar circumstances of a defendant being

the jury would acquit rather than convict him for first degree murder. 720 ILCS 5/9-2(c) (1992); *Swanson*, 570 N.E.2d at 506. At least one court noted that the language of the statute speaks only to jury trials. *Swanson*, 570 N.E.2d at 506. Thus, the court said a defendant in a bench trial need not elect the second degree murder option for conviction, and consequently may not prevent a court sitting as trier of fact from considering convicting him for second degree murder. *Id.* In other words, the defendant in a bench trial does not have the right to "roll the dice." *Id.*

136. *Burks*, 545 N.E.2d at 783; see also S. 522, 84th Ill. Gen. Ass'y 38 (May 23, 1985) (quoting Senator Sangmeister: "[W]e think that prosecutors will charge [second degree murder] when it is a manslaughter case the way they properly should").

137. *Gore*, 571 N.E.2d at 1049; *Clark*, 565 N.E.2d at 1379; see 720 ILCS 5/9-2(c) (1992).

138. *People v. Golden*, 614 N.E.2d 444, 451 (Ill. App. Ct. 1993); *Gore*, 571 N.E.2d at 1049; *Burks*, 545 N.E.2d at 783; see I.P.I.—CRIMINAL (1992), *supra* note 51, No. 7.01S, Committee Note.

139. *Clark*, 565 N.E.2d at 1379; I.P.I.—CRIMINAL (1992), *supra* note 51, No. 7.01S, Committee Note.

140. *People v. Newbern*, 579 N.E.2d 583, 597-98 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

141. *Burks*, 545 N.E.2d at 783-84.

142. *Id.*

143. The Illinois Pattern Jury Instructions state:

A person commits the offense of second degree murder when he kills an individual [without lawful justification] if, in performing the acts which cause the death,

[1] he intends to kill or do great bodily harm to that individual [or another]; [or]

[2] he knows that such acts will cause death to that individual [or another]; [or]

charged with second degree murder, but finds that in such circumstances "the State is required to prove the elements of first degree murder, but if it satisfies the jury it has done so, the only verdict and judgement to which it is entitled is guilty of second degree murder."<sup>144</sup> The Supreme Court Committee found that "[t]his result follows because the State . . . has conceded the presence of the mitigating factor that reduces the defendant's criminal behavior from first degree murder to second degree murder."<sup>145</sup>

In *People v. Clark*,<sup>146</sup> the defendant argued the second degree murder statute violated the Separation of Powers Clause by removing the State's Attorney's discretion to charge second degree murder.<sup>147</sup> Relying on *Burks*, the court rejected this claim and found two rationales to support its conclusion.<sup>148</sup> First, it relied upon prosecutorial ethics, stating "it would seem to be an impermissible exercise of prosecutorial discretion for a prosecutor to charge a defendant with a crime the prosecutor knows the defendant did not commit."<sup>149</sup> Thus, the prosecutor must be able to charge a defendant with second degree murder if he believes sufficient mitigation exists precluding a first degree murder conviction. Second, the court notes the statute "only refers to the circumstances where the State charges first degree murder and the defendant wants to reduce it to second degree murder."<sup>150</sup> As such, the court implicitly concludes the statute does not preclude the State from initially charging the defendant with second degree murder. The court

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[3] he knows that such acts create a strong probability of death or great bodily harm to that individual [or another].

I.P.I.—CRIMINAL (1992), *supra* note 51, No. 7.01S.

The Illinois Pattern Jury Instructions further provide:

To sustain 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 his acts would cause death to \_\_\_\_\_; [or]

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

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

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

*Id.* at No. 7.02S.

144. *Id.* at No. 7.01S, Committee Note.

145. *Id.*

146. 565 N.E.2d 1373 (Ill. App. Ct. 1991).

147. *Id.* at 1379.

148. *Id.*

149. *Id.*

150. *Id.*

therefore denied the defendant's separation of powers challenge.<sup>151</sup>

V. INCLUSION VERSUS EXCLUSION: WHETHER SECOND DEGREE  
MURDER IS A LESSER INCLUDED OFFENSE OF FIRST  
DEGREE MURDER

If an appellate court reverses a conviction for second degree murder and remands the case for retrial, different theories can affect the course of that trial. The generally accepted premise is that once a court finds a defendant guilty of second degree murder, the defendant may not later be convicted of first degree murder. The underlying rationales, however, vary between courts.<sup>152</sup>

Since Illinois introduced separate degrees,<sup>153</sup> courts have attempted to further classify the two types of murder. Central to this study is whether second degree murder is a lesser included offense of first degree murder. Various courts, relying on different reasoning and support, have reached contrary conclusions.<sup>154</sup>

The determination of whether second degree murder is lesser included within first degree murder has an even greater importance. If second degree murder is currently understood to be distinct from first degree murder, and *not* lesser included, courts can easily apply the statutes. If, however, second degree murder is viewed as a lesser included offense within first degree murder, it becomes simple for a court to inaccurately apply the law, oftentimes at the expense of the defendant.<sup>155</sup>

In order to understand the nature of the relationship between the first and second degree murder statutes, the improper application of the lesser included offense relationship in the first and second degree murder context should be discussed.

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151. *Clark*, 565 N.E.2d at 1379.

152. *Compare* *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991) (relying on collateral estoppel and lesser mitigated offense theories), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992) *with* *People v. Timberson*, 573 N.E.2d 374, 375 (Ill. App. Ct. 1991) (relying on the lesser included offense and double jeopardy theories).

153. PA 84-1450 became effective July 1, 1987. *People v. Shumpert*, 533 N.E.2d 1106, 1111 (Ill. 1989).

154. *Compare* *People v. Newbern*, 579 N.E.2d 583 (Ill. App. Ct. 1991) (4th Dist.) (holding that second degree murder is not a lesser included offense of first degree murder because it does not have fewer elements nor does it require a less culpable mental state than first degree murder), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992) *with* *People v. Timberson*, 573 N.E.2d 374 (Ill. App. Ct. 1991) (5th Dist.) (concluding second degree murder is a lesser included offense of first degree murder because second degree murder is more comparable to voluntary manslaughter, which was a lesser included offense of murder), *appeal denied*, 580 N.E.2d 122 (Ill. 1991).

155. *E.g.*, *People v. Collins*, 572 N.E.2d 1005, 1010 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 122 (Ill. 1991)

### A. The Doctrine of Lesser Included Offenses

Before analyzing the application of the lesser included offense doctrine in the first and second degree murder context, there must be an understanding of Illinois' law of lesser included offenses. A lesser included offense is typically one in which the elements of the lesser offense form a subset of the elements of the offense charged.<sup>156</sup>

Under Illinois' statutory test, a crime is a lesser included offense of another if either: (1) the offense involves the same or fewer statutory elements than comprise the greater offense; or (2) the lesser crime requires a lesser mental state.<sup>157</sup> The following hypothetical highlights the elements test. An individual commits the offense of, for example, unlawful restraint "when he knowingly without legal authority detains another."<sup>158</sup> The elements of the offense, therefore, are that the defendant had the requisite mental state of knowledge, that he acted without legal authority, and that he detained another.<sup>159</sup> To convict an individual for aggravated unlawful straint, the State must prove the defendant "knowingly without legal authority detain[ed] another while using deadly force."<sup>160</sup> To convict for the more serious offense, therefore, the State must prove the same three elements from unlawful restraint

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156. *People v. Kimball*, 614 N.E.2d 273, 275 (Ill. App. Ct. 1993); see also *People v. Kerrick*, 77 P. 711, 712 (Cal. 1904) ("To be necessarily included in the offense charged, the lesser offense must not only be part of the greater as in fact, but it must be embraced within the legal definition of the greater as a part thereof"); see also *Schmuck v. United States*, 489 U.S. 705, 719-21 (1989) (maintaining that "the elements of the offense of odometer tampering are not a subset of the elements of the crime of mail fraud," and that odometer tampering is therefore not a lesser included offense of mail fraud); MODEL PENAL CODE § 1.07(4)(a) (Official Draft 1962) (mandating that one offense is a lesser included offense of another when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. . .").

Proof of the greater offense is also proof of the lesser included offense. *Brown v. Ohio*, 432 U.S. 161, 168 (1977). *Brown* employs the "*Blockburger* analysis" for determining when two offenses are the "same" for double jeopardy purposes. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (describing the test as "whether each provision requires proof of a fact which the other does not"); see also *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993) (reaffirming the *Blockburger* test as the only indicator of whether two offenses are the same for double jeopardy purposes). The *Brown* Court, however, dealt with issues of double jeopardy, and explicitly declined to address "questions that may arise . . . after a conviction is reversed on appeal." *Brown*, 432 U.S. at 165 n.5. The latter, however, is precisely the situation here.

157. 720 ILCS 5/2-9(a) (1992). These tests are known as the "elements test" and the "mental state test." For example, the inchoate offense is lesser included in the offense charged. 720 ILCS 5/2-9(b) (1992).

158. 720 ILCS 5/10-3 (1992).

159. See *People v. Williams*, 582 N.E.2d 1158, 1160 (Ill. App. Ct. 1991) (discussing the elements of unlawful restraint), *appeal denied*, 591 N.E.2d 30 (Ill. 1992).

160. 720 ILCS 5/10-3.1 (1992) (emphasis added).

plus the added component of deadly force.<sup>161</sup> As the elements of unlawful restraint form a complete subset of aggravated unlawful restraint, it is a lesser included offense of its aggravated counterpart under the elements test.

An offense can also be lesser included in another if it requires a lesser mental state.<sup>162</sup> A conviction for first degree murder, for example, requires the defendant to unlawfully take the life of another with either an intentional or knowing state of mind.<sup>163</sup> Involuntary manslaughter, on the other hand, is also an unlawful killing, but only requires the defendant to have acted recklessly.<sup>164</sup> In other words, the primary distinction between first degree murder and involuntary manslaughter is the mental state set forth in the statute.<sup>165</sup> Recklessness, of course, is a less culpable mental state than intent and knowledge.<sup>166</sup> As such, involuntary manslaughter is a

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161. See *People v. Bloyer*, 558 N.E.2d 1056, 1057 (Ill. App. Ct.) (discussing the enhancement of unlawful restraint to aggravated unlawful restraint by the presence of a dangerous weapon), *appeal denied*, 564 N.E.2d 841 (Ill. 1990).

162. 720 ILCS 5/2-9(a) (1992).

163. 720 ILCS 5/9-1(a) (1992). A court may also convict a person of first degree murder through the felony murder provision. 720 ILCS 5/9-1(a)(3) (1992).

