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Illinois’s Drug-Induced Homicide Statute: Injecting Some Sense into a Misinterpreted Law

I.	INTRODUCTION	32
II.	THE ILLINOIS DRUG-INDUCED HOMICIDE STATUTE AND ITS HISTORY	33
III.	OTHER ILLINOIS MURDER/HOMICIDE STATUTES	34
	A. ILLINOIS’S FIRST DEGREE MURDER STATUTE	35
	B. ILLINOIS’S SECOND DEGREE MURDER STATUTE	35
	C. INVOLUNTARY MANSLAUGHTER AND RECKLESS HOMICIDE.....	36
	D. SUMMARY AND COMPARISONS OF THE ILLINOIS MURDER AND HOMICIDE STATUTES	36
IV.	DEVELOPMENT OF THE DRUG-INDUCED HOMICIDE LAW IN ILLINOIS.....	38
	A. THE COURT’S FIRST TIME ADDRESSING THE DRUG-INDUCED HOMICIDE STATUTE— <i>ILLINOIS V. FAIRCLOTH</i> (1992).....	39
	B. THE ONLY FEDERAL CASE TO DISCUSS THE DRUG-INDUCED HOMICIDE STATUTE— <i>UNITED STATES EX REL. FAIRCLOTH V. STERNES</i> (2000).....	40
	C. THE FIRST CASE TO FULLY ADDRESS THE DRUG-INDUCED HOMICIDE STATUTE’S VALIDITY— <i>ILLINOIS V. BOAND</i> (2005)	40
	D. THE FINAL AND MOST RECENT TIME THE ILLINOIS COURTS HAVE ADDRESSED THE DRUG-INDUCED HOMICIDE STATUTE— <i>FAIRCLOTH V. STERNES</i> (2006).....	44
V.	AN ANALYSIS OF ILLINOIS’S MENTAL STATE REQUIREMENTS FOR STATUTES AND HOW THEY RELATE TO THE DRUG-INDUCED HOMICIDE STATUTE.....	44
VI.	ILLINOIS’S FELONY MURDER STATUTE AND COMPARISONS TO THE DRUG-INDUCED HOMICIDE STATUTE	46
VII.	COMPARING ILLINOIS’S DRUG-INDUCED HOMICIDE STATUTE TO SIMILAR LAWS IN OTHER STATES.....	49
	A. COMPARING WYOMING’S DRUG-INDUCED HOMICIDE STATUTE TO ILLINOIS’S DRUG-INDUCED HOMICIDE STATUTE	50
	B. COMPARING NEW JERSEY’S DRUG-INDUCED DEATH STATUTE TO ILLINOIS’S DRUG-INDUCED HOMICIDE STATUTE	50
	C. COMPARING PENNSYLVANIA’S DRUG DELIVERY RESULTING IN DEATH STATUTE TO ILLINOIS’S DRUG-INDUCED HOMICIDE STATUTE.....	51
	D. OVERVIEW OF HOW OTHER STATES HAVE WRITTEN OR INTERPRETED THEIR STATUTES SIMILAR TO ILLINOIS’S DRUG-INDUCED HOMICIDE STATUTE	53
VIII.	CONCLUSION.....	54

I. INTRODUCTION

As drug overdoses in Illinois have been steadily increasing over the last decade, officials have begun looking at every method for trying to curb this dramatic increase.¹ In their search for a solution, state officials and law enforcement came across Illinois's Drug-Induced Homicide Statute—a law rarely charged since its enactment over two decades ago.² In the 1980s, America was not only on the brink of war with the Soviet Union, but was also fully engaged in a new type of war: the War on Drugs.³ In 1988, Illinois decided to ramp up its own fight against drugs by passing the Drug-Induced Homicide Act.⁴ By allowing Illinois courts to impose additional incarceration time for drug deliveries resulting in death, the new law was an attempt to introduce another tool against drug dealing.⁵ As charges and convictions of drug-induced homicide increase, it is prudent to fully analyze the breadth, vagueness, and necessity of the statute.⁶

This Comment will analyze the law itself, why the law was passed, what gap the Drug-Induced Homicide Statute fills compared to other homicide and murder statutes Illinois has in place, comparable laws in other states, and how the law has been interpreted by the Illinois courts. Furthermore, this Comment will seek to bring to light how the Illinois courts have incorrectly interpreted the Drug-Induced Homicide Statute by allowing potential liability for a death to last forever and to trigger no matter how the death occurred.⁷ Despite the current holdings of the Illinois courts, there are solutions to interpret the law in a manner that would be consistent with Illi-

1. Jessica Reichert, *Prescription Drug Abuse, Accidental Overdose on Rise in Illinois*, 8 ILL. CRIM. JUST. INFO. AUTHORITY RES. BULL., June 2011, at 1, 3, available at http://www.icjia.state.il.us/public/pdf/Bulletins/Prescription_drugs_062011.pdf (stating that unintentional drug overdoses have increased forty-nine percent between 1999 and 2007).

2. See Jim Salter & Jim Suhr, *A Shift to More Aggressive Tactics Against Heroin*, CNS NEWS (Apr. 14, 2012), <http://cnsnews.com/news/article/shift-more-aggressive-tactics-against-heroin>.

3. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1985).

4. 720 ILL. COMP. STAT. 5/9-3.3 (2011).

5. See *id.*

6. See Salter & Suhr, *supra* note 2.

7. See, e.g., *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005); see also 720 ILL. COMP. STAT. 5/9-3.3 (2011).

nois law and with the intent of the legislature to curb deaths resulting from illegally controlled substances.⁸

II. THE ILLINOIS DRUG-INDUCED HOMICIDE STATUTE AND ITS HISTORY

The late 1980s saw a large increase in drug use, and state governments all across the United States were attempting to find solutions in order to battle what was deemed as an epidemic sweeping the nation.⁹ One solution adopted by Illinois and a handful of other states was to enact laws that would drastically increase punishment for drug crimes resulting in death.¹⁰ Illinois enacted the Drug-Induced Homicide Statute, which states:

(a) A person who violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance, commits the offense of drug-induced homicide.¹¹

In order to get a full understanding of the law, it is important to also understand what constitutes a violation of section 401 of the Illinois Controlled Substances Act (CSA) or section 55 of the Methamphetamine Control and Community Protection Act (MCCPA).¹² Section 401 of the Illinois Controlled Substance Act states:

Except as authorized by this Act, it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance other than methamphetamine Examples of chemical classes . . . include, but are not limited to, the following: phenethylamines, N-substituted piperidines, morphinans,

8. See, e.g., *Boand*, 838 N.E.2d 367; see also 720 ILL. COMP. STAT. 5/9-3.3 (2011); Transcript of Debates, H.B. 4125, Illinois House of Representatives, 85th Gen. Assemb., 2d Sess., May 20, 1988, at 190-94, available at <http://www.ilga.gov/house/transcripts/htrans85/HT052088.pdf>.

9. Deaths from cocaine between 1984 and 1986 increased 88% (from 666 to 1,253), and between the years 1984 and 1987 hospital emergency room visits related to cocaine use increased 371% (from 7,054 to 26,186). Thomas N. Osran, *Illinois' Drug Induced Homicide Statute: A Tough State Just Got Tougher*, 9 N. ILL. U. L. REV. 537 (1989) (citing Nat'l Narcotics Intelligence Consumers Comm., 1987 Report 27 (April 1988)).

10. See Osran, *supra* note 9, at 538-40.

11. 720 ILL. COMP. STAT. 5/9-3.3 (2011).

