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I. INTRODUCTION

During the *Survey* period, July 1, 1986, through July 1, 1987, the Illinois Supreme Court considered a wide range of criminal law issues. This article will describe the cases that were decided, as well as examine the court's position on the issues presented. Additionally, this article will highlight important changes in, and additions to, the criminal statutory law of Illinois during the *Survey* period.

II. CASE LAW

The Illinois Supreme Court exercised great discretion in its review of substantive criminal law during the *Survey* period. Consequently, the volume of case law available for examination is relatively low. During the *Survey* period, the court reviewed convictions based primarily upon circumstantial evidence, convictions based upon the commission of more than one offense, and convictions involving lesser included offenses. The court construed provisions in statutes governing the use of deadly force in defense of dwellings, aggravated battery of a child, forgery, eavesdropping, and driving under the influence. The court also determined the constitutionality of several statutes involving arson, controlled substances, mandatory seat belts, driving privileges, and highway solicitation.

A. The State's Burden of Proving a Defendant Guilty Beyond a Reasonable Doubt

1. Circumstantial Evidence: The Dream Murder Case

In *People v. Linscott*,[1] the court upheld a conviction based exclusively upon circumstantial evidence. At trial, the jury found the defendant not guilty of rape, but guilty of the murder of his neighbor, a twenty-four year old female student.[2] The conviction was based upon the defendant's voluntary recounting to the police of his dream of an unknown woman's brutal beating.[3] Although some physical evidence corroborated the dream, other physical evidence did not.[4]

In reviewing the evidence presented at trial, the court did not distinguish between appellate review of convictions based upon direct evidence and appellate review of convictions based upon circumstantial evidence. In doing so, the court neither used the standards for deciding circumstantial evidence cases, nor stated that it was abandoning those standards.

Influenced primarily by the defendant's dream, the Illinois Supreme Court reversed the appellate court, affirmed the trial court's conviction,[5] and remanded.[6] The court concluded that the

1. 114 Ill. 2d 340, 500 N.E.2d 420 (1986).

2. *Id.* at 342, 500 N.E.2d at 421. Linscott received a forty-year prison sentence. *Id.*

3. *Id.* at 344-46, 500 N.E.2d at 421-23.

4. *Id.* at 347-48, 500 N.E.2d at 423. For an accounting of the physical evidence discovered at the scene of the murder, see *infra* notes 7 and 8. For a concise yet more detailed accounting of the facts in the case, the defendant's statements to the police, and the physical evidence presented to the court, see the appendix set forth in the appellate court's opinion on remand in *Linscott*, 159 Ill. App. 3d 1303, 511 N.E.2d 1303 (1st Dist. 1987).

5. *Linscott*, 114 Ill. 2d at 349, 500 N.E.2d at 421. The appellate court reversed the conviction because it concluded that Linscott's failure to admit guilt was significant in preventing his dream account from attaining confession status. The appellate court held that the circumstantial evidence was insufficient to exclude every reasonable theory of innocence. It further ruled that because the defendant's account was either inexplicit or inconsistent with many of the facts, it merely raised a possibility or suspicion of the defendant's guilt. *Linscott*, 135 Ill. App. 3d 773, 777-79, 482 N.E.2d 403, 407 (1st Dist. 1985).

Justice McNamara, however, would have affirmed the conviction based on: (1) the defendant's (dream) statements to the police exhibiting his knowledge of the crime, which he found equivalent to a confession, and (2) the support of certain physical evidence such as hair and blood findings. *Id.* at 780-81, 482 N.E.2d at 408 (McNamara, J., dissenting).

6. *Linscott*, 114 Ill. 2d at 349, 500 N.E.2d at 424. On remand, the appellate court considered two issues which it did not previously address. First, the court examined the prosecution's presentation of expert testimony in its closing argument. Second, the court scrutinized the State's destruction of physical evidence in the case. Subsequently, the appellate court remanded the case for a new trial on the murder charge because it concluded that the prosecutor's fabrication and distortion of evidence during closing argu-

defendant's dream reflected his personal knowledge of unusual details of the crime which sufficiently supported a jury's inference of guilt.[7] Based on the dream and certain forensic evidence,[8] the court concluded that the evidence was not "so unsatisfactory that no rational trier of fact could find the defendant guilty beyond a reasonable doubt," and concluded that the conviction was reasonable.[9]

Chief Justice Clark wrote a lengthy dissent criticizing the majority's failure to distinguish the standard used in reviewing a case based upon circumstantial evidence from a case based upon direct evidence.[10] The Chief Justice advocated following the court's precedent of distinct standards of appellate review,[11] and he charged

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ment regarding blood and hair comparisons were "so egregious" that the defendant was denied a fair trial. People v. Linscott, 159 Ill. App. 3d 71, 511 N.E.2d 1305 (1st Dist. 1987). Regarding the physical evidence, the State conducted a destructive test on the only vaginal swab taken from the victim after the defendant had requested, in a pre-trial discovery motion, a "list of all physical property that the State intends to use at trial" and that he have access to evidence prior to trial. *Id.* at 81, 511 N.E.2d at 1310. The court concluded that defendant's due process rights were not violated because the vaginal swab was not material and, thus, irrelevant to defendant's case; and, even if material and relevant, the evidence was inadmissible because the danger of unfair prejudice substantially outweighed any possible probative value. *Id.* at 83-84, 511 N.E.2d at 1311-12.

7. *Linscott*, 114 Ill. 2d at 344-47, 500 N.E.2d at 422-23. The court concentrated on the similarities between the defendant's statements and the actual crime. The defendant's account of the beating, his knowledge of the murder weapon, his knowledge of the victim's passive acceptance of the attack, his description of blood splatterings, and the presence of a stereo all corroborated physical evidence found at the scene. *Id.* at 344-45, 500 N.E.2d at 422. Although the supreme court never stated the evidence was purely circumstantial, the State conceded and the appellate court treated it as such.

8. *Id.* at 347-48, 500 N.E.2d at 423. The court also relied on certain physical evidence to support the conviction. Blood and hair samples taken from the scene matched samples taken from the defendant. However, police also recovered physical evidence unrelated to the defendant, such as the hair of a black man. *Id.* at 347-48, 500 N.E.2d at 423. Thus, although the court viewed the physical evidence as inconclusive when standing alone, when taken with the defendant's personal knowledge of the facts surrounding the crime, inferred from his dream, the court held the evidence sufficient for conviction. *Id.* at 348-49, 500 N.E.2d at 424.

9. *Id.* at 348, 500 N.E.2d at 423. The *Linscott* court followed the standard of review set forth in People v. Collins, 106 Ill. 2d 237, 478 N.E.2d 267 (1985), *cert. denied*, 474 U.S. 935 (1985), *reh'g. denied*, 474 U.S. 1027 (1985) (when reviewing the sufficiency of evidence, it is not the court's function to retry the defendant). In *Collins* a participant in the defendant's activities provided the State with direct evidence and the court used a standard of review for convictions based upon direct evidence.

10. *Linscott*, 114 Ill. 2d at 349-57, 500 N.E.2d at 424-28 (Clark, C.J., concurring in part and dissenting in part).

11. Since 1917, the court has distinguished the review of a conviction based upon circumstantial evidence from the review of a conviction based upon direct evidence. The court has stated that when the only evidence against the defendant is circumstantial evidence, "the guilt of the accused must be so thoroughly established as to exclude every other reasonable hypothesis." People v. Ahrling, 279 Ill. 70, 116 N.E. 764 (1917). The

the majority with applying the wrong standard.[12] In this case, the dissent concluded that the facts and circumstances did not exclude every reasonable hypothesis of innocence and did not meet the reasonable and moral certainty standards required for convictions based on circumstantial evidence alone.[13]

Justice Simon also dissented, concluding that the evidence was wholly circumstantial, the inferences too tenuous, and the dream evidence too ambiguous to exclude every other reasonable hypothesis of innocence.[14] He charged the majority with incorrectly assessing the coincidences between the defendant's dream and the murder, and with overemphasizing the similarities and ignoring the differences.[15] Not only did he conclude that reasonable doubt existed, he concluded also that the evidence failed to prove either knowledge or intent.[16] Justice Simon argued that without these essential elements, the conviction must fail and should have been

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court has consistently followed this rule. People v. Lewellen, 43 Ill. 2d 74, 250 N.E.2d 651 (1969); People v. Rhodes, 85 Ill. 2d 241, 422 N.E.2d 605 (1981); People v. Whitlow, 89 Ill. 2d 322, 433 N.E.2d 629 (1982). In People v. Bryant, 113 Ill. 2d 497, 499 N.E.2d 413 (1986), the court held that juries need no longer be given the reasonable hypothesis instruction. *Id.* at 511, 499 N.E.2d at 419. However, in neither *Linscott* nor *Bryant* has the court stated that it was abandoning the well-established standard for appellate review. For a discussion of the reasonable hypothesis theory as related in *Bryant* see *infra* notes 60, 71-74 and accompanying text.

12. *Linscott*, 114 Ill. 2d at 349, 500 N.E.2d at 424 (Clark, C.J., concurring in part and dissenting in part). Chief Justice Clark concluded that the defendant's statement represented a dream and not a recollection of an actual event. He concluded the dream was purely circumstantial evidence. *Id.* at 353, 500 N.E.2d at 425-26. Verdicts in cases based upon wholly circumstantial evidence rested on both the witness' credibility and on the reasonableness of inferences drawn from presented facts. *Id.* at 355, 500 N.E.2d at 427. Although Chief Justice Clark agreed that a reasonable hypothesis instruction need no longer be given to a jury, he advocated retaining the reasonable hypothesis standard for purposes of appellate review. *Id.* at 355, 500 N.E.2d at 427. For a more detailed account of the reasonable hypothesis theory, *see supra* notes 60, 71-74 and accompanying text.