164. *People v. Reeves*, 593 N.E.2d 683, 691 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 469 (Ill. 1992); see 720 ILCS 5/9-3(a) (1992) (providing that the state of mind for involuntary manslaughter is recklessness). Illinois defines recklessness as a "conscious disregard [of] a substantial and unjustifiable risk . . . ." 720 ILCS 5/4-6 (1992).

165. *Reeves*, 593 N.E.2d at 691.

166. Illinois law describes intent in the following manner: "A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (1992).

The Illinois provision regarding knowledge is a bit more detailed:

A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

720 ILCS 5/4-5 (1992).

The Criminal Code defines reckless as follows:

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of the statute using the latter term, unless the statute clearly requires another meaning.



lesser included offense of first degree murder due to its lesser mental state.<sup>167</sup> It is the less culpable mental state which is at the heart of the debate whether second degree murder is a lesser included offense of first degree murder.

*B. Differing Judicial Applications of the Lesser Included  
Analysis to the Murder Statutes*

Illinois courts are split on whether second degree murder is lesser included in first degree murder.<sup>168</sup> Those courts deciding that second degree murder is a lesser included offense of first degree murder rely upon the second prong of the statutory test by finding that the second degree murder statute requires a lesser mental state than its first degree sibling.<sup>169</sup> Other courts vigorously oppose this construction of the statute.<sup>170</sup>

*1. The Lesser Mental State: Courts Finding that Second Degree Murder Is a Lesser Included Offense of First Degree Murder*

To support the conclusion that second degree murder requires a lesser mental state than first degree murder, courts invariably rely upon *People v. Hoffer*.<sup>171</sup> Courts interpret *Hoffer* as holding that voluntary manslaughter was a lesser included offense of mur-

720 ILCS 5/4-6 (1992).

167. *Reeves*, 593 N.E.2d at 691.

168. *E.g.*, *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991) (4th Dist.) (holding that second degree murder is not a lesser included offense of first degree murder), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); *People v. Thomas*, 576 N.E.2d 1020, 1022 (Ill. App. Ct. 1990) (1st Dist.) (finding that second degree murder is not a lesser included offense of first degree murder), *appeal denied*, 580 N.E.2d 131 (Ill. 1991); *People v. Timberson*, 573 N.E.2d 374, 375 (Ill. App. Ct. 1991) (5th Dist.) (classifying second degree murder as a lesser included offense of first degree murder); *People v. Collins*, 572 N.E.2d 1005, 1011 (Ill. App. Ct.) (1st Dist.) (concluding second degree murder is a lesser included offense of first degree murder), *appeal denied*, 580 N.E.2d 122 (Ill. 1991).

169. *E.g.*, *People v. Timberson*, 573 N.E.2d 374, 377 (Ill. App. Ct.) (5th Dist.); *People v. Swanson*, 570 N.E.2d 503, 506 (Ill. App. Ct. 1991) (1st Dist.). Indeed, courts finding second degree murder to be a lesser included offense of first degree murder usually admit "second degree murder is not established by proof of the same or less than all the facts required to prove first degree murder . . ." and concede that second degree murder cannot be a lesser included offense of first degree murder under the elements test. *Timberson*, 573 N.E.2d at 377; *cf.* *People v. Brown*, 578 N.E.2d 1168, 1174 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 25 (Ill. 1992).

170. *See* O'Neill, *supra* note 39, at 224 (discussing this opposition); Steigmann, *supra* note 39, at 497 (noting the basis for the rejection of the lesser included theory). *See infra* notes 182-205 and accompanying text for a discussion of courts which hold that second degree murder is not a lesser included offense.

171. 478 N.E.2d 335 (Ill. 1985).

der.<sup>172</sup> The *Hoffer* court based its finding upon its belief that voluntary manslaughter required a less culpable mental state than murder.<sup>173</sup> Recently, some courts have transposed the *Hoffer* finding onto the new first and second degree murder statutes.<sup>174</sup> These courts reason that second degree murder's mental state must similarly be less culpable than that required for a first degree murder conviction.<sup>175</sup>

While it may be simple to state that second degree murder is lesser included in first degree murder merely because voluntary manslaughter was lesser included in murder, this analysis is not intellectually complete. The implicit logic underlying "less culpable" is that malice aforethought is an element required by the first degree murder statute, and second degree murder is first degree murder without malice. This is a carry-over from the courts' former framework in dealing with murder and voluntary manslaughter. Prior to the adoption of the 1961 Criminal Code, malice aforethought was an element of murder, while voluntary manslaughter was essentially murder without malice.<sup>176</sup> In order to maintain voluntary manslaughter as a lesser included offense of murder after the adoption of the 1961 Criminal Code, courts stated that the new voluntary manslaughter still required a lesser mental state than murder, implicitly believing that the "no malice" aspects of the old voluntary manslaughter were still part of the crime.<sup>177</sup>

For example, the Fifth District Appellate Court, in *People v. Timberson*,<sup>178</sup> wrote, "Although second degree murder is not established by proof of the same or less than all of the facts required to prove first degree murder, we think it does involve a less culpable mental state."<sup>179</sup> The court noted that voluntary manslaughter was a lesser included offense of murder, and reasoned that "second degree murder must [therefore] be considered a lesser included of-

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172. See *People v. Russell*, 574 N.E.2d 258, 261-62 (Ill. App. Ct. 1991) (noting *Hoffer's* holding that first degree murder is a lesser included offense); *People v. Swanson*, 570 N.E. 2d 503, 506 (Ill. App. Ct. 1991) (quoting from *Hoffer*). But see, e.g., *People v. Newburn*, 579 N.E.2d 583, 584 (Ill. App. Ct. 1991) (agreeing with Professor O'Neill's argument that voluntary manslaughter was not a lesser included offense of murder).

173. *Hoffer*, 478 N.E.2d at 340.

174. E.g., *Swanson*, 570 N.E.2d at 506.

175. See *id.* ("This same reasoning [from *Hoffer*], of course, applies to first and second degree murder"); *Timberson*, 573 N.E.2d at 377 (noting: "[O]ur supreme court recognized that the mitigating elements of the crime of voluntary manslaughter, which are identical to those of the crime of second degree murder, represent mental states of lesser culpability").

176. See *supra* notes 17-22 and accompanying text for a discussion of the murder and voluntary manslaughter statutes prior to the adoption of the Criminal Code of 1961.

177. *Hoffer*, 478 N.E.2d at 340.

178. 573 N.E.2d 374 (Ill. App. Ct. 1991).

179. *Id.* at 377.

fense of first degree murder."<sup>180</sup> The court assumed that the established principles regarding the application of voluntary manslaughter could similarly apply to the new statutory schemes involving first and second degree murder. This reasoning survives today.<sup>181</sup>

## 2. *Mentally Second to None: Courts Finding Identical Mental States in First and Second Degree Murder*

Other Illinois courts conclude that second degree murder cannot be a lesser included offense of first degree murder.<sup>182</sup> After agreeing that second degree murder is not a lesser included offense of first degree murder under the elements test, these courts also deny the existence of a lesser included offense relationship based upon the conclusion that the required mental states for first and second degree murder are identical.<sup>183</sup>

In order to obtain a conviction for first degree murder, the State must prove the defendant acted intentionally or knowingly.<sup>184</sup> To reduce the offense to second degree murder, the statute requires the defendant to prove one of the mitigating factors.<sup>185</sup> These factors, however, do not affect the mental state as established by the State. Instead, these courts hold that they simply establish a factor which lawmakers are willing to recognize in allowing a reduction in the severity of the punishment.<sup>186</sup>

In rejecting the contention that the establishment of mitigation is proof of a less culpable mental state, courts argue or imply that malice aforethought is not an element of either offense.<sup>187</sup> These courts often note that the concept of malice aforethought is not a part of the language of the first and second degree murder statutes.<sup>188</sup> Thus some Illinois courts find that, unlike the situation in

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180. *Id.*

181. *People v. Swanson*, 570 N.E.2d 503, 506 (Ill. App. Ct. 1991).

182. *E.g.*, *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); *People v. Thomas*, 576 N.E.2d 1020, 1022 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991); *see O'Neill, supra* note 39, at 224; *Steigmann, supra* note 39, at 497.

183. *Newbern*, 579 N.E.2d at 594-95; *cf. People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986) (finding no inconsistency between the mental states required by the murder and voluntary manslaughter statutes under the 1961 Criminal Code).

184. 720 ILCS 5/9-1(a) (1992). *See supra* notes 50-55 and accompanying text for a discussion of the State's burden of proof under the first degree murder statute.

185. 720 ILCS 5/9-2 (1992). *See supra* notes 56-59 and accompanying text for a discussion of the defendant's burden in reducing the homicide to second degree murder.

186. *People v. Cook*, 576 N.E.2d 1242, 1245 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 133 (Ill. 1991); *People v. Hrobowski*, 575 N.E.2d 1306, 1320-21 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 134 (Ill. 1991).

187. *E.g.*, *Newbern*, 579 N.E.2d at 594.

188. *Id.*

*Mullaney v. Wilbur*,<sup>189</sup> when a defendant argues there is sufficient mitigation to reduce the offense to second degree murder, he is not negating the mental state established by the State.<sup>190</sup>

In *People v. Thomas*, the court addressed the lesser included offense issue when a defendant brought an equal protection challenge to the statute.<sup>191</sup> The defendant posited that second degree murder was not a lesser included offense of first degree murder.<sup>192</sup> The court agreed.<sup>193</sup> The court noted that second degree murder is "first degree murder plus the element of mitigation."<sup>194</sup> It implicitly assumed this has two effects. First, the court summarily concluded second degree murder cannot be a lesser included offense under the elements test, as no subset of first degree murder elements defines second degree murder.<sup>195</sup> Second, and more significantly, the mental state required for second degree murder must be the same as first degree murder: intent or knowledge.<sup>196</sup> Otherwise, the defendant's establishment of mitigation would negate the mental state as proved by the prosecution.<sup>197</sup>

In *People v. Cook*<sup>198</sup> and *People v. Hrobowski*,<sup>199</sup> the defendants similarly argued that the required mental state for second degree murder was less than that required for first degree murder. The *Cook* court explicitly noted the defendants' heavy reliance on *Hoffer*.<sup>200</sup> The defendant there argued that, according to *Hoffer*, the mental states involved in murder and voluntary manslaughter

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189. 421 U.S. 684 (1975). See *supra* notes 76-91 and accompanying text for a discussion of *Mullaney*, malice, mental states and the burden of proof.

190. *People v. Golden*, 614 N.E.2d 444, 450-51 (Ill. App. Ct. 1993).

191. 576 N.E.2d 1020 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991). See *supra* notes 98-127 and accompanying text for a discussion of equal protection issues in the context of the first and second degree murder statutes.

192. *Id.* at 1022.

