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## Criminal Law

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# Criminal Law

*Sally L. Dilgart\**  
*and Kelly A. Giampa\*\**

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## I. INTRODUCTION

During the *Survey* year,<sup>1</sup> the Illinois Supreme Court reviewed many criminal law issues. This Article will summarize the most significant of these cases and analyze the court's reasoning in each decision. This Article also will review significant criminal law statutes enacted during the *Survey* period.

## II. CASE LAW

### A. *The State's Burden of Proof*

#### 1. Absence of Direct Evidence

In *People v. Thompkins*,<sup>2</sup> the Illinois Supreme Court affirmed the defendant's conviction and death sentence for numerous offenses<sup>3</sup> despite the absence of direct evidence against him.<sup>4</sup> A jury convicted Willie Thompkins of multiple counts of murder<sup>5</sup> for the execution-style shooting of Gerald Holton and Arthur Sheppard. The court subsequently sentenced Thompkins to death.<sup>6</sup>

1. The *Survey* year encompasses the period from July 1, 1987, to July 1, 1988.

2. 121 Ill. 2d 401, 521 N.E.2d 38 (1988).

3. *Id.* at 457, 521 N.E.2d at 63.

4. *Id.* at 451-52, 521 N.E.2d at 60.

5. *Id.* at 412, 521 N.E.2d at 42. The jury also convicted Thompkins of multiple counts of felony murder, armed violence, aggravated kidnaping, armed robbery, concealment of homicide, obstructing justice, solicitation to commit armed robbery, and conspiracy to commit murder and armed robbery. *Id.*

6. *Id.* at 412-13, 521 N.E.2d at 42. Initially, a grand jury indicted Willie Thompkins,

In addition to raising numerous procedural issues,<sup>7</sup> Thompkins argued on appeal that the trial court improperly applied the death penalty to him because his accomplice killed the victims.<sup>8</sup> In rejecting this argument, the court recognized the absence of any direct evidence showing that the defendant shot the victims<sup>9</sup> but inferred the defendant's intent to kill from the testimony of two key witnesses.<sup>10</sup>

Furthermore, the court found the evidence sufficient to convict the defendant under the theory of accountability.<sup>11</sup> It also recognized that even though the defendant may not have actually shot the victims, the evidence revealed that Thompkins planned and actively participated in armed robbery, murder, and concealment.<sup>12</sup> Consequently, the supreme court affirmed the trial court and ordered the defendant executed by lethal injection.<sup>13</sup>

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Pamela Thompkins, and Ronnie Moore for the slaying of Holton and Sheppard. Upon the defendant's motion, however, the court severed his case from that of his sister-in-law, Pamela Thompkins. *Id.* at 413, 521 N.E.2d at 42.

7. For a discussion of the procedural issues challenged by Thompkins, see Carey & Feeley, *Criminal Procedure*, 20 LOY. U. CHI. L.J. 391, 408 (1989).

8. *Thompkins*, 121 Ill. 2d at 450-53, 521 N.E.2d at 60-61. Thompkins also contended that the death penalty was inappropriate because his character was one of a hard-working family man who was forced to leave his full-time employment because of sarcoidosis, a rare and incurable respiratory disease. *Id.* at 450, 521 N.E.2d at 60.

9. *Id.* at 452, 521 N.E.2d at 60.

10. *Id.* The court relied on the testimony of its principal witness, Sandra Douglas, who was the only occurrence witness to the crimes. *Id.* at 451-52, 521 N.E.2d at 60. She testified that she saw the defendant point a gun at the victims. *Id.* at 451, 521 N.E.2d at 60. The court further relied on witness Keith Culbreath's testimony that the defendant invited him to commit an armed robbery. *Id.* at 451, 521 N.E.2d at 60. Finally, the court considered the statement made by Pamela Thompkins to Sandra Douglas that showed that Pamela previously had discussed murdering the victims with the defendant. *Id.* at 451-52, 521 N.E.2d at 60.

11. *Id.* at 452, 521 N.E.2d at 60. The principle of accountability is codified in article V of the Criminal Code. ILL. REV. STAT. ch. 38, paras. 5-1 to 5-5 (1987). Paragraph 5-2 provides in pertinent part:

A person is legally accountable for the conduct of another when:

.....

(c) either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

ILL. REV. STAT. ch. 38, para. 5-2(c) (1987).

The court stated that the issue of whether it could constitutionally impose the death penalty when a defendant's conviction was based on accountability and no evidence existed that indicated that the defendant actually killed or intended to kill the victim was decided previously. *Thompkins*, 121 Ill. 2d at 456, 521 N.E.2d at 62 (citing *People v. Garcia*, 97 Ill. 2d 58, 454 N.E.2d 274 (1983)).

12. *Thompkins*, 121 Ill. 2d at 452, 521 N.E.2d at 60. The court referred specifically to the testimony of Keith Culbreath and Sandra Douglas. *Id.* See *supra* note 10 and accompanying text.

13. *Thompkins*, 121 Ill. 2d at 457, 521 N.E.2d at 63. Justice Simon dissented with his

## 2. Absence of Physical Evidence

In *People v. Hernandez*,<sup>14</sup> the Illinois Supreme Court considered whether the trial court properly convicted the defendant when neither physical evidence nor witnesses linked the defendant to any of the crimes.<sup>15</sup> The trial court convicted Alejandro Hernandez of numerous crimes<sup>16</sup> for the abduction, rape, and murder of ten-year-old Jeanine Nicarico.<sup>17</sup>

On appeal, the defendant contended that the court can sustain a conviction based on a confession only when the confession was independently corroborated by physical evidence.<sup>18</sup> He argued that because there was no direct physical evidence linking him to the crimes, the evidence was insufficient to prove guilt beyond a reasonable doubt.<sup>19</sup>

The court rejected Hernandez's argument, however, and explained that the defendant misapplied the corroboration rule.<sup>20</sup> The court reiterated that the corroboration rule demanded only "proof of the *corpus delicti* committed consistently with the de-

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frequently-asserted objection to the constitutionality of the death penalty statute. *Id.* at 469, 521 N.E.2d at 68 (Simon, J., dissenting). He also criticized the majority's analysis of several of the defendant's procedural challenges. *Id.* at 457-69, 521 N.E.2d at 63-68 (Simon, J., dissenting). See Carey & Feeley, *Criminal Procedure*, 20 LOY. U. CHI. L.J. 391, 408 (1989).

14. 121 Ill. 2d 293, 521 N.E.2d 25, cert. denied, 109 S. Ct. 177 (1988).

15. *Id.* at 299-300, 521 N.E.2d at 28.

16. *Id.* at 295, 521 N.E.2d at 26. Following a jury trial, the defendant was convicted of murder, residential burglary, aggravated kidnaping, aggravated indecent liberties, deviate sexual assault, and rape. *Id.*

17. *Id.* at 295, 521 N.E.2d at 26. The defendant was indicted with two codefendants, Steven Buckley and Rolando Cruz. The trial court convicted both Hernandez and Cruz on all counts except home invasion which, upon the State's motion, was nol-prossed. *Id.* See *supra* note 16 for a list of the charges. The court was unable to similarly convict Buckley because the jury was unable to find him guilty on the same charges. *Hernandez*, 121 Ill. 2d at 295, 521 N.E.2d at 26.

18. *Hernandez*, 121 Ill. 2d at 319, 521 N.E.2d at 37. The defendant relied on *People v. Willingham*, 89 Ill. 2d 352, 359, 432 N.E.2d 861, 864 (1982). *Hernandez*, 121 Ill. 2d at 319, 521 N.E.2d at 37. The defendant interpreted *Willingham* to require independent physical evidence to corroborate a conviction based on a confession. *Id.*

19. *Hernandez*, 121 Ill. 2d at 319, 521 N.E.2d at 37. None of the many fingerprints found in the Nicarico home could be linked to the defendant. *Id.* at 305, 521 N.E.2d at 30-31. Further, although the police seized and investigated the defendant's clothes and shoes, the State offered no evidence suggesting that it discovered blood on the defendant's clothes or found prints matching those of his shoes near the body or on the Nicarico property. *Id.* at 305, 521 N.E.2d at 31.

20. *Id.* at 319, 521 N.E.2d at 37. The defendant assumed that to corroborate a confession the State must demonstrate proof of physical evidence connecting the defendant to the crime. The court, however, stated that there was no requirement of physical evidence connecting the defendant to the crime. *Id.* (citing *People v. Taylor*, 58 Ill. 2d 69, 317 N.E.2d 97 (1974); *People v. Norcutt*, 44 Ill. 2d 256, 255 N.E.2d 442 (1970)).

fendant's admission of guilt."<sup>21</sup> The court concluded that the corroboration requirement was satisfied because the crimes confessed and charged were actually committed.<sup>22</sup>

Although the court found the evidence sufficient to support the defendant's convictions, the court reversed the convictions and vacated the defendant's sentence<sup>23</sup> because it concluded that the defendant was deprived of a fair trial.<sup>24</sup>

### 3. Disproving Voluntary Manslaughter Defenses

In *People v. Reddick*,<sup>25</sup> the court consolidated the appeals of two defendants, Stephen Reddick and Gregory Lowe, and defined the State's burden of proof in a murder prosecution in which the accused raised a voluntary manslaughter defense.<sup>26</sup> The defendant Reddick was convicted of murder.<sup>27</sup> The other defendant, Lowe, was convicted of murder, attempted murder, and aggravated battery in a separate trial.<sup>28</sup> After separate appeals to the intermediate state courts were taken,<sup>29</sup> the supreme court granted the State leave

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21. *Id.* The court believed that four pretrial statements made by the defendant in which he acknowledged his participation were sufficient to establish his complicity. The statements contained varying accounts of the crimes and were inconsistent with the known facts. *Id.* at 305, 521 N.E.2d at 31. The prosecution presented no witnesses to any of the crimes. *Id.* at 319, 521 N.E.2d at 27.

22. *Id.* The defendant did not deny that the crimes were, in fact, perpetrated. *Id.* Additionally, the defendant argued that the evidence did not prove his involvement beyond a reasonable doubt. *Id.* at 318-19, 521 N.E.2d at 37. The defendant presented two theories. First, he claimed that he lied in his statements in order to obtain reward money. Second, he suggested that several of the witnesses had motives to fabricate stories and were thus incredible. *Id.* at 319, 521 N.E.2d at 37. On this issue, the court deferred to the jury's judgment and concluded that the evidence was not so weak that it left a reasonable doubt as to the defendant's guilt. *Id.* at 320, 521 N.E.2d at 37. The court refused to disregard the witnesses' testimony, believing that the "jury [could] reach a more informed judgment of their credibility than this court can achieve from reading the transcript of [the] proceedings." *Id.*

23. *Id.*

24. *Id.* at 318, 521 N.E.2d at 37. The court held that the admission of improperly and insufficiently redacted statements made by a non-testifying codefendant deprived Hernandez of his sixth amendment right to confront adverse witnesses. *Id.* at 309, 521 N.E.2d at 38. For an in-depth discussion of the procedural issues in this case, see Carey & Feeley, *Criminal Procedure*, 20 LOY. U. CHI. L.J. 391, 416 (1989).

25. 123 Ill. 2d 184, 526 N.E.2d 141 (1988).

26. *Id.* at 195, 526 N.E.2d at 145. See *infra* note 42 for the text of the voluntary manslaughter statute.

27. *Reddick*, 123 Ill. 2d at 188, 526 N.E.2d at 142.

28. *Id.* at 189, 526 N.E.2d at 142.

29. *Id.* at 188-89, 526 N.E.2d at 142. The appellate courts differed in their approaches to the waiver issue in these cases. The Third District noted Reddick's failure to object during trial to jury instructions that allocated the parties' burdens of proof, deemed the issue waived, and affirmed the conviction in an unpublished order. *Id.* at 188, 526 N.E.2d at 142. The First District reversed Lowe's convictions after it considered the

to appeal and consolidated the cases for review.<sup>30</sup>

At trial, the State proved the death of Reddick's roommate and homosexual lover, whom the police found dead in the home that the two men shared.<sup>31</sup> In a post-arrest statement to police officers, Reddick said that he killed the victim after they smoked marijuana, drank heavily, and quarreled.<sup>32</sup> At trial, however, Reddick claimed that he killed the victim in self-defense.<sup>33</sup>

In the second case, the State prosecuted Lowe for the murder and attempted murder of Larry and Gilbert Chaney.<sup>34</sup> Lowe also presented a theory of self-defense at trial.<sup>35</sup> He testified that he shot the victims after being repeatedly threatened with death and sexual abuse by Larry Chaney.<sup>36</sup> However, the testimony of several prosecution witnesses who were in the home at the time of the shooting contradicted the defendant's account.<sup>37</sup> The witnesses stated that they did not see the victim physically abuse or threaten the defendant, but rather that the activity between the two men

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same instructions and found "grave error" that could not be waived. *Id.* The supreme court ultimately reviewed the merits of both appeals under the plain error exception to the waiver rule. *Id.* at 198, 526 N.E.2d at 147.

30. *Id.* at 189, 526 N.E.2d at 142.

31. *Id.* The police found the naked victim dead on the floor. The physical evidence indicated a violent struggle, and the victim had been stabbed many times. The police found the defendant lying on a bed in an upstairs bedroom. *Id.* at 189, 526 N.E.2d at 142-43.

32. *Id.* at 189-90, 526 N.E.2d at 143. The defendant stated: "I started stabbing him, and I couldn't stop." *Id.* at 190, 526 N.E.2d at 143. Reddick also told the police officers that he attempted suicide when he realized what he had done. *Id.*

33. *Id.* He testified that the decedent called him racially insulting names. He alleged that the decedent suddenly pulled a steak knife from the bedside table, lunged at the defendant's chest, dropped the knife and ran from the room. When the decedent ran toward the kitchen, the defendant believed he was getting another knife. He followed him to the kitchen and grabbed a knife before the decedent could reach one. *Id.* The defendant remembered holding a knife and seeing the body fall, although he did not remember stabbing the decedent. *Id.* at 190-91, 526 N.E.2d at 143.

34. *Id.* at 191, 526 N.E.2d at 143.

35. *Id.*

36. *Id.* According to Lowe, Larry and Gilbert were in his home when he awoke from a nap. Lowe told Larry that he was not welcome in his home and he and Larry called each other names. Larry then pulled a bucket on which Lowe was sitting out from under him and kicked him. Larry got on top of Lowe. When Larry reached as if to hit him with a bottle, a mutual friend took the bottle and pulled Larry away. The defendant went upstairs and Larry followed him, threatening sexual abuse and death. Larry returned downstairs but continued to make threats against the defendant. After the defendant unsuccessfully tried to summon the police, he placed a gun in his pocket and went downstairs to leave the house. Larry threatened him and again grabbed a bottle as if to hit him. The defendant shot Larry and then shot Gilbert when he saw Gilbert coming at him with a shiny object in hand. *Id.* at 191-92, 526 N.E.2d at 143-44.

37. *Id.* at 191-93, 526 N.E.2d at 144.

appeared to be "playing, joking and fun and games."<sup>38</sup>

The court examined the jury instructions given at the defendants' trials.<sup>39</sup> The pattern jury instructions tracked the language of the statutes then in force.<sup>40</sup> The trial judge, in each case, gave the jury an instruction that defined the elements of murder.<sup>41</sup> The juries also received voluntary manslaughter instructions, however, that required the State to prove beyond a reasonable doubt either a sudden and intense passion resulting from serious provocation by another or that the defendant unreasonably believed that the circumstances justified killing the victim.<sup>42</sup>

The court readily concluded that if the burden was placed on the State to prove the elements of voluntary manslaughter beyond a reasonable doubt, then a jury sworn to hear a murder case would never return a verdict for the lesser crime of voluntary manslaughter.<sup>43</sup> In a murder prosecution, the State denies the existence of a mitigating mental state. The defendant, not the State, must establish the requisite mental state for voluntary manslaughter.<sup>44</sup> The court held that when a defendant charged with murder asserts an unreasonable belief of justification or serious provocation, the State does not bear any burden of proof with respect to those matters to obtain a voluntary manslaughter conviction.<sup>45</sup>

The court next examined the State's burden of proof in a murder

38. *Id.* at 192, 526 N.E.2d at 144.

39. *Id.* at 193-95, 526 N.E.2d at 144-45.

40. *Id.* at 193, 526 N.E.2d at 144.

41. *Id.* at 193-94, 526 N.E.2d at 144-45. The jury was told that "[a] person who kills an individual without lawful justification commits murder if, in performing the acts which cause death . . . [h]e knows that such acts create a strong probability of death or great bodily harm to that individual or another." ILL. REV. STAT. ch. 38, para. 9-1(a)(2)(1985).

42. *Reddick*, 123 Ill. 2d at 194, 526 N.E.2d at 145. The former voluntary manslaughter statute provided in pertinent part:

(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a *sudden and intense passion resulting from serious provocation* by: (1) The individual killed, or (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing *he believes the circumstances to be such that, if they existed, would justify or exonerate the killing* under the principles stated in Article 7 of this Code [use of force in defense of person], *but his belief is unreasonable*.

ILL. REV. STAT. ch. 38, para. 9-2 (1985) (emphasis added).

43. *Reddick*, 123 Ill. 2d at 194-95, 526 N.E.2d at 145.

44. *Id.*

45. *Id.* at 195, 526 N.E.2d at 145.



conviction.<sup>46</sup> The court looked at the definition of an affirmative defense<sup>47</sup> and concluded that the defenses of serious provocation and an unreasonable belief in self-defense are affirmative defenses to murder.<sup>48</sup> The accused must present some evidence to raise one of these defenses. If he succeeds in doing so, then the State acquires an additional burden to disprove that issue.<sup>49</sup> The court concluded that if a defendant in a murder trial presents sufficient evidence to raise issues that would reduce the charge of murder to voluntary manslaughter, then the State must prove beyond a reasonable doubt that those defenses are without merit in addition to statutory elements of murder.<sup>50</sup>

The court noted that its holding was limited because the legislature had since replaced the voluntary manslaughter statute with the second degree murder statute<sup>51</sup> for crimes committed after December 31, 1986.<sup>52</sup> Under the legislative amendments, the defendant bears the burden of proof for these mitigating mental states.<sup>53</sup>

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46. *Id.*

47. *Id.* at 195-96, 526 N.E.2d at 145-46. Section 3-2 of the Criminal Code of 1961 provides in pertinent part:

Affirmative defense.

(a) "Affirmative defense" means that unless the State's evidence raises the issues involving the alleged defense, the defendant, to raise the issue, must present some evidence thereof.

(b) If the issue involved in an affirmative defense, other than insanity, is raised then *the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.* If the affirmative defense of insanity is raised, the defendant bears the burden of proving by a preponderance of evidence his insanity at the time of the offense.

ILL. REV. STAT. ch. 38, para. 3-2 (1987)(emphasis added).

48. *Reddick*, 123 Ill. 2d at 196, 526 N.E.2d at 146.

49. *Id.*

50. *Id.* at 197, 526 N.E.2d at 146. The court found support for its position in the Criminal Code of 1874, which placed the burden of proving circumstances to excuse a homicide on the accused unless the evidence suggested manslaughter. *Id.* See ILL. REV. STAT. ch. 38, para. 373 (1874).

51. See ILL. REV. STAT. ch. 38, para. 9-2 (1987) for the provisions of the second degree murder statute. The amendment to the Criminal Code became effective July 1, 1987.

52. *Reddick*, 123 Ill. 2d at 197, 526 N.E.2d at 146.

53. *Id.* The court also decided that a rational jury could have found beyond a reasonable doubt that Reddick's manslaughter defenses were meritless. *Id.* at 199-201, 526 N.E.2d at 148. To discredit Reddick's claim of sudden passion, the court specifically relied on evidence that a few days prior to the killing Reddick said that he would "have to use the knives" if the decedent asked him to move out of the home. *Id.* at 200, 526 N.E.2d at 148. The court also rejected the suggestion that Reddick reasonably believed he was acting in self-defense, relying primarily on evidence of repeated stab wounds. *Id.* at 201, 526 N.E.2d at 148.

In Lowe's appeal, the court reversed the attempt murder and aggravated battery con-

After considering a number of other issues raised on appeal by the defendants, the court remanded both cases for new trials.<sup>54</sup>

## B. Challenges to the Sufficiency of the Evidence

### 1. Home Invasion/Residential Burglary

In *People v. Simms*,<sup>55</sup> the Illinois Supreme Court reviewed the defendant's convictions for the sexual assault and murder of Lillian LaCrosse, a woman who lived in an apartment building adjoining the defendant's residence.<sup>56</sup> Specifically, the court considered the sufficiency of the evidence for the defendant's convictions of home invasion and residential burglary.<sup>57</sup>

The defendant contended that the State failed to prove that he was guilty of home invasion and residential burglary because it failed to prove that he entered the victim's apartment without authorization.<sup>58</sup> In a custodial statement, the defendant claimed that he and the victim were having an affair and that he entered the

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victions as well because it found other instructional error. *Id.* at 201-02, 526 N.E.2d at 148-49.

54. *Id.* at 204, 526 N.E.2d at 149.

55. 121 Ill. 2d 259, 520 N.E.2d 308 (1988).

56. *Id.*

57. *Id.* at 269-71, 520 N.E.2d at 312-13. The trial court also convicted the defendant of aggravated criminal sexual assault and armed robbery. *Id.* at 262-63, 520 N.E.2d at 309. The armed robbery conviction was based on the defendant's admission that he took the victim's purse and movie camera when he left her apartment. *Id.* at 265, 520 N.E.2d at 310. He claimed that he took them because he thought he may have left his fingerprints on them during a prior visit with LaCrosse. *Id.*

The defendant challenged his murder conviction, claiming that the trial court denied him a fair trial by allowing the State to refer to the victim's family in closing arguments. *Id.* at 267-68, 520 N.E.2d at 311. The court concluded that the references to the victim's family during the bench trial were proper and inevitable considering the nature of the evidence. *Id.* at 268-69, 520 N.E.2d at 312. The court also relied on prior case law supporting the attorney's broad discretion in closing arguments and the trial judge's discretion in determining the character and scope of the argument. *Id.* at 269, 520 N.E.2d at 312 (citing *People v. Morgan*, 112 Ill. 2d 111, 131, 492 N.E.2d 1303, 1310 (1986) (quoting *People v. Smothers*, 55 Ill. 2d 172, 176, 302 N.E.2d 324, 327 (1973))). Finally, the court recognized that its prior decisions affirmed convictions despite incidental references to the victim's family. *Id.*

58. *Id.* at 269, 520 N.E.2d at 312. Unauthorized entry is an element of the burglary and home invasion statutes. See ILL. REV. STAT. ch. 38, para. 12-11 (1987) (home invasion); ILL. REV. STAT. ch. 38, para 19-1 (1987) (burglary).

