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I. INTRODUCTION

The fourteen Illinois Supreme Court decisions in the area of substantive criminal law[1] handed down during the *Survey* year suggest both the continuation of a trend and a seemingly small, yet significant departure from decisions in recent years. The continuing trend is the court's preference for granting review of, and reversing, lower court rulings that favor the defense, at least in substan-

1. Substantive criminal law concerns the application of the Criminal Code. For analysis of significant developments in Illinois criminal procedure during this *Survey* year, see *infra* Siskin and Rosenberg, *Criminal Procedure*, 21 LOY. U. CHI. L.J. 349 (1990).

tive criminal law. For example, in the noncapital cases examined in last year's *Survey*,[2] eight were before the supreme court following defense victories in lower courts;[3] two resulted from lower court judgments for the State.[4] In all but one of this *Survey* period's fourteen cases,[5] the defendant prevailed before the lower tribunal.

The significant departure presented by these cases is the unanimity previously unseen on the supreme court in recent years. There were three dissents in the noncapital cases in last year's *Survey*, all in cases wherein the majority sided with the State.[6] Only two dissents were recorded in the fourteen cases within this year's *Survey*,[7] both written by Justice Ben Miller. In each case, a majority of the supreme court held for the defense.[8]

One possible explanation for this new display of unanimity is Justice Seymour Simon's recent retirement; during his tenure on the court, Justice Simon developed a reputation as "the great dissenter."[9] Whatever the reason, the court's unanimity, coupled with its reluctance to overturn lower courts' decisions favoring the State, demonstrates that the court appears to view itself with increasing frequency as the court of last resort to halt what it perceives, rightly or wrongly, to be the lower courts' expansion of defendants' rights.

In legislation, the General Assembly defined new crimes and en-

2. *See* Dilgart and Giampa, *Criminal Law*, 20 LOY. U. CHI. L.J. 329 (1989).

3. People v. Parker, 123 Ill. 2d 204, 526 N.E.2d 135 (1988); People v. Reddick, 123 Ill. 2d 184, 526 N.E.2d 141 (1988) (*Reddick* was the consolidation of two separate appeals); People v. Geever, 122 Ill. 2d 313, 522 N.E.2d 1200, *appeal dismissed*, 109 S. Ct. 299 (1988); People v. Esposito, 121 Ill. 2d 491, 521 N.E.2d 873 (1988); People v. Holland, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *aff'd*, 110 S. Ct. 803 (1990); People v. Monroe, 118 Ill. 2d 298, 515 N.E.2d 42 (1987); People v. Haywood, 118 Ill. 2d 263, 515 N.E.2d 45 (1987); People v. Watson, 118 Ill. 2d 62, 514 N.E.2d 167 (1987).

4. People v. Reddick, 123 Ill. 2d 184, 526 N.E.2d 141 (1988); People v. Hicks, 119 Ill. 2d 29, 518 N.E.2d 148 (1987).

5. Faheem-El v. Klincar, 123 Ill. 2d 291, 527 N.E.2d 3007 (1988). Furthermore, the court had no choice but to hear *Faheem-El*, which came to the court on a petition for a writ of *habeas corpus*, because the supreme court has original jurisdiction over *habeas* petitions. *See* ILL. CONST. art. VI, § 4(a).

6. People v. Geever, 122 Ill. 2d 313, 522 N.E.2d 1200, *appeal dismissed*, 109 S. Ct. 299 (1988); People v. Holland, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *aff'd*, 110 S. Ct. 803 (1990); People v. Hicks, 119 Ill. 2d 29, 518 N.E.2d 148 (1987).

7. People v. Sequoia Books, Inc., 127 Ill. 2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 110 S. Ct. 835 (1990); People v. Lindner, 127 Ill. 2d 174, 535 N.E.2d 829 (1989).

8. *See supra* note 7 (Justice Ryan joined Justice Miller in dissenting from the majority in *Sequoia Books*).

9. Tapp, *Empowered by Principle: The Fascinating Career of Seymour Simon*, SULLIVAN'S L. REV. 5, 6 (Spring 1988). Justice Simon retired effective February 15, 1988. 122 Ill. 2d at v.

hanced the penalties for others,[10] notwithstanding the almost epidemic increase in prison population over the past decade.[11] Much of the new legislation was drug-related, including a new Class X offense for possession of large quantities of controlled substances.[12] Other new crimes concern sexual abuse of children and bodily harm to the elderly.[13] The legislature also revised two statutes that the supreme court ruled unconstitutional during the *Survey* year.[14]

II. CASE LAW

A. General Provisions and Principles of Criminal Liability

1. Rights of the Defendant: Multiple Convictions and Multiple Sentences

The Illinois Supreme Court held in *People v. Segara*[15] that multiple convictions for multiple acts of criminal sexual assault against the same victim, during a single episode, do not violate the defendant's constitutional guarantee against double jeopardy[16] if the acts are distinct; the resulting sentences, however, must run concurrently.[17]

In *Segara*, the defendant had known the victim for several years, but they had no prior sexual relationship.[18] On the night in question, the defendant forced his way into the victim's apartment, physically abused her, raped her and forced her to perform fellatio.[19] At a bench trial, the defendant was convicted of eight counts of aggravated criminal sexual assault.[20] The appellate court va-

10. *See infra* notes 279-362 and accompanying text.

11. As of January 1990, the Illinois Department of Corrections had custody of 24,869 inmates in a system designed for 15,750. *Illinois Inmate Population Growing at Record Pace*, Chi. Daily L. Bull., Jan. 17, 1990, at 3, col. 5. The population is expected to increase to 30,000 in the next five years. *Id.* at col. 4.

12. *See infra* note 350 and accompanying text.

13. *See infra* notes 301-08 and accompanying text. A Class X offense is, after murder, the most serious classification of felony for purposes of sentencing. ILL. REV. STAT. ch. 38, para. 1005-5-1 (1987). The sentence for a Class X felony is six to thirty years. *Id.* at 1005-8-1.

14. *See infra* notes 335-36, 355-60 and accompanying text.

15. 126 Ill. 2d 70, 533 N.E.2d 802 (1988).

16. The fifth amendment of the United States Constitution guarantees that "[no] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

17. *Segara*, 126 Ill. 2d at 76-78, 533 N.E.2d at 805.

18. *Id.* at 72, 533 N.E.2d at 803.

19. *Id.* at 72-73, 533 N.E. at 803. The defendant struck his victim twice in the face with his fist and hit her with his shoe. *Id.* at 73, 533 N.E.2d at 803. The victim was pregnant at the time of the attack and miscarried the next week. *Id.*

20. *Id.* at 71, 533 N.E.2d at 802-03. The defendant was convicted of violating ILL. REV. STAT. ch. 38, paras. 10-3(a) (unlawful restraint), 12-4(a) (aggravated battery), 12-

cated all but one conviction and affirmed the sentence, but it remanded for clarification of which count remained.[21] The supreme court granted the defendant's petition for leave to appeal, which sought a remand for resentencing due to the vacatur of the other seven convictions.[22]

The unanimous court reviewed the cases on which the appellate court grounded the vacaturs, including *People v. Cox*.[23] The *Cox* court held that when a defendant commits multiple criminal acts against the same victim within a short time, only one conviction and one sentence are proper.[24] *Cox* was modified, however, in *People v. King*,[25] which held that multiple convictions for multiple criminal acts against the same victim are permissible if the offenses are different and the sentences run concurrently.[26] Thus, if the defendant's offenses here constituted distinct acts, multiple convictions with concurrent sentences would be proper.[27]

Emphasizing the brutality of sexual assault and its lasting impact on the victim, the court had little difficulty in holding that each of the defendant's acts of rape was a separate act.[28] The court also found support in the rape statute's wording, which indicated a clear legislative intent that each act of rape be punished.[29] In light

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14(a)(2) (1987) (bodily harm to the victim), 12-14(a)(3) (threats or endangerment to life of victim or other person), and 12-14(a)(4) (assault during the course of the commission or attempted commission of another felony). The court merged the first two charges during sentencing. 126 Ill. 2d at 71-72, 533 N.E.2d at 802-03.

21. *Id.* at 72, 533 N.E.2d at 803.

22. *Id.* at 74, 533 N.E.2d at 804.

23. 53 Ill. 2d 101, 291 N.E.2d 1 (1972).

24. *Segara*, 126 Ill. 2d at 74, 533 N.E.2d at 804. In *Cox*, the defendant committed multiple acts of indecent liberties against the same child. *Cox*, 53 Ill. 2d at 103, 291 N.E.2d at 2. There, the court relied on Bell v. United States, 349 U.S. 81 (1955), and its rule, which states that in interpreting legislative intent in the face of a silent Congress, "the ambiguity should be resolved in favor of lenity." *Cox*, 53 Ill. 2d at 106, 291 N.E.2d at 4 (quoting *Bell*, 349 U.S. at 83).

25. 66 Ill. 2d 551, 363 N.E.2d 838, *cert. denied*, 434 U.S. 894 (1977), *superseded by statute as stated in*, People v. De Simone, 108 Ill. App. 3d 1015, 439 N.E.2d 1311 (2d Dist. 1982).

26. *Id.* at 566, 363 N.E.2d at 845. In *King*, the defendant committed rape and burglary with intent to commit rape, which the court found to be two distinct acts for which the defendant could receive separate convictions but concurrent sentences. *Id.*

27. *Segara*, 126 Ill. 2d at 76, 533 N.E.2d at 805.

28. *Id.* at 77-78, 533 N.E.2d at 805. The court stated:

> To permit a defendant to rape an individual several times over a period of time in the same place with little or no break between each act deprecates the heinous and violent nature of each act and the effect each act has upon the victim. . . . Rape is unlike other offenses: with each act, the victim's psychological constitution and most intimate part of her being have been violently invaded.

Id.

29. *Id.* The court stated that "although the legislature did not intend for defendant

of this intent, the court concluded that the two convictions for aggravated criminal sexual assault did not constitute double jeopardy.[30] Accordingly, the court affirmed the appellate court's vacatur of six of the eight convictions but reinstated another.[31] Lastly, the court declared that the sentences must run concurrently.[32]

2. Justifiable Use of Force: Jury Instructions on Necessity Defense

In *People v. Janik*,[33] the Illinois Supreme Court considered the quantum of evidence required to justify jury instructions on the affirmative defense of necessity[34] against the charge of leaving the scene of an accident.[35] The court ruled that the trial court properly denied such jury instructions when the defendant claimed simultaneously that he was justified in leaving the scene of an accident and he was unaware that he had been in a collision.[36]

While driving home after drinking at a local tavern, the defendant struck and killed a pedestrian.[37] The defendant did not stop; he drove the four blocks to his home and told his wife that someone had thrown something at the car.[38] A police officer who witnessed the accident followed the defendant home and questioned him; the defendant told the officer that he thought he had hit a

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to receive several convictions for each act, the General Assembly did go to great lengths to ensure that each act of rape, however committed, is punished." *Id.*

30. *Id.* at 78, 533 N.E.2d at 805.

31. *Id.* It then remanded to the circuit court to clarify the two retained counts and to sentence the defendant based on the reinstated conviction. *Id.* at 78, 533 N.E.2d at 805-06.

32. *Id.* at 78, 533 N.E.2d at 806.

33. 127 Ill. 2d 390, 537 N.E.2d 756 (1989).

34. The Criminal Code states that:

> [c]onduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occassioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

ILL. REV. STAT. ch. 38, para. 7-13 (1987).

35. 127 Ill. 2d 390, 537 N.E.2d 756.

36. *Id.* at 399-401, 537 N.E.2d at 760-61.

37. *Id.* at 394, 537 N.E.2d at 758. The force of the impact shattered the windshield, and the victim's glove and wallet were recovered from the front seat of the car. *Id.* at 394-95, 537 N.E.2d at 758. Although defendant later told police that he saw something in the road and swerved to avoid it, a police officer who witnessed the impact testified that the defendant did not swerve or take any evasive action. *Id.* at 395-96, 537 N.E.2d at 758-59.

38. *Id.* at 395-96, 537 N.E.2d at 758.

mailbox.[39]

A jury convicted the defendant of leaving the scene of an accident and of driving under the influence of alcohol ("DUI") but found him not guilty of driving with a blood alcohol level of .10 or more.[40] Although the appellate court unanimously affirmed the DUI conviction, it reversed the conviction for leaving the scene because the trial judge refused the defendant's request for jury instructions on the necessity defense to that charge.[41] The supreme court granted the State's petition for leave to appeal.[42]

The unanimous court, in an opinion by Justice Ryan, reviewed both convictions.[43] First, it considered the trial court's denial of the defendant's request for a jury instruction on the necessity defense.[44] The defendant asserted that he left the scene of the accident because he felt endangered, believing that someone had thrown a mailbox at his car.[45] This belief entitled him to invoke the necessity defense, he maintained, because these circumstances forced him to choose between leaving the scene of the accident or risking injury to himself.[46]

The court rejected the defendant's argument because the necessity defense requires that a defendant must have chosen to violate the law.[47] The court emphasized that the necessity defense is a

39. *Id.* at 396, 537 N.E.2d at 759.

