ILLINOIS MURDER JURISPRUDENCE IN THE ABSENCE OF CAPITAL PUNISHMENT

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On March 9, 2011, the State of Illinois became the sixteenth state to outlaw capital punishment.[1] Governor Pat Quinn, in commenting on his decision, stated: "[O]ur experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment."[2] His comment is well founded in fact. The reason for this is that Illinois has experienced a capital punishment error rate of 5.9% in the forty-odd years since the Supreme Court in *Furman v. Georgia* declared that the existing system of capital punishment practices was cruel and unusual for producing arbitrary and capricious results.[3] Currently, Illinois' murder statute combines aspects of the Pennsylvania Approach and the Model Penal Code, dividing murder into degrees and assigning different levels of punishment to each, but making the distinction depend upon aggravating and mitigating factors instead of the traditional premeditation/deliberation analysis.[4] This approach is superior, in many ways, to both the approaches upon which it is based, but it still has its own difficulties. Now, with the death sentence off the table, the complexity of the system has become outdated and counter-productive. Therefore, for

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1. *See* Ray Long, *Quinn Signs Death Penalty Ban, Commutes 15 Death Row Sentences to Life*, CHI. TRIB., Mar. 9, 2011, http://newsblogs.chicagotribune.com/clout_st/2011/03/quinn-signs-death-penalty-ban-commutes-15-death-row-sentences-to-life.html; John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 9, 2011, http://www.nytimes.com/2011/03/10/us/10illinois.html?_r=0 (reporting how the Illinois Senate acted quickly—in response to the Governor's statement—by passing 720 ILL. COMP. STAT. 5/119-1 (2011) to abolish the death penalty).

2. Schwartz, *supra* note 1.

3. *See* Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 381 n.2 (WINTER 2005) (citing Furman v. Georgia, 408 U.S. 238 (1972)).

4. *See* MODEL PENAL CODE, § 210.2.

the sake of consistency and judicial economy, Illinois should follow the example of other states, such as Texas: abandon the Pennsylvania Approach, and adopt a simplified statutory scheme that is more like the approach promulgated in the Model Penal Code.

This Note will begin with a historical survey of murder jurisprudence. First, it will consider the common law origins of murder as a felony and the way in which the Pennsylvania Approach altered the common law to limit the application of the death penalty by separating criminal homicide into categories and degrees. Next, this Note will delve into the Model Penal Code approach in an effort to show how the Code sought to simplify murder jurisprudence and impose utilitarian values upon the justice system. Then, this Note will turn to the current state of the law in Illinois, showing how Illinois employs some aspects of both the Pennsylvania Approach and the Model Penal Code. Finally, this Note will look at Illinois law in light of the State's recent abolition of the death penalty and consider what, if any, changes ought to be made to Illinois' murder statutes. In particular, this Note will consider whether or not there is any viable justification for maintaining a complicated homicide scheme that divides murder into degrees, and ultimately, this Note will reject the viability of said justifications, concluding that there is no reason to maintain the current, graded scheme of murder in Illinois.

I. MURDER AT COMMON LAW AND THE DEVELOPMENT OF THE PENNSYLVANIA APPROACH

"At common law, murder was defined as the unlawful killing of a human being with 'malice aforethought.'"[5] The *actus reus* element of common law murder is not very difficult to determine, the question being simply whether the criminal defendant acted in such a way as to cause the death of another. As such, the vast majority of litigation in murder prosecutions focused upon the *mens rea* requirement. However, deciding whether a person acted with "malice aforethought" proved problematic. Over time, it became an "arbitrary symbol" for judges, creating confusion and unpredictability.[6] Generally speaking, malice aforethought was considered to encompass four distinct states of mind: intent to kill, intent to cause grievous injury, depraved-heart murder, and intent to commit a felony.[7] Therefore, the scope of malice aforethought was extremely broad at common law. Considering the death

5. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 235 (West 5th ed. 2009) (citing Royal Comm'n on Capital Punishment, Report, CMD. No. 8932, at 26 (1953)).

6. DRESSLER, *supra* note 5, at 235–36.

7. *Id.* at 236.

penalty was mandatory in all cases of common law murder, it was executed far more frequently than it is today.[8]

The broad application of the death penalty at common law proved problematic as social perspectives on capital punishment changed in the eighteenth century.[9] In 1794, Pennsylvania adopted a statutory construction that divided intentional homicides into several categories, creating distinctions based upon *mens rea*.[10] Specifically, the statute (hereinafter referred to as the "Pennsylvania Approach"), which was adopted by nearly all of the other states following its enactment in Pennsylvania, divides criminal homicides into "(1) first-degree murder, (2) second-degree murder, (3) voluntary manslaughter, and (4) lesser manslaughters."[11] The critical distinction is the one between first- and second-degree murder. Under the Pennsylvania Approach, first-degree murder requires "premeditation and deliberation" (unless the killing is committed during the commission of certain felonies which inherently show deliberation and premeditation) in addition to malice, whereas second-degree murder only requires malice.[12]

II. THE PURPOSE OF GRADED MURDER: LIMITING CAPITAL PUNISHMENT

The distinction between first- and second-degree murder, though subtle, is important. Under the 1794 version of the Pennsylvania Approach, the common law mandatory death sentence was confined to the more serious offense of first-degree murder, while the jury had discretion to impose the death penalty for second-degree murder.[13] Over the course of the nineteenth and twentieth centuries, many state legislatures moved further away from the common law mandate. Most eliminated mandatory capital punishment in nearly all circumstances, making the imposition of capital punishment discretionary for first-degree murder, and making it impossible to execute a defendant convicted of second-degree murder.[14] Thus, the Pennsylvania Approach has greatly reduced the application of the death penalty; however, it has created its own serious problems. In particular, the

8. *See* Woodson v. North Carolina, 428 U.S. 280, 289 (1976); *see also* Gregg v. Georgia, 428 U.S. 153, 177 (1976).

9. Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1013 (2001).

10. David Crump, *Murder, Pennsylvania Style: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 259 (WINTER 2007).

11. *Id*. at 262.

12. *Id*. at 264; *see also* Stacy, *supra* note 9, at 1012.

13. Stacy, *supra* note 9, at 1013–14.

14. *Id*. at 1013; *see also* Woodson v. North Carolina, 428 U.S. 280, 291–93 (1976).

deliberation/premeditation formula has proved to be incredibly difficult to apply, spawning vast amounts of litigation.

The premeditation/deliberation requirement of the Pennsylvania Approach was designed to ensure that only the most heinous murders would be afforded the most severe punishment. Nevertheless, the results of this formula are not always in line with its purpose. For example, in *People v. Anderson*, the California Supreme Court found that there was insufficient evidence to support a conviction for first-degree murder when the defendant inflicted more than sixty stab wounds on a ten-year-old girl, because the court found his conduct was not deliberate and premeditated.[15] This case highlights an intrinsic weakness of the Pennsylvania Approach. When creating blameworthiness distinctions based solely on *mens rea*, the Pennsylvania Approach "sometimes gets it backward, punishing lesser crimes more severely and depreciating the seriousness of more blameworthy offenses."[16]

A second weakness of the Pennsylvania Approach is the haziness of the line between malicious murder and deliberate/premeditated murder. This haziness is based upon a legal fiction that makes it inherently difficult to apply. Traditionally, courts have formulated the premeditation/deliberation requirement as follows:

> To deliberate is to reflect, with a view to make a choice. If a person reflects, though but for a moment before he acts, it is unquestionably a sufficient *deliberation*. . . . *To premeditate is to think of a matter before it is executed. The word premeditated would seem to imply something more than deliberate, and may mean that the party not only deliberated, but had formed in his mind the plan of destruction*.[17]

This passage shows the difficulty faced by courts when confronted with the premeditation/deliberation issue: how much time must elapse for a person to have premeditated, and how do we know if they had formed a so-called "plan of destruction?" Some courts have used multi-factored balancing tests, considering things such as: provocation by the victim, conduct and statements by the defendant, history of ill-will between the parties, brutality of the murder, and helplessness of the victim at the time the

15. People v. Anderson, 447 P.2d 942, 945, 952 (1968). Controversially, the court stated that the brutality of the murder weighed in favor of it being non-deliberate, that the defendant's actions of asking whether the victim was a virgin prior to the murder was insufficient to show motive, and that his sending the victim's brother out on an errand while he committed the murder was insufficient to show planning. *Id*. at 952.

16. Crump, *supra* note 10, at 264, 274, 277–83; *see* DRESSLER, *supra* note 5, at 253–64.

17. State v. Guthrie, 461 S.E.2d 163, 179 (W. Va. 1995) (quoting State v. Dodds, 46 S.E. 228, 231 (W.Va. 1903)).

lethal blow was struck.[18] However, even within the bounds of such a test, courts have often reached diametrically opposed conclusions. For example, in *State v. Forrest*, the North Carolina Supreme Court found premeditation where the defendant had shot his victim five times at point blank range, which showed deliberate intent according to the court, but in *People v. Anderson*, the California Supreme Court found no premeditation because the fact that the defendant had inflicted sixty stab wounds on a child demonstrated that he had suffered from an emotional disturbance sufficient to prevent him from forming the requisite intent.[19] Finally, some courts have held that premeditation merely requires "a sufficient interval between the initial thought and the ultimate action . . . long enough to afford a reasonable man an opportunity to take a 'second look' at his contemplated actions."[20] It is difficult to believe there is actually a way to determine, as a bright-line rule, the exact moment a person goes from merely intending to commit a crime to "premeditating" its commission. Any such mental Rubicon is merely a legal fiction created for the purpose of artificially distinguishing between two similar acts and finding one to be more blameworthy.

III. A NEW APPROACH: THE MODEL PENAL CODE

The Model Penal Code takes a very different approach to murder. Most importantly, the Model Penal Code recombines first- and second-degree murder into one section, entitled "Murder"; murder consists of any criminal homicide which is committed purposely, knowingly, or recklessly.[21] Model Penal Code § 2.02 further defines each of these various states of mind. A person acts "purposely" when either (1) his "conscious object" was "to engage in conduct of that nature or to cause such a result," or (2) "if the element involves the attendant circumstances, [the defendant was] aware of the existence of such circumstances or he believes or hopes that they exist[ed]."[22] A person acts "knowingly" when (1) "if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist"; or (2) "if the element involves a result of his conduct, he is aware that it is practically

18. DRESSLER, *supra* note 5, at 262.

19. *Compare* State v. Forrest, 362 S.E.2d 252 (N.C. 1987) (finding premeditation), *with* People v. Anderson, 70 Cal. 2d 15 (2002) (finding no premeditation).

20. *See* People v. Furman, 404 N.W.2d 246, 249 (Mich. Ct. App. 1987) (citing People v. Vail, 227 N.W.2d 535, 538 (Mich. 1975)).

