FINDING BABY BEAR’S BED:
THE “JUST RIGHT” ALTERNATIVE TO THE ILLINOIS SUPREME COURT’S
PROPORTIONATE PENALTIES ZERO-SUM GAME IN PEOPLE V. SHARPE

By Joy Leanne Powers
Chicago-Kent School of Law

On October 6, 2005, the Illinois Supreme Court suddenly declared that “something has gone terribly wrong with this court’s proportionate penalties jurisprudence,”[1] and reversed more than twenty years of precedent by eliminating the cross-comparison proportionality test, changing drastically the Illinois proportionate penalties landscape. The Illinois Proportionate Penalties clause guarantees that a criminal penalty be determined according to the offense’s seriousness.[2] According to the Court, applying the existing cross-comparison proportionality test had become too difficult and too unpredictable.[3] Thus, the Court eliminated the test, disputing its legitimacy, its predictability, and its ultimate reach, and declaring that “judging penalties by a comparison with penalties for offenses with different elements should never have been part of our proportionate penalties jurisprudence.”[4] The Sharpe decision ushered in an era of proportionality review that, like Mama Bear’s bed in the classic Goldilocks story, was “too soft” on disproportionality.

While the Illinois Supreme Court correctly argues that the cross-comparison test had questionable origins, has spawned inconsistent caselaw, and renders important provisions unconstitutional, the Court’s analysis fails to recognize that the cross-comparison test provided a valuable protection to criminal defendants and internal consistency in the Criminal Code. This paper thus considers a proposed “Just Right” cross-comparison proportionate penalties test from the perspective of two distinct case-studies: the 15-20-25 to Life firearm enhancement
scheme and attempt second degree murder, arguing that a less-expansive cross-comparison proportionate penalties test should have been embraced in *People v. Sharpe*.

Before engaging in a comprehensive analysis of *People v. Sharpe*, Part I will paint an initial “broad stroke” introduction to the “too hard” proportionate penalties jurisprudence. Part II will then examine the *Sharpe* decision itself, critiquing the Illinois Supreme Court’s arguments in favor of eliminating the cross-comparison proportionality test. Part III will present the most compelling reasons in favor of a cross-comparison test. In Part IV, this paper will introduce and consider the desirability of a modified, “Just Right” cross-comparison test. This “Just Right” solution’s utility will be tested by application to two case studies which represent the cross-comparison test’s thorniest applications: the attempt second degree murder conundrum and the highly disproportionate 15-20-25 to Life firearm enhancement scheme. Lastly, Part V will conclude that the “Just Right” cross-comparison test is a better solution than either the existing cross-comparison test or the *Sharpe* solution, and will recommend that either the Illinois Supreme Court reverse its holding in *Sharpe* or the Illinois legislature adopt a statute incorporating a “Just Right” cross-comparison test into the Illinois Criminal Code.

**Part I: Too Soft**

**Proportionate Penalty Jurisprudence Before People v. Sharpe**

Prior to *People v. Sharpe*, Illinois proportionate penalties jurisprudence had been reasonably well settled. The Proportionate Penalties Clause of the Illinois Constitution requires that “All penalties... be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”[6] Prior to *Sharpe*, whether a penalty had been set “according to the seriousness of the offense” was determined using any one of three
different tests: the “shocks the conscience” test,\(^\text{[7]}\) the “cross-comparison test,” and the “identical elements” test.\(^\text{[8]}\) Post-Sharpe, a defendant may challenge a penalty’s proportionality using only two tests: the “shocks the conscience” test and the “identical elements” test.\(^\text{[9]}\)

\[A. \quad \text{The “Shocks the Conscience” Proportionality Test}\]

First, defendants may contest a penalty’s constitutionality on the basis that it is “cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.”\(^\text{[10]}\) In 1926, the Illinois Supreme Court noted that a penalty would violate the proportionate penalties clause under this test only if it was “a cruel or degrading punishment not known to the common law, or a degrading punishment which had become obsolete in the State prior to the adoption of its constitution.”\(^\text{[11]}\) In People v. Landers, the Court elaborated that “the nature, character and extent of penalties are matters almost wholly legislative, and the courts have jurisdiction to interfere with legislation upon the subject only where the penalty in manifestly in excess of the very broad and general constitutional limitation invoked.”\(^\text{[12]}\) As such, a penalty viewed by the Court as absurd or unwise will survive constitutional challenge; only a penalty that “shock[s] the conscience of reasonable men” would be outside the parameters of the Proportionate Penalties Clause.\(^\text{[13]}\) Thus, the “shocks the conscience” test, like the Eighth Amendment, appears to provide protection from only “cruel or degrading” forms of punishment.\(^\text{[14]}\)

The “shocks the conscience” test has never been evoked to strike a penalty based purely on its sheer length.\(^\text{[15]}\) Perhaps part of the problem is that there is no articulated benchmark with which to compare challenged punishments. Illinois courts have not defined what punishments might be cruel, degrading, or morally shocking because the concepts of “elemental
decency and fairness which shape the ‘moral sense’ of the community” evolve as society evolves.”[16] Thus, a court evaluating a punishment under the “shocks the conscience” test must weigh the gravity of the offense against the severity of the penalty “within our community’s evolving standard of decency.”[17]

B. The “Cross-Comparison” Proportionality Test

Second, a penalty violated the proportionality clause under the “cross-comparison” test where a suitable comparison offense considered a lesser threat to public health and safety was punished more severely than the charged offense.[18] A defendant challenging a penalty under the “cross-comparison” test must make three showings:[19] first, that the chosen comparison offense and the defendant’s offense have similar statutory purposes and are therefore appropriate for comparison;[20] second, that the comparison offense is more serious than the defendant’s offense; and third, that the comparison offense is punished less severely than the defendant’s offense.[21] The first step is a threshold requirement: courts will not compare offenses if they do not share a common statutory purpose because courts presume that “the legislature considered different factors in establishing the penalties” of offenses with different purposes.[22]

After establishing similarity of purposes, the defendant must compare the two offenses.[23] A court considers the factors evaluated by the legislature when setting an offense’s penalty, including the crime’s frequency, its risk of bodily harm, and any recent increase its commission.[24] Because the legislature is “better equipped than the judiciary to identify and remedy the evils confronting our society, and…more capable of gauging the seriousness of an offense,” courts generally defer to the legislature’s judgment that an offense is more serious than another.[25] Once a court determines that the comparison offense is more serious than the
charged offense, the defendant need only show that the comparison offense is punished less severely and the charged offense is unconstitutionally disproportionate. [26]

For example, in *People v. Pizano*, the defendant argued that possession of a fraudulent identification card was punished more severely than another offense involving the use of a fraudulent identification card with intent to commit theft, yet was less serious.[27] Possession of a fraudulent identification card is committed where a person knowingly possesses or displays a fraudulent identification card, and is a Class 4 felony[28] that requires the additional sentence of a $500 fine or fifty hours of community service.[29] The comparison offense required that the offender possess a fraudulent card with the intent to commit a theft, and is a simple Class 4 felony.[30] The court found that the two offenses had the same purpose: the protection against all types of fraudulent conduct that arise from the possession and use of fraudulent identification documents.[31] After agreeing with the defendant that the comparison offense was more serious (because it required additional intent), the court held that possession of a fraudulent identification card was unconstitutionally disproportionate because it was punished more severely than a similar, more severe offense.[32]

The “cross-comparison” test has proven wildly successful and has been used to declare a wide variety of Illinois criminal offenses unconstitutional; its most comprehensive casualty was the 15-20-25 to Life firearm enhancement scheme. In *People v. Moss*, the “cross-comparison” test was used to strike down several provisions of the enhancement scheme;[33] courts and legislators have interpreted *Moss* to have held entire bill, including thirty-three fifteen, twenty, and twenty-five year enhancements for the use or presence of firearms during the commission of certain specified felonies, to be unconstitutional.[34] Additionally, “cross-comparison” review
has been evoked to strike penalties for armed violence,[35] attempt first degree murder (but only with the 15-20-25 to Life firearm enhancements),[36] indecent solicitation of an adult,[37] possession of a stolen motor vehicle,[38] possession of a fraudulent identification card, [39] and certain violations of the Fish Code.[40] Unsuccessful defendants have been foiled by the similar statutory purpose requirement[41] and by courts’ reluctance to find a comparison offense more serious than the charged offense.[42]

C. The “Identical Elements” Proportionality Test

Third, the proportionate penalties guaranty is violated if identical offenses warrant different sentences.[43] Under this test, a defendant compares his offense to a chosen offense with identical elements,[44] demonstrating that his offense is punished more severely.[45]

The “identical elements” test arose initially on the basis of a common sense argument: according to the Illinois Supreme Court, “common sense and sound logic would seemingly dictate that…penalties be identical where offenses are identical.”[46] When identical offenses receive different penalties, prosecutorial discretion “will effectively nullify” the lesser punished offense, a result that is contrary to the legislature’s intent when it enacted both statutes.[47] Unlike the first proportionality test, the “identical elements” test provides defendants with more protection than the federal Constitution.[48] In United States v. Batchelder, the Supreme Court held that permitting prosecutors discretion to choose between two statutes with identical elements did not violate the constitutional guarantees of equal protection or due process.[49]

Defendants have enjoyed some success when challenging sentences using the “identical elements” test. Specifically, the “identical elements” test has been evoked to strike some 15-20-25 to Life firearm enhancements,[50] as well as armed violence predicated on kidnapping[51]
and armed violence as predicated on robbery.\[52\] The success of the “identical elements” test is limited primarily by the difficulty of finding a suitable identical comparison offense.\[53\]

D. Limiting Factors on Proportionality Review

Proportionate penalties jurisprudence before Sharpe, although somewhat a boon to defendants, was not without its limits. Not only did each test have its own built-in “check,”\[54\] but two overarching doctrines limit the ability of any form of proportionate penalty review to be used to invalidate penalties.

First, when considering the proportionality of the 15-20-25 to Life enhancements, courts presume a statute is constitutional and have a duty to construe it in a manner that upholds its validity if this can reasonably be done.\[55\] Thus, the burden of demonstrating the unconstitutionality of a statute falls on the party challenging the statute.\[56\] The constitutionality of a statute is reviewed de novo by a higher court; thus, a holding deeming a statute unconstitutional may not be upheld on appeal.\[57\]

Additionally, undue judicial activism in the proportionate penalties context is limited by the doctrine of standing.\[58\] In the proportionate penalties context, a defendant has standing to challenge a penalty only as it applies to him.\[59\] As such, a single defendant cannot challenge all 15-20-25 to Life firearm enhancements, but can only challenge the particular enhancement under which he is charged or sentenced.\[60\] The standing requirement severely limits the reach of the proportionate penalties clause and the number of frivolous challenges: a suitable test case must be found for each challenged sentencing provision. The standing requirement, however,
can also lead to anomalous results, as some clearly disproportionate penalties remain on the books for want of a proper test case.[61]

Part II: Too Hard

A Critique of the Decision that Eviscerated Proportionate Penalty Review

In April 2001, Kenneth Sharpe was changed with first degree murder[62] for the fatal shooting of Bernard Magett.[63] The charges alleged that Sharpe was armed with a firearm, personally discharged a firearm, or personally discharged a firearm proximately causing death while committing the murder, and therefore included fifteen, twenty, and twenty-five year sentencing enhancements as required by the 15-20-25 to Life firearm sentencing enhancement scheme.[64] The Sharpe case reached the Illinois Supreme Court after the Circuit Court of Cook County held that the fifteen and twenty year enhancements were unconstitutionally disproportionate.[65] This case served as the catalyst for the Illinois Supreme Court to dramatically alter proportionate penalties jurisprudence by eliminating cross-comparison review.[66]

A. The Sharpe Rationale: What’s There and What’s Not

Due to the weight of the Sharpe decision and the changes that it wrought in the proportionate penalties landscape, the Supreme Court’s main arguments will be summarized and critiqued, with special attention paid to considerations that the Supreme Court apparently ignored, under-considered, or cast aside.

1. Stare Decisis

The Illinois Supreme Court’s two primary arguments against the cross-comparison
test are directed at *stare decisis* – critiquing the origins and development of the cross-comparison test.[67] These arguments are addressed separately because they attack different aspects of *stare decisis* – first, the cross-comparison test’s inception; and second, the cross-comparison test’s warbling rulification.

a. A Questionable *Cf.* Citation

First, the Illinois Supreme Court attacked the cross-comparison test’s inception in 1983’s

*People v. Wisslead* and grounding in then-existing law. In order to highlight the test’s questionable initial grounding, the Court began with a concise history of the proportionate penalties clause from its inception in the 1870 Illinois Constitution.[68] The Court focused on restrictive interpretations of the clause,[69] noting that as late as 1962, all legislatively defined penalties had survived proportionality review with one lone exception: a 1873 case where a railroad forfeited its franchise as a penalty for price discrimination.[70] This history demonstrated a consistent interpretation of the clause as placing little restraint on the legislature’s power to ascribe criminal penalties.[71]

The Court, however, believed that the hundred-year period of restraint terminated abruptly with a “dramatically different reading” of the proportionate penalties clause in *Wisslead.*[72] There, the defendant argued that the penalty for armed violence predicated on unlawful restraint[73] violated the due process and proportionate penalties clauses because the armed violence offense was less serious, yet punished more severely than the similar offenses of aggravated kidnapping and forcible detention.[74] The *Wisslead* Court agreed.[75] According to *Sharpe, Wisslead* “simply accepted the defendant’s argument without a discussion of the legal standards applicable.”[76] Apparently, the *Wisslead* Court never mentioned the time-honored
proportionate penalties challenges standard (the “shocks the conscience” test), never explained where it “derive[ed] the notion that a proportionate penalties challenge could be based on the comparison of the penalty for one offense to the penalty for a different offense,” and gave only a Cf. citation as a basis for its holding that the sentencing discrepancy violated the proportionate penalties clause.[77]

This Cf. citation particularly enraged the Sharpe majority because it referred to two earlier due process cases, People v. Bradley[78] and People v. Wagner,[79] without explanation.[80] Both Bradley and Wagner stood for the proposition that the due process clause would invalidate a penalty where a less serious offense was punished more severely than a more serious offense.[81] Although the Sharpe Court believed that Wisslead used the Cf. symbol correctly in that Bradley and Wagner stood for a different proposition than that advocated by Wisslead, the Sharpe Court believed that “they were not sufficiently analogous to lend support.”[82] More importantly, Wisslead never explained why it borrowed from due process jurisprudence to support a proportionate penalties decision.[83]

While the Sharpe court is correct that Wisslead “fundamentally altered…a century’s worth of case law” with little or no analysis, the Court ignores points in favor of Wisslead’s conclusion. The Sharpe court fails to recognize that no member of the Wisslead court disagreed with the proposition that a less serious, severely punished offense would violate the policy underlying the proportionate penalties clause if a more serious offense punished less severely.[84] In fact, the Sharpe court acknowledges that Justice Simon’s dissent complains only that the Wisslead majority made an incorrect factual determination by ignoring the fact that an offender committing aggravated kidnapping or forcible detention with a weapon would be
charged with armed violence, and therefore artificially reducing the penalties for those offenses. Justice Simon suggests that the armed violence sentencing scheme is “internally consistent” and states that he does not find the punishment an “unconstitutional disproportion.” Justice Simon’s dissent thus supports the contention that a less serious crime punished more severely than a similar, more serious crime would be unconstitutionally disproportionate.

Additionally, the Wisslead decision derives significant legitimacy from the fact that no Illinois Supreme Court majority decision questioned its conclusion for twenty-two years. Sharpe itself cites to instances where the Court either used the same Cf. citation to support cross-comparison review or supported another conclusion by reference to the cross-comparison test’s established nature. In People v. Davis, the Court anchored its cross-comparison review with a Cf. citation to Bradley and Wagner rather than to Wisslead or its cross-comparison progeny. Davis even acknowledged that Bradley and Wagner were due process cases. In People v. Lewis, the Illinois Supreme Court supported the identical elements test by relying on the fact that “comparing different offenses and their penalties was an accepted part of our proportionate penalties jurisprudence.”

b. Warbling, Poorly Articulated Law

The Sharpe Court next attacks the cross-comparison test’s validity by chronicling the cross-comparison test’s “evolution” from its inception in Wisslead to its devastating invocation in Moss. According to the Sharpe Court, the resulting body of “badly reasoned,” “unworkable,” and “never…settled” law is “good cause to depart from stare decisis,” especially as it threatens to cause “serious detriment prejudicial to public interests.” Several
objectionable evolutionary trends emerge from the Sharpe court’s history of the cross-comparison test; specifically: (1) a movement away from the test’s grounding in the “cruel or degrading” proportionality standard, (2) an attempt to constrain the test by limiting possible comparison offenses, and (3) a movement away from judicial restraint and legislative deference.