40. *Id.* at 393-97, 537 N.E.2d at 757-59. Illinois law requires that when an accident results in injury or death, a driver must stop and remain at the scene to give information and aid. ILL. REV. STAT. ch. 95 1/2, para. 11-401(a) (1987). Illinois law also prohibits driving while under the influence of alcohol. *Id.* para. 11-501(a)(2). Although neither the defendant's wife nor the officer-witness noticed signs of intoxication, another officer smelled a moderate odor of alcohol when the defendant returned to the accident scene. 127 Ill. 2d at 395-96, 537 N.E.2d at 758-59. The defendant told the second officer that he had hit a mailbox and that he had been drinking, whereupon the officer arrested him for driving under the influence. *Id.* The defendant subsequently performed poorly on two field sobriety tests. *Id.* at 396-97, 537 N.E.2d at 759. The permissible blood alcohol concentration is 0.10. ILL. REV. STAT. ch. 95 1/2, para. 11-501(a)(1) (1987). The defendant's blood test result was 0.165. 127 Ill. 2d at 397, 537 N.E.2d at 759.

41. People v. Janik, 165 Ill. App. 3d 453, 518 N.E.2d 1332 (2d Dist. 1988). The court remanded for a new trial. *Id.* The defendant submitted two instructions: the pattern instruction defining the necessity defense and an instruction that the State had the burden of disproving the necessity defense beyond a reasonable doubt. 127 Ill. 2d at 398, 537 N.E.2d at 759.

42. *Id.* at 394, 537 N.E.2d at 757.

43. *Id.* at 394, 537 N.E.2d at 757-58. Because the defendant resubmitted his appellate brief, which addressed both convictions, the court could review both. *Id.*

44. *Id.* at 398, 537 N.E.2d at 759.

45. *Id.* at 400, 537 N.E.2d at 760.

46. *Id.*

47. *Id.* The court observed that when evidence supports a party's theory, that party is entitled to corresponding jury instructions. *Id.* Even when the basis of a defense conflicts with the defendant's testimony, he may nevertheless assert that defense. *Id.*

balancing test, a "choice between two admitted evils where other optional courses of action are unavailable."[48] The duty to stop after an accident arises only when the driver knows an accident has occurred.[49] Thus, the defendant had no duty to stop if, as he asserted, he was unaware of the accident.[50] Absent the duty to stop, he could not have chosen to breach that duty.[51] Consequently, because the defendant's description of the events did not involve a choice between evils, the trial court's denial of jury instructions on the necessity defense was proper.[52]

The court next considered whether the State had proved the DUI charge beyond a reasonable doubt.[53] The defendant argued that evidence of the blood testing's unreliability, the circumstances surrounding the field sobriety tests, and testimony that he did not appear intoxicated raised reasonable doubt of his guilt.[54] The court was unconvinced, observing that an arresting officer's believable testimony alone will satisfy the State's burden of proof for a DUI conviction, and the State had provided such evidence.[55] Consequently, because the State sustained its burden of proof even without the challenged evidence, the court affirmed the DUI conviction.[56]

B. Offenses Against The Person

1. Murder: Effective Date of the 1987 Statute

In *People v. Shumpert*,[57] the supreme court ruled that, in the absence of an explicit effective date provision in the 1987 revision to the homicide statute, the revision's effective date was July 1,

48. *Id.* at 399, 537 N.E.2d at 760 (citing People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977)).

49. *Id.* at 400, 537 N.E.2d at 760 (citing People v. Nunn, 77 Ill. 2d 243, 396 N.E.2d 27 (1979)).

50. *Id.*

51. *Id.* at 400-01, 537 N.E.2d at 760-61.

52. *Id.* at 399, 537 N.E.2d at 760.

53. *Id.* at 401, 537 N.E.2d at 761.

54. *Id.* The toxicologist testified that the blood-alcohol printout was inaccurate, the machine used was unreliable, and the operator might have erred in administering the test. *Id.* at 397-98, 537 N.E.2d at 759. The defendant also claimed that the flashing lights of the ambulance and the squad car disoriented him during the testing. *Id.* at 396-97, 537 N.E.2d at 759. The defendant's wife, patrons of the tavern, the officer-witness, and the nurse who administered the blood test all testified that he did not appear intoxicated. *Id.* at 401, 537 N.E.2d at 761.

55. *Id.* at 402, 537 N.E.2d at 762. The officer testified that she concluded the defendant was intoxicated from his watery eyes, poor performance of the sobriety tests, and odor of alcohol. *Id.*

56. *Id.* at 403, 537 N.E.2d at 762.

57. 126 Ill. 2d 344, 533 N.E.2d 1106 (1989).

1987.[58]

The defendant was indicted for murder under the 1985 homicide statute[59] for a killing that occurred on May 1, 1987.[60] He claimed that the murder indictment was invalid because the revised statute, which did not include the offense of "murder," became effective on January 5, 1987.[61] The State countered that because the statute contained no express effective date, it was effective on July 1, 1987, making the indictment under the prior law proper.[62] The trial court agreed with the defendant and dismissed the indictment; the supreme court permitted the State's direct appeal.[63]

Chief Justice Moran's opinion first considered the defendant's claim that the statute became effective on January 5, 1987, the signing date.[64] The court rejected this argument because it conflicted with the statute's wording.[65] The court then considered the defendant's claim that the application provision had to be an effective date provision to avoid conflicts between retroactive application and *ex post facto* prohibitions.[66] The court observed that a

58. *Id.* at 355, 533 N.E.2d at 1111. The history of the bill's passage led to this confusion. On June 23, 1986, the Illinois General Assembly passed a bill that revised the homicide statute. *Id.* at 348, 533 N.E.2d at 1107. The governor exercised his amendatory veto power and returned the bill with recommended changes. *Id.* at 348, 533 N.E.2d at 1107-08. The General Assembly passed the amended legislation in its final form on December 3, 1986, but the governor did not sign it until January 5, 1987. *Id.* at 348, 533 N.E.2d at 1108. The bill did not contain an explicit effective date; it said merely that the act "shall only apply to Acts occurring on or after January 1, 1987, which cause the death of another." *Id.* at 349, 533 N.E.2d at 1108. Thus, it was unclear whether the effective date of the statute was the date in the statute, the date the statute was signed, or another date. *Id.* at 348, 533 N.E.2d at 1107.

59. ILL. REV. STAT. ch. 38, para. 9-1 (1985).

60. *Shumpert*, 126 Ill. 2d at 347-48, 533 N.E.2d at 1107.

61. *Id.* at 348, 533 N.E.2d at 1107. The new statute renamed murder, first degree murder. ILL. REV. STAT. ch. 38, para. 9-1 (1987).

62. *Schumpert*, 126 Ill. 2d at 348, 533 N.E.2d at 1107.

63. *Id.* Illinois Supreme Court Rules allow the supreme court or a justice to permit a direct appeal when "the public interest requires prompt adjudication by the Supreme Court." ILL. S. CT. R. 302(b), ILL. REV. STAT. ch. 110A, para. 302(b) (1987).

64. *Schumpert*, 126 Ill. 2d at 350, 533 N.E.2d at 1108. The defendant's contention was based on statements by the governor and legislators that January 1, 1987 was the effective date. *Id.* The court listed other sources, including one of its own prior opinions, that had indicated the effective date was January 1, 1987. *Id.* (citing People v. Reddick, 123 Ill. 2d 184, 197, 526 N.E.2d 141, 151 (1988)). A number of secondary sources concluded that the statute became effective on July 1, 1987. *Id.*

65. *Id.* at 350-51, 533 N.E.2d at 1108-09. The court pointed out that the provision the defendant cited as an effective date provision states only that the statute "appl[ies] to Acts occurring on or after January 1, 1987" and does not say when the statute should be applied. *Id.* at 350-51, 533 N.E.2d at 1109. The court also noted that statements by legislators and the governor are not binding on the court. *Id.*

66. *Id.* at 351, 533 N.E.2d at 1109. The state and federal Constitutions prohibit passage of *ex post facto* laws. ILL. CONST. art. I, § 16; U.S. CONST. art. I, §§ 9, 10. The

statutory revision facilitating convictions by lessening the State's burden of proof would be *ex post facto* if applied retroactively.[67] Here, the revised statute required defendants to prove mitigating factors by a preponderance of the evidence, shifting the burden of proof from the State to the defendant.[68] Because the revised statute decreased the degree of proof needed to convict, the court concluded that retroactive application would violate *ex post facto* prohibitions.[69]

The court commented that effective date provisions, like *ex post facto* prohibitions, are designed to give citizens a fair warning of a particular type of conduct's consequences.[70] If the revised statute's effective date were January 1, 1987, the revision would not provide a fair warning and thus would violate both the *ex post facto* prohibition and the purpose of effective date provisions.[71] Accordingly, the court severed the application provision from the body of the statute and stated that the revised statute would be applied prospectively from its effective date.[72]

The court began its effort to ascertain this date by observing that a statute's effective date is determined by its date of passage, i.e., the date of "final legislative action prior to the presentation to the Governor."[73] Because the bill passed in December,[74] the statute fell within the general rule that a bill passed after June 30 becomes effective the following July 1.[75] Thus, the statute became effective on July 1, 1987, making the defendant's indictment under the ear-

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court defined *ex post facto* laws as those that are "both retroactive and more onerous than the law in effect on the date of the offense." Schumpert, 126 Ill. 2d at 351, 533 N.E.2d at 1109.

67. *Id.* at 351-52, 533 N.E.2d at 1109.

68. *Id.* The earlier statute had required the State to disprove affirmative defenses. *See* ILL. REV. STAT. ch. 38, para. 3-2(b) (1985).

69. *Schumpert*, 126 Ill. 2d at 353, 533 N.E.2d at 1110.

70. *Id.* at 352-53, 533 N.E.2d at 1109-10 (citing Mulligan v. Joliet Regional Port Dist., 123 Ill. 2d 303, 315, 527 N.E.2d 1264, 1269 (1988)).

71. *Id.* at 352-53, 533 N.E.2d at 1110.

72. *Id.* at 353, 533 N.E.2d at 1110 (citing County of Cook v. Renaissance Arcade and Bookstore, 122 Ill. 2d 123, 522 N.E.2d 73 (severance permitted if a provision's absence will not substantively affect the statute), *appeal denied sub. nom.* Mannheim Books, Inc. v. County of Cook, 109 S. Ct. 209 (1988)).

73. *Id.* at 354, 533 N.E.2d at 1110.

74. *Id.* at 354-55, 533 N.E.2d at 1110-11 (citing ILL. REV. STAT. ch. 1, para. 1203 (1987)). Although the legislature first presented the revised statute to the Governor in June, 1986, his amendatory veto required another vote in December. *Id.* at 348, 533 N.E.2d at 1107-08. For vetoed bills that are amended and passed, such as the one at issue, the date the legislature votes to accept the governor's recommendations is the date of passage for the purposes of determining the statute's effective date. *Id.* at 354, 533 N.E.2d at 1110.

75. *Id.* at 355, 533 N.E.2d at 1111. In Illinois, bills passed after June 30 become

lier statute proper.[76]

2. Aggravated Battery: State Criminal Law Not Preempted By OSHA Regulations

A challenge to the State's power to criminalize the failure to provide a safe workplace failed in *People v. Chicago Magnet Wire Corp.*[77] The supreme court ruled that regulations promulgated under the Federal Occupational Health and Safety Act of 1970 (OSHA)[78] do not preempt state criminal statutes.[79] Thus, the State may use state criminal statutes to prosecute employers for hazardous conditions in the workplace even though OSHA regulates the same conduct.[80]

3. Eavesdropping: Hand Held Over Mouthpiece Not "Functional Alteration" of Telephone

The supreme court held in *People v. Shinkle*[81] that a police officer who placed his hand over a telephone mouthpiece while listening to a conversation did not "functionally alter" the telephone; thus, he did not violate the Illinois eavesdropping statute.[82] Accordingly, evidence of the conversation was admissible at trial.[83]

Prior to charging the defendant with arson and conspiracy to commit arson and without court authorization or supervision, a police officer directed the defendant's alleged co-conspirator to telephone the defendant.[84] Holding his hand over the mouthpiece of

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effective on the following July 1, unless there is an express vote to use an earlier or later date. ILL. REV. STAT. ch. 1, para. 1202 (1987).

76. 126 Ill. 2d at 355, 533 N.E.2d at 1111. The court declined the defendant's invitation to distinguish between substantive and technical changes proposed by the amendatory veto. *Id.*

77. 126 Ill. 2d 356, 534 N.E.2d 962, *cert. denied sub. nom.* Asta v. Illinois, 110 S. Ct. 52 (1989).

78. *See* 29 U.S.C. §§ 651-78 (1982 & Supp. V 1987).