193. *Id.* The defendant then argued that after the court reversed his initial second degree murder conviction and remanded his case for a new trial, the new trial could end in his conviction for first degree murder because the principles of double jeopardy would not apply to protect him. *Id.* After agreeing with the defendant that second degree murder is not a lesser included offense of first degree murder, and that double jeopardy is therefore inapplicable, the court found that collateral estoppel prohibited the defendant from a subsequent conviction for first degree murder. *Id.* at 1022-23. See *infra* notes 293-307 and accompanying text for a discussion of the role of collateral estoppel in first and second degree murder trials.

194. *Id.* (citing Steigmann, *supra* note 39 at 497).

195. *Thomas*, 576 N.E.2d at 1022.

196. *Id.*

197. The fact that the defendant's establishment of mitigation negated the mental state proven by the prosecution was a fatal flaw in *Mullaney*. 421 U.S. 684, 694 (1975). See *supra* notes 76-91 and accompanying text for a discussion of *Mullaney*.

198. 576 N.E.2d 1242 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 133 (Ill. 1991).

199. 575 N.E.2d 1306 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 134 (Ill. 1991).

200. *Cook*, 576 N.E.2d at 1244.

are inconsistent.<sup>201</sup> The defendant's argument concluded the "mental states in first and second degree murder are inconsistent as well."<sup>202</sup> *Hrobowski* was a virtually identical case with the same result. Both the *Cook* and *Hrobowski* courts, quoting from *People v. Jerome*,<sup>203</sup> found "no inherent inconsistency between the mental states for first and second degree murder."<sup>204</sup> The courts therefore held that provocation or an unreasonable belief in justification by self-defense does not affect the elements of first degree murder—including the required mental states.<sup>205</sup> Having concluded that both the first and second degree murder statutes require the same mental state, these courts found second degree murder cannot be lesser included in first degree murder.

*C. Lesser Included Offenses, Murder and Old Shoes: Second Degree Murder Cannot Be a Lesser Included Offense of First Degree Murder*

In attempting to determine the relationship between first and second degree murder, some courts inappropriately try to fit second degree murder into the "comfortable old shoe"<sup>206</sup> of being a lesser included offense of first degree murder.<sup>207</sup> As one court put it, this characterization was attractive "simply because no other recognized description seem[ed] to fit."<sup>208</sup> Nonetheless, one cannot bootstrap the murder statutes to fit the lesser included offense design.

Simple statutory construction leads to the inescapable conclusion that the language of the statutes precludes an application of the lesser included offense analysis. The second degree murder statute begins by stating that "[a] person commits the offense of second degree murder when he commits the offense of first degree murder. . . ."<sup>209</sup> By its own definition, second degree murder finds its predicate in first degree murder. As such, the statute presupposes that the defendant acted with an intentional or knowing state of mind—the mental state the prosecution established in proving

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201. *Id.* at 1245.

202. *Id.*

203. 564 N.E.2d 221, 226 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 152 (Ill. 1991).

204. *Cook*, 576 N.E.2d at 1245; *Hrobowski*, 575 N.E.2d at 1320.

205. *Cook*, 576 N.E.2d at 1245; *Hrobowski*, 575 N.E.2d at 1320.

206. *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

207. See *supra* notes 182-205 and accompanying text for a discussion of Illinois decisions analyzing second degree murder as a lesser included offense of first degree murder.

208. *Newbern*, 579 N.E.2d at 588.

209. 720 ILCS 5/9-2(a) (1992). Second degree murder does not apply under the felony-murder provisions of the first degree murder statute. *Id.*; 720 ILCS 5/9-1(a)(3) (1992).

first degree murder.<sup>210</sup>

To reduce the offense to second degree murder, the defendant must establish that "he commit[ted] the offense of first degree murder . . . and either of the . . . mitigating factors [were] present. . . ."<sup>211</sup> Thus, the first and second degree murder statutes require the same predicate mental states. This is no great discovery, as *all* the elements of first degree murder must be present to convict the defendant of second degree murder. If the State fails to prove any of the elements of first degree murder, the defendant cannot be guilty of *either* first or second degree murder.<sup>212</sup> There is no reason the requisite mental state is any different from the other elements of the offense.

The statute's critics point to the defendant's burden of establishing mitigation in reducing the killing to second degree murder as tantamount to proving a lesser mental state. However, Illinois only recognizes four mental states.<sup>213</sup> First degree murder requires proof of either intent or knowledge.<sup>214</sup> If the second degree murder statute required a lesser mental state, presumably it would be one of recklessness, the next level recognized by the Criminal Code.<sup>215</sup> If that were the case, however, second degree murder would be indistinguishable from involuntary manslaughter.<sup>216</sup> The Legislature clearly could not have intended such an absurd result.

Moreover, subsequent developments in the law preclude the notion that the second degree murder statute requires a lesser mental state. To convict for first degree murder, the State must prove the defendant, either intentionally or knowingly, unlawfully

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210. *People v. Golden*, 614 N.E.2d 444, 451 (Ill. App. Ct. 1993). The *Golden* court wrote:

The Illinois murder statute does not require the defendant to prove a less culpable mental state to reduce first degree murder to second degree murder. Both degrees of murder require intent to kill or knowledge that one's act will cause great bodily harm . . . or a strong probability of death or great bodily harm.

*Id.*

See also *Newbern*, 579 N.E.2d at 598 (stating that the mental state for second degree murder is the same as first degree murder). If the State fails to prove the defendant acted intentionally or knowingly, the court should acquit the defendant before the second degree murder mitigation issues even arise. *Id.*

211. 720 ILCS 5/9-2(a) (1992).

212. *Newbern*, 579 N.E.2d at 598.

213. 720 ILCS 5/4-4 (intent), 4-5 (knowledge), 4-6 (recklessness), 4-7 (negligence) (1992).

214. 720 ILCS 5/9-1(a) (1992).

215. 720 ILCS 5/4-6 (1992).

216. See *People v. Presley*, 595 N.E.2d 606, 611 (Ill. App. Ct. 1991) (noting that the major difference between first degree murder and involuntary manslaughter is the mental state existing at the time of the homicide), *appeal denied*, 602 N.E.2d 469 (Ill. 1992). See *supra* notes 182-205 and accompanying text for a comparison of the mental states required for murder and involuntary manslaughter.

caused the death of another person.<sup>217</sup> In prosecuting second degree murder, however, the State must establish exactly the same elements.<sup>218</sup> This includes the mental state: intentionally or knowingly. The State cannot offer to prove a lesser mental state to convict the defendant of second degree murder. If it fails to prove the defendant acted at least knowingly, the defendant cannot be found guilty of either first or second degree murder.<sup>219</sup> Regardless of which offense with which the defendant is charged, the State must prove exactly the same elements, including the mental state.

Confusion arises when courts interpret mitigation as a lesser mental state. Part of this problem is due to some courts' conception of malice aforethought as the underlying mental state required by the first degree murder statute. Malice aforethought, however, was eliminated from the statutes when the legislature adopted the Criminal Code of 1961.<sup>220</sup> The Code clearly states that a "person is not guilty of an offense . . . [unless] he acts while having one of the mental states as described in Sections 4-4 through 4-7."<sup>221</sup> Those mental states are intent, knowledge, recklessness and negligence.<sup>222</sup> Malice aforethought is clearly no longer among those mental states recognized under Illinois statutory law.<sup>223</sup>

217. 720 ILCS 5/9-1(a) (1992).

218. *People v. Burks*, 545 N.E.2d 782, 784 (Ill. App. Ct. 1989); *Steigmann*, *supra* note 39, at 497; Criminal I.P.I.—No. 7.02S (1992), *supra* note 51, which provides:

To sustain 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 his acts would cause death to \_\_\_\_\_; [or]

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

*Id.* (emphasis added).

219. See I.P.I.—Criminal (1992), *supra* note 51, Nos. 7.04A, 7.06A

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, your deliberations should end, and you should return a verdict of 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.

*Id.*

220. *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986); *Taylor v. Gilmore*, 954 F.2d 441, 449 (7th Cir. 1992), *rev'd on other grounds sub nom.*, 113 S. Ct. 2112 (1993).

221. 720 ILCS 5/4-3(a) (1992). The Code also permits certain strict liability offenses. 720 ILCS 5/4-3, 4-9 (1992). The first and second degree murder statutes are definitely not within that group.

222. 720 ILCS 5/4-4 to 4-7 (1992).

223. See *Wright*, 488 N.E.2d at 978 ("With the elimination of malice aforethought as an element of murder . . .").

Voluntary manslaughter, of course, was a crime of lesser culpability than murder. The same holds true today of first and second degree murders. Indeed, second degree murder is *by definition* less culpable than first degree murder.<sup>224</sup> That is because second degree murder is a *mitigated* first degree murder. The mitigation required to establish second degree murder reduces the culpability of the defendant; hence he receives a less severe penalty.<sup>225</sup> That mitigation, however, does not automatically translate into a lesser mental state, at least not as the phrase is used in the Criminal Code as a term of art.<sup>226</sup>

The Illinois Supreme Court recently addressed the mental states for first and second degree murder. It found:

When a jury returns a verdict of guilty of voluntary manslaughter or second degree murder, the jury has found that the defendant intended to kill the victim. The . . . intent to kill was *mitigated* by the existence of either a sudden and intense passion or imperfect self-defense. It is the presence of either of these statutory mitigating factors that reduces an unlawful homicide from murder to voluntary manslaughter or second degree murder; *it is not the absence of an intent to kill*.<sup>227</sup>

Thus, the mitigation reducing a first degree murder to second degree murder flows from the two enumerated statutory factors: sudden and intense passion or an unreasonable belief in self-defense. It does not result from a lesser mental state required to prove second degree murder. Moreover, the mitigation itself does not amount to a lesser mental state than that required to prove first degree murder.

#### VI. WORKING BACKWARDS: PROBLEMS WITH USING THE LESSER INCLUDED AND DOUBLE JEOPARDY DOCTRINES

Lesser included offense issues often arise when an appellate court reverses and remands a second degree murder conviction for a

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224. *People v. Newbern*, 579 N.E.2d 583, 594 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

225. The maximum sentence for first degree murder is death. Second degree murder, classified as a Class 1 felony, has a sentencing range of four to fifteen years. Compare 720 ILCS 5/9-1 and 730 ILCS 5/5-8-1(a)(1) (1992) (the penalty for first degree murder) with 730 ILCS 5/5-8-1(a)(4) (1992) (providing the penalty for a Class 1 felony).