The first trend easily identified from the history of the cross-comparison test is the unexplained movement away from the cross-comparison test’s grounding in the original “cruel or degrading” or “shocks the conscience” proportionality test. In most early cross-comparison cases, courts compared the penalties of two offenses, but still evaluated the constitutionality of the penalties under the “shocks the conscience” standard. Specifically, a court would invalidate a penalty only if the “conduct that created a less serious threat to the public health and safety was punished more harshly than conduct that created a more serious threat” and that greater penalty was “so disproportionate to the offense that it shocked the moral sense of the community or was cruel and degrading.” Later, cross-comparison review became a mathematical equation – if the lesser offense was punished more severely, it simply was disproportionate; a finding that the penalty would shock the conscience was no longer necessary. Once lost, the “cruel or degrading” standard would pop up once again, without explanation, in conjunction with the cross-comparison test in 2003’s People v. Morgan, and then disappear just as quickly.

Second, the Sharpe court’s history illustrates the movement from a one-step to a two-step process requiring a threshold inquiry as to the suitability of the comparison offense. Initial cross-comparison review permitted a defendant to compare his offense with any less serious offense. Where the two offenses did not have related purposes, a court might reject the defendant’s contention that the comparison offense was more serious than the charged offense,
but there was no requirement that the offenses have related purposes.[105] For the first time in 
People v. Davis, a threshold inquiry of whether the statutes being compared had a related 
statutory purpose emerged.[106]

The Sharpe court, however, was less concerned about the threshold requirement’s inception than 
with courts’ inability to find a consistent method of comparing the statutory purposes of 
offenses.[107] Statutory purposes can be drawn narrowly or broadly – a narrow statutory 
purpose would preclude comparison with any other offense whereas a broad statutory purpose 
would permit comparison with all other offenses.[108] Various cases used narrow purposes and 
others used broad purposes.[109]

The Sharpe Court found the trend away from judicial restraint and legislative deference 
troubling.[110] In the first thirteen years of cross-comparison review, the Illinois Supreme Court 
“rejected almost all of the cross-comparison…arguments brought before the court;” only two 
defendants successfully argued that the cross-comparison of offenses demonstrated 
disproportionality.[111] After the 1997 Davis decision,[112] however, Illinois courts became 
more proactive and overturned more sentences based on cross-comparison proportionality 
review.[113] In just three short years preceding Sharpe, the Illinois Supreme Court invalidated 
nine penalties.[114] This trend caused the Sharpe Court to state that “this court was reluctant to 
invalidate penalties determined by the legislature…[w]e are reluctant no more.”[115]

For the Sharpe Court, this lack of restraint raises an important constitutional concern – the 
possibility that cross-comparison review sets “this court on a collision course with separation of 
powers principles.”[116] According to the court, continued use of cross-comparison 
proportionality review as it has evolved leaves the court “free to act as a superior legislative
branch, substituting our judgment for the legislature whenever we disagreed with the penalties it set.”[117] The Court’s analysis, however, stops short of actually stating that cross-comparison review does violate the separation of powers or hazarding a guess at what point it might.[118] Additionally, the Court fails to recognize that the Illinois Constitution in fact requires that it toe this separation of powers line by mandating that it review the proportionality of legislatively determined sentences.[119]

Sharpe’s history of the cross-comparison test expertly points out that the caselaw has been inconsistent and has thus become difficult to administer.[120] The court then reasons that this “unworkable,” “badly reasoned” law necessitates the elimination of cross-comparison proportionality review.[121] Sharpe, however, fails to contemplate any half-measures that might eliminate these inconsistencies and their resultant difficulties.[122] The court never considers returning to a cross-comparison review tempered by the “cruel or degrading” standard, adopting a cross-comparison review that lacks the related purposes threshold requirement, or providing new rules governing how narrowly or broadly a statutory purpose ought to be drawn by an evaluating court.[123]

The court in Sharpe also fails to consider that it could reverse the trend toward unlimited judicial interference with legislative prerogative. In fact, re-adoption of the initial cross-comparison review tempered by the “cruel or degrading” standard would significantly increase judicial restraint; defendants would have to satisfy this more difficult standard and would have limited caselaw to draw upon. Without any attempt to engage in such analysis, the court’s jump to elimination of the cross-comparison test appears premature.

2. A Slippery Slope
A driving factor behind the Court’s decision also appears to have been their perception that cross-comparison analysis represents a very slippery slope. While the court never explicitly makes a slippery slope argument, the court’s analysis of cross-comparison’s trajectory betrays a concern about the possible ramifications of its continued use.[124] As noted above, the court points out that the general trend is a movement away from judicial deference.[125] Additionally, the court’s analysis of Moss suggests that it is alarmed by the extension of already-decided cross-comparison cases.[126] Specifically, the court is concerned by the Sharpe trial court’s extension of Moss; there the trial court evoked Moss to invalidate the fifteen and twenty year enhancements in the murder statutes, holding that murder with a firearm is a less serious offense than aggravated battery with a firearm and aggravated discharge with a firearm.[127] The court finds this conclusion “obviously wrong.”[128]

Lastly, the court’s passing and unsupported mention of vague separation of powers concerns suggests that the court is alarmed by the possible ramifications of continued lack of judicial restraint.[129] Interestingly, the court cites no authority regarding the separation of powers claim despite asserting that the problem arises in that the court would “no longer be constrained to serve as a mere check on the legislature…instead, we would be free to act as a superior legislative branch, substituting our judgment for the legislature whenever we disagreed with the penalties it set.”[130] The court also makes no attempt to distinguish this finding from the separation of powers challenge it rejected involving the identical elements test in People v. Lewis[131] or from dicta indicating that cross-comparison review itself avoids separation of powers problems by constraining itself to comparison of similar offenses.[132] This lack of analysis suggests that the cross-comparison test does not yet run afoul of proper separation of
powers, but that the court is concerned about some undefined future use of the cross-comparison test.

Sharpe’s preoccupation with slippery slope arguments leads to the conclusion that the Court believed it had lost control of the cross-comparison test and that it therefore must go. As noted above, the Sharpe court declines to even consider and discard possible half-measures that might have allowed it to regain control of the cross-comparison test and avoid future extension and separation of powers problems. The court’s condemnation of Moss is particularly illustrative here.[133] Sharpe decried Moss because it adopted People v. Walden’s conception of the related purposes requirement, which considers only the 15-20-25 to Life enhancement’s statutory purpose rather than the purpose of the enhancement and the underlying offense.[134] This analysis permits the court to compare any 15-20-25 to Life enhanced offense to aggravated discharge of a firearm and aggravated battery with a firearm, and thus effectively extends Moss to strike all 15-20-25 to Life enhancements.[135] The Court could eliminate this threat by reversing Moss and Walden to the extent that they adopt this particular similarity of purpose analysis,[136] but it instead decides to throw the baby out with the bathwater.

The court also ignores the fact that it could clarify holdings in Moss and Walden to avoid what it perceives to be dangerous extendibility of those decisions.[137] The Sharpe court perceives an alteration to the cross-comparison analysis in Moss that leads to the “obviously wrong” conclusion reached by the Sharpe trial court. According to the Sharpe court, Moss and Walden evaluated the seriousness of only certain elements of an offense rather than the offense’s seriousness as a whole.[138] According to Sharpe, Moss and Walden compared aggravated battery with a firearm and aggravated discharge of a firearm with 15-20-25 to Life enhanced
offenses, and found the former more serious because they involved more serious firearm behavior than did the 15-20-25 to Life.[139] If the Sharpe Court had considered abrogating Moss and Walden to the extent that they stood for the proposition that only firearm conduct could be compared, the Sharpe Court could have avoided the “obviously wrong” conclusion that aggravated battery with a firearm and aggravated discharge of a firearm were more serious than murder with a firearm.[140]

Part III: Why Bother with Baby Bear’s Bed?:

Arguments in Favor of Some Form of Cross-Comparison Proportionality Review

Because the Illinois Supreme Court’s reasoning in Sharpe selectively ignored any significant arguments in favor of the cross-comparison test, a short synopsis of these arguments will be provided. These arguments are primarily policy arguments; specific arguments in response to the Illinois Supreme Court’s stare decisis and slippery slope arguments were provided in Part II.

A. Comparison of Offenses Permits Objective Evaluation of Penalties’ Appropriateness

Initial proportionality review was conducted in a vacuum.[141] When a challenge was made, a court considered whether an offense’s penalty “shocked the conscience of reasonable men.”[142] Such analysis is necessarily subjective. Comparison of offenses, however, introduces a certain amount of objectivity into proportionate penalties jurisprudence, as it permits a benchmark with which to compare a penalty.[143]

In Sharpe, the Illinois Supreme Court argues that cross-comparison review was “largely subjective” and that attempts to make it less subjective in Davis led only to further problems.[144] Sharpe never specifies exactly what made the initial formulation of the cross-
comparison test subjective – either the determination of which of two offenses is more serious, the “cruel or degrading” standard, or both.[145] Even if the “cruel or degrading” standard imparts some subjectivity to the cross-comparison test, the comparison of two offenses still provides a touchstone for an evaluating court, and is therefore less subjective than the “cruel or degrading” standard when used without comparison of offenses. Granted, the determination of which of two offenses is more serious can be subjective; however, courts have laid out a list of appropriate factors to consider: the crime’s frequency, its risk of bodily harm, and any recent increase its commission.[146] As such, evaluation of proportionality when coupled with offense comparison is more concrete, and less subjective, than other proportionality review.

B. Comparison of Different Offenses Is Not Wholly Inappropriate

1. Identical Elements Analysis Permits the Comparison of Different Offenses

Prior to Sharpe, comparison of different offenses was an accepted part of Illinois proportionality jurisprudence.[147] While condemning the cross-comparison test, however, the Sharpe court upheld the identical elements test, which evaluates proportionality by comparing two offenses.[148] Upholding the identical elements test confirms that comparison of two offenses is not wholly inappropriate.[149] According to the Court, the identical elements test is appropriate because the comparison of different, but substantively identical, offenses does not require a court to make subjective determinations,[150] force a court to act as a super-legislature, or threaten separation of powers principles.[151] As such, the Sharpe analysis suggests that if cross-comparison of offenses were sufficiently constrained, it too might be appropriate.

2. Other States Permit Cross-Comparison of Offenses to Determine Whether Sentences are Constitutional
In addition to being an accepted part of Illinois proportionate penalties jurisprudence, cross-comparison of offenses has been a part of some other states’ determinations of the constitutionality of sentences. States that have employed cross-comparison of offenses similar to the Illinois cross-comparison test include Alaska,[152] Kentucky,[153] Massachusetts,[154] North Carolina,[155] and Wisconsin.[156]

C. Cross-Comparison Review Protects Against Accidental Disproportionality and Helps Move Toward an Internally Consistent Criminal Code

Additionally, cross-comparison review protects against accidental disproportionality within the Illinois Criminal Code. A criminal code is not born in its entirety; instead, it grows offense by offense.[157] Each added offense may not reflect the code that it joins.[158] While some added offenses plug loopholes in the original code, others are at best duplicative and at worst contradictory and inconsistent.[159] Driven by constituent concerns and sometimes prompted by high-profile crimes, legislators do not always sufficiently safeguard the proportionality and internal consistency of a criminal code.[160] The end result is a “hodgepodge,” rather than an integrated, internally consistent criminal code.[161]

If a criminal code grows into a “hodgepodge,” preserving some form of a cross-comparison test can help to eliminate unintentional disproportionalities. In People v. Bradley,[162] the Illinois Supreme Court encountered an “obvious mistake:”[163] a defendant was punished more severely for possessing a controlled substance than he would have been had he sold it.[164] After comparing the two offenses, the Bradley court determined that the possession offense’s sentence violated due process because was not “designed to remedy the evil” the legislature targeted.[165] The Bradley Court’s job was made significantly easier by the
fact that the legislature had explicitly stated that “it is not the intent of the General Assembly to threaten the unlawful user or occasional petty distributor of controlled substances with the same severity as the large-scale, unlawful purveyors and traffickers of controlled substances.”[166] Bradley is relevant here, despite being a due process case, because it was the Bradley court’s comparison of two similar offenses that revealed the possession offense’s sentence to be unconstitutional.[167] It is doubtful if, viewed in a vacuum, that sentence would have appeared unconstitutional (or illogical or inappropriate) – even with the legislature’s statement on the books.

     Not every inconsistency in the Illinois Criminal Code will be so explicitly highlighted by the legislature, but this does not suggest that proportionality review ought not reach these inconsistencies. A criminal code should be internally consistent;[168] a code will have difficulty achieving its goals of norm-setting and deterrence if it is not internally consistent, clear, and rational.[169] Specifically, a code that does not provide a fair sentencing system and is not perceived as internally consistent will not inspire much deterrence.[170] Thus, although some have argued that the judiciary’s constitutional mandate did not include attempting to organize all criminal law into “one grand scheme of comparative proportionality review,”[171] common sense dictates that courts should have the power to correct “obvious mistakes” as well as less obvious, more pernicious errors.[172] These pernicious errors, like punishing the concealed carrying of a firearm during the commission of a specified crime more than the discharge of a firearm in the direction of a person (but not in the course of another crime), riddle the Illinois Criminal Code, calling into question its ability to set limits for acceptable behavior and deter criminal action.[173] As in Bradley, these errors do not necessarily appear to be errors at all
when viewed in a vacuum; instead a cross-comparison test is necessary to help a criminal code weighed down by political baggage achieve its goals of norm-setting and deterrence.

D. Cross-Comparison Review Protects Defendants from Disproportionate Sentences

The elimination of the cross-comparison test leaves criminal defendants without valuable Constitutional protection from illogical, inconsistent, and unnecessarily harsh penalties and significantly weakens the protections of the Illinois Proportionate Penalties clause. By eliminating the cross-comparison test in Sharpe, the Illinois Supreme Court significantly weakened the protection from inconsistent punishment the Proportionate Penalties clause provides to defendants. Granted, the Sharpe decision left intact two proportionate penalties tests – the “shocks the conscience” test and the identical elements test.[174] As noted in Part I, however, these two tests are of limited use to defendants; no “shocks the conscience” challenge has ever invalidated a sentence based on length alone[175] and an identical elements challenge is necessarily limited to those cases where an offense with identical elements exists within the Illinois Criminal Code.[176] As such, the Sharpe decision, for all intents and purposes, eliminated meaningful proportionality review for those offenses which cannot be compared to another offense with identical elements.

Some might argue that the protections formerly afforded to defendants under the cross-comparison test would be supplemented by the Illinois Due Process clause. The Illinois Due Process clause requires that a penalty be reasonably designed to remedy the particular evil that the legislature targeted in creating the offense.[177] Although some due process cases have compared two offenses to determine whether a penalty has been reasonably designed to remedy the harm the legislature was targeting;[178] the cases have long laid dormant and have recently
been negatively treated.[179] In Sharpe, moreover, the court indicated in *dicta* that “the cross-comparison challenge will not simply resurface as a due process challenge along the lines of Wagner”; indicating that the Due Process clause will not provide the protection defendants lost in Sharpe.[180]

Additionally, the Eighth Amendment to the Federal Constitution will not supply the protections defendants lost in *Sharpe*. The Eighth Amendment prohibits the imposition of cruel and unusual punishments,[181] and was intended to prohibit certain modes or conditions of punishment.[182] A majority of Supreme Court justices have concluded that the Eighth Amendment provides no guarantee of proportionality between a crime and its sentence’s length[183] or that the Eighth Amendment prohibits only “extreme sentences that are ‘grossly disproportionate’ to the crime.”[184] As such, the Eighth Amendment arguably provides only as much protection as the “shocks the conscience” proportionality test.[185]

Because neither Due Process nor the Eighth Amendment provide the protections defendants lost with the elimination of the cross-comparison proportionality test in *Sharpe*, a defendant’s ability to challenge a sentence’s proportionality is significantly weakened. Additionally, it could be argued that some defendants have more proportionality protection than others; those defendants who can find an offense with identical elements but a different sentence have a much stronger chance of obtaining meaningful proportionality review than those who cannot. Thus, not only does the *Sharpe* decision significantly weaken all defendants’ ability to challenge their sentences on the basis of proportionality, it weakens certain defendants’ ability more than others.