79. *Chicago Magnet Wire*, 126 Ill. 2d at 376, 534 N.E.2d at 970.

80. *Id.* For a full analysis of *Chicago Magnet Wire*, see Hartog-Rapp and Kaplan, *Labor Law*, 21 LOY. U. CHI. L.J. 507, 508 (1990).

81. 128 Ill. 2d 480, 539 N.E.2d 1238 (1989).

82. *Id.* The statute prohibits use of "an eavesdropping device to hear or record all or any part of any conversation unless [the person] does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party to such conversation and [with judicial authorization and supervision]." ILL. REV. STAT. ch. 38, para. 14-2(a) (1987).

83. *Shinkle*, 128 Ill. 2d at 489, 539 N.E.2d at 1242. The statute provides that "any evidence obtained in violation of this Article is not admissable in any civil or criminal trial" except for charges of violating the statute itself. ILL. REV. STAT. ch. 38, para. 14-5 (1987).

84. *Shinkle*, 128 Ill. 2d at 482-83, 539 N.E.2d at 1239. The defendant and his co-

an extension telephone, the officer listened as the defendant made self-incriminating statements.[85] The officer included written notes of the conversation in the police report.[86]

Before trial, the defendant moved to suppress the evidence of the conversation, claiming that it was inadmissible because it was obtained in violation of the eavesdropping statute.[87] The trial court denied the motion on the grounds that the officer had not "altered" the telephone.[88] At trial, the police officer gave a verbatim account of the overheard conversation, and a jury convicted the defendant of both charges.[89] The appellate court ruled that the denial of the defendant's motion to suppress was reversible error because the evidence was obtained in violation of the eavesdropping statute's plain meaning.[90] The supreme court granted the State's petition to appeal.[91]

Justice Miller, for the unanimous court, observed that the threshold question was whether the police officer had converted the extension telephone into an "eavesdropping device" by placing his hand over the receiver.[92] The court first reviewed the statute's history[93] and then examined cases decided under the statute that have held an extension telephone is not an eavesdropping device

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conspirator had committed arson at the defendant's office. *Id.* at 484, 539 N.E.2d at 1240. The co-conspirator was also indicted for arson and conspiracy, but he testified that the State's Attorney offered probation for his testimony. *Id.*

85. *Id.* at 483-84, 539 N.E.2d at 1239. The defendant said he would meet the co-conspirator the following evening to pay for the arson of his office. *Id.* at 484, 539 N.E.2d at 1240.

86. *Id.* at 483, 539 N.E.2d at 1239.

87. *Id.* at 482, 539 N.E.2d at 1239.

88. *Id.*

89. *Id.* at 484, 539 N.E.2d at 1240.

90. *Id.* at 482, 539 N.E.2d at 1239. The appellate court ruled that the officer transformed the extension into an eavesdropping device by placing his hand over the receiver, thereby making it incapable of transmitting sound. *Id.* at 485, 539 N.E.2d at 1240.

91. *Id.* at 482, 539 N.E.2d at 1239.

92. *Id.* The court reiterated the rules of statutory construction: "to ascertain and give effect to the intent of the legislature" and to look for this intent in the statute's language, "which must be given its plain and ordinary meaning." *Id.* The court emphasized too that any ambiguity in a criminal statute must be construed in the accused's favor. *Id.*

93. *Id.* at 487, 539 N.E.2d at 1241. The 1961 act applied only to "any device employing electricity." ILL. REV. STAT. ch. 38, para. 206.1 (1961). The court noted that the legislature had modified the statute to delete the criterion that the device "employ electricity" to bring the statute in line with Rathburn v. United States, 355 U.S. 107 (1957), which had held that "the monitoring of a conversation on an extension telephone does not constitute an interception of the conversation or the use of a device employing electricity to hear a conversation." *Shinkle*, 128 Ill. 2d at 487, 539 N.E.2d at 1241 (quoting *Rathburn*, 355 U.S. at 111).

for the purposes of the statute if it is not "functionally altered."[94]

In this case, the officer had not made deletions or additions to the telephone mechanism.[95] Thus, because "functional alteration" is required for a violation of the eavesdropping statute, the officer's placing his hand over the mouthpiece of the telephone in question did not violate the statute.[96] Accordingly, the evidence was admissible, so the denial of the defendant's motion to suppress was proper.[97]

The defendant also argued that the legislature intended that a listening device would be considered an "eavesdropping device" for statutory purposes whenever its user planned to eavesdrop.[98] Because the statute contained no language with respect to intent, however, the court found the defendant's interpretation unwarranted.[99] The court then affirmed the trial court's admission of the evidence, reversing the appellate court's contrary ruling.[100]

C. Offenses Against Property

1. Residential Burglary: Theft Not an Included Offense

The Illinois Supreme Court held in *People v. Schmidt*[101] that a defendant charged only with residential burglary, predicated on the intent to commit theft, cannot be convicted of theft because theft is not a lesser included offense[102] of residential burglary.[103]

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94. *Id.* (citing People v. Gaines, 88 Ill. 2d 342, 430 N.E.2d 1046 (1981), *cert. denied*, 456 U.S. 1001 (1982)). In *Gaines*, the defendant's mother and brother permitted the police to use an extension telephone to overhear their conversations with the defendant. 88 Ill. 2d at 360-61, 430 N.E.2d at 1055. The *Gaines* defendant claimed that the conversations could not be admitted as evidence because the officer had violated the eavesdropping statute. *Id.* at 359, 430 N.E.2d at 1055. The court rejected his argument, holding that "the statute is directed against the use of devices other than the telephone itself when the latter has not been functionally altered." *Id.* at 363, 430 N.E.2d at 1056. In a later case, the court held that an extension telephone without a speaking element violated the statute because it was "functionally altered." People v. Gervasi, 89 Ill. 2d 522, 526-27, 434 N.E.2d 1112, 1114 (1982).

95. *Shinkle*, 128 Ill. 2d at 489, 539 N.E.2d at 1242.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 126 Ill. 2d 179, 533 N.E.2d 898 (1988).

102. An included offense is one that "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." ILL. REV. STAT. ch. 38, para. 2-9(a) (1987).

103. 126 Ill. 2d at 183-84, 533 N.E.2d at 700. Residential burglary is an offense that is predicated on knowing entry with intent to commit a felony or theft in the building.

In *Schmidt*, the defendant was apprehended on the rear porch of a house, possessing jewelry and coins taken from inside the home.[104] The defendant claimed he had not actually entered the house but had knocked at the door looking for work, when he saw a man run out the rear door, dropping the jewelry and coins that the defendant then picked up.[105] A jury found the defendant guilty of both residential burglary and theft.[106] The appellate court, however, reversed the convictions as inconsistent and remanded for a new trial on all charges.[107] The supreme court granted the State leave to appeal.[108]

In an opinion authored by Justice Ward, the unanimous court affirmed the residential burglary conviction.[109] The court then reversed the theft conviction, stating that a defendant charged with a single offense can be convicted of an uncharged offense only if it is a lesser included offense of the charged offense.[110] Hence, the court

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ILL. REV. STAT. ch. 38, para. 19-1 (1987). Theft occurs when one "obtains or exerts unauthorized control over property of the owner." *Id.* para. 16-1(a).

104. *Schmidt*, 126 Ill. 2d at 182-83, 533 N.E.2d at 899-900.

105. *Id.* at 182, 533 N.E.2d at 899. At trial, however, the defendant was unable to explain why his fingerprints were inside the building. *Id.*

106. *Id.* at 181, 533 N.E.2d at 899. Although he had been charged only with residential burglary, the defendant requested jury instructions for theft as well. People v. Schmidt, 161 Ill. App. 3d 278, 279, 514 N.E.2d 494, 495 (4th Dist. 1987).

107. *Id.* The appellate court found that the elements of theft were not in the State's charge nor in its proof. *Id.* The appellate court stated that, under the circumstances, a fact finder logically could not find two separate crimes (one of entering a house with intent to commit burglary and one of theft by possession of stolen property). *Id.* at 280-81, 514 N.E.2d at 496-97.

108. *Schmidt*, 126 Ill. 2d at 181, 533 N.E.2d at 899.

109. *Id.* at 183, 533 N.E.2d at 900. The court held that the evidence, including a neighbor's testimony that she had observed the defendant enter the house, allowed no reasonable doubt of his guilt. *Id.*

110. *Id.* at 184, 533 N.E.2d at 900 (citing People v. Lewis, 83 Ill. 2d 296, 300, 415 N.E.2d 319, 320 (1980)). The court's holding was grounded in Illinois constitutional and statutory guarantees that a defendant cannot be convicted of a crime if he has not been charged with that offense. *Id.* *See* ILL. CONST. art. I, §§ 2, 7, 8 and ILL. REV. STAT. ch. 38, paras. 111-1, 111-3, 111-4 (1987). The court relied on earlier Illinois appellate decisions that vacated convictions for theft when theft was not a lesser included offense of the single charged offense. *Schmidt*, 126 Ill. 2d at 184, 533 N.E.2d at 900. In People v. Munoz, 101 Ill. App. 3d 447, 428 N.E.2d 624 (1st Dist. 1981), the appellate court vacated a theft conviction because the defendant had been charged only with burglary; the court held that the defendant could not be convicted of theft because it was not a lesser included offense of burglary, the charged offense. *Munoz*, 101 Ill. App. 3d 447, 428 N.E.2d 624. Similarly, in People v. Melmuka, 173 Ill. App. 3d 735, 527 N.E.2d 982 (1st Dist. 1988), the appellate court reversed a conviction of attempted theft because the defendant had been charged only with attempted burglary. *Melmuka*, 173 Ill. App. 3d at 735, 527 N.E.2d at 982.

The *Schmidt* court expressly declined to address People v. Dace, 104 Ill. 2d 96, 470 N.E.2d 993 (1984) and the "inherent relationship" test. 126 Ill. 2d at 185, 533 N.E.2d at 901. *Dace* was an appeal for error arising from the trial court's refusal to give tendered

vacated the theft conviction because the defendant had been charged only with residential burglary, and theft is not among the lesser included offenses of residential burglary.[111]

2. Aggravated Arson: Conviction Vacated Under Void *Ab Initio* Doctrine

In *People v. Zeisler*,[112] the Illinois Supreme Court held that the defendant could assert a post-conviction challenge to his aggravated arson conviction on the ground that the statute had been found void *ab initio*, even though he had not raised the issue earlier.[113]

The defendant was charged with attempted murder[114] and aggravated arson[115] for a setting a fire in his home in which his wife suffered severe burns.[116] The jury acquitted him on the attempted murder charge but convicted him of aggravated arson.[117] A series

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jury instructions on theft in a residential burglary trial. *Dace*, 104 Ill. 2d at 98, 470 N.E.2d at 994. *Dace* expressly rejected, but nevertheless seemed to apply, the "inherent relationship test" of United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971), under which a court is required to give instructions on a lesser, uncharged offense only if the offenses involved "relate to the protection of the same interests and [are] so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." *Dace*, 104 Ill. 2d at 100-03, 470 N.E.2d at 995-97 (citing *Whitaker*, 447 F.2d at 319).

111. *Schmidt*, 126 Ill. 2d at 185, 533 N.E.2d at 900. The court also rejected the defendant's challenge to the trial court's denial of his request for treatment under the Alcoholism and Substance Abuse Act. *Id.* The court emphasized that such a ruling will be reversed only when the trial court abuses its discretion. *Id.* at 185, 533 N.E.2d at 901. Because the trial court's decision had been based on evidence of Schmidt's prior criminal record, and the court's doubts that he was an addict, the court found no abuse of discretion. *Id.*

112. 125 Ill. 2d 42, 531 N.E.2d 24 (1988).

113. *Id.* at 46, 531 N.E.2d at 27. The void *ab initio* doctrine states that when the supreme court invalidates a statute, the legal status of the statute is as if it had never been passed. *Id.* at 46, 531 N.E.2d at 26.

114. ILL. REV. STAT. ch. 38, paras. 8-4, 9-1 (1987).

115. The statute stated that:

> A person commits aggravated arson when by means of fire or explosive he knowingly damages, partially or totally, any building or structure . . . and (1) he knows or reasonably should know that one or more persons are present therein or (2) any person suffers great bodily harm, or permanent disability or disfigurement as a result of the fire or explosion . . . .

ILL. REV. STAT. ch. 38, para. 20-1.1(a) (1981).

116. People v. Zeisler, 112 Ill. App. 3d 788, 790, 445 N.E.2d 1324, 1326 (3d Dist. 1983). The defendant's wife was burned over eighty per cent of her body. *Id.* She testified that prior to the fire, the defendant had attempted to hit her with a frying pan and then felled her with a blow from his fist. *Id.* at 792, 445 N.E.2d at 1327.