21. MODEL PENAL CODE § 210.2.

22. MODEL PENAL CODE § 2.02 (alteration in original).

certain that his conduct will cause such a result."[23] Finally, a person acts "recklessly" when he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."[24] Considering these definitions, it is clear that a purposeful killing under the Code is analogous to premeditated and deliberate murder under the Pennsylvania Approach; whereas knowing and reckless killings under the Code are analogous to the other traditional categories of malice: second-degree murder and depraved heart murder, respectively.

The advantage of the Model Penal Code approach is its relative simplicity. Under the Pennsylvania Approach, jurors are asked to determine whether a defendant crossed the line from intentionality to premeditation and deliberation. From the outset, this question is difficult to answer because of the inherently immeasurable nature of the defendant's mental processes; but even beyond this, the distinction between intention and premeditation/ deliberation is ultimately a legal fiction. It is exceedingly difficult to conceive of a bright line between the conduct deserving of a first-degree conviction, and conduct deserving of a second-degree conviction under the Pennsylvania Approach. In fact, although the distinction can be made clear with extreme examples, there is a large margin for error in the hazy middle ground between the two degrees. By consolidating murder, the Code makes the inquiry "clear and relatively unambiguous," asking jurors only to determine whether a killing is murder or manslaughter, a task which they "can probably apply . . . with a facility close to that of judges."[25]

The Model Penal Code's one degree approach has the advantage of simplicity, but it creates new problems for limiting the application of the death penalty. The strength of the Pennsylvania Approach lay in the fact that the first-degree/second-degree dichotomy made readily apparent the drafter's recognition that some murders are more blameworthy than others, and that for this reason the most extreme punishments should be reserved for the most grievous murders. Since the Code removes the distinction between first- and second-degree murder, it must find some other way to determine blameworthiness. The Code accomplished this by bifurcating a criminal trial into two distinct sections: in the first, the jury determines the defendant's guilt or innocence, and then in the second, the court determines the appropriate penalty.[26] During the sentencing portion of the trial, the court

23. *Id.*

24. *Id.*

25. Crump, *supra* note 10, at 294.

26. Russell D. Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 206 (SPRING 2004) (citing MODEL PENAL CODE § 210.6 cmt. at 74 (Tentative Draft No. 9, 1959)).

would weigh aggravating and mitigating factors to determine the appropriate sentence, and could only invoke capital punishment if there was at least one aggravating factor and no substantial mitigating factor.[27] The Code's desire for simplicity is understandable, but it led to problems after the Supreme Court decided *Furman v. Georgia*. In *Furman v. Georgia*, the Supreme Court, in a plurality decision, struck down three capital sentences on the grounds that the sentencing statutes gave juries too much discretion in assigning the death penalty.[28] After *Furman*, many states resurrected mandatory death sentence statutes that they had repealed.[29] This trend cut the knees out from under the Code, preventing many states from abandoning the Pennsylvania Approach. In the absence of sentencing discretion (upon which the Code's position thrived), the separation of first- and second-degree murder remained a practical necessity.

IV. THE CURRENT STATE OF THE LAW IN ILLINOIS: A HYBRID APPROACH

The current state of the law in Illinois combines some aspects of the Pennsylvania Approach with other aspects taken from the Code. In Illinois,

> (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.[30]

A close reading of subsection one shows that it combines the Code's "purposely" and "knowingly" categories of Sections 2.02(2)(a) and 2.02(2)(b).[31] Similarly, subsection two is equivalent to murder committed

27. *Id.*

28. *See* Furman v. Georgia, 408 U.S. 238, 256–57, 305, 313 (1972).

29. Covey, *supra* note 26, at 207.

30. 720 ILL. COMP. STAT. 5/9-1(a) (2011).

31. *Compare* 720 ILL. COMP. STAT. 5/9-1(a) (2011), *with* MODEL PENAL CODE § 210.2. The words "intends" and "knows" in § 9-1 are the functional equivalent of "conscious object" in § 2.02(2)(a) and "aware" or "practically certain" in § 2.02(a)(b), respectively.

"recklessly" under the code.[32] Finally, subsection three incorporates a limited version of the felony murder rule, although the Code does not provide for felony murder.[33]

From the above, it is clear that Illinois' first-degree murder statute is closely modeled off of the Model Penal Code, but still retains some aspects of the Pennsylvania Approach.[34] Specifically, rather than consider an additional element of premeditation or deliberation in order to secure a first-degree murder conviction, Illinois chose to make first-degree murder the standard charge and incorporated mitigating factors which can reduce the charge to second-degree murder. Under Illinois law, the prosecution must prove every element of first-degree murder beyond a reasonable doubt, while the burden falls upon the defendant to show, by a preponderance of the evidence, (1) that he acted "under a sudden and intense passion resulting from serious provocation" by either the victim or another person, or (2) that he acted "based upon a belief that his conduct was justified, but his belief was unreasonable."[35] Once the defendant has raised either of these mitigating factors by a preponderance of the evidence, the burden returns to the state to prove beyond a reasonable doubt that they did not, in fact, exist.[36] Still, Illinois has not entirely done away with the distinction between the two degrees, and the distinction remains important; the sentence for first-degree murder in Illinois ranges from twenty years to life in prison, whereas the sentence for second-degree murder ranges from four to twenty years in prison.[37]

Up until 2011, Illinois allowed capital punishment.[38] In order to sentence a criminal defendant to death, the prosecutor must first secure a conviction for first-degree murder. Having done so, he bears the burden of proving beyond a reasonable doubt that at least one of twenty-one specified aggravating factors is present in the case.[39] If the prosecutor proves the existence of one of the aggravating factors, the court would then "instruct the jury to consider any aggravating and any mitigating factors which are

32. *Compare* 720 ILL. COMP. STAT. 5/9-1(a) (2011), *with* MODEL PENAL CODE § 210.2. Although the word "reckless" is not used in the Illinois statute, the sentiment remains the same in both sections.