**Part IV: Just Right?: Testing A “Just Right”**
Cross-Comparison Test in the Context of Two Thorny Proportionality Problems

As demonstrated in Part III, some form of cross-comparison proportionality analysis is appropriate in order to correct accidental disproportionality, move toward an internally consistent Illinois criminal code, and protect defendants. But simply establishing that a cross-comparison test would be beneficial is not sufficient; a choice must be made regarding the form of cross-comparison analysis that is most appropriate. This paper proposes that the Illinois Supreme Court adopt a modified form of the cross-comparison test in place prior to Davis, which incorporates the original “cruel or degrading” proportionality review into the comparison of similar offenses.[186]

The proposed cross-comparison test will require three steps. First, a court must determine whether two offenses are appropriate for comparison. This threshold requirement is imported from pre-Sharpe cross-comparison and remains in order to avoid separation of powers problems in the subsequent determinations of the offenses’ seriousness.[187] Offenses will be considered appropriate for comparison if they have related purposes.[188] Although the Sharpe court argued that the related-purposes inquiry caused significant problems,[189] leaving some “wiggle-room” in the purposes inquiry will permit courts to take a common-sense approach to the inquiry. While Sharpe suggested that purposes could be drawn so broadly as to permit comparison with any offense (purpose to prevent crime) and so narrowly as to prohibit comparison with any other offense,[190] it seems highly unlikely that any court would seriously entertain these possibilities. Furthermore, although at time somewhat inconsistent,[191] existing cross-comparison cases provide courts guidance on this point. Additionally, this paper recommends that the legislature provide statements of legislative purpose to assist courts on this point.[192]
Second, a court must determine which of the two offenses is more serious. As noted above, this inquiry will most likely not run counter to the separation of powers clause as long as the court is comparing two offenses with related purposes.[193] The test will continue to consider various considerations of seriousness, including the crime’s frequency, its risk of bodily harm, and any recent increase its commission; however, this paper proposes that courts be cautioned to avoid falling into a consideration of only an offense’s contemplated risk of harm.[194] Additionally, this paper proposes that the Sharpe court’s erroneous reading of Moss and Walden, that a court ought only consider the seriousness of certain elements of the offenses,[195] should be eliminated, and courts should consider the seriousness of offenses in their entirety.

Lastly, a court should consider whether the penalties for the offenses are set according to the seriousness of the offense. Under the proposed cross-comparison test, a penalty has not been set according to the seriousness of the offense if a more serious offense is punished less severely, and this discrepancy is “cruel and degrading” or “shocks the conscience of the community.”[196] As such, the mere mathematical comparison present under the pre-Sharpe cross-comparison test is eliminated.[197]

The true test of this proposed “Just Right” cross-comparison test, however, is the following case studies.

A. Baby Bear Cross-Comparison and the Attempt Second Degree Murder Conundrum

Before applying the proposed “Just Right” cross-comparison test, it is necessary to make
a short survey of the Illinois attempt second degree murder problem. In Illinois, attempt is defined as an act that “constitutes a substantial step toward the commission of… [an] offense” when coupled with the “intent to commit a specific offense.” As such, a defendant must intend to effectuate a particular result rather than have a general intent to commit a physical act. Second degree murder is defined as first degree murder when one of two “mitigating factors” is present at the time of the killing: either (1) the accused acts “under a sudden and intense passion resulting from serious provocation,” called “provocation second degree murder,” or (2) the accused “believes the circumstances to be such that, if they existed, would justify or exonerate the killing… but his belief was unreasonable,” called “imperfect self-defense second degree murder.” First degree murder in Illinois is defined as the killing of an individual without lawful justification, if the person committing the killing intends to kill.

In *People v. Lopez*, the Illinois Supreme Court held that attempt second degree murder is a logical impossibility, and thus, does not exist under Illinois law. The *Lopez* defendant argued that because the second degree murder statute is essentially first degree murder plus mitigation, it follows that attempt second degree murder requires a substantial step toward the commission of first degree murder and proof of a mitigating circumstance. Instead, the Illinois Supreme Court drew from decisions interpreting an earlier version of second degree murder (called voluntary manslaughter) that incorporated the mitigating circumstances as elements of the offense and found that the attempt statute requires that a defendant must specifically intend to commit second degree murder. Thus, attempt second degree murder requires that a defendant specifically intend to kill without lawful justification and intend to have one of the mitigating circumstances present. According to the court, however, it is impossible to “intend either a sudden and intense passion due to serious provocation or an
unreasonable belief in the need to use deadly force.”[207] As such, there is no offense of attempt second degree murder in Illinois.[208] The *Lopez* decision was accompanied by a significant dissent, written by Justice McMorrow, which described the *Lopez* result as creating “a void in Illinois criminal law.”[209] As Justice McMorrow predicted, the result of *Lopez* is that a defendant who might otherwise have committed attempt second degree murder is now chargeable with attempt first degree murder.[210]

Filling this void, however, will prove difficult. As Justice McMorrow recognized, the Illinois General Assembly has already attempted to eliminate this problem once, in the 1986 adoption of the current first and second degree murder statutes.[211] In *People v. Reagan*, the Illinois Supreme Court held that because the mitigating circumstances were elements of voluntary manslaughter, a defendant accused of attempted voluntary manslaughter must have possessed the specific intent to kill with an unreasonable belief in the need to use deadly force in self-defense or the specific intent to kill in a sudden and intense passion based on serious provocation, both of which are impossible.[212] Thus, attempt voluntary manslaughter did not exist.[213] In response, the legislature rewrote the statutes, eliminating the mitigating circumstances as elements of second degree murder, and thus, potentially putting them out of reach of the attempt provision.[214] Initial academic response to the revisions suggested that the legislature had succeeded.[215] However, the appellate courts split over the issue; the second and third districts held that attempt predicated on the new second degree murder statute was possible;[216] the first and fifth districts held that it was not.[217] The *Lopez* decision rejected the legislature’s attempted fix, arguing that “our decision is based on the wording of our attempt statute” and that “these arguments [the academic response to the new second degree murder statute] fail to
consider the specific language of Illinois’ attempt statute, which plainly requires the intent to commit a specific offense, not simply the intent required to commit the predicate offense.”[218]

Because the Lopez decision focused on the attempt statute, rather than the second degree murder statute, it appears that altering the second degree murder statute will not “fix” the void left by Lopez. As long as the attempt statute requires that an offender have the specific intent to commit the completed offense, Illinois courts will hold that the specific intent to commit second degree murder includes an intent to have an unreasonable belief in the need for self-defense or a sudden and intense passion based on serious provocation.[219] Thus, any attempt to re-work second degree murder that does not somehow alter the definition and elements of the attempt statute will necessarily fail.[220] Changing the definition of attempt, however, is unlikely to occur; not only has the attempt statute remained virtually unchanged since the passage of the 1961 Criminal Code, but the present attempt statute is consistent with the Model Penal Code[221] and the law of other states.[222] Likely, the best solution would be to amend the attempt statute to include a provision permitting an attempt conviction where the actor has the intent required for the offense,[223] a move that would likely cause more trouble than it would solve.[224]

With a likely unfixable attempt second degree murder problem, Illinois is faced with what Justice McMorrow termed the “illogical and disparate treatment” of defendants who would otherwise be guilty of attempt second degree murder.[225] To illustrate this “disparate treatment,” Justice McMorrow spins a hypothetical about a bar fight, where Kane strangles his friend, Abel, during a bar fight, and breaks his neck.[226] While Abel is rushed to the hospital, Kane’s lawyer advises Kane that he clearly acted under a sudden and intense passion resulting from serious provocation, which constitutes second degree murder.[227] If convicted, Kane
faces a maximum sentence of fifteen years. The next day, however, Kane is dismayed to learn that Abel has survived, and thus, he is charged with attempt first degree murder, punishable by six to thirty years. Although Justice McMorrow fails to recognize it, this result would initially appear to be contrary to the pre-Sharpe cross-comparison proportionality test; second degree murder is more serious than attempt first degree murder, yet is inexplicably punished less severely.

Interestingly, application of the cross-comparison proportionality test pre-Sharpe did not render the attempt first degree murder statute unconstitutional because it punished attempt second degree murder situations more severely than the more serious offense of second degree murder. In the only case to directly address this issue, the Illinois Supreme Court in People v. Morgan held that the attempt first degree murder statute does not violate the proportionate penalties clause by being punished more seriously than more serious second degree murder. Although the court acknowledged that second degree murder is more serious than attempt first degree murder and that second degree murder is punished less severely, the court noted that “the penalty for attempted first degree murder is not so disparate that the statute is rendered unconstitutional by the defendant’s inability to prove the existence of mitigating circumstances.” When, however, the defendant committed the attempted first degree murder while armed with a firearm or discharging a firearm, and was thus subject to the fifteen, twenty, or twenty-five years to life enhancement, the result was unconstitutionally disproportionate because “persons whose actions are identical may be exposed to vastly disparate sentences depending on whether the victim lives or not.” (See Table 1). As such, Morgan incorrectly applied the pre-Sharpe cross-comparison test by refusing to engage in a
simple mathematical comparison of the sentences of second degree murder and attempt first
degree murder.[235]

Table 1: *Morgan* Cross-Comparison Results

<table>
<thead>
<tr>
<th>Offense (Mitigating Factor Present)</th>
<th>Attempt First Degree Murder Penalty</th>
<th>Second Degree Murder Penalty</th>
<th>Morgan’s Proportionality Determination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempt First Degree Murder</td>
<td>Class X Felony; 6 – 30 years imprisonment[236]</td>
<td>Class 1 Felony; 4 – 15 years imprisonment[237]</td>
<td>Proportionate (&quot;not so disparate&quot;)</td>
</tr>
<tr>
<td>Attempt First Degree Murder; Armed with Firearm</td>
<td>Enhanced Class X Felony; 21 – 45 years imprisonment</td>
<td>Class 1 Felony; 4 – 15 years imprisonment</td>
<td>Disproportionate (&quot;vastly disparate&quot;)</td>
</tr>
<tr>
<td>Attempt First Degree Murder; Discharged Firearm</td>
<td>Enhanced Class X Felony; 26 – 50 years imprisonment</td>
<td>Class 1 Felony; 4 – 15 years imprisonment</td>
<td>Disproportionate (&quot;vastly disparate&quot;)</td>
</tr>
<tr>
<td>Attempt First Degree Murder; Discharged Firearm and Proximately Caused Bodily Harm</td>
<td>Enhanced Class X Felony; 31 years – Life Imprisonment</td>
<td>Class 1 Felony; 4 – 15 years imprisonment</td>
<td>Disproportionate (&quot;vastly disparate&quot;)</td>
</tr>
</tbody>
</table>

If *Morgan* had properly applied the pre-*Sharpe* test, it would have been forced to come to the
conclusion that attempt first degree murder is unconstitutionally disproportionate.[239] The pre-
*Sharpe* test simply does not give the legislature any wiggle-room; if it a more serious offense is
punished less severely, then the less serious offense is unconstitutional.[240] The result would
be bad; for a time, there would be no attempt murder offense at all. Then, the legislature would
effectively be prohibited from replacing attempt murder with an offense punished more severely
than second degree murder, a Class 1 felony, [241] unless it could fix the attempt second degree
murder problem.
Although *Morgan* represented an anomaly under the pre-*Sharpe* cross-comparison test due to its failure to mathematically compare the sentences of second degree murder and attempt first degree murder, it suggests the possible result of the proposed “Just Right” cross-comparison test.[242] While the *Morgan* court does not use the “cruel or degrading” or “shocks the conscience” language, its “vastly disparate” and “not so disparate” language suggests that the court was in fact using the very “Just Right” cross-comparison test proposed by this paper.[243] Based on *Morgan*, it appears that the result of a “Just Right” cross-comparison test on the attempt second degree murder problem would be to uphold the use of attempt first degree murder in cases of apparent attempt second degree murder.[244] As such, the continued use of a “Just Right” cross-comparison analysis would not require the Illinois Supreme to side-step proper cross-comparison analysis in order to preserve the offense of attempt first degree murder.

**B. “Just Right” Comparison Review and the 15-20-25 to Life Firearm Enhancement Scheme**

The true test of a “Just Right” cross-comparison test, however, is its compatibility with the 15-20-25 to Life firearm enhancement scheme – the bill that produced many of the proportionate penalties decisions deplored by the *Sharpe* court (*Walden, Morgan*, and *Moss*).[245] If the “Just Right” cross-comparison test and a moderately rewritten firearm enhancement scheme can prove compatible, then the “Just Right” cross-comparison test is truly workable. In order to determine whether this result can be reached, this case study will first summarize the 15-20-25 to Life enhancement scheme as it currently written, then examine the scheme’s pre-*Sharpe* proportionate penalties problems and how the “Just Right” cross-comparison test would correct the pre-*Sharpe* problems, and lastly propose a moderately
rewritten 15-20-25 to Life enhancement scheme that conforms to both the legislature’s original goals and a “Just Right” cross-comparison test.

1. The Present 15-20-25 to Life Firearm Enhancement Scheme

As noted before, the 15-20-25 to Life firearm enhancement scheme provides significant sentencing enhancements for the presence or use of a firearm during a felony. The bill employs two tiers of enhancements based on the severity of the underlying offense: first, significant mandatory sentencing enhancements for the presence or use of a firearm during certain enumerated Class X felonies, and second, modification of an existing felony providing additional liability for the presence of a dangerous weapon during an Illinois felony. See Table 2.

Table 2: 15-20-25 to Life Sentencing Provisions

<table>
<thead>
<tr>
<th>Sentencing Scheme (Based on Underlying Felony)</th>
<th>Use of Firearm During Offense</th>
<th>Armed With</th>
<th>Personal Discharge</th>
<th>Personal Discharge Causing Great Bodily Harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enumerated Class X Felony</td>
<td>Penalty for Underlying Felony</td>
<td>6 – 30 years</td>
<td>6 – 30 years</td>
<td>6 – 30 years</td>
</tr>
<tr>
<td>Enhancement</td>
<td>15 years</td>
<td>20 years</td>
<td>25 years to life</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>21 – 45 years</td>
<td>26 – 50 years</td>
<td>31 years - life</td>
<td></td>
</tr>
<tr>
<td>Armed Violence</td>
<td>Category I Firearm: 15 years minimum</td>
<td>20 years minimum</td>
<td>25 – 45 years minimum</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Category II Firearm: 10 years minimum</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The first tier of enhancements applies to the eleven Class X felonies the legislature perceived to be the most serious: attempted first degree murder, first degree murder, intentional homicide of an unborn child, aggravated kidnapping, aggravated battery of a child, home invasion, aggravated criminal sexual assault, predatory criminal sexual assault of a child, armed robbery, and aggravated vehicular hijacking. These “enumerated” felonies are subject to mandatory sentencing enhancements of fifteen, twenty, and twenty-five years to life imprisonment in addition to their “base”
sentences of six to thirty years.[259] Thus, an offender who is "armed with a firearm"[260] while committing an enumerated felony will be sentenced to six to thirty years of imprisonment for the felony[261] and an additional fifteen years for the firearm.[262] Personally discharging a firearm[263] during an enumerated felony mandates a twenty year enhancement while the personal discharge of a firearm causing great bodily harm, permanent disability, permanent disfigurement, or death must be sentenced to an additional twenty-five years to life.[264] See Table 2.

The second tier of enhancements utilizes armed violence, 720 Illinois Compiled Statutes 5/33A, to provide lesser enhancements for Illinois felonies perceived to be less serious.[265] Thus, a felony[266] committed while armed with a Category I firearm[267] is a Class X felony punishable by a minimum fifteen years.[268] A person who commits a predicate felony while armed with a Category II firearm[269] will receive a minimum sentence of ten years.[270] A person who personally discharges a Category I or Category II firearm during the commission of an Illinois felony receives a minimum of twenty years.[271] If the discharge proximately causes great bodily harm, permanent disability, permanent disfigurement, or death, then the offender commits a Class X felony carrying a sentence of twenty-five to forty years of imprisonment.[272] See Table 2.