13. *Id.* at 356-57, 500 N.E.2d at 427-28 (Clark, C. J., concurring in part and dissenting in part). Chief Justice Clark believed that the court defied common sense by concluding that the defendant's description of the details of the crime was "unusual" or "strangely coincidental." *Id.* at 356, 500 N.E.2d at 427. Declaring the forensic evidence weak and lacking in all probative value, the Chief Justice concluded that Linscott was convicted upon suspicion alone. The Justice acknowledged that the defendant had described only one truly unusual detail connected with the crime, which was the victim's passive acceptance of death evidenced by a Hindu hand-signal made at the time of death. The Chief Justice concluded that this one coincidence could not alone entitle the reasonable jury to convict the defendant. *Id.* at 357, 500 N.E.2d at 428 (Clark, C. J., concurring in part and dissenting in part).

14. *Id.* at 358, 361, 500 N.E.2d at 428, 429-30 (Simon, J., concurring in part and dissenting in part).

15. *Id.* at 358-60, 500 N.E.2d at 428-29. (Simon, J., concurring in part and dissenting in part). For a further critical examination of the evidence against Linscott, see People v. Linscott, 135 Ill. App. 3d 773, 777-79, 482 N.E. 2d 403, 406-07.

16. *Linscott*, 114 Ill. 2d at 360, 500 N.E.2d at 429.

reversed.[17]

2. Felony-Murder

The Illinois Supreme Court reviewed a felony-murder conviction in *People v. Brackett*.[18] In *Brackett*, the defendant raped and severely beat an eighty-five year old widow, Mrs. Winslow, forced her to write a check for one hundred and twenty-five dollars, and after cooking himself a meal and taking a nap, left the victim lying naked and severely bruised in her living room.[19] The State charged Randy Brackett with rape, deviate sexual assault, and aggravated battery.[20] Although her injuries were healing, Mrs. Winslow became extremely depressed and refused to eat.[21] The trauma caused Mrs. Winslow's condition to worsen progressively, and she was subsequently transferred from the hospital to a nursing home where she continued to refuse to eat.[22] Five weeks after the initial attack, the victim died of asphyxiation, which resulted from six ounces of food being aspirated into her trachea.[23] Subsequently, the defendant was charged with and convicted of murder.[24]

On appeal, the defendant contended that he was not proven guilty of murder beyond a reasonable doubt because the evidence was insufficient to prove that any criminal agency had caused the death.[25] Brackett contended also that even if agency were proven,

17. *Id.* at 360-61, 500 N.E.2d at 430 (Simon, J., concurring in part and dissenting in part). Not only did Justice Simon find the dream evidence too ambiguous and the forensic evidence too inconclusive, he also found two factors creating independent substantial doubt: (1) lack of evidence that the victim knew her assailant, and (2) lack of motive on the defendant's part. *Id.* at 361, 500 N.E.2d at 430 (Simon, J., concurring in part and dissenting in part).

18. 117 Ill. 2d 170, 510 N.E.2d 877 (1987).

19. *Id.* at 173, 510 N.E.2d at 879.

20. *Id.* at 172, 510 N.E.2d at 878.

21. *Id.* at 173, 510 N.E.2d at 879. Mrs. Winslow suffered a broken arm, a broken rib, bruises on her face, neck, arms, trunk, and inner thighs, and internal abdominal bruises around the colon and kidney. *Id.* at 173, 510 N.E.2d at 879-80.

22. *Id.* at 173-74, 510 N.E.2d at 879.

23. *Id.* at 175, 510 N.E.2d at 880. Mrs. Winslow's nasal passages were too small and her facial injuries too severe to permit feeding by a nasal gastric tube. *Id.* at 174, 510 N.E.2d at 879. Consequently, Mrs. Winslow was fed small portions of pureed food on a spoon by nursing personnel. *Id.* Mrs. Winslow died while being fed. *Id.* at 174, 510 N.E.2d at 879-80. A pathologist testified that although none of Mrs. Winslow's injuries directly caused her death, the pain associated with a broken rib will inhibit deep breathing, limiting the amount of air available to the lungs which is needed to expel food from the trachea. *Id.* at 175, 510 N.E.2d at 880.

24. *Id.* at 172, 510 N.E.2d at 879.

25. *Id.* at 175, 510 N.E.2d at 880. The defendant argued that Mrs. Winslow's asphyxiation was an intervening event totally unrelated to his admitted crimes of rape and aggravated battery. *Id.* at 175-76, 510 N.E.2d at 880.

he had neither the intent to kill nor the knowledge that his acts created a strong probability of death.[26] Additionally, Brackett claimed that he could not have foreseen that death was a likely consequence of his bare-fisted blows upon the victim.[27]

The court rejected all of the defendant's arguments. [28] The court observed that Illinois courts have held consistently that an intervening cause, if completely unrelated to a defendant's acts, will relieve a defendant of criminal liability. The supreme court acknowledged, however, that the defendant still could be found guilty of murder when his criminal acts contributed to a persons's death.[29] A defendant's acts need not be the sole cause of death.[30] The court refused to find reversible error on the issue of causation and affirmed the circuit court's findings of fact and judgment that the defendant's acts set in motion a chain of events culminating in Mrs. Winslow's death.[31]

The court rejected also the defendant's contention that he lacked the requisite mental state for murder.[32] The court reiterated that death may be the natural consequence of bare-fisted blows when there is great disparity in size and strength between the two parties.[33] Finally, the court held that a defendant's inability to foresee

26. *Id.*

27. *Id.*

28. *Id.* at 181, 510 N.E.2d at 882.

29. *Id.* at 176, 510 N.E.2d at 880 (citing People v. Meyers, 392 Ill. 355, 64 N.E.2d 531 (1946); Cunningham v. People, 195 Ill. 550, 63 N.E. 517 (1902); People v. Schreiber, 104 Ill. App. 3d 618, 432 N.E.2d 1316 (1982); People v. Gulliford, 86 Ill. App. 3d 237, 407 N.E.2d 1094 (1980); People v. Brown, 57 Ill. App. 3d 528, 373 N.E.2d 459 (1978); People v. Paulson, 80 Ill. App. 2d 44, 225 N.E.2d 424 (1967)).

30. 117 Ill. 2d at 176, 510 N.E.2d at 880 (citing People v. Reader, 26 Ill. 2d 210, 186 N.E.2d 298 (1962)).

31. *Id.* at 176-77, 510 N.E.2d at 880-81. The court acknowledged that uncontradicted evidence showed that the ability to expel food was related directly to the volume of air present in the lungs. Mrs. Winslow could neither breathe deeply nor expel food from her trachea, a nasal feeding tube could not be used because of the beating she received, and her depressed, weakened, and debilitated state was the direct result of her trauma resulting from the defendant's attack upon her. *Id.* at 178, 510 N.E.2d at 881. The court stated that a defendant takes his victim as he finds him, and despite a pre-exiting condition, proof of causation will be sufficient as long as the defendant's acts contribute to death. *Id.* The court stated also that a person's age is a significant part of his existing health condition. *Id.* at 179, 510 N.E.2d at 881-81.

32. *Id.* at 179, 510 N.E.2d at 882. Supported by the long-standing Illinois principle of law that death is not ordinarily contemplated as a natural consequence of bare-fisted blows, the defendant argued that he could not know his blows created a strong probability of death or great bodily harm. *Id.*

33. *Id.* The court concluded that the trier of fact was, in this case, entitled to find that a twenty-one year old male, 6'3" tall, weighing 170 pounds who battered and raped an eighty-five year old widow, set in motion a chain of events that contributed to her death. *Id.* at 179, 510 N.E.2d at 882.

the precise manner of death will not relieve him of responsibility when he is charged with a felony.[34] Accordingly, the court concluded that Brackett need not have foreseen that his victim would die from asphyxiation in order to be found guilty of felony murder.[35]

3. Testimony of an Accomplice Witness

The Illinois Supreme Court once again gave deference to the trier of fact and upheld a conviction based upon the sufficiency of evidence reflected in the uncorroborated testimony of an accomplice witness in *People v. Titone*.[36] In a bench trial, the court convicted Dino Titone of armed robbery and the aggravated kidnapping and murder of two victims.[37] The State introduced the voluntary testimony of the codefendant's girlfriend, who served as the "back-up" driver during the crime.[38] The witness testified that the defendant shot the victims and left them to die in an automobile trunk parked in a forest preserve.[39] Before he died, one of the victims identified the codefendant, but failed to identify the defendant.

The defendant contended that he was not proved guilty beyond a reasonable doubt because the only evidence connecting him with the crimes was the uncorroborated testimony of an accomplice witness.[40] He argued further that the witness' testimony was suspect because she had hopes for a reward from prosecution and because she had used cocaine during her relationship with one of the

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34. *Id.*

35. *Id.* at 181, 510 N.E.2d at 882.

36. 115 Ill. 2d 413, 505 N.E.2d 300 (1986), *cert. denied*, 108 S. Ct. 210 (1987).

37. *Id.* at 415, 505 N.E.2d at 300. Defendants Robert J. Gacho and Joseph Sorrentino were also charged and convicted of the same crimes. The three cases were severed and Titone and Gacho were subsequently tried simultaneously before a single judge. Gacho elected a jury trial. Titone chose a bench trial. The court subsequently sentenced him to death. *Id.*

38. *Id.* at 416, 505 N.E.2d at 300-01. The codefendant's girlfriend and back-up driver was the prosecution's chief witness. *Id.*

39. *Id.* at 416-17, 505 N.E.2d at 301.