33. Crump, *supra* note 10, at 263. The Model Penal Code does not have a felony murder provision, ostensibly because reckless murder within the meaning of §§ 2.02 and 210.2 is sufficient to cover felony murder situations without recourse to a bright-line rule.

34. *See* 720 ILL. COMP. STAT. 5/9-1 (2011); 720 ILL. COMP. STAT. 5/9-2 (2010).

35. 720 ILL. COMP. STAT. 5/9-2(a) (2010). *See also* 720 ILL. COMP. STAT. 5/9-2(c) (2010).

36. *See* 720 ILL. COMP. STAT. 5/9-2(c) (2010).

37. *See* 730 ILL. COMP. STAT. 5/5-4.5-20(a) (2013); 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2012).

38. *See* 725 ILL. COMP. STAT. 5/119-1 (2011).

39. *See* 720 ILL. COMP. STAT. 5/9-1(b) (2011).

relevant to the imposition of the death penalty."[40] If the court or jury decides that the death sentence is appropriate, the sentence would be subjected to automatic review by the Supreme Court of Illinois.[41] However, in 2011 the Illinois Senate enacted 725 ILCS 5/119-1, which repealed the death sentence and limited the maximum sentence for aggravated first-degree murder to life imprisonment without parole.[42]

It is clear that Illinois has borrowed from both the traditional Pennsylvania Approach and the Model Penal Code in an effort to balance the State's interest in limiting capital punishment against the desire for relatively simple and efficient trials. However, it is now appropriate to reexamine the statutory structure of murder in Illinois as the death penalty has been removed from the picture and the balance of important social interests has shifted. In light of these shifts, it is now possible to reevaluate the statutory scheme to determine whether it still represents an effective balance between the need to protect the criminal defendant from over-punishment and the state's interests in convicting criminals, clarity, and judicial economy.

V. THE CASE FOR RECOMBINATION

At the core of any system of laws is the concept of *Lex Talionis*: the idea that when a person commits a crime they harm others, themselves, and society as a whole, and that this injury must be repaid in kind to return society to equilibrium.[43] This "eye for an eye" mentality has been rejected by many legal scholars and some theorists have attempted to replace it entirely with utilitarian justifications for law; nevertheless, the core concepts of retributivism remain a strong motivating force in our American legal society.[44] Retributivism is not entirely a negative philosophy, however; deeply rooted in this legal tradition is the concept that while we must ensure that the wrongdoer is punished for his crimes, we must be equally careful to avoid over-punishing him.[45] This conception of "deserts" was the driving force behind the inception of the Pennsylvania Approach and all subsequent attempts to limit capital punishment, as the death sentence is utterly final. It

40. *Id.* at 5/9-1(c).

41. *Id.* at 5/9-1(i).

42. *Id.* at 5/119-1; *see also* 730 ILL. COMP. STAT. 5/5-8-1 (2013).

43. DRESSLER, *supra* note 5, at 38-39 (quoting MICHAEL S. MOORE, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY (Ferdinand Schoeman ed., 1987)).

44. *See* DRESSLER, *supra* note 5, at 38, 48.

45. *Id.* at 39 (describing how retributivism is a legal theory based upon "deserts"; we punish people *because they deserve to be punished*, so it would make no sense whatsoever to punish them further than they deserve).

is the most severe and irreversible punishment that society can inflict, and so it is only appropriate for the most heinous of crimes.

Currently, capital punishment is not available in Illinois, and so sentencing is restricted to the inherently less serious punishments. As stated above, the sentence for first-degree murder in Illinois ranges from twenty years to life in prison whereas the sentence for second-degree murder ranges from four to twenty years in prison.[46] Although a valid argument can be made that life imprisonment without parole is not much different from a death sentence, it is nevertheless different in kind because no life is, in a literal sense, ended.[47] For this reason, the question of what sentence to give a criminal defendant becomes a quantitative line-drawing exercise. In Illinois, sentences are given ranges of application, and aggravating and mitigating factors are used to determine where in the spectrum the sentence should fall in any given case.[48] The fact Illinois uses aggravating and mitigating factors to determine the extent to which the defendant is sentenced is important because it makes the first-degree/second-degree dichotomy unnecessary to protect the defendant from over-punishment.

In Illinois, the court is *required* to consider aggravating and mitigating factors when assigning a sentence of imprisonment.[49] The fact that the court is required to consider the factors *and to give them weight* is important because it ensures that the state is protecting the criminal defendant from any semblance of judicial discrimination.[50] By creating this mechanism for protecting the defendant from over-punishment, Illinois has made a "second-degree" category of murder unnecessary. Under the Pennsylvania Approach, second-degree murder was, initially, created to protect the defendant from mandatory capital punishment if his crime did not meet a certain level of heinousness, and later to protect him from

46. 730 ILL. COMP. STAT. 5/5-4.5-20(a) (2012), *and* 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2012).