The defendant relied on the absence of any proof that he forced his way into LaCrosse's apartment. *Simms*, 121 Ill. 2d at 269-70, 520 N.E.2d at 312. Guided by the decision in *People v. Holman*, 103 Ill. 2d 133, 469 N.E.2d 119 (1984), *cert. denied*, 469 U.S. 1220 (1985), the court readily dismissed the significance that the defendant attached to the absence of proof of a forced entry. *Simms*, 121 Ill. 2d at 270, 520 N.E.2d at 312. In *Holman*, the Illinois Supreme Court held that the absence of physical signs of forced entry does not necessarily indicate that an entry was consented to. *Holman*, 103 Ill. 2d at 133, 469 N.E.2d at 119.

victim's apartment on the evening in question upon her invitation.<sup>59</sup> Although he admitted killing the victim, Simms claimed that he acted in self-defense.<sup>60</sup>

The court weighed the evidence of consensual entry against a strong inference of unauthorized entry.<sup>61</sup> It inferred from the evidence that the defendant entered the victim's apartment by deception.<sup>62</sup> The court relied on physical evidence of a blood stain on the front door, evidence of defense wounds on the victim's hands, and testimony from the victim's husband that the defendant had been harassing his wife for several months.<sup>63</sup> Accordingly, the court found that the evidence that the victim consented to the entry was weak.<sup>64</sup>

Further, the court stated that the trial judge was entitled to doubt the credibility of the defendant's unsubstantiated claim of authorized entry.<sup>65</sup> Specifically, the testimony of both of the victim's parents contradicted that of the defendant, making his story implausible.<sup>66</sup> The court also doubted the defendant's credibility because previously he presented two other false accounts of his activities on the morning after the crime.<sup>67</sup>

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59. *Simms*, 121 Ill. 2d at 265, 520 N.E.2d at 310. The defendant argued that the victim, a wife and mother of three, voluntarily admitted him into her apartment near midnight after her husband left for work. *Id.* at 263-65, 520 N.E.2d at 309-10.

60. *Id.* at 265, 520 N.E.2d at 310. Shortly after his arrest, the defendant told a police officer that after the victim let Simms into her apartment, he fondled her. *Id.* at 264-65, 520 N.E.2d at 310. When he told her that he had to leave, the victim became upset. *Id.* at 265, 520 N.E.2d at 310. The defendant claimed that she stabbed him in the leg with a knife and that in the struggle, he stabbed her in the neck. When she screamed, he choked her until she became unconscious. He wiped her body with a towel to remove any fingerprints. Simms then stabbed her in the neck and throat at least 10 times, attempting to eliminate the chance of being identified. *Id.*

61. *Id.* at 270-71, 520 N.E.2d at 312-13.

62. *Id.* at 270, 520 N.E.2d at 313. The court stated that a power outage at the time of the incident may have facilitated the defendant's deceptive entry into LaCrosse's apartment. *Id.* at 264, 520 N.E.2d at 310. The Commonwealth Edison personnel arrived at about 9:30 p.m. and worked outside the victim's apartment until about 1:45 a.m. *Id.* at 263, 520 N.E.2d at 309. During this outage, the hallways were lit by dim emergency lights and the outer door to the building was open to facilitate the workers' access. *Id.* at 270, 520 N.E.2d at 309.

63. *Id.* at 270-71, 520 N.E.2d at 312-13.

64. *Id.* at 270, 520 N.E.2d at 313.

65. *Id.* at 270-71, 520 N.E.2d at 313.

66. *Id.* at 270, 520 N.E.2d at 313. The defendant claimed that he and the victim had sexual intercourse during the afternoon on the day that he killed her. *Id.* However, both of the victim's parents testified that they spent the entire day with the victim and her three children. *Id.* Although the victim's whereabouts in the afternoon were not directly relevant to the defendant's crime, the court used the contradictory evidence to discount the defendant's overall credibility. *Id.* at 270-71, 520 N.E.2d at 313.

67. *Id.* A police officer testified that the defendant offered three different accounts to

The court determined that the trial judge could reasonably conclude from the State's evidence that the defendant entered the victim's apartment without authorization.<sup>68</sup> The court thus affirmed the convictions for home invasion and residential burglary.<sup>69</sup>

## 2. Murder: Mental State

In *People v. Foster*,<sup>70</sup> the supreme court affirmed the defendant's murder conviction for the brutal attack, sexual assault, and murder of his girlfriend, Jacqueline Simmons.<sup>71</sup> The attack occurred over a period of several hours in the presence of the victim's roommate and the defendant's friend.<sup>72</sup> The defendant yelled and cursed at the victim, accusing her of infidelity.<sup>73</sup> He threw her to the ground, kicked her, and struck her with a bat on the head, and on her arms, legs, and back.<sup>74</sup> The trial court convicted the defendant of murder and imposed the death sentence.<sup>75</sup>

On appeal, the defendant contended that the evidence presented at trial indicated that his conduct was not intentional, but reckless, due to his intoxicated, drugged condition and jealous state at the time of the crime.<sup>76</sup> He argued that the trial court's refusal to give

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explain a cut on his right thigh. *Id.* at 264-65, 520 N.E.2d at 310. First, the defendant claimed that he had injured himself cutting potatoes. *Id.* at 264, 520 N.E.2d at 310. When the officer questioned the likelihood of that explanation, the defendant said that he had been stabbed during a fight in Chicago. *Id.* Finally, after the officer informed the defendant that his brother told the police that the defendant had stabbed the victim, the defendant offered his third story and admitted killing the victim in self-defense. *Id.* at 264-65, 520 N.E.2d at 310.

68. *Id.* at 271, 520 N.E.2d at 318.

69. *Id.* Although the court affirmed the home invasion, residential burglary, and murder convictions, it reversed and remanded the defendant's death sentence for a resentencing hearing for several reasons. First, the court concluded that the harmless error doctrine should not be used in death penalty hearings involving alleged constitutional errors. *Id.* at 275, 520 N.E.2d at 315. Second, the court found that the State failed to meet its burden of proving beyond a reasonable doubt that the victim impact evidence did not affect the trial judge's decision to impose the death penalty. *Id.* For a detailed discussion of this issue, see Carey & Feeley, *Criminal Procedure*, 20 LOY. U. CHI. L.J. 391, 397 (1989).

70. 119 Ill. 2d 69, 518 N.E.2d 82 (1987), *cert. denied*, 108 S. Ct. 2044 (1988).

71. *Id.* at 90, 518 N.E.2d at 91.

72. *Id.* at 76-78, 518 N.E.2d at 84-85.

73. *Id.* at 76, 518 N.E.2d at 84.

74. *Id.* at 76-77, 518 N.E.2d at 84-85. The autopsy revealed that the victim suffered injuries to her head, chest, abdomen, and legs. *Id.* at 78, 518 N.E.2d at 85. The coroner noted that her brain was swollen and her liver was lacerated, which caused bleeding into the abdominal cavity. *Id.* The coroner testified that the victim died from multiple blunt trauma, which led to brain swelling and internal hemorrhage of the liver. *Id.*

75. *Id.* at 75, 518 N.E.2d at 84.

76. *Id.* at 87, 518 N.E.2d at 89. Theresa Williams, the victim's roommate and the State's key witness, testified that Foster left twice, once returning from the liquor store

an involuntary manslaughter instruction denied him a fair trial.<sup>77</sup>

The court relied on precedent that forbids an involuntary manslaughter instruction when the evidence clearly suggests murder.<sup>78</sup> The court reasoned that the primary difference between involuntary manslaughter and murder is the accompanying mental state.<sup>79</sup> The court relied on a literal interpretation of the statutes<sup>80</sup> and on precedent explaining that the requisite intent for murder is established when a defendant voluntarily commits an act that would normally tend to cause death or great bodily harm.<sup>81</sup>

The court reasoned that the evidence did not support the defendant's contention that his actions were merely reckless and not in-

with wine, beer, and gin. *Id.* at 76-77, 518 N.E.2d at 84-85. Later, he left with his friend for a 20-minute visit to a tavern. *Id.* at 77, 518 N.E.2d at 85.

Williams also testified that as the defendant struck the victim with the bat, he accused her of "messaging around." *Id.* at 76, 518 N.E.2d at 84. He badgered the victim to admit that she was having sexual relations with others, and then took her into the bathroom to determine from an examination of her underclothes whether she had recently engaged in sexual relations with another man. *Id.*

77. *Id.* at 87, 518 N.E.2d at 89. The defendant also raised several arguments on appeal challenging the constitutionality of the Illinois Death Penalty Act and the prosecutor's abuse of discretion in seeking a death sentence in this case. *Id.* at 90-91, 518 N.E.2d at 91. The court held that it could not properly conclude that the prosecutor's decision to ask for the death penalty was not based on the presence of a statutory aggravating factor and the likelihood that the sentencing authority would consider a death sentence appropriate. *Id.* at 93, 518 N.E.2d at 92. It thus concluded that the prosecutor did not abuse his discretion in seeking the death penalty. *Id.*

78. *Id.* at 87, 518 N.E.2d at 89 (citing *People v. Simpson*, 74 Ill. 2d 497, 501, 384 N.E.2d 373, 374 (1978); *People v. Sanders*, 56 Ill. 2d 241, 253, 306 N.E.2d 865, 872, *cert. denied*, 417 U.S. 972 (1974)). The court recognized, however, that a manslaughter instruction defining the lesser crime is appropriate when the record demonstrates some evidence that, if believed, would reduce the crime of murder to manslaughter. *Id.*

79. *Id.*

80. *Id.* at 87-88, 518 N.E.2d at 89-90. The first degree murder statute provides that the accused has the requisite mental state for murder when:

- (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
- (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
- (3) He is attempting or committing a forcible felony other than second degree murder.

ILL. REV. STAT. ch. 38, para. 9-1(a) (1987).

The involuntary manslaughter statute provides that "[a] person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual and he performs them recklessly." ILL. REV. STAT. ch. 38, para. 9-3(a)(1987).

81. *Foster*, 119 Ill. 2d at 88, 518 N.E.2d at 90 (citing *People v. Cannon*, 49 Ill. 2d 162, 166, 273 N.E.2d 829, 831 (1971); *People v. Latimer*, 35 Ill. 2d 178, 182-83, 220 N.E.2d 314, 317 (1966)).

tentional.<sup>82</sup> The court focused on the defendant's admission that he deliberately beat the victim with a baseball bat numerous times and on the severity of the injuries inflicted.<sup>83</sup> Finally, although the court recognized that an intoxicated or drugged state might support a finding of recklessness,<sup>84</sup> the court found no evidence in the record that the defendant was intoxicated at the time of the beating.<sup>85</sup> The court concluded that the trial court did not err in refusing the tendered instruction.<sup>86</sup> The court affirmed the trial court's murder conviction and ordered Foster executed by lethal injection.<sup>87</sup>

### C. Interpretation of the Elements of an Offense

#### 1. Kidnaping: Secret Confinement

In *People v. Enoch*,<sup>88</sup> the supreme court reviewed, among numerous procedural issues,<sup>89</sup> the sufficiency of the evidence for the defendant's convictions of aggravated kidnaping and attempted

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82. *Id.*

83. *Id.* at 88, 518 N.E.2d at 90. A pathologist testified that the victim's jaw was fractured, her brain was swollen, and her head and body were covered with bruises. *Id.* Theresa Williams, the victim's roommate, described the brutality that she saw the defendant inflict on the victim. *Id.* at 75-77, 518 N.E.2d at 84-85. He threw her on the floor, struck her with his hands, kicked her and beat her with a baseball bat on her legs, arms and back. *Id.* at 76-77, 518 N.E.2d at 84-85. He inserted the bat in her rectum and later "bragged" how far he had inserted the bat handle. *Id.* at 77-78, 518 N.E.2d at 84-85.

84. *Id.* at 88, 518 N.E.2d at 90 (citing *People v. Wright*, 111 Ill. 2d 18, 488 N.E.2d 973 (1986)(the defendant asserted his mental state was recklessness, not intent)). The relevant statute provides that "[a] person who is in an intoxicated or drugged condition is criminally responsible for his conduct unless such condition either: (a) Is so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense." ILL. REV. STAT. ch. 38, para. 6-3(a)(1987).

85. *Foster*, 119 Ill. 2d at 88, 518 N.E.2d at 90. See *supra* note 76 for a description of the record references to the defendant's use of alcohol.

86. *Foster*, 119 Ill. 2d at 88, 518 N.E.2d at 90.

87. *Id.* at 105, 518 N.E.2d at 98. In dissent, Justice Simon found that significant errors occurred at both the trial and the sentencing hearing. *Id.* at 106-10, 518 N.E.2d at 98-100 (Simon, J., dissenting). For these reasons, he would have remanded the case for a new trial. *Id.* at 110, 518 N.E.2d at 100 (Simon, J., dissenting).

88. 122 Ill. 2d 176, 522 N.E.2d 1124 (1988).

89. The court limited the review of procedural issues to those that were properly raised at trial including the defendant's claim that his constitutional right against self-incrimination had been violated, *id.* at 192-94, 522 N.E.2d at 1132-33; the defendant's challenge to the constitutionality of the death penalty statute, *id.* at 202-03, 522 N.E.2d at 1137-38; and the defendant's claim that counsel provided ineffective assistance, *id.* at 201-02, 522 N.E.2d at 1137. The defendant raised other issues that the court refused to review because defense counsel failed to raise them on a post-trial motion. *Id.* at 190-92, 522 N.E.2d at 1131-32.

In dissent, however, Justice Simon characterized the consequences that the majority attached to the defendant's failure to file a post-trial motion as a "new rule." *Id.* at 204,

rape.<sup>90</sup> The jury convicted the defendant of murder, aggravated kidnaping, attempted rape, and two counts of felony murder that were based on the charges of aggravated kidnaping and attempted rape.<sup>91</sup>

The evidence revealed that the defendant approached the victim, Amanda Kay Burns, at the hospital where she was employed just as she was leaving to go home.<sup>92</sup> The victim and the defendant walked several blocks together to her apartment.<sup>93</sup> After they entered the apartment, the defendant stabbed and killed her.<sup>94</sup>

First, the defendant argued that the aggravated kidnaping conviction was not supported by sufficient evidence.<sup>95</sup> Specifically, he claimed that the State failed to establish the elements of secrecy and confinement that are essential to support an aggravated kidnaping conviction.<sup>96</sup> The defendant argued that because witnesses saw him enter the victim's apartment with her and because he did not overtly conceal the victim's location from anyone, he did not secretly confine the victim.<sup>97</sup>

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522 N.E.2d at 1139 (Simon, J., concurring in part and dissenting in part). He believed the majority's ruling on this issue contradicted the court's previous position. *Id.*

90. *Id.* at 194-98, 522 N.E.2d at 1134-35.

91. *Id.* at 180-81, 522 N.E.2d at 1127. Illinois law provides that one who kills an individual while "attempting or committing a forcible felony other than voluntary manslaughter" can be charged with felony murder. ILL. REV. STAT. ch. 38, para. 9-1 (a)(3) (1987). In 1983, the Code provided that "forcible felony means treason, murder, voluntary manslaughter, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, arson, kidnaping, aggravated battery and any other felony which involves the use or threat of physical force against any individual." ILL. REV. STAT. ch. 38, para. 2-8 (1983)(emphasis added). The defendant's aggravated kidnaping and attempted rape charges supported two findings of felony murder. *Enoch*, 122 Ill. 2d at 181, 522 N.E.2d at 1127.

92. *Enoch*, 122 Ill. 2d at 181, 522 N.E.2d at 1127.

93. *Id.*

94. *Id.* at 183, 522 N.E.2d at 1128.

95. *Id.* at 194, 522 N.E.2d at 1134.

96. *Id.* at 195, 522 N.E.2d at 1134. Illinois law provides that "[k]idnaping occurs when a person knowingly . . . [a]nd secretly confines another against his will, or (2) [b]y force or threat of imminent force carries another from one place to another with intent secretly to confine him against his will." ILL. REV. STAT. ch. 38, para. 10-1(a)(1987).

The aggravated kidnaping statute provides in pertinent part: "A kidnaper within the definition of paragraph (a) of Section 10-1 is guilty of the offense of aggravated kidnaping when he . . . (3) [i]nflicts great bodily harm or commits another felony upon his victim . . . ." ILL. REV. STAT. ch. 38, para. 10-2(a)(1987).

97. *Enoch*, 122 Ill. 2d at 195, 522 N.E.2d at 1134. Testimony at trial from several of the victim's co-workers at the hospital indicated that the defendant entered the victim's office at the hospital and spoke briefly with the victim. *Id.* at 181, 522 N.E.2d at 1127. Two witnesses testified that they saw the victim and the defendant walking together toward the victim's apartment after she left work. *Id.* One witness saw the victim with the defendant within 100 feet of the victim's apartment. *Id.*

Nevertheless, the court held that the facts at trial sufficiently established that the defendant secretly confined the victim.<sup>98</sup> The court reasoned that the secrecy element may be proved by evidence of either the secrecy of the confinement or the secrecy of the place of the confinement.<sup>99</sup> The court concluded that in this case both the confinement and the place of confinement were secret.<sup>100</sup>

In so concluding, the court relied on testimony that revealed that no one knew that the victim and the defendant were in the apartment even though two witnesses saw them walking toward her apartment.<sup>101</sup> Derek Proctor, the victim's boyfriend, who expected to meet the victim after work,<sup>102</sup> testified that he spent at least forty-five minutes trying to determine whether the victim was in her apartment.<sup>103</sup> Proctor was, in fact, uncertain that the victim was inside her apartment until he saw the defendant leave the apartment almost one hour after Proctor first arrived.<sup>104</sup> The court concluded that no one knew that the defendant and the victim were inside her apartment.<sup>105</sup> Thus, the evidence sufficiently demonstrated that the defendant secretly confined the victim.<sup>106</sup>

The defendant next argued that the State failed to prove that he restrained the victim in the apartment.<sup>107</sup> The court rejected this argument, relying on evidence that the defendant tied the victim's hands behind her back with wire during the attack.<sup>108</sup> The court further inferred from evidence of the victim's blood in several rooms and on the telephone that the victim attempted to escape

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98. *Id.* at 195-96, 522 N.E.2d at 1134.

99. *Id.* at 195, 522 N.E.2d at 1134 (citing *People v. Mulcahey*, 72 Ill. 2d 282, 285, 381 N.E.2d 254, 256 (1978); *People v. Kleba*, 110 Ill. App. 3d 345, 357, 442 N.E.2d 605, 613 (1st Dist. 1982)).

100. *Id.* The court explained that a victim can be as secretly confined in her own home as in an isolated location. *Id.* (citing *Mulcahey*, 72 Ill. 2d at 285, 381 N.E.2d at 256).

101. *Id.*

102. *Id.* at 186, 522 N.E.2d at 1127-28.

103. *Id.* at 195, 522 N.E.2d at 1134. During this period, he telephoned the victim's apartment, rang the door bell several times, and knocked on the windows. *Id.* at 181-82, 522 N.E.2d at 1128. Neither the defendant nor the victim responded to either the telephone calls or the ringing of the doorbell. *Id.*

The evidence showed that after the defendant initially rang the victim's doorbell and got no response, he walked to the hospital where the security guard informed him that the victim had left. *Id.*

104. *Id.* at 195-96, 522 N.E.2d at 1134.

105. *Id.* at 196, 522 N.E.2d at 1134.

106. *Id.*

107. *Id.* See *supra* note 96 for the text of the kidnaping statute.

108. *Enoch*, 122 Ill. 2d at 196, 522 N.E.2d at 1134.



but was prevented.<sup>109</sup>

The defendant also contended that the evidence failed to support his conviction for attempted rape because it did not prove the specific intent to rape beyond a reasonable doubt.<sup>110</sup> The court stated that it may infer the requisite, specific intent from the circumstances of the assault.<sup>111</sup> The court noted that Illinois courts consistently have held that evidence of an assault with concomitant disrobing supported an attempted rape conviction.<sup>112</sup> Hence, the court concluded that the evidence reasonably supported the finding of intent to commit rape.<sup>113</sup>

In a lengthy dissent, Justice Simon criticized the majority's expansive definition of aggravated kidnaping.<sup>114</sup> He argued that the confinement of the victim was incidental to the murder and thus could not supply the basis for the defendant's aggravated kidnaping conviction.<sup>115</sup> Justice Simon suggested that the court distinguish between secret confinements that implicate the kidnaping statute and those that are merely incidental to an underlying felony.<sup>116</sup> He rejected the Model Penal Code's assumption that the distinction relates to the length of the asportation or the distance.<sup>117</sup> He also rejected the Code's description of a "substantial" asportation or period of confinement.<sup>118</sup> Justice Simon concluded that a conviction for kidnaping should be affirmed only when the confinement is not inherent in the substantive crime.<sup>119</sup> The confinement should increase the risk to the victim and substantially

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109. *Id.*

110. *Id.* at 197, 522 N.E.2d at 1135. The Criminal Code provides in relevant part that "[a] person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." ILL. REV. STAT. ch. 38, para. 8-4 (1987).

