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THE TWO-MURDER RULE IN ILLINOIS—A POTENTIAL RETURN TO ARBITRARY IMPOSITION OF THE DEATH PENALTY

*Joel H. Swift**

For approximately the first one hundred and fifty years of its existence, the state of Illinois resisted the grading of murder into culpability degrees with separate penalties.[1] Thus, while intent to kill was one consideration in determining whether malice aforethought was present, there existed no separate crime of premeditated murder in the first degree.[2] Instead, all unjustified homicides were murder if committed under facts and circumstances deemed to constitute either express or implied malice aforethought.

During the sixteen years between 1961 and 1977, however, three distinct but interrelated developments converged, resulting in the adoption of a modified form of first degree premeditated murder, and making culpability a potentially determining consideration in the imposition of the death penalty. The first development was the adoption of section 9-1(a) of the Criminal Code of 1961.[3] This section, which removed the phrase "malice aforethought"

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1. Murder was defined as "the unlawful killing of a human being . . . with malice aforethought, either express or implied." ILL. REV. STAT. ch. 38, § 358 (1959); *see* People v. Heffernan, 312 Ill. 66, 71, 143 N.E. 411, 413 (1924) (Illinois statute recognizes only one crime of murder).

2. *See* People v. Bush, 414 Ill. 441, 111 N.E.2d 326 (1953); People v. Brown, 288 Ill. 489, 123 N.E. 515 (1919); People v. Curtright, 258 Ill. 430, 101 N.E. 551 (1910). Since an intent to kill was not contained in the definition of murder, the crime was proven sufficiently if there was a finding that an unlawful killing was performed with malice aforethought, either express or implied. People v. Heffernan, 312 Ill. 66, 70, 143 N.E. 411, 413 (1924). Express malice aforethought was defined as "the deliberate intention to take away the life of a fellow creature." ILL. REV. STAT. ch. 38, § 358 (1959). Malice aforethought, however, could be inferred where there was no "considerable provocation" or where the circumstances of the killing demonstrated an "abandoned and malignant heart." *Id.; see also* People v. Slaughter, 29 Ill. 2d 384, 389, 194 N.E.2d 193, 195-96 (1963) (it is sufficient to satisfy the requirement of malice that a person acted with a wanton and reckless disregard of human life); People v. Winters, 29 Ill. 2d 74, 80, 193 N.E.2d 809, 812-13 (1963) (malice can be inferred from the character of the assault); People v. Henderson, 398 Ill. 348, 354, 75 N.E.2d 847, 849 (1947) (intent to kill is necessary to constitute express malice, but where no provocation exists, malice can be inferred); People v. Marshall, 398 Ill. 256, 263, 75 N.E.2d 310, 313 (1947) (malice is established where one shoots at one individual and unintentionally hits another); Kyle v. People, 215 Ill. 250, 252, 74 N.E. 146, 147 (1905) (malice is established where the defendant, without provocation, starts a fight with deceased for the purpose of killing him). Thus, intent was only one consideration in determining whether malice was present. People v. Heffernan, 312 Ill. 66, 70, 143 N.E. 411, 413 (1924). For a discussion of the common law influences upon the definition of malice in Illinois homicide law, see O'Neill, *"With Malice Toward None": A Solution to an Illinois Homicide Quandary,* 32 DEPAUL L. REV. 107, 109-10 (1982).

3. ILL. REV. STAT. ch. 38, § 9-1 (1961). The relevant portions of the definition of murder are:

from the definition of murder and replaced it with descriptions of the conduct, mental state, and circumstances that would render an unjustified homicide murder, effectively categorized the substantive crime of murder as intentional and unintentional.[4]

The second and third developments were directly related to the death penalty. In 1972, the United States Supreme Court declared Illinois' death penalty statute to be in violation of the cruel and unusual punishment clause of the eighth amendment to the United States Constitution.[5] As a direct result of this and subsequent Supreme Court death penalty decisions,[6] the third development occurred—the adoption of a death penalty statute by the Illinois legislature in 1977, making commission of two intentional or premeditated murders an aggravating factor pursuant to which capital punishment could be imposed.[7] Consequently, since 1977 the determination of whether a previous conviction was for intentional murder has been relevant to the imposition of the death penalty.

This article examines the steps by which this situation developed and reviews the jurisprudence of murder under the 1961 Code, both prior to and after 1977. It concludes that the language of the statute, and the failure of the judiciary to recognize that intentional murder must be identified separately from other forms of murder, has resulted in a potential for arbitrary imposition of the death penalty that renders unconstitutional the intentional murder provision of the death penalty statute. Finally, the article proposes two methods of rectifying the problem, either through the adoption of a jury instruction that distinguishes between intentional and unintentional murder, or through a revision in the statutory language of section 9-1(a) that would more accurately describe those types of murder.

HOMICIDE LAW IN ILLINOIS

When the Illinois murder statute was revised in 1961, the drafting committee found itself unable, or unwilling, to make a clear recommendation on the death penalty.[8] The General Assembly had refused to suspend the

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

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

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual. . . .

Id. For purposes of this article, section 9(a)(1) will be referred to as intentional murder and section 9(a)(2) will be referred to as unintentional murder. Additionally, a discussion of the Illinois statutory provision for felony murder is beyond the scope of this article. *See* ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1961).

4. *See infra* notes 11-14 and accompanying text.

5. Moore v. Illinois, 408 U.S. 786, 800 (1972).

6. *See infra* notes 15-30 and accompanying text.

7. Act of June 21, 1977, Pub. Act. No. 80-26, § 1, 1977 Ill. Laws 70 (codified at ILL. REV. STAT. ch. 38, § 9-1(b) (1981)).

8. ILL. ANN. STAT. ch. 38, § 9-1 Committee Comments—1961 at 17, 19-20 (Smith-Hurd 1979).

death penalty two years earlier,[9] and the committee proposal obviously represented a compromise. The death penalty was retained as a potential punishment for murder, but sentiment "that the death penalty should be applied only to the most heinous types of murder"[10] caused the committee to define the substantive crime with regard to separate categories, distinguished by the perceived level of culpability. Thus, subsection (a)(1) of section 9-1 described as the most culpable form of murder that "in which the evidence clearly showed the purpose to kill the victim . . . or some other person, the victim being killed accidentally."[11] The committee also indicated its awareness that the courts had recognized "[t]he intent to do great bodily harm . . . as equivalent to the intent to kill."[12] The second, less culpable, class of murder defined in subsection (a)(2) was designed by the drafting committee to identify those murders "in which actual intent to kill or do great bodily harm was not proved, and perhaps was disclaimed by the defendant, but the defendant's intentional act was clearly dangerous to life and he acted regardless of the consequences."[13] In drafting the statute, the committee therefore distinguished between intentional and unintentional murder and left for a later date the decision of whether this distinction could be considered as a factor in making sentencing determinations.[14]

DEVELOPMENT OF THE DEATH PENALTY IN ILLINOIS IN LIGHT OF UNITED STATES SUPREME COURT CASE LAW

While the substantive definition of murder stood in this form, significant events were occurring concerning the constitutional validity of the death

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9. *Id.* § 1-7 Committee Comments—1961 at 34 (Smith-Hurd 1979). Nevertheless, the General Assembly had recognized the significance of the issue by debating it separately from revisions in the substantive law. *Id.*

10. *Id.* § 9-1 Committee Comments—1961 at 19 (Smith-Hurd 1979).

11. *Id.* § 9-1 Committee Comments—1961 at 15 (Smith-Hurd 1979). The comments of a legislative drafting committee are "a source to which [courts] may properly look in determining legislative intent." People v. Touhy, 31 Ill. 2d 236, 239, 201 N.E.2d 425, 427 (1964); *see also* People v. Petropolous, 59 Ill. App. 2d 298, 306, 208 N.E.2d 323, 329 (1st Dist. 1965) (citing People v. Touhy, 31 Ill. 2d 236, 201 N.E.2d 425 (1964)), *aff'd*, 34 Ill. 2d 179, 214 N.E.2d 765 (1966).