40. *Id.* at 418, 505 N.E.2d at 301-02. The defendant contended also that even if the witness' testimony served to corroborate evidence as to certain events on the morning of the murders, it did not corroborate evidence concerning the identity of the perpetrator. *Id.* at 419, 505 N.E.2d at 302. He argued further that the circuit court erred in admitting into evidence a prior court-reported statement of the witness which he believed was motivated by her desire to avoid prosecution. *Id.* at 422-23, 505 N.E.2d at 303-04. Lastly, the defendant contended that his right to remain silent was violated when the State was permitted to impeach his exculpatory testimony by questioning him about his failure to advise police, at the time of his arrest, of his whereabouts on the night of the murders. *Id.* at 423-24, 505 N.E.2d at 304.

defendants.[41]

The supreme court concluded that the discovery of the victims at the scene sufficiently corroborated the sole witness' testimony implicating the defendant. The court ruled that the witness' statements were consistent, voluntary, uninfluenced by any "deal" with the State, and unaffected by drugs. Therefore, the evidence was not so improbable as to create reasonable doubt.[42] Finding the evidence sufficient, the court agreed with the trial court's assessment of the witness' credibility and conclusion of guilt beyond a reasonable doubt.[43]

In dissent, Justice Simon emphasized the lack of any physical evidence tying the defendant to the crime and criticized the majority for creating reasons explaining the victim's failure to identify the defendant.[44] Furthermore, the chief witness was an accomplice, transported to the police station sixteen hours after the crime, only after the police came to her house. Also, she made her statement after police fingerprinted, photographed, and Mirandized her. In light of these events, Justice Simon questioned the voluntariness of her testimony and asserted that her involvement was deep enough to cast significant doubt upon her story.[45] In Justice Simon's view, a defendant cannot properly be convicted on the basis of such testimony alone.[46]

B. Consideration of Improper Factors: Multiple Conviction Arising Out of a Single Act

In *People v. Lego*,[47] a jury convicted and sentenced the defendant

41. *Id.* at 418-19, 505 N.E.2d at 302.

42. *Id.* at 421-23, 505 N.E.2d at 302-03. The court concluded that the witness voluntarily agreed to accompany police and that "the only thing asked of her in order to avoid being charged with a crime was that she tell the truth." *Id.* at 420, 505 N.E.2d at 302. The court found no evidence that she had any hopes of escaping prosecution by implicating the defendant. *Id.* at 420, 505 N.E.2d at 303. Although the witness testified that she often used cocaine during the course of her relationship with one of the accomplices, the court found no evidence of drug usage at the time of trial that would bear on the credibility of her testimony. *Id.* at 419, 505 N.E.2d at 303.

43. *Id.* at 422, 505 N.E.2d at 303. The court ordered the defendant executed by lethal injection. *Id.* at 426, 505 N.E.2d at 305.

44. *Id.* at 427, 505 N.E.2d at 305-06 (Simon, J., dissenting).

45. *Id.* at 427-28, 505 N.E.2d at 306 (Simon, J., dissenting). The witness was told that the defendants were going "to waste" the victims, yet she made no attempt to leave. Instead, without compulsion, she attempted to conceal a weapon, but found it would not fit in her purse, and she supplied the "backup" car. *Id.* at 427, 505 N.E.2d at 306 (Simon, J., dissenting).

46. *Id.* at 428, 505 N.E.2d 306 (Simon, J., dissenting).

47. 116 Ill. 2d 323, 507 N.E.2d 800 (1987).

to death on each of four counts of murder.[48] Each murder count dealt with the brutal beating and stabbing of Mary Mae Johnson, an eighty-two-year-old widow.[49]

The supreme court ruled that the trial court erred in entering judgment on each of the four murder counts because the defendant, in fact, committed only one homicide.[50] Guided principally by the precedents set in *People v. Szabo*,[51] *People v. King*,[52] and *People v. Mack*,[53] the court held that convictions for more than one offense cannot be carved from the same physical act.[54] The court reasoned that when multiple convictions were obtained for offenses arising out of a single act, sentence may be imposed only for the most serious offense committed.[55] In the defendant's case, the court affirmed the most serious offense of intentional murder.[56]

48. *Id.* at 332, 507 N.E.2d at 802. The four counts of murder were based upon one intentional murder count and three felony murder counts. The counts were as follows: (1) intentional murder by beating and stabbing, (2) murder while committing the forcible felony of burglary with intent to commit murder, (3) murder while committing burglary with intent to commit theft, and (4) murder while committing an armed robbery. *Id.*

49. *Id.* The victim was found dead in her home after having been stabbed repeatedly and bludgeoned. *Id.*

50. *Id.* at 344, 507 N.E.2d at 807-08.

51. 94 Ill. 2d 327, 447 N.E.2d 193 (1983). In *Szabo*, the defendant was convicted of two counts of intentional murder, two counts of felony-murder, and one count of conspiracy to commit armed robbery. The court held that because only two victims were killed, the defendant could be convicted of only two murders. The court, therefore, erred by convicting the defendant on all four counts. *Id.* at 350, 447 N.E.2d at 204.

52. 66 Ill. 2d 551, 363 N.E.2d 838 (1977), *cert. denied*, 434 U.S. 894 (1977). In *King*, the defendant was convicted of rape and burglary with intent to commit rape. The court sentenced him to concurrent terms on the rape conviction and on the burglary conviction. The court held that the constitution did not bar multiple convictions and concurrent sentences for offenses arising from multiple acts that are identical to or motivated by some greater criminal objective. *Id.* at 565, 363 N.E.2d at 844. Because the offenses of rape and burglary were based on separate acts, each requiring proof of a different element, convictions for both can be proper. *Id.* at 566, 363 N.E.2d at 844-45. When more than one offense arises from a series of incidental or closely related acts, and the offenses are not lesser included offenses, the court can enter convictions with concurrent sentences. *Id.* at 566, 363 N.E.2d at 845.

53. 105 Ill. 2d 103, 473 N.E.2d 880 (1984). In *Mack*, the defendant was convicted of two counts of armed robbery and three counts of murder based on the shooting death of a security guard during a bank robbery. The court held that the defendant should have been convicted of only one count of robbery because there was only one taking of money from the bank. It further held that, although there was evidence to support the three murder charges, the defendant could be convicted of only one count of murder because the defendant murdered only one man. Only the conviction for the more culpable charge of intentionally and knowingly shooting and killing the victim which arose out of a single act could stand and sentence could be imposed only for the most serious offense. *Id.* at 136-37, 473 N.E.2d at 897-98.

54. *Lego*, 116 Ill. 2d at 344, 507 N.E.2d at 807-08.

55. *Id.*

56. *Id.* at 344, 507 N.E.2d at 808.

Having affirmed the primary murder conviction, the court vacated the conviction on the redundant homicide counts and upheld the order for Lego's execution by lethal injection.[57]

C. *Instructions to the Jury*

1. Lesser Included Offenses

The supreme court reversed a conviction in *People v. Bryant*[58] because the trial judge refused to give the defendant's tendered instruction on criminal damage to property as a lesser included offense to the charge of attempted burglary[59] and on the evidentiary burden to be met when all evidence of guilt is circumstantial.[60]

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57. *Id.* at 353, 507 N.E.2d at 812. Justice Simon dissented in part because he believed the Illinois death penalty to be unconstitutional. For a discussion of significant aspects of criminal procedure also considered by *Lego* involving pretrial publicity, venue, discovery, scope of permissible arguments by counsel, jury instruction, death penalty, sentencing and fair hearing, see the *Criminal Procedure* article in this *Survey.*

58. 113 Ill. 2d 497, 499 N.E.2d 413 (1986).

59. *Id.* at 501-02, 499 N.E.2d at 415. A lesser included offense:

> (a) Is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or
>
> (b) Consists of an attempt to commit the offense charged or an offense included therein.

ILL. REV. STAT. ch. 38, para. 2-9 (1985). The Illinois Supreme Court has recognized three methods for determining whether a particular offense is an included offense of another. They are as follows: (1) by comparing the statutory definitions of the offense to determine whether the more serious offense contains all the elements of the lesser offense, (2) if the more serious offense does not include every element of the lesser offense, by examining the charging instrument to determine whether it contains the missing element(s) necessary for the lesser offense, and (3) by employing the inherent relationship test which looks to the trial proof presented and requires the lesser and greater offenses to be inherently related. The supreme court expressly declined to adopt the inherent relationship method finding it counterproductive. *Bryant*, 113 Ill. 2d at 503, 499 N.E.2d at 415-16.

60. *Bryant*, 113 Ill. 2d at 502, 499 N.E.2d at 415. The appellate court found error with this refusal. The court ruled that because there were no eyewitnesses to the crime, the court should have given the tendered instruction regarding circumstantial evidence. *Bryant*, 131 Ill. App. 3d 1011, 476 N.E.2d 796 (3d Dist. 1985).

The tendered instruction at issue was Illinois Pattern Jury Instruction (IPI) Criminal, No. 3.02 (2d ed. 1981). The instruction provided as follows:

> Circumstantial evidence is proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of defendant. [It] should be considered by you together with all the other evidence .... You should not find the defendant guilty unless the facts or circumstances proved exclude every reasonable theory of innocence.

Id. The court has subsequently found the reasonable theory of innocence instruction obscure and misleading. For a discussion of the reasonable theory of innocence instruction, see *infra* notes 71-74 and accompanying text.

In dissent, Justice Barry alleged the State had not proved the specific intent necessary to satisfy the requisite mental state for the lesser crime of criminal damage to property.

A jury convicted Donald L. Bryant of the attempted burglary of a service station and sentenced him to an extended term of six years imprisonment.[61] Police officers arrested the fleeing defendant about twenty feet from the service station.[62] The burglary gates of the service station were pried away and several panes of glass were broken. The defendant was not wearing a shirt at the time of his arrest and police found a torn, knotted shirt nearby. The service station's owner noticed that several tires stacked outside the station window and a display just inside the window had been disturbed. Although the evidence was primarily circumstantial, the State presented direct testimony and certain physical evidence that connected the defendant to the crime. The defendant presented no evidence at trial.[63]

The supreme court ruled that the trial court should have given the lesser included offense instruction of criminal damage to property.[64] Although the charging instrument did not explicitly specify all the elements of the lesser offense,[65] the court concluded that the indictment set out the main outline of the lesser offense and implicitly set out the mental state of knowledge necessary for conviction of the lesser offense.[66] The indictment alleged attempted burglary[67] which required a knowing entry. The court reasoned that the indictment could be read as alleging an attempt to knowingly enter the premises because the defendant could not be found guilty of attempted burglary without finding intent to knowingly enter.[68] The court viewed the damage to the building as evidence of the

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Furthermore, the judge asserted that the mental state of knowingly damaging the property of another had never even been charged. He also found the evidence of attempt burglary more than circumstantial. Consequently, the justice found no error with the trial judge's refusal of defendant's tendered instructions. *Bryant*, 131 Ill. App. 3d at 1017, 476 N.E.2d at 796 (Barry, J., dissenting).