111. *Enoch*, 122 Ill. 2d at 197, 522 N.E.2d at 1135 (citing *People v. Triplett*, 46 Ill. 2d 109, 112, 263 N.E.2d 24, 26 (1970), *cert. denied*, 401 U.S. 955 (1971); *People v. Williams*, 128 Ill. App. 3d 384, 396, 470 N.E.2d 1140, 1149 (4th Dist. 1984)).

112. *Id.* at 198, 522 N.E.2d at 1135 (citing *People v. Bonner*, 37 Ill. 2d 553, 562, 229 N.E.2d 527, 533 (1967), *cert. denied*, 392 U.S. 910 (1968); *People v. Williams*, 128 Ill. App. 3d 384, 396-97, 470 N.E.2d 1140, 1149 (4th Dist. 1984)).

113. *Id.* Derek Procter found the victim on the bedroom floor with her hands tied. *Id.* at 182, 522 N.E.2d at 1128. Her blouse and jacket had been pulled down around her arms and she was naked from the waist down. *Id.* at 198, 522 N.E.2d at 1135. There was also evidence that the victim was gagged. *Id.*

114. *Id.* at 216-21, 522 N.E.2d at 1144-46 (Simon, J., dissenting).

115. *Id.* (Simon, J., dissenting).

116. *Id.* (Simon, J., dissenting).

117. *Id.* at 219, 522 N.E.2d at 1145 (Simon, J., dissenting).

118. *Id.* (Simon, J., dissenting).

119. *Id.* at 220, 522 N.E.2d at 1145-46 (Simon, J., dissenting).

facilitate the commission of the other offense.<sup>120</sup>

## 2. Felony Theft: Prior Conviction as an Element

In *People v. Hicks*,<sup>121</sup> the Illinois Supreme Court examined whether, under the terms of an enhancement provision statute,<sup>122</sup> the State must prove a defendant's prior theft conviction during the trial's evidentiary phase as a necessary element of the offense of felony theft.<sup>123</sup> The trial court convicted Terry Hicks of burglary and theft and sentenced him to concurrent prison terms.<sup>124</sup> The appellate court affirmed.<sup>125</sup>

On appeal, the defendant contended that the admission of his prior theft conviction during the evidentiary phase of the trial was improper.<sup>126</sup> He maintained that the court should not have allowed proof of his prior theft conviction to have been introduced at trial because it was not an element of the offense of felony theft and concerned only the severity of the punishment.<sup>127</sup>

Over a strong dissent by Chief Justice Clark,<sup>128</sup> the court rejected the defendant's argument.<sup>129</sup> Instead, the court held that unless otherwise provided, when a prior theft conviction statutorily

120. *Id.* (Simon, J., dissenting).

121. 119 Ill. 2d 29, 518 N.E.2d 148 (1987).

122. ILL. REV. STAT. ch. 38, para. 16-1(e)(1)(1987). The statute provides that: Theft of property, other than a firearm, not from the person and not exceeding \$300 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft, including retail theft, other than theft of a firearm, is a Class 4 felony.

*Id.*

The legislature subsequently amended this statute and clarified the question raised in the case. See ILL. REV. STAT. ch. 38, para. 16-1(e)(2)(1987)(a prior conviction is not an element of the offense).

123. *Hicks*, 119 Ill. 2d at 30-31, 518 N.E.2d at 149.

124. *Id.* at 30, 518 N.E.2d at 149.

125. *People v. Hicks*, 150 Ill. App. 3d 242, 243, 501 N.E.2d 1027, 1028 (5th Dist. 1986).

126. *Hicks*, 119 Ill. 2d at 30, 518 N.E.2d at 149.

127. *Id.* at 31, 518 N.E.2d at 149. Consequently, Hicks argued that the prior convictions should have been considered only at the sentencing hearing and not during the evidentiary phase of the trial. *Id.* at 30, 518 N.E.2d at 149. To support his argument, Hicks relied significantly upon *People v. Hayes*, 87 Ill. 2d 95, 429 N.E.2d 490 (1981). *Hicks*, 119 Ill. 2d at 31, 518 N.E.2d at 149. In *Hayes*, the court suggested that in order to elevate a retail theft conviction from a misdemeanor to a felony, proof of a prior retail theft conviction need not be alleged in an information or proved at trial. *Hayes*, 87 Ill. 2d at 98, 429 N.E.2d at 491. In *Hicks*, the defendant contended that admission of evidence of a prior conviction may have caused the jury to infer that the defendant committed the crime in the case at bar. *Hicks*, 119 Ill. 2d at 31, 518 N.E.2d at 149. He asserted that the admission of the evidence may have prejudiced the jury. *Id.*

128. *Hicks*, 119 Ill. 2d at 35-41, 518 N.E.2d at 151-54 (Clark, C.J., dissenting).

129. *Id.* at 31-35, 518 N.E.2d at 149-51.

elevates a subsequent offense to a felony, the State must allege and prove the prior conviction during the evidentiary phase of the trial.<sup>130</sup>

In its analysis, the court noted a recent amendment to the current theft statute.<sup>131</sup> The amendment provides that although an information or indictment must allege the prior conviction, it will not be considered an element of the offense of felony theft and should not be disclosed to the jury during trial.<sup>132</sup> The court suggested that the legislature's amendment of the statute indicated the absence of the provision's implied or prior existence.<sup>133</sup> The court reasoned that an amendatory change in language creates a presumption that it was intended to change the former law.<sup>134</sup> Consequently, the court concluded that the statute that applied to the defendant logically must have provided that the prior conviction was an element of the offense.<sup>135</sup> Thus, the court affirmed the de-

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130. *Id.* at 32, 518 N.E.2d at 149. The *Hicks* court relied on *People v. Palmer*, its most recently decided case on point. *Id.* at 31-33, 518 N.E.2d at 149-50. According to the court, *Palmer* merely "reaffirmed a long line of cases." *Id.* at 32, 518 N.E.2d at 149 (citing *People ex rel. Carey v. Pincham*, 76 Ill. 2d 478, 480, 394 N.E.2d 1043, 1044 (1979); *People v. Edwards*, 63 Ill. 2d 134, 138, 345 N.E.2d 496, 498 (1976); *People v. Owens*, 37 Ill. 2d 131, 132, 225 N.E.2d 15, 16 (1967); *People v. Ostrand*, 35 Ill. 2d 520, 529, 221 N.E.2d 499, 505 (1966), *overruled in part on other grounds*, *People v. Bracey*, 51 Ill. 2d 514, 283 N.E.2d 685 (1972)).

The *Hicks* court also relied on *Palmer* to specifically discredit the defendant's emphasis on *Hayes*. *Id.* at 32-33, 518 N.E.2d at 150. Further, the comments in *Hayes* that proof of a prior conviction need only be presented at sentencing and not to the jury were expressly dismissed as dicta by both the *Palmer* and *Hicks* courts. *Id.*

The court also rejected the defendant's reliance on *People v. Jackson*, 99 Ill. 2d 476, 459 N.E.2d 1362 (1984), for the proposition that the value of a stolen item is not an element of the offense when the value is used to elevate the theft from a misdemeanor to a felony. *Hicks*, 119 Ill. 2d at 33-34, 518 N.E.2d at 150. The defendant's analogy to *Jackson* was misplaced because the issue in *Jackson* was only whether value was an element for the specific purpose of determining whether the defendant should be allowed a retroactive application of a statutory amendment raising the value demarcation of stolen property. *Id.* Thus, the *Hicks* court concluded that *Jackson* did not properly provide authority for the defendant's contention that a prior conviction was not an element of the felony theft offense. *Id.* at 34, 518 N.E.2d at 150.

131. *Hicks*, 119 Ill. 2d at 34, 518 N.E.2d at 150. See ILL. REV. STAT. ch. 38, para. 16-1(e)(2)(1987)(effective January 1, 1988).

132. ILL. REV. STAT. ch. 38, para. 16-1(e)(2) (1987). This amendment also provided that value is an element of the offense of theft that must be proved during the evidentiary phase of trial. ILL. REV. STAT. ch. 38, para. 16-1(e)(4) (1987).

133. *Hicks*, 119 Ill. 2d at 34, 518 N.E.2d at 151 (citing *Western Nat'l Bank v. Village of Kildeer*, 19 Ill. 2d 342, 354, 67 N.E.2d 169, 175 (1960)).

134. (citing *People v. Nunn*, 77 Ill. 2d 243, 248, 396 N.E.2d 27, 29 (1979)).

135. *Id.* at 34-35, 518 N.E.2d at 151. The court noted that this statutory amendment did not affect the law as applied to the defendant because statutory amendments are given only prospective application. *Id.* (citing *Stigler v. City of Chicago*, 48 Ill. 2d 20, 24, 268 N.E.2d at 26, 28 (1971)).

fendant's conviction.<sup>136</sup>

In his dissent, Chief Justice Clark proposed that the majority's interpretation of the statute improperly would allow a jury to convict a defendant based on prior, similar crimes.<sup>137</sup> Chief Justice Clark also criticized the majority's reliance on subsequent statutory amendments to interpret prior legislative intent.<sup>138</sup>

### 3. Armed Robbery: Force or Threat of Force

In *People v. Holland*,<sup>139</sup> the supreme court upheld the defendant's armed robbery conviction based on the sufficiency of the evidence.<sup>140</sup> The trial court convicted Daniel Holland of rape, deviate sexual assault, aggravated kidnaping, and armed robbery for the sexual assault and robbery of a teenager.<sup>141</sup> The appellate court

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136. *Id.* at 35, 518 N.E.2d at 151.

137. *Id.* (Clark, C.J., dissenting). Specifically, he suggested that the majority's reliance on *Palmer* and on the recent amendment were misplaced. *Id.* at 36-41, 518 N.E.2d at 150 (Clark, C.J., dissenting). In distinguishing *Palmer*, Chief Justice Clark argued that when determining whether a jury should be exposed to a defendant's prior record, the critical variable is the relationship between the charged offense and the prior offense. *Id.* at 37, 518 N.E.2d at 152 (Clark, C.J., dissenting). When the charged offense and the prior offense are similar, he reasoned, a jury is likely to prejudge the defendant's propensity to commit the charged offense. *Id.* (Clark, C.J., dissenting). The prior offense in the *Palmer* statute could consist of *any* prior felony; the charged offense was the unlawful use of weapons. *Id.* (Clark, C.J., dissenting) (emphasis added). Chief Justice Clark concluded that the prior offense and the charged offense were not so similar that a defendant would likely be prejudiced by the admission of the prior offense. *Id.* (Clark, C.J., dissenting). Chief Justice Clark contrasted this to the theft enhancement statute, in which the prior crimes and the charged offense were identical. *Id.* (Clark, C.J., dissenting). Based on this fundamental dissimilarity between the statutes at issue in this case and in *Palmer*, he rejected the majority's reliance on *Palmer*. *Id.* at 37-38, 518 N.E.2d at 152 (Clark, C.J., dissenting).

138. *Id.* at 39-41, 518 N.E.2d at 153-54 (Clark, C.J., dissenting). Justice Simon joined Chief Justice Clark's dissent based on his agreement with this argument. *Id.* at 41, 518 N.E.2d at 154 (Simon, J., dissenting). Chief Justice Clark reasoned that because the legislature is a collective organization of 118 individuals who may each view a statutory provision differently, it is difficult to ascertain legislative intent. *Id.* at 39, 518 N.E.2d at 153 (Clark, C.J., dissenting). The process of ascertaining legislative intent is further complicated when the court attempts to infer the legislature's intentions from the subsequent actions of a later legislature which may be composed of different members. *Id.* at 39-40, 518 N.E.2d at 153 (Clark, C.J., dissenting).

139. 121 Ill. 2d 136, 520 N.E.2d 270 (1987).

140. *Id.* at 160-61, 520 N.E.2d at 281.

141. *Id.* at 140-41, 520 N.E.2d at 272. The court concluded that the offenses of rape, deviate sexual assault, and aggravated kidnaping "were accompanied by exceptionally brutal or heinous behavior indicating wanton cruelty." *Id.* at 141, 520 N.E.2d at 272. Consequently, the court sentenced Holland to extended terms of 60 years of imprisonment for rape and deviate sexual assault and an extended term of 30 years of imprisonment for aggravated kidnaping. *Id.* The court ordered the sentences to run concurrently. *Id.*

With regard to the armed robbery conviction, the court found that the defendant's

reversed and remanded the case<sup>142</sup> and the State was granted leave to appeal.<sup>143</sup> Holland challenged his conviction for armed robbery, in addition to numerous procedural issues.<sup>144</sup> He contended that the State failed to prove that he took property from the complainant by force or threat of force, which is an essential element of the case.<sup>145</sup>

The court disagreed with the defendant's assertion and found ample support for the defendant's armed robbery conviction.<sup>146</sup> After reviewing the record, the court determined that the victim had relinquished her school identification card and money in order to avoid the defendant's further violence.<sup>147</sup> Under these circumstances, the court found that the State adequately proved beyond a reasonable doubt that the defendant took the victim's property by force or threat of force.<sup>148</sup> The court thus affirmed the appellate court and upheld the defendant's armed robbery conviction.<sup>149</sup>

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objectives during the crime changed from sexual gratification to armed robbery and that the armed robbery occurred after the sexual assault was completed. *Id.* The court found that the defendant had been previously convicted of armed robbery four times. *Id.* Based on these findings, the court imposed a sentence of 25 years of imprisonment for the armed robbery to be served consecutively to the other extended-term sentences. *Id.* at 141, 520 N.E.2d at 272.

142. *People v. Holland*, 147 Ill. App. 3d 323, 346, 497 N.E.2d 1230, 1246 (1st Dist. 1986).

143. *Holland*, 121 Ill. 2d at 142, 520 N.E.2d at 272.

144. *Id.* at 160, 520 N.E.2d at 281. For an in-depth discussion of these procedural issues, see Carey & Feeley, *Criminal Procedure*, 20 LOY. U. CHI. L.J. 391, 400 (1989).

145. *Holland*, 121 Ill. 2d at 160, 520 N.E.2d at 281. The Illinois robbery statute provides in pertinent part that "a person commits robbery when he takes property from the person or presence of another *by the use of force or by threatening the imminent use of force.*" ILL. REV. STAT. ch. 38, para. 18-1(a)(1987)(emphasis added). A robbery committed "while [the perpetrator] carries on or about his or her person, or is otherwise armed with a dangerous weapon" constitutes armed robbery. ILL. REV. STAT. ch. 38, para. 18-2(a) (1987).

146. *Holland*, 121 Ill. 2d. at 160-61, 520 N.E.2d at 281.

147. *Id.* at 160, 520 N.E.2d at 281. The complainant testified that after the assault, the defendant, armed with a hunting knife, ordered the victim to close her eyes. *Id.* According to the victim, the defendant stated: "[I]t'll be easier that way. I'm going to knock you out." *Id.* at 150, 520 N.E.2d at 276. The victim then offered him "anything he wanted." *Id.* Holland took \$60 and her school identification card. *Id.*

148. *Id.* at 160-61, 520 N.E.2d at 281.

149. *Id.* at 161, 520 N.E.2d at 281. The court vacated the defendant's extended-term sentence for aggravated kidnaping and remanded the cause to the circuit court for resentencing on the aggravated kidnaping conviction. *Id.* at 163-64, 520 N.E.2d at 282. The court found that the defendant's sentence conflicted with the extended-term sentencing provision, which allows for extended-term sentences only when the offense is one of "the class of the most serious of which the offender was convicted." *Id.* at 161, 520 N.E.2d at 281 (citing ILL. REV. STAT. ch. 38, para. 1005-8-2(a)(1987)). The defendant's aggravated kidnaping conviction was a class 1 felony and the deviate sexual assault and rape were

## D. Constitutional Challenges to Statutes

### 1. Knowing Possession of Child Pornography

In *People v. Geever*,<sup>150</sup> the Illinois Supreme Court, in a consolidated appeal, addressed the constitutionality of an Illinois statute prohibiting the possession of child pornography.<sup>151</sup> The indictments charged John and Charlene Geever with twelve counts of possession of child pornography and Peter Sotas with three counts of possession of child pornography.<sup>152</sup> The defendants moved to dismiss, alleging that section 11-20.1(a)(2) violated the first and fourteenth amendments to the United States Constitution<sup>153</sup> as well

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class X felonies. *Id.* The court concluded that only the rape and deviate sexual assault convictions could sustain extended-term sentences. *Id.*

In dissent, Justice Simon criticized the majority's analysis of the admissibility of the defendant's confession and the exclusion of blacks from the jury. *Id.* at 172-78, 520 N.E.2d at 286-93 (Simon, J., dissenting).

150. 122 Ill. 2d 313, 522 N.E.2d 1200 (1988).

151. *Id.* at 315, 522 N.E.2d at 1201. See ILL. REV. STAT. ch. 38, para. 11-20.1(a)(2)(1987). The statute provides in pertinent part that a person commits the offense of child pornography when:

[W]ith the knowledge of the nature or content thereof, [he] reproduces, disseminates, offers to disseminate, exhibits or *possesses* any film, videotape, photograph or other similar visual reproduction of any child whom the person knows or reasonably should know to be under the age of 18 engaged in any activity described in subparagraphs (i) through (vii) of paragraphs (1) of this subsection.

*Id.* (emphasis added). The prohibited portrayals are those in which the child is:

- (i) actually or by simulation engaged in any act of sexual intercourse with any person or animal; or
- (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child and the sex organs of another person or animal; or
- (iii) actually or by simulation engaged in any act of masturbation; or
- (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal; or
- (v) actually or by simulation engaged in any act of excretion or urination within a sexual context; or
- (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or
- (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the genitals of the child or other person . . . .

ILL. REV. STAT. ch. 38, paras. 11-20.1 (a)(1)(i) - (vii) (1987).

152. *Geever*, 122 Ill. 2d at 315, 520 N.E.2d at 1201.

153. The first amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or to the right of people peaceably to assemble, and to petition the government for redress of grievances." U.S. CONST. amend. I (emphasis added). The fourteenth amendment to the Constitution of the United States provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

as article 1, sections 4<sup>154</sup> and 6<sup>155</sup> of the Illinois Constitution.<sup>156</sup> The circuit courts of Cook and DuPage counties granted the defendants' motions to dismiss and held that the specific provision at issue is unconstitutional.<sup>157</sup> The State directly appealed both dismissals.<sup>158</sup>

In challenging the statute, the defendants focused primarily on the first amendment and argued that in proscribing the knowing possession of child pornography in the home, the statute is unconstitutional.<sup>159</sup> The defendants relied specifically upon the United States Supreme Court's holding that an individual's first amendment rights within his own home far outweigh any government interest in regulating obscenity.<sup>160</sup> The *Geever* court's analysis, however, relied primarily upon precedent that recognized that the dissemination of child pornography bears so heavily and pervasively on the welfare of children that the state's interest in prohibition far outweighs any individual first amendment right.<sup>161</sup>

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any State deprive any person of life, liberty, or property, without due process of law . . . ."  
U.S. CONST. amend. XIV, section 1.

154. Section 4 of the Illinois Constitution provides in pertinent part: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty." ILL. CONST. art. I, § 4.

155. Section 6 of the Illinois Constitution provides in pertinent part: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means . . . ." ILL. CONST. art. I, § 6.

156. *Geever*, 122 Ill. 2d at 315, 520 N.E.2d at 1201.

157. *Id.* The courts' findings were based upon the United States Supreme Court's holding in *Stanley v. Georgia*, 394 U.S. 557 (1969). *Geever*, 122 Ill. 2d at 315, 522 N.E.2d at 1201. Specifically, the courts found that under the first and fourteenth amendments to the Constitution, the possession of child pornography within the home is permitted. *Id.*

158. *Geever*, 122 Ill. 2d at 315, 522 N.E.2d at 1201.

159. *Id.* at 316-17, 522 N.E.2d at 1201.

160. *Id.* The defendants relied on *Stanley v. Georgia* for this proposition. *Id.* In *Stanley*, the United States Supreme Court struck down the constitutionality of a Georgia statute that prohibited the possession of obscene material within the home. *Stanley*, 394 U.S. at 568. Although the *Stanley* Court recognized that obscene material was not protected constitutionally, the Court rejected the State's argument that it had the right "to protect the individual's mind from the effects of obscenity." *Id.* at 560, 565-66. The *Stanley* Court rejected the State's position as "wholly inconsistent with the philosophy of the First Amendment" because it attempted to control the moral content of a person's thoughts. *Id.* at 565-66.

161. *Geever*, 122 Ill. 2d at 319-27, 522 N.E.2d at 1203-07 (citing *New York v. Ferber*, 458 U.S. 747 (1982)). In *Ferber*, the defendant, an adult bookstore owner, sold two films to an undercover police officer that depicted two boys masturbating. *Ferber*, 458 U.S. at 751-52. The State indicted the defendant on two counts of violating a New York statute that prohibited one from promoting a performance of sexual conduct by a child under 16 years of age. *Id.* at 752. The New York Court of Appeals reversed the defendant's conviction, finding that the statute violated the first amendment. *Id.* The United States Supreme Court, in upholding the statute, concluded that a state has greater authority to

In construing the Illinois statute, the court first ascertained the legislature's intent.<sup>162</sup> The court concluded that the legislature enacted this statute in order to prevent and control the sexual abuse and exploitation of children, which it recognized as a national problem that seriously affects Illinois.<sup>163</sup> The legislature intended to prevent not only the production of child pornography, but the dissemination and possession of child pornography as well.<sup>164</sup>

Although the court acknowledged special constitutional safeguards to freedom of thought and mind in the privacy of one's home,<sup>165</sup> it emphasized that such protection is subject to limitation.<sup>166</sup> The court found that the individual's right to freedom of conduct at home must yield to society's compelling interest to protect children from the harm of emotional and sexual degradation.<sup>167</sup>

The court determined that because the statute requires scienter as to the content and nature of the depictions and specifically described the depictions and conduct subject to the statute,<sup>168</sup> the statute meets the minimum guidelines for constitutionality.<sup>169</sup> Consequently, the court held that the statute does not violate either the United States Constitution or the Illinois Constitution.<sup>170</sup>

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prohibit works portraying sexual acts by children than obscene materials portraying adults engaged in sexual activity and that the dissemination of child pornography clearly does not have first amendment protection. *Id.* at 756-65. The court also noted that advertising and selling child pornography provided the financial incentive to produce it. *Id.* at 759-65.