47. Note that in the most recent version of 730 ILL. COMP. STAT. 5/5-8-1 (2013), the Illinois statutory section provides for a sentence of life imprisonment without parole has been challenged on Eighth Amendment grounds. In *People v. Luciano*, the Appellate Court of Illinois for the Second District decided that a mandatory life sentence without parole was unconstitutional, at least when applied to a minor. People v. Luciano, 2013 Ill. App. 2d 110792, 951–54 (Ill. App. Ct. 2013). This statute has been attacked before, and prior versions have been declared unconstitutional on similar grounds. *See* People v. Miller, 202 Ill. 2d 328 (2004).

48. *See, e.g.*, 730 ILL. COMP. STAT. 5/5-5-3.1 (2013) (listing mitigating factors which fall in favor of minimizing an imposed sentence); 730 ILL. COMP. STAT. 5/5-5-3.2 (2014) (listing aggravating factors which favor maximizing an imposed sentence).

49. *See* 730 ILL. COMP. STAT. 5/5-5-3.1 (2013); 730 ILL. COMP. STAT. 5/5-5-3.2 (2014).

50. *Compare* 730 ILL. COMP. STAT. 5/5-5-3.1(a) (2013) (stating that "the following grounds *shall be accorded weight* in favor of *withholding or minimizing* a sentence of imprisonment" and listing factors)(emphasis added), *with* FLA. R. CRIM. P. 3.701(b) (listing "guidelines" for sentencing but specifically stating that these guidelines "are not intended to usurp judicial discretion").

capital punishment altogether.[51] However, under current Illinois law the court considers the mitigating factors set forth in 720 ILCS 5/9-2 in order to determine whether the defendant should be convicted of first- or second-degree murder, and then the court considers the aggravating and mitigating factors set forth in 730 ILCS 5/5-5-3.2 and 730 ILCS 5/5-5-3.1, respectively, in order to determine what duration of imprisonment it should assign under 730 ILCS 5/5-4.5-30.[52] For this reason, the categorization of the defendant's crime as "second-degree murder" only impacts the defendant's sentencing because second-degree murder is considered a "class 1 felony," whereas first-degree murder gets its own sentencing statute.[53] Thus, considering the fact that there is no danger that a murder defendant will be sentenced to death in Illinois, it becomes clear that if first- and second-degree murder were combined into a single section, the defendant would not be in any greater danger of over-punishment because the aggravating and mitigating factors that are already in place will operate to ensure that a more atrocious murder will receive a harsher sentence.

If there is no substantial danger that a criminal defendant will be over-punished under a consolidated statute, then it becomes necessary to see if there are any other interests that weigh in favor of maintaining the current scheme. Perhaps two of the most obvious are (1) the defendant's interest in avoiding the social stigma that comes with a first-degree murder conviction and (2) the judiciary's interest in assuring the community that the relative severity of homicides is given full consideration when a criminal defendant is convicted and sentenced. For the reasons discussed below, the first of these interests is not worthy of substantial protection, and the second is already accounted for through the requirement that the state prove every element of its case beyond a reasonable doubt.

It is immediately apparent that a conviction for murder will subject the defendant to a "very great . . . stigma."[54] Moreover, because the distinction between first- and second-degree murder—and in particular the availability of the death sentence in the case of the former—is so widely known, the stigma attached to a first-degree conviction will be substantially greater. This is not an accident or an unwanted by-product of the criminal justice system; rather, "one of the traditional justifications for punishment is the deterrent and educative impact of a criminal conviction—in other words, the

51. Stacy, *supra* note 9, at 1012.

52. *See* 730 ILL. COMP. STAT. 5/5-5-3.2(a) (2014); 730 ILL. COMP. STAT. 5/5-5-3.1(a) (2013); 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2012).

53. *See* 720 ILL. COMP. STAT. 5/9-2(d) (2010); 720 ILL. COMP. STAT. 5/5-4.5-20(a) (2013).

54. *See* Suzanne Uniacke, *What Are Partial Excuses to Murder*, in PARTIAL EXCUSES TO MURDER 1, 15 n.8 (Stanley Meng Heong Yeo ed., 1991).

stigma which accompanies it."[55] Nevertheless, it is important the stigma associated with a crime, as with any other punishment, is proportionate to the blameworthiness of the crime itself. Thus, the question is whether the difference in the stigma to which a defendant will be subjected from a first-degree or second-degree murder conviction is sufficiently weighty, by itself, to require that the state maintain the distinction. On this point, the Supreme Court has stated that "[t]he penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,'" which means that the difference in the sentences imposed on a defendant for specific crimes is an indicator of how serious the crime is and, for this reason, how much of a stigma ought to be imposed upon the defendant.[56]

As was noted above, in Illinois the difference between the maximum sentence for first- and second-degree murder is substantial. Following a conviction for second-degree murder, a defendant may be sentenced to as much as twenty years, whereas a defendant convicted of first-degree murder may be sentenced to as much as life in prison without parole.[57] At first glance it would appear that the defendant's interest in not being subjected to the stigma associated with first-degree murder is substantial; however, this is not the case. If the statutes were consolidated to create a single offense of "murder" and consideration of the mitigating factors of 720 ILCS 5/9-2 were moved to the sentencing portion of the trial, the defendant would not be subjected to the full weight of stigma associated with first-degree murder. By removing the modifying phrase "first-degree" from the name of the crime, the state will blur the meaning of the term "murder" with regards to severity both in the legal sense and in the colloquial. A consolidated statute will necessarily broaden the conduct to which it applies and will necessarily broaden the context of the term "murder" in the mind of the average citizen. Without the first-degree/second-degree dichotomy to provide context, the term "murder" will only invoke a more amorphous anger in the average, law-abiding citizen, which will effectively reduce the objective stigma borne by the defendant. The mere fact that a defendant may *feel* like they are suffering a substantially greater burden is of no consequence because when a court considers the constitutionality of a punishment, it does so from an objective standpoint, considering "objective indicia of society's standards, as expressed in legislative enactments and state practice[s]."[58] Viewed objectively, it seems equally likely that by removing the distinction between

55. TONI PICKARD ET AL., DIMENSIONS OF CRIMINAL LAW 441 (3rd ed. 2002).

56. Duncan v. State of La., 391 U.S. 145, 160 (1968) (citing District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)).