2. The Application of a “Just Right” Cross-Comparison Test to 15-20-25 to Life’s Proportionate Penalties Problems

Under the pre-Sharpe proportionate penalties jurisprudence, some, but not all, of the firearm enhancements had been declared unconstitutional.[273] The unconstitutionality of these enhancements stemmed primarily from three sources: the use of non-uniform definitions of
firearm conduct throughout the Illinois Criminal Code, the existence of un-enhanced firearm conduct throughout the Criminal Code, and the Morgan attempt second degree murder problem. The result of these proportionate penalties problems was a piece-meal enhancement scheme. Each of these three problems will be addressed and considered from the perspective of the proposed “Just Right” cross-comparison” test.

a. The First Cause of the Proportionality Problems: The Non-Uniform Definition of Firearm Conduct

The first major constitutional infirmity of 15-20-25 to Life under pre-Sharpe proportionate penalties jurisprudence is the non-uniform definition of firearm conduct throughout the Illinois criminal code. Specifically, definitions of firearm conduct not used by the 15-20-25 to Life enhancement scheme have the potential to be deemed “more serious” than 15-20-25 to Life firearm conduct, and therefore, trigger cross-comparison difficulties when they are punished less severely than 15-20-25 to Life offenses.

In Moss, for example, the Illinois Supreme Court determined that aggravated battery with a firearm and aggravated discharge of a firearm were more serious than three 15-20-25 to Life enumerated Class X felonies committed while personally discharging a firearm. See Table 3. Specifically, the court noted that aggravated battery with a firearm requires “injury resulting to a person through the…discharge of a firearm,” whereas the 15-20-25 to Life offenses required only that the offender be armed with or personally discharge a firearm. Additionally, aggravated discharge of a firearm required that the firearm be discharged in the direction of another person whereas the three 15-20-25 to Life offenses required only that the offender personally discharge the firearm. The court concluded that “the additional elements in aggravated battery with a firearm (injury resulting from the
intentional discharge of a firearm) and aggravated discharge of a firearm (discharge of a firearm in the direction of another person) render these offenses a greater ‘threat to the public health and safety.’”[282]

Table 3: *Moss* Proportionality Review (Pre-*Sharpe*)

<table>
<thead>
<tr>
<th>Offense</th>
<th>Court’s Determination of Seriousness</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Twenty Year Enhancement</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated Battery with a Firearm</td>
<td><em>More serious</em>; requires that injury result</td>
<td>6 – 30 years</td>
</tr>
<tr>
<td>Aggravated Discharge of a Firearm</td>
<td><em>More serious</em>; requires that firearm be discharged in direction of person</td>
<td>4 – 15 years</td>
</tr>
<tr>
<td>15-20-25 to Life Enumerated Class X Felony</td>
<td><em>Less serious</em>; requires only that offender discharge firearm</td>
<td>26 – 50 years</td>
</tr>
</tbody>
</table>

Likewise, in *People v. Walden*, the Illinois Supreme Court held that armed violence predicated on aggravated robbery was more serious than a 15-20-25 to Life enumerated felony[283] with a fifteen year enhancement because the armed violence offense required “additional elements” of firearm conduct.[284] Specifically, armed violence predicated on aggravated robbery required that the offender “inform the victim that he or she is presently armed with a firearm,” whereas armed robbery could be committed with a concealed firearm.[285] See Table 4. The *Walden* court reasoned that the armed violence offense was more serious because “the risk of violence is enhanced where the offender’s use or threatened use of force is backed up with the express mention of a firearm.”[286]

Table 4: *Walden* Proportionality Review (Pre-*Sharpe*)

<table>
<thead>
<tr>
<th>Offense</th>
<th>Courts’ Determination of Seriousness</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fifteen Year Enhancement</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Armed Violence Predicated on Aggravated Robbery</td>
<td><em>More serious</em>; requires that offender inform victim he is presently armed</td>
<td>Category 1 Firearm: 15 – 30 years Category 2 Firearm: 10 – 30 year</td>
</tr>
<tr>
<td>15-20-25 to Life Enumerated Class X Felony</td>
<td><em>Less serious</em>; requires only that offender be armed with firearm</td>
<td>21 – 45 years</td>
</tr>
</tbody>
</table>
The only “additional elements” the Illinois Supreme Court apparently considered relevant to the pre-*Sharpe* cross-comparison test’s seriousness determination were additional elements of firearm conduct.[287] In *Moss*, the state argued that the court should consider other “additional elements”: the substantive offenses themselves.[288] The State argued that aggravated battery with a firearm and aggravated discharge of a firearm were less serious because they involve “no additional felonies…[but] focus on the firearm conduct itself.”[289] The State cited the 15-20-25 to Life Act’s “Legislative findings,” which state that

[the] current law does contain offenses involving the use or discharge of a gun toward or against a person, such as aggravated battery with a firearm, aggravated discharge of a firearm, and reckless discharge of a firearm; however, the General Assembly has legislated greater penalties for the commission of a felony while in possession of a firearm because it deems such acts more serious.[290]

The Court, however, declined to defer to the legislature’s determination of relative seriousness, and instead based its analysis solely on the “additional elements” of firearm conduct.[291]

Non-uniform definition of firearm conduct throughout the Illinois Criminal Code gave rise to the “additional elements” of firearm conduct at issue in *Moss* and *Walden*. If the definitions of firearm conduct were consistent however, the *Moss* and *Walden* defendants would have been able to demonstrate, at best, that the comparison offenses are equally serious, thereby failing the second requirement of a successful cross-comparison proportionality review.[292] Thus, if the legislature prohibited firearm conduct in consistent categories, at least some proportionality problems would have been averted under the pre-*Sharpe* cross-comparison test.

Even if the proposed “Just Right” cross-comparison test were adopted, uniform definition of firearm conduct throughout the Illinois criminal code would be necessary to solve the
proportionate penalties problems illuminated by Moss and Walden.[293] Granted, the “Just Right” cross-comparison test would instruct courts to consider the entirety of an offense when weighing its seriousness, rather than focusing on one component of the offense like firearm conduct.[294] If courts were to consider the entirety of the offenses compared in Moss, it is possible that the seriousness determination would turn out differently; the 15-20-25 to Life enumerated felonies could be deemed to be equally or more serious because they involve a Class X felony in addition to the firearm conduct, while aggravated battery with a firearm and aggravated discharge of a firearm are essentially firearm conduct alone.[295] Courts could, however, determine that the discharge of a firearm in the direction of a person or discharge causing injury alone is more serious than the mere discharge of a firearm even in the context of a serious offense. The Walden seriousness determination is a closer question; both compared offenses (armed violence predicated on aggravated robbery and armed robbery) involved firearm conduct in the course of an otherwise prohibited felony.[296] Although the legislature perceived the enumerated Class X felonies as the most serious in the Illinois Code, courts might perceive the additional elements of firearm conduct to tip the seriousness determination in favor of the lesser-punished armed violence offense. Thus, in order to ensure that the “Just Right” cross-comparison test does not cause proportionate penalties difficulties for the 15-20-25 to Life firearm enhancement scheme, uniform definition of firearm conduct throughout the Illinois criminal code would be necessary.

The additional imposition of the “shocks the conscience” test or the Morgan “not very disparate” / “very disparate” consideration to the cross-comparison would not avoid the Moss and Walden challenges without uniform definition of firearm conduct. Assuming that the seriousness determinations were unchanged, the two comparison offenses in Moss are punished
by twenty years less than the 15-20-25 to Life enumerated felonies.[297] This disparity would almost certainly “shock the conscience” or be deemed “very disparate.”[298] Although the disparity in *Walden* is less drastic, a difference of a minimum of six years (if a Category I firearm is involved) and eleven years (if a Category II firearm is involved) would likely also “shock the conscience.”[299]

b. The Second Cause of the Proportionality Problems: Unequal Enhancement of Similar Firearm Conduct

Uniformly defining firearm conduct throughout the Illinois Criminal Code, however, would not have eliminated all pre-*Sharpe* proportionality problems. In *People v. Baker*, a defendant successfully challenged the constitutionality of the fifteen year enhancement as applied to aggravated kidnapping using the “identical elements” test.[300] The *Baker* defendant demonstrated that aggravated kidnapping committed while armed with a firearm and armed violence predicated on kidnapping while armed with a Category I firearm had identical elements, yet were punished differently.[301] Because aggravated kidnapping committed while armed with a firearm is punished more severely, the court found the fifteen year enhancement unconstitutionally disproportionate.[302] Here, uniform definitions of firearm conduct are not enough to eliminate proportionality challenges.[303]

A similar pre-*Sharpe* cross-comparison challenge was brought in *Moss*. There, the defendants argued that aggravated battery with a firearm and aggravated discharge of a firearm were more serious than three 15-20-25 to Life enumerated felonies committed when armed with a firearm, but were punished less severely.[304] See Table 5. The Illinois Supreme Court agreed that aggravated battery with a firearm and aggravated discharge of a firearm were more serious threats to public health and safety because they required the discharge of a
Although the Court’s reasoning is opaque, the Court appears to base its holding on the fact that the comparison offenses require the discharge of a firearm rather than any “additional elements” of firearm conduct. Instead, even if the additional firearm conduct were eliminated, aggravated battery with a firearm and aggravated discharge of a firearm would be more serious than the defendants’ offenses, as they require the personal discharge of a firearm while the defendants’ offenses merely required the possession of a firearm.

### Table 5: Moss Proportionality Problems

<table>
<thead>
<tr>
<th>Offense</th>
<th>Courts’ Determination of Seriousness</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated Battery with a Firearm</td>
<td>More serious; requires that firearm be discharged</td>
<td>6 – 30 years</td>
</tr>
<tr>
<td>Aggravated Discharge of a Firearm</td>
<td>More serious; requires that firearm be discharged</td>
<td>4 – 15 years</td>
</tr>
<tr>
<td>15-20-25 to Life Enumerated Class X Felony</td>
<td>Less serious; requires that offender be armed with firearm</td>
<td>21 – 45 years</td>
</tr>
</tbody>
</table>

*Moss* and *Baker* together suggested that a pre-*Sharpe* proportionate firearm enhancement scheme required that equal firearm conduct be equally enhanced in every situation. The defendants in *Moss* and *Baker* compared their offenses to offenses involving firearm conduct receiving either no enhancement at all (*Moss*) or lesser enhancement (*Baker*). Due to the “Just Right” cross-comparison test’s abandonment of the mathematical comparison of sentences, however, some unequal enhancement would be possible if a court would hold that the unequal enhancement was not “very disproportionate” (as in *Morgan*). In order to determine which unequal enhancements might survive “Just Right” cross-comparison review, each source of unequal enhancement currently present in the Illinois Criminal Code will be examined.

Offenses involving firearm conduct are unequally enhanced for three separate reasons: legislative fiat, double enhancement principles, and the 15-20-25 to Life two tier enhancement
scheme. First, some offenses are unenhanced due to legislative fiat.\[311\] The 15-20-25 to Life bill exempts certain “stand alone” firearm conduct from enhancement,\[312\] because the General Assembly deemed these felonies less serious than felonies involving firearm conduct.\[313\] Pre-
Sharpe, courts did not defer to the General Assembly’s determination of seriousness.\[314\] Whether a court would consider more dangerous firearm conduct (like the personal discharge of a firearm) standing alone as equally or less serious than less dangerous firearm conduct in the context of another offense (like the commission of a felony while armed with a firearm) is an open question. It is possible that a court would be swayed by the increased potential for bodily harm afforded by the firearm conduct and therefore determine the more dangerous firearm conduct, even standing alone, to be more serious. If determined to be more serious, the comparison of penalties would likely not survive the “shocks the conscience” test, as the difference in sentences is at least six years and as much as twenty-two years.\[315\]

See Table 6. As such, even the “Just Right” cross-comparison test would seemingly dictate that those offenses not currently enhanced by legislative fiat be at least somewhat enhanced.

Table 6: Legislative Fiat Unenhanced Offenses and 15-20-25 to Life Offenses

<table>
<thead>
<tr>
<th>Offense</th>
<th>Firearm Conduct</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated Discharge of a Firearm</td>
<td>Firearm personally discharged in direction of person (most serious)</td>
<td>Class 1 Felony; 4 – 15 years imprisonment</td>
</tr>
<tr>
<td>Enumerated Class X Felony with 15 Year Enhancement</td>
<td>Offender armed with firearm</td>
<td>Class X Felony + 15 year enhancement; 21 – 45 years imprisonment</td>
</tr>
<tr>
<td>Enumerated Class X Felony with 20 Year Enhancement</td>
<td>Firearm personally discharged</td>
<td>Class X Felony + 20 year enhancement; 26 – 50 years imprisonment</td>
</tr>
<tr>
<td>Armed Violence Offense while Armed with Firearm (Category I)</td>
<td>Offender armed with a firearm (Category I)</td>
<td>15 – 30 years imprisonment</td>
</tr>
<tr>
<td>Armed Violence Offense while Armed with Firearm (Category II)</td>
<td>Offender armed with a firearm (Category II)</td>
<td>10 – 30 years imprisonment</td>
</tr>
<tr>
<td>Armed Violence Offense; Personal Discharge</td>
<td>Firearm personally discharged</td>
<td>20 – 30 years imprisonment</td>
</tr>
</tbody>
</table>

Second, some offenses are not enhanced due to double enhancement problems. Double enhancement occurs where a single factor influences a sentence twice; counting the same factor
twice is improper because the legislature considers all elements of an offense when setting a penalty.\[316\] Double enhancement principles prevent armed violence from being predicated on an offense already requiring the presence or use of a firearm or dangerous weapon.\[317\] Under the “Just Right” cross-comparison test, courts would likely view offenses unenhanceable due to double enhancement concerns to be equally or less serious than 15-20-25 to Life enumerated Class X felonies when the firearm conduct is equal, thereby causing no proportionate penalties difficulties. The problem, however, arises where a defendant compares an unenhanceable offense involving more dangerous firearm conduct (like the discharge of a firearm) with an enhanced offense involving less dangerous firearm conduct (like carrying a concealed firearm – “armed with a firearm”). In this case, a court would most likely deem the more dangerous firearm conduct to be more serious – and thus, trigger proportionate penalties problems even under the “Just Right” cross-comparison test. As before, the minimum disparity between offenses is four years and can be as much as twenty years.\[318\] See Table 7. While the four year disparity will most likely survive “Just Right” challenge, twenty will not.

Table 7: Double Enhancement Offenses and 15-20-25 to Life Offenses

<table>
<thead>
<tr>
<th>Offense</th>
<th>Firearm Conduct</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aggravated Battery with a Firearm[319]</td>
<td>Discharge of a firearm causing injury (at minimum) (most serious)</td>
<td>Class X Felony; 6 – 30 years imprisonment</td>
</tr>
<tr>
<td>Enumerated Class X Felony with 15 Year Enhancement</td>
<td>Offender armed with firearm</td>
<td>Class X Felony + 15 year enhancement; 21 – 45 years imprisonment</td>
</tr>
<tr>
<td>Enumerated Class X Felony with 20 Year Enhancement</td>
<td>Firearm personally discharged</td>
<td>Class X Felony + 20 year enhancement; 26 – 50 years imprisonment</td>
</tr>
<tr>
<td>Armed Violence Offense while Armed with Firearm (Category I)</td>
<td>Offender armed with a firearm (Category I)</td>
<td>15 – 30 years imprisonment</td>
</tr>
<tr>
<td>Armed Violence Offense while Armed with Firearm (Category II)</td>
<td>Offender armed with a firearm (Category II)</td>
<td>10 – 30 years imprisonment</td>
</tr>
<tr>
<td>Armed Violence Offense; Personal Discharge</td>
<td>Firearm personally discharged</td>
<td>20 – 30 years imprisonment</td>
</tr>
</tbody>
</table>

Third, firearm conduct is unequally enhanced due to the two tiers of enhancements used in the original 15-20-25 to Life bill.\[320\] As noted above, the original 15-20-25 to Life enhancement
scheme added fifteen, twenty, and twenty-five year enhancements to enumerated felonies and reworked armed violence to include lesser enhancements.[321] Additionally, armed violence distinguishes between Category I and Category II firearms.[322] It is unlikely that the entire scheme would survive cross-comparison analysis if a court determined the armed violence offense to be more serious than an enumerated felony; currently, there are disparities of as many as eleven years between similar firearm conduct.[323] A two-tiered enhancement scheme similar to the one originally advanced by the 15-20-25 to Life scheme could survive “Just Right” cross-comparison review. Even if a court determined that an armed violence offense was more serious than an enumerated felony, the difference in punishment would not “shock the conscience” and would likely be deemed by a court to be “not very disproportionate.”[324] See Table 8.