61. *Bryant*, 113 Ill. 2d at 500, 499 N.E.2d 414.

62. *Id.* at 501, 499 N.E.2d at 414.

63. *Id.* at 501, 499 N.E.2d at 415. Latent fabric impressions on pieces of glass were consistent with the impression produced by the shirt discovered near the scene. *Id.* Also, shards of glass in Bryant's shoes had the same refractive index as the service station's window glass. *Id.*

64. *Id.* at 505, 499 N.E.2d at 416.

65. The one-count indictment alleged that the defendant: "with the intent to commit . . . Burglary in violation of Illinois Revised Statutes, Chapter 38, Section 19-1(a), did perform a substantial step toward the commission of that offense in that he pulled away a screen and broke a window of a building . . . with the intent to enter said building without authority, and to commit therein a theft, in violation of paragraph 8-4(a), Chapter 38, Illinois Revised Statutes." *Bryant*, 113 Ill. 2d at 504-05, 499 N.E.2d at 416.

66. *Id.*

67. For the text of the charge, see *supra* note 65.

68. *Bryant*, 113 Ill. 2d at 505, 499 N.E.2d at 417.

defendant's substantial step toward the commission of a burglary. The court, therefore, held that the charging instrument could be interpreted as containing an implicit allegation that the defendant knowingly caused damage to property, the element necessary for conviction of the lesser offense.[69] The court ruled that the evidence could have "rationally sustained" an acquittal of the greater offense of burglary and a conviction for the lesser offense of criminal damage to property.[70]

2. Reasonable Theory of Innocence Abolished

Importantly, the court also concluded that the reasonable theory of innocence instruction should no longer be used.[71] Paragraph 3.02 of the Illinois Pattern Jury Instructions provides for a reasonable theory of innocence test which is to be used when evidence is strictly circumstantial.[72] The court viewed the instruction as obscure and misleading and refused to find the burden of proof fundamentally different in cases in which the evidence of guilt was entirely circumstantial.[73] Consequently, the court ruled that the same definitional instruction of reasonable doubt should be used in all cases regardless of the nature of the evidence presented.[74]

D. Statutes Analyzed

1. Use of Deadly Force in Defense of a Dwelling

In *People v. Sawyer*,[75] the court interpreted Illinois statutory law permitting the use of deadly force in defense of a dwelling.[76] After

69. *Id.* at 506, 499 N.E.2d at 417.

70. *Id.* at 505-06, 499 N.E.2d at 416-17. Instructions on less serious offenses are not always required. For limits on the operation of the lesser included offense doctrine, see *id.* at 507, 499 N.E.2d at 417-18.

71. *Id.* at 510, 499 N.E.2d at 419.

72. Illinois Pattern Jury Instruction (IPI) Criminal, No. 3.02 (2d ed. 1981). *See supra* note 60. The reasonable theory of innocence charge attempted to express a reasonable doubt standard in the "vocabulary" of circumstantial evidence; and, in effect, attempted to define reasonable doubt. *Id.* at 511, 499 N.E.2d at 419.

73. *Id.* at 511, 499 N.E.2d at 419. The court concluded that the language of the instruction suggested to juries that a unique standard governed cases in which the evidence of guilt was entirely circumstantial and that the burden of proof was, therefore, somehow fundamentally different. *Id.*

74. *Id.* at 511-12, 499 N.E.2d at 419-20.

75. 115 Ill. 2d 184, 503 N.E.2d 331 (1986), *cert. denied*, 107 S. Ct. 3216 (1987).

76. Illinois law provides that:

> A person is justified in the use of force against another when and to the extent that he *reasonably believes* that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is

retrial,[77] a jury convicted Terrance Sawyer of voluntary manslaughter and the trial court sentenced him to the minimum term of four years.[78]

In *Sawyer*, the defendant and victim were acquaintances and rival suitors for the affections of one of the witnesses.[79] Both were present at their mutual girlfriend's house where a heated discussion regarding the relationships occurred.[80] The girlfriend-witness chose the defendant as a suitor and eventually asked the victim to leave.[81] The victim left the house and then re-entered unlawfully, ignoring instructions to stay out. A scuffle ensued and Sawyer stabbed the victim to death.[82]

The only issue raised on appeal was whether the State had proved that Sawyer unjustifiably used force in defense of a dwelling.[83] The Illinois Supreme Court affirmed the voluntary manslaughter conviction, holding the evidence insufficient to support the defendant's affirmative defense.[84]

The court identified two necessary elements to justify the use of force in defense of a dwelling. First, the victim's entry must be "violent," "riotous," or "tumultuous."[85] Second, the defendant must have a reasonable, subjective belief that deadly force is necessary to prevent "an assault upon, or an offer of personal violence to," himself or another within the dwelling.[86] The court concluded

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justified in the use of force which is intended or likely to cause death or great bodily harm only if:

(a) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he *reasonably believes* that such force is necessary to prevent an assault upon, or offer of personal violence to him or another then in the dwelling . . . .

ILL. REV. STAT. ch. 38, para. 7-2(a) (1985) (emphasis added).

77. The trial court initially granted the defendant a retrial after the court determined it had improperly refused to give a tendered jury instruction on the use of force in defense of a dwelling. *Sawyer*, 115 Ill. 2d at 187, 503 N.E.2d. at 332.

78. *Id.* at 187, 191, 503 N.E.2d at 332, 334-35. The appellate court agreed that there was insufficient evidence to justify the defendant's use of force and it affirmed the circuit court's conviction. 139 Ill. App. 3d 383, 386, 487 N.E.2d 662, 664 (3d Dist. 1985).

79. *Sawyer*, 115 Ill. 2d 187, 503 N.E.2d at 333.

80. *Id.* at 188, 503 N.E.2d at 333.

81. *Id.* at 189, 503 N.E.2d at 333.

82. *Id.* at 189-90, 503 N.E.2d at 333-34.

83. *Id.* at 187, 503 N.E.2d at 333.

84. *Id.* at 196-97, 503 N.E.2d at 337. In concluding that the defendant's use of force was unjustified, the court relied on and quoted ILL. REV. STAT. ch. 38, para. 7-2(a) (1983), which is identical to the 1985 statute. For the text of this statute, see *supra* note 76.

85. *Sawyer*, 115 Ill. 2d at 192, 503 N.E.2d at 335.

86. *Id.*

that the defendant failed to prove both necessary elements.[87] Although the victim's re-entry was unlawful, the court found no evidence that he entered in a "violent, riotous or tumultuous manner."[88]

Regarding the second element, the court concluded that the defendant unreasonably believed that he needed to use deadly force to prevent assault or personal violence.[89] Because the defendant did not have a reasonable fear of danger, the court affirmed the jury's voluntary manslaughter conviction[90] and sentence.[91]

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87. *Id.* at 196-97, 503 N.E.2d at 337.

88. *Id.* at 193, 503 N.E.2d at 335. The court clearly distinguished self defense, requiring a defendant's subjective belief of imminent danger to life or threat of great bodily harm, from defense of dwelling, requiring only a threat of assault or personal violence. *Id.* at 193, 503 N.E.2d at 335-36. Both defenses, however, rely on examination of the facts and circumstances and the reasonableness of the defendant's belief. *Id.* According to Illinois Law:

> A person is justified in the use of force [in self-defense] . . . when and to the extent that he *reasonably believes* that such conduct is necessary to defend himself or another against . . . imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he *reasonably believes* that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

ILL. REV. STAT. ch. 38, para. 7-1 (1985) (emphasis added). *See supra* note 76 for text of statute regarding defense of dwelling.

89. *Sawyer*, 115 Ill. 2d at 196-97, 503 N.E.2d at 337. The court distinguished *Sawyer* from People v. Givens, which exonerated the defendant on the grounds of defense of dwelling despite the absence of any struggle before the killing. *Givens*, 26 Ill. 2d 371, 186 N.E.2d 225 (1962). *Givens* involved an elderly, partially blind defendant who shot a stranger after giving warning. *Id.* at 372-73, 186 N.E.2d at 226. Unlike Sawyer, Givens' fear of danger from the intrusion was found to be reasonable. *Id.* at 375-76, 186 N.E.2d at 227. In *Givens*, the intruder was thirty-five years old and weighed about 170 pounds, while the defendant was fifty-nine years old and weighed approximately 130 pounds. The *Givens* court concluded that because the defendant was not physically able to repel the intruder by hand, he reasonably believed that the only way to protect himself and stop the intruder was to shoot the intruder. *Id.* Unlike *Givens*, the defendant and victim in *Sawyer* were approximately the same age and weight and had known each other for eight or nine years. *Sawyer*, 115 Ill. 2d at 196, 503 N.E.2d at 337.

90. Having concluded that the defendant's belief in use of deadly force was unreasonable, the court relied on ILL. REV. STAT. ch. 38, para. 9-2(b)(1985), to affirm the conviction for voluntary manslaughter. *Id.* at 197, 503 N.E.2d at 337. The statute provides in pertinent part:

> A person who intentionally or knowingly kills [another] 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 . . . *but his belief is unreasonable.*

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

91. In dissent, Justice Simon agreed with the defendant's conviction, but disagreed with the four-year sentence imposed. *Sawyer*, 115 Ill. 2d at 197, 201, 503 N.E.2d at 337, 339 (Simon, J., concurring in part and dissenting in part). Justice Simon asserted that the court incorrectly assessed the factors in sentencing. The trial judge found only one miti-

2. Unlawful Use of Weapons

The Illinois Supreme Court addressed the constitutionality of the statute regarding the unlawful use of weapons by felons[92] in *People v. Ryan*.[93] The defendants, four inmates of the Menard Correctional Center, were charged with unlawful possession of weapons[94] after prison officials discovered homemade weapons in their respective cells.[95]

Section 24-1.1 of the Criminal Code prohibits a felon from knowingly possessing any weapon prohibited under section 24-1 of the Code.[96] Section 24-1 of the Code prohibits certain weapons outright,[97] prohibits other weapons only in certain situations,[98] and

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gating factor. *Id.* at 197-98, 503 N.E.2d at 337-38. In doing so, Justice Simon charged the trial judge with rejecting a number of other factors which should have been considered, such as education, employment history, community activities, and circumstances which furnished substantial ground to explain and even excuse Sawyer's conduct such as strong provocation. *Id.* at 198-99, 503 N.E.2d 338. Instead, the trial judge improperly considered the supposedly aggravating factor of the need for deterrence and substantially abused his sentencing discretion. *Id.* at 200, N.E.2d at 339. Justice Simon asserted that deterrence was inapplicable because the defendant was convicted for his unreasonable judgment in the need for deadly force - an offense for which punishment would have little deterrent effect. *Id.* Simon asserted that the assessment was so blatantly improper that justice required a *sua sponte* reconsideration of the sentence. *Id.* at 197, 503 N.E.2d at 337.