226. The Illinois Supreme Court has recently analyzed this issue in a similar context. It stated that "[t]he legislature may choose, if it so decides, to amend the aggravated battery statute to recognize that it is possible for a defendant to knowingly or intentionally cause great bodily harm while acting under a sudden or intense passion or under an actual but unreasonable belief in the need for self-defense." *People v. Allen*, 606 N.E.2d 1149, 1152-53 (Ill. 1992). This is exactly what the Legislature has done with the first and second degree murder statutes. *Id.*; accord *State v. Lee*, 818 S.W.2d 778, 781 (Tex. Crim. App. 1991) ("[W]e cannot conclude that intent or knowledge accompanied by sudden passion exists as a mental state of a lesser degree of culpability than intentional or knowing.").

227. *Allen*, 606 N.E.2d at 1152 (emphasis added).



new trial. If the trial court, on remand, finds that double jeopardy precludes a charge of first degree murder, its path is clear. All the trial court needs to do is find that second degree murder is a lesser included offense of first degree murder.<sup>228</sup> After this finding, the court's path brings it directly to the companion doctrines of implied acquittal and double jeopardy. The court then holds the initial conviction for second degree murder constituted an implied acquittal of first degree murder, and it easily finds double jeopardy.

#### A. *Implied Acquittal: On the Road to Double Jeopardy*

Generally, conviction of a lesser included offense operates as an acquittal of the greater charge.<sup>229</sup> In *Green v. United States*, the United States Supreme Court held that when a jury convicts a defendant of a lesser included offense of the crime originally charged, but the verdict is silent as to the charged offense itself, the jury has implicitly acquitted him of the greater offense.<sup>230</sup> Illinois formally adopted this theory by statute, stating that a "conviction of an included offense is an acquittal of the offense charged."<sup>231</sup> If second degree murder is a lesser included offense of first degree murder, the defendant found guilty of second degree murder would automatically be acquitted of first degree murder.<sup>232</sup>

#### B. *Final Destination: The Land of Double Jeopardy*

The defense of double jeopardy leads courts to analyze the relationship between first and second degree murder. It is well settled that once a court acquits a defendant of a charge, the State cannot subsequently put him or her in jeopardy for the same offense.<sup>233</sup> Thus, the determination of whether a person is being put in jeopardy more than once is closely related to the question of whether the one offense is lesser included in another.<sup>234</sup> The "guarantee against double jeopardy affords separate protections against three

228. See *United States v. Bailin*, 977 F.2d 270, 281 (7th Cir. 1992) ("[f]ocusing on greater and lesser offenses is a double jeopardy argument . . .").

229. *Green v. United States*, 355 U.S. 184, 190-91 (1957); see also AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 1.08(1) (Official Draft 1962) (promoting "[a] finding of guilt of a lesser included offense [as] an acquittal of the greater inclusive offense . . .").

230. 355 U.S. 184, 190 (1957).

231. 720 ILCS 5/3-4(a) (1992).

232. E.g., *People v. Russell*, 574 N.E.2d 258, 262 (Ill. App. Ct. 1991); *People v. Timberson*, 573 N.E.2d 374, 375 (Ill. App. Ct. 1991).

233. *Arizona v. Washington*, 434 U.S. 497, 503 (1978); see U.S. CONST. amend. V (mandating that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"); ILL. CONST. of 1970, art. I, § 10 (providing that "[n]o person shall . . . be twice put in jeopardy for the same offense").

234. *State v. Woodfork*, 478 N.W.2d 248, 255 (Neb. 1991) (White, J., concurring).

things: (1) a second prosecution after acquittal; (2) a second prosecution after conviction;<sup>235</sup> and (3) multiple punishments for the same offense.<sup>236</sup> Illinois statutory law codifies the theory of double jeopardy in section 3-4 (a) of the Criminal Code.<sup>237</sup> The double jeopardy prohibition against a subsequent prosecution is effective when a court convicts a defendant of a lesser included offense of the crime initially charged.<sup>238</sup> Thus, once a court finds second degree murder to be a lesser included offense in first degree murder, it automatically finds a subsequent prosecution or retrial for first degree murder barred under double jeopardy principles.<sup>239</sup> Therefore, courts using double jeopardy to protect the second degree murder defendant on remand are likely to find that second degree murder is a lesser included offense of first degree murder.

*C. As Second Degree Murder is Not A Lesser Included Offense in First Degree Murder, Double Jeopardy Does Not Apply*

When a trial court retries a defendant after a reversal of an initial second degree murder conviction, it innately feels that a conviction for first degree murder would be unfair.<sup>240</sup> Thus, some trial courts latch onto the double jeopardy nomenclature to limit any finding of guilt at retrial.<sup>241</sup> These courts see double jeopardy as a means to avoid the threat of a defendant being found guilty of first degree murder at the new trial.

The Double Jeopardy Clause has been described by Chief Justice Rehnquist as "one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of

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235. New trials resulting after remands do not trigger double jeopardy. *See Tibbs v. Florida*, 457 U.S. 31, 40 (1982) (holding that a defendant who successfully appeals a conviction generally is subject to retrial); *United States v. Scott*, 437 U.S. 82, 90-91 (1978) (noting that successful appeals based on any claim of error other than insufficiency of the evidence do not serve to bar retrial); *United States v. Tateo*, 377 U.S. 463, 464 (1964) (stating that retrying a defendant whose conviction is set aside because of error does not violate the double jeopardy provision); *Ball v. United States*, 163 U.S. 662, 672 (1896) (noting that defendant can be retried when he gets his conviction set aside).

236. *People v. Stefan*, 586 N.E.2d 1239, 1244 (Ill. 1992).

237. *People v. Thomann*, 554 N.E.2d 755, 757 (Ill. App. Ct.), *appeal denied*, 561 N.E.2d 704 (Ill. 1990), *cert. denied sub. nom.*, 111 S. Ct. 1582 (1991); *see* 720 ILCS 5/3-4(a) (1992) (providing that prosecution is barred if defendant was formerly prosecuted for the same offense and the prosecution resulted in a conviction by a final order or judgement, or was terminated improperly after the jury was impaneled and sworn).

238. 720 ILCS 5/3-4(a) (1992); *see Illinois v. Vitale*, 447 U.S. 410, 421 (1980) (finding that a conviction of a lesser included offense bars a subsequent trial of the greater offense).

239. *E.g.*, *People v. Timberson*, 573 N.E.2d 374, 377 (Ill. App. Ct. 1991); *People v. Swanson*, 570 N.E.2d 503, 506 (Ill. App. Ct. 1991).

240. *Cf. Timberson*, 573 N.E.2d at 374.

241. *Id.* at 377; *Swanson*, 570 N.E.2d at 506.

Rights."<sup>242</sup> It forces courts and practitioners through a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."<sup>243</sup> Indeed, one court has observed that the title double jeopardy "is periodically invoked by false claimants, such as the non-double jeopardy look-alikes of dual sovereignty and enhanced punishment and by the double jeopardy reject of compulsory joinder or same transaction."<sup>244</sup> With all the apparent confusion in this area of the law, it is not surprising that many courts wrongly apply the Double Jeopardy Clause to the first and second degree murder relationship.

In order to reach any discussion of double jeopardy, second degree murder must be a lesser included offense of first degree murder. However, second degree murder cannot properly be a lesser included offense of first degree murder.<sup>245</sup> The double jeopardy argument, therefore, is not available as a prophylactic against a conviction for first degree murder at a retrial after a second degree murder conviction.

#### *D. Problems With Using Lesser Included and Double Jeopardy Analyses*

The following cases demonstrate the application of double jeopardy rules to second degree murder defendants. The appellate holdings and discussion in *People v. Godina*<sup>246</sup> and *People v. Collins*<sup>247</sup> exemplify the necessity of properly understanding the relationship between the first and second degree murder statutes. The State charged the defendants in both cases with first degree murder. In *Godina*, the trial court directed a verdict of acquittal at the close of the State's case-in-chief.<sup>248</sup> The court, however, then ordered the State to continue on a charge of second degree murder.<sup>249</sup> The defendant, correctly recognizing the inherent inconsistency in the court's orders, immediately moved for a directed verdict on second degree murder. The defendant claimed that "since the State had failed to prove first degree murder, the State, as a matter of

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242. *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

243. *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (Rehnquist, J.).

244. *Butler v. State*, 605 A.2d 186, 186-87 (Md. Ct. Spec. App. 1992) (citations omitted), *cert. granted*, 612 A.2d 897 (Md. 1992).

245. See *supra* notes 207-218 and accompanying text for a discussion of the inapplicability of the lesser included offense analysis to the first and second degree murder statutes.

246. 584 N.E.2d 523 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 26 (Ill. 1992).

247. 572 N.E.2d 1005 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 122 (Ill. 1991).

248. *Godina*, 584 N.E.2d at 526.

249. *Id.*

law, failed to prove the elements of second degree murder.”<sup>250</sup> The judge denied the defendant’s motion. As a trial can continue on a lesser included offense after a directed verdict is granted on the greater charge, the court was implicitly relying upon the lesser included analysis in concluding that the State could proceed on a second degree murder charge without having proven first degree murder.

Furthermore, the appellate court in *Godina* demonstrated a remarkable confusion of the issues in handling the case on appeal. In upholding the trial court on this issue,<sup>251</sup> the court wrote that “the trial court determined that the prosecution had met its burden as to second degree murder by showing that an unjustified killing occurred, and that [the defendant] reasonably believed he was acting in self-defense when he took part in the acts which led to [the decedent’s] death.”<sup>252</sup> As noted above, the prosecution’s burden to prove second degree murder consists of exactly the same elements required under the first degree murder statute.<sup>253</sup> Once the State proves the elements of first degree murder, if a defendant can prove he acted with a belief in self-defense, the trier of fact must determine if that belief was reasonable.<sup>254</sup> If it was not reasonable, the defendant is guilty of second degree murder. The defendant’s belief in self-defense is a mitigating factor which reduces the first degree murder charge to a second degree murder conviction.<sup>255</sup> Should the trier of fact determine the belief was reasonable, the defendant has successfully asserted the affirmative defense of self-defense as described in section 7-1 of the Criminal Code,<sup>256</sup> and therefore should escape conviction.<sup>257</sup> Finding that the defendant “reasonably believed he was acting in self-defense when he took part in the acts

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250. *Id.*

251. *Id.* at 529. The appellate court reversed on other grounds. *Id.* at 527.

252. *Godina*, 584 N.E.2d at 529-30.

253. See *supra* notes 67-71 and accompanying text (discussing the State’s burden of proof under the first and second degree murder statutes).

254. 720 ILCS 5/7-1 (1992).

255. *Id.* See *supra* notes 68-79 and accompanying text for a discussion of the mitigating factors in reducing the homicide to second degree murder.

256. State law provides in relevant part that a person “is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another . . . .” 720 ILCS 5/7-1 (1992). The State carries the burden to disprove self-defense. *People v. Brown*, 578 N.E.2d 1168, 1173 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 25 (Ill. 1992). The reasonableness of such a belief is one element of self-defense. *Id.* Thus, once the defendant offers sufficient evidence of self-defense, the State must disprove it. See *infra* notes 326-331.