Table 8: Proposed Armed Violence and Enumerated Felony Comparison

<table>
<thead>
<tr>
<th>Firearm Conduct</th>
<th>Armed Violence Sentence</th>
<th>Enumerated Felony Sentence</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed with a Firearm</td>
<td>15 – 30 years</td>
<td>18 – 30 years</td>
<td>3 years</td>
</tr>
<tr>
<td>Used a Firearm</td>
<td>18 – 30 years</td>
<td>21 – 45 years</td>
<td>3 years</td>
</tr>
<tr>
<td>Personally Discharged a Firearm</td>
<td>21 – 30 years</td>
<td>26 – 50 years</td>
<td>5 years</td>
</tr>
<tr>
<td>Personally Discharged + Great Bodily Harm</td>
<td>26 – 45 years</td>
<td>31 years – Life</td>
<td>5 years</td>
</tr>
</tbody>
</table>

Additionally, Baker points towards one more adjustment that would need to be made to the 15-20-25 to Life scheme in order to provide equal-enough enhancement of all firearm conduct. Baker was an identical elements proportionate penalties challenge,[325] which remains unaffected by Sharpe.[326] As such, offenses with identical elements must still receive identical sentences. Thus, a proportionate 15-20-25 to Life must equally enhance any offenses that might trigger identical elements proportionality review.[327]

c. The Third Cause of the Proportionality Problems: The Morgan Problem

The last proportionality problem facing the 15-20-25 to Life firearm enhancement
scheme under the cross-comparison test was the problem high-lighted in *Morgan*. Recall that in *Morgan*, the Illinois Supreme Court invalidated the 15-20-25 to Life enhancements in the context of attempt first degree murder because they were less serious than second degree murder, yet punished much more severely.[328] Although it purported to use the pre-*Sharpe* cross-comparison test, the *Morgan* court distorted the test in order to uphold attempt first degree murder.[329] Under the “Just Right” cross-comparison test, attempt first degree murder without the 15-20-25 to Life enhancements is undoubtedly constitutionally proportionate; however, the 15-20-25 to Life enhancements are still constitutionally troubled because the disparity between an enhanced attempt first degree murder sentence and an unenhanced second degree murder sentence is so great.[330] See Table 9.

Table 9: *Morgan* Cross-Comparison Results

<table>
<thead>
<tr>
<th>Attempt First Degree Murder Offense (Mitigating Factor Present)</th>
<th>Attempt First Degree Murder Penalty</th>
<th>Second Degree Murder Penalty</th>
<th>Morgan’s Proportionality Determination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempt First Degree Murder</td>
<td>Class X Felony; 6 – 30 years imprisonment[331]</td>
<td>Class 1 Felony; 4 – 15 years imprisonment[332]</td>
<td>Proportionate (“not so disparate”)</td>
</tr>
<tr>
<td>Attempt First Degree Murder; Armed with Firearm</td>
<td>Enhanced Class X Felony; 21 – 45 years imprisonment</td>
<td>Class 1 Felony; 4 – 15 years imprisonment[333]</td>
<td>Disproportionate (“vastly disparate”)</td>
</tr>
<tr>
<td>Attempt First Degree Murder; Discharged Firearm</td>
<td>Enhanced Class X Felony; 26 – 50 years imprisonment</td>
<td>Class 1 Felony; 4 – 15 years imprisonment</td>
<td>Disproportionate (“vastly disparate”)</td>
</tr>
<tr>
<td>Attempt First Degree Murder; Discharged Firearm and Proximately Caused Bodily Harm</td>
<td>Enhanced Class X Felony; 31 years – Life Imprisonment</td>
<td>Class 1 Felony; 4 – 15 years imprisonment</td>
<td>Disproportionate (“vastly disparate”)</td>
</tr>
</tbody>
</table>

In order to uphold the enhancements as applied to attempt first degree murder, second degree murder must be similarly enhanced. Second degree murder is not an enumerated Class X
felony, and therefore, any 15-20-25 to Life enhancements must be currently accomplished via armed violence.[334] Illinois case-law, however, prevents armed violence from being predicated on offenses where courts believe that the deterrent or punitive goals of the armed violence statute.[335] Predicating armed violence on second degree murder fails to serve the deterrent purpose of armed violence because second degree murder is not intentional and therefore cannot be deterred; to the extent that the offender’s decision to arm himself was intentional, merely being armed with a firearm is not necessarily criminal.[336] Additionally, predicating armed violence on second degree murder fails to serve the punitive purpose of armed violence because the offender who intended to commit no crime, but committed second degree murder is no more responsible for public danger than a person who arms himself but goes about his business without committing a crime.[337]

As such, Morgan highlights another situation in which an offense involving firearm conduct remains unenhanced despite 15-20-25 to Life, and can therefore be used as a comparison offense to demonstrate disproportionality as in Baker or Moss. Thus, in order for the 15-20-25 to Life firearm enhancement scheme to survive proportionality review in its entirety, second degree murder must be somehow enhanced sufficiently to avoid being determined “very disproportionate” when compared to attempt first degree murder.[338]

3. A Proposal for a “Just Right” Proportionate 15-20-25 to Life Enhancement Scheme

The proposed 15-20-25 to Life firearm enhancement scheme is premised on the theory that all firearms “significantly escalate[] the threat and potential for bodily harm, and…increase[] the potential for harm to more persons”[339] regardless of the felony committed or the type of firearm used. Therefore, the scheme enhances all felony offenses involving firearm
The proposal preserves the current two-tier scheme, subject to two caveats. First, all offenses vulnerable to identical elements proportionality challenges and their identical comparison offenses must be subject to equal enhancements to avoid proportionality problems based on the identical elements test. Second, the proposed scheme eliminates armed violence’s distinction between Category I and Category II firearms and reduces the disparity between the enhanced sentences of the enumerated offenses and armed violence offenses to a maximum of five years, thereby bringing the two-tier scheme within the bounds of the “shocks the conscience” test. See Table 10. Because armed violence cannot be predicated on some offenses, the proposed enhancement scheme modifies these offenses to incorporate similar enhancement provisions in accordance with the legislature’s determination of the seriousness of the underlying offense, thereby eliminating any possible unenhanced comparison offenses. These ineligible offenses include offenses which criminalize the discharge of various types of firearms and ammunition, offenses rendered ineligible to serve as predicate offenses for armed violence by double enhancement principles, and those felonies upon which armed violence cannot be predicated for policy reasons, including first degree murder and second degree murder.

Additionally, the proposed enhancement scheme recasts the current enhancement scheme into four, rather than three, categories of firearm conduct in order to facilitate consistent definition of firearm conduct throughout the Criminal Code and eliminate Moss and Walden-esque challenges. See Table 10. The proposed scheme breaks firearm usage into four categories, carving a category for the “use” of a firearm between the present categories of “armed with” a firearm and “personal discharge of a firearm.” This additional category allows Illinois to distinguish between offenders who possess and those who utilize a firearm during a
felony. Additionally, the proposed scheme narrows the “personal discharge” category by requiring that an offender personally discharge the firearm in the direction of a person. Thus, the proposed 15-20-25 to Life firearm enhancement scheme corrects those proportionality problems that would remain despite the use of a “Just Right” cross-comparison test and therefore would be compatible with such a test.

Table 10: 15-20-25 to Life Enhancement Scheme as Compared to Proposed Firearm Enhancement Scheme

<table>
<thead>
<tr>
<th>15-20-25 to Life Enhancements</th>
<th>Proposed Proportionate Scheme</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Firearm Use</strong></td>
<td><strong>Sentence</strong></td>
</tr>
<tr>
<td>Armed with a Firearm</td>
<td>Armed Violence: 10 or 15 – 30 years</td>
</tr>
<tr>
<td></td>
<td>Enumerated Felony: 21 – 45 years</td>
</tr>
<tr>
<td>Personally Discharged</td>
<td>Armed Violence: 20 – 30 years</td>
</tr>
<tr>
<td></td>
<td>Enumerated Felony: 26 – 50 years</td>
</tr>
<tr>
<td>Personally Discharged + Great Bodily Harm</td>
<td>Armed Violence: 25 – 45 years</td>
</tr>
<tr>
<td></td>
<td>Enumerated Felony: 31 years – life</td>
</tr>
</tbody>
</table>

Part V: Conclusion

The proposed “Just Right” cross-comparison test can survive the two thorniest problems created by the pre-Sharpe cross-comparison test, by first correcting the anomalous result in Morgan and preserving a proportionate attempt first degree murder and by second proving itself compatible with a modestly rewritten 15-20-25 to Life firearm enhancement scheme. Additionally, the analysis supporting the elimination of the cross-comparison test in Sharpe was flawed; it focused entirely on stare decisis and slippery-slope arguments and ignored both policy arguments in favor of some form of cross-comparison test and alternative options open to the Illinois Supreme Court. As such, the Sharpe decision moved proportionate penalties
jurisprudence from “too hard” to “too soft.” These policy arguments high-light the “softness” of
the post-*Sharpe* proportionate penalties jurisprudence; elimination of the cross-comparison test
removed important relief from a Criminal Code crowded with “hodgepodged” offenses and
important protections for defendants from internally inconsistent sentences

Thus, this paper recommends that the Illinois Supreme Court reverse its poorly reasoned decision
in *Sharpe* and adopt the proposed “Just Right” cross-comparison test. This proposed “Just
Right” test preserves the positive aspects of the pre-*Sharpe* test, including the “related purposes”
requirement to eliminate separation of powers difficulties. The test, however, returns to the roots
of proportionality jurisprudence and includes the “shocks the conscience” comparison standard,
thereby eliminating purely mathematical comparison of sentences.[353] As such, the “Just
Right” test provides defendants and citizens some protection from disproportionality while
permitting courts some leeway to uphold sentences that are not “vastly” disproportionate[354] –
striking an appropriate balance between the expansive pre-*Sharpe* cross-comparison and the
toothless post-*Sharpe* proportionality landscape.
Appendix 1: 15-20-25 to Life Pre-Sharpe Proportionate Penalties Troubles

(Shading denotes unconstitutional enhancement)

<table>
<thead>
<tr>
<th>Predicate Offense</th>
<th>Enhancement</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempted First Degree Murder</td>
<td>15 Years</td>
<td>Morgan, 203 Ill. 2d 470 (2003) (Cross-comparison test)</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td></td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td></td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>Sawczenko-Dub, 345 Ill. App. 3d 522 (2003); Moore, 343 Ill. App. 3d 331 (2003); Arnold, 349 Ill. App. 3d 668 (2004); Tolbert, 354 Ill. App. 3d 94 (2004)</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td></td>
</tr>
<tr>
<td>Intentional Homicide of an Unborn Child</td>
<td>15 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>Moss, 206 Ill. 2d 503 (2003) (cross-comparison test)</td>
</tr>
<tr>
<td>Aggravated Battery of a Child</td>
<td>15 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td>N/A</td>
</tr>
<tr>
<td>Home Invasion</td>
<td>15 Years</td>
<td>Hill, 199 Ill. 2d 440 (2002); Dryden, 349 Ill. App. 3d 115 (2004) (cross-comparison test)</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td></td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td></td>
</tr>
<tr>
<td>Aggravated Criminal Sexual Assault</td>
<td>15 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td>N/A</td>
</tr>
<tr>
<td>Predatory Criminal Sexual Assault of a Child</td>
<td>15 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>Moss, 206 Ill. 2d 503 (2003) (cross-comparison test)</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td>Moss, 206 Ill. 2d 503 (2003) (cross-comparison test)</td>
</tr>
<tr>
<td>Aggravated Vehicular Hijacking</td>
<td>15 Years</td>
<td>Moss, 206 Ill. 2d 503 (2003) (cross-comparison test)</td>
</tr>
<tr>
<td></td>
<td>20 Years</td>
<td>Moss, 206 Ill. 2d 503 (2003) (cross-comparison test)</td>
</tr>
<tr>
<td></td>
<td>25 Years to Life</td>
<td>N/A</td>
</tr>
</tbody>
</table>

[1] People v. Sharpe, 839 N.E.2d 492 (Ill. 2005). This sudden about-face was not due to a change in the Court’s personnel; the Sharpe decision was unanimous. Id.

Passed in 1999, the 15-20-25 to Life scheme was originally publicized during George Ryan’s gubernatorial campaign. Joe Mahr, *Violent Criminals to Get “15-20-Life”: New Law Slaps Gun Offenders with Longer Sentences, Leaving Taxpayers to Stomach Bigger Cost*, PEORIA J. STAR, Aug. 3, 1999. The scheme provided fifteen, twenty, and twenty-five year enhancements for the presence or use of a firearm during the commission of eleven specified Illinois felonies and increased minimum sentences for the same conduct in any other Illinois felony. See generally 1999 ILL. LAWS 404. For further explanation, see Part IV.

--

This short-hand name for the first proportionality test is of my own creation; the other two are the names used by Illinois courts themselves. The *Sharpe* decision often calls this test the “cruel or degrading” standard. People v. Sharpe, 839 N.E.2d 492 (Ill. 2005).

People v. Lombardi, 705 N.E.2d 91, 98 (Ill. 1998).

*Sharpe*, 839 N.E.2d at 517.


People v. Calicott, 153 N.E. 688, 690 (Ill. 1926) (felony punishment escape from an Illinois State Farm not unconstitutionally disproportionate).

People v. Landers, 160 N.E. 836, 838 (Ill. 1927) (upholding felony sentence for sixteen year old’s un-resisted escape from Illinois State Farm, a penal institution; original offense was misdemeanor).

*Id.*

See People v. Gonzales, 184 N.E.2d 833 (Ill. 1962). The Eighth Amendment’s prohibition of cruel and unusual punishment prohibits certain modes or conditions of punishment. See Estelle v. Gamble, 429 U.S. 97 (1976); Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001) (exposure to sub-zero temperature due to unrepaired cell windows during winter months sufficient to state claim for cruel and unusual punishment); 21A AM. JUR. 2d Criminal Law § 951 (2005).

See People v. Sharpe, 839 N.E.2d 492, 499-500 (Ill. 2005); *Gonzales*, 184 N.E.2d at 835 (“shocks the conscience” proportionate penalties test successfully evoked to strike a penalty only once – forfeiture of a railroad’s franchise for price discrimination); Chicago & Alton R.R. Co. v. People ex. Rel. Koerner, 67 Ill. 11 (1873). The Court came closest to deciding a sentence was disproportionate under the “shocks the conscience test” in *People v. Miller*, where the court invalidated the multiple murder statute’s required life sentence as applied to a fifteen-year-old
who had served as a look-out, holding that sentencing this teenager to life without parole “grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community.” 781 N.E.2d 300, 308 (Ill. 2002). Much of the court’s analysis focused on the offender’s age and his “split second” decision to act as a look-out; the sentence’s sheer length was not the only driving factor. Id.


[17] Id.


[19] Courts most often collapse these three steps into a two step matrix. See, e.g., Sharpe, 839 N.E.2d at 509-10.

[20] The standard for determining whether two offenses have similar statutory purposes will be discussed by Part II infra, as the Illinois Supreme Court argued that there was no consistent, rule-governed standard for evaluating similarity of purpose. See supra text accompanying notes 103-106, 133-136.


[23] Moss, 795 N.E.2d at 221.


[26] Moss, 795 N.E.2d at 221.

[27] 806 N.E.2d 1100 (Ill. 2004).

[28] Punishable by probation or by one to three years imprisonment. 730 ILL. COMP. STAT. 5/5-5-8(a)(7) (2005).


[30] Id.

[31] Pizano, 806 N.E.2d at 1107.

[32] Id.
[33] Moss, 795 N.E.2d at 221.