92. ILL. REV. STAT. ch. 38, para. 24-1.1 (1985). For the text of this statute, see *infra* note 96.

93. 117 Ill. 2d 28, 509 N.E.2d 1001 (1987). *Ryan* consolidated the State's cases against four felons. The State charged John Ryan, Don Rico Reese, Peter Lee, and Juan DeJesus, each with unlawful possession of a weapon. *Id.* at 30-31, 509 N.E.2d at 162-63.

94. ILL. REV. STAT. ch. 38, para. 24-1.1 (1985). For the text of the statute, see *infra* note 96.

95. *Ryan*, 117 Ill. 2d at 31, 509 N.E.2d at 1001-02.

96. ILL. REV. STAT. ch. 38, para. 24-1.1 (1985). Section 24-1.1 of the Code provides, in relevant part, as follows:

> (a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act . . . if the person has been convicted of a felony under the laws of this State or any other jurisdiction . . . .
>
> (b) Sentence. Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony. Any person who violates this Section while confined in a penal institution . . . is guilty of a Class 1 felony, if he possesses any weapon prohibited under Section 24-1 of this Code regardless of the intent with which he possesses it, and a Class X felony if he possesses any firearm, firearm ammunition or explosive.

Id.

97. *Id.* at para. 24-1(a)(1), (a)(5), (a)(6), (a)(7), (a)(11)(1985). The unlawful weapons prohibited by these provisions include, among others, any bludgeon, black-jack, sandbag, metal knuckles, throwing star, *id.* at para. 24-1(a)(1), spring gun, *id.* at para. 24-1(a)(5), silencer, *id.* at para. 24-1(a)(6), machine gun, grenade, bottle or other container containing any explosive, *id.* at para. 24-1(a)(7), and explosive bullet, *id.* at para. 24-1(a)(11).

prohibits other weapons only when carried or possessed "with intent to use the same unlawfully against another."[99] The weapons allegedly possessed by each of the defendants were included in this last category.[100]

The defendants contended that the statute was unconstitutionally vague on its face for two reasons.[101] First, the statute failed to provide adequate notice of the specific conduct prohibited.[102] Second, the statute failed to provide authorities with meaningful guidance for enforcement.[103]

The defendants found the statute vague because it offered no clear indication of how or when to apply, within an institutional setting, the concepts of abode, land, and place of business, which are used in Section 24.1-1(a) to delimit possession with respect to felons who are not confined.[104] The court, however, ruled that the

98. ILL. REV. STAT. ch. 38, para. 24-1(a)(3), (a)(4), (a)(8), (a)(9), (a)(10), (a)(12). Among the prohibitions are the following: carrying on or about the person or in a vehicle any object containing noxious liquid gas or substance, *id.* at para. 24-1(a)(3), any concealed pistol, revolver, stun gun, taser or other firearm, *id.* at para. 24-1(a)(4), any firearm in any place licensed to sell intoxicating liquor or at any public gathering, *id.* at para. 24-1(a)(8), any firearm when hooded, robed or masked, *id.* at para. 24-1(a)(10), and any bludgeon, black-jack, metal knuckles, switchblade, or any object containing noxious liquid gas while on the grounds of any school, college or university, *id.* at para. 24-1(a)(12).

99. *Id.* at para. 24-1(a)(2). The pertinent paragraph provides as follows:

> (2) Carries or possesses with intent to use the same unlawfully against another, a dagger, dirk, billy, dangerous knife, razor, stiletto, broken bottle or other piece of glass, stun gun or taser or any other dangerous or deadly weapon or instrument of like character . . . .

ILL. REV. STAT. ch. 38, para. 24-1(a)(2)(1985).

100. 117 Ill. 2d at 32, 509 N.E. 2d at 1002. Defendants Ryan, Lee and DeJesus were each charged with possessing weapons made from a metal rod that was sharpened into what was described as a dagger, dirk, or pick; and defendant Reese was charged with possessing two knives, seven inches in length, made from plexiglass. *Id.* at 31-32, 509 N.E.2d at 1002.

101. *Id.* at 33, 509 N.E.2d at 1003. The circuit court invalidated the statute at issue, ruling that the statute was vague and over broad, and that it denied the defendants both due process and equal protection. *Id.* at 30-31, 33, 509 N.E.2d at 1001-02. Upon direct appeal, the supreme court acknowledged that the overbreadth doctrine permitted a party, who would not otherwise have standing, to attack a penal statute if it involved first amendment freedoms, but found the doctrine inapplicable in this case because the challenged provision did not implicate any rights of speech or association or other form of activity protected by the first amendment. *Id.* at 33, 509 N.E.2d at 1003. The circuit court also ruled that the information filed against the four defendants failed to allege an offense. *Id.* at 30-31, 36, 509 N.E.2d at 1001-02, 1005. On appeal, in addition to their constitutional challenge, the defendants continued to plead the insufficiency of information filed. *Id.* at 36-39, 509 N.E.2d at 1004-05. *See infra* note 113.

102. *Id.* at 33, 509 N.E.2d at 1003.

103. *Id.*

104. *Id.* at 34, 509 N.E.2d at 1003. The defendants questioned whether prison confinement included a prisoner being transported from one penal institution to another, or being treated in a private hospital outside the prison grounds. *Id.*

statute must be examined only in light of the specific facts of the four cases involved.[105] The dangerous weapons were found in each defendant's cell, which was a place clearly within the intended reach of the statute.[106] The court consequently ruled that the defendants could not challenge the statute for vagueness because the statute clearly applied to their conduct.[107]

To further support their charge of vagueness, the defendants questioned the practical application and effect of the statute because it failed to provide any exemption for otherwise blameless activity.[108] The court rejected this challenge, reemphasizing that the weapons had been found in the defendants' cells and that, consequently, their conduct clearly fell within the scope of the statute.[109]

Finally, the defendants proposed that the absence of any requirement of unlawful intent with respect to possession of weapons by a felon in confinement deprived the statute of any "core meaning."[110] The court held that the provision regarding intent must be examined with its apparent purpose in mind.[111] In light of the central objective of prison administration to safeguard institutional security, the court concluded that prison officials had an obvious interest in preventing prisoners' access to weapons.[112] Consequently, the court ruled that the statute regarding unlawful possession of a

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 34, 509 N.E.2d at 1003. The defendants contended that prisoners working in the prison kitchen or engaging in recreation on the prison baseball diamond could technically, but innocently violate the statute. *Id.* at 35, 509 N.E.2d at 1003. The court ultimately advised that if the defendants based their challenge on the statute simply because it prohibited innocent conduct, their complaint should be one of substantive due process or statutory interpretation, neither one of which had been pleaded. *Id.* at 36, 509 N.E.2d at 1004.

109. *Id.* at 35, 509 N.E.2d at 1003-04. Furthermore, two of the defendants acknowledged that they had made the weapons for self protection. *Id.* at 35, 509 N.E.2d at 1004. Having engaged in clearly proscribed conduct, a defendant may not complain of vagueness of the law as applied to others. *Id.* (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 495 (1982)).

110. *Id.* at 35, 509 N.E.2d at 1004. The court noted that the offense of unlawful use of weapons requires an unlawful intent when the charge involved possession of a weapon listed in section 24-1(a)(2). Section 24-1.1(a) incorporated the unlawful intent requirement when the felon was not confined in a prison, but section 24-1.1(b) eliminated the intent requirement with respect to a felon confined in prison at the time of the offense. *Id.* at 32, 509 N.E.2d at 1002.

111. *Id.* The court acknowledged that the apparent purpose of the statute was to prohibit even innocent possession of items that were likely to be hazardous in a penal setting. *Id.* at 32-33, 509 N.E.2d at 1002.

112. *Id.* at 35-36, 509 N.E.2d at 1004.

weapon by a felon was not unconstitutionally vague as applied to prison inmates.[113]

3. Aggravated Arson

In *People v. Johnson*,[114] the defendant, Gary Johnson, challenged the constitutionality of the Illinois aggravated arson statute.[115] The State charged Gary Johnson with aggravated arson, alleging that he knowingly damaged a building by fire, when he had reason to know that someone was present within it.[116] The circuit court held that the statute unconstitutionally violated his due process because it failed to define the underlying offense which he allegedly aggravated and dismissed the charge against him. The State then appealed as a matter of right.[117]

In deciding the due process challenge to the charge of aggravated arson, the court relied upon its prior reasoning in *People v. Wick*.[118] Wick was charged with violating section 20-1.1(a)(3) of the aggravated arson statute which provided that an offense was committed when a person knowingly damaged a building by fire and a fireman or police officer was injured at the scene as a result.[119] Wick argued that the statute violated due process and was

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113. *Id.* at 38, 509 N.E.2d at 1005. Regarding the defendants' allegation that the information filed insufficiently charged an offense, the court ruled that even if the information failed to clearly indicate with which subsections of section 24-1.1 the defendants were being charged, the statute created a single offense that could be committed in a variety of ways without any requirement of intent. *Id.* at 37, 509 N.E.2d at 1005. Incorrectly citing the edition of the relevant statutory compilation did not prejudice the defendants, and failing to specifically name the prohibited weapons did not violate the requirement for sufficient notice. *Id.* at 37-38, 509 N.E.2d at 1004-05.