162. *Geever*, 122 Ill. 2d at 324, 522 N.E.2d at 1205. For the text of the Illinois statute, see *supra* note 151.

163. *Geever*, 122 Ill. 2d at 324, 522 N.E.2d at 1205.

164. *Id.* The court recognized that the incentive for producing and disseminating child pornography is the ability to sell the product. *Id.* at 326, 522 N.E.2d at 1206. By restricting possession of child pornography, the legislature intended to dry up the market. *Id.*

165. *Id.* at 325, 522 N.E.2d at 1205.

166. *Id.* at 325, 522 N.E.2d at 1205-06 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)(due process clause of the fourteenth amendment does not confer a right of privacy to homosexuals to commit sodomy in their homes)).

167. *Id.* at 327, 522 N.E.2d at 1206-07.

168. *Id.* at 327, 522 N.E.2d at 1207. See *supra* note 151 for the pertinent text of the statute.

169. *Geever*, 122 Ill. 2d at 327, 522 N.E.2d at 1207.

170. *Id.* The court cited cases in which other state courts upheld the constitutionality of similar statutes proscribing the possession of child pornography. *Id.* at 327-28, 522 N.E.2d at 1207 (citing *Felton v. State*, 526 So. 2d 635 (Ala. Crim. App. 1986), *aff'd*, 526 So. 2d 638 (Ala. 1988); *State v. Meadows*, 28 Ohio St. 3d 43, 503 N.E.2d 697, *cert. denied*, 480 U.S. 936 (1987)).

The court also noted other states that criminalized the knowing possession of child pornography. *Id.* at 329, 522 N.E.2d at 1207 (citing OHIO REV. CODE ANN. § 2907.322 (A)(5) (Baldwin 1986); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1989); NEV.



Finally, the defendants argued that they were deprived of due process because the Illinois statute does not fairly give notice that the possession of child pornography in the home is illegal.<sup>171</sup> The court, however, determined that the language of section 11-20.1(a)(2) provides adequate notice of the proscribed conduct and thus does not violate the defendant's right to due process.<sup>172</sup> The court consequently reversed the judgments and remanded the cases to the circuit courts.<sup>173</sup>

Although Justice Clark agreed that this case involved "admittedly repugnant material,"<sup>174</sup> he would have held the statute violative of the first and fourteenth amendments to the Constitution and article I, sections 4 and 6 of the Illinois Constitution.<sup>175</sup> Justice Clark traced the history and importance of the free speech provisions,<sup>176</sup> and conceded that child pornography is "worthless rubbish" that is not entitled to the protection of the first amendment.<sup>177</sup> He disagreed, however, with the majority's application of *Ferber*.<sup>178</sup> He argued that *Ferber* did not extend to the question of private possession and that *Stanley*, therefore, applied.<sup>179</sup>

Justice Clark also criticized the majority's failure to address the state constitutional issues.<sup>180</sup> Whereas the federal guarantee of privacy is found only in the "penumbras" of provisions of the Bill of

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REV. STAT. ANN. § 200.730 (Michie 1986); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (1988); TEX. PENAL CODE ANN. § 43.26(a)(1) (Vernon Supp. 1989); UTAH CODE ANN. § 76-5a-3(1)(a) (Supp. 1988); WASH. REV. CODE § 9.68A.070(1)(1988).

171. *Id.* at 329, 522 N.E.2d at 1207-08. The defendants argued that in possessing the pornography, they relied on *Stanley*'s holding that the state could not proscribe the mere possession of obscene materials in the home under the first and fourteenth amendments. *Id.* at 329, 522 N.E.2d at 1208.

172. *Id.* at 330, 522 N.E.2d at 1208.

173. *Id.*

174. *Id.* (Clark, J., dissenting).

175. *Id.* at 331, 522 N.E.2d at 1208 (Clark, J., dissenting).

176. *Id.* at 331-34, 522 N.E.2d at 1208-10 (Clark, J., dissenting).

177. *Id.* at 334, 522 N.E.2d at 1210 (Clark, J., dissenting).

178. *Id.* (Clark, J., dissenting). Although *Ferber* would allow governmental regulation of the production and distribution of child pornography or other unprotected materials, *Ferber* did not address the separate and unrelated issue of an individual's private possession of child pornography in his home. *Id.* (Clark, J., dissenting).

179. *Id.* (Clark, J., dissenting). Under the burden imposed by *Stanley*, the State must demonstrate a compelling governmental interest that cannot be served by more narrowly tailored means. *Id.* at 330-31, 522 N.E.2d at 1208. Although the State's interest in preventing child abuse was indisputable here, Justice Clark concluded that the government failed to show its goal could not be achieved by less restrictive methods. *Id.* He would have, therefore, invalidated the statute on first amendment grounds. *Id.* at 337, 522 N.E.2d at 1211 (Clark, J., dissenting).

180. *Id.* (Clark, J., dissenting).

Rights,<sup>181</sup> the Illinois Constitution explicitly protects citizens against invasions of their privacy<sup>182</sup> and must be construed broadly.<sup>183</sup> Justice Clark stated that because a state court's interpretation of the Illinois Constitution need not parallel a federal court's interpretation of the United States Constitution, the Illinois Supreme Court is free to recognize the greater and more certain protection to privacy afforded by the state constitution.<sup>184</sup> Because the state guarantee of privacy also protects private possession of reading material, Justice Clark would invalidate the statute on state constitutional grounds as well.<sup>185</sup>

## 2. Aggravated Battery on a State or County Public Aid Worker

In *People v. Watson*,<sup>186</sup> the court considered the constitutionality of a provision of the aggravated battery statute.<sup>187</sup> The challenged provision elevates battery to aggravated battery when the defendant committed battery against a state or county public aid worker.<sup>188</sup> The defendant, Brenda Watson, who struck a Jackson

181. *Id.* at 339-40, 522 N.E.2d at 1212 (Clark, J., dissenting). Many scholars have questioned the textual and historical legitimacy of any federal constitutional right of privacy. *See, e.g.,* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

182. *Geever*, 122 Ill. 2d at 337, 522 N.E.2d at 1211 (Clark, J., dissenting). *See supra* note 155 for the text of this constitutional provision.

183. *Id.* at 338, 522 N.E.2d at 1211-12 (Clark, J., dissenting).

184. *Id.* at 339, 522 N.E.2d at 1212 (Clark, J., dissenting). *Accord* *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (recognizing a state's sovereign right to adopt, in its own constitution, free speech provisions that are more expansive than those conferred by the United States Constitution).

185. *Geever*, 122 Ill. 2d at 342, 522 N.E.2d at 1214 (Clark, J., dissenting).

186. 118 Ill. 2d 62, 514 N.E.2d 167 (1987).

187. *Id.* at 66-69, 514 N.E.2d at 169-71. *See* ILL. REV. STAT. ch. 38, para. 12-4(b)(5) (1987).

188. ILL. REV. STAT. ch. 38, para. 12-4(b)(5) (1987). The challenged statute provides, in pertinent part:

(b) A person who, in committing a battery, commits an aggravated battery if he either:

.....

(5) knows the individual harmed to be a caseworker, investigator, or other person employed by the State Department of Public Aid or a County Department of Public Aid and such caseworker, investigator, or other person is upon the grounds of a Public Aid office or grounds adjacent thereto, or is in any part of a building used for Public Aid purposes, or upon the grounds of a home of a public aid applicant, recipient, or any other person being interviewed or investigated in the employee's discharge of his duties, or on grounds adjacent thereto, or is in any part of a building in which the applicant, recipient, or other such person resides or is located;

.....

County caseworker while at the public aid office,<sup>189</sup> contended that section 12-4(b)(5) of the statute violates equal protection<sup>190</sup> because it imposes stricter penalties when a defendant attacked state or county workers than when a defendant attacked local workers.<sup>191</sup> The circuit court found no reasonable basis for distinguishing between state, county, and local workers who performed the same duties and, therefore, held section 12-4-(b)(5) unconstitutional.<sup>192</sup>

Upon the State's appeal, the Supreme Court reversed and held the statute valid under an equal protection analysis.<sup>193</sup> The court

*Id.*

189. *Watson*, 118 Ill. 2d at 64, 514 N.E.2d at 168. The State initially charged Watson with aggravated battery under section 12-4(b)(5) because she knew that the person she struck was an employee of the Department of Public Aid. *Id.* The State later amended the information to include a second count for aggravation under section 12-4(b)(8) because the battery occurred on public property. *Id.* The pertinent portion of the statute provides:

(b) A person who, in committing a battery, commits an aggravated battery if he either:

.....

(8) Is, or the person battered is, on or about a public way, public property or public place of accommodation or amusement.

ILL. REV. STAT. ch. 38, para. 12-4(b)(8)(1987).

190. *Watson*, 118 Ill. 2d at 66, 514 N.E.2d at 169. The equal protection clause of the United States Constitution provides in pertinent part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The equal protection clause of the Illinois Constitution provides in pertinent part: "No person shall . . . be denied the equal protection of the laws." ILL. CONST. art. I, § 2.

191. *Watson*, 118 Ill. 2d at 65, 514 N.E.2d at 169.

192. *Id.* at 65, 67, 514 N.E.2d at 169, 170.

193. *Id.* at 69, 514 N.E.2d at 171. Initially, the court considered the State's argument that Watson lacked standing to challenge the validity of the statute. *Id.* at 65-66, 514 N.E.2d at 169. The State focused on three points. *Id.* First, it argued that the statute does not adversely affect the defendant's rights because the defendant could be charged under either section of the statute, section 12-4(b)(5) or 12-4(b)(8). *Id.* at 65, 514 N.E.2d at 169. The language charging the defendant under 12-4(b)(5) is "merely duplicative" of that in 12-4(b)(8). *Id.* Therefore, the State argued that section 12-4(b)(5) itself does not adversely affect Watson's rights. *Id.*

Second, the State argued that the defendant could not challenge the validity of section 12-4(b)(5) because the State charged her with a battery committed in a public place, which falls within the purview of section 12-4(b)(8). *Id.* The State reasoned that Watson's challenge to section 12-4(b)(5) could not stand because it was based on an argument that, hypothetically, it could be applied unconstitutionally to another party. *Id.* Finally, the State argued that the defendant lacked standing because she had not been found guilty or sentenced under the statute. *Id.* at 65-66, 514 N.E.2d at 169.

The court readily rejected the State's arguments, relying on *People v. Ziltz*, 98 Ill. 2d 38, 455 N.E.2d 70 (1983). *Watson*, 118 Ill. 2d at 66, 514 N.E.2d at 169. In *Ziltz*, the court stated that "a defendant has standing to challenge the validity of a statute if he or she has sustained or is in immediate danger of sustaining, some direct injury as a result of the enforcement of the statute." *Ziltz*, 98 Ill. 2d at 41, 455 N.E.2d at 71. The *Watson*

rejected the defendant's assertion that the statute creates an unreasonable classification violative of equal protection.<sup>194</sup> Instead, the court recognized that a state may, in the absence of a fundamental right, differentiate between similarly situated persons as long as it shows a rational basis for doing so.<sup>195</sup>

In its analysis, the court reviewed portions of the Public Aid Code<sup>196</sup> and compared the duties performed by state and county employees with those of local governmental units.<sup>197</sup> The court noted significant differences in their respective duties.<sup>198</sup> Although state and county employees are charged with planning, administering, and investigating a variety of programs, the Code empowers local units with much less responsibility and authority.<sup>199</sup>

Additionally, the *Watson* court recognized that courts have upheld statutes intended to afford greater protection to categories of people who are subjected to greater risks in performing special duties.<sup>200</sup> The court recognized that the more extensive authority and

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court reasoned that because the defendant was charged with violating section 12-4(b)(5), it was possible that he would be convicted and sustain harm. *Watson*, 118 Ill. 2d at 66, 514 N.E.2d at 169. *Watson* thus possessed standing to challenge the statute. *Id.*

194. *Watson*, 118 Ill. 2d at 67, 514 N.E.2d at 170.

195. *Id.* (citing *People v. Tosch*, 114 Ill. 2d 474, 481, 501 N.E.2d 1253, 1256 (1986), *cert. denied*, 107 S. Ct. 3235 (1987)). In *Tosch*, the Illinois Supreme Court upheld, on equal protection grounds, a provision of the highway solicitation statute that exempted from the purview of the statute charitable solicitations by agencies that met specific conditions and that received express permission by municipal ordinance. *Tosch*, 114 Ill. 2d at 480-83, 501 N.E.2d at 1255-57. See ILL. REV. STAT. ch. 95 1/2, para. 11-1006(c)(1987).

The *Tosch* court stated that a reasonable classification resting on some difference related to the objective of the legislation that treats similarly situated persons alike will be upheld. *Tosch*, 114 Ill. 2d at 481, 501 N.E.2d at 1256. For a detailed discussion of *Tosch*, see MacCarthy & Jarzyna, *Criminal Law*, 19 LOY. U. CHI. L.J. 373, 404-07 (1988).

196. ILL. REV. STAT. ch. 23, paras. 1-1 to 13-5 (1987).

197. *Watson*, 118 Ill. 2d at 67-68, 514 N.E.2d at 170.

198. *Id.* at 68, 514 N.E.2d at 170.

199. *Id.* Articles II, IV, V, VII, and XII of the Public Aid Code delineate the responsibilities of state and county public aid workers. The Code authorizes state and county workers to administer programs to accomplish the following: provide aid to the aged, blind, and disabled, ILL. REV. STAT. ch. 23, paras. 3-1 to 3-15 (1987); provide aid to families with dependent children, ILL. REV. STAT. ch. 23, paras. 4-1 to 4-12 (1983); provide medical assistance, ILL. REV. STAT. ch. 23, paras. 5-1 to 5-14 (1987); provide aid to the medically indigent, ILL. REV. STAT. ch. 23, paras. 7-1 to 7-6 (1987).

By contrast, articles VI and IX of the Public Aid Code describe the duties and responsibilities of local workers. Article VI empowers local government units to administer the programs as provided in article VI. Article IX grants local units the authority to provide the social services and rehabilitative services authorized in article IX. ILL. REV. STAT. ch. 23, para. 9-1 (1987).

200. *Watson*, 118 Ill. 2d at 67, 514 N.E.2d at 170 (citing *People v. Hanson*, 53 Ill. 2d 79, 289 N.E.2d 611 (1972), *cert. denied*, 411 U.S. 937 (1973) (enhancement to aggravated battery valid when the offender knew the person harmed was either a peace officer or

responsibility given state and county public aid workers placed them in situations of greater risk.<sup>201</sup>

The court reasoned that the legislature imposed an enhanced punishment for an offense committed against a state or county worker in order to protect these employees.<sup>202</sup> The court concluded that the classification is reasonably related to a legitimate governmental objective<sup>203</sup> and refused to consider whether the legislature's chosen means were the best available.<sup>204</sup> Consequently, the court reversed the judgment of the circuit court and remanded the cause for proceedings consistent with its opinion.<sup>205</sup>

### 3. Summary Suspension of Driving Privileges/Issuance of Judicial Permits

In *People v. Esposito*,<sup>206</sup> the Illinois Supreme Court reviewed the constitutionality of several provisions of the summary driving suspension law.<sup>207</sup> Pursuant to section 11-501.1 of the Vehicle Code,<sup>208</sup> the state summarily suspended the driving privileges of

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correctional institution employee); *In re V.P.*, 139 Ill. App. 3d 786, 487 N.E.2d 638 (2d Dist. 1985)(enhancement to aggravated battery valid when the offender knew that the victim was a group worker at a county youth detention home); ILL. REV. STAT. ch. 38, para. 12-4(b)(6)(1987)).

201. *Id.* at 68, 514 N.E.2d at 170.

202. *Id.*

203. *Id.*

204. *Id.* at 68-69, 514 N.E.2d at 170-71. The court stated that such consideration was not a proper subject of judicial inquiry. *Id.* (citing *People v. Tosch*, 114 Ill. 2d 474, 482, 501 N.E.2d 1253, 1257 (1986) (quoting *Garcia v. Tully*, 72 Ill. 2d 1, 10, 377 N.E.2d 10, 14 (1978))).

205. *Id.* at 69, 514 N.E.2d at 171.

206. 121 Ill. 2d 491, 521 N.E.2d 873 (1988). The court considered this challenge on direct appeal by the Secretary of State. *Id.* at 496-97, 521 N.E.2d at 875.

207. ILL. REV. STAT. ch. 95 1/2, paras. 11-501.1, 6-206.1 (1987). See *infra* notes 208 and 210, respectively, for the provisions of these sections of the Vehicle Code.

208. Section 11-501.1 of the Vehicle Code provides in pertinent part:

(a) Any person who drives or is in actual physical control of a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of Section 11-501.2, to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol, other drug, or combination thereof content of such person's blood if arrested, as evidenced by the issuance of a Uniform Traffic Ticket, for any offense as defined in section 11-501 or a similar provision of a local ordinance . . . .

. . . .

(c) A person requested to submit to a test as provided above shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test will result in the statutory summary suspension of such person's privilege to operate a motor vehicle as provided in section 6-208.1 of this Code. The person shall also be warned by the law enforcement officer that if the person submits to the test or tests provided for in section (a) of this Section and the alcohol concentration in such person's blood or breath is 0.10 or greater, a statutory sum-

the defendant, Cheryl Esposito, after she consented to a breathalyzer test that registered her blood alcohol concentration as 0.16.<sup>209</sup> Esposito subsequently petitioned for a judicial driving permit pursuant to section 6-206.1 of the Vehicle Code.<sup>210</sup> She also petitioned for a hearing to rescind her summary suspension.<sup>211</sup>

Esposito alleged on appeal that sections 11-501.1 and 6-206.1 violates the equal protection and due process guarantees of the United States Constitution and the Illinois Constitution<sup>212</sup> and that section 6-206.1 violates the separation of powers clause of the Illinois Constitution.<sup>213</sup> The circuit court agreed and subsequently held both sections invalid.<sup>214</sup>

mary suspension of such person's privilege to operate a motor vehicle, as provided in Sections 6-208.1 and 11-501.1 of this Code will be imposed.

ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(a), 11-501.1(c)(1987).

209. *Esposito*, 121 Ill. 2d at 495-96, 521 N.E.2d at 875. The Illinois Appellate Court previously upheld the constitutionality of the provision authorizing summary suspension of drivers who either refused to submit to a breathalyzer test or who failed the test. *See People v. Flores*, 155 Ill. App. 3d 964, 508 N.E.2d 1132 (2d Dist. 1987).

210. *Esposito*, 121 Ill. 2d at 496, 521 N.E.2d at 875. Section 6-206.1 of the Vehicle Code authorizes a person whose license has been suspended for the first time pursuant to section 11-501.1 to request the court to grant a judicial driving permit in order to relieve undue hardship. ILL. REV. STAT. ch. 95 1/2, para. 6-206.1 (1987). The statute also provides guidelines for the court to consider prior to issuing a judicial driving permit and prohibits issuance of a permit in certain instances. ILL. REV. STAT. ch. 95 1/2, para. 6-206.1(a)(3) (1987). For further discussion of this statute, see MacCarthy & Jarzyna, *Criminal Law*, 19 LOY. U. CHI. L.J. 373, 423-35 (1988).

211. *Esposito*, 121 Ill. 2d at 496, 514 N.E.2d at 875. Esposito petitioned for a hearing under section 2-118.1(b) of the Motor Vehicle Code which provides that:

(b) Upon the notice of statutory summary suspension served under Section 11-501.1, the person may make a written request for a judicial hearing in the circuit court of venue. The request to the circuit court shall state the grounds upon which the person seeks to have the statutory summary suspension rescinded. Within 30 days after receipts of the written request[,] . . . the hearing shall be conducted by the circuit court having jurisdiction. This judicial hearing, request or process shall not stay or delay the statutory summary suspension. Such hearings shall proceed in the court in the same manner as in other civil proceedings. . . .

ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b)(1985).

212. The United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty or property, *without due process of law*; nor deny any person within its jurisdiction the *equal protection of the laws*." U.S. CONST. amend XIV, § 1 (emphasis added).

The Illinois Constitution provides in pertinent part: "No person shall be deprived of life, liberty or property *without due process of law*, nor be denied the *equal protection of the laws*." ILL. CONST. art. I, § 2 (emphasis added).

213. *Esposito*, 121 Ill. 2d at 497, 514 N.E.2d at 875. The separation of powers clause in the Illinois Constitution of 1970 provides: "The legislative, executive and judicial branches are separate. No branch shall exercise property belonging to another." ILL. CONST. art. II, § 1.

214. *Esposito*, 121 Ill. 2d at 496, 521 N.E.2d at 875. The Illinois Supreme Court recently upheld against a separation of powers challenge the provision that directed the

In reversing the lower court, the Illinois Supreme Court first determined that the challenged statutes did not affect a fundamental right or discriminate unreasonably against a suspect class.<sup>215</sup> The court thus applied a rational basis test in judging the statute.<sup>216</sup>

The court rejected the defendant's contention that by penalizing those who drive drunk on public highways differently than those who drive on private property, the statute's classification is irrational.<sup>217</sup> Instead, the court deferred to legislative judgment<sup>218</sup> and reasoned that the legislature may have reasonably believed that intoxicated drivers pose a greater threat on highways while driving at high speeds than on private roads where the speed limits tend to be lower.<sup>219</sup>

The court further observed that the defendant misconstrued section 11-501.1 when she argued that it violates equal protection by penalizing only drivers with a blood alcohol concentration of 0.10 or more, while not penalizing other categories of drivers who were less impaired or impaired by other drugs.<sup>220</sup> The court emphasized

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circuit court to forward reinstatement fees to the Secretary of State. *People v. O'Donnell*, 116 Ill. 2d 517, 508 N.E.2d 1066 (1987). For a detailed discussion of the *O'Donnell* court's analysis, see MacCarthy & Jarzyna, *Criminal Law*, 19 LOY. U. CHI. L.J. 373, 402-04 (1988).