57. *See supra* notes 47 and 49, and accompanying text.

58. Kennedy v. Louisiana, 554 U.S. 407, 408 (2008).

first- and second-degree murder, the state will have no impact upon, or even *lessen* the stigma to which a defendant is subjected. The reason for this being that it is more difficult for an individual to be angry about something he understands less. Thus, although a criminal defendant certainly has an interest in avoiding the imposition of additional stigma, there is no reason to believe that the recombination of first- and second-degree murder into a single offense will increase that burden in any measurable way.

The next potential justification for maintaining the current statutory scheme relates to judicial integrity. Ostensibly, by having two degrees of murder, the judiciary demonstrates how seriously it considers questions of guilt and deprivation of liberty. At common law, all criminal homicides were felonies, and all felonies were punishable by death.[59] This wide application of the death sentence often resulted in great injustice, and it was precisely to counteract these injustices that the Pennsylvania Approach split murder into degrees in the first place.[60] By carefully considering the severity of each individual homicide and shaping the sentence to fit that level of severity, the Pennsylvania Approach served both to reduce the instances of substantial injustice occurring in the system, and also to promote an image of the justice system that fostered trust in the system, but it did so at the cost of the common law's relative simplicity. The question in this case is whether or not the distinction between first- and second-degree murder is necessary to protect the defendant and the image of the justice system's integrity, and the fact of the matter is that it is not.

The distinction between first- and second-degree murder is not necessary to protect the image of the justice system for two reasons. First, in the absence of capital punishment, the distinction between the punishment for first- and second-degree murder is not so substantial as to require the additional protection. Second, any lingering doubt held by the average person as to the integrity of the system is readily assuaged by the requirement that the state prove every element of the crime beyond a reasonable doubt.

As was noted above, in the absence of capital punishment, the difference between the sentences for first- and second-degree murder is that the sentence for first-degree murder in Illinois ranges from twenty years to life in prison, whereas the sentence for second-degree murder ranges from four to twenty years in prison.[61] This difference in punishment is clearly substantial, and for this reason it is vitally important that sufficient protections exist in

59. *See* Woodson v. North Carolina, 428 U.S. 280, 289 (1976); Gregg v. Georgia, 428 U.S. 153, 176–177 (1976).

60. Stacy, *supra* note 9, at 1013.

61. *See* 725 ILL. COMP. STAT. 5/119-1(a) (2011).

order to protect a criminal defendant from over-punishment. However, under the statutory scheme proposed in this Note, the protections for the defendant would be sufficient as they exist now. The reason for this is simple: with the death sentence on the table, it was of the utmost importance to ensure that capital punishment was not assigned to any but the most heinous criminals, leading to the severe controls present in the current statutory scheme. Since the death penalty is no longer available, the current set of aggravating and mitigating factors—already present in Illinois law—is more than sufficient to ensure a just sentence. This distinction flows from the fact that capital punishment is *different in kind* from other forms of punishment; whereas imprisonment takes away liberty, capital punishment *ends a human life*.[62]

Beyond this difference in kind lies a more practical concern: popular faith in judicial integrity. If judges determining murder cases under the proposed scheme were to begin to return substantially different sentences for apparently similar crimes, substantial justice will not be served and the people living within the jurisdiction will begin to lose faith in the integrity of the system. This effect would be especially problematic for state judges because they are dependent upon public opinion for reelection.[63] However, this does not mean that the current system cannot or ought not to be changed; rather, judges will only have to be more careful when explaining their sentencing decision. Generally speaking, "[w]hen there is substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation."[64] However, when confronted with a similar issue, the Ninth Circuit stated that "[a] formal statement of reasons is not necessary" to protect judicial integrity; rather, "[t]he courts may easily make their explanations orally during the sentencing procedures, and these will appear in the record."[65] Thus, the Illinois judiciary will be more than capable of protecting its integrity and appearance thereof simply by abiding by basic requirements of impartial adjudication.

62. As the court noted in Rummel v. Estelle, 445 U.S. 263 (1980), the presence of the death sentence makes adjudicating the reasonableness of a sentence because "the 'seriousness' of an offense or a pattern of offenses in modern society is not a line, but a plane," and "[o]nce the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence . . . violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment." *Id.* at 284. This seems to imply that a death penalty-free system will be better able to adjudicate sentencing in an objective manner.

63. *See* ILL. CONST. art. 6, § 10.