257. See *People v. Newbern*, 579 N.E.2d 583, 589 (Ill. App. Ct. 1991) (explaining the affirmative defense of the justifiable use of force), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); 720 ILCS 5/7-1 (1992) (requiring the reasonableness of the belief).

which led to [the decedent's] death,"<sup>258</sup> the court should have acquitted him before doing anything else.

The appellate court further stated, however, that the "trial judge left it up to the jury to determine whether [the defendant's] actions in self-defense were reasonable or otherwise unreasonable."<sup>259</sup> The court argued that "[r]egardless of how the jury decided that issue, its ultimate determination would not have resulted in an inconsistent verdict. A verdict of guilty of voluntary manslaughter (predecessor to second degree murder) and not guilty of murder are not inconsistent."<sup>260</sup> Although seemingly at odds with its earlier statement, the court apparently concluded the jury could still have found the court defendant guilty of second degree murder, in spite of its earlier conclusion the defendant's actions were reasonable.

In reasoning that a guilty verdict of voluntary manslaughter was not inconsistent with an acquittal of murder charges, the *Godina* implicitly court relied upon the lesser included offense analysis. As previously noted, under the earlier statutes, some courts found that a guilty verdict for voluntary manslaughter could be consistent with an acquittal of a murder charge by finding voluntary manslaughter to be a lesser included offense of murder.<sup>261</sup> In arguing that the same logic applies under the new homicide statutes, the court implies second degree murder must similarly be a lesser included offense of first degree murder. Thus, once again, this mischaracterization encourages the court to apply the statutes incorrectly and permits the possibility of an erroneous finding of guilt of second degree murder. If the court truly determined the defendant did have a reasonable belief in self-defense, it should have found him not guilty.<sup>262</sup>

The *Collins* court noted that a conviction for voluntary manslaughter was at times a "legal compromise" between a murder conviction and acquittal.<sup>263</sup> The Court found the evidence in that case "too inconclusive, vague, and contradictory to sustain Collins' conviction of murder in the first degree."<sup>264</sup> Nonetheless, the court

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258. *Godina*, 584 N.E.2d at 529-30.

259. *Id.* at 530.

260. *Id.*

261. See, e.g., *People v. Hoffer*, 478 N.E.2d 335, 340 (Ill.) (stating that the mental state for voluntary manslaughter was "less culpable" than the mental state required for murder), *cert. denied*, 474 U.S. 847 (1985). But see *supra* notes 39-45 and accompanying text for an argument that voluntary manslaughter could not have been properly categorized as a lesser included offense of murder under the 1961 Criminal Code.

262. See *People v. Newbern*, 579 N.E.2d 583, 595 (Ill. App. Ct. 1991) (concluding that the mitigating circumstance of self-defense does not establish guilt), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

263. *People v. Collins*, 572 N.E.2d 1005, 1008 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 122 (Ill. 1991).

264. *Id.* at 1011.

found there was "sufficient evidence to support a conviction of second degree murder."<sup>265</sup> Relying on Illinois Supreme Court Rule 615(b)(3),<sup>266</sup> the court ordered that "the degree of murder should be reduced under the specific circumstances of this case."<sup>267</sup>

While Rule 615(b)(3) permits an appellate court to reduce the offense, that "power is only available where a lesser included offense is involved."<sup>268</sup> Thus, implicit in the *Collins* decision is a similar, and incorrect, characterization of second degree murder as a lesser included offense of first degree murder.<sup>269</sup>

The characterization of second degree murder as a lesser included offense of first degree murder "is impossible to reconcile with the plain meaning of the second degree murder statute."<sup>270</sup> However, if a court adopts this classification, the decisions in *Godina* and *Collins* are entirely predictable and understandable. As one court poignantly stated:

[W]hen an appellate court, as in *Collins*, determines that the evidence is "too inconclusive, vague, and contradictory" to sustain a defendant's conviction of first degree murder, the court would reverse defendant's conviction outright. Because second degree murder is—*by statutory definition*—first degree murder *plus* a mitigating factor, if the evidence is insufficient to prove the elements of first degree murder beyond a reasonable doubt, *no* murder conviction of any kind can be permitted to stand.<sup>271</sup>

#### VII. DIFFERENT ROUTE, SAME DESTINATION: COLLATERAL ESTOPPEL EFFECTIVELY PREVENTS A FIRST DEGREE MURDER CONVICTION AT RETRIAL

Having rejected the double jeopardy path to prohibiting a second degree murder defendant from facing a first degree murder conviction at retrial, courts search for another method of attaining the same desired goal. Collateral estoppel easily provides the vehicle to reach that result. First, this section discusses the doctrine of collateral estoppel. Second, it analyzes the application of collateral estoppel in second degree murder cases.

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265. *Id.*

266. 134 Ill. 2d 615(b)(3) (1991). The rule permits an appellate court to "reduce the degree of the offense of which the appellant was convicted." *Id.*

267. *Collins*, 572 N.E.2d at 1011.

268. *People v. Kick*, 576 N.E.2d 395, 398 (Ill. App. Ct. 1991).

269. See *People v. Newbern*, 579 N.E.2d 583, 598 (Ill. App. Ct. 1991) (disagreeing with the *Collins* implication that second degree murder is a lesser included offense of first degree murder), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

270. *Id.*

271. *Id.* (emphasis in original).

### A. The Doctrine of Collateral Estoppel

In one court's "more prosaic terms, the traditional bar of double jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime."<sup>272</sup> Both theories enable a court to reach the goal of preventing a subsequent trial on a particular charge. While all roads may lead to Rome, these two avenues differ. Each theory has its own requirements and functions at law. Indeed, "collateral estoppel is applicable in criminal cases only when double jeopardy is not."<sup>273</sup> Finding double jeopardy inapplicable, some courts properly turn to collateral estoppel as a bar to a retrial for first degree murder after a reversal of an initial second degree murder conviction.<sup>274</sup>

Collateral estoppel, or issue preclusion, bars the relitigation of a particular issue at trial.<sup>275</sup> While more common in civil law contexts, collateral estoppel plays a vital role in criminal law as well.<sup>276</sup> Indeed, the Criminal Code<sup>277</sup> statutorily "embodies the

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272. *United States v. Mock*, 604 F.2d 341, 343-44 (5th Cir. 1979). In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court seems to have overruled the underlying holding in *Mock*. Nonetheless, the court's characterization of the two doctrines remains true.

273. *United States v. Bailin*, 977 F.2d 270, 275 (7th Cir. 1992).

274. *E.g.*, *People v. Newbern*, 579 N.E.2d 583, 597 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); *People v. Thomas*, 576 N.E.2d 1020, 1022 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991).

275. *People v. Moore*, 561 N.E.2d 648, 650 (Ill. 1990). The modern doctrine of collateral estoppel arose from the Roman Law concepts of *exceptio rei judicata* or *res judicata*. 2 BLACK ON JUDGEMENTS 601 (1st ed. 1891). By the twelfth century, the Roman principles of *res judicata* entered English jurisprudence. Robert Wyness Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 U. ILL. L. REV. 41, 44 (1940). Over the centuries, the principles behind modern collateral estoppel developed and became ingrained in Anglo-Saxon common law. *E.g.*, *Aslin v. Parkin*, 2 Burr. 665, 97 Eng. Rep. 501 (K.B. 1758) (opinion of Lord Mansfield); 2 JACOB'S LAW DICTIONARY 441 (1811). The principles of collateral estoppel have long been part of the common law of the United States as well. *E.g.*, *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 113 (1821) (stating that a "fact which has been directly tried, and decided by a Court of competent jurisdiction, cannot be contested again between the same parties. . ."); *Lessee of Parrish v. Ferris*, 67 U.S. (2 Black) 606, 609 (1862) ("This Court acknowledges the rule, and has uniformly applied it, of the conclusiveness of a judgement of a Court of concurrent jurisdiction between the same parties or their privies upon the same question"); *Cromwell v. County of Sac*, 94 U.S. 351, 354 (1876) ("[T]he judgement of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court").

276. *E.g.*, *People v. Scott*, 594 N.E.2d 217, 249 (Ill. 1992), *cert. denied*, 113 S. Ct. 1590 (1993); *Sealfon v. United States*, 332 U.S. 575, 578 (1948); *United States v. Oppenheimer*, 242 U.S. 85, 88 (1916); *Frank v. Mangum*, 237 U.S. 309, 334 (1915).

277. Illinois law provides:

common law doctrine of collateral estoppel.<sup>278</sup> To bar the relitigation of an issue, collateral estoppel requires that the issue be controlling or material to both cases.<sup>279</sup> Additionally, the original trier of fact must have actually and necessarily "decided the issue to render a verdict."<sup>280</sup>

Collateral estoppel originated in civil law.<sup>281</sup> Consequently, in order to apply the doctrine to criminal case, one must entertain the different policy considerations which underlie civil and criminal law.<sup>282</sup> In the civil context, "the issues in dispute are private rights between private parties."<sup>283</sup> In the criminal case, the "important public interest is the enforcement of the criminal law accurately and justly while safeguarding the rights of the accused. . . ."<sup>284</sup>

To ensure the initial trier of fact took sufficient care in determining the matter, collateral estoppel precludes the relitigation of an issue only if it was necessarily decided.<sup>285</sup> Moreover, the burden of raising a collateral estoppel challenge to a prosecution rests on

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(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

....

(2) Was terminated by final order or judgement, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution . . . .

720 ILCS 5/3-4(b) (1992).

278. *Thomas*, 576 N.E.2d at 1022.

279. *Id.*

280. *Id.*; accord *Apostolides v. State*, 593 A.2d 1117, 1121 (Md. 1991). In the civil arena, many courts apply the following rule:

A valid and final personal judgement is conclusive between the parties, except on appeal or other direct review, to the following extent:

....

(3) A judgement in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgement. . . .

RESTATEMENT (SECOND) OF JUDGEMENTS § 17 (1982).

281. *Eatherton v. State*, 810 P.2d 93, 98 (Wyo. 1991).

282. *Id.* See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (discussing collateral estoppel distinctions between civil and criminal law).

283. *Eatherton*, 810 P.2d at 98; see, e.g., RESTATEMENT (SECOND) OF JUDGEMENTS, § 27, cmt. (c) (1982) (discussing the purpose of collateral estoppel: "The problem involves a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute").

284. *Eatherton*, 810 P.2d at 98.