12. *Id.*

ecgonines, quinazolinones, substituted indoles, and arylcycloalkylamines.¹³

In addition to the drugs listed in the CSA, section 55 of the MCCPA uses similar language to include methamphetamine amongst the illegal drugs for delivery, manufacturing, or possession.¹⁴ It is important to note both the Controlled Substance Act and the Methamphetamine Control and Community Protection Act utilize “knowingly” as the mens rea, which would later be adopted by the courts for the Drug-Induced Homicide Statute.¹⁵

Finally, a violation of the Drug-Induced Homicide Statute is considered a Class X felony punishable by between fifteen to thirty years of imprisonment, or thirty to sixty years if an extended term applies.¹⁶ Therefore, if a jury finds a defendant guilty of drug-induced homicide, there is little room for a judge to take mitigating factors into account since the minimum sentence he could impose is fifteen years of imprisonment, whereas the underlying drug charge most likely would have allowed for a significantly shorter sentence.¹⁷

III. OTHER ILLINOIS MURDER/HOMICIDE STATUTES

In order for the Drug-Induced Homicide Statute to have a place in Illinois law, it needs to fill a gap in the Illinois homicide and murder laws.¹⁸ Therefore, it is necessary to analyze the current state of Illinois’s laws on homicide and murder and determine if the Drug-Induced Homicide Statute is necessary, and if so, what type of homicides or murders the legislature sought to ensure would be covered.¹⁹

13. 720 ILL. COMP. STAT. 570/401 (2010).

14. 720 ILL. COMP. STAT. 5/9-3.3 (2011); *see also* 720 ILL. COMP. STAT. 646/55 (2010) (“It is unlawful knowingly to engage in the delivery or possession with the intent to deliver methamphetamine or a substance containing methamphetamine.”).

15. *See* 720 ILL. COMP. STAT. 5/9-3.3 (2011); 720 ILL. COMP. STAT. 646/55 (2010); *see also* Illinois v. Boand, 838 N.E.2d 367 (Ill. App. Ct. 2005).

16. 720 ILL. COMP. STAT. 5/9-3.3 (2011). This section states:

(b) Sentence. Drug-induced homicide is a Class X felony.

(c) A person who commits drug-induced homicide by violating subsection (a) or subsection (c) of Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act commits a Class X felony for which the defendant shall in addition to a sentence authorized by law, be sentenced to a term of imprisonment of not less than 15 years and not more than 30 years or an extended term of not less than 30 years and not more than 60 years.

Id.

17. *See id.*

18. *See id.*; *see also* 720 ILL. COMP. STAT. 5/9-1, -2, -3 (2010).

19. *See* 720 ILL. COMP. STAT. 5/9-3.3 (2010); *see also* 720 ILL. COMP. STAT. 5/9-1, -2, -3 (2010).

A. ILLINOIS'S FIRST DEGREE MURDER STATUTE

Illinois is unique in the sense it uses only one statute to encompass the mental states of intent and knowledge, as well as to include the felony murder doctrine.²⁰ The underlying foundation for first degree murder in Illinois occurs when “[a] person . . . kills an individual without lawful justification . . . in performing the acts which cause the death.”²¹

The statute then lists the three methods in which the death can occur in order for the person to commit first degree murder.²² The first method utilizes the mental state of purpose by stating a person commits first degree murder if “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.”²³ The second method involves the mental state of knowledge, which occurs when a person “knows that such acts create a strong probability of death or great bodily harm to that individual or another.”²⁴ Third, the statute includes what is commonly known as felony murder, or when the death occurs as the result of a person “attempting or committing a forcible felony other than second degree murder.”²⁵ First degree murder in Illinois has a penalty of imprisonment between twenty years and life.²⁶

B. ILLINOIS'S SECOND DEGREE MURDER STATUTE

Illinois uses its Second Degree Murder Statute as an extension of the First Degree Murder Statute,²⁷ in that “[a] person commits the offense of second degree murder when he or she commits the offense of first degree murder . . . and either of the following mitigating factors are present.”²⁸ The statute then continues on to list two possible situations when a person's actions in committing what would normally be first degree murder would instead constitute second degree murder²⁹:

- (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender en-

20. See 720 ILL. COMP. STAT. 5/9-1 (2010).

21. *Id.*

22. *Id.*

23. 720 ILL. COMP. STAT. 5/9-1(a)(1) (2010).

24. 720 ILL. COMP. STAT. 5/9-1(a)(2) (2010).

25. 720 ILL. COMP. STAT. 5/9-1 (2010).

26. *Id.*

27. *Id.*

28. 720 ILL. COMP. STAT. 5/9-2 (2010).

29. *Id.*

deavors to kill, but he or she negligently or accidentally causes the death of the individual killed; or

(2) at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in . . . this Code, but his or her belief is unreasonable.³⁰

When a person in Illinois is found guilty of second degree murder (considered a Class 1 felony) the penalty is imprisonment with a minimum of four years and a maximum of twenty years.³¹

C. INVOLUNTARY MANSLAUGHTER AND RECKLESS HOMICIDE

The last important Illinois statute dealing with murder or homicide deals with actions that fall under the mental state of recklessness or negligence.³² The Illinois law defining involuntary manslaughter and reckless homicide reads:

A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle. . . . A person commits reckless homicide if he or she unintentionally kills an individual while driving a vehicle and using an incline . . . to cause the vehicle to become airborne.³³

The penalty imposed for both reckless homicide and involuntary manslaughter (considered a Class 3 felony) is imprisonment with a minimum sentence of two years and a maximum sentence of five years.³⁴

D. SUMMARY AND COMPARISONS OF THE ILLINOIS MURDER AND HOMICIDE STATUTES

Comparing these laws with the Drug-Induced Homicide Statute demonstrates that Illinois was most likely trying to increase the penalty for

30. *Id.* (“Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.”).

31. *Id.*

32. 720 ILL. COMP. STAT. 5/9-3 (2010).

33. *Id.*

34. 730 ILL. COMP. STAT. 5/5-4.5-40 (2010).

drug crimes resulting in death beyond what already existed in the Illinois Criminal Code.³⁵ Since two parts of the First Degree Murder Statute require either purposeful or knowing intent, it is extremely unlikely the courts would interpret the regular delivery or sale of drugs as reaching that high level of intent.³⁶ Furthermore, felony murder in Illinois requires the underlying felony to be a forcible felony, and the Illinois courts have never interpreted the delivery of a controlled substance as “forcible.”³⁷

Of all the other Illinois statutes dealing with murder, only first degree murder carries a stiffer penalty than the drug-induced homicide law.³⁸ Based solely on the length of imprisonment, it would appear the Illinois legislature determined there were higher societal concerns regarding the illegal delivery of controlled substances that resulted in someone's intended or unintended death than of a person committing any of the following crimes: impassioned first degree murder, wrongful belief that first degree murder was justifiable, reckless homicide, or unintentional killing of someone through actions that are likely to cause death or great harm.³⁹ Essentially, someone pulling out a firearm and killing another person during a bar fight would serve less time under Illinois law than someone giving their spouse a single ecstasy pill, and the spouse dying from having an allergic reaction to the ecstasy.⁴⁰

Since the elements for drug-induced homicide are unique,⁴¹ the other Illinois statutes on murder or homicide do not constitute lesser-included offenses.⁴² Illinois has also determined that if a defendant is found guilty of multiple murder/homicide statutes, the court is to only enter in the charge with the highest culpable state, and dismiss the remaining charges.⁴³ The Illinois courts have also determined drug-induced homicide is more culpa-

35. Transcript of Debates, H.B. 4125, Illinois House of Representatives, 85th Gen. Assemb., 2d Sess., May 20, 1988, at 190-94. Representative Shaw addressed the assembly stating, “as you know, what we have had is an awful amount of problems with drugs, the sale of drugs and a lot of deaths as a result of drugs and I believe that this piece of legislation would answer some of the problems that we have had.” *Id.* at 191.

36. 720 ILL. COMP. STAT. 5/9-1 (2010).

37. 21 ILL. LAW AND PRAC. HOMICIDE § 7. For a more detailed definition of forcible felonies, see 720 ILL. COMP. STAT. 5/2-8 (2010).

38. 730 ILL. COMP. STAT. 5/5-4.5-20 (2010); 720 ILL. COMP. STAT. 5/9-3.3 (2011).