64. U.S. v. Capriola, 537 F.2d 319, 321 (9th Cir. 1976).

65. *Id.*

From the foregoing, it is clear that the defendant will be protected from over-punishment by the fair and impartial use of the aggravating and mitigating factors already in place, albeit at a different stage in the proceedings. Furthermore, the judiciary will be able to protect its integrity and appearance of integrity through careful explanation of its actions.[66] However, there is another important aspect of the criminal code which will help to assure both of these goals: the requirement that the prosecution prove every element of the charge beyond a reasonable doubt. If, as proposed, the degrees of murder were consolidated and the court's analysis of aggravating and mitigating factors were moved to the sentencing phase of the trial, the state would still be required to prove the existence of aggravating factors and disprove the existence of mitigating factors beyond a reasonable doubt.[67] The "beyond a reasonable doubt" standard imposed upon the state in criminal proceedings is the most rigorous standard of proof imposed in our justice system.[68] This is important because "[i]n any given proceeding, the minimum standard of proof the due process clause permits reflects the weight of the private and public interests affected, as well as a societal judgment about how the risk of error should be allocated between the parties."[69] Because of the inherent stringency of the "beyond a reasonable doubt" standard, the defendant will be protected from over-punishment—and the judiciary from a diminished trust in its integrity—so long as Illinois courts faithfully and sagaciously apply core principles of criminal adjudication.

VI. BENEFITS OF CONSOLIDATION

Having determined that the consolidation of Illinois' first- and second-degree murder statutes into one body of law will not cause any serious harm to the courts' ability to effectively carry out their duties to provide substantial justice, it is now time to consider the various values that lend support to the idea of consolidation. The most important of these reasons are as follows: first, a consolidated system would be more simple and would allow for easier

66. Notably, while this Note has been concerned almost entirely with the danger of excessive punishment, these same principles of careful explanation and fair adjudication will also serve to ensure that the defendant is not *under*-punished either.

67. *See* People *ex rel.* Carey v. Cousins, 397 N.E.2d 809, 817 (Ill. 1979) (showing that this legal requirement is now the current system).

68. Santosky v. Kramer, 455 U.S. 745, 755 (1982) ("When the State brings a criminal action to deny a defendant liberty or life . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'") (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

69. *In re.* D.T., 818 N.E. 1214, 1225 (Ill. 2004) (citing *Santosky*, 455 U.S. at 755).

and faster determination of cases; second, a consolidated system, while providing no substantial risk of over-punishment, could have a deterrent effect upon potential murderers; and third, a consolidated system would relieve some of the strain on the judiciary, promoting judicial economy.

The first value that supports consolidation is simplicity. If the elements of the various degrees of murder were combined into a single, broader offense, then the scope of the crime would be more easily apparent to the jurors assigned to determine a murder case. A consolidated system would, like the Model Penal Code, make the law concerning the substantive offense of murder "clear and relatively unambiguous," asking jurors only to determine whether a killing is murder or manslaughter, a task which they "can probably apply . . . with a facility close to that of judges."[70] In particular, aggravating and mitigating factors would be considered only once, and only at the sentencing hearing. As a result of this, the jurors serving at trial would not be asked to consider whether factors make a crime more or less heinous, allowing them to more easily determine whether the defendant's actions fall within the broad definition of consolidated murder. Moreover, when aggravating and mitigating factors are considered at the sentencing hearing, it will be easier for attorneys to navigate the factors effectively (whether the hearing be conducted before the bench or before a jury). The reason for this is that the attorneys would be able to rely upon the judge's legal expertise in the case of a bench hearing, and, in the case of a hearing before a jury, the attorneys would be able to focus their efforts more effectively upon explaining the factors. As a result, there would be no chance that the jurors would become confused between the theories governing aggravating and mitigating factors and those governing the substantive elements of murder.[71]

The second value which supports consolidation is the potential deterrence that it offers.[72] Generally speaking, "an increase in the detection, arrest and conviction rate" will have a greater deterrent effect

70. Crump, *supra* note 10, at 294.

71. With regards to this last point, it is important to point out that this increased simplicity would not necessarily make it more likely that a defendant will undergo greater punishment. The reason for this is that while, under the current system, an impassioned juror might choose to disregard a mitigating factor at trial for fear that the defendant will get off, under the proposed system guilt will have already been determined when the factors are brought up. This will allow the attorneys to approach the facts with a "clean slate," which will likely enable them to secure the reasonable and impartial determination of the jury at the sentencing proceeding.

72. Although the deterrent effect of any judicial activity is always difficult to quantify, I have tried to show at length why consolidation of the murder statutes would not have any substantial negative impact upon the retributive aspects of the law. For this reason I do not feel it necessary to revisit the topic at this time. Suffice to say that any potential deterrent effect of consolidation, though somewhat speculative, would be an added bonus with no expense to retributive values.

than a similar "increase in the severity of the penalty upon conviction."[73] In this case, the effect of consolidating the murder statutes and moving aggravating and mitigating factors to a separate sentencing proceeding would be to increase the likelihood that a deserving criminal will be convicted. The reason for this is that juries will be presented with, relatively speaking, simpler issues to decide, with the more complicated analysis of how blameworthy the defendant is (and so how much punishment is appropriate) being reserved until after a conviction has already been secured. If the statutes are consolidated, the result would be perceived as an increase in the conviction rate, without in any meaningful way making heavier sentences more likely. Properly executed, such a system could achieve the best deterrent results without sacrificing retributive integrity. Normal citizens would not be cowed into submission by the fear of extreme punishment; rather, they would be secure in the knowledge that crimes are being punished and punished proportionally.

The third value which supports consolidation is the state's interest in judicial economy. Judicial economy is defined in *Black's Law Dictionary* as "[e]fficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources."[74] This definition is important in this context for several reasons. By consolidating the various degrees of murder into a single broad definition, the Illinois courts will be spared from having to spend time and resources litigating the hazy distinctions between first- and second-degree murder. Moreover, by moving the courts' consideration of aggravating and mitigating factors to a second, sentencing hearing, the courts will be spared from reduplicating the efforts required to disentangle the various issues relating to such factors on more than one occasion. Finally, by simplifying the substantive law of murder and, as was described above, minimizing the opportunities for jury confusion, the courts will, in effect, reduce the complexity of appeals, allowing for greater economy at every level of the Illinois judiciary.