285. *Pettaway v. Plummer*, 943 F.2d 1041, 1044 (9th Cir. 1991), cert. denied, 113 S. Ct. 296 (1992); cf. *People v. Scott*, 594 N.E.2d 217, 249 (Ill. 1992) (refusing to apply collateral estoppel "if it is not clear that the former judgment or verdict necessarily decided the factual question at issue in the subsequent proceeding").



the defense.<sup>286</sup> In order to meet that burden, the defendant must show that the prior court favorably resolved the issue he seeks to foreclose from further litigation, and that the relitigation of that issue at the subsequent trial could result in the trier of fact reaching a different conclusion on that issue.<sup>287</sup> Thus, collateral estoppel will prevent the State from relitigating a common necessary factual issue already decided in the defendant's favor.<sup>288</sup>

Parties may employ collateral estoppel either offensively or defensively.<sup>289</sup> "Offensive use of collateral estoppel occurs when a plaintiff forecloses [a defendant's option of litigating] an issue the defendant previously litigated unsuccessfully in another action."<sup>290</sup> "Defensive use [of collateral estoppel] occurs when a defendant [prevents] a plaintiff from asserting a claim the plaintiff previously litigated and lost."<sup>291</sup> In the parlance of murder, on one hand, offensive collateral estoppel would bar the defendant from asserting a claim previously won by the prosecution.<sup>292</sup> On the other hand, defensive collateral estoppel prevents the State from relitigating an issue upon which the defense was previously triumphant. Defensive collateral estoppel precludes the prosecution from relitigating the mitigation issue. The doctrine thereby prevents the State from retrying a defendant on first degree murder charges after a reversal of a second degree murder conviction. Therefore, collateral estoppel is an effective defense for a defendant convicted of second degree murder but remanded to the trial court to face a first degree murder charge.

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286. *People v. Winston*, 558 N.E.2d 773, 775 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 846 (Ill. 1990); *United States v. Bailin*, 977 F.2d 270, 280 (7th Cir. 1992); *accord* *Butler v. State*, 605 A.2d 186, 200 (Md. Ct. Spec. App.), *cert. granted*, 612 A.2d 897 (Md. 1992).

287. *Winston*, 558 N.E.2d at 775.

288. *Apostolides v. State*, 593 A.2d 1117, 1121 (Md. 1991).

289. *In re Owens*, 532 N.E.2d 248, 251 (Ill. 1988). The offensive and defensive uses of collateral estoppel generally appear when one of the subsequent parties was not a party to the prior litigation. See WARREN FREEDMAN, *RES JUDICATA AND COLLATERAL ESTOPPEL* 31 (1988). However, there is nothing limiting this usage to such a scenario. See BLACK'S LAW DICTIONARY 261 (6th ed. 1990) (providing a broad definition of collateral estoppel).

This terminology first appeared in the civil arena when one of the subsequent parties was absent from the prior litigation. *Standefor v. United States*, 447 U.S. 10, 21 (1980). This became known as "non-mutual" collateral estoppel. *Id.* Whatever its future in civil actions, non-mutual collateral estoppel does not apply to criminal cases. *Id.* at 25; *accord* *Butler*, 605 A.2d at 194, n.9.

290. *Owens*, 532 N.E.2d at 251.

291. *Id.*

292. See *infra* notes 333-335 and accompanying text for a discussion of the State's offensive use of collateral estoppel against a criminal defendant.

*B. Light at the End of the Tunnel: Collateral Estoppel as a Bar to a First Degree Murder Conviction at Retrial*

In a second degree murder case remanded after an appeal for a new trial, collateral estoppel properly prohibits the State from relitigating the mitigation issue. When the State charges a defendant with first degree murder, the court may convict him or her of second degree murder only if the trier of fact makes two findings. First, the trier of fact must find that the prosecution established all the elements of first degree murder.<sup>293</sup> Second, the trier of fact must be satisfied that the defense met its burden of proving one of the two mitigating factors.<sup>294</sup> If an appellate court finds some defect with the State's case, the court can remand it for a new trial.<sup>295</sup> Because the defendant's case—including the establishment of mitigation—will never be found to be tainted,<sup>296</sup> collateral estoppel prevents relitigation of the mitigation issue at the new trial.<sup>297</sup> In other words, issue preclusion bars the trier of fact at retrial from reconsidering the sufficiency of any mitigation.

Because the trier of fact may not consider the question of mitigation, the only question at retrial is whether the prosecution can prove all the elements of first degree murder beyond a reasonable doubt. If the State meets that burden, with the prior establishment of mitigation, the guilty verdict must be for second degree murder.<sup>298</sup>

Collateral estoppel has become a shorthand term for the general area of issue preclusion. In the remand and retrial situation, it is really the direct estoppel component of issue preclusion which prevents the State from relitigating the mitigation issue. If a retrial is a continuation in the life of a criminal prosecution,<sup>299</sup> the

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293. *People v. Newbern*, 579 N.E.2d 583, 598 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992); *People v. Thomas*, 576 N.E.2d 1020, 1022 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 131 (Ill. 1991); *People v. Bosek*, 569 N.E.2d 551, 565 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 121 (Ill. 1991), *cert. denied*, 112 S. Ct. 1180 (1992); see 720 ILCS 5/9-2(a) (1992) (listing the elements of second degree murder).

294. *Newbern*, 579 N.E.2d at 598; *Thomas*, 576 N.E.2d at 1022; *Bosek*, 569 N.E.2d at 565; see 720 ILCS 5/9-2 (1992).

295. It is always the defendant who appeals because state law prohibits the prosecution from appealing such a case in Illinois. See Ill. Sup. Ct. R. 604(a) (1991) (listing the instances when the State may appeal). Hence, these remands are always due to a defect found in the prosecution's case.

296. It will not be found to be tainted because it is not an issue the State can appeal. Cf. *id.* (providing the limited circumstances in which the State may appeal). Furthermore, common sense dictates that no defendant will appeal a favorable finding for mitigation.

297. E.g., *Newbern*, 579 N.E.2d at 597-98; *Thomas*, 576 N.E.2d at 1022-23.

298. *Newbern*, 579 N.E.2d at 597-98; *Thomas*, 576 N.E.2d at 1022-23.

299. See, e.g., *United States v. Bailin*, 977 F.2d 270, 275 (7th Cir. 1992) (discussing retrials in the double jeopardy context). See *supra* note 235 and accompanying text for a discussion of when a retrial may trigger double jeopardy.

new trial cannot be truly "collateral," and any issue preclusion under these circumstances is not "collateral."<sup>300</sup> However, for the purposes of this Article, the general term "collateral estoppel" includes all the aspects of issue preclusion and direct estoppel.

Upon retrial of a mistried count in a multi-count indictment, direct estoppel bars the State from relitigating issues at the new trial that were necessarily and finally decided in the defendant's favor at the earlier trial.<sup>301</sup> "Direct estoppel prevents a party from relitigating a fact which was already determined against it in a decision that finally disposes of a part of a claim on the merits but does not preclude all further action on the remainder of the claim. . . ."<sup>302</sup> As such, if a defendant is convicted of second degree murder, the jury's finding of mitigation is final. It becomes binding and impossible to relitigate at a subsequent retrial. Should the defendant again be found guilty, estoppel limits the conviction to second degree murder.

This places the defendant in the same posture as if the original charge was for second degree murder.<sup>303</sup> When the State initially charges a defendant with second degree murder, it concedes the mitigation issue. In such a case, the court must limit the jury's options to an acquittal of the defendant or a conviction of second degree murder.<sup>304</sup> The same is true for the defendant whose initial second degree murder conviction is reversed and remanded for a new trial. At retrial, defendant faces only an acquittal or a conviction of second degree murder. The court may not convict him of first degree murder.

In first and second degree murder trials, the jury considers whether the defendant demonstrated sufficient mitigation to warrant reducing the homicide to second degree murder.<sup>305</sup> While "the

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300. *Bailin*, 977 F.2d at 276.

301. *Id.* A conviction for second degree murder may not immediately appear to be in the defendant's favor. By convicting him of second degree murder, however, the jury accepted the defendant's mitigation argument. That is the issue found in his favor. As one court shrewdly observed: "[a] verdict of guilty of manslaughter, for instance, is not in one's favor, compared to going free. It is most definitely in one's favor, however, compared to a verdict of guilty of first degree murder." *Butler v. State*, 605 A.2d 186, 198 (Md. Ct. Spec. App.), *cert. granted*, 612 A.2d 897 (Md. 1992).

302. *Bailin*, 977 F.2d at 276 (internal quotations omitted).

303. See *supra* notes 128-151 and accompanying text for a discussion of initial second degree murder charges.

304. *People v. Burks*, 545 N.E.2d 782, 784 (Ill. App. Ct. 1989); see I.P.I.—CRIMINAL (1992), *supra* note 51, No. 7.01S, Committee Note (requiring the State "to prove the elements of first degree murder, but if it satisfies the jury it has done so, the only verdict and judgement to which it is entitled is guilty of second degree murder. This result follows because the State . . . has conceded the presence of the mitigating factor. . . .").

305. See *supra* notes 72-75 and accompanying text for a discussion of the defendant's burden to establish mitigation.

law must recognize that a jury can act in an irrational manner—even to the point of ignoring the law or the Judge's instructions in a blend of undecipherable mercy,"<sup>306</sup> the law presumes the jury followed the law and the jury's instructions.<sup>307</sup> As one court explained: "We do not demand of the jurors the legal mastery of Justice Cardozo and the logical consistency of Mr. Spock. We only want to know what they probably really did, right or wrong."<sup>308</sup> If the defendant is found guilty of second degree murder, the law assumes the jury properly found sufficient mitigation. The parties, therefore, will not relitigate that issue.

VIII. THE COMFORTABLE NEW SHOE OF THE "LESSER MITIGATED OFFENSE": *PEOPLE V. NEWBERN* INTRODUCES THE NEW TERMINOLOGY INTO ILLINOIS' LEGAL VOCABULARY

Some courts try to force the first and second degree murder statutes into the "comfortable old shoe" of the lesser included offense analysis "simply because no other recognized description seems to fit."<sup>309</sup> One court, however, found a new way to describe this relationship, and the statutes easily slide into the comfortable, albeit new, shoe of the lesser mitigated offense characterization.

A. *The Lesser Mitigated Offense*

In *People v. Newbern*, the Fourth District Appellate Court adopted a new description of the relationship between the first and second degree murder statutes.<sup>310</sup> In rejecting the conclusion that second degree murder is a lesser included offense of first degree murder, the *Newbern* court found that second degree murder is actually a "lesser mitigated offense" of its first degree sibling.<sup>311</sup> The court first analyzed the lesser included offense doctrine in the context of the first and second degree murder statutes. It concluded second degree murder cannot be a lesser included offense of first degree murder because it does not meet either statutory test. Second degree murder does not have the same or fewer elements than

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306. *Pettaway v. Plummer*, 943 F.2d 1041, 1045-46 (9th Cir. 1991), *cert. denied*, 113 U.S. 296 (1992).