39. See 720 ILL. COMP. STAT. 5/9-2, -3, -3.3 (2010); 730 ILL. COMP. STAT. 5/5-4.5-30, -40 (2010).

40. See *Illinois v. Garcia*, 651 N.E.2d 100, 110 (Ill. 1995) (listing reasonable provocation to constitute second degree murder including “mutual combat”).

41. *Illinois v. Faircloth*, 599 N.E.2d 1356, 1360 (Ill. App. Ct. 1992) (“The drug induced homicide statute is a unique statute that imposes criminal responsibility for the death of a person on anyone in the chain of delivery of controlled substances that were the cause of that person’s death.”).

42. See *id.*

43. See *Illinois v. Kuntu*, 752 N.E.2d 380, 395 (Ill. 2001).

ble than involuntary manslaughter based solely on the fact that the former is a Class X felony, and the latter, a Class 3 felony.⁴⁴ Therefore, even if the death were to occur from the knowing delivery of the controlled substance as a result of negligence or recklessness, the perpetrator would be subject to the higher penalty of drug-induced homicide.⁴⁵

In summary, it appears as though the Illinois legislature was not content including illegal delivery of controlled substances within the scope of felony murder, and, instead, deemed delivery of a controlled substance resulting in a death, no matter how the death came about, more serious than all other forms of murder (except first degree murder).⁴⁶ The legislature passed the Drug-Induced Homicide Statute with a higher term of imprisonment upon conviction despite the fact the courts had and could continue to construe the delivery of drugs as reckless behavior, thus allowing the conviction of involuntary manslaughter.⁴⁷ Based on the length of imprisonment imposed for violating the Drug-Induced Homicide Statute,⁴⁸ the Illinois legislature appears to have deemed the illegal delivery of controlled substances to be so serious it was necessary for the increased punishment as compared to other forms of murder and homicide.⁴⁹

IV. DEVELOPMENT OF THE DRUG-INDUCED HOMICIDE LAW IN ILLINOIS

Despite the twenty-three years the Drug-Induced Homicide Statute has been on the books in Illinois, the issue of its validity has never made it to the Illinois Supreme Court and has only been considered by the appellate courts on three occasions.⁵⁰ The issue was also briefly addressed in federal court on one occasion in Illinois's Northern District in *United States ex rel. Faircloth v. Sternes*.⁵¹

44. *Boand*, 838 N.E.2d at 397. Although the court does not discuss the levels of culpability between the Drug-Induced Homicide Statute and the other Illinois murder/homicide statutes, it can most likely be presumed that the level of culpability is determined based on classification of the felony. Therefore, only a first degree murder conviction would carry precedence over a drug-induced homicide conviction. *See id.*

45. *See id.*

46. *See* 720 ILL. COMP. STAT. 5/9-3.3 (2011).

47. *See, e.g., Illinois v. Faircloth*, 599 N.E.2d 1356, 1360 (Ill. App. Ct. 1992).

48. 720 ILL. COMP. STAT. 5/9-3.3 (2011).

49. *See id.*

50. *Faircloth*, 599 N.E.2d 1356; *Boand*, 838 N.E.2d 367; *Faircloth v. Sternes*, 853 N.E.2d 878 (Ill. App. Ct. 2006).

51. *United States ex rel. Faircloth v. Sternes*, No. 00 C 1346, 2000 WL 1847627 (N.D. Ill. Dec. 14, 2000).

A. THE COURT'S FIRST TIME ADDRESSING THE DRUG-INDUCED HOMICIDE STATUTE—*ILLINOIS V. FAIRCLOTH* (1992)

Illinois v. Faircloth was the first time the Drug-Induced Homicide Statute was addressed by any of the Illinois courts at the appellate level.⁵² In *Faircloth*, three friends (Faircloth and two female friends) engaged in heavy cocaine usage over a three-day period.⁵³ Ultimately, one of the female friends died after a seizure resulting from the drug use.⁵⁴ All three friends had used cocaine on numerous occasions prior to this event.⁵⁵ Faircloth provided the cocaine that caused his friend's death on this occasion by stealing it from a drug dealer all three had previously used to obtain cocaine.⁵⁶ Faircloth was found guilty of drug-induced homicide and possession with the intent to deliver a controlled substance and sentenced to fifteen years for the homicide and fifteen years for the possession to be served consecutively.⁵⁷

On appeal, the court noted the defendant failed to raise any issue "as to the validity of the statute."⁵⁸ Since the defendant, however, did raise the issue of whether involuntary manslaughter was a lesser-included offense to drug-induced homicide, the court analyzed the statute solely for the purpose of determining the mental state necessary to commit drug-induced homicide.⁵⁹ The court determined "[t]he mental state in this statute is 'knowingly,' which comes from Section 401 of the Controlled Substances Act of 1971."⁶⁰ Furthermore, the court went on to hold, "[t]he defendant just needs to make a knowing delivery of a controlled substance, and if any person then dies as a result of taking that substance, the defendant is responsible for that person's death."⁶¹ This essentially meant there was no mental state required of the defendant in causing the death of the victim, just simply that he had knowingly delivered the controlled substance resulting in her death.⁶²

52. *Faircloth*, 599 N.E.2d at 1362 ("We could find no other cases in this jurisdiction involving the drug induced homicide statute . . .").

53. *Id.* at 1358.

54. *Id.*

55. *Id.*

56. *Faircloth*, 599 N.E.2d at 1358-59.

57. *Id.* at 1357-58.

58. *Id.* at 1362.

59. *Id.* at 1360.

60. *Id.*

61. *Faircloth*, 599 N.E.2d at 1360.

62. *See id.*

B. THE ONLY FEDERAL CASE TO DISCUSS THE DRUG-INDUCED HOMICIDE STATUTE—*UNITED STATES EX REL. FAIRCLOTH V. STERNES* (2000)

United States ex rel. Faircloth v. Sternes represents the federal appeal from the same defendant, Faircloth, in the previous case regarding his conviction.⁶³ In this appeal, Faircloth attempted to raise the issue of the statute's validity based on its vagueness.⁶⁴ The court dismissed Faircloth's claim without analysis of the Drug-Induced Homicide Statute's constitutionality because after the circuit court dismissed the first appeal, Faircloth "failed to pursue the claim in subsequent appeals."⁶⁵ This proved fatal for Faircloth in this appeal because "petitioners must pursue their federal claims to the highest level of state review" before being taken up on appeal by the federal courts.⁶⁶ Because of Faircloth's mistake, the issue regarding the validity of the Drug-Induced Homicide Statute was once again avoided.⁶⁷

C. THE FIRST CASE TO FULLY ADDRESS THE DRUG-INDUCED HOMICIDE STATUTE'S VALIDITY—*ILLINOIS V. BOAND* (2005)

In *Illinois v. Boand*, the state appellate court finally gave a full analysis to the statute's validity, addressing a multitude of issues including: overbreadth, vagueness, legislative intent, and foreseeability of death.⁶⁸ The facts of this case display a fatal flaw in the Drug-Induced Homicide Statute, that is, the statute does not take into account that the deceased individual may have been suicidal and simply using drugs as the method to end their own life.⁶⁹ Furthermore, it extends the foreseeability of a person's death beyond traditional court holdings in the past.⁷⁰

Boand dealt with a group of four friends (two female and two male), including the defendant, Boand, and the deceased, Levin.⁷¹ Levin had a history of substance abuse, and in the three months prior to her death, had been hospitalized on four separate occasions for attempting suicide and overdosing on drugs and alcohol.⁷² In fact, two days before Levin's death, she had attended a drug party, where Boand was not present, and ingested

63. *United States ex rel. Faircloth v. Sternes*, No. 00 C 1346, 2000 WL 1847627 (N.D. Ill. Dec. 14, 2000).

64. *Id.* at *3.

65. *Id.* at *5.

66. *Id.*

67. *See Sternes*, 2000 WL 1847627.

68. *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005).