12. ILL. ANN. STAT. ch. 38, § 9-1 Committee Comments—1961 at 15 (Smith-Hurd 1979). The drafters of the 1961 Code indicated that intentional murder described those situations in which "the evidence clearly showed [a] purpose to kill the victim . . . or some other person. . . ." *Id.*

13. *Id.* at 15-16. The Committee specifically noted that subsection (a)(2)—the unintentional murder provision—was "intended to define conduct which, lacking actual intent to kill or do great bodily harm or knowledge that such a result will occur, involve[d] knowledge of the probability that the offender's acts will cause death or great bodily harm." *Id.* at 18.

14. *Id.* at 19-20. The Committee noted:

> In fact, one of the prime reasons for differentiating between the various types of murder . . . was to permit a variation in penalty. However, such a wide divergence of opinion developed as to the desirability of reducing the number of cases in which the death penalty can be used that it appeared desirable . . . to leave [the issue] to the General Assembly . . . as a separate proposition.

Id. at 19. The Committee also stated, "If the General Assembly, and the people of the State,

penalty. In 1972, citing its decision in *Furman v. Georgia,*[15] the United States Supreme Court held in *Moore v. Illinois* "that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments" to the United States Constitution.[16] For several years the meaning of this decision was unclear, primarily because the judgment of the Court in *Furman* was announced in a per curiam opinion, with each member of the majority writing a separate concurring opinion. Thus, no single rationale for the decisions was established, leaving some doubt as to whether a constitutionally valid death penalty statute could be drafted.[17] Chief Justice Burger, however, in his analysis of the five concurring opinions, concluded that for at least two members of the majority the constitutional defect was the "random and unpredictable manner" in which the punishment of death was being meted out.[18] Consequently, he advised legislative bodies that they might "bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed."[19] Either of these approaches, the Chief Justice suggested, would meet the objections to the Georgia and Illinois statutes, made by Justices Stewart and White, and would thereby satisfy a majority of the Court.

Four years later, in a series of three decisions, the Chief Justice's analysis of *Furman* proved accurate. In *Gregg v. Georgia*[20] and *Proffitt v. Florida,*[21]

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desire at any time to eliminate capital punishment in less than all cases the division of the offense of murder into three categories . . . will permit it to be done." *Id.* at 19-20.

15. 408 U.S. 238 (1972).

16. Moore v. Illinois, 408 U.S. 786, 800 (1972). Although the Illinois statute was formally struck down in *Moore,* the rationale for that decision was stated in the five concurring opinions in Furman v. Georgia, 408 U.S. 238 (1972).

17. *See* Comment, *Illinois' Post-*Furman *Capital Punishment Statute,* 1974 U. ILL. L.F. 400.

18. 408 U.S. 238, 400 (1972) (Burger, J., dissenting). In his dissent, Chief Justice Burger analyzed the pivotal concurring opinions of Justices Stewart and White. *Id.* at 397-98. The Chief Justice found that the critical factor in both of these concurring opinions was the infrequent imposition of the death penalty. *Id.* Chief Justice Burger did not read the concurrences as proscribing death as a punishment per se but that Justices Stewart and White objected to the unbridled discretion exercised by judges and juries in imposing a death sentence. *Id.*

An analysis of all five concurring opinions suggests that the common denominator of the *Furman* majority was the potential for arbitrary or discriminatory infliction of death. Justice Douglas stated that the statutes were unconstitutional because the sentence was being selectively imposed upon minorities. 408 U.S. at 240 (Douglas, J., concurring). Justice Stewart concurred, stating that the eighth amendment prohibited a death penalty that was capriciously and randomly imposed. *Id.* at 306 (Stewart, J., concurring). Justice White stated that the infrequent imposition of the death penalty constituted cruel and unusual punishment. *Id.* at 310 (White, J., concurring). Justices Brennan and Marshall concluded that the death penalty was a per se violation of the eighth and fourteenth amendments. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Moreover, Justice Brennan expressed the view that the infrequency of imposing the death sentence nullified any possible penal purpose. *Id.* at 257 (Brennan, J., concurring).

19. 408 U.S. 238, 400 (1972) (Burger, J., dissenting).

20. 428 U.S. 153 (1976).

21. 428 U.S. 242 (1976).

the Court examined death penalty statutes that adopted the first of the Chief Justice's suggestions—the provision of standards to be followed in determining the sentence. Noting that the statutes required proof of the existence of one or more specified aggravating factors, and that a determination that these factors outweighed any mitigating circumstances present, the two opinions held that the deficiencies found in *Furman v. Georgia* had been rectified.[22] In the accompanying case of *Jurek v. Texas*,[23] the second of Chief Justice Burger's suggestions was at issue. In *Jurek*, the majority held that although the Texas statute did not specify certain aggravating circumstances, it did narrow the categories of murder for which the death penalty could be imposed; consequently, the same result was achieved and the statute was considered constitutionally valid.[24]

Implicit in the plurality opinion of *Gregg* were the seeds of a controversy yet to develop—the relevance of culpability to the death penalty. The opin-

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22. The opinion of the *Gregg* Court, announced by Justice Stewart, stated as follows:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

Gregg v. Georgia, 428 U.S. 153, 206-07. In a concurring opinion, Justice White expressed a similar view of the Georgia statute. *Id.* at 207, 222-23 (White, J., concurring). The Florida statute was given like consideration in Proffitt v. Florida, 428 U.S. 242, 258; *id.* at 260 (White, J., concurring). A seventh member of the Court, Justice Blackmun, concurred in the judgments in both *Gregg* and *Proffitt*. His conclusion was based not on the view that the deficiencies found in *Furman* had been corrected, however, but on a continued assertion that *Furman* had been wrongly decided. Gregg v. Georgia, 428 U.S. at 227; Proffitt v. Florida, 428 U.S. at 261 (Blackmun, J., concurring).

23. 428 U.S. 262 (1976).

24. The *Jurek* Court declared:

> We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to

ion pointed out that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."[25] With regard to the former, capital punishment was viewed as "an expression of society's moral outrage at particularly offensive conduct"[26] and possibly "the appropriate sanction in extreme cases . . . [which are] grievous . . . affront[s] to humanity. . . ."[27] With regard to the latter social purpose, the plurality opinion indicated that although the threat of death probably has little or no effect on the murderer who acts in passion,[28] in the case of "carefully contemplated murders . . . the possible penalty of death may well enter into the cold calculus that precedes the decision to act."[29] The Justices casting the pivotal votes upholding the facial validity of the death penalty apparently based their decisions on the same philosophical perception as that which motivated the drafters of the Illinois murder statute—the death penalty can be justified more readily in the context of intent-to-kill murders because they require greater culpability than murders in which causing death is not the "conscious objective or purpose" of the killer.[30]

The issue of the relevance of culpability as a basis for differentiating between capital and noncapital murder arose more clearly two years later in the Supreme Court decision of *Lockett v. Ohio,*[31] in which the death penalty statute limited the sentencing court to a consideration of three specified mitigating factors.[32] Chief Justice Burger, in a plurality opinion joined by

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> assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

Jurek v. Texas, 428 U.S. 262, 276. A similar view was embraced by Justices White and Blackmun. *Id.* at 277 (White, J., concurring); *id.* at 279 (Blackmun, J., concurring).

25. 428 U.S. 153, 183 (1976). For a discussion of the deterrent effects of death penalty statutes, see Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death,* 65 AM. ECON. REV. 397, 415-16 (1975) (strong probability that executions have a deterrent effect). *But see* Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach,* 35 VAND. L. REV. 587 (1982) (no way to determine deterrent effect, but death penalty should still be imposed); *cf.* Comment, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification,* 34 OKLA. L. REV. 567 (1981) (moral and philosophical resolutions would never allow imposition of the death penalty).

