


Spring 2008

## The CLEAR Initiative and Mental States: 1½ Problems Solved, 41 J. Marshall L. Rev. 701 (2008)

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### Recommended Citation

Timothy P. O'Neill, The CLEAR Initiative and Mental States: 1½ Problems Solved, 41 J. Marshall L. Rev. 701 (2008)

<http://repository.jmls.edu/lawreview/vol41/iss3/6>

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# THE CLEAR INITIATIVE AND MENTAL STATES: 1 ½ PROBLEMS SOLVED

TIMOTHY P. O'NEILL\*

## I. INTRODUCTION

Every first year law student knows that the prosecution can convict someone of a crime only if it proves both a “bad act” (*actus reus*) and “bad mental state” (*mens rea*) beyond a reasonable doubt.<sup>1</sup> But the “*mens rea*” requirement has been the source of two problems in Illinois law over the last few decades. The first is a general problem caused by the Illinois legislature’s carelessness in drafting criminal statutes. The second is a particular problem caused by a legal error made by the Illinois Supreme Court.

The general problem, as John Decker points out,<sup>2</sup> is that the Illinois Criminal Code<sup>3</sup> for many years has contained numerous offenses in which the legislature failed to include an explicit mental state. One of the great strengths of the CLEAR Initiative (Criminal Law Edit, Alignment and Reform)<sup>4</sup> is its decision to

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1. See MODEL PENAL CODE § 2.01(1) cmt. at 214-15 (stating that “[a] civilized society does not punish for thoughts alone.”); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1, at 332 (2d ed. 1986) (noting the commonly expressed statement that a crime consists of both a physical part and a mental part). This idea is deeply rooted in our jurisprudence as William Blackstone many years ago stated: “Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act.” 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (William S. Hein & Co., Inc. 1992).

2. John Decker, *The Mission of the Criminal Law Edit, Alignment, and Reform Commission (CLEAR): An Introductory Commentary*, 41 J. MARSHALL L. REV. 611 (2008).

3. 720 ILL. COMP. STAT. 5/1-1 to 690/4.5 (2004). The last major revision of the Code was passed by the legislature in 1961 and became effective on January 1, 1962. It is referred to as the “Criminal Code of 1961.”

4. “The CLEAR Initiative’s goals include: giving laypeople better access to the Criminal Code to help them better obey the law; providing judges and lawyers with an easier to understand and easier to apply set of rules; reducing disputes over the Criminal Code that can thus reduce costly re-trials, court

guarantee that a particular mental state is included in every criminal offense. This Article will first discuss the difficulties caused by the Illinois legislature's careless omission of mental states during the last forty-five years. It will show how the legislature's mistakes were then compounded by judicial errors. It will also examine how these errors then adversely affected Illinois Pattern Jury Instructions in criminal cases. It will then describe how the CLEAR initiative has successfully dealt with this problem.

The particular problem, on the other hand, concerns the failure of the Illinois Supreme Court to recognize the existence of the offense of "attempt second degree murder." The Illinois Supreme Court has stubbornly held to the position that such an offense is an impossibility. By doing so, it has created a legal paradox: a person who uses deadly force either through sudden provocation or through an unreasonable belief in the need for self-defense receives a *shorter* sentence if the victim *dies*, and a *longer* sentence if the victim *lives*. In other words, the defendant is actually rewarded for making sure the victim really is dead! Incredibly, the Illinois Supreme Court has had two chances in the last few decades to correct this travesty, but each time the Court failed to understand basic *mens rea* principles familiar to first-semester law students. The CLEAR initiative attempts to correct this problem. Unfortunately, as this Article will discuss, it only solves half of the problem.

## II. TAKING *MENS REA* SERIOUSLY: THE CLEAR INITIATIVE'S IMPORTANT REFORM OF THE ILLINOIS CRIMINAL CODE

We must begin by examining the source for much of the current Illinois Criminal Code's work in the area of mental states: the Model Penal Code, which the American Law Institute drafted between 1952 and 1962.<sup>5</sup>

One of the goals of the Model Penal Code was to bring some

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delays, mistakes, and appeals; reducing the Criminal Code's size; improving the Criminal Code's indexing; and giving policy makers a better understanding of the implications of their proposed amendments. CLEAR Initiative, <http://www.clearinitiative.org/index.php> (last visited Jan. 14, 2008). "The CLEAR Initiative was developed by staff at Chicago Metropolitan 2020, a business-based civic organization promoting long-term planning and smart investment in the Chicago region and working for better outcomes in our legal and corrections system." Press Release, CLEAR Initiative, CLEAR Commission Presents Criminal Code Recommendations to Illinois General Assembly (Sept. 14, 2006) available at <http://www.clearinitiative.org/documents/ClearPressRelease091406.pdf> (last visited Jan. 14, 2008).

5. MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 8 (Foundation Press 2002).

order to the area of mental states. The common law was full of colorful names describing a host of mental states: people who acted with “depravity of the will” or “diabolical malignity;” people who possessed an “abandoned heart,” a “bad heart,” a “heart regardless of social duty, and fatally bent on mischief,” or a “wicked heart;” a person with a “mind grievously depraved,” or with a “mischievous vindictive spirit.”<sup>6</sup> The problem was trying to define these terms for the fact-finder.

The Model Penal Code’s solution was to define all offenses using only four criminal states of mind: purpose, knowledge, recklessness, and negligence.<sup>7</sup> In addition, it refers to any criminal offense that does not require a showing of a criminal mental state as a “strict liability” offense.<sup>8</sup>

The drafters of the Illinois Criminal Code of 1961 were greatly influenced by the Model Penal Code.<sup>9</sup> Thus, Illinois also adopted four mental states. Three came straight from the Model Penal Code: knowledge,<sup>10</sup> recklessness,<sup>11</sup> and negligence.<sup>12</sup> The fourth was essentially the Model Penal Code’s “purpose,” except the Illinois Code called it “intent.”<sup>13</sup> The Illinois Code also adopted the concept of “strict liability,” but instead called it “absolute liability.”<sup>14</sup>

Further reflecting the Model Penal Code, the Illinois Code even provided for those situations in which an offense did not explicitly provide for any mental state. The Illinois Code included a “default” provision for these situations. Section 4-3(b) held that, provided the offense is not an absolute liability offense, then either intent, knowledge, or recklessness would be “applicable.”<sup>15</sup>

Section 4-3(b) created three interpretive difficulties for Illinois courts. The first was determining whether the “default” mental states needed to be charged and proved in the same way the prosecution charged and proved mental states explicitly set out in the definition of an offense. The second was to determine whether all three “default” mental states always applied whenever Section

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6. *Id.* at 50-51.

7. MODEL PENAL CODE § 2.02.

8. *See* MODEL PENAL CODE § 2.05 (noting that culpability requirements do not apply to violations and to statutory offenses clearly defined as having no mental state by the legislature).

9. *See* Richard Singer, *The 25th Anniversary of the Model Penal Code: Foreword*, 19 RUTGERS L.J. 519, 519 (1988) (observing that nearly forty states have based criminal laws on the Model Penal Code).

10. 720 ILL. COMP. STAT. 5/4-5 (2004).

11. 720 ILL. COMP. STAT. 5/4-6 (2004).

12. 720 ILL. COMP. STAT. 5/4-7 (2004).

13. 720 ILL. COMP. STAT. 5/4-4 (2004).

14. 720 ILL. COMP. STAT. 5/4-9 (2004).

15. 720 ILL. COMP. STAT. 5/4-3(b) (2004). This was modeled after Model Penal Code § 2.02(3).

4-3(b) applied. The third difficulty was how to determine whether an offense without an explicit mental state was an absolute liability offense or whether it should be supplemented with Section 4-3(b)'s "default" mental states.

The Illinois courts' struggle with the first of these quandaries began with the Supreme Court case of *People v. Terrell*<sup>16</sup> in 1989. The offense of aggravated criminal sexual assault contained no mental state.<sup>17</sup> Therefore, the court applied the "default" Section 4-3(b) provision and held that intent, knowledge, or recklessness would apply.<sup>18</sup>

*Terrell* did not elaborate on exactly what this meant. It seems clear that Section 4-3(b) means that the prosecutor must choose a mental state from this list and insert it into the indictment or information. In this way, the fact-finder would have to determine whether the prosecution had proved the existence of the selected mental state by proof beyond a reasonable doubt. In the words of Professor Paul Robinson, Model Penal Code Section 2.02(3) provides that the mental state must be "read in."<sup>19</sup> Charging and proving the appropriate mental state beyond a reasonable doubt is not an option – it is a constitutional requirement.<sup>20</sup>

Unfortunately, *Terrell* created a myriad of troubles by describing the mental states provided through the operation of Section 4-3(b) as being "implicit" or "implicitly required."<sup>21</sup> That word and that phrase are nowhere to be found in Section 4-3(b), which refers to the three default mental states as simply being "applicable."<sup>22</sup>

Where did *Terrell* come up with the concept of "implied" mental states? Although *Terrell* does not cite to them, the Committee Comments to Section 4-9 describe the operation of Section 4-3(b) as "implying" mental states.<sup>23</sup> In addition, two earlier Illinois Supreme Court cases had noted the Committee Comments' use of the term "implied mental states." *People v. Nunn* used the word "implied" to describe the operation of Section

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16. 132 Ill. 2d 178, 547 N.E.2d 145 (Ill. 1989).