117. *Zeisler*, 125 Ill. 2d at 44, 531 N.E.2d at 25.

of direct appeals were unsuccessful,[118] and the defendant filed two post-conviction petitions.[119] The first alleged that the defendant's wife recanted her testimony, which would entitle him to a reversal; the other demanded vacatur of the conviction because the aggravated arson statute had been declared unconstitutional in an earlier decision.[120] The lower court vacated the conviction, and the appellate court affirmed, holding that the statute was inapplicable because it was void *ab initio*.[121] The supreme court granted the State's petition for leave to appeal.[122]

The unanimous court, speaking through Justice Cunningham, rejected the State's contention that the United States Supreme Court had invalidated the void *ab initio* doctrine in *Pope v. Illinois*[123] and denied the State's request for a remand to determine harmless error under the admittedly unconstitutional statute.[124] The court distinguished *Pope*, in which a jury instruction rather than a statute was found unconstitutional.[125] When a statute is found unconstitutional, the void *ab initio* doctrine requires vacatur of any conviction that resulted from it.[126]

The court further observed that the State may prosecute a defendant retroactively under an amended version of a void statute

118. *Id.* The appellate court affirmed the trial court. *Id.* After the Illinois Supreme Court denied leave to appeal, the United States Supreme Court granted certiorari, vacated the judgment, and remanded to the appellate court for a determination of the constitutionality of a warrantless search of the defendant's home. *Zeisler v. Illinois*, 465 U.S. 1002 (1984). On remand, the appellate court affirmed the denial of the defendant's motion to suppress the evidence from the search. People v. Zeisler, 125 Ill. App. 3d 558, 465 N.E.2d 1373 (3d Dist. 1984), *cert. denied*, 471 U.S. 1005 (1985).

119. *Zeisler*, 125 Ill. 2d at 44, 531 N.E.2d at 25. For the Post Conviction Hearing Act, see ILL. REV. STAT. ch. 38, paras. 122-1 through 122-8 (1987).

120. 125 Ill. 2d at 43-44, 531 N.E.2d at 25-26. In People v. Johnson, 114 Ill. 2d 69, 499 N.E.2d 470 (1986), the court had found the subsection in question fatally flawed because it did not contain the predicate offense of arson. *Johnson*, 114 Ill. 2d at 70-71, 499 N.E.2d 471-72. Prior to *Johnson*, the court declared in People v. Wick, 107 Ill. 2d 62, 67 481 N.E.2d 676, 679 (1985), that the 1983 statute was unconstitutional because it did not specify the requisite state of mind.

121. 162 Ill. App. 3d 578, 515 N.E.2d 1297 (3d Dist. 1987). The appellate opinion did not mention that defendant's wife recanted her testimony, which had been the basis of the defendant's cross-appeal. *Zeisler*, 125 Ill. 2d at 43, 531 N.E.2d at 25.

122. *Id.*

123. 481 U.S. 497 (1987) (obscenity jury instruction unconstitutional but case remanded for a determination of harmless error in the use of the instruction).

124. *Zeisler*, 125 Ill. 2d at 48, 531 N.E.2d at 27. Harmless error is a standard of review that allows a reviewing court to examine, *inter alia*, unwaived jury instructions to ensure that a defendant received a fair trial when the evidence is "closely balanced or where the error was of such a magnitude that the accused was denied a fair trial and fundamental fairness requires that the jury be properly instructed." *Id.*

125. *Id.*

126. *Id.*

without violating *ex post facto* and due process guarantees, but it may do so only if the amendment is not substantive.[127] Because the amendment in question contained the previously-omitted underlying element of arson, it was substantive, so the statute could not be applied retroactively.[128] Consequently, the court affirmed the vacatur of the defendant's conviction.[129]

D. Other Offenses

1. Obscenity Statute: Forfeiture Provision Unconstitutional

In *People v. Sequoia Books, Inc.*,[130] the Illinois Supreme Court found unconstitutional a statute that required posting a forfeitable bond for any subsequent use of a building from which obscene materials had been sold.[131] The court held that the statute violated the first amendment of the United States Constitution because it was a prior restraint on freedom of expression.[132]

In *Sequoia*, although the defendants were found guilty of violating the Illinois obscenity statute,[133] they continued to sell obscene materials.[134] The State filed a complaint to have the store building

127. *Id.* at 48-49, 531 N.E.2d at 27-28.

128. *Id.* at 49, 531 N.E.2d at 28. The arson had occurred in 1981; the statute was revised in 1987. *Id.*

129. *Id.* at 50, 531 N.E.2d at 28. The court also addressed the defendant's double jeopardy, finding that under the void *ab initio* doctrine the conviction was invalid because the statute effectively did not exist at the time of the defendant's conviction. *Id.* The court emphasized, however, that because arson has no statute of limitations, the State was free to initiate a new action against the defendant for arson. *Id.*

130. 127 Ill. 2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 110 S. Ct. 835 (1990).

131. *Id.* at 291, 537 N.E.2d at 312. The statute mandated one year closure of a building found to be a public nuisance under ILL. REV. STAT. ch. 38, para. 37-1 (1985), unless its owner posted a bond of one thousand to five thousand dollars, forfeitable upon a subsequent offense. *Id.* para. 37-4.

132. *Sequoia Books*, 127 Ill. 2d at 291, 537 N.E.2d at 312. The first amendment, as incorporated by the fourteenth amendment, limits the State's power to restrict citizens' freedom of speech. *See* U.S. CONST. amends. I and XIV.

133. The statute prohibits the knowing or reckless sale of "any obscene writing, picture, record or other representation or embodiment of the obscene . . . ." ILL. REV. STAT. ch. 38, para. 11-20(a)(1) (1987). Obscene material is that which:

> (1) the average person, applying contemporary adult community standards, would find . . . , taken as a whole, appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find . . . depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts . . . and (3) taken as a whole, . . . lacks serious literary, artistic, political or scientific value.

Id. para. 11-20(b).

134. *Sequoia Books*, 127 Ill. 2d at 276, 537 N.E.2d at 305. Between 1982 and 1985, the State filed forty criminal charges involving 1500 publications against the defendant store and its employees. *Id.* The store owners were found guilty of eight of the nine

declared a public nuisance and to enjoin its use.[135] The defendants moved to dismiss the complaint, claiming that the statute was unconstitutional as a prior restraint on freedom of expression.[136] The trial court denied the motion and granted a temporary injunction.[137] The State later petitioned for a rule to show cause, claiming that the defendants had violated the injunction terms by selling obscene materials.[138]

At the permanent injunction hearing, the trial court held that the defendants had violated the obscenity statute.[139] In accordance with the nuisance abatement statute, the court enjoined the use of the building but said that the store could remain open upon posting a forfeitable bond.[140] The defendants posted the bond and appealed.[141] On remand, the trial court revoked the bond and dissolved the stay because the defendants had violated the bond conditions by selling obscene materials.[142] The appellate court reversed, finding that the permanent injunction was a prior restraint on the defendant's freedom of expression and that the statutory procedure was constitutionally flawed.[143]

Before the supreme court, the defendants argued that the standard of review was strict scrutiny[144] because the final injunction order constituted a prior restraint on their freedom of speech, mak-

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charges against them; in 1986, the store owners were charged with and found guilty of four more obscenity charges. *Id.* at 275-76, 537 N.E.2d at 305.

135. *Id.* at 276, 537 N.E.2d at 304. A public nuisance is "any building used in the commission of offenses prohibited by [certain statutes, including the obscenity statute]." ILL. REV. STAT. ch. 38, para. 37-1 (1987).

136. *Sequoia Books*, 127 Ill. 2d at 276, 537 N.E.2d at 305. The defendants contended that the statute was facially invalid and that its procedure lacked necessary safeguards against impermissible prior restraint. *Id.*

137. *Id.* The injunction restrained the defendants from maintaining a public nuisance and, in particular, from violating the obscenity statute. *Id.* The store owners filed an interlocutory appeal that was dismissed. *Id.* at 276-77, 537 N.E.2d at 305.

138. *Id.* at 277, 537 N.E.2d at 305.

139. *Id.*

140. *Id.* at 277-78, 537 N.E.2d at 306.

141. *Id.* at 278, 537 N.E.2d at 306. The State moved to revoke the bond and vacate the stay of the injunction. *Id.*

142. *Id.*

143. People v. Sequoia Books, Inc., 165 Ill. App. 3d 143, 518 N.E.2d 775 (2d Dist. 1988). The appellate court found that the *ex parte* temporary restraining order and preliminary injunction provisions were unconstitutional as prior restraints and that "the procedural elements of section 37-4 of the [Criminal] Code [are] constitutionally deficient in safeguarding presumptively protected speech." *Id.* at 152-53, 518 N.E.2d at 781.

144. *Sequoia Books*, 127 Ill. 2d at 279, 537 N.E.2d at 306. Strict scrutiny is the heightened standard of review used for "legislation [that] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

ing the statute presumptively invalid.[145] The State countered that because the statute regulated both protected speech and unprotected speech, the standard of review was not strict scrutiny and thus the statute was not an impermissible prior restraint.[146] In support, the State invoked *United States v. O'Brien*,[147] in which the United States Supreme Court reaffirmed that when an expression comprises speech and nonspeech elements, states may limit that expression.[148] Furthermore, the State contended, the sale of obscene materials was no different from sexual conduct, which *Acara v. Cloud Books, Inc.*[149] held the State can regulate in certain circumstances.[150]

The majority opinion, authored by Justice Clark, agreed that the standard of review for prior restraint on pure speech is strict scrutiny.[151] The court observed, however, that under *O'Brien*, a state may impose restrictions when both speech and nonspeech elements are present if the state acts within its constitutional powers and if the restriction furthers a substantial state interest.[152] Here, the statute met these criteria. The State had the authority under its police power to abate nuisances, and it had a substantial interest in the quality of life in the community.[153]

The court objected, however, to the statute's "incidental restriction" on protected speech, finding that it was not the least restrictive means available to advance the State's interest.[154] The court

145. 127 Ill. 2d at 279, 537 N.E.2d at 306.

146. *Id.* at 281, 537 N.E.2d at 306. The first amendment protects only expression that is an "interchange of ideas for bringing about of political and social changes desired by the people." *Id.* at 284, 537 N.E.2d at 308 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). Obscenity is not within the purview of the amendment's protection because it has "no essential part of any exposition of ideas." *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

147. 391 U.S. 367 (1968).

148. *Sequoia Books*, 127 Ill. 2d at 281, 537 N.E.2d at 306 (citing *O'Brien*, 391 U.S. at 376).

149. 478 U.S. 697 (1986) (New York statute that permitted the State to close a building for one year if illegal sexual conduct occurred there held constitutional).

150. *Sequoia Books*, 127 Ill. 2d at 283, 537 N.E.2d at 309.

151. *Id.* at 280, 537 N.E.2d at 307.

152. *Id.* at 281, 537 N.E.2d at 307. The *O'Brien* test sets forth four criteria under which restrictions may be imposed. The state may restrict speech,

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. (quoting *O'Brien*, 391 U.S. at 377).

153. *Id.* at 286, 537 N.E.2d at 310.

154. *Id.* at 290, 537 N.E.2d at 311. When a statute restricts certain constitutional

characterized the statute as a "blunderbuss," noting that it did not differentiate between the vendor of a single book and one who sold thousands.[155] Additionally, by restricting obscene, unprotected speech, the statute impermissibly interfered with protected speech sold from the same location.[156] Furthermore, the statute effectively and improperly discriminated against bookstore owners in particular.[157]

The court observed that the statute's effectiveness lay in its ability to prevent distribution of obscene materials by establishing an economic risk in addition to the penal sanctions.[158] The State had not shown, however, that the penal sanctions were inadequate to protect State interests.[159] Moreover, the statute discouraged the sale of protected, but sexually explicit material, not just sale of obscene materials.[160] This, the court concluded, amounted to "overkill."[161] The court also rejected the State's contention of its substantial interest in the effects of obscenity sales on the neighborhood.[162] Although the court acknowledged that this State interest was vital, other "less draconian" means were available to achieve this end.[163] Accordingly, the statute failed to pass the least restrictive means prong of the *O'Brien* test; thus, it was unconstitutional when used to enjoin use of a building solely on the basis of on-site obscenity violations.[164]

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rights such as free speech, the State must show that the statute represents the "least drastic means" of doing so. *Id.* at 291, 537 N.E.2d at 312.

155. *Id.* at 288, 537 N.E.2d at 311.

156. *Id.* at 289, 537 N.E.2d at 311. The court compared the statute at issue with an invalidated Washington statute that had provided for unlimited civil fines calculated on gross profits and imposed upon obscenity violators whether or not such profits were limited to those derived from sales of obscene materials. *Id.* (citing J-R Distribs., Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984)). The court, however, did not mention that *J-R Distributors* had been reversed by the Supreme Court, which found that the proper course was to invalidate only the offending portion of the Washington statute rather than the entire statute. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985).

157. *Id.* (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)). The court further observed that distinguishing bookstore owners from owners of other types of commercial property might be an unconstitutional classification. *Id.*

158. *Id.*

159. *Id.* at 289-90, 537 N.E.2d at 311.