26. 428 U.S. 153, 183 (1976).

27. *Id.* at 184.

28. *Id.* at 185.

29. *Id.* at 186.

30. The statutory definition of intent provides the following:

> A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.

ILL. REV. STAT. ch. 38, § 4-4 (1981).

31. 438 U.S. 586 (1978).

32. *Id.* at 607. The mitigating factors Ohio juries were allowed to consider were whether the victim caused or encouraged the crime; whether the defendant acted under duress; and whether the defendant committed the crime while suffering from a psychosis that was insufficient to establish an insanity defense. *Id.* (citing OHIO REV. CODE ANN. § 2929.04(B) (1975)).

Justices Stewart, Powell, and Stevens, held that the state could not constitutionally prohibit the consideration of any relevant mitigating circumstances and suggested that "[t]he absence of direct proof that the defendant intended to cause the death of the victim" was improperly precluded from consideration.[33] It is thus clear that the plurality viewed a defendant's intent to kill as a relevant factor in capital sentencing. Justice White's concurring opinion went even further, asserting that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim."[34] Justices Blackmun and Marshall also expressed the view that a death penalty statute which did not include a consideration of culpability was, for that reason, constitutionally invalid.[35]

The relevance of culpability to the death penalty arose again in *Enmund v. Florida,*[36] in which Justice White, writing for a five member majority, held that such punishment could not be imposed when the evidence indicated that the defendant neither killed, attempted to kill, nor intended to kill the victim.[37] In reaching this conclusion, the Court pointed out that the decision as to capital punishment must focus on the defendant's culpability, and stated that "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' "[38] Noting the social purposes served by the death penalty, as identified in *Gregg v. Georgia,*[39] the Court indicated that it was "quite unconvinced" that unintended murders would be measurably deterred by the threat of the death penalty,[40] and that retribution "very much depends on the degree of . . . culpability."[41] Although Justice O'Connor, in dissent, characterized Enmund's argument (and therefore the majority's holding) as asserting that "death is an unconstitutional penalty absent an intent to kill,"[42] such a broad reading of the opinion may be unwarranted.[43] The decisions in *Lockett* and *Enmund*

33. *Id.* at 608.

34. *Id.* at 624 (White, J., concurring).

35. Justice Blackmun declared that in his view, "the Ohio judgment in this case improperly provided the death sentence for a defendant . . . without permitting any consideration by the sentencing authority of . . . the degree of her *mens rea,* in the commission of the homicide." Lockett v. Ohio, 438 U.S. 587, 613 (Blackmun, J., concurring). Justice Marshall maintained that the Ohio death penalty statute "makes no distinction between a willful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. . . . [It] turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants." *Id.* at 620 (Marshall, J., concurring).

36. 102 S. Ct. 3368 (1982).

37. *Id.* at 3376-77.

38. *Id.* at 3377 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

39. *See supra* note 25 and accompanying text.

40. Enmund v. Florida, 102 S. Ct. at 3377.

41. *Id.* at 3378.

42. *Id.* at 3388.

43. Since Enmund was not physically present at the time the homicide occurred but was waiting in the escape vehicle, the Court clearly was not presented with the issue of whether the death penalty may be imposed upon a murderer who actually, but unintentionally, kills

do establish with certainty, however, that a culpability line drawn between intentional and unintentional murder, for purposes of capital punishment, if not constitutionally mandated, is unquestionably constitutionally permitted.

While the Supreme Court was debating issues of arbitrariness and culpability with respect to the death penalty, the Illinois legislature also was grappling with these problems. In the wake of *Moore v. Illinois*,[44] which struck down Illinois' death penalty statute, the state legislature adopted a new statutory provision in November of 1973. This provision contained a list of six circumstances which, if present, would justify the imposition of the death penalty, provided that specified procedures were followed.[45] Following the Texas approach, all but one of the circumstances defined a particular fact situation in which capital punishment would be appropriate.[46] One circumstance, however, characterized as the "two-murder" aggravating factor, provided that the death penalty might be imposed when the defendant

> has been convicted of murdering two or more individuals under Section 9-1 of the Criminal Code of 1961, as amended, or under any law of the United States or of any State which is substantially identical to Subsection (a) of Section 9-1 of the Criminal Code of 1961, as amended, regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts. . . .[47]

Significantly, no distinction was drawn among the several categories of murder established in subsection (a) of section 9-1, and the two-murder rule therefore authorized execution of any individual twice convicted of murder, without regard to whether the murders were intentional or unintentional.

This 1973 version of the death penalty statute was challenged before the Illinois Supreme Court in *People ex rel. Rice v. Cunningham*,[48] where the defendant's primary claim was the invalidity of the procedures established for imposition of capital punishment. Included, however, was a challenge

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the victim. This issue also is not raised by the Illinois provision under consideration here, which at least since 1977 has limited imposition of the death penalty to individuals who personally have committed two intentional murders. ILL. REV. STAT. ch. 38, § 9-1(b)(3); *see infra* notes 53-54 and accompanying text.

44. 408 U.S. 786 (1972).

45. Act of Nov. 8, 1973, Pub. Act. No. 78-921, § 2, 1973 Ill. Laws 2959, 2961 (amending ILL. REV. STAT. ch. 38, § 1005-5-3 (1973)).

46. The circumstances in which the state could have sought the death penalty were (1) the murder of a policeman or fireman in the line of duty; (2) the murder of a correctional officer in the line of duty or otherwise present at the facility; (3) the commission of a multiple murder; (4) a murder committed during the hijacking of an airplane, train, ship, bus, or other public conveyance; (5) a murder committed by a hired killer; and (6) a murder that occurred in the course of a robbery, rape, aggravated kidnapping, arson, or following the commission of indecent liberties with a child. *Id.*

In addition, the trial judge was to notify the chief judge of the circuit court before sentencing the defendant to death. The chief judge then assigned three judges to hear evidence and determine the sentence. The trial judge then entered the sentence as determined by this panel. *Id.*

47. *Id.*

48. 61 Ill. 2d 353, 336 N.E.2d 1 (1975).

to the statutorily enumerated aggravating circumstances. Although the statute was declared unconstitutional based on the procedural issues, the court specifically upheld the validity of the aggravating circumstances, stating:

> Respondents have raised constitutional claims that several of the enumerated situations which require imposition of the death penalty are vague and uncertain. We have examined the categories enumerated in the statute and are of the opinion that they are proper.[49]

Notwithstanding this determination, the invalid portions of the statute were found to be so connected to, and dependent on, the valid portions that they could not be severed; therefore, the entire statute was declared unconstitutional.[50]

Subsequent to this decision, the United States Supreme Court decisions in *Gregg, Proffitt,* and *Jurek*[51] were handed down. During its next attempt to draft a death penalty statute, the Illinois legislature was afforded the guidance provided by those opinions, as well as the holding in *Cunningham.* In the 1977 version of the statute, currently in effect, a list of seven aggravating factors was established,[52] including a revised version of the two-murder rule. This version provides:

> A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:
>
> . . . .
>
> 3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts *so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts. . . .*[53]

The addition of the italicized words is clearly a major change in the two-murder rule. This change indicates that under subsection (a) of section 9-1 the mere fact of two murder convictions is insufficient to justify the imposition of the death penalty. Under the current language, both murders must

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49. *Id.* at 361, 336 N.E.2d at 6.

50. *Id.* at 362, 336 N.E.2d at 7.

51. *See supra* notes 20-24 and accompanying text.