307. *People v. Bernard*, 500 N.E.2d 1074, 1081 (Ill. App. Ct. 1886).

308. *Butler v. State*, 605 A.2d 186, 204 (Md. Ct. Spec. App.), *cert. granted*, 612 A.2d 897 (Md. 1992).

309. *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992). See *supra* notes 171-81 and accompanying text for a discussion of courts classifying second degree murder as a lesser included offense of first degree murder.

310. 579 N.E.2d 583 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

311. *Id.* at 596.

first degree murder.<sup>312</sup> Furthermore, it does not have a less culpable mental state.<sup>313</sup>

However, the court did not end its discussion there. It concluded that "it will not suffice for us to say what that relationship is *not*—namely that second degree murder is not a lesser included offense of first degree murder."<sup>314</sup> The court continued in its effort to "state what that relationship is, and . . . hold that second degree murder is a *lesser mitigated offense* of first degree murder. . . ."<sup>315</sup>

While acknowledging that the concept of the lesser mitigated offense was new to Illinois law, the *Newbern* court noted the *sui generis* emergence of Illinois' entire second degree murder scheme.<sup>316</sup> The court classified second degree murder as a lesser crime than first degree murder, noting that its penalties upon conviction are significantly less than the potential punishment a first degree murder defendant may receive.<sup>317</sup> The court explained its holding that second degree murder was a lesser mitigated offense of first degree murder, noting that second degree murder is "first degree murder plus defendant's proof by a preponderance of the evidence that a mitigating factor is present."<sup>318</sup> By definition, therefore, second degree murder is a mitigated first degree murder.

In coining the phrase "lesser mitigated offense," the court was simply providing a legal label for the definition provided by the statute. Second degree murder is clearly a lesser offense than first degree murder. Indeed, it is the proof of mitigation which makes second degree murder a lesser offense than first degree murder. Thus, the *Newbern* court merely coupled these two aspects of the statutes and created a label to describe this formula.

Although the concept is new to Illinois law, Illinois did not create the lesser mitigated offense. New York's second degree murder statute at issue in *Patterson v. New York* is a type of lesser mitigated offense.<sup>319</sup> Montana also codified a type of murder titled the

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312. *Id.*

313. *Id.*; see 720 ILCS 5/2-9(a) (1992). See *supra* notes 39-45 and accompanying text for an argument that voluntary manslaughter could not have been a lesser included offense of murder under the prior statutes. See also *supra* notes 206-227 and accompanying text which reject the lesser included offense analysis in the context of the first and second degree murder statutes.

314. *Newbern*, 579 N.E.2d at 596 (emphasis in original).

315. *Id.* (emphasis in original).

316. *Id.*

317. *Id.* The maximum sentence for first degree murder is death. 720 ILCS 5/9-1 (1992); 730 ILCS 5/5-8-1(a)(1) (1992). Second degree murder, classified as a Class 1 felony, has a sentencing range of four to fifteen years. 720 ILCS 5/9-1 (1992); 730 ILCS 5/5-8-1(a)(4) (1992).

318. *Newbern*, 579 N.E.2d at 586.

319. See 432 U.S. 197, 205-06 (1977) (finding no due process violation in New York's murder statute which required the defendant to prove by a preponderance a mitigating factor to reduce a first degree murder charge).

"mitigated deliberate homicide."<sup>320</sup> A person in Montana commits a mitigated deliberate homicide when he intentionally causes the death of another,<sup>321</sup> but does so under the influence of extreme stress.<sup>322</sup> This extreme stress is similar to Illinois' provocation theory of mitigation reducing a first degree murder charge to second degree murder.<sup>323</sup> Like Illinois' provisions, the Montana statute requires the defendant to prove by a preponderance of the evidence the requisite mitigation.<sup>324</sup> Furthermore, the Montana statute clearly stipulates that mitigated deliberate homicide is not an included offense of deliberate homicide.<sup>325</sup> This is also similar to Illinois, where courts cannot properly consider second degree murder as a lesser included offense of first degree murder.<sup>326</sup>

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320. MONT. CODE ANN. § 45-5-103 (1991). Montana's statute reads:

(1) A person commits the offense of mitigated deliberate homicide when he purposely or knowingly causes the death of another human being but does so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

(2) It is an affirmative defense that the defendant acted under the influence of extreme mental or emotional stress for which there was reasonable explanation or excuse, the reasonableness of which shall be determined from the viewpoint of a reasonable person in the actor's situation. This defense constitutes a mitigating circumstance reducing deliberate homicide to mitigated deliberate homicide and must be proved by the defendant by a preponderance of the evidence.

(3) Mitigated deliberate homicide is not an included offense of deliberate homicide as defined in [Section] 45-5-102(1)(b).

(4) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years and may be fined not more than \$50,000, except as provided in [Section] 46-18-222.

*Id.*

321. These are the same elements of first degree murder in Illinois. See 720 ILCS 5/9-1(a) (1992). See *supra* note 46 for a discussion of the elements of first degree murder.

322. MONT. CODE ANN. § 45-5-103(1) (1991).

323. See 720 ILCS 5/9-2(a)(1) (1992). See *supra* note 59 and accompanying text for a discussion of provocation as a mitigating factor.

324. MONT. CODE ANN. § 45-5-103(2) (1991). The Montana Supreme Court upheld the provision requiring the defendant to prove mitigation and relied substantially on *Patterson v. New York*, 432 U.S. 197 (1977). *State v. Knight*, 822 P.2d 99, 102 (Mont. 1991). The Court held that the mitigated deliberate homicide statute "does not unconstitutionally shift the burden of proof to a defendant." *Id.* at 102. This reasoning resembles Illinois opinions sustaining the second degree murder statute in the face of similar due process challenges. *E.g.*, *People v. Cook*, 576 N.E.2d 1247, 1244 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 133 (Ill. 1991).

325. MONT. CODE ANN. § 45-5-103(3) (1991). In dicta, at least one Montana court inexplicably referred to mitigated deliberate homicide as an included offense of deliberate homicide. *Knight*, 822 P.2d at 102. This is clearly in direct contradiction of the language of the statute.

326. See *supra* notes 207-218 and accompanying text for a discussion of the inapplicability of the lesser included offense analysis in the first and second degree murder context.

### B. The Value of the Lesser Mitigated Offense Characterization

The characterization of second degree murder as a lesser mitigated offense of first degree murder clarifies the relationship between the two offenses. While many courts reflexively turn to the lesser included offense framework simply because of its familiarity, the lesser mitigated offense description provides both courts and practitioners with a ready label which accurately describes the relationship between first and second degree murder.

Once courts properly understand that second degree murder is a lesser mitigated offense of first degree murder, the trial and appellate process will operate more efficiently due to the classification's easy application. Trial courts should realize that second degree murder is simply a first degree murder lessened by appropriate and sufficient mitigation.<sup>327</sup> The State must still prove all the elements of first degree murder in order to receive a conviction on any murder charge.<sup>328</sup> Should the State prove those elements, the defense can attempt to establish the mitigation necessary to receive a conviction for the lesser offense of second degree murder.<sup>329</sup> Thus it should be clear that a defendant cannot be found guilty of second degree murder if the State fails to prove any of the elements of first degree murder.<sup>330</sup>

The acceptance of this characterization should also aid in the appellate analysis and retrial of a second degree murder defendant. If a defendant is found guilty of second degree murder, the trier of fact necessarily found that the defendant satisfactorily established the necessary mitigation to reduce the degree of the homicide.<sup>331</sup> As such, the State can no longer litigate the mitigation issue.<sup>332</sup> Should the appellate court reverse the defendant's conviction and remand the case for a new trial, the State may not argue the absence of mitigation. At retrial, the only appropriate verdicts would be not guilty or guilty of second degree murder.

By characterizing second degree murder as a lesser mitigated offense of first degree murder, courts avoid the improper application of the statutes and the misapplication of the lesser included offense analysis to those statutes.<sup>333</sup> Further, because the lesser mitigated offense structure emphasizes that second degree murder

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327. *People v. Newbern*, 579 N.E.2d 583, 596 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1022 (Ill. 1992).

328. *Id.* at 598.

329. *Id.*

330. *Id.*

331. *Id.* at 597. See *supra* notes 294-308 and accompanying text for a discussion of the application of collateral estoppel at a second degree murder defendant's retrial.

332. *Newbern*, 579 N.E.2d at 598.

333. *Id.* See *supra* notes 246-271 and accompanying text for a discussion of the flawed analysis in *People v. Collins*, 572 N.E.2d 1005 (Ill. App. Ct.), *appeal*

is first degree murder plus mitigation, the new classification highlights the jury's finding of mitigation in the initial trial. It therefore should be more clear that collateral estoppel operates to preclude the State from relitigating the mitigation issue at a subsequent new trial.

IX. TO BOLDLY GO WHERE NO ONE HAS GONE BEFORE: SHOULD THE STATE BE PERMITTED TO APPLY ESTOPPEL AGAINST A DEFENDANT?

One issue the courts have failed to reach is whether the State can apply collateral estoppel against a defendant.<sup>334</sup> This situation would arise when a defendant faces retrial after his conviction for *first* degree murder has been reversed. Could the State then estop the defense from arguing mitigation and preclude the new jury from finding the defendant guilty of second degree murder?

At first glance, the theory behind collateral estoppel might appear to support this contention. However, not every first degree murder trial involves second degree murder issues. Even in a case which may involve mitigation issues, the defendant has sole discretion whether to instruct the jury as to second degree murder.<sup>335</sup> Hence, the defendant may forego his option to have the instruction read to the jury as a matter of trial strategy. If he exercises that option, the jury never considers the mitigation issue. If the jury does not consider the issue, it is neither actually nor necessarily resolved at the first trial. Collateral estoppel cannot apply.

Furthermore, courts are extraordinarily hesitant to restrict a criminal defendant from arguing any theory at trial in his defense.<sup>336</sup> By estopping the defendant from arguing mitigation to the jury, his available defenses may be significantly limited. As such, without strong legal and policy support, a trial judge would be hard pressed to find that restricting a defendant in this way would not be fundamentally unfair.

X. THE INTERPLAY BETWEEN SELF-DEFENSE AND THE UNREASONABLE BELIEF REQUIRED FOR SECOND DEGREE MURDER

The Illinois Supreme Court recently agreed to hear challenges

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*denied*, 580 N.E.2d 122 (Ill. 1991), as well as other courts' misapplication of these statutes.

334. This would be an offensive application of collateral estoppel. See *supra* notes 289-292 and accompanying text for a discussion of offensive and defensive application of collateral estoppel.