160. *Id.* at 290, 537 N.E.2d at 311.

161. *Id.*

162. *Id.* at 290-91, 537 N.E.2d at 312.

163. *Id.* at 291, 537 N.E.2d at 312. The court suggested less restrictive alternatives such as zoning restrictions. *Id.*

164. *Id.* The court emphasized that its holding did not apply to the statute's constitutionality for forfeiture following other offenses such as child pornography, sale of obscene materials to minors, or tie-in sales to distributors. *Id.* at 291-92, 537 N.E.2d at 312.

In dissent, Justice Miller, joined by Justice Ryan, contended that, under the circumstances, the statute did not constitute unconstitutional prior restraint.[165] Justice Miller claimed that first amendment protection was irrelevant to the facts at issue, comparing the case before the court to a prosecution for building code violations in a store selling obscene materials.[166] He declared that the underlying obscenity deserved no constitutional protection and likened the case to *Arcara*.[167] Justice Miller also questioned the applicability of the *O'Brien* test.[168] Even if the test were relevant, he claimed, the statute was necessary to protect the State's interest and thus fully satisfied the test.[169]

2. Controlled Substances Act: Vehicle Forfeiture Permissible for Pouring Cocaine on Car Floor

In a case involving a driver who attempted to hide cocaine by pouring it onto his car floor, the Illinois Supreme Court held that the driver had used the car to "facilitate" violation of the Controlled Substances Act,[170] and thus the vehicle was subject to forfeiture.[171]

In *People v. 1946 Buick, VIN 34423520*,[172] the police stopped Samuel Smith for driving through a stop sign.[173] Approaching the car, the police saw Smith empty onto the car floor a packet of

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The court also declined to address the constitutionality of the *ex parte* preliminary injunction and temporary restraining order provisions in isolation, relying on the general rule that a finding of unconstitutionality in one part of a statute invalidates the whole unless that part can be severed without affecting the rest. *Id.* at 292, 537 N.E.2d at 312. The court ruled that the invalidation of the bond and closure provisions made the *ex parte* provisions "pointless." *Id.* at 292, 537 N.E.2d at 312-13.

165. *Id.* at 294, 537 N.E.2d at 313 (Miller, J., dissenting).

166. *Id.* at 294-95, 537 N.E.2d at 313 (Miller, J., dissenting).

167. *Id.* at 299-301, 537 N.E.2d at 315-16 (Miller, J., dissenting). *See supra* note 149 and accompanying text.

168. *See supra* note 152 and accompanying text.

169. 127 Ill. 2d at 299-301, 537 N.E.2d at 315-16 (Miller, J., dissenting). To Justice Miller, the closure and release provisions were no harsher than criminal fines and imprisonment because the injunction against use was limited to the building in which obscenity violations had been found, and the defendants were free to conduct their business in other locations. *Id.* Furthermore, a building owner had merely to post a bond in order to use the building. *Id.*

170. ILL. REV. STAT. ch. 56 1/2, para. 1505(a)(3) (1987). The Controlled Substances Act permits forfeiture of "all conveyances, including . . . vehicles . . . , which are used . . . in any manner to facilitate any violation of [the Controlled Substances Act]." *Id.*

171. People v. 1946 Buick, VIN 34423520, 127 Ill. 2d 374, 537 N.E.2d 748 (1989). "VIN" stands for "Vehicle Identification Number."

172. *Id.*

173. *Id.* at 375-76, 537 N.E.2d at 749.

white powder, which testing later revealed to be cocaine.[174] After Smith pled guilty to a charge of possession of a controlled substance, the State filed suit for forfeiture of the vehicle.[175] The trial court denied the State's petition and released the car, ruling that forfeiture in this case would not be consistent with the statute's legislative intent.[176] The appellate court affirmed, grounding its decision on *People v. One 1985 Chevrolet Camaro*,[177] which held on similar facts that under the *in pari materia* doctrine, the statute was inapplicable.[178] The State successfully petitioned for leave to appeal.[179]

Chief Justice Moran's opinion for the unanimous court first corrected Smith's and the appellate court's misuse of the *in pari materia* doctrine, noting that the doctrine applies only when a statute's language is ambiguous.[180] Use of the doctrine was inapt in this case because the language of the statute was "clear and unambiguous."[181] The court emphasized that the key word in interpreting the Controlled Substances Act was "facilitate," which it defined as "mak[ing] easier or less difficult."[182] Using the car floor to hide the cocaine made Smith's continued possession easier and thus brought the car within the purview of the forfeiture provision.[183] Accordingly, the court reversed the trial and appellate court decisions and remanded for a forfeiture order.[184] The court emphasized, however, that its decision was limited to the facts

174. *Id.* at 376, 537 N.E.2d at 749. The police recovered 0.33 grams of cocaine. *Id.*

175. People v. 1946 Buick, VIN 34423520, 164 Ill. App. 3d 963, 964, 518 N.E.2d 397, 398 (1st Dist. 1987).

176. *1946 Buick*, 127 Ill. 2d at 376, 537 N.E.2d at 749.

177. 149 Ill. App. 3d 609, 500 N.E.2d 1023 (3d Dist. 1986).

178. *1946 Buick*, 127 Ill. 2d at 376-77, 537 N.E.2d at 750. The *in pari materia* doctrine states that two statutes pertaining to the same subject or matter must be construed together. BLACK'S LAW DICTIONARY 711 (5th ed. 1979). The corresponding forfeiture section of the Criminal Code states that a "vehicle . . . used with the knowledge and consent of the owner in the commission of, or in the attempt to commit, . . . an offense prohibited by . . . [selected sections] of the Illinois Controlled Substances Act" is subject to forfeiture. ILL. REV. STAT. ch. 38, para. 36-1 (1987). Following *Camaro*, the *1946 Buick* appellate court found that, in combination, the statutes mandated "a nexus between the transportation of the controlled substance and the violation of the Act . . . . [T]he transportation must facilitate or be intended to facilitate such violation . . . . [T]ransportation of a controlled substance, without more, is not sufficient to establish the nexus . . . ." 164 Ill. App. 3d at 965, 518 N.E.2d at 399.

179. *1946 Buick*, 127 Ill. 2d at 375, 535 N.E.2d at 749.

180. *Id.* at 377, 537 N.E.2d at 750 (citing Kozak v. Retirement Bd. of the Firemen's Annuity & Benefit Fund, 95 Ill. 2d 211, 219, 447 N.E.2d 394, 398 (1983)).

181. *Id.*

182. *Id.* (quoting BLACK'S LAW DICTIONARY 531 (5th ed. 1979)).

183. *Id.* at 378, 537 N.E.2d at 750.

184. *Id.*

before it, expressly declining the State's invitation to broaden the forfeiture statute's scope to include mere possession of controlled substances in a vehicle.[185]

3. Mandatory Revocation of Driver's License for Sex Offenses: Statute Unconstitutional

In *People v. Lindner*,[186] the supreme court held that a statute mandating driver's license revocation for conviction of certain crimes violated constitutional due process guarantees.[187]

The *Lindner* defendant pled guilty to charges of criminal sexual assault and aggravated criminal sexual abuse and was sentenced to probation.[188] The Motor Vehicle Code required that the court send his driver's license and conviction records to the Secretary of State to begin mandatory license revocation proceedings.[189] The defendant moved to block the court from sending the records, claiming that the statute deprived him of life, liberty, and property without due process of law.[190] The court held the statute unconstitutional and allowed him to retain his license.[191] The supreme court permitted the State to appeal directly.[192]

Justice Stamos' majority opinion first addressed the questions of the appropriate standard of review and the state interest.[193] Although the defendant had a property interest in his driver's li-

185. *Id.*

186. 127 Ill. 2d 174, 535 N.E.2d 829 (1989).

187. *Id.* at 183, 535 N.E.2d at 833. The statute mandated license revocation for drivers convicted of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, aggravated criminal sexual abuse, juvenile pimping, soliciting for a juvenile prostitute, and for certain violations of the Controlled Substances Act. ILL. REV. STAT. ch. 95 1/2, para. 6-205(b)(2) (1987).

188. 127 Ill. 2d at 177, 535 N.E.2d at 830. The victims were his two stepdaughters who were under eighteen years of age at the time of the offenses. *Id.* He was also sentenced to psychological counseling. *Id.* at 187, 535 N.E.2d at 835 (Miller, J., dissenting).

189. *Id.* at 177, 535 N.E.2d at 830.

190. *Id.*

191. *Id.* at 187-88, 535 N.E.2d at 835 (Miller, J., dissenting). The circuit court concluded that the revocation would violate the defendant's due process rights under the federal and state constitutions because there was no connection between his crimes and the state interest in highway safety, and there was no public transportation between the defendant's home and either his job or his psychologist. *Id.*

192. *Id.* at 176, 535 N.E.2d at 830. Illinois Supreme Court Rule 302(a) allows direct appeals to the supreme court from final circuit court judgments when, *inter alia*, a statute has been held invalid. ILL. S. CT. R. 302(a), ILL. REV. STAT. ch. 110A, para. 302(a) (1987). On appeal, the defendant also claimed that the statute violated the Illinois Constitution's separation of powers provision. 127 Ill. 2d at 177, 535 N.E.2d at 830 (citing ILL. CONST. art. II, § 1).

193. *Id.* at 179-82, 535 N.E.2d at 831-33.

cense, the standard of review was the rational basis test.[194] The defendant contended that to determine the statute's basis, the court could consider only those state interests explicitly declared in the statute; the State countered that the court was obliged to consider any rational basis, even if not expressed in the statute.[195] After examining the statute in its entirety, the court identified the state interest as the "safe and legal operation and ownership of motor vehicles."[196]

The court then focused on the reasonableness of the relationship between this interest and the statute's underlying purpose.[197] Remarking that the defendant's crimes did not involve a motor vehicle, the court concluded that not only was there no reasonable relationship between his crimes and the statute's purpose, there was no relationship whatsoever.[198] Lastly, the court examined the statute as a method of furthering the State's interest in safe and legal vehicle operation.[199] Because the offenses enumerated in the statute did not involve motor vehicles, and because there was no discernible basis for choosing the listed offenses rather than others, the court concluded that the statute was invalid.[200]

In a spirited dissent, Justice Miller stated that the majority view of the statute's purpose and the state interest was unjustifiably nar-

194. *Id.* at 179-80, 535 N.E.2d at 831 (citing Bernier v. Burris, 113 Ill. 2d 219, 228-29, 497 N.E.2d 763, 767 (1986), and Williamson v. Lee Optical of Oklahoma, Inc. 348 U.S. 483, 488 (1955)). The rational basis standard of review requires that a statute "bear a reasonable relationship to the public interest intended to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective." *Id.* at 180, 535 N.E.2d at 831 (quoting Illinois Gamefowl Breeders Ass'n v. Block, 75 Ill. 2d 443, 453, 389 N.E.2d 529, 532 (1979)).

195. *Id.* at 180-82, 535 N.E.2d at 832-33. The State claimed that the court was obliged to consider "any conceivable basis" for finding the statute valid, even if this required finding purposes other than safe and legal motor vehicle operation. *Id.* at 183, 535 N.E.2d at 833.

196. *Id.* at 181-82, 535 N.E.2d at 833. The court observed that the State's interpretation was too deferential an approach even for the highly deferential rational basis test. *Id.* at 184, 535 N.E.2d at 833. The court emphasized that although courts have a duty to uphold a statute's constitutionality, they have an equivalent duty to invalidate a statute if it is unconstitutional. *Id.*

197. *Id.* at 182, 535 N.E.2d at 833.

198. *Id.* at 182-83, 535 N.E.2d at 833.

199. *Id.*

200. *Id.* at 183, 535 N.E.2d at 833. The court also rejected the State's argument that the statute's purposes included punishment, deterrence, and keeping sex offenders near their homes where they are known. *Id.* at 184-85, 535 N.E.2d at 833-34. The majority observed that the General Assembly had repealed the statute in question and added a new provision that gives the Secretary of State discretionary power to suspend or revoke a driver's license for conviction of certain crimes. *Id.* at 185-86, 535 N.E.2d at 834. For the new legislation, effective January 1, 1989, see *infra* notes 355-60 and accompanying text.

row.[201] Justice Miller insisted that the majority improperly grounded its opinion on a statutory statement of purpose written eight years before the provision at issue.[202] Moreover, the statute mandated license revocation for yet other offenses unrelated to highway safety.[203] In addition, Justice Miller declared, the provision for license revocation "when any other law of [Illinois] requires either the revocation or suspension of such license or permit" indicated a broad legislative intent.[204] Justice Miller also found a state interest in diminishing the mobility of sex offenders.[205] Consequently, he would uphold the provision as constitutional.[206] Justice Miller also cautioned that the majority's decision was overly broad because it invalidated the entire revocation provision, not just the portion concerning the offenses the defendant had committed.[207]

4. Possession of a Stolen Motor Vehicle: Penalty Constitutional

In *People v. Bryant*,[208] the supreme court held that the sanction for possession of a stolen vehicle does not violate the due process and proportionate penalties guarantees of the Illinois Constitution.[209]

The defendant in *Bryant* was convicted at a bench trial for possession of a stolen motor vehicle, and he received a three-and-one-half year sentence.[210] On appeal, the defendant first challenged the

201. *Lindner*, 127 Ill. 2d at 189-90, 535 N.E.2d at 835-36 (Miller, J., dissenting). Justice Miller observed that the majority read the statute to exclude any basis for revocation other than a crime that was connected to the operation of a motor vehicle. *Id.* Justice Miller pointed out that the statute had explicitly included offenses that were connected with operating motor vehicles, but then listed additional, unrelated offenses. *Id.* at 189, 535 N.E.2d at 836 (Miller, J., dissenting). Justice Miller remarked that such an express addition implied that the unrelated offenses were intentionally included, rejecting the majority's inference that because the offenses at issue did not involve motor vehicle operation, they were not intended to be within the statute's purview. *Id.* at 190, 535 N.E.2d at 836 (Miller, J., dissenting).