215. *Esposito*, 121 Ill. 2d at 500, 521 N.E.2d at 877.

216. *Id.* When applying a rational basis test, the reviewing court will uphold the statute in question if it can find a rational relationship between the classification created and a legitimate state purpose. *Id.* (citing *People v. Tosch*, 114 Ill. 2d 474, 501 N.E.2d 1253 (1986)). The court described the two-stage equal protection analysis. First, the court determines the level of scrutiny applicable to the challenged classification. A higher level of scrutiny is necessitated when a fundamental right or suspect class is involved. When neither category is involved, the court may use a lower level of scrutiny. In the second step of the analysis, the court scrutinizes the goal of the state. If the statute affects a fundamental right or a suspect class, then the court will sustain the statute only when it serves a compelling state interest. If no fundamental right or suspect class is involved, however, then the rational basis test is appropriate. *Id.*

217. *Id.* *Esposito* identified a purported inconsistency between section 11-501, which penalizes impaired drivers who drive anywhere in the state, and section 11-501.1, which applies the summary suspension procedure and the implied consent concept only to those who drive on public highways. *Id.* The defendant claimed that because the hazards of drunken driving are similar whether an intoxicated person drives on private property or on a public highway, the legislature's distinction and classification is irrational and arbitrary. *Id.*

218. *Id.* at 501, 521 N.E.2d at 877.

219. *Id.* Although the court recognized the argument that the legislature should have adopted the summary suspension to apply to all drunken drivers, the court stated that it could uphold the statute as long as it is not arbitrary and will accomplish the legislature's purposes. *Id.* at 501-02, 521 N.E.2d at 878 (citing *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill. 2d 499, 349 N.E.2d 61 (1976)).

220. *Id.* at 502, 521 N.E.2d at 878. The defendant claimed that such a distinction was irrational and appeared to assert that summary suspension should be imposed on all impaired drivers regardless of the cause or degree of their impairment. *Id.*

that the statute imposes summary suspension on all drivers who refuse to submit to the test, regardless of whether they were impaired by alcohol or other drugs. Secondly, the statute imposes summary suspension on those who submitted and whose test results demonstrated a blood alcohol level of 0.10 or more.<sup>221</sup> Additionally, the court disagreed with the defendant's contention that a person with a blood alcohol count of 0.10 or more and a person under the influence of other drugs are so similarly situated that they require identical treatment under the equal protection clause.<sup>222</sup> The court found that the legislature enacted the summary suspension statute in response to widespread concern for the dangers posed by drunken drivers.<sup>223</sup> It stated that the legislature may have rationally concluded that the need to remove drunk drivers from the highways was more urgent than the removal of other categories of impaired drivers.<sup>224</sup> The court, therefore, permitted the legislature to take reform "one step at a time."<sup>225</sup>

Furthermore, the legislature's conclusive determination that a blood alcohol level of at least 0.10 impairs a person's ability to drive, eliminates the need for additional proof of impairment.<sup>226</sup> The legislature did not make a similar determination for impairment by drugs other than alcohol.<sup>227</sup> Therefore, in these situations the state must conduct a hearing to demonstrate that the intoxicating substance actually impaired the driver.<sup>228</sup> Those who use drugs or a combination of alcohol and drugs do not escape punishment if

221. *Id.*

222. *Id.* at 502-03, 521 N.E.2d at 878.

223. *Id.* at 503, 521 N.E.2d at 878.

224. *Id.* The court stated that the legislation "need not . . . cover every evil that might conceivably have been attacked." *Id.* (citing *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 372-73, 489 N.E.2d 1374, 1384 (1986)(quoting *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969))).

225. *Id.* (quoting *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 372-73, 489 N.E.2d 1374, 1384 (1986)(quoting *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969))).

226. *Id.* at 503-04, 514 N.E.2d at 878. The Illinois Supreme Court upheld this provision in *People v. Ziltz*, 98 Ill. 2d 38, 455 N.E.2d 70 (1983), in which the court stated:

The obvious legislative intent in enabling section 11-501(a)(1) was to impose strict liability on drivers found to be impaired by an alcohol concentrate of 0.10% or above. Defendant argues, and the state admits, that holding the driving of a motor vehicle with more than 0.10% concentrate is an offense by itself does away with all necessity for the state to show impairment. The legislature has made the determination that driving with an alcohol concentration of 0.10 or above does constitute impairment.

*Id.* at 42-43, 455 N.E.2d at 72.

227. *Esposito*, 121 Ill. 2d at 503, 521 N.E.2d at 878.

228. *Id.* at 503-04, 521 N.E.2d at 878-79.



their abilities have been found to be impaired.<sup>229</sup> The court thus found that the legislature acted rationally when it imposed summary suspension on drivers who tested 0.10 and not on other categories of impaired persons.<sup>230</sup> The court concluded that section 11-501.1 does not violate equal protection.<sup>231</sup>

The *Esposito* court next considered the defendant's due process attack on the summary suspension procedures.<sup>232</sup> Specifically, the defendant argued that the failure to allow an evidentiary hearing prior to suspension violates her due process rights.<sup>233</sup> The court responded, however, that due process does not necessarily require an evidentiary hearing in every instance in which the state seeks to suspend driving privileges.<sup>234</sup>

The court applied a balancing test and specifically considered three factors: the nature and weight of the private interest affected by the statute; the likelihood of erroneous deprivation of the private interest involved as a result of the procedures used; and the government's interest in enacting the procedures and the burdens resulting from alternative procedures.<sup>235</sup>

In considering the first factor, the court identified the private interest at stake as the continued possession of a driver's license pending the outcome of a hearing.<sup>236</sup> The court determined that the duration of the suspension,<sup>237</sup> the availability of review,<sup>238</sup> and

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229. *Id.* at 504, 521 N.E.2d at 879.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* The defendant argued and the State conceded that once issued, a license to drive is a protected property interest that requires due process guarantees prior to suspension or revocation. *Id.*

234. *Id.* (citing *Dixon v. Love*, 431 U.S. 105 (1977)). In *Dixon*, the United States Supreme Court upheld an Illinois statute authorizing the state to revoke without a hearing the license of a motorist whose license had been repeatedly suspended for certain traffic offenses. *Dixon*, 431 U.S. at 112-16.

235. *Esposito*, 121 Ill. 2d at 505, 514 N.E.2d at 879. This three-factor balancing test was first adopted in *Matthew v. Eldridge*, 424 U.S. 319 (1976). After identifying and reviewing the three factors, the *Eldridge* court held that due process did not require a hearing before terminating benefits under the Social Security Act.

The *Eldridge* test also was used in *Mackey v. Montrym*, 443 U.S. 1 (1979). In *Mackey*, the United States Supreme Court upheld a Massachusetts statute authorizing the state to suspend the license of one who refused to submit to a breath test upon arrest for driving under the influence. *Id.* at 19.

236. *Esposito*, 121 Ill. 2d at 506, 521 N.E.2d at 879. The United States Supreme Court's prior holding in *Mackey* suggested that the actual weight given to this interest depended on: 1) the duration of the suspension; 2) the availability of prompt review after the suspension; and 3) the availability of hardship relief. *Mackey*, 443 U.S. at 11-19.

237. *Esposito*, 121 Ill. 2d at 506, 514 N.E.2d at 880. The Illinois statute provides for a six-month suspension when one refused to submit to the test, and a three-month sus-

the availability of hardship relief under the statute<sup>239</sup> do not differ significantly from those in other cases in which summary provisions were upheld.<sup>240</sup> In fact, the Illinois statute provides additional hardship relief in the form of a judicial driving permit.<sup>241</sup> Under these circumstances, the court concluded that neither the nature nor the weight of the private interest requires a prior evidentiary hearing.<sup>242</sup>

In considering the second factor, the court examined the likelihood that the summary suspension would lead to erroneous deprivation of driving privileges.<sup>243</sup> The defendant argued that a suspension based on a chemical test is inherently more fallible than a suspension based on the driver's refusal to take the test and, therefore, necessitates an evidentiary hearing prior to suspension.<sup>244</sup> In rejecting this argument, the court relied primarily on

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pension when a driver submitted and the test results indicated a 0.10 or higher blood alcohol concentration. See ILL. REV. STAT. ch. 95 1/2, paras. 11-501.1, 6-2087.1 (1987). The court compared the length of suspension in the Illinois statute to those in other suspension statutes that courts have upheld. See *Mackey v. Montrym*, 443 U.S. 1 (1979)(statute provided a 90-day suspension); *Dixon v. Love*, 431 U.S. 105 (1977)(statute provided a one-year suspension); *People ex rel. Eppingina v. Edgar*, 112 Ill. 2d 101, 492 N.E.2d 187 (1986)(statute provided revocation for an indefinite period of time).

238. *Esposito*, 121 Ill. 2d at 506-07, 514 N.E.2d at 880. The court compared the Illinois system for post-suspension review with those provisions approved in previous decisions. Section 2-118.1 of the Vehicle Code requires a judicial hearing within 30 days after receipt of a written request by the driver. See ILL. REV. STAT. ch. 95 1/2, para. 2-118.1 (1987). Further, the suspension is not effective until 46 days after the state notifies the driver of the suspension. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(g)(1987). These provisions can result in either a pre- or post-suspension review, depending on the timeliness of the driver's request. *Esposito*, 121 Ill. 2d at 507, 521 N.E.2d at 880.

The court found that the provision for review in the Illinois statute falls between those approved in *Love* and *Montrym*. See *supra* notes 234 and 235 for a brief description of the statutes at issue and the court's holdings in these cases. In *Love*, the approved statute required a hearing within 20 days after the driver's written request for review. The statute in *Montrym* provided for review immediately upon suspension, initiated only by the driver's oral request for review. *Esposito*, 121 Ill. 2d at 506-07, 521 N.E.2d at 880.

239. *Esposito*, 121 Ill. 2d at 507, 521 N.E.2d at 880. The court noted that the statute's provisions for hardship relief were previously approved by the United States Supreme Court in *Montrym*. See *supra* note 196 for a description of the statute at issue in *Montrym*. The Illinois statute allows a first time offender to petition the court for a judicial driving permit to use for employment or alcohol treatment purposes. See ILL. REV. STAT. ch. 95 1/2, para. 6-206.1 (1987). Alternatively, the offender may petition the Secretary of State for a permit to "relieve undue hardship." ILL. REV. STAT. ch. 95 1/2, para. 6-205 (c)(1987).

240. *Esposito*, 121 Ill. 2d at 507, 521 N.E.2d at 880.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 508-09, 521 N.E.2d at 881. Even assuming *arguendo* that the risk of error regarding chemical testing is enhanced, the court remained unpersuaded that the risk is so substantial as to require an evidentiary hearing. *Id.* at 509, 521 N.E.2d at 881. The

evidence that a police officer observed the defendant's drunken behavior, which was subsequently substantiated by the chemical test.<sup>245</sup> Further, the court determined that the statute minimizes the risk of erroneous deprivation by allowing for a challenge to the validity of the test results.<sup>246</sup>

In considering the third factor, the court addressed the public interest in the summary suspension procedure and the burdens resulting from alternative procedures.<sup>247</sup> The court recognized the state's compelling interest in protecting the public from drunken drivers on the highways.<sup>248</sup> It acknowledged that summary suspension promotes the state's interest by promptly removing drunken motorists from the roads and by deterring drunken drivers.<sup>249</sup> The court found merit in the statute's tendency to encourage drivers to cooperate in testing, thus preserving drivers' due process rights, while providing the state with objective evidence of drunkenness.<sup>250</sup>

Consequently, the court concluded that the summary suspension procedure satisfies the due process requirements because it advances the state's interest in public safety, while exposing the driver to an "insubstantial risk" of erroneous deprivation of rights.<sup>251</sup> In conclusion, the court held that the summary suspension procedure is consistent with the equal protection and due process clauses of the Illinois and United States Constitutions, while declining to address the constitutionality of the judicial driving

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court reiterated that due process does not mandate that all governmental decisions assure perfect, error-free determinations. *Id.* (quoting *Mackey*, 443 U.S. at 13).

245. *Id.* The evidence in the record revealed that a police officer stopped Esposito after he saw her car cross the center line of the road twice. When he spoke with the defendant, he noticed that her breath smelled of alcohol and that her eyes were blood shot. A breathalyzer test revealed a blood alcohol concentration of 0.16. *Id.*

246. *Id.* at 509-10, 521 N.E.2d at 881. Specifically, the court suggested that the hearing provided for by section 2-118.1 of the Motor Vehicle Code gives the driver an opportunity to challenge the results of the test. The court cited *People v. Hamilton*, 118 Ill. 2d 153, 514 N.E.2d 965 (1987), in which the Illinois Supreme Court held that one whose license has been revoked may challenge the testing procedure and the admission of allegedly invalid test results at a hearing pursuant to section 2-118.1. For the text of the relevant portion of section 2-118.1, see *supra* note 211.

247. *Esposito*, 121 Ill. 2d at 510, 521 N.E.2d at 881.

248. *Id.*

249. *Id.*

250. *Id.* at 510, 521 N.E.2d at 881-82. The court also noted that automatic suspension promotes the public's interest in administrative efficiency in that it eliminates the incentive to seek a presuspension hearing for the purpose of delaying suspension. *Id.* at 510, 521 N.E.2d at 882.

251. *Id.* at 511, 521 N.E.2d at 882.

permit provision.<sup>252</sup> The court thus reversed and remanded the cause to the circuit court.<sup>253</sup>

#### 4. Criminal Sexual Assault/Aggravated Criminal Sexual Assault

In *People v. Haywood*,<sup>254</sup> the Illinois Supreme Court consolidated the appeals of four defendants<sup>255</sup> in order to review the constitutionality of several provisions of the criminal sexual assault statute<sup>256</sup> and the aggravated criminal sexual assault statute.<sup>257</sup> Specifically, the defendants challenged the phrases "force or threat of force"<sup>258</sup> and "bodily harm."<sup>259</sup>

Before trial, each defendant moved to dismiss the charges, alleging that the definitions under the criminal sexual assault and aggravated criminal sexual assault statutes violate the United States Constitution's due process guarantees because they are vague and overbroad.<sup>260</sup> Both the Marion County Circuit Court and the Fayette County Circuit Court declared that sections 12-13(a)(1) and

252. *Id.* at 516, 521 N.E.2d at 884. As a final matter, the court considered the defendant's separation of powers challenge to section 6-206.1 of the Vehicle Code, which permits the issuance of judicial driving permits. *Id.* at 511-16, 521 N.E.2d at 882-84. The court, however, declined to address the merits of this claim because it held that the defendant lacked standing to question the statute's constitutional validity. *Id.* at 512-13, 521 N.E.2d at 882-83.

253. *Esposito*, 121 Ill. 2d at 516, 521 N.E.2d at 884.

254. 118 Ill. 2d 263, 515 N.E.2d 45 (1987).

255. Defendant John Haywood was charged in Marion County with two counts of aggravated criminal sexual assault. *Id.* at 266, 515 N.E.2d at 47. Defendants Rhodes, Russell, and Garland were individually charged in Fayette County with one count of aggravated criminal sexual assault and with criminal sexual assault as a lesser included offense. The Fayette County court also charged the defendant Garland with a second offense of criminal sexual assault based on a separate incident. *Id.*

256. ILL. REV. STAT. ch. 38, para. 12-13 (1987). The statute provides in pertinent part: "(a) The accused commits criminal sexual assault if he or she: (1) commits an act of sexual penetration by the use of force or threat of force . . ." ILL. REV. STAT. ch. 38, para. 12-13(a)(1)(1987)(emphasis added).

257. ILL. REV. STAT. ch. 38, para. 12-14 (1987). The statute provides in pertinent part:

(a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during the commission of the offense:

. . . .

(2) the accused caused *bodily harm* to the victim . . . .

ILL. REV. STAT. ch. 38, para. 12-14(a)(2)(1987)(emphasis added).

258. *Haywood*, 118 Ill. 2d at 268-69, 515 N.E.2d at 48.

259. *Id.* at 275-77, 515 N.E.2d at 51-52.

260. *Id.* at 267, 515 N.E.2d at 47. For the text of the United States Constitution's due process clause, see *supra* note 212.

12-14(a)(2) are unconstitutionally vague and overbroad.<sup>261</sup>

On appeal, the court considered the defendant's argument that section 12-13(a)(1) is unconstitutionally vague on its face because it fails to adequately describe the proscribed conduct constituting criminal sexual assault and fails to provide a clear standard for enforcement.<sup>262</sup> Specifically, the defendants argued that the definition of "force or threat of force" in section 12-12(d) did not indicate the nature or quality of the force required to constitute an offense under section 12-13.<sup>263</sup> Further, they argued that the offense of criminal sexual assault is "in derogation of the common law offense of rape,"<sup>264</sup> and that the statute must, therefore, be construed strictly. They contended that "force" must be interpreted literally and, therefore, must be construed in its broadest sense possible.<sup>265</sup> Because of this literal and broad interpretation of the statute, the defendants concluded that the statute fails to proscribe adequately the nature of the force necessary to constitute the offense.<sup>266</sup>

The court stated that a challenged statute will be unconstitutionally vague on its face only when the statute specifies no standard of conduct.<sup>267</sup> The court stated that it could consider this particular statute vague only if "force" is interpreted literally to mean every possible use of force.<sup>268</sup> The court relied on legislative intent and common sense in concluding that the statute adequately defines the conduct proscribed.<sup>269</sup>

In examining the legislative history of the statutes in question, the court concluded that the legislature intended to replace the repealed offenses of rape and deviate sexual assault, which required

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261. *Haywood*, 118 Ill. 2d at 267, 515 N.E.2d at 47. The Circuit Court of Marion County held the entire Criminal Sexual Assault Act unconstitutional. Upon reconsideration, the court modified its judgment and limited its ruling to sections 12-13 (a)(1) and 12-14(a)(2). *Id.*

262. *Id.* at 268-69, 515 N.E.2d at 48.

263. *Id.* at 269, 515 N.E.2d at 48.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 270, 515 N.E.2d at 48 (citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)). If a statute is challenged for unconstitutional vagueness on its face, it will be held unconstitutional only if it is "incapable of any valid application." *Id.* (citing *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)).

268. *Id.*

269. *Id.* at 270-71, 515 N.E.2d at 48-49. The court applied common sense and reasoned that the legislature could not have intended a new definition of force that would be so broad as to include all conceivable notions of the word. *Id.* at 270, 515 N.E.2d at 48. The court further explained that the statute should be given a construction consistent with legislative purposes and policies in enacting it. *Id.* at 270-71, 515 N.E.2d at 49.

that the sexual act involve force, with the criminal sexual assault statute.<sup>270</sup> The court further reasoned that the legislature intended to retain under section 12-13(a)(1) the same meaning of "force" that existed under the former rape and deviate sexual assault statutes.<sup>271</sup>

In *Haywood*, the defendants argued that the legislature did not intend to retain the definition of "force" in the repealed statutes.<sup>272</sup> Specifically, they argued that although the prior rape statute required a showing of force against the victim's will,<sup>273</sup> the current statute does not.<sup>274</sup> Similarly, although the prior deviate sexual assault statute required that the victim be "compelled" to perform the sexual act,<sup>275</sup> the legislature did not include this element in the new statute.<sup>276</sup> Therefore, the defendants argued that the legislature did not intend the term "force" to mean the force that compels an individual to engage in sexual activity against his will, but rather intended that the victim's state of mind be irrelevant.<sup>277</sup> They argued that "force" can be construed to include even the type of force in the physical act of sexual penetration itself.<sup>278</sup> They

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270. *Id.* at 271, 515 N.E.2d at 49. The Illinois General Assembly repealed large portions of the prior statutes by Public Act 83-1117. *Id.* The Act's sponsors asserted that the purpose of the bill was to recodify the sexual offenses so as to criminalize all sexual assaults without distinguishing between the type of act proscribed and the sex of the victim or the offender. *Id.*

271. *Id.* at 272, 515 N.E.2d at 49. The court relied on two theories to support its conclusion. First, the court recognized that a statute in derogation of the common law cannot be construed to change the common law beyond what is expressed by the statute's words. *Id.* (citing *In re W.W.*, 97 Ill. 2d 53, 454 N.E.2d 207 (1983)). Second, the court relied on evidence from the legislative debates that showed the legislature's intent to retain the common law definition of force from the two repealed statutes. *Id.* at 272-73, 515 N.E.2d at 50 (citing HOUSE PROCEEDINGS, 83d Ill. Gen. Assem., June 14, 1984, at 63)).

272. *Id.* at 273, 515 N.E.2d at 50.

273. The pertinent section of the former statute provided:

Rape. (a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, *by force and against her will*, commits rape.

ILL. REV. STAT. ch. 38, para. 11-1 (1983)(repealed 1984)(emphasis added).

274. *Haywood*, 118 Ill. 2d at 273, 515 N.E.2d at 50. The former rape and deviate sexual assault statutes were replaced by the criminal sexual assault statute. ILL. REV. STAT. ch. 38, para. 12-13 (1987). See *supra* note 256 for the relevant portion of this statute.

275. The relevant portion of the former statute provided: "Any person of the age 14 or upwards, who *by force or threat of force, compels* any other person to perform or submit to any act of deviate sexual conduct commits deviate sexual assault." ILL. REV. STAT. ch. 38, para. 11-1 (1983)(repealed 1984)(emphasis added).

276. *Haywood*, 118 Ill. 2d at 273, 515 N.E.2d at 50.