[34] See People v. Dryden, 811 N.E.2d 302, 307-310 (Ill. App. Ct. 2004) (applying, without question, the Moss reasoning to different firearm enhancements); H.B. 3913, 93d General Assembly, Bill Status “Synopsis as Introduced” (H.B. 3913 “eliminates the provisions added by Public Act 91-404 for the enhancement of penalties for the commission of various offenses with a firearm that have been held unconstitutional on the basis of disproportionate sentencing by the Illinois Supreme Court in People v. Moss”).

[35] See, e.g. People v. Wisslead, 446 N.E.2d 512 (Ill. 1983) (armed violence as predicated on unlawful restraint was unconstitutionally disproportionate under the cross-comparison test).

[36] People v. Morgan, 786 N.E.2d 994 (Ill. 2003) (attempt first degree murder (with mitigating factors present) with 15-20-25 to Life enhancements unconstitutionally disproportionate because punished much more severely than more serious offense of second degree murder).

[37] People v. M.T., 816 N.E.2d 354 (Ill. 2004) (indecent solicitation of an adult unconstitutionally disproportionate under the cross-comparison test; comparison offense indecent solicitation of a child).

[38] People v. Vail, 525 N.E.2d 588 (Ill. 1988) (possession of a stolen motor vehicle unconstitutionally disproportionate under the cross-comparison test; comparison offense theft).

[39] People v. Pizano, 806 N.E.2d 1100 (Ill. 2004) (possession of fraudulent identification card unconstitutionally disproportionate under the cross-comparison test; comparison offense possession of fraudulent identification card and intent to commit theft, etc.).

[40] People v. Hamm, 595 N.E.2d 540 (1992) (Class 3 felony violations of the Fish Code were unconstitutionally disproportionate).


[44] The identical elements test requires that the defendant demonstrate that his offense and another comparison offense have identical elements. People v. Bloomingburg, 804 N.E.2d 638 (Ill. App. Ct. 2004). Thus, a defendant who sought to compare murder with a firearm and murder with another weapon failed; although the two offenses both required proof that an offender kill without lawful justification and with the requisite intent, they did not both require that the actor personally discharge a firearm. Id. at 650-52.


People v. Christy, 564 N.E.2d 770, 782 (1990). Later, in People v. Lewis, the Illinois Supreme Court reasoned that the “identical elements” test should exist because “comparing offense with identical elements was less troublesome than comparing offenses with different elements because it did not require a subjective determination by this court as to which offense was more serious.” People v. Sharpe, 839 N.E.2d 492, 507-08 (Ill. 2005).

[48] Sharpe, 839 N.E.2d 492, 507-08 (Ill. 2005); see generally Christy, 564 N.E.2d at 776-77.


[50] See, e.g., Baker, 794 N.E.2d 353 (Ill. 2003) (aggravated kidnapping while armed with a firearm and therefore subject to a mandatory fifteen year enhancement unconstitutionally disproportionate; comparison offense armed violence as predicated on kidnapping).

[51] Christy, 564 N.E.2d 770 (armed violence as predicated on kidnapping unconstitutionally disproportionate; comparison offense aggravated kidnapping with a Category I weapon).

[52] Lewis, 677 N.E.2d 830 (armed violence as predicated on robbery unconstitutionally disproportionate; comparison offense armed robbery).

[53] Most “identical elements” proportionality challenges fail because the defendant is unable to demonstrate that the charged offense and the comparison offense have identical elements. See, e.g., Sharpe, 839 N.E.2d 492 (first degree murder with firearm and first degree murder using another weapon do not have identical elements); People v. Pickens, 822 N.E.2d 58 (Ill. App. Ct. 2004) (battery and domestic battery offenses do not have identical elements; defendant’s proportionality challenge thus fails).

[54] The “shocks the conscience” test is limited by its stringent requirements – only penalties that are “grossly disproportionate,” rather than merely “unwise,” are unconstitutional. People v. Landers, 160 N.E. 836, 838 (Ill. 1927). The “cross-comparison” test is limited by the threshold requirement that a suitable comparison offense must have a similar statutory purpose and the requirement that the comparison offense be determined to be more serious than the charged offense; whereas the “identical elements” test is limited by the difficulty of finding a comparison offense with identical elements. People v. Dixon, 835 N.E.2d 925 (Ill. App. Ct. 2005); Pickens, 822 N.E.2d 58; People v. Tolbert, 820 N.E.2d 6 (Ill. App. Ct. 2004).


[56] Id.

[57] Id.

[58] Standing is a party’s legal right to make a claim or challenge. Black’s Law Dictionary, 8th ed. 2004 (“standing”).

See, e.g., Hill, 771 N.E.2d at 378. In People v. Morgan, the defendant was able to challenge several 15-20-25 to Life enhancements in one suit because the defendant was at risk for sentencing under several enhancements. 786 N.E.2d 994, 1001 (Ill. 2003). Morgan sought to challenge all three 15-20-25 to Life enhancements as applied to attempted first degree murder. Id. at 1001-04. The court permitted Morgan to challenge all three enhancements because “the facts alleged in the information bring the defendant within the scope of the entire ‘15-20-25 to life’ sentencing scheme, placing him at risk of being sentenced to any of the mandatory enhancements” depending on the jury’s determination of the defendant’s firearm conduct. Id. at 1002.

For example, prior to the Illinois Supreme Court’s decision in People v. Sharpe, approximately one third of the 15-20-25 to Life firearm enhancements to the so-called “enumerated offenses” were held to be unconstitutionally disproportionate, while two thirds of the enhancements remained valid penalties (despite the fact that these remaining enhancements’ constitutionality was highly suspect). See Appendix 1; People v. Sharpe, 839 N.E.2d 492, 514 (if Moss upheld, then all fifteen and twenty year enhancements are unconstitutional).

First degree murder occurs when an actor kills an individual without lawful justification, and intends to kill or do great bodily harm, knows that his actions create a strong probability of death, or is attempting or committing a forcible felony. 720 ILL. COMP. STAT. 5/9-1(a) (2005). Sharpe was charged with three counts each of two different forms of first degree murder -- intentional first degree murder and first degree murder committed with the knowledge that he was creating a strong probability of death or great bodily harm. Sharpe, 839 N.E.2d at 497.

Id. at 496-97.

Id. For more information on the 15-20-25 to Life sentencing enhancement scheme, see supra note 5 and Part IV.

Sharpe, 839 N.E.2d at 497. The circuit court reached this result by following Supreme Court precedent in Moss, which has been extended to hold that all fifteen and twenty year enhancements are less serious, yet punished more severely, than aggravated battery with a firearm and aggravated discharge of a firearm. Id. at 514.

Id. at 514-15.

It is doubtful that stare decisis is the appropriate inquiry for determining whether cross-comparison review is appropriate; however, because the Illinois Supreme Court’s analysis focuses on stare decisis, this paper will likewise.

Id. at 499-500.

For example, the Court cited People v. Landers, which held that a penalty would withstand a proportionality challenge unless it was absurd, unwise, or “shock[ed] the conscience of reasonable men.” Id.
70] Id. at 500; Chi. & Alton R.R. Co. v. People ex. rel. Koerner, 67 Ill. 11 (1873).


72] Id. at 500.

73] Armed violence occurs where the defendant commits a predicate offense while armed with a particular category of dangerous firearm, and affords a significantly increased penalty for the danger added by the presence of the weapon. 720 ILL. COMP. STAT. 5/33A-2 (2005). In this case, the defendant’s predicate offense was unlawful restraint, 720 ILL. COMP. STAT. 5/10-3 (2005), which occurs where the defendant knowingly and without lawful authority detains another person. People v. Wisslead, 446 N.E.2d 512 (Ill. 1983).

74] Id.

75] Id.

76] Sharpe, 839 N.E.2d at 501.

77] Id. at 501.

78] 403 N.E.2d 1029 (Ill. 1982).


80] Sharpe, 839 N.E.2d at 501-02.

81] Id. at 501. Additionally, the Sharpe Court argued that Wagner misunderstood Bradley’s holding. Id. at 502-03.

82] Id. at 502-03.

83] Id.

84] People v. Wisslead, 446 N.E.2d 512, 515-516 (Ill. 1983) (Simon, J., dissenting); Sharpe, 839 N.E.2d at 502-03.

85] Sharpe, 839 N.E.2d at 500-01 (“this court’s conclusion drew a sharp dissent from three members of the court”); Wisslead, 446 N.E.2d at 515-516 (Simon, J., dissenting).

86] Id. at 516 (Simon, J., dissenting).

87] Id. at 515 (Simon, J., dissenting).

88] Several dissenting opinions have questioned cross-comparison review. See, e.g., People v. Davis, 687 N.E.2d 24 (Ill. 1997) (Miller, Harrison, J.J., dissenting); People v. Lewis, 677 N.E.2d

[89] Sharpe, 839 N.E.2d at 507-09.

[90] 687 N.E.2d 24 (Ill. 1997).


[92] Davis, 687 N.E.2d at 29.

[93] 677 N.E.2d 830 (Ill. 1996)


[95] Sharpe, 839 N.E.2d at 513 (Ill. 2005) (characterizing the use of cross-comparison review in Moss as having “evolved” from earlier uses of the test).

[96] People v. Moss effectively declared all 15-20-25 to Life sentencing enhancements unconstitutional. See id. at 513.

[97] Id., 839 N.E.2d at 516.

[98] Id.

[99] Id. at 504.


[101] Sharpe, 839 N.E.2d at 509; see also People v. Moss, 795 N.E.2d 208 (Ill. 2003); People v. Hamm, 595 N.E.2d 540 (Ill. 1990).

[102] 786 N.E.2d 994 (Ill. 2003). Please see the attempt first degree murder case-study (Part IV) for further explanation of this aberration in cross-comparison proportionality review.

[103] Sharpe, 839 N.E.2d at 492.

[105] See, e.g., Hickman, 644 N.E.2d at 1151 (“both offenses are serious. The plain language…expresses different reasons for punishing each offense severely”).

[106] Sharpe, 839 N.E.2d at 507.

[107] See id. at 510-14.


[109] See id. at 511-13 (comparing People v. Koppa, using a very narrow statutory purpose, with People v. Lombardi, using a broad statutory purpose; comparing People v. Walden, looking to the legislative purpose of a statutory enhancement only, with People v. Hill, looking to the legislative purpose of both statutory enhancement and the underlying offense).

[110] Sharpe, 839 N.E.2d at 514.

[111] Id. at 504-05. These two successful cases were People v. Morris, 554 N.E.2d 235 (Ill. 1990) (defendant compared the penalty for possessing an altered temporary registration permit with unauthorized possession of certificate of title; the court found that the penalty violated the “cruel or degrading” standard) and People v. Hamm, 595 N.E.2d 540 (Ill. 1990) (defendant was charged with felony violations of the Fish Code and compared these offenses to similar provisions of the Illinois Vehicle Code).

[112] 687 N.E.2d 24 (Ill. 1997). Davis is a significant proportionate penalties case because it, for the first time, set out three separate forms of proportionality review and divided cross-comparison review into a two-step analysis, requiring both similarity of purpose between the compared offenses and mathematical disproportionality of sentence. See Sharpe, 839 N.E.2d 492, 508-09 (Ill. 2005).

[113] Id. at 514.

[114] Id.

[115] Id. The Sharpe court does not attempt to explain why it has ceased being reluctant to overrule the legislature’s determination of sentences; however, this trend might be due (at least in part) to the separation of the “shocks the conscience” test and the cross-comparison test.

[116] Id. at 516-17.

[117] Id.

[118] See id.
See ILL. CONST., art. I, § 11 (1970). For a more thorough analysis of the separation of powers issue, specifically from the perspective of a slippery slope argument, see text at notes 129-132 supra.

Sharpe, 839 N.E.2d 492, 499-515 (Ill. 2005).

Id. at 517.

The court ignores such half-measures even though several of these possible half-measures are chronicled in its history of the cross-comparison test. See Sharpe, 839 N.E.2d 492. The Sharpe case does reject the defendant’s argument under the pre-Davis test (cross-comparison incorporating the “shocks the conscience” test), but fails to explain why this test is inappropriate except to note that Davis made it obsolete. Id. at 518-519.

Id.

Id. at 499-517.

Id. at 517.

Id. at 513-14.

Id. at 513-14. While there is support for the contention that Moss applies equally to all 15-20-25 to Life enhancements, no other court has applied it to the murder enhancements.

Id. at 513-14.

Id. at 516-17.

Id.

677 N.E.2d 830, 834 (Ill. 1996) (identical elements proportionality analysis does not violate separation of powers).

Sharpe, 839 N.E.2d at 516-17; People v. Fuller, 714 N.E.2d 501, 508 (Ill. 1999) (limiting cross-comparison to offenses with similar purposes minimizes risk separation of powers problems); People v. Lombardi, 705 N.E.2d 91, 101 (Ill. 1998) (by comparing only similar offenses, cross-comparison test minimizes risk of violating separation of powers); Lewis, 677 N.E.2d at 834 (identical elements proportionality analysis does not violate separation of powers).

See Sharpe, 839 N.E.2d at 516-17.

Id. at 513-14.

Id. at 513-14.
By thus reversing Moss and Walden, the analysis would revert to that used in People v. Hill, a case that considered the purpose of both the enhancement and the underlying felony. See 771 N.E.2d 374 (Ill. 2002).

See Sharpe, 839 N.E.2d at 513-14.

Id.

Id.

Id. at 514.

Sharpe, 839 N.E.2d 492, 499-500 (Ill. 2005).

People v. Landers, 160 N.E. 836 (Ill. 1927).

People v. Lewis, 677 N.E.2d 830, 834 (Ill. 1996) (comparison of two statutes for purposes of evaluating proportionality imparts objectivity into proportionality consideration that is otherwise lacking).


Sharpe, 839 N.E.2d at 515.


Sharpe, 839 N.E.2d at 507-08, 517; see also People v. Hampton, 2005 WL 3291016 (using identical elements test after Sharpe decision). Additionally, a line of due process cases utilizes a similar form of cross-comparison review derived from People v. Bradley. See People v. Greene, 450 N.E.2d 329 (Ill. 1983); People v. Wagner, 433 N.E.2d 267 (Ill. 1982). Although dicta in the Sharpe decision might arguably construed to mandate overruling of this line of cases, the due process cases suggest that comparison of different offenses is not wholly inappropriate. Sharpe, 839 N.E.2d at 518 (“the cross-comparison challenge will not simply resurface as a due process
challenge along the lines of Wagner. We agree with the dissenters in Wagner that the majority in that case misapplied Bradley…”).

[149] See id. at 517.

[150] Presumably because the identical elements test does not require a court to determine which of two offenses is more serious

[151] Id. at 517. In People v. Lewis, the Illinois Supreme Court rejected a separation of powers challenge to the identical elements proportionality analysis, arguing that a court need not make subjective determinations as to the relative seriousness of un-like offenses. 677 N.E.2d 830, 833-34 (Ill. 1996).

[152] Green v. State, 390 P.2d 433 (Alaska 1964) (defendant compared the sentences of first degree and second degree murder; fact that second degree murder sentence could be longer was outweighed by the fact that first degree murder sentence was served at hard labor).


[154] Commonwealth v. Jackson, 344 N.E.2d 166 (Mass. 1976) (a penalty designed purely to deter can be so excessive in comparison to other offenses as to constitute cruel and unusual punishment).


[156] State v. Radke, 647 N.W.2d 873 (Wis. 2002) (comparison of “two strikes” and “three strikes” legislation).


[158] See id.

[159] Id.

[160] See John Chase, Panel to Take on Criminal Law Maze: Commission Seeks to Simplify Code, CHI. TRIB. December 14, 2004 (quoting Sen. Kirk Dillard: “When something occurs in any of the members of the General Assembly’s district in a criminal matter…the legislator always wants to add a new law for a lot of reasons, including for public relations’ purposes…and over time…it turns into a hodgepodge.”); Paul H. Robinson, Reforming the Federal Criminal Code: A Top Ten List, 1 BUFF. CRIM. L. REV. 225, 225 (1997) (“high-profile voter-friendly crime issues are readily processed by Congress, but the characteristics of an effective criminal code—meaningful organization, internal consistency, rationality in formulation, and
comprehensiveness in coverage—apparently are not of sufficient political payoff to interest federal legislators.

[161] Id.

[162] 403 N.E.2d 1029 (Ill. 1980).

[163] Id. at 420 (Ryan, J. dissenting).