69. *See id.*

70. *See id.*

71. *Id.* at 376.

72. *Boand*, 838 N.E.2d at 375.

cocaine, marijuana, and muscle relaxers.⁷³ Levin became intoxicated to the point that she drove her vehicle off the road crashing into a tree, destroying her new car, and requiring hospitalization for her injuries.⁷⁴

Levin's friend testified that on the day of her death, Levin stated she had "nothing left to live for."⁷⁵ Prior to meeting up with the defendant that evening, Levin and her friend smoked marijuana and ingested Vicodin.⁷⁶ As the party moved to Boand's home, Levin began strongly expressing her desire for cocaine.⁷⁷ Boand then presented four bottles, one for each person, of methadone, which had been prescribed to him to help treat his heroin addiction.⁷⁸ One of the four drank only about half of the bottle placed in front of her, which Levin then grabbed and consumed in addition to her own bottle.⁷⁹ Following the consumption of the methadone, Levin became upset and demanded more drugs, specifically crack cocaine.⁸⁰ At this point Boand and one female, not Levin, left the party while Levin remained in the house with the other male.⁸¹ Levin had sexual intercourse with the other male, and then an hour later proceeded to pass out on the couch.⁸² When Boand returned to the house, instead of calling the paramedics, they unsuccessfully attempted to revive Levin in a cold shower.⁸³ The forensic pathology report indicated Levin died from a combination of cocaine and methadone intoxication.⁸⁴

Boand was charged and convicted of drug-induced homicide, involuntary manslaughter, and criminal sexual assault.⁸⁵ On appeal, Boand chal-

73. *Id.* at 376.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Boand*, 838 N.E.2d at 376.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 376-77.

82. *Boand*, 838 N.E.2d at 377. There is some conflicting testimony as to whether Levin continued to consume more drugs, including more of Boand's methadone, between the five hours that Boand was away from the house. *Id.* The inconsistent testimony suggests that Levin may have found more of Boand's methadone and drank that in addition to what she had already smoked and consumed earlier. *Id.*

83. *Id.* at 377.

84. *Id.* at 378. The facts of the case make it unclear when or where Levin had ingested the cocaine that was found in her system, but none of the testimony suggests that Boand was present when she did. *Id.*

85. *Id.* at 378-79. Boand was sentenced concurrently to twenty years on the drug-induced homicide charge, five years on the involuntary manslaughter charge, and eleven years on the criminal sexual assault charge. *Id.* The drug-induced homicide and involuntary manslaughter charges are connected with Levin's death, and the criminal sexual assault charge is because he allegedly unsuccessfully attempted to have sexual intercourse with the other female at the party while she was unconscious. *Id.*

lenged the validity of the Drug-Induced Homicide Statute, contending it was unconstitutionally overbroad and vague.⁸⁶ The court broke down the analysis of the statute into two sections: overbreadth and vagueness (which is then broken down into three broad sections: legislative intent, mental state, and foreseeability of death).⁸⁷

Boand's challenge on overbreadth claimed the statute was designed to target professional drug dealers.⁸⁸ Boand argued that the trial court's interpretation made anyone who may step into the chain of delivery criminally liable, thus making the statute too wide-reaching.⁸⁹ The court dismissed this argument stating that overbreadth arguments are designed for protections within the First Amendment, and that Boand made no allegations his First Amendment rights were being violated.⁹⁰

Moving forward, the court then addressed Boand's argument the Drug-Induced Homicide Statute was too vague.⁹¹ The court analyzed the legislative intent of the statute to determine who the Drug-Induced Homicide Statute was intended to target.⁹² The court dismissed Boand's argument that the statute was designed to target drug dealers, stating if the legislature wanted to only target drug dealers it would have put language to that effect into the statute, instead of just referring to *delivery*.⁹³ Next, the court

86. *Id.* at 398.

87. *Boand*, 838 N.E.2d at 398-402.

88. *Id.* at 398-99.

89. *Id.*

90. *Id.*; U.S. CONST. amend. I.

91. *Boand*, 838 N.E.2d at 399-400. A vagueness argument challenges that a statute would be incapable of providing a normal person with enough information to be able to determine if their conduct would be lawful or unlawful. *See Illinois v. Maness*, 732 N.E.2d 545 (Ill. 2000). Furthermore, for Boand to succeed in his vagueness argument the application of the Drug-Induced Homicide Statute must have been overly vague to his specific circumstances. *See Illinois v. Warren*, 671 N.E.2d 700 (Ill. 1996).

92. *Boand*, 838 N.E.2d at 399-400.

93. *Id.* Although this Comment will not go into detail regarding the legislative intent, the analysis may not be as black and white as the *Boand* court seems to imply. During the floor debate, Representative McCracken warned "any lobbyist listening who represents . . . criminal defendants [to] stay out of the House." Transcript of Debates, H.B. 4125, Illinois House of Representatives, 85th Gen. Assemb., 2d Sess., May 18, 1988, at 43, available at <http://www.ilga.gov/house/transcripts/htrans85/HT051888.pdf>. When the bill came up in front of the House two days later, Representative Countryman argued that the law was "inartfully written and probably will cause nothing but Constitutional problems in the courts. Its [sic] unclear. . . . I'm not opposed . . . to . . . becoming tough on drug dealers. . . . But this is a bad law, bad legislation and isn't drafted accurately and it's unconstitutional and will do nothing but create problems" Transcript of Debates, H.B. 4125, Illinois House of Representatives, 85th Gen. Assemb., 2d Sess., May 20, 1988, at 191-92. The House approved the bill, and in the Senate there was additional conversation regarding the statute's intention to target drug dealers by Senator Geo-Karis:

[A] bill of this nature . . . does provide that the manufacturer or dealer who delivers an illegally controlled substance to another responsible for

addressed the mental state, or lack thereof, in the Drug-Induced Homicide Statute.⁹⁴ Ultimately, the court referred back to the holding in *Faircloth* that the mental state was implied by the legislature and intended to be knowingly in regards to the delivery of the controlled substance.⁹⁵ The *Boand* court addressed the mental state for the actual death by comparing it to felony murder, holding “[j]ust as the felony murder statute imposes criminal liability for a death resulting from a forcible felony, the drug-induced-homicide statute imposes criminal liability for a death resulting from the knowing delivery of certain controlled substances.”⁹⁶

Finally, the court used the same comparison with felony murder in order to link the foreseeability of the victim’s death to any individual in the chain of delivery that would fall under Illinois’s proximate cause theory.⁹⁷ The proximate cause theory applies to Illinois’s felony murder law through the holding in *Illinois v. Lowery*, where the court held “liability attaches under the felony-murder rule for any death proximately resulting from the unlawful activity—notwithstanding the fact that the killing was by one resisting the crime.”⁹⁸ The court went on further to explain, “when a felon’s attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation . . . he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.”⁹⁹

The court affirmed the conviction of drug-induced homicide, adding it did not matter that Boand “did not ‘encourage’ Levin to ingest the methadone [T]he evidence presented is sufficient to sustain the conviction because the State was required to prove only that defendant’s delivery of methadone was ‘knowing.’”¹⁰⁰

the death of any person resulting from the use of that illegal drug can be penalized with a Class X felony. . . . It’s high time we got after these miserable drug pushers who’ve made a . . . travesty of the lives of young people.

Transcript of Debates, H.B. 4125, Illinois Senate, 85th Gen. Assemb., 2d Sess., June 24, 1988, at 92-94, available at <http://www.ilga.gov/senate/transcripts/strans85/ST062488.pdf>. The statute was further discussed by Senator D’Arco, stating, “I want to get these drug pushers off the street just like you guys . . . [but] [t]his is a terrible bill, but like all these terrible bills that involve the Criminal Code, this bill will pass just like the rest of them.” *Id.* at 93-94.

94. *Boand*, 838 N.E.2d at 400-01; see also 720 ILL. COMP. STAT. 5/9-3.3 (2011).