17. *Id.* at 188-90, 547 N.E.2d at 157-58 (citing 720 ILL. COMP. STAT. 5/12-14 (1985)).

18. *Id.* at 190, 547 N.E.2d at 159; see also 720 ILL. COMP. STAT. 5/4-3(b) (1985) (declaring that a mental state of either intent, knowledge, or recklessness is implied when a statute fails to prescribe a mental state).

19. Paul H. Robinson, Michael T. Cahill, and Usman Mohammad, *The Five Worst (And Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 68 (2000).

20. *In re Winship*, 397 U.S. 358, 362 (1970).

21. 132 Ill. 2d at 189, 547 N.E.2d at 156-58.

22. 720 ILL. COMP. STAT. 5/4-3(b) (1985).

23. ILL. REV. STAT. ch. 38, par. 4-9, committee's notes, at 283 (Smith-Hurd 1979).

4-3(b);<sup>24</sup> nevertheless, it noted that the prosecution “is required to prove that the accused had knowledge” even though “knowledge” is a default mental state given Section 4-3(b).<sup>25</sup> Similarly, *People v. Valley Steel Products* referred to Section 4-3(b) as “implying” mental states.<sup>26</sup> Nevertheless, the court proceeded to dismiss the indictment for failing to charge a mental state pursuant to Section 4-3(b).<sup>27</sup>

These two cases show that at the time *Terrell* was decided the Supreme Court had previously held that even if the mental state had been supplied through operation of the Section 4-3(b) “default” provision, the prosecution still had to both charge and prove a culpable mental state. This seems unremarkable.

Yet some lower courts fixated on *Terrell*’s use of the word “implied” and reached the perverse conclusion that the prosecution *did not have to either charge or prove* any mental state in order to convict a defendant of the Class X felony of aggravated criminal sexual assault.<sup>28</sup>

This unfortunate trend started with the Fourth District case of *People v. Burton*, where the court held that when a mental state is merely “implied” through operation of Section 4-3(b) it does not have to be included in the instructions to the jury.<sup>29</sup> *Burton* could only reach this conclusion by ignoring the Supreme Court decisions in both *Nunn* and *Valley Steel*. Over a vigorous dissent,<sup>30</sup> the *Burton* majority essentially read *mens rea* out of the elements needed to prove a Class X offense.

*Burton* was followed in a number of subsequent Illinois appellate decisions.<sup>31</sup> In fact, the First District in *People v.*

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24. 77 Ill. 2d 243, 250, 396 N.E.2d 27, 30 (Ill. 1979).

25. *Id.* at 252, 396 N.E.2d at 31.

26. 72 Ill. 2d 408, 425, 375 N.E.2d 1297, 1304 (Ill. 1978).

27. *Id.*, 375 N.E.2d at 1304-05.

28. Conviction for the offense of aggravated criminal sexual assault, for first time offenders, was then, and still is, a Class X felony, carrying a sentence of no less than six years and no more than thirty years. ILL. REV. STAT., ch. 38 par. 12-14 (1985); ILL. REV. STAT., ch. 38 par. 1005-8-1(2) (1985); 720 ILL. COMP. STAT. 5/12-14 (2006). The punishment for aggravated criminal sexual assault after a prior conviction for either criminal sexual assault, aggravated criminal sexual assault, or predatory criminal sexual assault is imprisonment for life. 720 ILL. COMP. STAT. 5/12-13(b)(2) (2006).

29. 201 Ill. App. 3d 116, 120, 558 N.E.2d 1369, 1370-74 (Ill. App. Ct. 1990).

30. *See id.* at 123-29, 558 N.E.2d at 1375-78 (Steigmann, J., dissenting) (noting that the jury should have been instructed that the State must prove that the defendant had a mental state of intent, knowledge, or recklessness in order to convict the defendant of aggravated sexual assault).