202. *Id.* The statement of purpose was written in 1953; the provision at issue dates back only to 1961. *Id.*

203. *Id.* The statute also required revocation for perjury or false statements on driver's license or auto registration documents. *Id.*

204. *Id.* (quoting ILL. REV. STAT. ch. 95 1/2, para. 6-205(b)(4) (1987)).

205. *Id.* at 191, 535 N.E.2d at 836 (Miller, J. dissenting).

206. *Id.* at 191, 535 N.E.2d at 836-37 (Miller, J., dissenting).

207. *Id.* at 191, 535 N.E.2d at 837 (Miller, J., dissenting).

208. 128 Ill. 2d 448, 539 N.E.2d 1221 (1989).

209. *Id.* at 457-58, 539 N.E.2d at 1226. The Illinois Constitution states in pertinent part that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ." ILL. CONST., art. I, § 2. It also states that "[a]ll penalties shall be determined . . . according to the seriousness of the offense . . . ." *Id.* § 11.

210. 128 Ill. 2d at 451, 539 N.E.2d at 1222. The defendant and another man were

constitutionality of the sentencing provision.[211] The appellate court vacated the conviction, holding the sentencing provision unconstitutional because the sanction for possession of a stolen vehicle was harsher than that for the lesser included offense of theft or for organized motor vehicle theft.[212] The State appealed as of right.[213]

The unanimous court, speaking through Chief Justice Moran, held that the defendant could raise the constitutionality issue on appeal.[214] The court rejected the State's claim that the defendant had waived his right to raise this issue on appeal by not mentioning it at the trial court level, and it reaffirmed that a party may raise at any time the issue of a statute's unconstitutionality.[215]

The defendant's challenge to the statute was twofold. First, the statute created two classes of possessors of stolen motor vehicles: individuals and organized motor vehicle thieves.[216] The supreme court concluded that this distinction was false because the statute indicated an unambiguous intent to apply to all possessors of stolen vehicles, whether organized or not.[217] Thus, the court held no unconstitutional disparity existed between the two groups in the severity of punishment.[218]

The defendant also argued that the classification of the offense at issue as a Class 2 felony meant that the penalty was constitution-

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pushing a motorcycle when they were stopped by police. *Id.* at 452, 539 N.E.2d at 1223. The police checked the Vehicle Identification Number, discovered that the motorcycle belonged to a third person, and arrested the two men for possession of a stolen vehicle. *Id.* at 452-53, 539 N.E.2d at 1223. The defendant was convicted under the statute that prohibits unlawful possession of a motor vehicle. *Id. See* ILL. REV. STAT. ch. 95 1/2, para. 4-103(b) (1987).

211. 128 Ill. 2d at 453, 539 N.E.2d at 1223. He also claimed ineffective assistance of counsel. *Id.* at 452, 539 N.E.2d at 1223. For the procedural issues in *Bryant*, see Suskin and Rosenberg, *infra* note 1, at 350.

212. People v. Bryant, 165 Ill. App. 3d 996, 520 N.E.2d 890 (1st Dist. 1988). The appellate court held that theft was a lesser included offense of possession of a stolen motor vehicle, making the penalty difference constitutionally disproportionate. *Id.* at 1002, 520 N.E.2d at 894. The court also examined the legislative debates and found a lack of corresponding legislative intent. *Id.* at 1002-04, 520 N.E.2d at 894 -95.

213. *Bryant*, 128 Ill. 2d at 451, 539 N.E.2d at 1223. Under Supreme Court Rule 317, a party may appeal from an appellate court decision as of right when a constitutional question is raised for the first time at the appellate level. ILL. S. CT. R. 317, ILL. REV. STAT. ch. 110A, para. 317 (1987).

214. *Bryant*, 128 Ill. 2d at 454, 539 N.E.2d at 1224.

215. *Id.* at 453-54, 539 N.E.2d at 1223-24 (citing People v. Frey, 54 Ill. 2d 28, 294 N.E.2d 257 (1973)).

216. 128 Ill. 2d at 451, 539 N.E.2d at 1222.

217. *Id.* at 454-55, 539 N.E.2d at 1224. The court noted that when, as here, a statute's ordinary and plain meaning is clear, a court may not look beyond that language to determine legislative intent. *Id.* (citing People v. Harron, 85 Ill. 2d 261, 266-67, 422 N.E.2d 627, 629 (1981)).

218. *Id.* at 456, 539 N.E.2d at 1225.

ally disproportionate to that of the greater offense of theft, a Class 3 felony.[219] Possession of a stolen motor vehicle was a lesser included offense of theft, he contended, making the harsher sanction violative of the due process and proportionality clauses of the state constitution.[220] Remarking that the judiciary typically defers to the legislature in matters of penal sanctions,[221] the court concluded that the incremental changes in the severity of the penalty for possession of a stolen motor vehicle signified a legislative intent to differentiate between that offense and ordinary theft.[222] Accordingly, the court held that increases in the penalty were reasonably designed to decrease the number of incidents of an increasingly frequent crime and thus did not violate the Illinois Constitution.[223]

E. Sentencing Statutes

1. Parole Term: Unserved Portion of Maximum Indeterminate Sentence Included

The Illinois Supreme Court, in *Faheem-El v. Klincar*,[224] determined that the purpose of the 1978 amendment to the sentencing statute was to extend Department of Corrections control over an inmate/parolee to include both the mandatory parole term and any unserved portion of a maximum indeterminate sentence.[225] Thus, parole terms were not limited to the statutorily-mandated three or

219. *Id.* at 454, 539 N.E.2d at 1224. As a Class 2 felony, possession of a stolen vehicle carried a three to seven year sentence. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(5) (1987). By contrast, theft of property valued at more than three hundred dollars was a Class 3 felony, which mandates only a two to five year prison sentence. *Id.* para. 1005-8-1(a)(6). For the revisions to the sentencing provisions of the theft statute during the *Survey* year, see *infra* notes 321-25.

220. 128 Ill. 2d at 456-57, 539 N.E.2d at 1225.

221. Courts apply the rational basis test to penal sanctions, holding them unconstitutional only if they are not rationally related to correcting a danger to the community. *See supra* note 194 for the rational basis test.

222. *Bryant*, 128 Ill. 2d at 457-58, 539 N.E.2d at 1225-26. In 1977, the crime was a Class 4 felony; in 1979, the legislature added a provision making a subsequent offense a Class 3 felony. *Id.* at 457, 539 N.E.2d at 1225. In 1983, subsequent offenses became Class 2 felonies, and the first offense became a Class 3 felony. *Id.* In 1985, the statute made the offense a Class 2 felony for both the first and any subsequent convictions. *Id.* The court noted that these changes corresponded to the increasing frequency of car theft. *Id.* at 457-58, 539 N.E.2d at 1226.

223. *Id.*

224. 123 Ill. 2d 291, 527 N.E.2d 307 (1988).

225. *Id.* at 302, 527 N.E.2d at 312. For murder, the 1973 statute imposed an indeterminate sentence of not less than fourteen years and stated that indeterminate sentences "shall include as though written therein a parole term in addition to the term of imprisonment . . . [of] 5 years." ILL. REV. STAT. ch. 38, para. 1005-8-1(c)(1), (e)(1) (1973). The five year term was changed to three years in 1978. *See* ILL. REV. STAT. ch. 38, para. 1005-8-1(d)(1) (1979).

five years.[226]

In *Faheem-El*, the petitioner had been convicted of murder in 1973, sentenced to an indeterminate prison sentence of thirty to ninety years, and paroled in October, 1983.[227] Three-and-one-half years later, the petitioner was arrested and charged with delivery of thirty dollars' worth of cocaine.[228] The Prisoner Review Board issued a parole violator warrant, preventing the petitioner's release on bail.[229] At a subsequent parole revocation hearing, the Board found that the petitioner had violated his parole, and it ordered his return to prison.[230]

The petitioner filed a petition in the Illinois Supreme Court for a writ of *habeas corpus*,[231] claiming that the parole revocation was improper because his parole term had expired automatically in October, 1986, three years after his release from prison.[232] The petitioner argued that the Parole Board's revocation power did not extend beyond the statutory parole term of three years; once that term expired, the Board had no power to imprison him.[233] The Board maintained that, for an indeterminate sentence, the parole term does not begin until the expiration of the maximum term to which a defendant has been sentenced, which in this case was eighty years after the petitioner's release on parole.[234]

Chief Justice Moran's opinion for an unanimous court began by noting that the court must grant a *habeas* petition if a prisoner has satisfied the underlying judgment on which it is based; consequently, the court had to determine whether the petitioner had satisfied his 1973 sentence.[235] The court remarked that the sentencing statute defined length of parole in terms of the indeterminate sentence, including the minimum and maximum terms for an offense, rather than merely its parole provisions.[236] The court concluded

226. *Faheem-El*, 123 Ill. 2d at 296, 527 N.E.2d at 309.

227. *Id.* at 294, 527 N.E.2d at 308.

228. *Id.*

229. *Id.*

230. *Id.*

231. The Illinois Constitution gives the supreme court original jurisdiction in *habeas corpus* cases. ILL. CONST. art VI, § 4(a). *See also* ILL. REV. STAT. ch. 110, para. 10-124 (1987) (causes for discharge when in custody on process of court); ILL. REV. STAT. ch. 110A, para. 381 (original jurisdiction in the supreme court for actions pursuant to article VI, § 4(a) of the Illinois Constitution).

232. *Faheem-El*, 123 Ill. 2d at 296-97, 527 N.E.2d at 309-10.

233. *Id.* at 297, 527 N.E.2d at 309-10.

234. *Id.* at 297, 527 N.E.2d at 310. The defendant had served ten years of his thirty to ninety year sentence. *Id.* at 294, 527 N.E.2d at 308.

235. *Id.* at 295, 527 N.E.2d at 309.

236. *Id.* at 298, 527 N.E.2d at 310. *See supra* note 225.

that the parole provision did not include the notion of a sentence's premature termination and thus comprised both the statutory parole term and any remaining portion of the maximum prison sentence.[237] The court emphasized that "[p]arole *alters only the method and degree of confinement* during the period of commitment," not its length.[238] Thus, release on parole qualifies a prisoner for sentence discharge only if he also has completed the maximum sentence.[239] This in turn can be accomplished only if the mandatory parole term commences when the maximum sentence period expires.[240]

The court commented that this interpretation was consistent with the mandatory parole term statute's objective.[241] The earlier versions of the sentencing statute required an inmate to remain in state custody until his maximum term of imprisonment ended; thereafter he was not under the control of the Department of Corrections.[242] This, however, had the unwelcome effect of releasing prisoners into society without supervision if they had served the full maximum sentence.[243] To remedy this oversight, the statute was amended to require an additional time period for supervision after release for those who had served their entire sentence in prison.[244] This change assured that all prisoners, particularly those who had not merited an early release, would be under State control for a period of time after their release from prison.[245] The court found this change indicative of a legislative intent to extend, rather than to limit, the length of time for state control.[246] Accordingly, the court denied the petition, concluding that the petitioner was not entitled to discharge merely by having served his three years of parole.[247]

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237. *Faheem-El*, 123 Ill. 2d at 298-99, 527 N.E.2d at 310-11.

238. *Id.* at 299, 527 N.E.2d at 311 (quoting People v. Williams, 66 Ill. 2d 179, 187, 361 N.E.2d 1110, 1114 (1977) (emphasis added)).

239. *Id.* at 300, 527 N.E.2d at 311.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 300-01, 527 N.E.2d at 311.

244. *Id.* at 301, 527 N.E.2d at 311.

245. *Id.* at 301, 527 N.E.2d at 311-12.