[164] Id. at 412-414 (defendant was charged with possession of a controlled substance, and subject to one to ten years of imprisonment; if defendant had sold the controlled substance, he would be subject to only one to three years of imprisonment).

[165] Id. at 418.

[166] ILL. REV. STAT. 1977, ch. 561/2, par. 1100; Bradley, 403 N.E.2d at 418.

[167] In addition to Bradley, the court uses the same approach in People v. Wagner, 433 N.E.2d 267 (Ill. 1982) to find that a statute punishing delivery of a substance represented to be a controlled substance more severely than delivery of the controlled substance itself violated due process. Id.


[169] Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681, 682 (April 1983); Dane S. Ciolino, The Mental Element of Lousiana Crimes: It Doesn’t Matter What You Think, 70 TUL. L. REV. 855, 893 n. 159 (March 1996). An internally consistent code is all the more necessary considering the stakes at issue – fines and incarceration as well as the stigma that attaches after conviction. Robinson & Grall, supra note 169, at 682.


[172] If the legislature creates much of the problem in the first place, who else is left to identify errors?

[173] See 720 ILL. COMP. STAT. 5/24-1.2 (2005) (personal discharge of firearm in direction of a person is a Class 1 Felony, punishable by four to fifteen years imprisonment and possible probation); 720 ILL. COMP. STAT. 5/12-11 (2005) (offender armed with concealed firearm in
context of home invasion commits enhanced Class X felony, punishable by a minimum of twenty-one years).

[174] See *Sharpe*, 839 N.E.2d 492, 517, 523 (Ill. 2005) (“we retain the other two types of proportionate penalties challenges”).

[175] See *infra* at note 15.

[176] *People v. Bloomingburg*, 804 N.E.2d 638 (Ill. App. Ct. 2004). Although there is some indication that the identical elements test will be used with more frequency after the *Sharpe* decision, the test is still limited by the requirement that the comparison offense have identical elements. See *People v. Hampton*, 2006 WL 463112 (Ill. App. Ct. 2005) (aggravated criminal sexual assault while armed with a firearm and therefore subject to mandatory fifteen year enhancement unconstitutionally disproportionate; comparison offense armed violence as predicated on criminal sexual assault).


[179] See, e.g., *Sharpe*, 839 N.E.2d at 501-503 (court notes that Bradley and Wagner were poorly supported and reasoned); *People v. Williams*, 621 N.E.2d 62, 63-64 (Ill. App. Ct. 1993) (defendant makes comparison-type due process arguments, but court distinguishes *Bradley* and *Wisslead*, and determines the penalty does not violate due process independent of other comparable offenses); *People v. Marsan*, 606 N.E.2d 344, 346 (Ill. App. Ct. 1992) (defendant attempts to evoke comparison of offenses in due process challenge; court evaluates whether penalty violates due process clause independent of other comparable offenses); *People v. Walcher*, 515 N.E.2d 319, 322 (Ill. App. Ct. 1987) (court “does not believe that it is the proper function of this court to make its own determination or evaluation regarding the relative severity of the disparate offenses of child pornography and criminal sexual abuse.”). *But see People v. Tucker*, 637 N.E.2d 477 (Ill. App. Ct. 1994) (rejecting defendant’s due process challenge because defendant’s analysis regarding the relative seriousness of the offenses was based solely on the degree of harm caused by the offenses); *People v. Markovich*, 552 N.E.2d 1232, 1235 (Ill. App. Ct. 1990) (court compares two offenses, but does not agree with the defendant’s determination of which is more serious); *State v. Radke*, 647 N.W.2d 873 (Wis. App. Ct. 2002) (relying on several Illinois cases, including *Bradley*, to support comparison-type proportionate penalties review of two-strikes law).

[180] *People v. Sharpe*, 839 N.E.2d 492, 518 (Ill. 2005). Interestingly, the *dicta* suggests that in cases analogous to *Bradley*, and where the legislature has explicitly stated an intent to punish a particular harm more severely than another, but has not, due process protection may still exist. See *id.* at 518.

See Estelle v. Gamble, 429 U.S. 97 (1976); Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001) (prisoner’s exposure to sub-zero temperature due to unrepaired windows in prisoner’s cell during winter months were sufficient to state claim under §1983 for cruel and unusual punishment); 21A Am. Jur. 2d Criminal Law § 951.


Id. at 1001 (opinion of Kennedy, J., joined by O’Connor and Souter, JJ.).

See People v. Farmer, 650 N.E.2d 1006, 1014 (Ill. 1995) (court evaluates length of sentence under Eighth Amendment by considering whether the sentencing scheme is “grossly disproportionate to the offense”).

Sharpe rejected the defendant’s attempt to make an argument under this test, reasoning simply that this test was obsolete after Davis. 839 N.E.2d 492, 518-19 (Ill. 2005).

See People v. Fuller, 714 N.E.2d 501, 508 (Ill. 1999) (limiting cross-comparison to offenses with similar purposes minimizing risk separation of powers problems); People v. Lombardi, 705 N.E.2d 91, 101 (Ill. 1998) (by comparing only similar offenses, cross-comparison test thereby minimizes risk of violating separation of powers); People v. Lewis, 677 N.E.2d 830, 834 (Ill. 1996) (identical elements proportionality analysis does not violate separation of powers).

The proposal recommends that courts be required to find that the purposes of two compared offense are related, not identical. A related purposes requirement will avoid, for example, the comparison of offenses within the Fish Code with motor vehicle licensing provisions. See People v. Hamm, 595 N.E.2d 540 (Ill. 1992).


Id. at 511; People v. Powell, 822 N.E.2d 131, 141 (Ill. App. Ct. 2004).

Sharpe, 839 N.E.2d at 510-514.

At least in any future legislation.

See People v. Fuller, 714 N.E.2d 501, 508 (Ill. 1999) (limiting cross-comparison to offenses with similar purposes minimizing risk separation of powers problems); People v. Lombardi, 705 N.E.2d 91, 101 (Ill. 1998) (by comparing only similar offenses, cross-comparison test thereby minimizes risk of violating separation of powers); People v. Lewis, 677 N.E.2d 830, 834 (Ill. 1996) (identical elements proportionality analysis does not violate separation of powers).


Sharpe, 839 N.E.2d at 513-514.
This is effectively the standard used under cases prior to *Davis* and used in *Morgan*. *Sharpe*, 839 N.E.2d at 505-508; People v. Morgan, 786 N.E.2d 994 (Ill. 2003).

See *Sharpe*, 839 N.E.2d at 508-509.

720 ILL. COMP. STAT. 5/8-4(a) (2005); People v. Lopez, 655 N.E.2d 864, 865 (Ill. 1995).


720 ILL. COMP. STAT. 5/9-2(a). The second degree murder statute is a bit of an anomaly in criminal law; the burden of proving the mitigating factors by a preponderance of the evidence is on the defendant. *People v. Jeffries*, 646 N.E.2d 587, 592 (Ill. 1995).

720 ILL. COMP. STAT. 5/9-1(a) (2005); *Lopez*, 655 N.E.2d at 866. Other forms of first degree murder exist; however, the second degree murder statute applies only to intentional first degree murder. See 720 ILL. COMP. STAT. 5/9-2(a); People v. Holmes, 627 N.E.2d 98 (Ill. App. Ct. 1993) (defendant’s conviction predicates second degree murder on “knowing” murder; court overturns).

*Lopez*, 655 N.E.2d at 867-68.

Id. at 867-68.

Voluntary manslaughter in Illinois was defined as the intentional or knowing killing of an individual, where, at the time of the killing, the offender believes the circumstances to be such that, if they existed, would justify or exonerate the killing (imperfect self-defense) or where the offender acted under a sudden and intense passion brought about by serious provocation. ILL. REV. STAT. 1979, ch. 38, par. 9-2 (replaced by Pub. Act 84-1450, eff. July 1, 1987). The voluntary manslaughter provision required that the State prove the mitigation for voluntary manslaughter beyond a reasonable doubt; murder, however, could be proven without *disproving* the two mitigating circumstances (unless the defendant presented some evidence of the mitigating circumstances). Daniel B. Shanes, Murder Plus Mitigation: The “Lesser Mitigated Offense” Arrives in Illinois, 27 J. MARSHALL L. REV. 61 (Fall 1993). Attempt voluntary manslaughter, had it existed, would have required that the defendant intend to kill without legal justification. *People v. Reagan*, 457 N.E.2d 1260, 1261 (Ill. 1983). However, if the defendant believed the circumstances to be such that he was acting in self-defense, then he in fact intended to kill with lawful justification (in self-defense), and killing with lawful justification is not a crime. Id.


Id. at 867.

Id.
[208] Id.

[209] Id. at 869-70 (McMorrow, J, dissenting).

[210] Id.


[213] Id.


[218] See id. Regardless of the fact that these are mitigating factors, and not elements of the offense, intent to commit the elements of second degree murder is actually intent to commit first degree murder. Id. at 867-868. Thus, intent of the presence of the mitigating factors is necessary to distinguish the offense from first degree murder. Id. at 868.

[220] See id. at 867-868.

[221] The Model Penal Code appears to require only the intent required by the substantive offense, however, cases interpreting the Model Penal Code’s provision interpret it to require an intent to commit a specific offense. See MODEL PENAL CODE § 5.01(1) (1962); State v. Mendez, 785 A.2d 945 (N.J. 2001) (Person must act with purpose to commit substantive offense to be found guilty of attempt); Commonwealth v. Henley, 474 A.2d 1115 (Pa. 1984) (Attempt requires that the actor intend to commit an offense).


Such a solution would permit convictions without specific intent to commit offenses other than second degree murder. See generally People v. Taylor, 733 N.E.2d 902 (Ill. App. Ct. 2000) (attempt statute applies presumptively to all substantive offenses).


Id.

Id.

Id.

Id.

Id. at 868-73; People v. Morgan, 786 N.E.2d 994 (Ill. 2003) (second degree murder is both comparable to and more serious than attempt first degree murder). But see People v. Ford, 815 N.E.2d 872 (Ill. App. Ct. 2004) (holding that second degree murder is not necessarily more serious than attempt first degree murder; however, Ford was sentenced to an extended term for heinous and brutal conduct). It is arguable that attempt first degree murder (when applied in situations that would constitute attempt second degree murder) and second degree murder have related statutory purposes: to prevent the unlawful killing of another person in one of the mitigating circumstances. Cf. Morgan, 786 N.E.2d 994 (permitting comparison of second degree murder and attempt first degree murder); People v. Henderson, 820 N.E.2d 108 (Ill. App. Ct. 2004) (comparison of attempt first degree murder of police officer and second degree murder inappropriate only because attempt first degree murder of police officer has second, more specific purpose of deterring the unlawful killing of police officers).
[231] See Morgan, 786 N.E.2d 994.

[232] Id.

[233] Id. at 1005.

[234] Id. at 1007.

[235] See People v. Sharpe, 839 N.E.2d 492, 515 (Ill. 2005) (“if a less serious offense was punished more harshly than a more serious offense, then the greater penalty would be invalidated”). It is interesting to note that the Sharpe court ignored Morgan’s sudden evocation of “not so disparate” and “vastly disparate” determinations, and instead argued only that Morgan failed to make the threshold determination that the compared offenses had similar purposes. Sharpe, 839 N.E.2d 512-13.

[236] Attempt first degree murder is a non-probationable offense. 730 ILL. COMP. STAT. 5/5-5-3.

[237] Second degree murder is a probationable offense. 730 ILL. COMP. STAT. 5/5-5-3.

[238] Second degree murder is not enhanced under the 15-20-25 to Life firearm enhancement scheme. See People v. Drakeford, 564 N.E.2d 792 (Ill. 1990).


[240] See People v. Sharpe, 839 N.E.2d 492, 515 (Ill. 2005) (“if a less serious offense was punished more harshly than a more serious offense, then the greater penalty would be invalidated”).


[242] See Morgan, 786 N.E.2d 994. The Sharpe court is correct to complain that Morgan failed to engage in the threshold analysis to determine whether the offenses have “related purposes.” Sharpe, 839 N.E.2d 492, 512-13 (Ill. 2005). It is likely that a defendant could successfully argue that both second degree murder and attempt first degree murder have a related statutory purpose of deterring and preventing unlawful killings. See People v. Henderson, 820 N.E.2d 108 (Ill. App. Ct. 2004) (comparison of attempt first degree murder of police officer and second degree murder inappropriate only because attempt first degree murder of police officer has second, more specific purpose of deterring the unlawful killing of police officers).


[244] Morgan, 786 N.E.2d 994.

A Class X felony is a non-probationable offense generally punishable by six to thirty years of imprisonment. 730 ILL. COMP. STAT. 5/5-8-1(a)(3) (2004).  

720 ILL. COMP. STAT. 5/8-4(c) (2005). A person commits attempt by taking a substantial step towards the commission of an offense with the intent to commit that offense. Id. at 5/8-4(a).

730 ILL. COMP. STAT. 5/5-8-1(a)(1)(d) (2005). First degree murder is a killing without lawful justification where the actor intended to cause death, knows that his actions will cause death, knows that such actions cause a strong probably of death or great bodily harm, or is committing a forcible felony. 720 ILL. COMP. STAT. 5/9-1(a) (2005).

720 ILL. COMP. STAT. 5/10-2(b). A person commits aggravated kidnapping when he kidnaps "for the purpose of obtaining ransom," kidnaps a child under thirteen, kidnaps a mentally retarded person, wears a hood or covering that conceals his identity, is armed with a dangerous weapon or firearm, or personally discharges a firearm. Id. at 5/10-2(a).

720 ILL. COMP. STAT. 5/12-4(b). To commit aggravated battery of a child, a person must be at least eighteen years of age and intentionally or knowingly cause great bodily harm or permanent disability to a child under thirteen or a mentally retarded person. Id. at 5/12-4(a).

720 ILL. COMP. STAT. 5/12-11(a)(3), (a)(4), (a)(5). To commit home invasion, a person must enter a dwelling place of another while armed with a dangerous weapon or firearm and knowing or having reason to know that a person is present. The offender must also use force or threaten imminent use of force upon a person within the dwelling place. Id. at 5/12-11(a).

720 ILL. COMP. STAT. 5/12-14(a)(8), (a)(9), (a)(10). Aggravated criminal sexual assault is committed when a person commits criminal sexual assault and displays a dangerous weapon or firearm, causes bodily harm to the victim, threatened or endangered the life of the victim or another person, the criminal sexual assault was committed during the course of another felony, the victim was over sixty years of age, the victim was physically handicapped, or delivered a controlled substance to the victim. Id. at 5/12-14(a).

720 ILL. COMP. STAT. 5/12-14.1(a)(1.1), (a)(1.2). Predatory criminal sexual assault of a child is committed when a person is over seventeen years of age and commits an act of sexual penetration with a victim under thirteen years of age. Id. at 5/12-14.1(a)(1).
A person commits aggravated robbery if he commits robbery while carrying a dangerous weapon or firearm. *Id.* at 5/18-2(a).

To commit aggravated vehicular hijacking, a person must commit vehicular hijacking and take the motor vehicle from a person over sixty years of age, a person under sixteen years of age, or carry a dangerous weapon or firearm. *Id.* at 5/18-4(a).

Offenders are "armed with a firearm" when they "carry on or about [their] person or [are] otherwise armed with a firearm." *Id.* at 5/2-3.6.

See, e.g., *id.* at 5/18-4(b).

A person personally discharges a firearm when "he or she...knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm." *Id.* at 5/2-15.5.

See, e.g., *id.* at 5/18-4(b).

Prior to “15-20-25 to life,” armed violence increased the penalty of any felony committed by an offender armed with any dangerous weapon. See *id.* at 5/33A-2, 5/33A-3 (1998). The penalty for armed violence increased as the dangerousness of the weapon increased. *Id.* at 5/33A-2, 5/33A-3 (1998). Armed violence was designed to be charged in addition to a “predicate felony”; where an offender was sentenced on both the predicate felony and armed violence, the sentences were served concurrently. People v. Robinson, 593 N.E.2d 148 (Ill. App. Ct. 1992).

The 15-20-25 to Life bill prohibits armed violence from being predicated on the enumerated Class X felonies. See *id; infra* Part II.A.1.