52. ILL. REV. STAT. ch. 38, § 9-1(b)(1)-(7) (1981). Some of the aggravating circumstances are the following: the murder of a policeman or fireman in the course of his duties; the murder of a correctional department employee; murder committed during the hijacking of an airplane, train, ship, or bus; murder committed for hire; felony murder; and murder of a witness for the prosecution. *Id.*

Recently, the legislature added an eighth aggravating circumstance, which provides that a defendant who murders an individual under the age of 12 in an exceptionally brutal, heinous, or wantonly cruel manner may be sentenced to death. Act of Dec. 15, 1982, Pub. Act. No. 82-1025, § 1, 1982 Ill. Laws 2927, 2929.

53. ILL. REV. STAT. ch. 38, § 9-1(b)(3) (1981) (emphasis added).

have been committed intentionally.[54] Thus, fifteen years after the drafters of subsection (a) drew the distinction between intended and unintended murder, for the purpose of limiting the death penalty to the more culpable form,[55] the legislature adopted the suggested distinction, making conviction of more than one intentional murder an aggravating factor that justifies imposition of the death penalty, while excluding the lower culpability categories of murder from the two-murder rule.

In light of United States Supreme Court case law, the two-murder rule is clearly valid. The plurality opinion in *Gregg v. Georgia* pointed out that the death penalty serves "two principal social purposes: retribution and deterrence. . . ."[56] A two-murder rule is well designed to achieve these goals. To the extent that retribution is a motivating consideration, it is surely reasonable for a legislature to conclude that someone who murders twice is more deserving of society's vengeance than someone who murders once. Inherent in such a judgment is the view that one who kills once (under circumstances that did not include any other aggravating factor) is deserving of severe punishment but has not yet earned the most extreme "expression of society's moral outrage."[57] On the other hand, once he has received society's mercy and has been afforded another chance, the commission of a second murder can reasonably be deemed sufficiently "grevious an affront to humanity"[58] to warrant extreme retributive punishment.

It also can be logically asserted that the deterrent function is reasonably served by a two-murder rule. If the death penalty has any deterrent effect at all,[59] that effect has to be substantially increased when it is no longer a generalized threat but has been focused on a particular individual and has specifically placed him on notice that he risks his own life if he repeats his criminal conduct.

Similarly, limitation of the two-murder rule to intentional murders is a reasonable legislative judgment, effecting the social purposes of retribution and deterrence. As the decisions in *Lockett v. Ohio*[60] and *Enmund v Florida*[61] pointed out, the more culpable the homicidal conduct, the stronger is the societal sense of a need for vengeance. At the same time, while the prospect of being subjected to execution may have some deterrent effect on the carelessly dangerous person, it is not unreasonable for a legislature to con-

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54. The Illinois Senate debates indicated that the two-murder rule should be applicable only to intentional murders. S. DEB., 80th Sess., 65th Legis. Day (June 1, 1977) (available on microfiche at 19-21). It was suggested that where a person kills one person intentionally and kills another accidentally, the two-murder rule would be inapplicable. *Id.*

A similar view was taken in the House. H. DEB., 80th Sess., 76th Legis. Day (June 14, 1977) (available on microfiche at 91).

55. *See supra* notes 11-14 and accompanying text.

56. Gregg v. Georgia, 428 U.S. at 183.

57. *Id.*

58. *Id.* at 184.

59. *Id.* at 184 n.31.

60. 438 U.S. 586 (1978).

61. 102 S. Ct. 3368 (1982).

clude that the primary deterrent value of the death penalty lies in the context of consciously formulated decisions to take life.[62]

All of this appears to dovetail quite well. The Illinois murder statute distinguishes between intentional murder and unintentional murder in subsections (a)(1) and (a)(2) of section 9-1.[63] The death penalty statute adopts this distinction, in subsection (b)(3) of section 9-1,[64] as a relevant factor in determining whether a sentence of death may be imposed. And the United States Supreme Court has held that such a distinction is clearly valid, if not mandated.[65] The facial validity of the rule that makes the commission of two intentional murders an aggravating factor warranting imposition of the death penalty, therefore, cannot be seriously questioned.

Potential for Inappropriate Application of the Two-Murder Rule

The operation of the two-murder rule is obviously dependent upon proper application of the substantive distinction between intentional murder defined in subsection (a)(1) of Section 9-1 of the Criminal Code and unintentional murder defined in (a)(2). In practice, however, this distinction has not been maintained, and the line between the two categories has been effectively destroyed by judicial interpretation and jury application because, notwithstanding the existence of two categories, the statute created only a single crime of murder that could be committed with varying degrees of culpability.[66] Because of the absence of a penalty distinction prior to 1977, there was little reason for courts or juries to be cognizant of the intended categorical differentiations.

This problem has been exacerbated by a potential overlap between intentional and unintentional murder caused by the operation of an evidentiary inference and by the specific language of subsection (a)(2). The evidentiary inference, which has been part of Illinois murder law for over a century, permits a trier of fact to conclude that a person intends the natural and probable consequences of his deliberate acts.[67] Thus, one who deliberately

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62. *See* Enmund v. Florida, 102 S. Ct. 3368, 3377-78 (1982) (quoting Justice Frankfurter's dissent in Fisher v. United States, 328 U.S. 463, 484 (1946), for the proposition that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation").

63. *See supra* notes 11-14 and accompanying text.

64. *See supra* notes 54-56 and accompanying text.

65. *See supra* notes 25-43 and 57-59 and accompanying text.

66. "Under section 9-1 there is but one crime of murder, not three separate and distinct offenses. . . . Each of subparagraphs (1), (2) and (3) under section 9-1(a) describes the mental state or the conduct of the defendant which must accompany the acts which cause the death." People v. Allen, 56 Ill. 2d 536, 543, 309 N.E.2d 544, 547 (1974).

67. *See* People v. Davis, 35 Ill. 2d 55, 61, 219 N.E.2d 468, 471 (1966) ("intent is implied from the character of the act"). This evidentiary inference is sometimes wrongly described in criminal cases as a presumption. *See* People v. Coolidge, 26 Ill. 2d 533, 187 N.E.2d 694 (1963). In discussing this inference, the court in *Coolidge* stated:

> [S]ince every sane man is *presumed* to intend all the natural probable consequences flowing from his own deliberate act, it follows that if one wilfully does an act

engages in conduct that creates a strong probability of death or serious bodily harm, from which death results, may be found guilty of intentional murder without direct proof of an intent to kill. So long as there existed a high degree of probability that a death would occur, intent to kill could be inferred.

Conversely, the language chosen to describe unintentional murder under subsection (a)(2)—knowledge that the conduct creates a strong probability of death or great bodily harm—lends itself to a misreading that would include intentional as well as unintentional murders. An attorney conversant with the definitional difference in the mental states established by Article 4 of the Code should be aware that intentional murder exists when causing death is the actor's "conscious objective or purpose,"[68] while knowing murder occurs when the actor is conciously aware of a risk that death will result, but he disregards this risk.[69] To a lay juror, charged in the language of

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the direct and natural tendency of which is to destroy another's life, the natural irresistible conclusion, in the absence of qualifying facts, is that the destruction of such other person's life was intended.