95. *Boand*, 838 N.E.2d at 400; *Illinois v. Faircloth*, 599 N.E.2d 1356 (Ill. App. 1992).

96. *Boand*, 838 N.E.2d at 400-01.

97. *Id.* at 401 (citing *Illinois v. Dekens*, 695 N.E.2d 474 (Ill. 1998), for the proximate cause element).

98. *Illinois v. Lowery*, 687 N.E.2d 973, 975-76 (Ill. 1997).

99. *Id.* at 976.

100. *Boand*, 838 N.E.2d at 402.

D. THE FINAL AND MOST RECENT TIME THE ILLINOIS COURTS HAVE
ADDRESSED THE DRUG-INDUCED HOMICIDE STATUTE—*FAIRCLOTH V.*
STERNES (2006)

Faircloth returned for another appeal, this time attempting to challenge the constitutionality of the Drug-Induced Homicide Statute based on the premise the statute imposes a murder-type punishment without requiring a murder-type mens rea.¹⁰¹ Faircloth also attempted to argue the statute additionally violated the Illinois Constitution based on the Proportionate-Penalties Clause.¹⁰²

The holding for this case is essentially a reiteration of the court's findings a year earlier in *Boand*.¹⁰³ The court stated it was foreseeable that a person could die from the delivery of drugs and suggesting otherwise was "contrary to common experience . . . [and] contrary to the spirit of numerous Illinois laws that criminalize the sale, delivery and use of illegal drugs."¹⁰⁴ Finally, the court also rejected the proportionality argument because the penalty imposed by the statute did not "shock the moral sense of the community" considering a person died as a result of Faircloth's actions.¹⁰⁵

Considering the same appellate court had written the holding for *Boand* less than a year prior to this case, it was little surprise the court refused to find *Boand* wrongly decided.¹⁰⁶ *Faircloth* was the last time any Illinois court has addressed the validity of the Drug-Induced Homicide Statute.¹⁰⁷

V. AN ANALYSIS OF ILLINOIS'S MENTAL STATE REQUIREMENTS FOR
STATUTES AND HOW THEY RELATE TO THE DRUG-INDUCED HOMICIDE
STATUTE

Illinois has specific requirements for its statutes in regards to the mental state of a defendant, as described in the Illinois Compiled Statutes: "(a) A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in Sections 4-4 through 4-7."¹⁰⁸

101. Faircloth v. Sternes, 853 N.E.2d 878, 880-81 (Ill. App. Ct. 2006).

102. *Id.* at 881.

103. *See id.*; *see also Boand*, 838 N.E.2d 367.

104. *Faircloth*, 853 N.E.2d at 884.

105. *Id.*

106. *See id.*; *see also Boand*, 838 N.E.2d 367.

107. *See Faircloth*, 853 N.E.2d 878.

108. 720 ILL. COMP. STAT. 5/4-3 (2010).

Sections 4-4 through 4-7 recite the four commonly known mental states when it comes to criminal statutes: intent, knowledge, recklessness, and negligence.¹⁰⁹ In order for a statute to avoid any mental state by allowing for strict liability, Illinois requires the offense cannot be more serious than a misdemeanor.¹¹⁰ Therefore, in order to comply with section (a) of the statute, it was necessary for Illinois courts to find some form of mental state to apply to the Drug-Induced Homicide Statute.¹¹¹ This is likely why Illinois courts that addressed the Drug-Induced Homicide Statute held the mental state of knowledge found within the Illinois Controlled Substance Act also applies to drug-induced homicide.¹¹²

The Illinois statute also requires in section (b) that each element of a statute is clearly defined with a mental state, or that a mental state of recklessness, knowledge, or intent may be assumed:

(b) If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element. If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4, 4-5 or 4-6 is applicable.¹¹³

While the courts may choose to interpret the necessary intent for the delivery of the controlled substance within the Drug-Induced Homicide Statute as knowledge, there was clearly no mental state assigned to the death element of the statute.¹¹⁴

Based on the language of the Illinois statute, one clear option the Illinois courts had, but did not follow, was to interpret the Drug-Induced Homicide Statute by applying the knowledge mental state to each element of the offense, both the delivery of the controlled substance as well as the resulting death.¹¹⁵ Furthermore, a second option based on the statute and other previous court holdings of assigning a mental state of recklessness or higher

109. 720 ILL. COMP. STAT. 5/4-4 to -7 (2010).

110. 720 ILL. COMP. STAT. 5/4-9 (2010).

111. See 720 ILL. COMP. STAT. 5/4-3 (2010). Furthermore, the Illinois Supreme Court has held that it would not assume strict liability for statutes that did not have a prescribed mental state. See, e.g., *Illinois v. Anderson*, 591 N.E.2d 461 (Ill. 1992).

112. 720 ILL. COMP. STAT. 5/9-3.3 (2011); 720 ILL. COMP. STAT. 570/401 (2010); see, e.g., *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005).

113. 720 ILL. COMP. STAT. 5/4-3 (2010).

114. 720 ILL. COMP. STAT. 5/9-3.3 (2011).

115. See, e.g., *Illinois v. Faircloth*, 599 N.E.2d 1356, 1360 (Ill. App. Ct. 1992); *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005).

to the death element was also not utilized by the courts in *Faircloth* and *Boand*.¹¹⁶ Instead of following either of the two paths described by statute, the courts decided to compare the Drug-Induced Homicide Statute with Illinois's felony murder law.¹¹⁷

VI. ILLINOIS'S FELONY MURDER STATUTE AND COMPARISONS TO THE DRUG-INDUCED HOMICIDE STATUTE

Illinois implemented the Felony Murder Statute¹¹⁸ in an attempt to limit the violence that often accompanies certain felonies by making a murder conviction available to a person that killed someone while carrying out a forcible felony.¹¹⁹ There are only two elements to Illinois's felony murder rule: "(1) that the defendant was a participant in a forcible felony; and (2) that the victim was killed during the commission of the felony as a direct and foreseeable consequence of it."¹²⁰ The courts have further interpreted that the foreseeable consequence (as described in element two) follows the proximate cause theory, a minority position with respect to other states' felony murder interpretations.¹²¹ There are several stark differences that become apparent when the appellate courts attempt to utilize components of the Felony Murder Statute and apply them to the Drug-Induced Homicide Statute.¹²²

First, the Felony Murder Statute has almost always been regarded as an exception to the rule.¹²³ In fact, in virtually every felony criminal statute in the country, and especially with regards to murder and homicide statutes, there is a requirement for both an act and specified mental state.¹²⁴ The Illinois courts have stated "[t]he offense of felony murder is unique because it does not require the State to prove the intent to kill."¹²⁵ This aspect alone makes it rather unlikely the Illinois legislature contemplated the Drug-

116. 720 ILL. COMP. STAT. 5/4-3 (2010). *See also, e.g.*, Illinois v. Gean, 573 N.E.2d 818, 822 (Ill. 1991) (stating that when an Illinois statute does not prescribe a mental state, "then either intent, knowledge or recklessness applies").

117. *See, e.g., Boand*, 838 N.E.2d 367.

118. 720 ILL. COMP. STAT. 5/9-1 (2010).

119. *See, e.g., Illinois v. Schmidt*, 924 N.E.2d 998 (Ill. App. Ct. 2009); Illinois v. Graham, 791 N.E.2d 724 (Ill. App. Ct. 2003).

120. Illinois v. Milka, 783 N.E.2d 51, 71 (Ill. App. Ct. 2003).

121. *See, e.g., Illinois v. Ruiz*, 795 N.E.2d 912 (Ill. App. Ct. 2003). Most states follow the agency theory instead of the proximate cause theory. *See James W. Hilliard, Felony Murder in Illinois—the "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 25 S. ILL. U. L.J. 331 (2001).

122. *See* 720 ILL. COMP. STAT. 5/9-1, -3.3 (2010).

123. *See Osran, supra* note 9, at 544.