277. *Id.*

278. *Id.* at 273-74, 515 N.E.2d at 50.

claimed that under this interpretation, any act of sexual penetration, even consensual, fits within the offense of criminal sexual assault.<sup>279</sup>

The court rejected the defendant's assertion that the victim's consent is irrelevant in determining whether an offense was committed.<sup>280</sup> The court concluded that a person of common intelligence and experience could distinguish between sexual acts accomplished by force, as proscribed in the statute and sexual activity between consenting adults.<sup>281</sup> Therefore, it held that section 12-13(a)(1) satisfies the due process requirements.<sup>282</sup>

Next, the court addressed the trial courts' determinations that the definition of "bodily harm," as described in the aggravated criminal sexual assault statute, lacked an objective standard as to the type of bodily harm that constitutes a statutory violation.<sup>283</sup> The lower courts reasoned that because the statute does not designate a specific type of bodily harm, a physical invasion of the anatomy by the simple act of sexual penetration can constitute bodily harm.<sup>284</sup>

The supreme court rejected the trial courts' construction of "physical harm" and relied on the "well-known legal meaning" of the term.<sup>285</sup> The court noted that it had previously considered the definition of "bodily harm" in the context of a battery statute and concluded that it could properly apply the same meaning to bodily harm in section 12-14.<sup>286</sup>

The court concluded that the term "bodily harm" is consistent

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279. *Id.*

280. *Id.* The court reasoned that although the prosecution need not formally prove nonconsent, if the prosecution shows that there was an act of sexual penetration by force, then this evidence demonstrates the nonconsensual nature of the act. *Id.* at 274, 515 N.E.2d at 50.

281. *Id.*

282. *Id.*

283. *Id.* at 275-77, 515 N.E.2d at 50-52. The statute defines "bodily harm" as "physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy and impotence." ILL. REV. STAT. ch. 38, para. 12-12(b)(1987).

284. *Haywood*, 118 Ill. 2d at 276, 515 N.E.2d at 51.

285. *Id.* The court noted that when a statute contains language with a generally understood legal meaning, the court will assume that the legislature intended that meaning. *Id.*

286. *Id.* at 276-77, 515 N.E.2d at 51. Specifically, it concluded that the definition requires temporary or permanent physical damage to the body. *Id.* The court cited *People v. Mays*, 91 Ill. 2d 251, 256, 437 N.E.2d 633 (1982), in which the court stated: "Although it may be difficult to pinpoint exactly what constitutes bodily harm for the purposes of the statute, some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent is required." *Id.* at 256, 437 N.E.2d at 635-36.

with the commonly understood meaning and, therefore, is definite enough to meet the requirements of due process.<sup>287</sup> The court stated that the trial courts erred in holding the section unconstitutionally vague and indefinite. The court reversed and remanded the judgments of the circuit courts of Fayette and Marion Counties.<sup>288</sup>

### 5. Aggravated Arson

In *People v. Orange*,<sup>289</sup> a jury convicted Leroy Orange of murder, concealment of a homicidal death, and aggravated arson.<sup>290</sup> The defendant confessed that he tied up, gagged, and then stabbed three adults and a ten-year-old child.<sup>291</sup> He set two fires in the victims' apartment before leaving.<sup>292</sup> The trial judge sentenced Orange to death.<sup>293</sup>

On appeal, the court readily accepted the defendant's argument that it must reverse the aggravated arson conviction because the statute under which the defendant was charged subsequently had been declared unconstitutional.<sup>294</sup> The court thus reversed the defendant's aggravated arson conviction.<sup>295</sup>

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287. *Haywood*, 118 Ill. 2d at 277, 515 N.E.2d at 52.

288. *Id.* at 277, 515 N.E.2d at 51.

289. 121 Ill. 2d 364, 521 N.E.2d 69 (1988).

290. *Id.* at 369, 521 N.E.2d at 71.

291. *Id.* Although the defendant confessed in a statement to the police, at trial he denied any involvement in these crimes. *Id.* at 370, 521 N.E.2d at 72.

292. *Id.* at 370, 521 N.E.2d at 72.

293. *Id.* at 369, 521 N.E.2d at 71. The court stayed the defendant's execution pending direct appeal. *Id.*

294. *Id.* at 392 521 N.E.2d at 82. The defendant in *Orange* was charged under section 20.1-1(a)(1) of the Criminal Code of 1961. ILL. REV. STAT. ch. 38, para. 20.1-1(a)(1)(1983). The statute provided in relevant part that: "(a) A person commits aggravated arson when in the course of committing arson 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 . . ." *Id.*

The *Orange* court relied on the Illinois Supreme Court's finding that the aggravated arson statute was unconstitutional. *People v. Johnson*, 114 Ill. 2d 69, 499 N.E.2d 470 (1986). In *Johnson*, the State charged Gary Johnson with aggravated arson and alleged that he knowingly damaged a building by fire and had reason to know that someone was present within the building. *Id.* at 69-70, 499 N.E.2d at 471. The supreme court affirmed the trial court's dismissal of the charge, holding that section 20.1(a)(1) unconstitutionally violated the defendant's due process rights because it failed to define the underlying offense committed. *Id.* at 72-73, 499 N.E.2d at 472. See also *People v. Clark*, 114 Ill. 2d 450, 501 N.E.2d 123 (1986) (supreme court followed its reasoning in *Johnson* and reversed the defendant's aggravated arson conviction).

295. *Orange*, 121 Ill. 2d. at 392, 521 N.E.2d at 82. The defendant also raised many procedural challenges. For a discussion of these arguments, see Carey & Feeley, *Criminal Procedure*, 20 LOY. U. CHI. L.J. 391, 423 (1989). With the exception of the aggravated arson charge, the court rejected the defendant's other challenges and affirmed the



The court, however, rejected the defendant's related argument that the invalidity of the aggravated arson conviction necessitated a new sentencing hearing.<sup>296</sup> The court reasoned that because the trial judge based the defendant's death penalty sentence on the multiple murders, the reversal of the arson conviction was irrelevant to the death sentence.<sup>297</sup> The court ordered the defendant executed by lethal injection.<sup>298</sup>

## 6. The Drug Paraphernalia Act

In *People v. Monroe*,<sup>299</sup> the court considered the constitutionality of the Drug Paraphernalia Act (the "Act").<sup>300</sup> The defendants, Louis Monroe and Ellis Levin, were charged in separate actions for violations of the Act.<sup>301</sup> The trial court consolidated the two cases and ultimately held that the Act was unconstitutionally vague.<sup>302</sup> The State appealed.<sup>303</sup>

The defendants contended that the Act was unconstitutionally vague because the definition of drug paraphernalia in section 2(d) of the Act and the penalty provision in section 3(a) contained contradictory requisite mental states.<sup>304</sup> Specifically, the defendants argued that section 2(d) required actual knowledge,<sup>305</sup> while sec-

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defendant's convictions for murder and concealment of a homicidal death. The court also affirmed the trial court's sentence of death. *Orange*, 121 Ill. 2d at 393, 521 N.E.2d at 82.

296. *Orange*, 121 Ill. 2d at 392-93, 521 N.E.2d at 82.

297. *Id.*

298. *Id.* at 393, 521 N.E.2d at 82. Justice Simon dissented from the majority's consideration of the defendant's challenge based on the ineffectiveness of counsel at his resentencing hearing. *Id.* at 393-400, 521 N.E.2d at 82-86 (Simon, J., dissenting). Justice Simon also reiterated his opposition to the constitutionality of the death penalty. *Id.* at 400, 521 N.E.2d at 86 (Simon, J., dissenting).

299. 118 Ill. 2d 298, 515 N.E.2d 42 (1987).

300. ILL. REV. STAT. ch. 56 1/2, paras. 2101 - 2107 (1985).

301. *Monroe*, 118 Ill. 2d at 299, 515 N.E.2d at 42.

302. *Id.*

303. *Id.*

304. *Id.* at 301, 515 N.E.2d at 43.

305. *Id.* at 302, 515 N.E.2d at 43 The statute provided in pertinent part:

(d) Drug Paraphernalia means all equipment, products and materials of any kind *which are peculiar to and marketed for use in* planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body cannabis or a controlled substance in violation of the 'Cannabis Control Act' or the 'Illinois Controlled Substances Act.'

ILL. REV. STAT. ch. 56 1/2, para. 2102(d) (1985)(emphasis added).

tion 3(a) required only constructive knowledge.<sup>306</sup> The defendants contended that these contradictory mental states made the Act unconstitutionally vague.<sup>307</sup>

The State argued that the requirement of constructive knowledge in the penalty section did not negate, but rather strengthened the scienter requirement in the definition section.<sup>308</sup> Thus, the State argued that the offense is committed when one knows, or under the circumstances reasonably should have known, that he is marketing an item for use as drug paraphernalia.<sup>309</sup>

The court rejected the State's argument, finding its interpretation of the two conflicting mental states illogical.<sup>310</sup> The court relied on a United States Court of Appeals finding that the use of the phrase "marketed for use" included a scienter requirement because one who marketed for a particular use clearly intended that use.<sup>311</sup> The Illinois Supreme Court concluded that because the definition section of the Drug Paraphernalia Act required actual knowledge and the penalty section required only constructive knowledge, the Act did not clearly proscribe the prohibited conduct.<sup>312</sup> Thus, the Act failed to provide due process of law and was unconstitutional.<sup>313</sup>

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306. *Monroe*, 118 Ill. 2d at 301, 515 N.E.2d at 43. This section of the statute provided that a violation of the Act occurred when:

(a) Any person who keeps for sale, offers for sale, sells or delivers for any commercial consideration any item which that person *knows, or under all of the circumstances reasonably should have known*, to be drug paraphernalia, commits a business offense for which a fine of \$1,000.00 shall be imposed for each item.

ILL. REV. STAT. ch. 56 1/2, para. 2103(a) (1985)(emphasis added).

307. *Monroe*, 118 Ill. 2d at 302, 515 N.E.2d at 43.

308. *Id.*

309. *Id.*

310. *Id.* at 304, 515 N.E.2d at 44.

311. *Id.* at 302-03, 515 N.E.2d at 43-44. The State relied on *Camille Corp. v. Phares*, 705 F.2d 223 (7th Cir. 1983). In *Camille Corp.*, the court held that actual and constructive knowledge standards can be reconciled in a drug paraphernalia act. *Id.* at 230-31. The *Camille Corp.* court considered an East Moline, Illinois, drug paraphernalia ordinance that required scienter in the definition section and only constructive knowledge in the penalty section. The *Camille Corp.* court upheld the statute, reasoning that the sections could be read together so as to "require *both* that the violator intended the object for use with illegal drugs and also at least had reason to know that the transferee contemplated such illegal usage." *Id.* at 230 (emphasis in original).

The *Monroe* court, however, distinguished *Camille Corp.* It found that the ordinance in question in that case "permitted constructive knowledge only in regards to the [transferee's] intentions . . . whereas under the [Illinois] Act[,] constructive knowledge [was] permitted to redefine the [seller's] mental state requirement." *Monroe*, 118 Ill. 2d at 304-05, 515 N.E.2d at 44-45.

312. *Monroe*, 118 Ill. 2d at 305, 515 N.E.2d at 45.

313. *Id.*

## 7. Sexual Relations Within Families

In *People v. Parker*,<sup>314</sup> the Illinois Supreme Court determined that the sexual relations within families statute<sup>315</sup> applies to stepparent-stepchild relationships.<sup>316</sup> In *Parker*, the defendant admitted, in response to police questioning, that his eighteen-year-old stepson performed oral sex on him twice.<sup>317</sup> The trial court convicted the defendant of the offense of sexual relations within families.<sup>318</sup> The appellate court reversed the lower court and held that the statute is ambiguous.<sup>319</sup>

Upon appeal by the State, the supreme court rejected the defendant's argument that the statute does not prohibit sexual conduct between a stepparent and a stepchild over seventeen years of age.<sup>320</sup> The court focused on the legislative intent and determined that although the statute does not expressly use the word "stepparents," this category is included within the group of persons subject to the statute.<sup>321</sup>

The court also relied on a 1986 amendment to the statute to determine the legislative intent.<sup>322</sup> The court reasoned that the amendment provided a more expansive definition of persons sub-

314. 123 Ill. 2d 204, 526 N.E.2d 135 (1988).

315. The statute under which the lower court convicted the defendant provided:

- (a) A person commits sexual relations within families if he or she:
  - (1) Commits an act of sexual penetration as defined in Section 12-12 of this Code; and
  - (2) The person knows that he or she is related to the other person as follows:
    - (i) Brother or sister, either of the whole blood or the half blood; or (ii) Father or mother, when the child or *stepchild*, regardless of legitimacy and either of the whole blood or half blood or by adoption, was 18 years of age or over when the act was committed.

ILL. REV. STAT. ch. 38, para. 11-11 (a)(1985)(emphasis added).

316. *Parker*, 123 Ill. 2d at 213-14, 526 N.E.2d at 139.

317. *Id.* at 207, 526 N.E.2d at 136.

318. *Id.* at 206, 526 N.E.2d at 136.

319. *Id.* at 207, 526 N.E.2d at 136. See *People v. Parker*, 152 Ill. App. 3d 732, 504 N.E.2d 1003 (3d Dist. 1987).

320. *Parker*, 123 Ill. 2d at 211, 526 N.E.2d at 138.

321. *Id.* at 210, 526 N.E.2d at 137-38. The court relied on prior cases holding that as long as the court could ascertain the legislative purpose from a statute, it could modify or add words to eliminate inconsistency with the legislative intent. *Id.* at 210-11, 526 N.E.2d at 138. See *People v. Bratcher*, 63 Ill. 2d 534, 349 N.E.2d 31 (1976); *People v. Scott*, 57 Ill. 2d 353, 312 N.E.2d 596 (1974); *Community Consol. School Dist. No. 210 v. Mini*, 55 Ill. 2d 382, 304 N.E.2d 75 (1973).

322. *Parker*, 123 Ill. 2d at 211-12, 526 N.E.2d at 138. The amendment added the *underscored* portion below: "(a) A person commits sexual relations within families if he or she is related to the other person as follows: . . . (iii) *Stepfather or stepmother, when the child was 18 years or over when the act was committed.*" ILL. REV. STAT. ch. 38, para. 11-11 (a)(2)(Supp. 1986)(emphasis added).

ject to the statute, but did not create a new offense.<sup>323</sup> The court rejected the defendant's argument that the amendment substantively changed the law.<sup>324</sup> Although the court recognized that an amendatory change creates a presumption that the amendment was intended to change the former law,<sup>325</sup> it stated that the legislature also may amend a law to simply clarify its intent.<sup>326</sup>

The court next considered the defendant's argument that the language creates an ambiguous conflict.<sup>327</sup> The defendant argued that the word "stepchild" is inconsistent with the phrase "regardless of legitimacy and either of the whole or half blood or by adoption."<sup>328</sup>

The court, however, found no ambiguity.<sup>329</sup> It reasoned that the terms "half-blood," "whole-blood," and "legitimacy" were all inapplicable references to the word "stepchild" because those terms could only describe the relationship of a child to its parents or siblings.<sup>330</sup> The court affirmed the judgment of the trial court and reversed the appellate court.<sup>331</sup>

## 8. Feticide

In *People v. Shum*,<sup>332</sup> the court considered the constitutionality of the feticide statute.<sup>333</sup> A jury convicted Keith Shum of the murder of Gwendolyn Whipple, the attempted murder of Theresa Con-

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323. *Parker*, 123 Ill. 2d at 212, 526 N.E.2d at 139.

324. *Id.*

325. *Id.* at 211, 526 N.E.2d at 138.

326. *Id.* at 212, 526 N.E.2d at 139.

327. *Id.* at 212-13, 526 N.E.2d at 139.

328. *Id.* at 212, 526 N.E.2d at 139. For the complete text of this statute, see *supra* note 315.

329. *Parker*, 123 Ill. 2d at 213, 526 N.E.2d at 139.

330. *Id.* The court reiterated that if the court can ascertain the legislature's intent, then it can declare some words surplusage to carry out the legislative intent. *Id.* (citing *People v. Todd*, 59 Ill. 2d 534, 543, 322 N.E.2d at 447, 453 (1975)).

331. *Id.* at 214, 526 N.E.2d at 139. In a special concurrence, Justice Clark disagreed with the majority's reliance on the subsequent amendment; he believed that the court must limit itself to the interpretation of the statute in effect at the time of the offense. *Id.* at 214, 526 N.E.2d at 139-40 (Clark, J., concurring). Justice Clark argued that the issue is whether the statute sufficiently warns the defendant of its proscribed activities. *Id.* at 215, 526 N.E.2d at 140 (Clark, J., concurring). He reasoned that because the term "stepchild" necessarily implies the existence of a stepparent, the statute is not ambiguous, and thus fairly warned the defendant. *Id.* at 216, 526 N.E.2d at 140 (Clark, J., concurring). He conceded that the statute is imprecise, but stated that imprecision does not necessarily "equate with ambiguity," and it does not invalidate a statute or "necessitate reliance on subsequent statutory amendments." *Id.* (Clark, J., concurring).

332. 117 Ill. 2d 317, 512 N.E.2d 1183 (1987).

333. ILL. REV. STAT. ch. 38, para. 9-1.1 (1981)(repealed 1986). The statute provided in pertinent part:

way, and the feticide of Whipple's unborn baby.<sup>334</sup> The court sentenced the defendant to death on the murder charge and to concurrent prison terms for the feticide, rape, and attempted murder convictions.<sup>335</sup> The defendant appealed to the supreme court.<sup>336</sup>

The evidence revealed that the defendant fired five bullets at Whipple, striking her skull, forehead, and left shoulder.<sup>337</sup> The defendant then fled.<sup>338</sup> A paramedic, who arrived soon after the shooting, detected no vital signs or heartbeats in either Whipple or her unborn child.<sup>339</sup> A trial expert testified that the bullet that entered Whipple's skull caused her death.<sup>340</sup> The fetus died from the intrauterine asphyxia caused by the mother's death.<sup>341</sup> Two doctors testified that the full-term fetus was capable of surviving outside of the mother's womb at the time of the incident.<sup>342</sup>

On appeal, the defendant raised five questions regarding the con-

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- (a) A person commits the offense of feticide who causes the death of a fetus if, in performing the acts which cause the death, he, without lawful justification:
- (1) either intended to kill or do great bodily harm to the mother carrying the fetus or knew that such acts would cause death or great bodily harm to the mother; or
  - (2) he knew that his acts created a strong probability of death or great bodily harm to the mother; or
  - (3) he was attempting to or committing a forcible felony against the mother other than voluntary manslaughter; and
  - (4) he knew, or reasonably should have known under all of the circumstances, that the mother was pregnant.
- (b) For purposes of this Section, 'fetus' means a fetus which the physician or pathologist performing the fetal autopsy determines, based upon the particular facts of the case before him, to have been capable, at the time of its death, of sustained life outside of the mother's womb with or without life support equipment, and such capacity for sustained life is proven beyond a reasonable doubt.

*Id.*

334. *Shum*, 117 Ill. 2d at 332, 512 N.E.2d at 1187.

335. *Id.* at 332-33, 512 N.E.2d at 1187. The court imposed a prison term of 60 years for the feticide and 30 years each for the rape of Whipple, the rape of Conway, and the attempted murder of Conway. *Id.* at 337, 512 N.E.2d at 1189.

336. *Id.* at 333, 512 N.E.2d at 1187.

337. *Id.* at 334-35, 512 N.E.2d at 1188. On July 6, 1982, the defendant visited the apartment that Whipple, Conway, and Conway's three children shared. *Id.* at 333, 521 N.E.2d at 1187. Conway had previously become acquainted with the defendant through her boyfriend. *Id.* When Conway and the defendant argued, the defendant became angry and poked Conway's face with an umbrella tip. *Id.* Conway responded by grabbing a knife. *Id.* The defendant pulled out a gun and forced the women to lie next to each other across a bed. He undressed and raped each woman, and then forced them to perform oral sex on him. He then aimed the gun alternatively at each woman, threatening to kill them. *Id.* at 333-34, 521 N.E.2d at 1187.

338. *Id.* at 335, 512 N.E.2d at 1188.

339. *Id.*

340. *Id.* at 336-37, 512 N.E.2d at 1189.

341. *Id.*

342. *Id.* at 337, 512 N.E.2d at 1189.

stitutionality of the feticide statute: whether the statute adequately defines the stage at which culpability is triggered; whether the statute arbitrarily allows unqualified physicians to conduct the autopsy on the fetus; whether the statute expresses a policy wholly inconsistent with Illinois' abortion statute; whether the statute distinguishes between the mens rea requirements for murder and feticide in an arbitrary and irrational manner; and whether the statute arbitrarily fails to reflect the legislature's expressed intent.<sup>343</sup>

The defendant first argued that the statute failed to adequately warn a person of ordinary intelligence of the proscribed conduct because the definition of "fetus" is based on shifting medical opinion as to viability of the fetus.<sup>344</sup> The court concluded, however, that there could be no shifting medical opinion as to whether Whipple's fetus could sustain life outside the womb<sup>345</sup> because evidence showed that the fetus was full-term and that Whipple was in the early stages of labor at the time of the murder.<sup>346</sup> Consequently, the court concluded that Shum lacked standing to make this claim because he was not within the class of people who could challenge the statute's definitions.<sup>347</sup>

The court similarly concluded that the defendant lacked standing to make the second constitutional challenge that the statute arbitrarily allows unqualified doctors to conduct the fetal autopsy.<sup>348</sup> Because a Cook County deputy medical examiner who specialized in pathology performed the autopsy, the court concluded that the defendant was not within the class of defendants as to whom the law is purportedly unconstitutional.<sup>349</sup>

The defendant's third challenge concerned the alleged inconsistency between the feticide statute and the Illinois Abortion Law of 1975.<sup>350</sup> The defendant noted that the legislature's policy as de-

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343. *Id.* at 357, 512 N.E.2d at 1199. The defendant also raised various procedural challenges, all of which the court rejected. See *Carey & Feeley, Criminal Procedure*, 20 LOY. U. CHI. L.J. —, — (1989).

344. *Shum*, 117 Ill. 2d at 358, 512 N.E.2d at 1199.