Id. at 537, 187 N.E.2d at 697 (emphasis added). The distinction between inferences and presumptions in criminal proceedings has important constitutional ramifications. Inferences *permit* a jury to find the existence of one fact upon direct proof of another fact. *See* E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 304.1, at 86-88 (3d ed. 1979 & Supp. 1983). Presumptions, on the other hand, *require* the trier of fact to find the existence of the fact based upon proof of another fact. *Id.* This mandatory nature of presumptions precludes their use in criminal proceedings because it relieves the prosecution of its burden of proving every element of the crime beyond a reasonable doubt. *See* Sandstrom v. Montana, 442 U.S. 510 (1979) (instruction that the law presumes a person intends the ordinary consequences of his voluntary acts may be interpreted as mandatory and, therefore, violates the fourteenth amendment's requirement that the state prove every element of an offense beyond a reasonable doubt); Mullaney v. Wilbur, 421 U.S. 684 (1975) (rebuttable presumption that places the burden on defendant of providing some evidence that he acted in a heat of passion unconstitutionally relieves the prosecution of its burden of proof); *In re* Winship, 397 U.S. 358 (1970) (due process clause of the fourteenth amendment requires the state to prove every element of a criminal charge beyond a reasonable doubt); *see also* People v. Weinstein, 35 Ill. 2d 467, 470, 220 N.E.2d 432, 433-34 (1966) (pre-*Winship* case holding that Illinois Constitution requires the prosecution to prove every element of a criminal charge beyond a reasonable doubt). Inferences, however, because of their permissive nature, can be used in criminal proceedings. *See, e.g.*, People v. Evans, 92 Ill. App. 3d 874, 416 N.E.2d 377 (2d Dist. 1981) (for a conviction of murder, it is sufficient to infer intent by showing the commission of an act the natural tendency of which is to destroy another's life). For a more detailed discussion of inferences and presumptions as applied in civil and criminal cases, see Graham, *Presumptions—More Than You Ever Wanted to Know and Yet Were Too Disinterested to Ask*, 17 CRIM. L. BULL. 431 (1981).

68. *See supra* note 30.

69. ILL. REV. STAT. ch. 38, § 4-5 (1981) provides:

Knowledge; A person knows or acts knowingly or with knowledge of:

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

(b) The result of his conduct, described by the statute defining the offense, when

the murder statute, one who points a loaded firearm directly at another and deliberately pulls the trigger[70] obviously knows that his acts create a strong probability of death or great bodily harm. Consequently, a jury presented with such a case and unaware that its decision could have capital punishment implications, might randomly choose subsection (a)(1) or (a)(2) as the provision violated, without regard to, or even a realization of, the culpability difference.

The contours of this problem are best evidenced by several illustrations. In one of the earliest cases to arise under the 1961 Code, *People v. Davis,*[71] the defendant, her boyfriend, and two other persons had been playing cards in the defendant's kitchen. At one point during the evening, the defendant pointed a gun at the boyfriend, who was seated with his hands on the table. The testimony of the other witnesses indicated that she brandished the gun angrily and demanded two dollars from the victim and that both witnesses attempted to persuade her to put the gun away. The defendant ignored these protests and fired two shots, one of which entered the victim's neck, causing death. The jury was instructed on (a)(2) murder, voluntary and involuntary manslaughter, and self-defense, and it returned a verdict of guilty of (a)(2) murder. In affirming the conviction the supreme court stated, "The evidence in this case would have justified an instruction based upon the theory that the defendant deliberately intended to kill. . . . The record does not indicate why the prosecution failed to submit such an instruction."[72] The court then held that intent to kill need not be proven but could be inferred where death was a natural and probable consequence of the conduct.[73] In other words, the supreme court affirmed a conviction of unintended murder, upon facts that clearly demonstrated that the defendant had an intent to kill, based upon the principle that intent could be inferred from the dangerous conduct. In this posture, should Davis kill again, it would be next to impossible to determine whether her first murder would be considered intentional, and thus an aggravating circumstance, for purposes of the application to the two-murder rule, although clearly the rule should apply.[74]

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he is consciously aware that such result is practically certain to be caused by his conduct.

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

70. *See* People v. Bone, 103 Ill. App. 3d 1066, 432 N.E.2d 329 (3d Dist. 1982); People v. Stocks, 93 Ill. App. 3d 439, 417 N.E.2d 1080 (5th Dist. 1981).

71. 35 Ill. 2d 55, 219 N.E.2d 468 (1966).

72. *Id.* at 60-61, 219 N.E.2d at 471.

73. *See id.* at 61, 219 N.E.2d at 471.

74. The statement that this murder should count is intended only to suggest that it is the type of murder that the legislature undoubtedly had in mind when it adopted both the intentional murder provision of section 9-1(a)(1) and the two intentional murder aggravating factor of section 9-1(b)(3). No opinion is herein expressed as to the legislative intent or constitutional validity of a retroactive application of section 9-1(b)(3).

Three additional cases from the early 1970's serve to further illustrate the breakdown of the distinction between intentional and unintentional murder. In *People v. Forrest,*[75] the defendant, with the expressed intention to kill the occupant of a passing car, shot and killed his own companion. Notwithstanding the clear language of subsection (a)(1) indicating that intentional murder results if "[a] person . . . kills an individual . . . [with intent] to kill . . . that individual *or another,*"[76] the appellate court held that Forrest's conduct was sufficient to constitute (a)(2) unintentional murder. In the similar case of *People v. French,*[77] the defendant fired a gun at a crowd of people, killing one. Again, the court concluded that the evidence satisfied (a)(2) murder but applied the *Davis* reasoning that intent to kill could be inferred from the high degree of likelihood that death would result from the conduct. Finally, in *People v. Wilson,*[78] the defendant and his victim had had several quarrels; shortly after one quarrel, the defendant approached his victim, said "you know, I'm for real," and plunged a knife into the victim's chest.[79] In this case, the appellate court did not infer intent but held that there was a strong probability that his acts would cause death or serious bodily harm.

As has been indicated, the absence of a penalty distinction prior to 1977 reasonably explains the judicial failure to insure that juries understood, and properly applied, the difference between intentional and unintentional murder.[80] Since the adoption of intent to kill as an element of murder that has relevance to capital punishment, however, it has become necessary that the culpability distinction be made along with each murder conviction. In other words, when eligibility for, or exemption from, execution is determined by the mental state with which the crime was committed, the eighth amendment is not satisfied unless the jury specifically determines whether that mental state existed. An examination of post-1977 murder convictions, however, indicates that the kind of random categorization condemned in *Furman v. Georgia*[81] is currently in operation in Illinois.

In what is undoubtedly the smallest category of cases, the crimes appear to have been properly characterized. In *People v. Vega,*[82] for example, the defendant terminated a long running fued by shooting the victim five times. The jury concluded that Vega intended to cause death or great bodily harm and convicted him of murder under subsection (a)(1). As a consequence, the retributive and deterrent purposes of the two-murder rule have been set in operation and Vega has been placed on notice that a repetition of this method of solving a problem could cost him his own life.[83]

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75. 133 Ill. App. 2d 70, 272 N.E.2d 813 (1st Dist. 1971).
76. ILL. REV. STAT. ch. 38, § 9-1(a)(1) (1981) (emphasis added).
77. 3 Ill. App. 3d 884, 279 N.E.2d 519 (1st Dist. 1972).
78. 3 Ill. App. 3d 481, 278 N.E.2d 473 (1st Dist. 1971).
79. *Id.* at 484, 278 N.E.2d 475.
80. *See supra* note 66 and accompanying text.
81. 408 U.S. 238 (1972).
82. 107 Ill. App. 3d 289, 437 N.E.2d 919 (2d Dist. 1982).
83. An examination of reported appellate reviews of murder convictions since 1977 discloses