31. *See, e.g., People v. Bofman*, 283 Ill. App. 3d 546, 551, 670 N.E.2d 796, 799 (Ill. App. Ct. 1996) (defining the crime of aggravated criminal sexual assault as a general intent crime and stating that it does not require the allegation of a specific mental state); *People v. Robinson*, 265 Ill. App. 3d 882, 889, 637 N.E.2d 1147, 1151 (Ill. App. Ct. 1994) (holding that it was not reversible error for the indictment to fail to allege a mental state); *People v.*

*Bofman* extended the *Burton* principle by holding that an “implied” mental state under Section 4-3(b) did not even have to be charged in the indictment or information.<sup>32</sup> *Bofman* ignored two Illinois Supreme Court cases decided after *Burton* that both held that a Section 4-3(b) mental state needed to be proven the same as any other mental state.<sup>33</sup>

And what happened when the Illinois Supreme Court directly confronted the *Burton* decision, which held that the prosecution did not have to prove a specific mental state for aggravated criminal sexual assault because it was “implied” by Section 4-(b)? The Supreme Court in *People v. Simms* ignored all of the precedent to the contrary and inexplicably agreed with *Burton*.<sup>34</sup>

These cases created a problem for the Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases (“IPI Committee”).<sup>35</sup> The Fourth Edition’s instructions on criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse all lack provisions for instructing the jury on mental states.<sup>36</sup> Drafted before the Illinois Supreme Court’s decision in *Simms*, all of these instructions contain a standard paragraph in the Committee Notes intimating that although *Burton* may not accurately reflect *Terrell*, *Burton* nevertheless holds that the instructions need not include mental states.

The *Burton* case forced the IPI Committee to deviate from the usual way it dealt with instructions affected by Section 4-3(b). Ordinarily, if an offense lacked a mental state in its definition, the IPI Committee included the three default mental states of intentionally, knowingly, and recklessly as bracketed alternatives, and then went on to explain this choice in the Committee Note.<sup>37</sup>

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Adams, 265 Ill. App. 3d 181, 187, 638 N.E.2d 254, 258 (Ill. App. Ct. 1994) (noting that where a mental state is implied, a court is not always required to instruct the jury as to the mental state).

32. *Bofman*, 203 Ill. App. 3d at 551, 670 N.E.2d at 80.

33. See *People v. Anderson*, 488 Ill. 2d 15, 24, 591 N.E.2d 461, 466 (Ill. 1992) (holding that a state must prove recklessness, knowledge, or intent when punishing a defendant for violation of a hazing statute); *People v. Gean*, 143 Ill. 2d 281, 288, 573 N.E.2d 818, 822 (Ill. 1991) (finding that the defendant had to be consciously aware that he did not have the authority to hold certificates without complete assignment).

34. 192 Ill. 2d 348, 375, 736 N.E.2d 1092, 1114 (Ill. 2000).

35. The author served as Reporter to the Committee from 1989-99.

36. Illinois Supreme Court Committee, ILLINOIS PATTERN JURY INSTRUCTIONS – CRIMINAL §§ 11.55 to 11.62A (4th ed. 2006) [hereinafter IPI].

37. See, e.g., *id.* §§ 13.60 to 13.61 (highlighting both the definition and issues instructions for the offense of “insurance fraud conspiracy,” where the Committee inserted a bracketed choice of the three default mental states because the statute did not include one); see also *id.* § 13.60 committee’s note (citing *People v. Anderson*, 591 N.E.2d 461 (Ill. 1991), for the authority to include this choice).

Unfortunately, the *Burton* line of cases created an anomalous exception.

The second interpretive difficulty deals with yet another way Illinois courts have flouted Section 4-3(b). The statute clearly provides that any of the three mental states can be the default mental state. It is a meal served *prix fixe*, not *a la carte*. Nevertheless, for certain offenses the Illinois Supreme Court has ignored this unambiguous language and has selected one or two, but not all three, as possible mental states.<sup>38</sup> For example, in *People v. Whitlow* the Illinois Supreme Court considered a statute that forbade a person from “employ[ing] any device, scheme or artifice to defraud in connection with the sale or purchase of any security, directly or indirectly.”<sup>39</sup> The court held that because the statute did not include a mental state, Section 4-3(b) applied. The court envisioned its job as *selecting* which of the mental states was applicable; the court chose intentional and knowing, but not reckless.<sup>40</sup> Although it might seem odd to speak of “recklessly” violating a statute of this nature, Section 4-3(b) provides no authority for the Supreme Court to pick-and-choose in this way.