246. *Id.* at 301, 527 N.E.2d at 312. The court pointed out that the defendant's interpretation would mandate incarceration of the defendant for the unserved time plus the mandatory parole term (a total of eighty years) if he had been arrested within his parole term, but would permit no incarceration whatsoever if he had been arrested one day after his three year parole period had ended. *Id.* at 301-02, 527 N.E.2d at 312. The court called this result "absurd." *Id.* at 302, 527 N.E.2d at 312.

247. *Id.*

2. Supervision: Not Constitutionally Required for Certain Repeat Offenders

During the *Survey* period, the Illinois Supreme Court twice addressed constitutional challenges to the sentencing provisions for drunk drivers who previously entered guilty pleas to reckless driving charges. In the first case, the court was able to avoid the defendant's constitutionality challenge due to deficiencies in the record and in the judgment itself.[248] In the second case, with a more complete trial record, the court held that the statute did not violate constitutional equal protection guarantees.[249]

In *People v. Kuhn*,[250] the defendant pled guilty to driving under the influence of alcohol ("DUI") and disobeying a traffic control device; he requested court supervision.[251] A few years previously, the defendant had been charged with DUI, but the charge had been reduced to reckless driving.[252] The applicable sentencing statute, however, prohibited court supervision for DUI convictions if, within five years prior to the current charge, the defendant had pled guilty to a reckless driving charge in the course of a plea bargain.[253] Before his sentencing, the defendant asked the court to declare the statute unconstitutional.[254] The trial court held that the statute violated the equal protection provisions of the Illinois and United States Constitutions and continued the case.[255] The State appealed directly to the supreme court.[256]

The unanimous court, speaking through Chief Justice Moran, first examined the record for the current charge to find indications that the defendant had plea bargained in 1983 for his earlier reckless driving charge.[257] Although the defendant claimed that he had

248. People v. Kuhn, 126 Ill. 2d 202, 533 N.E.2d 909 (1988). *See infra* notes 251-64 and accompanying text.

249. People v. Eckhardt, 127 Ill. 2d 146, 535 N.E.2d 847 (1989). *See infra* notes 264-77 and accompanying text.

250. 126 Ill. 2d 202, 533 N.E.2d 909 (1988).

251. *Id.* at 204, 533 N.E.2d at 909. The defendant also had been charged with operating a motor vehicle with a blood alcohol level of 0.10 or more. *Id.* at 203, 533 N.E.2d at 909. The State's motion to dismiss this charge was granted. *Id.* at 204, 533 N.E.2d at 909.

252. *Id.* at 205, 533 N.E.2d at 910.

253. *Id. See* ILL. REV. STAT. ch. 95 1/2, para. 11-503 (1987); ILL. REV. STAT. ch. 38, para. 1005-6-1(d)(3) (1987).

254. *Kuhn*, 126 Ill. 2d at 204, 533 N.E.2d at 909.

255. *Id.*

256. *Id.* at 204, 533 N.E.2d at 909-10. The Illinois Supreme Court Rules permit direct appeal for questions of constitutionality of statutes. ILL. S. CT. R. 302(a), ILL. REV. STAT. ch. 110A, para. 302(a) (1987).

257. *Kuhn*, 126 Ill. 2d at 206, 533 N.E.2d at 910.

brought the earlier charge's file to his second trial, the file was not contained in the record for the second offense, and thus it could not be considered on appeal.[258] In addition, although the defendant testified at the second trial that he had been charged with DUI in 1983 and had pled guilty to reckless driving, he had not said specifically that the earlier guilty plea resulted from a plea bargain.[259] Thus, the court concluded that the record was insufficient to support the denial of a supervision order.[260]

The court also questioned its jurisdiction over the appeal.[261] Because the trial court had continued the case for status without sentencing the defendant, there was no final order; without a final order, the court had no jurisdiction to hear the appeal.[262] Rather than simply dismissing the case, the supreme court vacated the trial court's declaration of unconstitutionality and remanded the cause for sentencing.[263]

Two months later, the court issued an authoritative ruling on the statute's constitutionality in *People v. Eckhardt*.[264] The *Eckhardt* record revealed a prior plea bargain, solving *Kuhn*'s technical deficiencies.[265] In *Eckhardt*, the trial court also held the statute unconstitutional on equal protection grounds[266] and again the State appealed directly to the supreme court.[267] Even though the trial court's order was interlocutory, the supreme court ruled that it had jurisdiction pursuant to its supervisory authority.[268]

The defendant contended that the statute impermissibly estab-

258. *Id.* at 205, 533 N.E.2d at 910.
259. *Id.* at 206, 533 N.E.2d at 910.
260. *Id.* at 206, 533 N.E.2d at 911.
261. *Id.* at 207, 533 N.E.2d at 911.
262. *Id.*
263. *Id.*
264. 127 Ill. 2d 146, 535 N.E.2d 847 (1989).
265. *Id.* at 149, 535 N.E.2d at 848. *Eckhardt* mirrors *Kuhn* in many respects. In 1984, the defendant pled guilty to reckless driving in a plea bargain following a DUI charge; less than three years later he was arrested for DUI and other charges. *Id.* As in *Kuhn*, the defendant requested supervision and filed a motion asking the court to declare the statute unconstitutional on equal protection grounds. *Id.* at 150, 535 N.E.2d at 848.
266. *Id.* The defendant contended that the statute made an impermissible distinction between those who were found guilty of reckless driving after plea bargaining and those who pled guilty to an original charge of reckless driving. *Id.* The trial court declared the statute unconstitutional because it impermissibly treated two groups that had committed the same offense differently. *Id.*
267. *Id.* at 148, 535 N.E.2d at 847. Unlike *Kuhn*, in *Eckhardt*, the State appealed under Supreme Court Rule 603, which states that the only method of review of criminal cases is by appeal. *Id.* *See* ILL. S. CT. R. 603, ILL. REV. STAT. ch. 110A, para. 603 (1987).
268. *Eckhardt*, 127 Ill. 2d at 149, 535 N.E.2d at 847. The court noted that the parties had not raised the issue of jurisdiction but said that the case was "an appropriate one for

lished two classes that the State treated differently.[269] The unanimous court, speaking through Justice Ryan, first observed that the question presented did not concern either a suspect class or fundamental interest, making the standard of review the rational basis test.[270] The court then remarked that not all statutory distinctions between classes are unconstitutional.[271] Unlike the trial court, the supreme court concluded that the distinction at issue, between those who entered a blind guilty plea to a charge of reckless driving and those who bargained for it, was drawn between two groups whose conduct differed because the charge against the group of plea bargainers likely had been reduced.[272] Consequently, the distinction was permissible because the two groups differed in that the plea bargainers usually committed more serious offenses than those who had been charged initially with reckless driving.[273]

The court held the state interest in highway safety sufficient to withstand the defendant's constitutional challenge.[274] The court determined that the statute was intended to exclude from supervision both those who were convicted under the DUI statute and those who had plea bargained to the lesser offense of reckless driving.[275] Thus, for constitutional purposes, those who plea bargain to reckless driving are differently situated from those originally so charged; consequently, the statute does not violate equal protection guarantees because those treated differently are indeed different.[276] Accordingly, the court upheld the statute's constitutionality.[277]

IV. LEGISLATION

A. General Provisions and Principles of Criminal Liability

1. New Class of Victims for Certain Offenses

The Illinois legislature amended the Criminal Code's general definitions to add the term "institutionalized severely or profoundly mentally retarded person."[278] The definition includes

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the exercise of [its] supervisory authority." *Id.* (citing ILL. CONST. art. VI, § 16 and Brokaw Hosp. v. Circuit Court, 52 Ill. 2d 182, 287 N.E.2d 472 (1972)).

269. *Id.* at 150, 535 N.E.2d at 848.

270. *Id.* at 151, 535 N.E.2d at 848. *See supra* note 194 for the rational basis test.

271. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).

272. *Id.* at 151, 535 N.E.2d at 848-49.

273. *Id.* at 151, 535 N.E.2d at 849.

274. *Id.* at 152, 535 N.E.2d at 849.

275. *Id.* at 152-53, 535 N.E.2d at 849.

276. *Id.* at 153, 535 N.E.2d at 849.

277. *Id.*

278. ILL. REV. STAT. ch. 38, para. 2-10.1 (West Supp. 1989). This follows a similar

those who have an I.Q. of forty or lower and who reside in a special facility.[279] This added a new class of victims for certain crimes, including aggravated kidnaping,[280] child abduction,[281] soliciting for a juvenile prostitute,[282] juvenile pimping,[283] exploitation of a child,[284] child pornography,[285] aggravated battery of a child,[286] aggravated criminal sexual assault,[287] and aggravated criminal sexual abuse.[288]

2. Corporate Criminal Liability

The legislature expanded the potential criminal liability of corporations in three ways. The first permits prosecution of corporations for obscenity and child pornography.[289] The second permits corporations to be prosecuted for violation of the State Environmental Protection Act.[290] The last singles out corporations for maximum fines of fifty thousand dollars or the amount specified in the offense, whichever is greater.[291]

3. Solicitation, Solicitation of Murder and Murder for Hire

The General Assembly created two new solicitation offenses and modified an existing one.[292] The revision limits the application of the solicitation statute to offenses other than first degree murder.[293] One new offense is solicitation of murder, which is defined as commanding, requesting, or encouraging another to commit first degree murder.[294] This is a Class X felony that carries a sentence of

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bill during the last *Survey* year extending the victim class for these crimes to include elderly and physically handicapped persons. *See* Dilgart and Giampa, *supra* note 2, at 381.

279. ILL. REV. STAT. ch. 38, para. 2-10.1 (West Supp. 1989). For the purposes of the definition, "facilities" include developmental disability facilities, nursing homes, or long term care facilities. *Id.*

280. *Id.* para. 10-2.

281. *Id.* para. 10-5.

282. *Id.* para. 11-15.1.

283. *Id.* para. 11-19.1.

284. *Id.* para. 11-19.2.

285. *Id.* para. 11-20.1.

286. *Id.* para. 12-4.3.

287. *Id.* para. 12-14(c).

288. *Id.* para. 12-16.

289. *Id.* para. 5-4(1).

290. *Id.* para. 5-4(a)(1).

291. *Id.* para. 1005-9-1(1). For non-corporations, the maximum fine is ten thousand dollars or the amount specified in the offense, whichever is greater. *Id.*

292. *Id.* paras. 8-1 through 8-1.2. (repealing Pub. Act 1003, 1988 Ill. Legis. Serv. 85-1003).

293. *Id.* para. 8-1.

294. *Id.* para. 8-1.1(a).

not less than fifteen nor more than thirty years.[295] The other new offense is that of solicitation of murder for hire.[296] It includes the elements of solicitation of murder, but has the additional element of a contract, agreement, understanding, or request for money or anything of value in connection with the procurement.[297] The sentence for this Class X offense is not less than twenty nor more than forty years.[298]

B. Offenses Against the Person

1. Drug-Induced Homicide

The legislature created the new offense of drug induced homicide, which occurs when the victim dies as a result of partaking of any amount of a controlled substance that was manufactured or delivered in violation of the Illinois Controlled Substances Act.[299] The offense is a Class X felony that provides an imprisonment term of fifteen to thirty years in addition to the sentence authorized in the sentencing statute, or an extended term of thirty to sixty years.[300]

2. Offenses Against Senior Citizens and Children

The General Assembly showed its concern for older citizens by adding the offense of aggravated battery of a senior citizen, which is the knowing or intentional infliction of great bodily harm on, or permanent disabling or disfiguring of, a person sixty years of age or older.[301] This is a Class 2 felony, for which no probation, periodic imprisonment, or conditional discharge is allowed.[302]

The legislature continued its efforts to protect the children of Illinois from sexual abuse. It added the offense of keeping a place of juvenile prostitution.[303] The statute provides enhanced sanctions for keeping a place of prostitution in which the prostitutes are under sixteen years of age but allows the affirmative defense of rea-

295. *Id.* para. 8.1.1(b)
296. *Id.* para. 8-1.2(a).
297. *Id.*
298. *Id.* para. 8.1.2(b).
299. *Id.* para. 9-3.3. For the penalty provisions of the Controlled Substances Act, see *id.* ch. 56 1/2, paras. 1401-1413 (1987 & West Supp. 1989).
300. ILL. REV. STAT. ch. 38, para. 9-3.3(b) (West Supp. 1989).
301. *Id.* para. 12-4.6.
302. *Id.* para. 1005-5-3(c)(2)(I).
303. *Id.* para. 11-17.1. The first offense is a Class 1 felony; subsequent offenses are Class X felonies and conviction subjects a defendant to the forfeiture sanctions of paragraph 11-20.1A of the Act. *Id.* para. 11-17.1(c), (d).

sonable belief that the person was sixteen or older.[304] Also, the legislature amended the criminal sexual assault and the aggravated criminal sexual abuse statutes to add sexual penetration of a victim at least thirteen years of age but younger than eighteen, if the accused was seventeen years of age or older and was in a position of trust, authority, or supervision in relation to the victim at the time of the crime.[305]

The Class A misdemeanor of permitting sexual abuse of a child,[306] which allowed prosecution of a parent or step-parent who knowingly allowed a child to be the victim of criminal sexual abuse or assault and who failed to prevent the act or its recurrence, was repealed.[307] Also, the Child Abduction Act, which formerly applied only to luring victims into vehicles, was expanded to include abduction of a child into a building, housetrailer, or dwelling place.[308]

3. Forfeiture Provisions

The legislature performed a major revision of the forfeiture provisions pertaining to sex crimes. Although the provision is substantively unchanged, the revision created a new code section for post-conviction forfeiture of property or profits connected with keeping a place of juvenile prostitution[309] and exploitation of a child,[310] as well as for the formerly-included offense of child pornography.[311] One half the proceeds are to be deposited with the Violent Crime Victims Assistance Fund.[312] In addition, the legislature completely revised the forfeiture provisions of the obscenity statute[313] and established an Obscenity Profits Forfeiture Fund that will receive twenty-five per cent of the property forfeited.[314]

Even before the Illinois Supreme Court decided *People v. Sequoia Books, Inc.*,[315] the legislature amended the obscenity statute

304. *Id.* para. 11-17.1(a), (b).