A Category I firearm is a hand-gun, sawed-off shotgun, sawed-off rifle, firearm small enough to be concealed on a person, semi-automatic firearm, or machine gun. 720 ILL. COMP. STAT. 5/33A-3(a) (2004).

A Category II firearm includes any rifle, shotgun, spring gun, firearm, or stun gun that is not a Category I firearm. *Id.* at 5/33A-3(a-5).

See 1999 Ill. Laws 404.
Id.

See Appendix 1 for table graphically depicting the proportionate penalties troubles.

A piece-meal enhancement scheme is unlikely to have the deterrent effect sought by Illinois’ legislature. Although tough penalties might some deterrent effect, studies based on other states’ mandatory firearm enhancement schemes suggest that these schemes are not successful deterrents. See, e.g., David McDowall, et. al., Criminology: A Comparative Study of the Preventative Effects of Mandatory Sentencing Laws for Gun Crimes, 83 J. CRIM. L. & CRIMINOLOGY 378 (Summer 1992) (modest reduction in homicides and assaults involving guns in areas with firearm enhancement scheme; no comparative reduction in non-firearm crimes); Hofer, supra note 170 at 43 (survey of empirical studies concluded that “passage of of [a firearm enhancement statute], in and of itself, does not guarantee a decrease in crimes involving firearms.”); Thomas B. Marvel & Carlisle E. Moody, The Impact of Enhanced Prison Terms for Felonies Committed with Guns, 33 CRIMINOLOGY 247 (1995) (no decrease in gun-related crime after passage of firearm sentencing enhancements). It is likely that Illinois’ piecemeal firearm enhancement scheme is even less effective than other states’ similar schemes; scholars argue that “crime control…can[not] be achieved if [firearm sentence enhancements] are circumvented or applied inconsistently.” Cf. Hofer, supra note 170, at 69.

The assessment of the “Just Right” cross-comparison test’s effect on identified proportionality problems of the 15-20-25 to Life firearm enhancement scheme will, to the extent possible, utilize existing precedent.

The cross-comparison test does not require that equally serious offenses be punished equally; only that less serious offenses not be punished more severely than more serious offenses. See People v. Moss, 795 N.E.2d 208, 221 (Ill. 2003).

These three 15-20-25 to Life Class X enumerated felonies were armed robbery, aggravated vehicular hijacking, and aggravated kidnapping. Id.

Id. at 224-25.


Moss, 795 N.E.2d at 223-24.

Id. at 224.

Id. at 225 (italics added).

The Class X felony at issue in Walden was armed robbery. People v. Walden, 769 N.E.2d 928 (Ill. 2002).

Id.
[285] Id.

[286] Id. at 932.

[287] See id.

[288] People v. Moss, 795 N.E.2d 208, 223. The court summarized the State’s argument as follows: “the State contends that the “15/20/25-to-life” offenses…are more serious because they involve elements in addition to firearm conduct. … By contrast, no additional felonies are involved in aggravated battery with a firearm and aggravated discharge of a firearm, which focus on the firearm conduct itself.” Id. (emphasis added).

[289] Id. at 223.

[290] Id. at 223.

[291] Id. at 223-225. The Court’s reticence in Moss to consider “additional elements” other than firearm conduct in its seriousness inquiry was reflected in People v. Tolbert. 820 N.E.2d 6 (Ill. App. Ct. 2004). In Tolbert, the court noted in dicta that although murder by arson or explosives “harms others [in addition to the murder victim] by creating unrealized risks…that are similar to the risk…created by killing one person with a gunshot,” it would defer to the legislature’s determination that murder committed by personally discharging a firearm was more serious than murder committed by arson or explosives. Id. at 14 (court did not engage in similarity of purpose analysis).

[292] Cross-comparison proportionality review requires that the comparison offense be more serious than the defendant’s offense. People v. Hill, 199 Ill. 2d 440, 452, 771 N.E.2d 374, 381 (2002).

[293] Uniform definition of firearm conduct would be a positive improvement. Uniform definition might help eliminate various offenses which punish similar, but slightly different firearm conduct, making the Code simpler to understand and use. Additionally, consistent categories would likely ease the lesser-included offense inquiry. Most importantly, however, uniform definition would make the Illinois Criminal Code a more integrated, internally consistent Code.

[294] See text at notes x-x, infra.

[295] 1999 ILL. LAWS 404; 720 ILL. COMP. STAT. 5/24-1.2 (2005); id. at 5/12-4.2.

[296] People v. Walden, 769 N.E.2d 928 (Ill. 2002).

[297] See 720 ILL. COMP. STAT. 5/24-1.2 (2005) (aggravated battery of a firearm punishable as a Class 1 felony – four to fifteen years imprisonment); id. at 5/12-4.2 (2005) (aggravated battery with a firearm punishable as a Class X felony – six to thirty years imprisonment); id. at 5/18-2 (2005) (armed robbery with the discharge of a firearm punishable as a Class X felony with a
twenty year enhancement – twenty-six to fifty years imprisonment); 730 ILL. COMP. STAT. 5/5-5-8(a) (defining Class 1 and Class X felonies).


[299] 720 ILL. COMP. STAT. 5/18-2 (armed robbery while armed with a firearm punishable as a Class X felony with a mandatory fifteen year enhancement – twenty-one to forty-five years imprisonment); 720 ILL. COMP. STAT. 5/33A-2 (armed violence predicated on aggravated robbery punishable by fifteen to thirty years or ten to thirty years depending on the kind of firearm used); 730 ILL. COMP. STAT. 5/5-5-8(a) (defining Class 1 and Class X felonies).

[300] People v. Baker, 794 N.E.2d 353 (Ill. App. Ct. 2004). The identical elements test requires that the defendant demonstrate that his offense and another comparison offense have identical elements, but are punished differently. People v. Bloomingburg, 804 N.E.2d 638 (Ill. App. Ct. 2004). A defendant who sought to compare murder with a firearm and murder with another weapon failed; although the two offenses both required proof that an offender kill without lawful justification and with the requisite intent, they did not both require that the actor personally discharge a firearm. Id. at 650-52. The identical elements test remains valid after Sharpe. 839 N.E.2d 492 (Ill. 2005).

[301] Baker, 794 N.E.2d at 358. Both offenses required that the offender commit kidnapping while armed with a firearm. Id. Armed violence predicated on kidnapping while armed with a Category I firearm is punishable by fifteen to thirty years and aggravated kidnapping while armed with a firearm is punishable by twenty-one to forty-five years. Id.

[302] Id. at 358. Armed violence predicated on kidnapping while armed with a Category I firearm is punishable by fifteen to thirty years and aggravated kidnapping while armed with a firearm is punishable by twenty-one to forty-five years. Id.

[303] The firearm conduct in both offenses was identical. Id. at 358.

[304] Moss, 206 Ill. 2d at 223-25. Aggravated battery with a firearm is a Class X felony, punishable by six to thirty years of imprisonment. 720 ILL. COMP. STAT. 5/12-4.2(b) (2004); 730 ILL. COMP. STAT. 5/5-8-1(a)(3) (2004). Aggravated discharge of a firearm is a Class 1 felony with a penalty range of four to fifteen years. 720 ILL. COMP. STAT. 5/24-1(a)(4) (2004); 730 ILL. COMP. STAT. 5/5-8-1(a)(4) (2004).

[305] Id. at 224-25.

[306] Id. at 223-25.

[307] See id.


[309] See Moss, 795 N.E.2d at 225.

[311] See Moss, 795 N.E.2d at 223.

[312] Including offenses like aggravated battery with a firearm, aggravated discharge of a firearm, and reckless discharge of a firearm.


[315] See 720 ILL. COMP. STAT. 5/24-1.2 (aggravated discharge of a firearm); id. at 5/18-2 (aggravated robbery); id. at 5/33A-2, 3 (armed violence).

[316] See generally id. at 227.

[317] See generally People v. Hanson, 485 N.E.2d 1144 (Ill. App. Ct. 1985). The weapon is counted once as an element of the offense and once as an element of armed violence. Id. at 1148. Conversely, offenses not specifically requiring the presence or use of a firearm will survive double enhancement challenge even if the use of a weapon is proven beyond a reasonable doubt. People v. Becker, 734 N.E.2d 987 (Ill. App. Ct. 2000). Aggravated battery (based on the use of a dangerous weapon) and armed robbery have been held ineligible to be enhanced via armed violence. People v. Van Winkle, 430 N.E.2d 987 (Ill. 1981); People v. Del Percio, 475 N.E.2d 528 (Ill. 1985).

[318] While the four year disparity might survive “Just Right” cross-comparison, the nine, fourteen, fifteen, and twenty year disparities most likely will not. The goal of this proposal is to create a workable relationship between the “Just Right” cross-comparison test and a firearm enhancement scheme in its entirety.

[319] Aggravated assault cannot be enhanced via armed violence because it already requires the presence of a firearm. 720 ILL. COMP. STAT. 5/12-2(a).


[321] Id.

[322] 720 ILL. COMP. STAT. 5/33A-2 (2004). Offenses committed while armed with a Category II firearm are punished less severely than those committed with Category I firearms. Id.

[323] See Table 2, at page 40 infra. If a court were to determine that the predicate felony on which armed violence was predicated was more serious than an enumerated felony where both offenses were committed while armed with a firearm, the armed violence offense (if committed with a Class II felony) would be punished by eleven years less than the enumerated felony. See 720 ILL. COMP. STAT. 5/33A-3 (2005); 720 ILL. COMP. STAT. 5/18-2 (2005). An eleven year disparity is probably to great to survive the “shocks the conscience test.”
The armed violence offense is punishable by twenty-five to forty-five years and the enumerated Class X offense is punishable by twenty-one to forty-five years. 1999 ILL. LAWS 404. The difference is minimal at best; the minimum sentence differs by only four years. It is likely that a court, like the Illinois Supreme Court in Morgan, would determine that the sentences are not very disproportionate.


794 N.E.2d 353, 358 (Ill. App. Ct. 2004). This result would seem to make sense; identical conduct should be punished identically regardless of which criminal offense reaches that conduct.

See generally People v. Morgan, 786 N.E.2d 994 (Ill. 2003).

See text at note 242-244, infra.

See generally Morgan, 786 N.E.2d 994.

Attempt first degree murder is a non-probationable offense. 730 ILL. COMP. STAT. 5/5-5-3.

Second degree murder is a probationable offense. Id.

Second degree murder is not enhanced under the 15-20-25 to Life firearm enhancement scheme. People v. Drakeford, 564 N.E.2d 792 (Ill. 1990).


See People v. Drakeford, 564 N.E.2d 792, 794-95 (Ill. 1990).

Id. at 794-95.

Id. at 795.

Id. at 795.

See People v. Morgan, 786 N.E.2d 994 (Ill. 2003).


The proposal does not, however, enhance offenses which prohibit only the possession or transfer of firearms, such as 720 ILL. COMP. STAT. 5/24-1 (2004) (unlawful use of firearms). The proposal thus recognizes that firearm use or possession during a felony is more serious than the possession of a firearm prohibited for other reasons, such as the offender’s status as a felon. See id. at 5/24-1.1 (2004).
Although it is the author’s personal opinion that the length of the sentence enhancements should be significantly reduced in order to lessen the 15-20-25 to Life’s impact on prison overcrowding and the overall correctional budget, such a change is outside the scope of this paper. As such, the proposed proportionate 15-20-25 to Life firearm enhancement scheme preserves, except as otherwise noted, the penalties currently proscribed.


720 ILL. COMP. STAT. 5/33A-3 (2005). By eliminating this distinction, the eleven year difference between the minimum sentences for an enumerated Class X felony and an armed violence offense is reduced to a “not very disproportionate” six years.

It is likely that a five year disparity between compared offense would survive “Just Right” cross-comparison review as neither “shocking the conscience” nor being considered “vastly disproportionate.” *Cf.* People v. Morgan, 786 N.E.2d 994 (Ill. 2003). By reducing the disparity in sentences between the enumerated Class X felonies and armed violence, the proposal eliminates the possibility of successful cross-comparison challenges based on the theory that an armed violence offense is more serious in its entirety than one of the enumerated Class X felonies where both felonies involve the same firearm conduct. Additionally, the proposed enhancement scheme has adjusted sentences to prevent successful cross-comparison challenges claiming that additional firearm conduct makes an armed violence offense more serious than an enumerated Class X felony. In every instance where armed violence might involve more serious firearm conduct than an enumerated Class X felony, the armed violence offense is punishable by at least as much as the lesser firearm conduct in the context of an enumerated Class X felony. For example, if a defendant were to argue that an armed violence offense was more serious than a Class X felony because the armed violence offense included the personal discharge of a firearm and the Class X felony included only the use of a firearm, the challenge would be unsuccessful because the offenses are punished identically. *See* Table 10.

Although it might appear that an offender would serve more time if convicted of a predicate felony and armed violence than if convicted of a felony with incorporated firearm enhancements, this is unlikely. A defendant cannot be convicted and sentenced for both armed violence and the predicate felony when a “single physical act” is the basis for both charges. JOHN F. DECKER, 1 ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES § 9.64 at 506 (3d ed. 2000); *see, e.g.*, People v. Donaldson, 435 N.E.2d 477 (Ill. 1982). Even where both convictions arise from more than one physical act, sentences for multiple offenses run concurrently “unless otherwise specified by the court.” *See* “Illinois Sentencing and Disposition Guide,” Memorandum from Justice Gino L. DiVito, to Illinois Trial Court Judges 47 (November 2004) (quoting 730 ILL. COMP. STAT. 5/5-8-4(b)).

These “discharge offenses” include aggravated discharge of a firearm, 720 ILL. COMP. STAT. 5/24-1.2, aggravated discharge of a machine gun or a firearm equipped with a device designed or used for silencing the report of a firearm, *id.* at 5/24-1.2-5, and unlawful discharge of firearm projectiles, *id.* at 5/24-3.2. Under the proposal, these offenses receive sentences that track, to the extent possible, the sentences for armed violence. It is debatable whether reckless
discharge of a firearm should also receive increased sentences, as the reckless discharge of a
firearm seems less culpable than the other felonies involving firearms. See id. at 5/24-1.5
(2004).

[347] These offenses include aggravated unlawful restraint, id. at 5/10-3.1 (requires presence of
dangerous weapon), forcible detention, id. at 5/10-4 (requires presence of dangerous weapon),
aggravated assault, id. at 5/12-2(a)(1) (requires deadly weapon), aggravated assault (discharges a
firearm), id. at 5/12-3(a)(13) (requires discharge of firearm), aggravated battery (deadly
weapon), id. at 5/12-4(a)(1) (requires deadly weapon, other than discharge of firearm),
aggravated battery with a firearm, id. at 5/12-4.2 (requires firearm), aggravated battery with a machine
gun or a firearm equipped with any device or attachment designed or used for silencing the report of a firearm, id. at
5/12-4.2-5 (requires firearm), home invasion, id. at 5/12-11 (requires dangerous weapon or firearm), aggravated
criminal sexual abuse, id. at 5/12-16 (requires dangerous weapon), armed robbery, id. at 5/18-2 (requires weapon or
firearm), aggravated robbery, id. at 5/18-5(a) (requires dangerous weapon), escape, id. at 5/31-6 (requires weapon),
aiding escape, id. at 5/31-7 (requires weapon).

[348] Because the legislature intended armed violence to enhance the penalty for a felony
involving use of a weapon, the deterrent purpose “cannot be satisfied where, even without the
use of a weapon, the predicate felony…is punishable by a more severe sentence than is available
for armed violence.” DECKER, supra note 199 (citing People v. Hobbs, 619 N.E.2d 258, 261
(Ill. App. Ct. 1993)).

[349] See text accompanying notes 328-338, infra.

[350] California likewise provides an enhancement for “use” of a firearm. CAL. PEN. CODE §
12022(b)(1). By using the term “uses” instead of “while armed,” the Legislature requires
firearm in California requires conduct that produces a fear of harm or force by means or display
of a firearm. Id. Use also requires a nexus between the use of the weapon and the

[351] Arizona also distinguishes between “use or threatening exhibition” of a firearm and mere
possession of a firearm. ARIZ. REV. STAT. § 13-604(G) (no enhancement for mere possession
of firearm).


[353] This paper also recommends that the legislature adopt the proposed modified version of the
15-20-25 to Life firearm enhancement scheme in order to conform to the proposed “Just Right”
cross-comparison test.