Similarly, in *People v. Gean* the Supreme Court considered a statute making it a crime to possess a vehicle title without complete assignment.<sup>41</sup> Because the statute included no mental state, the court simply chose “knowledge” from the three mental states in Section 4-3(b).<sup>42</sup> Yet a year later in *People v. Tolliver* the court had second thoughts about this decision; it concluded that “there are myriad situations where a person could knowingly possess an incomplete title for innocent purposes.”<sup>43</sup> The court thus created its own new mental state: “criminal knowledge, in other words, knowledge plus criminal purpose.”<sup>44</sup>

These cases led the IPI Committee to follow suit and to occasionally choose fewer than all three mental states as defaults when the use of a particular mental state appeared inappropriate. For example, despite the fact that the statutory definition of “prostitution” lacks a mental state<sup>45</sup> — and thus Section 4-3(b) would provide that either intentionally, knowingly, or recklessly

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38. See *People v. Whitlow*, 89 Ill. 2d 322, 333, 433 N.E.2d 629, 634 (Ill. 1982) (stating that Section 4-3(b) applies); see also *Gean*, 143 Ill. 2d at 288, 573 N.E.2d at 822 (noting that knowledge is the appropriate mental state); *People v. Tolliver*, 147 Ill. 2d 397, 401-03, 589 N.E.2d 527, 529-30 (Ill. 1992) (creating a new mental state of “knowledge plus criminal purpose”).

39. ILL. REV. STAT. ch. 121 1/2, par. R.3.3 137.2-17 (1973).

40. *Whitlow*, 89 Ill. 2d at 333, 433 N.E.2d at 634.

41. See 143 Ill. 2d at 287, 573 N.E.2d at 821 (discussing ILL. REV. STAT. ch. 95 1/2, par. R.3.3 4-104 (1987)).

42. *Id.* at 288, 573 N.E.2d at 822.

43. *Tolliver*, 147 Ill. 2d at 401-02, 589 N.E.2d at 529.

44. *Id.* at 402-03, 589 N.E.2d at 530.

45. 720 ILL. COMP. STAT. 5/11-14 (2004).



could be an applicable mental state — IPI 9.10 declined to include “recklessly” as a possible choice.<sup>46</sup>

While this flouting of the clear meaning of Section 4-3(b) by both the Supreme Court and the IPI Committee has not necessarily caused unjust results — after all, it is hard to imagine a prosecutor wanting to charge someone with “recklessly” committing the offense of prostitution — it has nevertheless injected an unfortunate degree of uncertainty into the statute’s interpretation.

The third difficulty in interpreting Section 4-3(b) concerns the understandable problems Illinois courts have had in deciding the legislative intent behind those offenses whose statutory definitions lack an explicit mental state. For these offenses, the issue for the court is whether the legislature intended Section 4-3(b) to supply the default mental states or whether the legislature intended the offense to be one of absolute liability. The legislature’s intent is not always obvious.

Section 4-9 of the Code provides:

A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding \$500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.<sup>47</sup>

The Illinois Supreme Court in *People v. Molnar* noted that the Committee Comments to Section 4-9 show that the legislature intended to generally limit the scope of absolute liability.<sup>48</sup> Thus, the court stated that unless it found either clear legislative intent to impose absolute liability or an important public policy favoring absolute liability, it would rely on the default mental states of Section 4-3(b).<sup>49</sup>

*Molnar* concerned a statute that punished the failure to register as a sex offender as a Class 3 felony; the statutory language was devoid of a mention of any mental state.<sup>50</sup> The court began by noting that “where the punishment is great, it is less likely that the legislature intended to create an absolute liability offense.”<sup>51</sup> Yet because the legislature did include a mental state

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46. See IPI § 9.10 committee’s note (stating that the use of “recklessly” as a mental state for the offense of prostitution would be “inappropriate”).

47. 720 ILL. COMP. STAT. 5/4-9 (2004).

48. 222 Ill. 2d 495, 522, 857 N.E.2d 209, 223 (Ill. 2006).

49. *Id.* at 519, 857 N.E.2d at 223.

50. *Id.* at 520-21, 857 N.E.2d at 224; see also 730 ILL. COMP. STAT. 150/10 (2004) (“Any person who is required to register under this Article who violates any of the provisions of this Article . . . is guilty of a Class 3 felony.”).

51. *Molnar*, 222 Ill. 2d at 522, 857 N.E.2d at 224 (citing *Gean*, 143 Ill. 2d at 286-87, 573 N.E.2d at 821).

for the offense in the very next sentence of the statute,<sup>52</sup> the court concluded that it must have intended that the failure to resister was indeed an absolute liability offense.<sup>53</sup>

The CLEAR initiative deals with all three of these difficulties. As John Decker expresses it:

[T]he Commission early on adopted the position that a particular mental state should be reflected in all crimes, thereby avoiding the suggestion the offense in question is an absolute liability offense. In this connection, it was also agreed that *generally* the appropriate mental state should be *knowledge*, thereby requiring the State to prove the defendant knowingly engaged in conduct that is criminal, except where the legislative intent indicates proof of acting intentionally is required or, on the other hand, that mere recklessness is sufficient.<sup>54</sup>