305. *Id.* paras. 12-13(a)(4) (criminal sexual assault) and 12-16(f) (aggravated criminal sexual abuse).

306. ILL. REV. STAT. ch. 38, para. 12-16.1 (1987).

307. 1988 Ill. Legis Serv. 85-1443 (West) (effective January 11, 1989). For its enactment during the last *Survey* year, see Dilgart and Giampa, *supra* note 2, at 380.

308. ILL. REV. STAT. ch. 38, para. 10-5(b)(10) (West Supp. 1989).

309. *Id.* para. 11-17.1.

310. *Id.* para. 11-19.2.

311. *Id.* para. 11-20.1A(a).

312. *Id.* para. 11-20.1A(c)(2).

313. *Id.* para. 11-20(g).

314. *Id.* para. 11-20(g)(6)(iii)(c).

315. 127 Ill. 2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 110 S. Ct. 835 (1990). *See supra* notes 130-69 and accompanying text.

to state specifically that it does not authorize prior restraint on allegedly obscene materials or performances.[316] Whether this version will survive due process challenges such as *Sequoia Books* remains to be seen.

4. Intimidation and Ethnic Intimidation

The offense of intimidation now includes threats by telephone, mail, or in person,[317] and ethnic intimidation now includes criminal trespass to residence and criminal trespass to real property.[318]

5. Home Invasion

The offense of home invasion now includes staying in another's home if there is knowledge or reason to know that others are present.[319] The amendment also adds the affirmative defense of immediately leaving or surrendering to those lawfully present without attempting to cause or causing serious bodily injury to those present.[320]

C. Offenses Against Property

1. Theft

Formerly there were only two classes of theft;[321] however, the legislature amended the statute to assign felony classifications that correspond to the value of the property stolen.[322] Although theft of three hundred dollars or less remains a Class A misdemeanor if not from the person, theft of property worth more than three hundred dollars and less than ten thousand dollars is now a Class 3 felony.[323] For property worth less than three hundred dollars stolen from the person or property worth between three hundred and ten thousand dollars, the offense is a Class 3 felony; if the property is valued at more than ten thousand dollars and less than one hundred thousand dollars, the offense is a Class 2 felony; if the value of the property exceeds one hundred thousand dollars, the offense is a Class 1 felony.[324] The statute expressly requires the trier of fact to

316. ILL. REV. STAT. ch. 38, para. 11-20(g)(5) (West Supp. 1989).
317. *Id.* para. 12-6.
318. *Id.* para. 12-7.1.
319. *Id.* para. 12-11(a).
320. *Id.* para. 12-11(b).
321. ILL. REV. STAT. ch. 38, para. 16-1 (1987).
322. *Id.* para. 16-1 (West Supp. 1989).
323. *Id.* para. 16-1(b)(1), (4).
324. *Id.* paras. 16-1(b)(4) -(6).

determine the property's value.[325] Also, the legislature created the offense of taking property that is in a law enforcement agency's custody when a representative of the agency explicitly has represented that the property is stolen.[326]

2. Criminal Damage to Property

The legislature enhanced the offense of shooting a firearm at a train to a Class 4 felony, regardless of the amount of damage.[327]

D. Other Offenses

1. Gambling

The gambling statute was amended specifically to exclude a "crane game" from the list of prohibited gambling devices.[328]

2. Interference with Public Contracts

The General Assembly enacted a series of new laws criminalizing interference with public contracts by contractors and public employees.[329] These include the prohibition of bid-rigging[330] and bid rotating[331] by contractors. Bid-rigging is a Class 3 felony, and conviction is a bar to bidding on public contracts in Illinois for five years.[332] Bid rotating is a Class 2 felony, conviction for which permanently bars bidding on public contracts in Illinois.[333]

The new law also prohibits public officials from opening a sealed bid before the opening date, or disclosing information about a bid, a contractor, or bidding procedure that is not public information.[334] Any bidder who receives this information and does not report it to the Attorney General or the State's Attorney commits a Class A misdemeanor.[335] In addition, a public official commits a

325. *Id.* para. 16-1(c).
326. *Id.* para. 16-1(a)(5).
327. *Id.* paras. 21-1(1)(g), 21-1(2).
328. *Id.* para. 28-2(a)(3). A crane game is defined as a game of skill in which the prize is contained within the device and has a wholesale value of five dollars or not more than seven times the cost of playing the game, whichever is less. *Id.*
329. *Id.* paras. 33E-1 - 33E-11.
330. *Id.* para. 33E-3. Bid-rigging is the knowing agreement with a competitor to submit, or not submit, a bid that will result in the contract being awarded to that person; this includes bids that are submitted with a price or term that is intended to make the bid unacceptable. *Id.*
331. *Id.* para. 33E-4. Bid rotating is the collusive submission of bids in a pattern that permits those who bid on projects to distribute the work amongst themselves. *Id.*
332. *Id.* para. 33E-3.
333. *Id.* para. 33E-4.
334. *Id.* para. 33E-5(a)-(c).
335. *Id.* para. 33E-6(d).

Class 4 felony if he tells a bidder that his bid will be accepted if specific individuals are included.[336] A public official who awards a contract on the basis of criteria that were not public information is guilty of a Class 3 felony.[337] A public official who improperly opens the bid is guilty of a Class 4 felony.[338]

The offer or acceptance of a kickback is a Class 3 felony, and failure to report another's offer or solicitation of a kickback is a Class 4 felony.[339] If the amount of a kickback is included directly or indirectly in the contract price, the public agency involved may recover civil penalties of twice the kickback amount.[340]

On a public project, a contractor's inspector commits a Class 3 felony when accepting a bribe for wrongful approval or certification of anything in the project; failure to report the offer is a Class 4 felony.[341] The person who offers the bribe also commits a Class 4 felony.[342] Lastly, one who authorizes a change order that is for ten thousand dollars or more, or that extends the completion time by thirty days or more, without a written determination of necessity and lack of reasonable foreseeability, commits a Class 4 felony.[343]

3. Litter Control Act

The General Assembly amended the Litter Control Act to change certain of its provisions from petty offenses to Class B misdemeanors.[344] A second conviction is a Class A misdemeanor; subsequent convictions are Class 4 felonies.[345] Similarly, dumping garbage on another's land is no longer a petty offense. It is now a Class B misdemeanor for the first conviction, a Class A misdemeanor for the second and a Class 4 felony for subsequent convictions; any property used for a third or later offense is subject to forfeiture.[346]

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336. *Id.* para. 33E-6(b).
337. *Id.* para. 33E-6(e).
338. ILL. REV. STAT. ch. 38 para. 33E-5(a) (West Supp. 1989).
339. *Id.* para. 33E-7(a)-(c).
340. *Id.* para. 33E-7(d).
341. *Id.* para. 33E-8(b).
342. *Id.* para. 33E-8(a).
343. *Id.* para. 33E-9.
344. *Id.* para. 86-8(a). The offenses include throwing litter from a motor vehicle onto a public way or into a body of water in Illinois, or putting residential trash in public receptacles. *Id.* paras. 86-4 - 7.
345. *Id.* para. 86-8(a).
346. ILL. REV. STAT. ch. 100 1/2, para. 28 (West Supp. 1989).

4. Cannabis Control Act

The legislature amended the Cannabis Control Act to include the new offense of cannabis trafficking, which prohibits intentionally delivering or causing another to deliver 2500 grams or more of marijuana.[347] Conviction mandates a minimum sentence of not less than twice the minimum term for other violations of the Act and not more than twice the maximum term; fine amounts also must be no less than twice the minimum nor more than twice the maximum amount authorized by the Act.[348]

5. Controlled Substances Act

The trafficking provision of the Controlled Substances Act was amended to encompass the manufacture or delivery of such substances in any state or country.[349] In addition, the legislature created the Class X felony of manufacturing or delivering heroin, cocaine, morphine, or LSD in amounts greater than ninety-nine grams, with enhanced mandatory sentences ranging from nine to sixty years.[350] Mere possession of between fifteen and one hundred grams of the same substances remains a Class 1 felony, but with enhanced sentences from six to fifty years.[351] In addition, for possessing, manufacturing, or delivering over 99 grams of any of these substances, the maximum fine is the full street value of the substance.[352]

The legislature enhanced the lowest level of violation of the Controlled Substances Act from a Class A misdemeanor to a Class 4 felony; a subsequent violation is now a Class 3 rather than a Class 4 felony.[353] Also, the maximum fine for a first violation of the Act was raised to $100,000 from $5000; the fine for subsequent offense is a maximum of $200,000.[354]

6. Motor Vehicle Code

The Motor Vehicle Code was amended to repeal the provisions, which were found unconstitutional, mandating driver's license rev-

347. ILL. REV. STAT. ch. 56 1/2, para. 705.1(a) (West Supp. 1989).
348. *Id.* para. 705.1(b).
349. *Id.* para. 1401.1(a).
350. *Id.* paras. 1401-1402.
351. *Id.* paras. 1402, 1402.1.
352. *Id.* paras. 1401.2, 1402.1.
353. *Id.* para. 1406(b).
354. *Id.*

ocation for anyone convicted of certain sex offenses.[355] The amendment gives the Secretary of State discretionary power to impose, without a preliminary hearing, a one-year suspension or revocation upon a first conviction of the same offenses.[356] Subsequent offenses require a five-year suspension.[357] The amendment also changed any revocation in effect on December 31, 1988 to a suspension.[358] The Act extended the Secretary's authority to impose the one-year suspension or revocation for those convicted of a first offense of possession of more than five grams of a controlled substance or more than thirty grams of marijuana.[359] For subsequent convictions within five years, the license will be suspended for five years.[360] Whether these changes will withstand constitutional challenges remains to be seen.

7. Environmental Protection Act

The statute of limitations for violations of the State Environmental Protection Act[361] is now five years from either the date of the discovery of the violation by those legally obliged to discover it, or the date the appropriate prosecuting agent learns of the offense.[362]

IV. Conclusion

Rather than standing as a watershed in the development of substantive criminal law, the *Survey* year saw the Illinois Supreme Court continue its recent trend toward conservatism and a hardened stance of anti-crime, as well as develop a previously unseen unanimity toward that end. The court, for the most part, adhered to established standards of judicial review and, in nine of the fourteen decisions examined in this Article, unanimously reversed lower court decisions favoring the defense. Given that three currently sitting justices have announced plans to retire from the court following the 1990 elections,[363] the court's propensity for conservatism and unanimity is uncertain.

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355. Ill Rev. Stat. ch. 95 1/2, para. 6-205. *See supra* notes 186-207 and accompanying text (People v. Lindner, 127 Ill. 2d 174, 535 N.E.2d 829 (1989)).

356. *Id.* para. 6-206(a)(29) -(30).

357. *Id.* para. 6-206(a)(29).

358. *Id.* para. 6-205(f).

359. *Id.* para. 6-206(a)(28).

360. *Id.*

361. Ill. Rev. Stat. ch. 111 1/2, para. 1044 (1987 & West Supp. 1989).

362. *Id.* para. 1044(m) (West Supp. 1989).

363. Justices Stamos, Ward, and Ryan will not seek reelection. Grady, *Justices with a future, New Illinois Supreme Court will influence the '90s and beyond*, Chicago Tribune, March 4, 1990, § 4 (Perspective), at 1.

The legislature too exhibited a distinct desire to "get tough" on crime, as evidenced by the number of amendments that created new offenses or enhanced penalties, even for such innocuous "crimes" as littering. The legislature continues to respond to popular sentiment by enacting harsher sanctions for sex offenses, especially when the victims are relatively helpless, and for drug-related crimes. Given the temper of the times, there is little doubt that this trend will continue, notwithstanding the strains being placed upon the Illinois corrections system.[364]

364. *See supra* note 11.