114. 114 Ill. 2d 69, 499 N.E.2d 470 (1986).

115. The challenged statute provided as follows:

> (a) A person commits aggravated arson when by means of fire or explosive he knowingly damages, partially or totally, any building or structure, including any adjacent building or structure, and (1) he knows or reasonably should know that one or more persons are present therein or (2) any person suffers great bodily harm, or permanent disability or disfigurement as a result of the fire or explosion or (3) a fireman or policeman who is present at the scene acting in the line of duty, is injured as a result of the fire or explosion.

ILL. REV. STAT. ch. 38, para. 20-1.1 (1983).

116. *Johnson*, 114 Ill. 2d at 69, 499 N.E.2d at 471. Johnson was charged with violating section 20-1.1(a)(1) of Illinois Revised Statutes (1983). *See supra* note 115 for pertinent text of section 20-1.1(a)(1) of the aggravated arson statute.

117. *Johnson*, 114 Ill. 2d at 69-70, 499 N.E.2d at 471.

118. *Id.* at 70-71, 73, 499 N.E.2d at 471-72 (citing People v. Wick, 107 Ill. 2d 62, 481 N.E.2d 676 (1985)).

119. *Wick*, 107 Ill. 2d 62, 64-65, 481 N.E.2d 676-78 (1985) (citing ILL. REV. STAT. ch. 38, para. 20-1.1(a)(3)(1981)). The 1981 and 1983 statutes are identical. For the text of the aggravated arson statute, see *supra* note 115.

an unreasonable and arbitrary exercise of the state's police power.[120]

The *Wick* court determined that the underlying conduct that the aggravating factors were meant to enhance was not necessarily criminal in nature; and further, that the statute punished both innocent and culpable conduct.[121] The court believed that the lesser offense of simple arson required proof of a greater mental state than the offense of aggravated arson.[122] Because the statute failed to require culpable intent, the court held the statute unconstitutional.[123]

In *Johnson*, the State attempted to distinguish *Wick* by arguing that culpable intent was inherent in Johnson's crime because the basis of a subsection 1 offense was damaging a building with knowledge that a person or persons were present within.[124] The State contended that such an act could not be innocent, but the court remained unpersuaded.[125]

Although the court conceded that the involved offense was inherently culpable, it held culpability alone insufficient to overcome the controlling defect in the aggravated arson statute challenged in *Wick*.[126] Because the legislature failed to define the underlying of-

120. *Wick*, 107 Ill. 2d at 65, 481 N.E.2d at 678.

121. *Id.* at 66, 481 N.E.2d at 678. The statute did not require an unlawful purpose in setting a fire. *Id.* For the pertinent text of section 20-1.1(a)(3), see *supra* note 115.

122. *Wick*, 107 Ill. 2d at 65, 481 N.E.2d at 678. Although simple arson required an unlawful purpose of knowingly damaging property without consent or of fraudulently damaging property, aggravated arson did not. *Id.*

123. *Id.* at 67, 481 N.E.2d at 679. The *Wick* court held section 20-1.1(a)(3) of the aggravated arson statute unconstitutionally broad and ruled that the legislative exercise of police power did not meet the requirement of due process because the provision was not reasonably related to protecting an identifiable public interest. *Id.* at 66-67, 481 N.E.2d at 678-79. The court, however, did not rule on the validity of subsections 20-1.1(a)1 or 20-1.1(a)(2). *Id.* at 67-68, 481 N.E.2d at 679. For the text of section 20-1.1(a)(3), see *supra* note 115. For further discussion of the *Wick* opinion, see Rogers and Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 446-47 (1986).

124. *Johnson*, 114 Ill. 2d at 71, 499 N.E.2d at 472.

125. *Id.* at 70-71, 499 N.E.2d at 471. The court contrasted simple arson with aggravated arson and concluded that simple arson, a class 2 felony, required a higher degree of malice or unlawfulness than did aggravated arson, a Class X felony. *Id.* Section 20-1 defines arson, in pertinent part as follows:

> A person commits arson when, by means of fire or explosive, he knowingly:
>
> (a) Damages any real property, or any personal property having a value of $150 or more, of another without his consent or
>
> (b) With intent to defraud an insurer, damages any property or any personal property having a value of $150 or more.

ILL. REV. STAT. ch. 38, para. 20-1 (1985).

126. *Johnson*, 114 Ill. 2d at 72, 499 N.E.2d at 472.

fense that is aggravated under section 20-1.1(a)(1), the court declared the *Wick* reasoning controlling and held subsection (a)(1) of the aggravated arson statute unconstitutional.[127]

In *People v. Clark*,[128] the trial court found Dexter Clark guilty of aggravated arson,[129] arson,[130] and possession of an incendiary device.[131] For purposes of sentencing, the arson conviction and the aggravated arson conviction merged and the defendant received a fifteen-year prison term for aggravated arson and a concurrent three-year prison term for possession of an incendiary device.[132] The defendant contended that his conviction for aggravated arson

127. *Id.* at 72-73, 499 N.E.2d at 472. *See also* People v. Dukes, 146 Ill. App. 3d 790, 497 N.E.2d 351 (1st Dist. 1986), *appeal denied*, 113 Ill. 2d. 563 (1986); People v. Lekas, 155 Ill. App. 3d 391, 508 N.E.2d 221 (1st Dist. 1987); People v. Orr, 149 Ill. App. 3d 348, 500 N.E.2d 665 (1st Dist. 1986), *rehearing denied*, 515 N.E.2d 120 (1987) (each construing constitutionality of ILL. REV. STAT. ch. 38, para. 20-1.1(a)(1)). In *Johnson*, the court recognized that the General Assembly had amended the aggravated arson statute since the initial judgment had been entered. However, the court explicitly refused to express any opinion as to the amendment's validity. *Johnson*, 114 Ill. 2d at 72-73, 499 N.E.2d at 472. Codified as ILL. REV. STAT. ch. 38, para. 20-1.1 (1985), the amendment attempted to cure the defect noted in *Wick* by defining the underlying offense of arson and only then following-up with three subsections to aggravate the conduct. Aggravated arson is now defined as follows:

> (a) A person commits aggravated arson when in the course *of committing arson* he knowingly damages, partially or totally, any building or structure, including any adjacent building or structure, and (1) he knows or reasonably should know that one or more persons are present therein or (2) any person suffers great bodily harm, or permanent disability or disfigurement as a result of the fire or explosion or (3) a fireman or policeman who is present at the scene acting in the line of duty, is injured as a result of the fire or explosion.

ILL. REV. STAT. ch. 38, para. 20-1.1 (amended 1985) (emphasis added). For a general discussion of the 1985 amendment, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 460 (1986).

128. 114 Ill. 2d 450, 501 N.E.2d 123 (1986).

129. ILL. REV. STAT. ch. 38, para. 20-1.1(a) (1983). *See supra* note 115 for the text of the statute. Clark was charged with violating the 1981 version of the statute which was identical to the 1983 statute cited. The Johnson court subsequently held section 20-1.1(a)(1) unconstitutional. For the text of the statute as amended, see *supra* note 127. For a discussion of *Johnson*, see *supra* notes 114-27 and accompanying text.

130. ILL. REV. STAT. ch. 38, para. 20-1 (1985). For the text of paragraph 20-1, see *supra* note 125.

131. ILL. REV. STAT. ch. 38, para. 20-2 (1985). The pertinent section provides as follows:

> (a) A person commits the offense of possession of explosives or explosive or incendiary devices in violation of this Section when he possesses, manufactures or transports any explosive compound, timing or detonating device for use with any explosive compound or incendiary device and either intends to use such explosive or device to commit any offense or knows that another intends to use such explosive or device to commit a felony.

ILL. REV. STAT. ch. 38, para. 20-2(a)(1985).

132. *Clark*, 114 Ill. 2d at 452, 501 N.E.2d at 124. The appellate court affirmed both the conviction and the sentence. *Id.*

must be reversed because the court had subsequently held section 20-1.1(a)(1) of the statute unconstitutional in *People v. Johnson*.[133] The supreme court agreed, and declared that the conviction was based on an invalid statute.[134] Consequently, the court reversed the conviction for aggravated arson and remanded for re-sentencing because the arson conviction had been merged with the conviction under an aggravated arson statute subsequently declared unconstitutional.[135]

4. Penalty Provision for Look-Alike Substances

People v. Upton[136] challenged the validity of section 1404 of the Illinois Controlled Substances Act.[137] In *Upton*, a jury convicted

133. *Id.* at 460, 501 N.E.2d at 127. For a discussion of *Johnson*, see *supra* notes 114-27 and accompanying text.

134. *Id.* The court affirmed the arson conviction and the conviction and sentence for possession of an incendiary device. *Id.* at 461, 501 N.E.2d at 128. The court noted "in passing" that the aggravated arson statute had been amended to correct the constitutional deficiencies. It held the amendment was irrelevant, however, because the defendant had been charged with violating the former version of the statute. *Id.* at 460, 501 N.E.2d at 128. For the text of the amended statute, see *supra* note 127.

135. *Clark*, 114 Ill. 2d at 460-61, 501 N.E.2d at 127-28.

136. 114 Ill. 2d 362, 500 N.E.2d 943 (1986).

137. *Id.* at 364, 500 N.E.2d at 944. The challenged section provided, in relevant part, as follows:

> (b) It is unlawful for any person knowingly to manufacture, distribute, advertise, or possess with intent to manufacture or distribute a look-alike substance. Any person who violates this subsection (b) shall be guilty of a Class 3 felony, the fine for which shall not exceed $20,000.
>
> (c) It is unlawful for any person knowingly to possess a look-alike substance. Any person who violates this subsection (c) is guilty of a petty offense. Any person convicted of a subsequent offense under this subsection (c) shall be guilty of a Class C misdemeanor.
>
> (d) In any prosecution brought under this Section, it is not a defense to a violation of this Section that the defendant believed the look-alike substance actually to be a controlled substance.