Thus, for a variety of offenses, Senate Bill 0100 inserts the mental state “knowingly” where no mental state was previously specified.<sup>55</sup> This one change remedies all three problems just discussed. First, it makes it clear that a mental state both must be alleged in the charging papers and proved beyond a reasonable doubt. Second, by specifying a mental state in the statute, it obviates the need for an Illinois court to decide whether one, two, or all of the possible mental states in Section 4-3(b) are applicable to the offense. Third, it eliminates the possibility that a court might mistakenly find that the legislature intended a felony to be an absolute liability offense.

Additionally, Senate Bill 0100 adds a provision to clarify that if a defendant acts intentionally, by definition this also means that he acted knowingly.<sup>56</sup> This provision – found in the Model Penal

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52. “Any person who is required to register under this Article who knowingly and willfully gives material information required by this Article that is false is guilty of a Class 3 felony.” 730 ILL. COMP. STAT. 150/10.

53. *Molnar*, 222 Ill. 2d at 522, 857 N.E.2d at 223-24.

54. Decker, *supra* note 2, at 634-35.

55. See, e.g., 720 ILL. COMP. STAT. 5/9-3.4 (proposed Jan. 1, 2008) (discussing concealment of homicidal death, formerly 720 ILL. COMP. STAT. 5/9-3.1); 720 ILL. COMP. STAT. 5/10-5(b)(8) to (b)(9) (proposed Jan. 1, 2008) (discussing child abduction); 720 ILL. COMP. STAT. 5/11-6.5 (proposed Jan. 1, 2008) (discussing indecent solicitation of an adult); 720 ILL. COMP. STAT. 5/11-6.70 (proposed Jan. 1, 2008) (discussing prostitution, formerly 720 ILL. COMP. STAT. 5/11-14); 720 ILL. COMP. STAT. 5/11-6.125 (proposed Jan. 1, 2008) (discussing posting of identifying information on a pornographic internet site, formerly 720 ILL. COMP. STAT. 5/11-23); 720 ILL. COMP. STAT. 5/12-101 (proposed Jan. 1, 2008) (discussing assault, formerly 720 ILL. COMP. STAT. 5/12-1); 720 ILL. COMP. STAT. 5/12-111 (proposed Jan. 1, 2008) (discussing the compelling organization membership of persons, formerly 720 ILL. COMP. STAT. 5/12-6.1).

56. 720 ILL. COMP. STAT. 5/4-5(c) (proposed Jan. 1, 2008); S.B. 0100, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (as introduced), *available at* <http://www.ilga.gov/legislation/95/SB/PDF/09500SB0100.pdf> (last visited Feb. 13, 2008).

Code<sup>57</sup> - eliminates the argument that the State fails to prove the defendant acted "knowingly" if it establishes the more culpable mental state of "intentionally." Additionally, this resulted in Senate Bill 0100 substituting the mental state "intent or knowledge" with simply "knowledge."<sup>58</sup>

Finally, Senate Bill 0100 continues the work of the Criminal Code of 1961 in rooting out archaic mental states in order to ensure that Illinois recognizes only four: intentionally, knowingly, recklessly, and negligently. Thus, for the offense of "threatening public officials," Senate Bill 0100 changes "knowingly and willfully delivers" to simply "knowingly delivers."<sup>59</sup> Other revisions eliminated outdated mental states such as "designedly"<sup>60</sup> and "gross carelessness or neglect."<sup>61</sup>

The CLEAR initiative has done an excellent job of solving a long-standing *mens rea* quandary within the Illinois Criminal Code.

### III. THE CLEAR INITIATIVE AND "ATTEMPT SECOND DEGREE MURDER"

The Illinois Supreme Court does not recognize the crime of "attempt second degree murder."<sup>62</sup> The reason for this is that a decade ago the court made a legal mistake concerning *mens rea* that would shame even a beginning law student.

First, let's define our terms. Since 1987, murder in Illinois has been divided into two degrees. The first degree murder statute provides in pertinent part that: "(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 . . . intends to kill . . . that individual or another . . ."<sup>63</sup> However, a person who commits first degree murder can have the crime

57. MODEL PENAL CODE § 2.02(5).

58. See, e.g., 720 ILL. COMP. STAT. 5/11-6.10 (proposed Jan. 1, 2008) (discussing sexual exploitation of a child, formerly 720 ILL. COMP. STAT. 5/11-9.1); 720 ILL. COMP. STAT. 5/12-104 (proposed Jan. 1, 2008) (discussing battery of unborn child, formerly 720 ILL. COMP. STAT. 5/12-3.1); S.B. 0100, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (as introduced), available at <http://www.ilga.gov/legislation/95/SB/PDF/09500SB0100.pdf> (last visited Feb. 13, 2008) (changing "intentionally or knowingly" to "knowingly").