335. 720 ILCS 5/9-2(c) (1992).

336. See STEPHEN A. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE* 1208 (3d ed. 1988) (noting that "[a] fact once determined against a defendant is not binding upon him in a subsequent criminal prosecution").



to the second degree murder.<sup>337</sup> The defendants challenging the statute raise several issues, including the constitutionality of the statutory arrangement and the proper evaluation of the requisite mental state for first and second degree murder.<sup>338</sup> These defendants also claim that the unreasonable belief in self-defense aspect of the second degree murder statute is a nullity.<sup>339</sup>

Unreasonable belief in self-defense typically arises when a first degree murder defendant claims self-defense and, as is almost always the case, simultaneously argues second degree murder.<sup>340</sup> The present defendants' challenge to the of the statute dissects the various burdens of proof in a self-defense claim.<sup>341</sup> When a murder defendant claims self-defense, the State must prove more than the three "regular" elements of first degree murder. The State must also show that the killing was not carried out in self-defense—that the claim of self-defense is "not justified."<sup>342</sup> A person is justified in killing another if he reasonably believes the force used was necessary to repel the imminent use of unlawful force.<sup>343</sup> Thus, justification has two distinct aspects: (1) the defendant's actual, subjective belief in the necessity of the use of deadly force; and (2) the objective reasonableness of that belief. Herein lies the confusion.

Challengers to the statute claim that in arguing second degree murder, the new law requires defendants to prove that they had an unreasonable belief in self-defense.<sup>344</sup> Such a requirement obviously runs counter to a self-defense claim that they had a reasonable belief in the necessity of deadly force. In other words, they believe the statute forces them to argue that the defendant had both a reasonable belief (to obtain an acquittal based on self-de-

337. *People v. Jeffries, pet. for leave to appeal allowed*, 616 N.E.2d 341 (Ill. 1993), consolidated on appeal with *People v. Newburn, petition for leave to appeal allowed*, 619 N.E.2d 144 (Ill. 1993).

338. See *infra* notes 344-346 and accompanying text for a discussion of the flaws alleged to exist in the statute. See *supra* notes 213-214 and accompanying text which address the mental state required for murder.

339. Until now, defendants have attacked *both* the provision concerning unreasonable belief and the rule on provocation.

340. In a murder case where self-defense is at issue, the law may entitle the defendant to a jury instruction on unreasonable belief second degree murder. *People v. Lockett*, 413 N.E.2d 378, 382 (Ill. 1980).

341. The issue of self-defense and the reasonableness of the defendants' subjective belief is a question of fact. *People v. Savickas*, 594 N.E.2d 1233, 1239 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 470 (Ill. 1992); *Lockett*, 413 N.E.2d at 381-82.

342. *E.g.*, *People v. Truss*, No. 1-90-1426, 1993 WL 375302 (Ill. App. Ct. 1993).

343. 720 ILCS 5/7-1 (1992); see I.P.I.—CRIMINAL, *supra* note 51, Nos. 24-25.06.

344. See *People v. Hooker*, 618 N.E.2d 1074, 1082 (Ill. App. Ct. 1993) (stating that "we acknowledge the curiousness of any rule that requires a person to show that he acted unreasonably").

fense) *and* an unreasonable belief (to obtain a second degree murder conviction) in the necessity for the use of force.

They contend that in a self-defense second degree murder case, the statute requires the defendant to prove that "at the time of the killing he believe[d] the circumstances to be such that, if they existed, would justify or exonerate the killing [as self-defense], but his belief is unreasonable."<sup>345</sup> The statute's challengers believe that the "but his belief is unreasonable" language is a part of the requisite mitigation, and the defendant therefore carries the burden of proving it.

This simply is not so. A careful reading of the statute demonstrates that the defendant must prove only that he had an actual belief in the necessity of self-defense *irrespective of the objective reasonableness of that belief*. The statutory reference to the unreasonable belief merely refers to the issues accompanying self-defense. It is not part of what the defendant has to prove in order to establish mitigation. Thus, defendants do not (and obviously should not) argue the objective unreasonableness of that belief.<sup>346</sup> Instead, to reduce a finding of first degree murder to second degree murder, it is the defendant's burden to prove by a preponderance of the evidence only that the defendant had an actual belief in the necessity for self-defense independent of the objective reasonableness of the belief.<sup>347</sup>

Defendants further argue that for the State to defeat a claim of self-defense, in arguing the justification issue, it must first attempt to disprove the defendant's actual, subjective belief. If the State succeeds, the defendant is guilty of first degree murder.<sup>348</sup> If the State fails, the trier of fact must then consider whether the defendant's belief was objectively reasonable. If it was objectively reasonable, the defendant successfully asserted self-defense and is not guilty of either first degree or second degree murder. If there is no finding of objective reasonableness, the trier of fact must find the defendant guilty of second degree murder.

In organizing the logical process in this manner, the defendant merges the trier of fact's consideration of self-defense and second degree murder claims. This shifts the burden of proving his subjective belief from his shoulders to those of the State. This argument places the burden of proof in precisely the same place it was under the old voluntary manslaughter statute. Under the old law, the

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345. 720 ILCS 5/9-2(c) (1992).

346. See *People v. Sims*, 617 N.E.2d 411, 418 (Ill. App. Ct. 1993) (holding that "the defense had the burden of proving that the defendant *believed* he was acting in self-defense") (emphasis in original).

347. *Id.*

348. Of course, the State must also prove the three "regular" elements of murder.

State had the burden to disprove the defendant's subjective belief beyond a reasonable doubt. Under the defendant's paradigm, the State must again attempt to disprove it during the trier of fact's consideration of self-defense and second degree murder.

Courts should reject this erroneous application of the murder statutes with the following evaluation. Once the State establishes the three "regular" elements of first degree murder, the trier of fact must address the justification issue.<sup>349</sup> In order to instruct the jury on self-defense, the defendant must establish some evidence of each of the following: (1) the decedent threatened him with force; (2) the defendant was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable.<sup>350</sup>

If the State negates *any one* of the self-defense elements, the defendant loses on his claim of self-defense.<sup>351</sup> Although it may wish to attack the defendant's claimed subjective belief, the State should logically be free to argue whichever element it chooses to dispute. The defendant's unreasonable belief is not an element the State must disprove in defeating a claim of self-defense.<sup>352</sup> This is only one of the six factors which the State may rebut to overcome a claim of self-defense. The State may just as easily defeat a self-defense claim by proving the absence of any threat of force against the defendant, that the defendant was the aggressor, the absence of a danger of imminent harm, or a lack of unlawful force.<sup>353</sup> When the State disputes one of the elements of self-defense, it does not concede the existence of any of the others, including whether the defendant had a subjective belief in self-defense.

If the trier of fact determines that the State has disproved one of the elements, it must find the defendant guilty of either first or second degree murder. The second degree murder statute clearly dictates the proper analysis. After finding the three "regular" elements of first degree murder and the lack of justification, the trier of fact must determine whether the defendant subjectively believed

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349. There is no magical order in which to apply these elements. The Illinois Pattern Jury Instructions sequentially list the elements as propositions with justification following the establishment of three "regular" elements of first degree murder. IPI - CRIMINAL (1992), *supra* note 51, No. 7.06A. As such, the instructions do not bifurcate proof of first degree murder from the justification. *Id.*

350. *People v. Chavez*, 592 N.E.2d 69, 81 (Ill. App. Ct. 1992).

351. *Id.*

352. *People v. Bosek*, 569 N.E.2d 551, 566 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 121 (Ill. 1991), *cert denied*, 112 S. Ct. 1180 (1992).

353. *E.g.*, *People v. Purdle*, 571 N.E.2d 178, 181 (Ill. App. Ct.) (holding that "the State met its burden of proving that [the] defendant was not legally justified in killing [the victim] . . . [t]here was ample testimony that [the] defendant was the aggressor. . . ."), *appeal denied*, 580 N.E.2d 129 (Ill. 1991).

he was acting in self-defense. Because self-defense is rejected on other grounds, the defendant must still establish his subjective belief.

The burden of proof on this issue rests squarely on the defendant. The preponderance of the evidence must show that the defendant subjectively believed he needed to use deadly force.<sup>354</sup> If the trier of fact finds the evidence rises to the level of a preponderance, the defendant is guilty of second degree murder. If the opposite is true, the defendant is guilty of first degree murder.

Thus, defendants should argue the obvious—that they killed in self-defense and, in the alternative, that the killing was a second degree murder rather than a first degree murder. In other words, the defendant should first claim he had an actual belief in self-defense and that it was objectively reasonable. As a fallback position, the defendant should claim he still had the subjective belief, regardless of its objective reasonableness.

## XI. CONCLUSION

Courts innately feel that a defendant whose second degree murder conviction is reversed and remanded for a new trial should not be subject to a conviction for first degree murder at retrial. Under the old voluntary manslaughter/murder statutes, voluntary manslaughter was generally found to be a lesser included offense of murder. Hence, such a retrial for murder clearly violated double jeopardy. The new law of second degree murder, however, is not lesser included in first degree murder. Thus, double jeopardy cannot apply.

Instead, principles of collateral estoppel effectively prevent a retrial for first degree murder where the defendant was initially convicted of second degree murder. At the initial trial, the trier of fact necessarily found the defendant established one of the mitigating factors in order to find him guilty of second degree murder. Due to collateral estoppel, the State may not subsequently relitigate mitigation issues. Thus, the defendant is in exactly the same position as if the State simply charged him with second degree murder: the prosecution must prove all the elements of first degree murder, but the presence of mitigation is not at issue. As such, the jury may either acquit or convict the defendant of second degree murder.

The recent characterization of second degree murder as a *lesser mitigated offense* of first degree murder perfectly tracks the language and intent of the statutes. Second degree murder is first degree murder plus mitigation. It is, by definition, a mitigated (and therefore lesser offense than) first degree murder. This description

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354. *People v. Sims*, 617 N.E.2d 411, 418 (Ill. App. Ct. 1993).

also serves to highlight the applicability of collateral estoppel in a retrial situation.

The characterization of second degree murder as a lesser mitigated offense of first degree murder, coupled with the doctrine of collateral estoppel, is fully consistent with the plain language of Illinois' murder statutes, their legislative history and relevant constitutional precedents. Although the concepts of double jeopardy do not apply in the context of these rather unique statutes, collateral estoppel assures the full protection of defendants' rights. Finally, the correct use of these doctrines will bring the courts to the same just conclusion as reached through a more tortuous analysis.

The first and second degree murder statutes resolve much of the confusion that reigned during the tenure of the murder/voluntary manslaughter era. The lesser mitigated offense characterization clarifies the relationship between the two offenses, and provides clear guidance in applying the law.