Vega's culpability, however, is clearly no greater than that of a number of other murderers who have not received such notice, and are not in danger of execution, either because the jury was not made aware of the intentional/unintentional distinction between (a)(1) and (a)(2) murder, or because it was not made aware of the necessity to determine the category into which the murder fit. Illustrative of the first group of cases is *People v. Bone,*[84] in which the court described the events as follows: "[T]he defendant approached [the victim], who asked 'May I help you?' The defendant replied 'Yes' and then shot [the victim] with a handgun. The defendant had both hands on his gun and his legs were spread as the gun discharged."[85] This killing was found to be unintentional murder under subsection (a)(2). Again, in *People v. Henry,*[86] the court examined the evidence and concluded, "The effect of this evidence supports the State's theory that the defendant deliberately took aim at the victim before firing the fatal shot."[87] Nonetheless, Henry's conviction for unintentional murder under subsection (a)(2) was sustained, the court stating, "A review of the State's evidence clearly supports a reasonable inference that the defendant's act was performed with the knowledge that such act created a strong probability of death or great bodily harm to the victim."[88] Finally, in *People v. Dunnigan,*[89] the accused threw his victim to the ground, got on top of her, and repeatedly stabbed her with a butcher knife, leaving the knife buried in her chest. The jury was instructed only on unintentional murder, and its verdict of guilty was affirmed, the court stating that the defendant "must have known that his acts created a strong probability of death or great bodily harm."[90] Paradoxically, in the preceding paragraph the court stated, "[T]he presence of multiple stab wounds are themselves enough to negate any possibility that the defendant acted . . . unintentionally."[91]

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two other cases in which a verdict of intentional murder was returned. People v. Freeman, 105 Ill. App. 3d 1078, 435 N.E.2d 503 (4th Dist. 1982); People v. Manley, 104 Ill. App. 3d 478, 432 N.E.2d 1103 (1st Dist. 1982). In the Freeman case, the defendant was 16 years old and thus not subject to the death penalty. *See* ILL. REV. STAT. ch. 38, § 9-1(b) (1981). The conviction in the Manley case was reversed for failure to instruct the jury on voluntary manslaughter and self-defense. Consequently, since the amendment of the death penalty provisions in 1977, establishing intent to kill as a relevant consideration in the execution decision, only one murderer, Vega, has been clearly placed in that category.

84. 103 Ill. App. 3d 1066, 432 N.E.2d 329 (3d Dist. 1982).

85. *Id.* at 1067, 432 N.E.2d at 330-31.

86. 103 Ill. App. 3d 1143, 432 N.E.2d 359 (3d Dist. 1982).

87. *Id.* at 1148, 432 N.E.2d at 362.

88. *Id.* (citing ILL. REV. STAT. ch. 38, § 9-1(a)(2)).

89. 89 Ill. App. 3d 763, 412 N.E.2d 37 (3d Dist. 1980).

90. *Id.* at 766, 412 N.E.2d at 39 (citing ILL. REV. STAT. ch. 38, § 9-1(a)(2)).

91. *Id.* In the following additional cases, a conviction of murder was sustained on the ground that the victim knew his acts created a strong probability of death or great bodily harm: People v. Battles, 93 Ill. App. 3d 1093, 418 N.E.2d 22 (1st Dist. 1981) (defendant had beaten and starved his infant daughters over a period of four or five days); People v. Stocks, 93 Ill. App. 3d 439, 417 N.E.2d 1080 (5th Dist. 1981) (defendant, after telling another that he was going to shoot the deceased, waited in the deceased's living room with a loaded shotgun and shot him in the face). Probably the most egregious illustration of judicial failure to recognize

The other category of cases is that in which there is merely a conviction of murder, without a determination of whether it was intentional or unintentional. Illustrative of these are *People v. Gangstad,*[92] in which the defendant and another person beat, strangled, and hanged their victim, and *People v. Reyes,*[93] in which the defendant, for no apparent reason, shot his victim from a distance of five feet.[94] In each of these cases, a verdict finding the defendant guilty of murder was returned, but no judgment was made regarding the defendant's mental state, thus precluding subsequent application of the two-murder rule should he kill again. A review of *Vega, Bone, Henry, Dunnigan, Gangstad,* and *Reyes,* therefore, discloses two things. First, all six defendants committed murder under circumstances which demonstrated that causing death or great bodily harm was their conscious objective or purpose, and thus should be in that group of murderers who may be subject to the death penalty in the event of a subsequent intentional murder pursuant to section 9-1(b)(3). Second, only Vega is in fact in that group. Consequently, the Illinois two-murder scheme, while clearly valid on its face, is being applied in a manner that contains the very defect found to invalidate death penalty statutes in *Furman v. Georgia*[95] and *Moore v. Illinois.*[96] The distinction between those murderers who may be executed and those who may not is drawn purely arbitrarily, and the potential for imposing the death penalty on "a capriciously selected random handful"[97] is present.

RESOLUTION

A resolution of this problem may be achieved in one of two ways. Because the statutory scheme is facially valid, the failure to distinguish between intentional and unintentional murder in practice can be judicially rectified through the use of a jury instruction that will alert the jury both to the need to differentiate between the categories and to the substantive difference in the applicable mental state. Alternatively, the legislature could rectify the

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the distinction between intentional murder and strong probability murder occurred in People v. Beverly, 63 Ill. App. 3d 186, 379 N.E.2d 753 (1st Dist. 1978), where the victim was found lying face down with his hands behind his head, shot in the back of the neck. Although the particular type of murder was not specifically at issue in this case, the court suggested that these facts would support a finding of subsection (a)(2) unintentional murder. *Id.* at 194, 379 N.E.2d at 760.

92. 105 Ill. App. 3d 774, 434 N.E.2d 841 (2d Dist. 1982).

93. 108 Ill. App. 3d 911, 439 N.E.2d 1089 (1st Dist. 1982).

94. *See also* People v. Hernandez, 105 Ill. App. 3d 501, 434 N.E.2d 532 (1st Dist. 1982) (although defendant was indicted for both intentional and unintentional murder, and the appellate court described the crime as "obviously preconceived, cold-blooded action," the jury's verdict failed to specify the category into which the murder fell); People v. Sanchez, 105 Ill. App. 3d 488, 434 N.E.2d 395 (1st Dist. 1982) (although defendant was indicted for both intentional and unintentional murder, verdict of guilty after bench trial failed to specify the category into which the murder fell).

95. 408 U.S. 238 (1972).

96. 408 U.S. 786 (1972).

97. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

problems in the application of the statutory scheme by modifying the statutory language for unintentional murder.

In drafting a new jury instruction, the judiciary should focus on two considerations. First, such an instruction should clearly indicate that subsections (a)(1) and (a)(2) define distinctly different categories of murder, and should go beyond the mere use of the words *intends* and *knows* to include the defining language for those terms provided in sections 4-4[98] and 4-5[99] of the Code. Furthermore, since intentional murder requires a higher level of culpability than unintentional murder,[100] any fact situation that could reasonably support a finding of either should include an indication that unintentional murder should be considered only if intentional murder has not been proven.[101]

With these considerations in mind, an appropriate jury instruction might read as follows:

> Murder may be committed either intentionally or unintentionally. A person commits the offense of murder intentionally when he kills an individual if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual or another. A person commits the offense of murder unintentionally when he kills an individual if, in performing the acts which cause the death, he knows that such acts create a strong probability of death or great bodily harm to that individual or another.
>
> To sustain a charge of intentional murder, the State must prove the following propositions:
>
> First: That the defendant performed the acts which caused the death of [the victim]; and
>
> Second: That when the defendant did so, it was his conscious objective or purpose to kill or do great bodily harm to [the victim] or another.
>
> To sustain a charge of unintentional murder, the State must prove the following propositions:
>
> First: That the defendant performed the acts which caused the death of [the victim]; and
>
> Second: That the defendant, when he performed those acts, was either indifferent as to whether he would cause the death of [the victim] or actively desired that death not occur; and
>
> That when the defendant did so he was consciously aware that his acts created a strong probability of death or great bodily harm to [the victim] or another.
>
> If you find from your consideration of all the evidence that intentional murder has been proved beyond a reasonable doubt, you should find the defendant guilty of unintentional murder.
>
> If you find from your consideration of all the evidence that intentional murder has not been proved beyond a reasonable doubt, and that uninten-

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98. *See supra* note 30.

99. *See supra* note 69.

100. *See* Enmund v. Florida, 102 S. Ct. 3368 (1982); People v. Bone, 103 Ill. App. 3d 1066, 432 N.E.2d 329 (3d Dist. 1982).