345. *Id.*

346. *Id.*

347. *Id.* The court relied on precedent in which it stated that "[a] party who would attack a statute as unconstitutional must bring himself within the class as to whom the law is unconstitutional." *Id.* (citing *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill. 2d 499, 510-11, 349 N.E.2d 61, 67 (1976) (quoting *People v. Bombacino*, 51 Ill. 2d 17, 19-20, 280 N.E.2d 687, 699 (1972))).

348. *Id.* See *supra* note 333 for the text of section (b) of the statute referred to in the defendant's argument.

349. *Shum*, 117 Ill. 2d at 358, 512 N.E.2d at 1199.

350. *Id.* at 358-59, 512 N.E.2d at 1199. The abortion law indicates that:

It is the intention of the General Assembly of the State of Illinois to reasonably

fined by the abortion law is to protect the right to life of the unborn child from the point of conception.<sup>351</sup> He argued that the feticide statute conflicts with the state policy by excluding from prosecution persons who harm the fetus after conception but prior to the point of viability.<sup>352</sup> Because the statute cannot be reconciled with the policy expressed in the Illinois Abortion Act, he contended that the court must find it to be unconstitutional.<sup>353</sup>

The court rejected this argument on several grounds.<sup>354</sup> First, it noted that the statutes do not address the same interests.<sup>355</sup> The United States Supreme Court has constitutionally protected the right to abort.<sup>356</sup> By contrast, the feticide statute attempts to protect a pregnant woman and her unborn child from the intentional harm caused by a third party.<sup>357</sup> Second, the court held that the policy statement from the abortion law on which the defendant relied<sup>358</sup> indicated a policy that the legislature recognized as impermissible under United States Supreme Court decisions.<sup>359</sup> The court concluded that no inconsistency existed between the two

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regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of [the] woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the long standing policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right of life from conception under the laws and Constitution of this State.

ILL. REV. STAT. ch. 38, para. 81-21 (1981).

351. *Shum*, 117 Ill. 2d at 358, 512 N.E.2d at 1199.

352. *Id.* at 358-59, 512 N.E.2d at 1199. See *supra* note 333 for the legislature's definition of fetus. The statute does not penalize one who caused the death of a fetus that was not yet capable of sustaining life outside the womb.

353. *Shum*, 117 Ill. 2d at 358-59, 512 N.E.2d at 119.

354. *Id.* at 359, 512 N.E.2d at 1199.

355. *Id.*

356. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 147-56 (1973)).

357. *Id.* at 359, 512 N.E.2d at 1199-1200.

358. See *supra* note 312 for the text of the policy statement behind the Abortion Law of 1975.

359. *Shum*, 117 Ill. 2d at 359, 512 N.E.2d at 1200 The relevant portion of this policy statement provided:

[T]he General Assembly finds and declares that the longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

ILL. REV. STAT. ch. 38, para. 81-21 (1981).

statutes.<sup>360</sup>

Shum next argued that the distinctions between the mens rea requirements for feticide and murder are irrational and arbitrary.<sup>361</sup> Specifically, he noted that the mens rea requirement for murder may be directed either at the decedent or at another,<sup>362</sup> whereas the mens rea for feticide must be directed only at the mother.<sup>363</sup> In addition, Shum argued that because the feticide statute excludes voluntary manslaughter and reckless homicide, this distinction is irrational as well.<sup>364</sup>

The court disagreed with the defendant's argument, finding that the distinctions between feticide and murder are logical.<sup>365</sup> The court reasoned that because one can be charged with feticide only when he knew or reasonably should have known that the woman was pregnant, the doctrine of transferred intent does not apply.<sup>366</sup> Further, the legislature rationally limited feticide to cases in which the offender intended to harm the mother because it is unlikely that one could kill a fetus without intending to harm the mother.<sup>367</sup> The court also determined that the legislature logically excluded cases of voluntary manslaughter and reckless conduct because these require a less culpable mental state than required by the feticide statute.<sup>368</sup>

Finally, the court considered Shum's contention that the statute fails to reflect the legislature's expressed intent.<sup>369</sup> The defendant

360. *Shum*, 117 Ill. 2d at 359, 512 N.E.2d at 1200.

361. *Id.* at 359-60, 512 N.E.2d at 1200.

362. *Id.* at 360, 512 N.E.2d at 1200. The murder statute provides that one who kills another without legal justification commits murder if:

- (1) He either intends to kill or do great bodily harm *to the individual or another*, or knows that such acts will cause death *to that individual or another*; or
- (2) He knows that such acts create a strong probability of death or great bodily harm *to that individual or another* . . . .

ILL. REV. STAT. ch. 38, para. 9-1(a)(1), 9-1(a)(2) (1987) (emphasis added).

363. *Shum*, 117 Ill. 2d at 360, 512 N.E.2d at 1200. The relevant parts of the statute provide that the offense of feticide occurs when the offender:

- (1) either intended to kill or do great bodily harm *to the mother* carrying the fetus or knew that such acts would cause death or great bodily harm to the mother; or (2) he knew that his acts created a strong probability of death or great bodily harm *to the mother*; or (3) he was attempting or committing a forcible felony *against the mother* other than voluntary manslaughter . . . .

ILL. REV. STAT. ch. 38, paras. 9-1.1(a)(1) to (a)(3)(1987)(emphasis added).

364. *Shum*, 117 Ill. 2d at 360, 512 N.E.2d at 1200.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 361, 512 N.E.2d at 1200.



noted that the legislative debates indicate an intention to limit culpability to knowing conduct.<sup>370</sup> He argued that because the statute provides for culpability when the offender knew or reasonably should have known that the woman was pregnant, the statute does not adequately express the true legislative intent.<sup>371</sup> The court completely rejected this argument. It found it sufficiently clear that culpability arises whenever the defendant knows or reasonably should have known that the woman is pregnant.<sup>372</sup> Consequently, the court refused to refer to any other aid to construction, including the legislative debates.<sup>373</sup>

The defendant further argued that even if the statute survived constitutional scrutiny, the evidence failed to prove his guilt beyond a reasonable doubt because it failed to establish that he knew that Whipple was pregnant.<sup>374</sup> The court rejected this argument, relying on evidence that Whipple was nine months pregnant on the day of the murders and that the full-term fetus was within normal weight limits.<sup>375</sup> The court also considered that the defendant knew Whipple four or five months prior to the incident. A photograph of Whipple taken before her pregnancy showed that she had not been obese prior to the pregnancy.<sup>376</sup> Finally, the court relied on Conway's statement that the defendant saw Whipple naked from the waist down on the day of the crime when he undressed and raped her.<sup>377</sup> The court inferred from the evidence that the defendant reasonably should have known that Whipple was pregnant.<sup>378</sup>

The defendant next argued that the facts raised a reasonable doubt as to whether Whipple's fetus was capable of sustained life outside of the mother's womb at the time of its death.<sup>379</sup> The court

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370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* (citing *People v. Boykin*, 94 Ill. 2d 138, 445 N.E.2d 1174 (1983)(in determining legislative intent, courts should first consider the statutory language)).

374. *Id.*

375. *Id.* at 361, 512 N.E.2d at 1201.

376. *Id.* at 361-62, 512 N.E.2d at 1201.

377. *Id.* at 362, 512 N.E.2d at 1201.

378. *Id.* The court recognized that the evidence supporting the defendant's knowledge of the pregnancy was circumstantial. *Id.* It stated, however, that it was entitled to draw inferences from the evidence that could sustain a conviction. *Id.* (citing *People v. Evans*, 87 Ill. 2d 77, 429 N.E.2d 520 (1981); *People v. Williams*, 40 Ill. 2d 522, 240 N.E.2d 645 (1968)).

379. *Id.* The defendant suggested three indicators that the fetus was not viable: the fetus's below average birth weight; the deputy examiner's external autopsy; and Whipple's previous miscarriage. *Id.*

rejected Shum's assertions, however, and relied upon medical testimony from the deputy medical examiner and a doctor, both of whom believed that the fetus was capable of surviving outside the womb and that there were no abnormalities.<sup>380</sup>

Finally, the defendant argued that because the feticide conviction arose from the single act of killing Whipple, the court must reverse the feticide conviction.<sup>381</sup> The defendant contended that the court could only convict Shum on the more serious offense of the murder of Whipple.<sup>382</sup> The court rejected the defendant's argument on several grounds.<sup>383</sup> First, the court recognized two distinct victims of Shum's actions: Whipple and her unborn child.<sup>384</sup> The court then concluded that Illinois law required separate convictions for separate victims.<sup>385</sup> Second, the court concluded that because the offense of feticide is not a lesser included offense of murder, both convictions could stand.<sup>386</sup> Consequently, the court affirmed the trial court's judgment and ordered the defendant executed by lethal injection.<sup>387</sup>

### III. LEGISLATION

#### A. Jurisdiction

Public Act 85-740, effective January 1, 1988, amended the state criminal jurisdiction statute<sup>388</sup> to allow prosecution for felony mur-

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380. *Id.* at 362-63, 512 N.E.2d at 1201. The medical examiner and the doctor testified that the fetus's weight was within the normal range, that the fetus developed without genetic abnormalities, and that the condition that resulted in Whipple's prior miscarriage was absent in this pregnancy. *Id.*

381. *Id.* at 363, 512 N.E.2d at 1201.

382. *Id.* The defendant relied on *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838 (1977) (the defendant was charged with rape and burglary with intent to commit rape for the assault of a victim).

383. *Id.* at 363-64, 512 N.E.2d at 1201-02.

384. *Id.* at 363, 512 N.E.2d at 1201. In contrast, the defendant in *King* committed two offenses against a single victim. *King*, 66 Ill. 2d at 552, 363 N.E.2d at 839.

385. *Shum*, 117 Ill. 2d at 363, 512 N.E.2d at 1201 (citing *People v. Butler*, 64 Ill. 2d 485, 356 N.E.2d 330 (1976)).

386. *Id.* at 363-64, 512 N.E.2d at 1202. The court noted that in order to classify an offense as a lesser included offense of another, "all the elements of the lesser offense must be included within the greater offense." *Id.* at 363, 512 N.E.2d at 1202 (quoting *People v. Smith*, 78 Ill. 2d 298, 306, 399 N.E.2d 1289 (1980)). Applying this standard, the court reasoned that because the feticide statute required the death of a fetus and the murder statute did not, feticide could not be a lesser included crime of murder. *Id.* at 363-64, 512 N.E.2d at 1202.

387. *Id.* at 374-75, 512 N.E.2d at 1207. Justice Simon's dissent advocated a reversal based on a procedural issue. *Id.* at 375, 512 N.E.2d at 1207 (Simon, J., dissenting). Chief Justice Clark joined in the dissent. *Id.* (Clark, C.J., dissenting).

388. ILL. REV. STAT. ch. 38, para. 1-5 (1985).

der in Illinois if the underlying felony was committed in Illinois.<sup>389</sup>

### B. *Limitations Periods*

The Illinois General Assembly passed several public acts relating to the statute of limitations period. Public Act 85-673, effective January 1, 1988, added the offense of reckless homicide to those which the general statutes of limitation do not apply and for which prosecution may begin at any time.<sup>390</sup>

Public Act 85-441, effective January 1, 1988, provides that the prosecution for an offense involving sexual conduct or penetration, when the defendant and victim are in a fiduciary relationship at the time of the offense, may be commenced within one year after the discovery of the offense.<sup>391</sup>

### C. *Intoxicated Condition as Defense*

Public Act 85-670, effective January 1, 1988, amended the statute that created an intoxicated or drugged state as an affirmative defense.<sup>392</sup> The amendment provides that a drugged or intoxicated person is criminally responsible for his conduct unless his condition suspends his powers of reason and renders him unable to form the required specific intent.<sup>393</sup>

### D. *Murder*

The Illinois General Assembly effected several changes to the murder statutes. Effective July 1, 1988, Public Act 85-1003 created the offense of solicitation of murder.<sup>394</sup> One who commands, encourages, or requests another person to commit murder with the intent that first degree murder be committed, commits a class X felony.<sup>395</sup> The statute provides that the term of imprisonment shall not be less than fifteen years or more than thirty years.<sup>396</sup>

Public Act 85-1003 also created the offense of solicitation of murder for hire.<sup>397</sup> One commits this offense when, with the intent

389. ILL. REV. STAT. ch. 38, para. 1-5 (b)(1987).

390. ILL. REV. STAT. ch. 38, para. 3-5(a)(1987).

391. ILL. REV. STAT. ch. 38, para. 3-6(e) (1987).

392. ILL. REV. STAT. ch. 38, para. 6-3 (1985).

393. ILL. REV. STAT. ch. 38, para. 6-3(a)(1987). The former statute required only that the intoxicated condition negated the mental state. ILL. REV. STAT. ch. 38, para. 6-3 (1985).

394. ILL. REV. STAT. ch. 38, paras. 8-1.1, 8-1.2 (1987).

395. ILL. REV. STAT. ch. 38, para. 8-1.1 (1987).

396. ILL. REV. STAT. ch. 38, para. 8-1.1(b) (1987).

397. ILL. REV. STAT. ch. 38, para. 8-1.2 (1987).

that first degree murder be committed, he forms a contract or agreement with another to murder for money or other value.<sup>398</sup> The statute classifies the offense as a class X felony and provides a term of imprisonment of not less than twenty years and not more than forty years.<sup>399</sup>

The Illinois General Assembly also amended the aggravating factors under the first degree murder statute.<sup>400</sup> Effective January 1, 1988, Public Act 85-404 provides that an aggravating factor for the death penalty exists when the defendant is convicted of murdering two or more individuals as a result of the same act or separate acts, as long as the defendant knew that his acts would cause death or created the strong probability of death or great bodily harm.<sup>401</sup> The amendment also eliminated the requirement that the acts be premeditated.<sup>402</sup>

### E. Children

The Illinois General Assembly responded to the continuing problem of the sexual abuse of children by expanding the sexual assault statutes to provide greater protection for children. Public Act 85-1003, effective January 1, 1988, expanded the criminal sexual assault statute,<sup>403</sup> making it criminal for any "person responsible for the child's welfare" to commit an act of sexual penetration with the child under eighteen years of age.<sup>404</sup> A person responsible for a child's welfare commits aggravated criminal sexual abuse if he commits an act of sexual conduct with a victim who is under eighteen years of age.<sup>405</sup>

Public Act 85-1003 added a new paragraph to both the criminal sexual assault and aggravated criminal sexual abuse statutes defining the phrase "person responsible for child's welfare."<sup>406</sup> This category includes the child's foster parent, guardian, school teacher, or any other caregiver.<sup>407</sup>

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398. *Id.*

399. ILL. REV. STAT. ch. 38, para. 8-1.2(b) (1987). Public Act 85-1003, effective July 1, 1988, amended the solicitation act to exclude first degree murder from its purview because solicitation to commit first degree murder is covered by the new solicitation for murder statute. *See* ILL. REV. STAT. ch. 38, para. 8-1.1 (1987).

400. ILL. REV. STAT. ch. 38, para. 9-1(b)(1987).

401. ILL. REV. STAT. ch. 38, para. 9-1(b)(3) (1987).

402. *Id.*

403. ILL. REV. STAT. ch. 38, para. 12-13 (1985).

404. ILL. REV. STAT. ch. 38, para. 12-13(a)(3)(1987).

405. ILL. REV. STAT. ch. 38, para. 12-16(b) (1987).

406. ILL. REV. STAT. ch. 38, paras. 12-13(a)(3), 12-16(b) (1987).

407. *Id.*

Public Act 85-365, effective January 1, 1988, created the offense of permitting the sexual abuse of a child.<sup>408</sup> This act punishes a parent or step-parent who either permitted an act of criminal sexual abuse or assault to be committed against his child or who failed to reasonably prevent its commission.<sup>409</sup> The act defines "child" as minor under seventeen years of age.<sup>410</sup> A violation of this act is a class A misdemeanor.<sup>411</sup>

Public Act 85-996, effective July 1, 1988, added a provision to the aggravated battery of a child statute.<sup>412</sup> It provides that the commission of a second or subsequent offense of aggravated child battery within three years following a prior conviction or discharge constitutes a class 1 felony.<sup>413</sup>

### F. *Aggravated Assault*

The Illinois General Assembly amended the offense of aggravated assault three times during the *Survey* year. Public Act 85-691, effective January 1, 1988, enhances an assault charge to aggravated assault when the perpetrator knows that the victim is either physically handicapped or over sixty years of age.<sup>414</sup> The Illinois General Assembly defined "physically handicapped person" as one who suffers from a permanent and disabling physical characteristic, which resulted from disease, injury, function disorder, or congenital condition.<sup>415</sup>

Public Act 85-804, effective January 1, 1988, provides that one who commits an assault with a device that is substantially similar in appearance to a firearm commits an aggravated assault.<sup>416</sup>

Public Act 85-780, effective January 1, 1988, provides that one who discharges a firearm during an assault commits an aggravated assault.<sup>417</sup> The act provides that one who violates this section commits a class 4 felony.<sup>418</sup>

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

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

410. *Id.*

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

412. ILL. REV. STAT. ch. 38, para. 12-4.3 (1987).

413. ILL. REV. STAT. ch. 38, para. 12-4.3 (a) (1987). The first-time offender of the statute commits a class 2 felony. ILL. REV. STAT. ch. 38, para. 12-4.3 (1987).

414. ILL. REV. STAT. ch. 38, para. 12-2(a)(11), 12-2(a)(12)(1987).

415. ILL. REV. STAT. ch. 38, para. 2-15a (1987).

416. ILL. REV. STAT. ch. 38, para. 12-2(a)(1)(1987).

417. ILL. REV. STAT. ch. 38, para. 12-2(a)(13) (1987).

418. ILL. REV. STAT. ch. 38, para. 12-2(b) (1987). The legislature distinguished this particular enhancement from assault to aggravated assault from aggravated assaults defined in the other portions of the section, which remain class A misdemeanors. See ILL. REV. STAT. ch. 38, para. 12-2(a), 12-2(b)(1987).

### G. *Enhancement*

The Illinois General Assembly displayed its concern for the protection of elderly and physically handicapped persons when it created enhancement provisions for assault, sexual assault, robbery, and battery. Public Act 85-691, effective January 1, 1988, provides that one who knowingly assaults a physically handicapped person or a person over sixty years of age commits aggravated assault.<sup>419</sup> The act also amended the aggravated criminal sexual assault and aggravated criminal sexual abuse statutes.<sup>420</sup> The amendment provides that one who commits criminal sexual assault on a physically handicapped person commits aggravated criminal sexual assault.<sup>421</sup> Public Act 85-691 amended the aggravated criminal sexual abuse statute to provide an enhancement of the criminal sexual abuse statute when one commits an act of criminal sexual abuse against a physically handicapped person or a person over sixty years of age.<sup>422</sup>

Effective July 1, 1988, Public Act 85-996 elevates a battery charge to aggravated battery when the offender knows that the victim is physically handicapped.<sup>423</sup> The provision defines a physically handicapped person as one who suffers from a permanent disabling condition, which results from disease, injury, functional disorder, or congenital condition.<sup>424</sup>

Finally, the legislature's concern for the elderly and the physically handicapped was demonstrated by its amendment of the robbery statute.<sup>425</sup> The act enhances the penalty for robbery from a class 2 felony to a class 1 felony when the victim is physically handicapped or over sixty years of age.<sup>426</sup>

Public Act 85-691 also added the commission of an offense against a physically handicapped person to the list of factors in aggravation.<sup>427</sup>

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419. ILL. REV. STAT. ch. 38, para. 12-2(a)(11), 12-2(1)(12)(1987).

420. ILL. REV. STAT. ch. 38, paras. 12-14, 12-16 (1985).

421. ILL. REV. STAT. ch. 38, para. 12-14(a)(6)(1987). The prior statute mandated enhancement when the victim was sixty years or older. ILL. REV. STAT. ch. 38, para. 12-14(a)(5)(1985).

422. ILL. REV. STAT. ch. 38, para. 12-16(a)(3), 12-16(a)(4)(1987).

423. ILL. REV. STAT. ch. 38, para. 12-4(b)(13) (1987).

424. *Id.* This definition of physically handicapped also was added to the "General Definitions" section of the Code. See ILL. REV. STAT. ch. 38, para. 2-15a (1987).

425. ILL. REV. STAT. ch. 38, para. 18-1 (1985).

426. ILL. REV. STAT. ch. 38, para. 18-1(b)(1987).

427. ILL. REV. STAT. ch. 38, para. 1005-5-3.2(a)(9) (1987). The prior statute already made the commission of an offense against a person over 60 years of age a factor in aggravation. ILL. REV. STAT. ch. 38, para. 1005-5-3.2(a)(8)(1985).

### H. Criminal Housing Management

Public Act 85-341, effective January 1, 1988, amended the criminal housing management statute.<sup>428</sup> The amendment changed the requisite mental state from "knowing" to "reckless"<sup>429</sup> and rewrote several phrases so that they would be easier to read.<sup>430</sup> A second or subsequent conviction of this offense is now a class 4 felony.<sup>431</sup>

Public Act 85-384, effective January 1, 1988, amended the maintaining public nuisance statute<sup>432</sup> to criminalize the maintenance of a building used in the commission of the offense of criminal housing management.<sup>433</sup>

### I. Sex Offenses

During the *Survey* year, the Illinois General Assembly demonstrated its continuing concern for sexual abuse. Public Act 85-837, effective January 1, 1988, expanded the criminal sexual assault statute<sup>434</sup> to provide an enhanced sentence for a second or subsequent offense of criminal sexual assault.<sup>435</sup> A person who has been convicted previously of criminal sexual assault and who commits a second offense under any similar statute in Illinois or in another jurisdiction that is substantially equivalent to or more serious than the crime prohibited in this statute, commits a class X felony.<sup>436</sup> If the State intends to treat the charge as a class X felony, then the information or indictment charging the person must state the prior conviction and give notice of the State's intention to treat the charge as a class X felony.<sup>437</sup> The prior conviction is not an element of the offense and may not be disclosed to the jury during the

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428. ILL. REV. STAT. ch. 38, para. 12-5.1(1987). The former statute provided in pertinent part:

(a) A person commits the offense of criminal housing management when, having personal management or control of residential real estate, whether as a legal or equitable owner . . . , he knowingly permits by his gross carelessness or neglect the physical condition or facilities . . . to become or remain so deteriorated that the health or safety of any inhabitant is endangered . . .