124. *See id.*

125. Illinois v. Davison, 923 N.E.2d 781, 785-86 (Ill. 2010).

Induced Homicide Statute would be analogous to the characteristics of felony murder.¹²⁶

Second, based on Illinois courts' expression of the uniqueness of the statute, it seems unlikely the Illinois Supreme Court would extend felony murder characteristics to non-forcible felonies, such as the delivery of a controlled substance.¹²⁷ The Illinois Supreme Court has expressly stated felony murder is not supposed to be treated the same way as any other statute because "[i]t is the inherent dangerousness of forcible felonies that differentiates them from nonforcible felonies."¹²⁸ It would seem if the Illinois legislature wanted drug-induced homicide to follow in the path of felony murder, it would have stated so clearly or simply expanded the statute on felony murder to include controlled substance deliveries as forcible felonies.¹²⁹ In fact, there is no reference to felony murder in either the Illinois House or Senate debates when the Drug-Induced Homicide Statute was passed.¹³⁰

Third, under Illinois's Felony Murder Statute, the killing resulting in the charge must occur during the commission of a forcible felony.¹³¹ Therefore, an individual's risk of committing felony murder has a specific ending point, which is the same moment the forcible felony comes to an end.¹³² On the other hand, in regards to drug-induced homicide, the courts have stated after the knowing delivery of a controlled substance, the deliverer commits the offense at any point in time any person dies as a result of the controlled substance.¹³³ In effect, the person delivering the drugs could violate the statute the same day as delivering the drugs, a year later, ten years later, or perhaps even fifty years later, since there is no ending point in time for the potential liability of any person dying as a result of the controlled substance.¹³⁴ The statute of limitations under the current Drug-Induced Homicide Statute would also not prevent potential unlimited exposure to criminal liability because the statute would not be violated until the victim died, and thus, the statute of limitations could potentially not arise for months or years after the delivery of a controlled substance.¹³⁵ It seems unlikely the legislative intent for the Drug-Induced Homicide Statute was for every per-

126. *See id.*

127. *See, e.g.,* Illinois v. Lowery, 687 N.E.2d 973 (Ill. 1997).

128. *Id.* at 977.

129. *See id.*

130. Transcript of Debates, H.B. 4125, Illinois House of Representatives, 85th Gen. Assemb., 2d Sess., May 20, 1988, at 190-94; Transcript of Debates, H.B. 4125, Illinois Senate, 85th Gen. Assemb., 2d Sess., June 24, 1988, at 92-95.

131. *See, e.g.,* Illinois v. Hall, 683 N.E.2d 1143 (Ill. App. Ct. 1993).

132. *Id.*

133. *See* Illinois v. Boand, 838 N.E.2d 367 (Ill. App. Ct. 2005).

134. *See id.*

135. *See* 720 ILL. COMP. STAT. 5/9-3.3 (2011).

son participating in the chain of delivery, no matter how small, of a controlled substance to be exposed to potential criminal liability for eternity.¹³⁶

Fourth, under the Felony Murder Statute “the defendant [must have] acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong possibility of death or great bodily harm to the murdered individual or another.”¹³⁷ Studies have shown an individual using heroin, an arguably more dangerous drug than methadone, only has a 0.00035% chance of dying as a result of each individual injection.¹³⁸ Since the court in *Boand* interpreted the mere delivery of a controlled substance as an act creating the strong possibility of death, virtually every circumstance involving the delivery of a controlled substance where a person dies would violate the Drug-Induced Homicide Statute.¹³⁹ This means in the following hypothetical situations there would be a violation of the Drug-Induced Homicide Statute, and those mentioned would be liable for between fifteen and thirty years in prison.¹⁴⁰

1. A husband and wife have been using heroin together daily for a decade, and due to a drug dealer supplying a bad batch of heroin, the wife dies after injecting herself. Not only is the drug dealer liable for her death, but the husband would be as well if he happened to pick up the heroin that particular morning.

2. Person A sells marijuana to Person B, who goes home and smokes a small quantity of the marijuana. Person B, while high, decides to end his life and jumps out the window resulting in his death. Person A would be liable for his death since Person B may not have jumped had he not been under the influence.

3. Person A gives a friend some marijuana at a party. Four months later the friend smokes some of the marijuana and gets into a car accident while high, killing a person in another vehicle. Not only is the friend liable for the death, but so is Person A for delivering the marijuana to the friend.

4. Twenty people are in a row together attending a rock concert. The first person pulls out a baggy of ecstasy pills, takes one, and passes the

136. *See id.*

137. 720 ILL. COMP. STAT. 5/9-1(6)(b) (2010).

138. Osran, *supra* note 9 (citing Lynne H. Rambo, Note, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drugs*, 20 GA. L. REV. 671, 689 (1986)).

139. *See Boand*, 838 N.E.2d at 401-02.

140. *See* 720 ILL. COMP. STAT. 5/9-3.3 (2011).

bag down the line. Out of the twenty people, only four actually consume an ecstasy pill. The twentieth person in the row has an allergic reaction and dies. Not only is the first person liable, but so are the other eighteen people in the row for knowingly delivering the ecstasy to the next person in line. Each of the nineteen people, even those that did not even take a pill, could be found guilty of drug-induced homicide and sentenced to up to thirty years in prison.

While these may just be hypothetical situations, any of them could easily occur, again raising the question as to what degree the legislature wanted to extend the liability for committing drug-induced homicide.¹⁴¹

If the Illinois legislature had intended for drug-induced homicide to accept characteristics from the Felony Murder Statute, it would have addressed and detailed to what extent liability would apply.¹⁴² Since the Illinois legislature was silent beyond relating drug-induced homicide to the unlawful delivery of a controlled substance, it seems unlikely the legislature intended for the statute to apply in the same context as felony murder.¹⁴³ Therefore, the *Boand* court altered the intent of the legislature by allowing a mens rea to apply only to the delivery of the controlled substance and not to the death.¹⁴⁴

VII. COMPARING ILLINOIS'S DRUG-INDUCED HOMICIDE STATUTE TO SIMILAR LAWS IN OTHER STATES

When the War on Drugs was running rampant through the 1980s,¹⁴⁵ Illinois was not the only state legislature that sought to bring harsher punishments to crimes involving the delivery of drugs that resulted in death.¹⁴⁶ Many states across the nation looked to combat the influx of drug-related crimes through new criminal statutes, and some, like Illinois, focused on attempting to prevent deaths caused by illegal controlled substances.¹⁴⁷ Although Illinois has recently started to see an increase in drug-induced homi-

141. Transcript of Debates, H.B. 4125, Illinois House of Representatives, 85th Gen. Assemb., 2d Sess., May 20, 1988, at 190-94.

142. See *Boand*, 838 N.E.2d 367.

143. See *id.*

144. See *id.*

145. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1985).

146. E.g., MICH. COMP. LAWS ANN. § 750.317a (West 2011); N.J. STAT. ANN. § 2C:35-9 (West 2011); 18 PA. CONS. STAT. ANN. § 2506 (West 2011); WASH. REV. CODE ANN. § 69.50.415 (West 2011); WYO. STAT. ANN. § 6-2-108 (West 2011).