ILL. REV. STAT. ch. 56 ½, para. 1404 (Supp. 1982).

The challenged statute in *Upton* emanated from an earlier "misrepresentation" statute which penalized the sale of a non-narcotic substance, that was represented to be a narcotic, with a penalty of one to ten years imprisonment; whereas the penalty for actual sale carried a term of ten years to life. ILL. REV. STAT. ch. 38, para. 22-40 (1961).

In 1973, the legislature amended this statute to penalize look-alike misrepresentation offenses more severely than actual narcotic offenses. As a result, the fraudulent sale of a controlled substance was penalized as a Class 3 felony with a potential $15,000 fine. ILL. REV. STAT. ch. 56 ½, para. 1404 (1973). The penalty equalled that for the sale of a Schedule III controlled substance. *Id.* at para. 1401 (d). The penalties for Schedule IV or V substances were less severe; each punishable as a Class 4 felony with a potential $10,000 or $5,000 fine. *Id.* at para. 1401(e)(f).

In 1981, the legislature again amended the relevant statutes. Misrepresentation offenses continued to carry greater potential fines than did actual controlled substance offenses. *Compare* ILL. REV. STAT. ch 56 ½, paras. 1401(f)(g), 1402(b), and 1404 (1981).

the defendant of three separate counts of unlawful distribution of look-alike substances.[138] On appeal, Lori Upton claimed that her conviction resulted from the application of an unconstitutional statutory scheme which violated due process by providing for a harsher potential penalty than would have been imposed for delivery of real controlled substances.[139]

The supreme court declared the provision constitutional.[140] The court acknowledged that the penalty provision in *Upton* was virtually identical to a provision that it recently held violated due process in *People v. Wagner*.[141] The court, however, distinguished the statute in *Upton* from the statute in *Wagner* and sustained the constitutionality of the statute.[142] In response to *Wagner*, the legislature amended the statute, and included a preamble that explained and justified the retained penalty disparity.[143] The court concluded

138. *Upton*, 114 Ill. 2d at 366, 500 N.E.2d at 945. The jury sentenced the defendant to one year of conditional discharge and imposed a one hundred dollar fine on each count plus court costs and restitution. *Id.*

139. *Id.* at 364, 500 N.E.2d at 944. The challenged provision of the Controlled Substances Act punished delivery of a non-controlled look-alike substance with a fine of up to $220,000. ILL. REV. STAT. ch. 56 ½, para. 1404(b) (Supp. 1982). Section 1401 of the act, however, punished delivery of controlled substances with either a $5,000, $10,000, or $15,000 fine. ILL. REV. STAT. ch. 56 ½, para. 1401 (e),(f),(g) (Supp. 1982).

After the defendant's conviction but before her appeal, the Legislature, again amended sections 1404 and 1401 of the Controlled Substances Act. Section 1404, as amended, punished delivery of a non-controlled look-alike substance as a Class 3 felony with a fine of up to $150,000. ILL. REV. STAT. ch. 56 ½, para. 1404 (b)(1985). Section 1401, as amended, punished delivery of a controlled substance as a Class 3 felony with a fine of either $75,000, $100,000, or $125,000. ILL. REV. STAT. ch. 56 ½, para. 1401 (e),(f),(g) (1985).

140. *Upton*, 114 Ill. 2d at 375, 500 N.E.2d at 949.

141. 89 Ill. 2d 308, 433 N.E.2d 267 (1982). The issue in *Wagner* concerned the disparity between penalties for the sale of controlled and non-controlled substances. The challenged statute in Wagner punished delivery of a non-controlled, look-alike substance as a Class 3 felony permitting a $15,000 fine. ILL. REV. STAT. ch. 56 ½, para. 1404 (1977). On the other hand, the statute punished delivery or possession of a controlled substance as a Class 3 or 4 felony permitting a $5,000, $10,000, or $15,000 fine. ILL. REV. STAT. ch 56 ½, para. 1401 (d),(e),(f) (1977). The court held that the penalty violated due process because the provisions were not reasonably designed to remedy the evil determined by the legislature to be the greater threat to the public. *Wagner*, 89 Ill. 2d at 313, 433 N.E.2d at 270.

142. *Upton*, 114 Ill. 2d at 373, 376, 500 N.E.2d 948-49.

143. The preamble explicitly recognized that the manufacture, delivery, and possession of look-alike substances carried special dangers and greater harm to users than the manufacture, delivery and possession of prohibited narcotic substances. *Upton*, 114 Ill. 2d at 370-71, 500 N.E.2d at 947. *See also* Rogers & Wetzel, *Criminal Law 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J., 435, 450 (1986). The court also concluded that, unlike Wagner, the penalty provisions in *Upton* did not directly contradict the declared legislative intent. *Upton*, 114 Ill. 2d at 373, 500 N.E.2d at 948.

The *Upton* court further recognized three important changes enacted by amendments to the statute after *Wagner*. These changes were as follows: (1) A lengthy definition of

that the justifications for the penalty disparity were substantially and rationally related to the larger objectives of the Illinois Controlled Substances Act of preventing drug traffic and drug abuse.[144]

5. Eavesdropping

The Illinois Supreme Court announced a broad interpretation of the Illinois Eavesdropping Statute[145] in *People v. Beardsley*.[146] In *Beardsley*, the police stopped the defendant for speeding and arrested him after he refused to tender his license before speaking with counsel.[147] While sitting in a squad car with two officers awaiting a tow truck, the defendant taped the officers' conversation. Neither officer consented to the recording, and both indicated that they were unaware of the taping but knew that the defendant possessed a tape recorder.[148] A jury found Beardsley guilty of speeding and eavesdropping.[149]

Relying on the common law definition of the offense, the common meaning of the term "eavesdropping," and the court's decision in *People v. Klingenberg*,[150] Beardsley contended that

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look-alike substances broadened the category of proscribed substances. ILL. REV. STAT. ch. 56 ½, para. 1102(z)(Supp. 1982). (2) Simple possession of a look-alike substance became a petty offense. ILL. REV. STAT. ch. 56 ½, para. 1404 (c) (Supp. 1982). (3) Penalty provisions retained and actually increased the disparity between maximum fines for look-alike substances and actual narcotic substances. ILL. REV. STAT. ch. 56 ½, para. 1404 (Supp. 1982). *Upton*, 114 Ill. 2d at 367-70, 500 N.E.2d at 945-47.

144. *Upton*, 114 Ill. 2d at 374-75, 500 N.E.2d at 949. The "rationally related" justifications for the penalty disparity included the following: (1) look-alike drugs caused more overdoses either because of their more prevalent impurities or because they lead users to miscalculate dosages of actual narcotics; (2) dealers plausibly made greater profit and thus would be deterred only by greater penalties. *Id.*

The court further declared that due process did not require a precise ratio between two sets of penalties. *Upton*, 114 Ill. 2d at 376, 500 N.E.2d at 950.

145. The pertinent provision of the statute at issue provided that:

> A person commits eavesdropping when he (a) Uses an eavesdropping device to . . . record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party . . . in accordance with Article 108A of the "Code of Criminal Procedure of 1963" . . . .

ILL. REV. STAT. ch. 38, para. 14-2 (1985).

146. 115 Ill. 2d 47, 503 N.E.2d 346 (1986). *Beardsley* presented a rather unusual set of facts. The issue in eavesdropping cases usually involves the question of whether to permit law enforcement authorities to wire-tap.

147. *Id.* at 48-49, 503 N.E.2d at 347-48.

148. *Id.* at 49, 503 N.E.2d at 348.

149. *Id.* at 48, 503 N.E.2d at 347. Beardsley received a seventy-five dollar fine for speeding, a five hundred dollar fine for eavesdropping, and twelve months probation with ten hours of public service. *Id.*

150. 34 Ill. App. 3d 705, 339 N.E.2d 456 (1975) (recording defendant's voice during custodial interrogation after the defendant was arrested and charged with driving while

eavesdropping can occur only when a conversation is intended by the declarant to be private.[151] On the other hand, the State relied on the plain language of the statute, the principles of statutory construction, and the court's decision in *People v. Kurth*,[152] and contended that eavesdropping occurs when a conversation is recorded without the consent of all parties.[153]

The Illinois Supreme Court agreed with the defendant and concluded that the statute's intent was to protect individuals from the surreptitious monitoring of their conversations by eavesdropping devices.[154] It declared that the critical factor in determining the offense of eavesdropping was whether the complainant ever intended the conversation to be private under circumstances that justified an expectation of privacy.[155] The court ruled that no violation of the eavesdropping statute occurred when the conversation was recorded by a third party to the conversation or by one who was knowingly present during the conversation.[156]

The court determined that the officers did not intend their con-

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under the influence was not eavesdropping within the meaning of the statute). The *Klingenberg* court commented that the generally accepted definition of eavesdropping was "to listen secretly to what is said in private." *Id.* at 707, 339 N.E.2d at 458. The court also acknowledged the common law definition as "stand[ing] under the eaves of another home to enable one to hear what was said within the privacy of the home." *Id.* *See also* ILL. ANN. STAT. ch. 38, art. 14 Committee Comments, at 581 (Smith-Hurd 1972).

151. *Beardsley*, 115 Ill. 2d at 51, 503 N.E.2d at 349. The legislature supports this conclusion through its committee comments which state that the statute's primary purpose and intent was to protect an individual's privacy. ILL. REV. STAT. ch. 38, para. 14 committee comments, at 606-07 (1961)(revised 1972).

152. 34 Ill. 2d 387, 216 N.E.2d 154 (1975). *Kurth* held that an unknown, surreptitious recording of a conversation could not be used as evidence against any party who had not consented to the recording or playing of his conversation. *Id.* at 395, 216 N.E.2d 158. The issue, however, did not involve whether the conduct itself was criminal. The statute construed in *Kurth* provided, in relevant part, that a person committed eavesdropping when he "use[d] an eavesdropping device to hear or record all or any part of any conversation without the consent of any party thereto . . . . " ILL. REV. STAT. ch. 38, para. 14-2(a) (1965). The statute was subsequently amended requiring that the hearing or recording be with the consent of all parties. ILL. REV. STAT. ch. 38, para. 14-2(a)(1985). For the text of the amended statute, see *supra* note 145.