59. 720 ILL. COMP. STAT. 5/12-114 (proposed Jan. 1, 2008) (formerly 720 ILL. COMP. STAT. 5/12-9).

60. See S.B. 0100, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (as introduced) (changing the mental state for "fraud in issuance of stock," 720 ILL. COMP. STAT. 5/17-17 (2006), to knowingly), available at <http://www.ilga.gov/legislation/95/SB/PDF/09500SB0100.pdf> (last visited Feb. 13, 2008).

61. See *id.* (replacing the mental state for "common carriers; gross neglect," 720 ILL. COMP. STAT. 5/12-5.5 (2006), with "recklessness").

62. *People v. Lopez*, 166 Ill. 2d 441, 448, 655 N.E.2d 864, 867 (Ill. 1995).

63. 720 ILL. COMP. STAT. 5/9-1.

reduced to second degree murder in two situations. First, if the person can show by a preponderance of the evidence that at the time of the killing she was “acting under a sudden and intense passion resulting from serious provocation,” she is guilty only of second degree murder.<sup>64</sup> Second, if the person can show by a preponderance of the evidence that at the time of the killing she was acting under a real, but unreasonable, belief that her actions were justified by self-defense, she is likewise guilty only of second degree murder.<sup>65</sup>

Thus, second degree murder in Illinois is simply first degree murder *plus* mitigation.<sup>66</sup> As expressed by the Illinois Supreme Court, second degree murder is merely “a lesser mitigated offense of first degree murder.”<sup>67</sup>

What happens if the defendant unjustifiably intends to kill a person but the person does not die? The Illinois attempt statute provides that “[a] person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.”<sup>68</sup> Thus if the defendant unjustifiably acts with the intent to kill – and the victim somehow survives – the defendant is guilty of only attempt first degree murder.<sup>69</sup>

64. 720 ILL. COMP. STAT. 5/9-2(a)(1).

65. 720 ILL. COMP. STAT. 5/9-2(a)(2).

66. *Id.*

67. *People v. Jeffries*, 164 Ill. 2d 104, 119-22, 646 N.E.2d 587, 594-95 (Ill. 1995).

68. 720 ILL. COMP. STAT. 5/8-4(a).

69. Depending on the circumstances, the sentence for a conviction of first degree murder ranges from 20 years to life, with the possibility of the death penalty. 730 ILL. COMP. STAT. 5/5-8-1(a). First degree murder in Illinois is its own separate class of felony. *Id.* at 5/5-8-1(b). The sentence for attempt first degree murder, without any aggravating factors, is a Class X felony, with a possible sentence ranging from six to thirty years. 720 ILL. COMP. STAT. 5/8-4(c)(2). Aggravating factors can lead to a sentence beyond 30 years, including up to 80 years for an attempt to commit first degree murder on a peace officer, correctional officer, or emergency medical technician acting in the course of his or her duties, 720 ILL. COMP. STAT. 5/8-4(c)(1)(A)(d), or up to a life sentence if great bodily harm results from using a firearm during an attempted first degree murder. *See* 720 ILL. COMP. STAT. 5/8-4(c)(1)(D) (stating that if the person “discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement . . . a term of natural life may be added to the term of imprisonment imposed by the court.”).

A report issued in 2005 covering years 1995 through 2004 indicates that the average sentence imposed for first degree murder ranged from 34.4 to 37.6 years while the average sentence imposed for attempted first degree murder ranged from 11.0 to 12.1 years. *See* ROBERT J. JONES, STEVEN P. KARR, BRUCE W. OLSON & SHEILA M. URBAS, ILLINOIS DEPARTMENT OF CORRECTIONS, 2004 STATISTICAL PRESENTATION 55, [http://www.idoc.state.il.us/subsections/reports/statistical\\_presentation\\_2004/default.shtml](http://www.idoc.state.il.us/subsections/reports/statistical_presentation_2004/default.shtml) (last visited Feb. 13, 2008) (showing “determinate” or fixed sentences for crimes committed after February 1, 1978).