147. See, e.g., MICH. COMP. LAWS ANN. § 750.317a (West 2011); N.J. STAT. ANN. § 2C:35-9 (West 2011); 18 PA. CONS. STAT. ANN. § 2506 (West 2011); WASH. REV. CODE ANN. § 69.50.415 (West 2011); WYO. STAT. ANN. § 6-2-108 (West 2011).

cide charges, other states have still seen very little case law, if any, regarding their similar drug-induced homicide laws.¹⁴⁸ Therefore, even though many states have similar laws to Illinois's law on the books, only a handful of them have been addressed by their courts.¹⁴⁹

A. COMPARING WYOMING'S DRUG-INDUCED HOMICIDE STATUTE TO ILLINOIS'S DRUG-INDUCED HOMICIDE STATUTE

Whereas the Illinois Drug-Induced Homicide Statute leaves liability open to the deliverer of the controlled substance no matter who receives the drugs and no matter who dies as a result, the Wyoming statute seeks to reign in the vast liability presented in the Illinois statute by requiring that the death is a result from the "unlawful[] deliver[y] [of] a controlled substance to a minor and that minor dies as a result . . . of that controlled substance."¹⁵⁰ Additionally, the maximum punishment for the Wyoming statute is for "imprisonment in the penitentiary for not more than twenty . . . years."¹⁵¹ While the Wyoming law does not fully address the confusion that is caused by a lack of mens rea, it does remedy the issues with the Illinois law by dealing with extending the liability past the recipient of the controlled substance as well as requiring the victim be a minor to prevent scenarios where grown adults who are married or friends may end up liable for the other's death despite the drug usage being undertaken together.¹⁵²

B. COMPARING NEW JERSEY'S DRUG-INDUCED DEATH STATUTE TO ILLINOIS'S DRUG-INDUCED HOMICIDE STATUTE

In New Jersey, the legislature clearly set forth that the death resulting from the delivery of a controlled substance was a strict liability offense in its Drug-Induced Death Statute, which states "[a]ny person who manufactures, distributes or dispenses . . . any . . . controlled substance . . . is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and is guilty of the crime of the first degree."¹⁵³

For New Jersey's statute, unlike the Illinois version, the mens rea, or lack thereof, was specifically written to make the deliverer of the controlled substance strictly liable for any death that occurs.¹⁵⁴ The strict liability ele-

148. For example, the only case that has made it to the appellate court level in New Jersey is *State v. Ervin*, 577 A.2d 1273 (N.J. Super. Ct. App. Div. 1990), and no cases have yet been addressed by the New Jersey Supreme Court.

149. *Id.*

150. WYO. STAT. ANN. § 6-2-108 (West 2011).

151. *Id.*

152. *See id.*; *see also* 720 ILL. COMP. STAT. 5/9-3.3 (2011).

153. N.J. STAT. ANN. § 2C:35-9 (West 2011).

154. *Id.*

ment has been upheld by the New Jersey superior courts because it was clearly written that way by the legislature and is still “limited . . . to deaths which are the proximate consequences of inherently dangerous illegal activities.”¹⁵⁵ Although a strict liability theory may work for the New Jersey version of the statute,¹⁵⁶ Illinois courts would err if they were to make the same holding because of the Illinois statute regarding strict liability, which states no crime may be considered a strict liability offense if it is greater than a misdemeanor.¹⁵⁷

While the official interpretation by Illinois courts is that the Drug-Induced Homicide Statute follows the proximate cause theory seen most prominently in felony murder, there seems to be little contrast between this interpretation and strict liability because, under either theory, the actor's mental state is irrelevant.¹⁵⁸ The key difference between the two drug-induced homicide statutes is that the New Jersey statute has much more clarity and complies with the other state laws, whereas the Illinois law does not fit in with the current laws and is forbidden from being interpreted as a strict liability offense because of another state law.¹⁵⁹

C. COMPARING PENNSYLVANIA'S DRUG DELIVERY RESULTING IN DEATH STATUTE TO ILLINOIS'S DRUG-INDUCED HOMICIDE STATUTE

Of all the states that have a law similar to Illinois's Drug-Induced Homicide Statute, Pennsylvania has the most case law addressing the constitutionality of these types of statutes.¹⁶⁰ In part, this is because the original version of the Pennsylvania statute was held unconstitutional in the case *Pennsylvania v. Highhawk*, and therefore, the law needed to be reworked and reanalyzed to ensure the new law was constitutionally sound.¹⁶¹ Initially, the Pennsylvania statute read similarly to the Illinois version: “[a] person commits murder of the third degree who administers, dispenses, delivers, gives, prescribes, sells, or distributes any controlled substance or counterfeit controlled substance in violation of . . . [t]he Controlled Substance, Drug,

155. See *State v. Ervin*, 577 A.2d 1273, 1276 (N.J. Super. Ct. App. Div. 1990).

156. See *id.*

157. 720 ILL. COMP. STAT. 5/4-9 (2010).

158. See, e.g., *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005).

159. See N.J. STAT. ANN. § 2C:35-9 (West 2011); see also 720 ILL. COMP. STAT. 5/9-3.3 (2011); 720 ILL. COMP. STAT. 5/4-9 (2010).

160. See, e.g., *Pennsylvania v. Ludwig*, 874 A.2d 623 (Pa. 2005); *Pennsylvania v. Nahavandian*, 849 A.2d 1221 (Pa. Super. Ct. 2004), *vacated*, 888 A.2d 815 (Pa. 2006); *Pennsylvania v. Highhawk*, 687 A.2d 1123 (Pa. Super. Ct. 1997).

161. The original version of the statute was found unconstitutional in *Highhawk*, 687 A.2d at 1129, and the revised version was then found constitutional in *Nahavandian*, 849 A.2d at 1228.

Device and Cosmetic Act, and another person dies as a result of using the substance.”¹⁶²

The court in *Highhawk* found certain language in the statute dealing with the sentencing requirements to be “unclear and ambiguous,” and held the statute unconstitutional because the language did not “give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction.”¹⁶³ Because the confusing language alone was sufficient to find the statute unconstitutional, the court did not address the lack of the mens rea requirement until the statute was rewritten by the legislature.¹⁶⁴

Pennsylvania v. Nahavandian was the first case in which the Pennsylvania courts addressed the mens rea requirement of the current statute.¹⁶⁵ In this case, the defendant supplied heroin to a couple of people that were out partying for the night, one of which died from overdosing.¹⁶⁶ After the defendant was convicted under the statute, he appealed the conviction under many theories, including that the statute was unconstitutional due to a lack of a stated mens rea.¹⁶⁷ Because the language of the statute refers to the violation as “murder in the third degree,” the court applied the mens rea required for other forms of murder in the third degree, which in Pennsylvania is malice.¹⁶⁸ Since a finding of malice would be up to the fact finders of the case, the court upheld the defendant’s conviction based on the sufficiency of the evidence to meet the necessary elements.¹⁶⁹ Two years later, however, this conviction was vacated by the Pennsylvania Supreme Court for consideration in light of its ruling in *Pennsylvania v. Ludwig*.¹⁷⁰

Pennsylvania v. Ludwig was really the first time the Pennsylvania courts directly and fully addressed the issue of mens rea.¹⁷¹ In this case, the defendant was contacted and met up with fifteen-year-old, seventeen-year-old, and eighteen-year-old girls and sold them each a double-stacked pill of ecstasy.¹⁷² After consuming the pills, the fifteen-year-old girl became violently ill and ultimately died due to an overdose.¹⁷³ Initially, the trial court held the statute was unconstitutionally vague because, based on the lan-

162. The language of the original version of the statute can be found in *Highhawk*, 687 A.2d at 1124.

163. *Id.* at 1125, 1127-28 (citing *Pennsylvania v. Heinbaugh*, 354 A.2d 244, 246 (Pa. 1976)).

164. *Id.* at 1129; see also *Nahavandian*, 849 A.2d 1221.

165. *Nahavandian*, 849 A.2d 1221.

166. *Id.* at 1226.

167. *Id.*

168. *Id.* at 1228.

169. *Id.* at 1233.

170. *Pennsylvania v. Nahavandian*, 888 A.2d 815 (Pa. 2006).

171. *Pennsylvania v. Ludwig*, 874 A.2d 623 (Pa. 2005).

172. *Id.* at 626.