VII. WHAT IF THE DEATH PENALTY IS REVIVED?

One final item of importance is proposed Illinois House Bill 3012, which, if passed, would reinstate the death sentence in Illinois.[75] The fact that the death sentence has been repealed in Illinois has been central to the

73. DRESSLER, *supra* note 5, at 36 (referencing Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment*, 42 JUST. QUARTERLY 173, 174, 176, 180 (1987)).

74. BLACK'S LAW DICTIONARY 851 (7th ed. 1999).

75. *See* H.B. 3012, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

arguments contained in this Note, but it is not necessarily a definite prerequisite to reform. Admittedly, the presence of the death sentence would make many of the arguments presented less forceful in their current form and would require that they be reevaluated; however, consolidated statutes have proved effective when enacted in jurisdictions that still have the death sentence. For example, Texas enacted a consolidated penal code similar to the Model Penal Code in 1973, and the result has been that "Texans are governed by murder laws that say what they mean, reflect the people's values, produce crime gradations roughly corresponding to blameworthiness, and communicate the rules consistently to judges and jurors."[76] In Texas, guilt is determined using a single murder statute that encompasses both traditional degrees, and then aggravating and mitigating factors are used to determine the applicability of the death sentence during sentencing.[77] Unlike Illinois, the sentencing phase of the trial does not appear to be bifurcated, but is rather concurrent with the adjudication of guilt; nevertheless, Texans are satisfied with the protections they receive from their judiciary.[78] In this regard, the statutory scheme proposed in this essay appears to provide more protection, not less, than its Texas counterpart. For this reason it seems likely that a substantially just middle-ground could be found between the two approaches.

While it is beyond the scope of this Note to provide an alternative scheme to apply in the case that the Illinois legislature decides to reenact capital punishment into Illinois law, it would seem negligent to conclude without making some initial observations on the matter. First of all, under the current law (assuming the death penalty was never repealed) a defendant would have to be convicted of murder and then his crime would have to be adjudged "aggravated" by the presence of one or more delineated aggravating factors and the absence of substantial mitigating factors.[79] After the defendant is determined to be guilty of aggravated (first-degree) murder, the court would have to determine whether the aggravating factors present in that particular case warrant the imposition of the death penalty.[80] If in fact the court did decide to impose the death penalty, then the sentence would be subject to automatic review by the Illinois Supreme Court so that the court could review it for factual, legal, or constitutional error.

Within the above context, it is not difficult to see how the proposed scheme could be effective even if the death penalty were reenacted.

76. Crump, *supra* note 10, at 260–261.

77. *Id.* at 294.

78. *Id.*, at 260–261.

79. *See* 730 ILL. COMP. STAT. 5/5-5-3.2 (2014); 730 ILL. COMP. STAT. 5/5-5-3.1 (2013).

80. *See* 720 ILL. COMP. STAT. 5/9-1(c) (2011).

Specifically, after the defendant is adjudged guilty of murder as defined by the proposed consolidated statute, the court would proceed to the second hearing for sentencing as normal. At the sentencing hearing, the court would consider the aggravating and mitigating factors as set forth in the statutory code and determine what sentence is appropriate. If the court decided that the death penalty was warranted, then the idea of automatic review should be retained to ensure that the defendant receives every protection due to him at law, but beyond that there would be no need for any other significant change.

Thus, the repealing of the death penalty is not so much a necessary prerequisite of penal code reform as a possible catalyst for a radical change. Regardless of which way the legislature rules on the subject, change should be given serious thought, especially because there is so much potential benefit to be gained from a consolidated system.

VIII. CONCLUSION

In conclusion, Illinois murder law currently consists of a partial hybrid of the traditional Pennsylvania Approach and the simpler approach of the Model Penal Code. Because Illinois has repealed the death penalty, it is time to restructure the statutory scheme to allow for more efficient and simpler litigation. In order to accomplish this, the two degrees of murder should be recombined into one section in the Illinois criminal code, and any consideration of aggravating or mitigating factors should be moved to a second sentencing hearing held after an adjudication of guilt. If Illinois made this change, criminal defendants would be in no substantial danger of suffering a more severe sentence because the aggravating and mitigating factors currently present in Illinois law would guide the court's sentencing decision. Similarly, the defendant would not suffer greater social stigma if convicted of "murder" alone instead of "first-degree" or "second-degree" murder, and even if he did, this is not an interest that the judiciary law should protect. Thus, a consolidated statutory scheme would be in line with traditional retributivist values. Moreover, the proposed consolidated statute would pose no danger to judicial integrity or the public perception and may actually help the public to feel more secure in the judiciary's decisions. Beyond this, consolidating the degrees of murder into a single degree and bifurcating the sentencing into a separate hearing based on aggravating and mitigating factors would serve important social values by making litigation more simple and clear-cut, by potentially deterring criminals due to the greater likelihood that the guilty will be punished, and by increasing judicial economy by limiting the scope and duration of litigation in this important area of criminal law. For all of these reasons, I respectfully propose that a

substantial change to Illinois murder law be given serious consideration. Over the short term, the effects of such a substantial change would upset the finely crafted playing field that is criminal homicide litigation in Illinois, but the long term effects would be more than worth the temporary disruption.