But what if the attempt first degree murder was motivated either by “sudden and intense passion” or an “unreasonable belief in self-defense?” If second degree murder is simply “a lesser mitigated offense of first degree murder,” then it logically follows that “*attempt* second degree murder” is simply “a lesser mitigated offense of *attempt* first degree murder.” In fact, the rationale for “attempt second degree murder” was so clear that the Illinois Pattern Jury Instructions included instructions for the offense in its Third Edition issued in 1992.<sup>70</sup>

Yet in 1995, the Illinois Supreme Court in *People v. Lopez*<sup>71</sup> could not understand this. Its first mistake was in its characterization of first and second degree murder. Instead of recognizing that the legislature had established *one* offense of “murder” divided into *two* degrees, it perversely insisted that “first and second degree murder are separate offenses.”<sup>72</sup>

From this error, it went on to conclude that “for an attempt second degree murder, the defendant must *intend* the presence of a mitigating factor, which is an impossibility.”<sup>73</sup> The court stated that it was an impossibility because attempt second degree murder would require both “the intent to kill without lawful justification, *plus the intent to have a mitigating circumstance present.*”<sup>74</sup>

Justice McMorro, joined by Justice Bilandic in partial dissent, was overly-kind when she merely described the majority’s reasoning as “senseless.”<sup>75</sup> No one “intends” mitigating circumstances; rather, mitigating circumstances are simply the factors that motivate a person to commit an act.<sup>76</sup> The only “intent” needed for the offense of “attempt second degree murder” is an objectively unjustifiable intent to kill.<sup>77</sup> The accompanying circumstances of either unreasonable belief in self-defense or “sudden and intense passion” simply reduce what would be “attempt first degree murder” to “attempt second degree murder.”<sup>78</sup>

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70. JAMES B. HADDAD & ROBERT J. STEIGMANN, ILLINOIS PATTERN JURY INSTRUCTIONS 124, 128-31 (West Publ’g Co. 3rd ed. 1992). The relevant instructions are 6.05Y, 6.07Y, and 6.07Z. *Id.* The 1994 Pocket Part added Instructions 6.05Z, 6.07YY, and 6.07ZZ.

71. *Lopez*, 166 Ill. 2d 441, 655 N.E.2d 864. The decision was similar to the Court’s refusal to recognize “attempt voluntary manslaughter” under the old homicide scheme. See *People v. Reagan*, 99 Ill. 2d 238, 457 N.E.2d 1260 (1983).

72. *Id.* at 447, 655 N.E.2d at 867.

73. *Id.* at 449, 655 N.E.2d at 868 (emphasis added).

74. *Id.* at 448, 655 N.E.2d at 867 (emphasis added).

75. *Id.* at 457, 655 N.E.2d at 871 (McMorro, J., concurring in part and dissenting in part).

76. *Id.* at 454, 655 N.E.2d at 870-71 (McMorro, J., concurring in part and dissenting in part).

77. *Id.*

78. *Id.* at 455, 655 N.E.2d at 870-71 (McMorro, J., concurring in part and

The “senseless” reasoning of *Lopez* led the Illinois criminal bar to despair that the Illinois Supreme Court could never get this simple point straight. Therefore it is very good news that the CLEAR initiative amends the attempt statute to expressly provide that there is an offense of “attempt second degree murder” based on serious provocation.<sup>79</sup>

What is disappointing, however, is the lack of a provision establishing “attempt second degree murder” based on imperfect self-defense. Thus, it remains true that if a defendant kills a person while harboring a real, but unreasonable, belief in the need for self-defense, she will be convicted of “second degree murder.” Yet if the victim survives, she still will be convicted of “attempt first degree murder.”

CLEAR deserves credit for solving half of the “attempt second degree murder” problem. Unfortunately, the other half remains unresolved.

#### IV. CONCLUSION

One of the great advances of the Criminal Code of 1961 was to begin to align Illinois with the Model Penal Code’s efforts to reduce all culpable mental states to only four. The last few decades have shown that not all of the problems were solved. The CLEAR Initiative’s Senate Bill 0100 has taken a giant step towards completing the revolution. Explicit use of a finite number of mental states will foster more accurate charging papers and improved jury instructions. Moreover, CLEAR deserves credit for beginning to undo the harm of *People v. Lopez*. Establishing “attempt second degree murder” based on serious provocation, is a start. Next, Illinois must recognize “attempt second degree murder” based on imperfect self-defense.

Two problems, one and one-half solutions. CLEAR has made a very good start.

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dissenting in part).

79. On page 59, Senate Bill 0100 as introduced adds a new section to the attempt statute:

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

S.B. 0100, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (as introduced), available at <http://www.ilga.gov/legislation/95/SB/PDF/09500SB0100.pdf> (last visited Feb. 20, 2008).