173. *Id.* at 627.

guage of the statute, it was impossible to determine if the applicable mens rea included malice or was intended to be a strict liability offense.¹⁷⁴

The Pennsylvania Supreme Court affirmed this finding based on two reasons.¹⁷⁵ First, the court stated the culpability requirement for third degree murder has “consistently” been malice.¹⁷⁶ Secondly, the Pennsylvania Supreme Court addressed the issue of the sufficiency of the evidence.¹⁷⁷ The court noted that “supplying an illegal and *potentially* dangerous substance of unknown quality to another does not in and of itself support a finding of malice.”¹⁷⁸ The court went on to hold that supplying an illegal drug to a minor (or anybody for that matter) that was potentially harmful without knowing the recipient’s medical history to determine how the drug might react in their system, providing a double dose of the drug, and receiving money for the illegal drug was not enough evidence to establish a prima facie case of malice in order to establish a finding of guilt.¹⁷⁹

The Pennsylvania courts have gone on to interpret the statute as requiring the mental state of malice as opposed to strict liability (as held by the New Jersey courts) or a comparison to felony murder (like Illinois’s interpretation of its Drug-Induced Homicide Statute).¹⁸⁰ Pennsylvania has managed to balance increasing punishment to people who deliver an illegal controlled substance resulting in a person’s death with a statutory interpretation adhering to the fundamental underlying principle of criminal law that a person should be punished for his crime based on his mental culpability.¹⁸¹

D. OVERVIEW OF HOW OTHER STATES HAVE WRITTEN OR INTERPRETED THEIR STATUTES SIMILAR TO ILLINOIS’S DRUG-INDUCED HOMICIDE STATUTE

Clearly, there is no consensus across the states as how to formulate and interpret a law designed to additionally punish those who deliver a controlled substance when, as a result of that delivery, someone dies.¹⁸² The Wyoming statute does not address the issue of mens rea, but does specify that the deceased must have been the individual the controlled substance

174. *Id.* at 627-28.

175. *Id.*

176. *Ludwig*, 874 A.2d at 630.

177. *Id.* at 632.

178. *Id.*

179. *Id.* at 633-34.

180. *See, e.g., Ludwig*, 874 A.2d 623; *see also Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005); *State v. Ervin*, 577 A.2d 1273 (N.J. Super. Ct. App. Div. 1990).

181. *See, e.g., Ludwig*, 874 A.2d 623.

182. *E.g.,* 720 ILL. COMP. STAT. 5/9-3.3 (2011); MICH. COMP. LAWS ANN. § 750.317a (West 2011); N.J. STAT. ANN. § 2C:35-9 (West 2011); 18 PA. CONS. STAT. ANN. § 2506 (West 2011); WASH. REV. CODE ANN. § 69.50.415 (West 2011); WYO. STAT. ANN. § 6-2-108 (West 2011).

was delivered to in order for the crime to have been committed.¹⁸³ In New Jersey, the legislation relies on strict liability in regards to the death of anybody as a result of the delivery of the controlled substance.¹⁸⁴ Finally, Pennsylvania has held a mens rea of malice is required in order for a conviction to be maintained.¹⁸⁵ Perhaps, in part, because there is little case law in virtually every state regarding statutes dealing with drug-induced homicide, little consensus has developed across the country as to the best way to design and interpret the appropriate statutes in order to increase the punishment for delivering a controlled substance resulting in another person's death.

VIII. CONCLUSION

While the intent of the 1988 Illinois legislature was undoubtedly in the right place when it passed the Drug-Induced Homicide Statute to curb drug related deaths, the drafters of the statute's language did a poor job writing a law that was clear, understandable, and constitutional.¹⁸⁶ While the statute is quite clear that the delivery of the controlled substance must be knowingly, as found in the Controlled Substance Act, section 55, a mens rea requirement for death is entirely absent in the Illinois statute.¹⁸⁷

The Illinois appellate courts have interpreted this lack of mens rea to imply that the legislature drafted the statute with the intent for it to play out similar to the felony murder doctrine, despite the complete absence of any such language to that effect within the statute.¹⁸⁸ Furthermore, in applying the felony murder doctrine to the statute, it has the effect of broadening the statute to apply to any knowing delivery of an illegally controlled substance that, no matter how, proximately causes the death of any person, whether they were the recipient of the delivery or not.¹⁸⁹ Under the current interpretation of the statute, the deliverer of the controlled substance would be liable even if the deceased used the controlled substance to commit suicide or died from an allergic reaction.¹⁹⁰ It seems unlikely the original drafters of the Drug-Induced Homicide Statute intended for this outcome without specifying their intent for a proximate cause theory to apply within the statute.¹⁹¹ Without clear language or reasonable inferences that could be made

183. See WYO. STAT. ANN. § 6-2-108 (West 2011).

184. See *Ervin*, 577 A.2d 1273.

185. See *Ludwig*, 874 A.2d 623.

186. See 720 ILL. COMP. STAT. 5/9-3.3 (2011).

187. *Id.*; 720 ILL. COMP. STAT. 646/55 (2010).

188. See *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005).

189. See *id.*

190. See *id.*

191. See 720 ILL. COMP. STAT. 5/9-3.3 (2011).

from the current way the statute is written, it should be held unconstitutional for being overly vague.¹⁹²

This does not mean drug-induced homicide should necessarily be completely scrapped from Illinois's Criminal Code.¹⁹³ After all, the intent and desire to curb deaths resulting from the delivery of controlled substances is still as prevalent today as in the 1980s.¹⁹⁴ It is this author's opinion that Pennsylvania's statute and its interpretation by its courts is the best amongst all the states, including Illinois's statute, because it clearly and in a straightforward manner explains the elements of the crime and contains a clear mens rea requirement of malice.¹⁹⁵ This will cause some separation from the strict liability and felony murder interpretations that increase punishment for an identical crime simply because someone died as a result of the delivery, but still allow increased punishment beyond the mere delivery of a controlled substance when the deliverer is acting with malice or with knowing or purposeful intent that leads to the death of another.¹⁹⁶

Furthermore, revising the current Illinois statute, would allow the public to fully understand the potential consequences of their actions, whereas with the current interpretation it is unlikely an ordinary person would visualize the connection between Illinois's proximate cause theory found in felony murder with the necessary culpability for drug-induced homicide.¹⁹⁷ Therefore, one of two solutions should be taken by Illinois's courts: (1) hold the current version of the law unconstitutional and leave it up to the legislature to decide the requisite mens rea with regards to the death occurring from the delivery of an illegally controlled substance,¹⁹⁸ or (2) follow the holding of *Illinois v. Gean* to proscribe a mens rea to the statute of recklessness or above (i.e., knowledge or intent).¹⁹⁹ Either of these two solutions would be vastly superior to the current illogical interpretation of Illinois's Drug-Induced Homicide Statute.²⁰⁰ By addressing the lacking mens rea element, by either solution, the Illinois courts can ensure the Illinois Drug-

192. See *id.*

193. See *id.*

194. Jessica Reichert, *Prescription Drug Abuse, Accidental Overdose on Rise in Illinois*, 8 ILL. CRIM. JUST. INFO. AUTHORITY RES. BULL., June 2011, at 1, 3 (stating that unintentional drug overdoses have increased forty-nine percent between 1999 and 2007).

195. See, e.g., 18 PA. CONS. STAT. ANN. § 2506 (West 2011); *Pennsylvania v. Ludwig*, 874 A.2d 623 (Pa. 2005). See also 720 ILL. COMP. STAT. 5/9-3.3 (2011).

196. See, e.g., *Ludwig*, 874 A.2d 623; *Illinois v. Boand*, 838 N.E.2d 367 (Ill. App. Ct. 2005); *State v. Ervin*, 577 A.2d 1273 (N.J. Super. Ct. App. Div. 1990).

197. See *Boand*, 838 N.E.2d 367.

198. See 720 ILL. COMP. STAT. 5/9-3.3 (2011).

199. *Illinois v. Gean*, 573 N.E.2d 818, 822 (Ill. 1991) (stating when an Illinois statute does not prescribe a mental state within its own language either intent, knowledge, or recklessness applies).

200. See 720 ILL. COMP. STAT. 5/9-3.3 (2011).

Induced Homicide Statute does not encroach on the public's right to have fair and equitable laws that are reasonably understandable.²⁰¹

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201. *See id.*

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