101. Where the facts could justify conviction of crimes of different levels of culpability, the lower culpability offense is an "included" offense. ILL. REV. STAT. ch. 38, § 2-9(a) (1981). Conviction of the included offense is appropriate only after an acquittal of the more culpable crime. *See* People v. Bone, 103 Ill. App. 3d 1066, 432 N.E.2d 329 (3d Dist. 1982).

> tional murder has been proved beyond a reasonable doubt, you should find the defendant guilty of unintentional murder.
>
> If you find from your consideration of all the evidence that neither intentional nor unintentional murder has been proved beyond a reasonable doubt, you should find the defendant not guilty of murder.

This proposed instruction opens with definitions of the two categories of murder, in the words of the statute, but alerts the jury in the first paragraph that two generically different mental states exist and that it will be expected to determine whether actual intent was present. The second and third paragraphs contain issue instructions that define the words *intends* and *knows,* thereby assisting the jury in making its determination by distinguishing between defendants who have a conscious objective or purpose to kill and defendants who do not actually intend to kill, but are subjectively aware that they are engaging in extremely dangerous conduct. The final three paragraphs direct the jury's attention to the order in which it should consider the issues presented. Since intentional murder requires the highest level of culpability, and may have capital punishment implications, the initial judgment should be whether that class of murder has been committed. Only if the jury concludes that death or great bodily harm was not actually intended, should it move to the second class of murder and determine whether the accused knowingly engaged in such extremely dangerous conduct that the resulting death constitutes murder. Finally, the instruction informs the jury that if neither of these situations has been proven beyond a reasonable doubt, there has been no murder.[102]

While this proposed jury instruction will achieve the goal of insuring an independent evaluation of the actor's mental state when he committed the homicide, and thereby lessen the potential for capricious inclusion or exclusion of a particular murder from the death penalty category, its language is considerably more complex than the language of the statute,[103] and it is axiomatic that the more complex a jury instruction, the more likely it is that the jury will misunderstand and misapply the law. An alternative method of communicating the intentional/unintentional distinction to the jury, in less complex form, would therefore be preferable, and is available through a revision of the statutory language.

The precedential origins of the category of unintended murder that subsection (a)(2) was designed to describe trace back to the 1883 supreme court decision in *Mayes v. People.*[104] In that case, the defendant threw a heavy

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102. In drafting this proposed jury charge, the author took guidance from Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases, Illinois Pattern Jury Instructions, 7.01 and 7.02 (1981), and he wishes to express his gratitude to the Illinois Supreme Court Committee.

103. One of the goals of the drafters of the current murder statute, and particularly subsection (a)(2), was to define the crime in language that would "require a minimum of further definition in jury instructions. . . ." ILL. ANN. STAT. ch. 38, § 9-1, Committee Comments—1961 at 18 (Smith-Hurd 1979).

104. 106 Ill. 306 (1883).

glass at his wife, who was carrying a lighted oil lamp. The glass struck the lamp, causing burning oil to spill over the wife, resulting in her death. In affirming the murder conviction, notwithstanding the defendant's assertion that there was insufficient proof of an intent to kill or cause great bodily harm, the court stated:

> [I]t was utterly immaterial whether plaintiff in error intended the glass should strike his wife . . . or whether he had any specific intent, but acted solely from *general malicious recklessness,* disregarding any and all consequences. It is sufficient that he manifested a *reckless, murderous disposition.* . . . [I]t is apparent he was willing that any result might be produced, at whatever the harm to others.[105]

Mayes thus established reckless conduct, committed under circumstances which created an unusually high risk of death or serious injury, which took a human life, as a separate and distinct category of murder.[106] During the eight decades between the decision in *Mayes* and the adoption of the 1961 Code, Illinois courts repeatedly recognized this class of "reckless and wanton" murder,[107] and it was the intention of the drafters of the Code to define

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105. *Id.* at 313-14 (emphasis added).

106. A maliciously reckless murder requires a mental state similar to that required for the crime of involuntary manslaughter. The difference between reckless murder and involuntary manslaughter is in the degree of risk that an accused has disregarded. *Cf.* ILL. REV. STAT. ch. 38, § 9-3 (1981) (involuntary manslaughter statute); *see* Phegley v. Greer, 497 F. Supp. 519 (C.D. Ill. 1980). The *Greer* court noted that "in Illinois, the crimes of murder and involuntary manslaughter do not require proof of different mental states. The only distinction between the crimes is the degree to which a defendant's acts risk death or great bodily harm." *Id.* at 520. *Compare* ILL. REV. STAT. ch. 38, § 9-1(a)(2) (1981) (murder is committed when one's conduct creates a "*strong probability* of death") (emphasis added) *with* ILL. REV. STAT. ch. 38, § 9-3 (1981) (involuntary manslaughter is committed when one's conduct is "*likely* to cause death") (emphasis added). For cases illustrating the differences between these two mental states, compare People v. Crenshaw, 298 Ill. 412, 131 N.E. 576 (1921) (death caused by blow with bare fist does not constitute murder where victim and defendant are of comparable size and strength) with People v. Jones, 26 Ill. 2d 381, 186 N.E.2d 246 (1962) (blow with fist, causing a child to fall out of a moving automobile, sufficient to constitute murder) and People v. Allum, 78 Ill. App. 2d 462, 223 N.E.2d 187 (1st Dist. 1967) (repeated blows to head with defendant's fists sufficient to justify murder conviction). *See also* People v. Marrow, 403 Ill. 69, 85 N.E.2d 34 (1949) (unprovoked and unjustified blow to victim's head with a wrench imposed a sufficient risk to justify a murder conviction); People v. Groh, 307 Ill. 165, 138 N.E. 523 (1923) (forcing victim, who was standing on the running board of defendant's car, into another car imposed a sufficient risk to justify a murder conviction); People v. Camberis, 297 Ill. 455, 130 N.E. 712 (1921) (speeding imposed a sufficient risk to justify a manslaughter conviction); People v. Venckus, 278 Ill. 124, 115 N.E. 880 (1917) (firing gun into crowd of 20 people imposed a sufficient risk to justify a manslaughter conviction); Murphy v. People, 37 Ill. 447 (1865) (struggle over a gun, during which victim was killed, imposed a sufficient risk to justify a manslaughter conviction); People v. Gresham, 78 Ill. App. 3d 1003, 398 N.E.2d 398 (3d Dist. 1979) (defendant's claim that he did not beat his daughter but that he bumped her head against the wall while stumbling in an intoxicated state required that the jury be given an instruction on involuntary manslaughter); People v. Johnson, 33 Ill. App. 3d 168, 337 N.E.2d 240 (4th Dist. 1975) (placing a pillow over victim's face creates a strong probability of death and is sufficient to justify a murder conviction).

107. *See, e.g.,* People v. Jordan, 18 Ill. 2d 489, 165 N.E.2d 296 (1960) (stabbing deceased

it in subsection (a)(2).[108] For reasons that are unexplained, however, the drafting committee chose to describe it as knowing rather than reckless murder, and it thereby created the problem heretofore described—that juries cannot distinguish between intentional murder and murder in which the actor knew his conduct created a strong probability of death.

The alternative resolution of this problem, therefore, would be accomplished by reestablishing recklessness as the mental state required for murder under subsection (a)(2). As proposed, the statute would read as follows:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> . . . .
>
> (2) He acts recklessly under circumstances creating a strong probability of death or great bodily harm to that individual or another. . . .