ILL. REV. STAT. ch. 38, para. 12-5.1(a) (1985).

429. ILL. REV. STAT. ch. 38, para. 12-5.1(a)(1987).

430. *Id.*

431. ILL. REV. STAT. ch. 38, para. 12-5.1(b) (1987). A first-time offender of the statute commits a class A misdemeanor. ILL. REV. STAT. ch. 38, para. 12-5.1(b)(1987).

432. ILL. REV. STAT. ch. 38, para. 37-1 (1987).

433. *Id.* See *supra* note 428 for the relevant portion of the criminal housing management statute.

434. ILL. REV. STAT. ch. 38, para. 12-13 (1985).

435. ILL. REV. STAT. ch. 38, para. 12-13(b)(1987).

436. *Id.*

437. *Id.*

trial.<sup>438</sup>

Public Act 85-651, effective January 1, 1988, enacted several important amendments to the criminal sexual abuse statutes.<sup>439</sup> The amendment entirely eliminated section 12-15(b)(1).<sup>440</sup> The amendment raised the maximum age of the victim from sixteen to seventeen years of age when the accused is under seventeen years of age.<sup>441</sup> The amendment added a new paragraph to the criminal sexual abuse statute.<sup>442</sup> It provides that the offense is committed when one commits an act of sexual penetration or sexual conduct when the victim is at least thirteen years of age but under seventeen years of age and the accused is less than five years older than the victim.<sup>443</sup>

Public Act 85-651 also added a new paragraph to the aggravated criminal sexual abuse statute.<sup>444</sup> The act provides that an individual commits aggravated criminal sexual abuse when he commits an act of sexual conduct using force or threat of force against a victim who is at least thirteen years old, but less than seventeen years old when the act is committed.<sup>445</sup>

The act also altered the prior statute to provide that when the accused, who is under seventeen years of age, commits an act of sexual conduct with force or threat of force on a victim, who is under seventeen years of age, the accused commits aggravated criminal sexual assault.<sup>446</sup>

The act also amended several other factors in the aggravated criminal sexual abuse act.<sup>447</sup> It makes "sexual conduct" against a victim punishable as criminal sexual assault.<sup>448</sup> The act also raises

438. *Id.*

439. ILL. REV. STAT. ch. 38, paras. 12-15, 12-16 (1985).

440. The text of the eliminated paragraph provided that one commits sexual criminal abuse if "the accused was 17 years of age or over and commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 16 years of age when the act was committed." ILL. REV. STAT. ch. 38, para. 12-15(b)(1)(1985).

441. ILL. REV. STAT. ch. 38, para. 12-15(b)(2)(1987). Under the prior statute, one committed criminal sexual abuse when "the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age *but under 16 years of age* when the act was committed." ILL. REV. STAT. ch. 38, para. 12-15(b)(2) (1985) (emphasis added).

442. ILL. REV. STAT. ch. 38, para. 12-15(c)(1987).

443. *Id.*

444. ILL. REV. STAT. ch. 38, para. 12-16(c) (1987).

445. *Id.*

446. ILL. REV. STAT. ch. 38, para. 12-16(c)(2)(1987). The prior statute set the victim's maximum age at 13. ILL. REV. STAT. ch. 38, para. 12-16(c)(2)(1985).

447. ILL. REV. STAT. ch. 38, para. 12-16 (1985).

448. ILL. REV. STAT. ch. 38, para. 12-16(d)(1987). The prior statute only punished



a victim's maximum age from sixteen to seventeen years of age.<sup>449</sup>

Public Act 85-688 provides that, effective January 1, 1988, the court may order one who was convicted under sections 12-13, 12-14, 12-15, or 12-16 of the Code to pay all or a portion of the victim's expenses for treatment in addition to any other penalties provided by the respective statutes.<sup>450</sup>

### J. Juvenile Delinquency

Public Act 85-906, effective November 23, 1987, created a new offense: contributing to the criminal delinquency of a juvenile.<sup>451</sup> A person who is at least twenty-one years of age commits this offense when he "solicits, compels or directs" a person under seventeen years of age to commit a felony.<sup>452</sup> There must be a showing of intent to promote a felony.<sup>453</sup>

The offender commits a felony one grade higher than the offense that was committed by the juvenile.<sup>454</sup> If a juvenile commits first degree murder or another class X felony, however, then the offender who contributed to the juvenile's criminal delinquency receives the penalty for the first degree murder or the class X felony.<sup>455</sup>

### K. Weapons

The Illinois General Assembly showed marked concern for the use of firearms by amending existing statutes and creating new provisions. Public Act 85-268, effective January 1, 1988, expanded the unlawful use of weapons statute to include a ballistic knife.<sup>456</sup> The Illinois General Assembly included the possession of the knife under several circumstances. One commits the offense of unlawful

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an accused who committed an act of "sexual penetration." ILL. REV. STAT. ch. 38, para. 12-16(d)(1985).

449. ILL. REV. STAT. ch. 38, para. 12-16(d)(1987). The prior statute provided that "the accused commits aggravated criminal sexual abuse if he or she commits an act of sexual penetration with a victim who was at least 13 years of age but under 16 years of age and the accused was at least 5 years older than the victim." ILL. REV. STAT. ch. 38, para. 12-16(d)(1985).

450. ILL. REV. STAT. ch. 38, para. 12-18(d)(1987). The types of treatment include "medical, psychiatric, rehabilitative or psychological." *Id.*

451. ILL. REV. STAT. ch. 38, para. 33D-1 (1987).

452. ILL. REV. STAT. ch. 38, para. 33D-1(a) (1987).

453. *Id.*

454. ILL. REV. STAT. ch. 38, para. 33D-1(b) (1987).

455. *Id.*

456. ILL. REV. STAT. ch. 38, para. 24-1(a)(1)(1987). The statute defines ballistic knife as a "device that propels a knifelike blade as a projectile by means of a coil spring, elastic material or compressed gas." *Id.*

use of weapons when one sells, manufactures, purchases, possesses, or carries a ballistic knife.<sup>457</sup> One who carries or possesses a ballistic knife in a vehicle or on his person, while he is hooded, robed, or masked so as to conceal his identity also commits this offense.<sup>458</sup> The act also criminalizes the possession of a ballistic knife by one on the grounds or in a building of any elementary or secondary school, or any college or university.<sup>459</sup>

Public Act 85-669, effective January 1, 1988, amended the offense of unlawful possession of firearms and firearm ammunition.<sup>460</sup> The legislature deleted the provision that criminalized the possession of any firearm or firearm ammunition by one who has been convicted of a felony in Illinois or another state.<sup>461</sup>

Public Act 85-736, effective September 22, 1987, expanded the unlawful use of weapons by felons statute<sup>462</sup> by adding two new sections.<sup>463</sup> The first added section prohibits the possession of any weapon<sup>464</sup> by one who is confined in an Illinois Department of Corrections penal institution, regardless of that person's intent.<sup>465</sup> This section expanded the prior statute, which did not specifically prohibit possession by prisoners, but rather prohibited the possession of weapons by felons.<sup>466</sup> The Illinois General Assembly also added a section providing an affirmative defense for one whose possession of the weapon was specifically authorized by rule, regulation, or directive of the Illinois Department of Corrections.<sup>467</sup>

457. *Id.*

458. ILL. REV. STAT. ch. 38, para. 24-1(a)(9) (1987).

459. ILL. REV. STAT. ch. 38, para. 24-1(a)(12) (1987).

460. ILL. REV. STAT. ch. 38, para. 24-3.1(a)(3) (1987).

461. ILL. REV. STAT. ch. 38, para. 24-3.1(1)(3) (1987).

462. ILL. REV. STAT. ch. 38, para. 24-1.1 (1987). The act cited is Senate Bill 1316. The same act is also cited as House Bill 2093.

463. ILL. REV. STAT. ch. 38, para. 24-1.1(b), 24-1.1(c) (1987).

464. ILL. REV. STAT. ch. 38, para. 24-1.1(b)(1987). The statute specifically prohibits the use or possession of weapons prohibited under section 24-1 of the Code. *Id.* The prohibited weapons include a bludgeon, black jack, slung-shot, sand-club, sand-bag, metal knuckles, throwing star, switch blade, knife, and ballistic knife. ILL. REV. STAT. ch. 38, para. 24-1(a)(1) (1987).

465. ILL. REV. STAT. ch. 38, para. 23-1.(b) (1987). This act clarified the unlawful use of weapons by felons statute by specifying that the offender must be incarcerated in a penal institution that is a facility of the Illinois Department of Corrections. ILL. REV. STAT. ch. 38, para. 24-1.1(d) (1987). The amended statute provides that "[a]ny person who violates this section while confined in a penal institution, which is a facility of the Illinois Department of Corrections, is guilty of a Class 1 felony." *Id.* (emphasis added).

466. ILL. REV. STAT. ch. 38, para. 24-1.1(a)(1985). The prior statute provided that one who possessed any firearm or firearm ammunition and previously had been convicted of a felony under the laws of Illinois or any other jurisdiction, committed unlawful use of weapons by felons. *Id.*

467. ILL. REV. STAT. ch. 38, para. 24-1.1(c)(1987).

Public Act 85-632, effective January 1, 1988, altered the confiscation and disposition of weapons statute.<sup>468</sup> When a confiscated weapon is used as evidence in a criminal trial, upon disposition of the matter, the court may order the weapon to be transferred to the state police department for use in laboratory training or any other purpose that the Department deems appropriate.<sup>469</sup> The act deleted the paragraph that limited the transfer of the confiscated material to only criminal laboratories.<sup>470</sup>

Public Act 85-755, effective September 23, 1987, created two new offenses that criminalize the possession of contraband in state and non-state penal institutions.<sup>471</sup> One who possesses an item of contraband in a non-state penal institution, regardless of his intent, commits this offense.<sup>472</sup> The offense is penalized as a class 4 felony.<sup>473</sup> The act created an affirmative defense for one who possesses the contraband by authority of a rule, directive, or order of the institution's governing authority.<sup>474</sup>

The act similarly created an offense for possession of contraband in state penal institutions.<sup>475</sup> One who possesses contraband in a state penal institution, regardless of his intent for doing so, commits this offense.<sup>476</sup> The act created an affirmative defense for the situation in which an Illinois Department of Corrections rule, order, or directive specifically authorizes the possession.<sup>477</sup>

Unlike the penalty for possession of contraband in a non-state penal institution, the penalty for possession of contraband in a state penal institution varies with the type of contraband possessed.<sup>478</sup> Possession of alcoholic liquor,<sup>479</sup> cannabis,<sup>480</sup> controlled

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468. ILL. REV. STAT. ch. 38, para. 24-6 (1985).

469. ILL. REV. STAT. ch. 38, para. 24-6(b)(1987).

470. ILL. REV. STAT. ch. 38, para. 24-6(b)(1985).

471. ILL. REV. STAT. ch. 38, paras. 31A-1, 31A-1.1 (1987).

472. ILL. REV. STAT. ch. 38, para. 31 A-1(b) (1987). The prior statute criminalized the *bringing* of contraband into a non-state penal institution, ILL. REV. STAT. ch. 38, para. 31A-1(a)(1)(1985)(emphasis added), the *causing* of another to bring contraband into a non-state penal institution, ILL. REV. STAT. ch. 38, para. 31A-1(a)(2) (1985) (emphasis added), and the *placing* of contraband near the non-State penal institution in order to give an inmate access to it. ILL. REV. STAT. ch. 38, para. 31A-1(a)(3) (1985)(emphasis added).

473. ILL. REV. STAT. ch. 38, para. 31 A-1(d) (1987).

474. ILL. REV. STAT. ch. 38, para. 31 A-1(e) (1987).

475. ILL. REV. STAT. ch. 38, para. 31 A-1.1(b) (1987).

476. *Id.*

477. ILL. REV. STAT. ch. 38, para. 31 A-1.1(g) (1987).

478. ILL. REV. STAT. ch. 38, paras. 31 A-1.1(d) to 31 A-1.1(f) (1987).

479. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(i) (1987).

480. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(ii) (1987).

substances,<sup>481</sup> hypodermic syringes, needles, or other instruments used for injecting controlled substances or cannabis,<sup>482</sup> is a class 4 felony.<sup>483</sup> Possession of a weapon<sup>484</sup> is a class 1 felony.<sup>485</sup> Possession of a firearm,<sup>486</sup> firearm ammunition,<sup>487</sup> or an explosive<sup>488</sup> in a state penal institution is a class X felony.<sup>489</sup>

#### L. *False Impersonation of a Peace Officer*

Public Act 85-741, effective January 1, 1988, created the offense of false impersonation of a peace officer.<sup>490</sup> One who knowingly and falsely represents himself to be a peace officer commits a class 4 felony.<sup>491</sup> One who knowingly and falsely represents himself as a peace officer while attempting or committing a felony commits aggravated false impersonation of a peace officer.<sup>492</sup>

#### M. *Money Laundering*

Public Act 85-675, effective January 1, 1988, created the offense of money laundering.<sup>493</sup> One who knowingly engages or attempts to engage in the transaction of "criminally derived property" commits this offense.<sup>494</sup> The mental state required is either the intent to promote the unlawful activity from which the property came or the knowledge that the transaction was designed to conceal information about the criminally derived property.<sup>495</sup>

#### N. *N.C.A.A. Recruitment Violations*

Public Act 85-665, effective January 1, 1988, expanded the of-

481. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(iii) (1987).

482. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(iv) (1987).

483. ILL. REV. STAT. ch. 38, para. 31 A-1.1(d) (1987).

484. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(v) (1987).

485. ILL. REV. STAT. ch. 38, para. 31 A-1.1(e) (1987).

486. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(vi) (1987).

487. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(vii) (1987).

488. ILL. REV. STAT. ch. 38, para. 31 A-1.1(c)(2)(vii) (1987).

489. ILL. REV. STAT. ch. 38, para. 31 A-1.1(f) (1987).

490. ILL. REV. STAT. ch. 38, para. 32-5.1 (1987).

491. *Id.*

492. ILL. REV. STAT. ch. 38, para. 32-5.2 (1987). The aggravated offense is penalized as a class 3 felony. *Id.*

493. ILL. REV. STAT. ch. 38, para. 29B-1 (1987).

494. *Id.* The statute defines "criminally derived property" as "any property constituting or derived from proceeds obtained, directly or indirectly, pursuant to a violation of the Criminal Code of 1961, the Illinois Controlled Substances Act or the Cannabis Control Act." ILL. REV. STAT. ch. 38, para. 29B-1(b)(4) (1987).

495. ILL. REV. STAT. ch. 38, para. 29B-1(a) (1987). This offense is penalized as a class 3 felony. ILL. REV. STAT. ch. 38, para. 29B-1(c) (1987).

fense of offering a bribe.<sup>496</sup> One who offers or promises another person money or any other item of value or advantage to induce that person to attend or to refrain from attending a particular institution of secondary or higher education in order to participate or not participate in interscholastic athletic competition commits this offense.<sup>497</sup> The statute specifically excludes bona fide financial aid, scholarships, family contributions, and items of de minimis value that the university provides to any or all students or prospective students.<sup>498</sup>

One who offers money or other things of value to an individual who participates in interscholastic athletics at any institution of higher education and represents that person in future negotiations with a professional sports team for employment also commits the offense of offering a bribe.<sup>499</sup>

### O. Computer Crimes

Public Act 85-926, effective December 1, 1987, demonstrates the legislature's awareness of the increasing need to control computer crime. The act created three new offenses<sup>500</sup> and procedures for the forfeiture of any money, property, or other things of value obtained as a result of the computer fraud.<sup>501</sup>

One commits the offense of computer tampering when, without the authorization of the computer's owner, he knowingly accesses the owner's computer, program, or data,<sup>502</sup> obtains data or services from it,<sup>503</sup> damages the computer, or alters, deletes, or removes a computer program or data.<sup>504</sup> The sentence varies with the manner in which the offense is committed.<sup>505</sup>

One who accesses another's computer or data commits a class B misdemeanor.<sup>506</sup> One who damages the computer or alters,

496. ILL. REV. STAT. ch. 38, para. 29-1 (1987).

497. ILL. REV. STAT. ch. 38, para. 29-1(b) (1987). This offense is a class A misdemeanor. *Id.*

498. *Id.*

499. ILL. REV. STAT. ch. 38, para. 29-1(c) (1987). Either type of action is punishable as a class A misdemeanor. ILL. REV. STAT. ch. 38, paras. 29-1(b), 29-1(c) (1987).

500. ILL. REV. STAT. ch. 38, paras. 16D-3, 16D-4, 16D-5 (1987). The act also created a section that defines the terms computer, computer program data, property, access, services, and vital services or operations. ILL. REV. STAT. ch. 38, paras. 16D-2(a) to 16D-2(g) (1987).

501. ILL. REV. STAT. ch. 38, para. 16D-6 (1987).

502. ILL. REV. STAT. ch. 38, para. 16D-3(a)(1) (1987).

503. ILL. REV. STAT. ch. 38, para. 16D-3(a)(2) (1987).

504. ILL. REV. STAT. ch. 38, para. 16-D(a)(3) (1987).

505. ILL. REV. STAT. ch. 38, paras. 16D-3(b)(1) to 16D-3(b)(3) (1987).

506. ILL. REV. STAT. ch. 38, para. 16D-3(b)(1) (1987).

removes, or deletes its programs commits a class 4 felony.<sup>507</sup> A second or subsequent offense of the latter type is a class 3 felony.<sup>508</sup>

One commits aggravated computer tampering when he commits the offense of computer tampering and, in so doing, knowingly disrupts or interferes with the vital operations or services of a state or local government or public utility.<sup>509</sup> The offense of aggravated computer tampering also is committed when one commits the offense of computer tampering and, in so doing, knowingly creates a strong probability of death or great bodily harm.<sup>510</sup>

The act also created the offense of computer fraud, which criminalizes the accessing of a computer, program, or data for the purpose of fraud or deception.<sup>511</sup> One commits this offense by knowingly accessing a computer, a program, or data for the purpose of deceiving or defrauding.<sup>512</sup> One also commits this offense by knowingly destroying a computer or altering, deleting, or removing a program or data for the purpose of deceiving or defrauding.<sup>513</sup>

The statute also provides that one who knowingly accesses a computer, program, or data and, in so doing, obtains money or control of another's money, property, or services in an effort to defraud or deceive commits computer fraud.<sup>514</sup> If one commits computer fraud in this manner, then the penalties vary according to the value of the money, property, or services.<sup>515</sup> If the value is \$1000 or less, then the offender is guilty of a class 4 felony.<sup>516</sup> If the value is more than \$1000 but less than \$50,000, then the offender is guilty of a class 3 felony.<sup>517</sup> If the value of the money, property, or services equals or exceeds \$50,000, then the offender

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507. ILL. REV. STAT. ch. 38, para. 16D-3(b)(2) (1987).

508. ILL. REV. STAT. ch. 38, para. 16D-3(b)(3) (1987).

509. ILL. REV. STAT. ch. 38, para. 16D-4(a)(1) (1987). This offense is punishable as a class 3 felony. ILL. REV. STAT. ch. 38, para. 16D-4(b)(1) (1987).

510. ILL. REV. STAT. ch. 38, para. 16D-4(a)(2) (1987). Aggravated computer tampering committed in this manner is a class 2 felony. ILL. REV. STAT. ch. 38, para. 16D-4(b)(2) (1987).

511. ILL. REV. STAT. ch. 38, para. 16D-5 (1987).

512. ILL. REV. STAT. ch. 38, para. 16D-5(a)(1) (1987). This action is punishable as a class 4 felony. ILL. REV. STAT. ch. 38, para. 16D-5(b)(1) (1987).

513. ILL. REV. STAT. ch. 38, para. 16D-5(a)(2) (1987). The offense of computer fraud committed in this manner is penalized as a class 3 felony. ILL. REV. STAT. ch. 38, para. 16D-5(b)(2) (1987).

514. ILL. REV. STAT. ch. 38, para. 16D-5(a)(3) (1987).

515. ILL. REV. STAT. ch. 38, paras. 16D-5(b)(3)(i) to (b)(3)(iii) (1987).

516. ILL. REV. STAT. ch. 38, para. 16D-5(b)(3)(i) (1987).

517. ILL. REV. STAT. ch. 38, para. 16D-5(b)(3)(ii) (1987).

commits a class 2 felony.<sup>518</sup>

#### IV. CONCLUSION

Although the Illinois Supreme Court and the Illinois General Assembly addressed a wide variety of criminal law issues during the *Survey* period, several new developments can be recognized and monitored.

The Illinois General Assembly strengthened its continuing resolve to protect persons unable to protect themselves. Responding to the problem of sexual abuse and exploitation of children, for example, the general assembly created new offenses and enhanced existing penalties for crimes involving juvenile victims. The Illinois Supreme Court, within its own role of judicial review, also expressed its concern in this area. In the *Geever* decision, the court upheld the statute prohibiting possession of child pornography against a number of constitutional challenges. In *Parker*, the court expanded the scope of the sexual relations within families statute by means of authoritative construction.

To assure the physical safety of the elderly and physically handicapped, in turn, the general assembly revised a number of statutes to mandate stiffer penalties. Indeed, a person's age or physical disability is now a factor that may prompt a harsher sentence for the commission of any offense within this state.

General public safety concerns were evident in a number of other measures taken during the *Survey* year. The supreme court in *Esposito* upheld summary license suspension provisions within the Illinois Vehicle Code aimed at intoxicated motorists. Prison security was another separate topic under study in the legislature this year; new statutes prohibiting the possession of contraband and weapons within the state's prisons were enacted. New and tougher laws against criminal housing management, money laundering, and computer crime complete the public welfare measures adopted during the *Survey* term.

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518. ILL. REV. STAT. ch. 38, para. 16D-5(b)(3)(iii) (1987).