A careful examination of the definitions of knowledge and recklessness in sections 4-5[109] and 4-6[110] of the Criminal Code indicates that this formulation does not, in legal effect, differ from the language currently used. Both mental states require (1) a conscious awareness of a potential danger, and (2) a voluntary act in disregard of the danger. The only real distinction exists in the level of risk involved, with knowledge requiring that the result be practically certain to occur, while recklessness involves only a substantial risk. The substantive murder statute, however, both as currently formulated and as herein proposed, substitutes its own risk level—that of strong

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during a fight constitutes wanton and reckless disregard); People v. Wesley, 18 Ill. 2d 138, 163 N.E.2d 500 (1959) (stabbing deceased in chest with screwdriver constitutes reckless disregard); People v. Shields, 6 Ill. 2d 200, 127 N.E.2d 440 (1955) (reckless disregard sufficient for murder); People v. Johnson, 2 Ill. 2d 165, 117 N.E.2d 91 (1954) (repeatedly shooting an unarmed victim at an extremely close range is sufficient to sustain reckless and wanton murder conviction); People v. Marrow, 403 Ill. 69, 85 N.E.2d 34 (1949) (striking deceased with a wrench demonstrates reckless disregard, which is sufficient for murder conviction); People v. Simmons, 399 Ill. 572, 78 N.E.2d 269 (1948) (firing multiple shots at a victim who allegedly threatened defendant with a knife constitutes reckless disregard, which is sufficient for murder conviction); Adams v. People, 109 Ill. 444 (1884) (forcing victim to jump from train while train was in motion constitutes reckless disregard, which is sufficient for murder conviction).

108. The Committee declared that "Section 9-1 is intended to define the types of conduct which constitute murder, as indicated by the Illinois cases. . . ." ILL. ANN. STAT. ch. 38, § 9-1 Committee Comments—1961 at 17 (Smith-Hurd 1979). Accordingly, in drafting the (a)(2) unintentional murder provision, the Committee focused on the prevailing case law and concluded that the "Illinois courts . . . use repeatedly expressions such as 'dangerous act likely to produce death,' with reckless disregard of the consequences." *Id.* at 18 (citations omitted).

109. *See supra* note 69.

110. The definition of *recklessness* is as follows:

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

ILL. REV. STAT. ch. 38, § 4-6 (1981).

probability.[111] Thus, under both formulations, murder exists if death is caused by one who deliberately engages in dangerous conduct while subjectively aware of a strong probability that death or great bodily harm will occur.

Notwithstanding the absence of a technical difference between the two formulations, the proposed statute would have a significant practical effect, because both knowledge and recklessness have a lay, as well as a legal, meaning. A jury charged in the language of the proposed statute surely will not conclude that one who shot his victim from point-blank range,[112] or stabbed her several times in the chest,[113] acted "recklessly under circumstances creating a strong probability of death."[114] The very use of the word *reckless* in subsection (a)(2), particularly when juxtaposed against *intent* in subsection (a)(1), delivers to a lay juror the message that he or she is being instructed to distinguish between intentionally causing death and unintentionally causing it through dangerous conduct.

The use of the mental state of recklessness to define unintentional murder would not only return Illinois law to its status prior to the 1961 revision, but would also render it consistent with the widely held modern views on unintentional murder. Professors LaFave and Scott, for example, in defining this category of murder, which they call "depraved-heart" murder, speak of "extremely negligent conduct."[115] Similarly, Professors Perkins and Boyce indicate that "an act may involve such a wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought even if there is no actual intent to kill or injure."[116] Finally, the Model Penal Code, from which the mental states contained in Article 4 of the Illinois Criminal Code of 1961 were adopted,[117] defines this category as murder "committed recklessly under circumstances manifesting extreme indifference to the value

111. *See id.* § 9-1(a)(2) (1981). The confusion engendered by the use of knowledge rather than recklessness as the mental state for unintentional murder is illustrated by the decision in People v. Guthrie, 123 Ill. App. 2d 407, 258 N.E.2d 802 (4th Dist. 1970). In that case, the appellate court affirmed the jury's conclusion that the defendant had consciously engaged in conduct that created a strong probability of death, but reversed the murder conviction because his conduct was consistent with a mental state of recklessness. *Id.* at 411-14, 258 N.E.2d at 804-06. The court clearly was confused, by the statutory language, into believing that reckless conduct could not support a murder conviction.

112. *See* People v. Henry, 103 Ill. App. 3d 1143, 432 N.E.2d 359 (3d Dist. 1982); People v. Bone, 103 Ill. App. 3d 1066, 432 N.E.2d 329 (3d Dist. 1982); People v. Stocks, 93 Ill. App. 3d 439, 417 N.E.2d 1080 (5th Dist. 1981).

113. *See* People v. Dunnigan, 89 Ill. App. 3d 763, 412 N.E.2d 37 (3d Dist. 1980).

114. See statute proposed herein.

115. Professors LaFave and Scott have written as follows:

> Extremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others—though unaccompanied by any intent to kill or do serious bodily injury—and which actually causes the death of another, may constitute murder.

W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 541 (3d ed. 1972).

116. R. PERKINS & R. BOYCE, CRIMINAL LAW 59 (3d ed. 1982).

117. *Compare* ILL. REV. STAT. ch. 38, §§ 4-4 to 4-7 (1981) *with* MODEL PENAL CODE § 2.02 (2)(a)-(d) (Proposed Official Draft, 1962; Tentative Draft No. 4, 1955).

of human life."[118] Significantly, each of these formulations refers to the Illinois decision in *Mayes v. People*[119] as an illustrative instance of the category of murder being described.[120] It is thus evident that the substitution of recklessness for knowledge as the required mental state for unintentional murder under section 9-1(a)(2) would be consistent with established Illinois law, would conform to widely accepted approaches to this category of murder, and would sharply focus for the trier of fact the difference between intentional and unintentional murder.

CONCLUSION

In light of the constitutional requirement that the line between those murders that have death penalty implications and those that do not be clearly and narrowly drawn, the decision by the Illinois legislature in 1977 to establish intent to kill, or premeditation, as one factor for determining the location of that line, has rendered it constitutionally necessary for Illinois juries to make a specific determination on that issue.[121] The existing evidence indicates, however, that such a determination is rarely made, and, as a consequence, the potential for arbitrariness condemned in *Furman v. Georgia*[122] and *Moore v. Illinois*[123] has crept back into Illinois law.

The occasions on which a particular murder is declared to have been intentional are rare, and it is considerably more frequent that what would appear to have been an intentional murder is either not classified at all, or is inadvertently misclassified as an unintentional murder. As a consequence, actual culpability, as evidenced by intent, is only sometimes determined. The correction of this situation, either through a carefully designed jury instruction or a change in the statutory language, to alert the jury to the need for classification, is essential if the Illinois two-murder rule is to survive constitutional scrutiny.

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118. MODEL PENAL CODE § 210.2(1)(b) (Official Draft and Revised Comments 1980).

119. 106 Ill. 306 (1883).

120. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 115, at 543 n.10; R. PERKINS & R. BOYCE, *supra* note 116, at 60 n.95; MODEL PENAL CODE § 210.2(1)(b) comment a at 23 n.44 (Official Draft and Revised Comments 1980).

121. The necessity that the jury distinguish between intentional and unintentional murder would require a special verdict in murder trials, contrary to general Illinois practice. ILL. REV. STAT. ch. 38, § 115-4(1) (1981) ("Unless the affirmative defense of insanity has been presented during the trial, the jury shall return a general verdict as to each offense charged."). This requirement may be mandated, as well, by the significance of intent to kill raised in Enmund v. Florida, 102 S. Ct. 3368 (1982). *See supra* notes 36-43 and accompanying text. The Illinois legislature has recently adopted the use of special verdicts in which the jury is required to make a finding of guilty but mentally ill. *See* Act of Sept. 17, 1981, Pub. Act No. 82-553, § 2, 1981 Ill. Laws 2782, 2786 (amending ILL. REV. STAT. ch. 38, § 115-4(j) (1981)).

122. 408 U.S. 238 (1972).

123. 408 U.S. 786 (1972).