153. *Beardsley*, 115 Ill. 2d at 51, 503 N.E.2d at 348.

154. *Id.* at 53, 503 N.E.2d at 349.

155. *Id.* at 54, 503 N.E.2d at 350. To clarify the dimensions of the term "expectation of privacy," the court relied, in part, on the rationale of Lopez v. United States, 373 U.S. 427 (1963). In *Lopez*, the Court concluded that the government had not used an electronic device to record a conversation it could not have otherwise heard because its agent was a participant and fully entitled to disclose the conversation. The electronic device used merely provided the most reliable evidence of the conversation possible. *Id.* at 439.

156. *Beardsley*, 115 Ill. 2d at 56, 503 N.E.2d at 351. The court noted the amended version of the statute brought it into conformity with the court's holding in *Kurth*. *Id.* at 58, 503 N.E.2d at 352.

versation to be private, because they not only spoke in the presence of the defendant, but they also knew that the defendant possessed a tape recorder and they made no attempt to seize the recorder until the defendant was incarcerated.[157] Because the defendant had not listened secretly to a private conversation and had not surreptitiously obtained information otherwise inaccessible to him, the court reversed his conviction.[158]

6. Chemical Blood Analysis for DUI Charges

The supreme court ruled upon the admissibility of chemical analysis relating to the changes of driving while under the influence ("DUI") and reckless homicide in *People v. Emrich*.[159] Joseph Emrich was involved in an early morning automobile collision in which two people were killed. He was subsequently indicted on two counts of reckless homicide and one count of driving under the influence of intoxicating liquor.[160]

The defendant moved to suppress the admission of a chemical blood analysis taken after the collision because the blood had not been mixed with an anticoagulant or preservative as required by Public Health standards.[161] The circuit court suppressed the anal-

157. *Id.* at 54, 503 N.E.2d at 350. The court suggested that if the officers intended their conversation to be private, they would have left the squad car. *Id.*

158. *Id.* at 58-59, 503 N.E.2d at 352. Consequently, the court overruled *Kurth* to the extent it would have ruled the defendant violated the statute by not having the consent of *all* parties present. *Id.* at 59, 503 N.E.2d at 352. The court, however, hastened to add that it may not have made the same decision if the defendant had been equipped with a transmitter instead of a recorder. The court intimated that it may have judged the transmission of the conversation as an impermissible interception. *Id.* Justice Simon wrote a specially concurring opinion, joined by Chief Justice Clark. Justice Simon agreed with the reversal, but only on the basis of the officer's implied consent to the recording itself. *Id.* at 64, 503 N.E.2d at 354 (Simon, J., specially concurring). Justice Simon believed the majority's opinion ignored amendatory language, ignored the history of the statute, and ignored the requirement for the consent of all parties present to the conversation. *Id.* at 59-60, 64, 503 N.E.2d at 352, 355 (Simon, J., specially concurring). He asserted that the majority ignored the manifest legislative intent and damaged the statute's probable cause requirement which permits recording with the consent of one party, only if coupled with a court order obtained in certain circumstances. *Id.* at 62, 64-65, 503 N.E.2d at 354-55 (Simon, J., specially concurring). Justice Simon contended that the statute intends that one must have the consent of all parties before one can record a conversation without a court order. *Id.* at 59, 503 N.E.2d at 352 (Simon, J., specially concurring).

159. 113 Ill. 2d 343, 498 N.E.2d 1140 (1986).

160. *Id.* at 345, 498 N.E.2d at 1141.

161. *Id.* at 346-47, 498 N.E.2d at 1142. ILL. REV. STAT. ch. 95 ½, para. 11-501.2 provides in relevant part:

> Upon the trial of any civil or criminal action or proceeding arising out of an arrest for an offense as defined in Section 11-501 . . . evidence of the concentration of alcohol, other drug or combination . . . in a person's blood or breath at the time alleged, as determined by analysis of the person's blood, urine, breath

ysis because the State's failure to maintain properly the blood sample resulted in spoilation and violated the defendant's due process by denying him an opportunity for an independent analysis.[162]

On appeal, the defendant argued that both the DUI and reckless homicide charges should have been dropped because the evidence failed to meet the requisite standards governing DUI evidence.[163] In addition, the defendant claimed that by failing to add an anticoagulant, the State failed to maintain a proper sample for an independent evaluation and had, therefore, denied him due process.[164]

In a unanimous decision, the supreme court affirmed the suppression of the chemical analysis for the DUI charge.[165] The court, however, reversed the suppression of evidence in the two reckless homicide charges.[166] The court ruled that the statute governing blood analyses applied only to prosecutions for DUI and held that

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or other bodily substance, shall be admissible. Where such test is made the following provision shall apply:

1. Chemical analyses . . . to be considered valid . . . shall have been performed according to standards promulgated by the Department of Public Health in consultation with the Department of Law Enforcement by an individual possessing a valid permit . . . .

ILL. REV. STAT. ch. 95 ½, para. 11-501.2(a)(1) (1985).

The Department of Public Health provided that "when vacuum-type blood-collecting containers are . . . used as primary collecting tubes, two (2) tubes should be collected each containing an anticoagulant/preservative which will not interfere with the intended analytical method." *Emrich*, 113 Ill. 2d at 348, 498 N.E.2d at 1142 (citing Rule 11.01(d)(3) of the Dept. of Public Health Standards and Procedures for Testing of Breath, Blood and Urine for Alcohol and/or Other Drugs (1982)). *See also* People v. Orth, 154 Ill. App. 3d 144, 506 N.E.2d 960 (1987), *cert. denied.* (once results of breathalyzer tests are used in driver's license suspension hearing, evidence the test was performed according to the Department of Health's uniform standard; and that the machine was regularly tested for accuracy are necessary elements of foundation for admission). *Id.* at 147-48, 506 N.E.2d at 963.

In a recent decision, the Illinois Supreme Court held that the testing standards of section 11-501.2 apply to summary suspension proceedings and that licensees may challenge a summary suspension by alleging noncompliance with these standards at a rescissionary hearing. *See* People v. Hamilton, 118 Ill. 2d 153, 160-61, 514 N.E.2d 965, 970 (1987). A licensee may petition for a rescissionary hearing pursuant to ILL. REV. STAT. ch. 95 ½, para. 2-118.1 (1985)

162. *Emrich*, 113 Ill. 2d at 347-48, 498 N.E.2d at 1142. The appellate court affirmed, but never reached the due process issue. Instead the court specifically relied on the failure to add an anticoagulant and interpreted the mandatory language regarding the chemical analysis standards of section 11-501.2 applicable to both reckless homicide and DUI prosecutions suppressing the blood analysis with respect to all counts. *Emrich*, 132 Ill. App. 3d 547, 551-52, 478 N.E.2d 6, 10 (1985).

163. *Emrich*, 113 Ill. 2d at 351-52, 498 N.E.2d at 1144.

164. *Id.* at 353, 498 N.E.2d at 1144.

165. *Id.* at 351, 498 N.E.2d at 1143.

166. *Id.* at 351, 498 N.E.2d at 1144.

the terms of the statute did not apply to evidence introduced in reckless homicide cases.[167] Rather, chemical blood analysis offered as proof in reckless homicide cases must comply only with "ordinary standards of admissibility."[168] Consequently, the court remanded the case for a finding of fact about the accuracy of the chemical blood analysis.[169]

7. The Seat Belt Statute

In a per curiam decision, the Illinois Supreme Court consolidated four cases[170] upon direct appeal and considered the constitutionality of the seat belt statute in *People v. Kohrig*.[171] The court refused to rule on either the desirability or necessity of the law.

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167. *Id.*

168. *Id.* To reach this conclusion, the court relied on its reasoning in People v. Murphy, 108 Ill. 2d 228, 483 N.E.2d 1288 (1985), which held, that with respect to reckless homicide charges, evidentiary blood analysis must meet the ordinary test of admissibility. *Id.* In *Murphy*, like *Emrich*, blood analysis was ruled admissible despite the absence of an anticoagulant. Unlike *Emrich*, however, the *Murphy* court had no doubt about the test's validity and accuracy. In *Emrich*, not only was there a conflict about the test's validity, but there was no finding about its accuracy. *Emrich*, 113 Ill. 2d at 352, 498 N.E.2d at 1144. For a more detailed discussion of People v. Murphy, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 448-49 (1986).

169. *Id.* at 353, 498 N.E.2d at 1144. In addition the court rejected the defendant's due process claim as meritless. *Id.* at 353-54, 498 N.E.2d at 1145. The court held that the State's failure to preserve a blood sample for the defendant's independent testing did not rise to the level of a constitutional violation. *Id.* at 354, 498 N.E.2d at 1145. In rejecting the due process claim, the court relied on California v. Trombetta, 467 U.S. 479 (1984), and concluded that the defendant failed to prove two essential requirements: (1) that the evidence possessed an exculpatory value that was apparent before its destruction and (2) that the evidence was of such a nature that defendant was unable to obtain comparable evidence by other reasonably available means. *Emrich*, 113 Ill. 2d at 353-54, 498 N.E.2d at 1145.

170. In each case, the police charged the defendant with failing to wear a seat belt while operating an automobile on a public street or highway. The circuit courts of Marion, Effingham, Fayette, and Champaign Counties each held the statute to be unconstitutional and dismissed the charges. People v. Kohrig, 113 Ill. 2d 384, 389-91, 498 N.E.2d 1158, 1158-59 (1986).

171. 113 Ill. 2d 391, 498 N.E.2d 1159 (1986). The seat belt statute provides, in relevant part, as follows:

(a) Each driver and front seat passenger of a motor vehicle operated on a street or highway in this State shall wear a properly adjusted and fastened seat safety belt . . . . ILL. REV. STAT. ch. 95 ½, para. 12-603.1(a)(1985).

The statute also provides for certain persons to be exempt from the seat belt use requirement. The following persons and vehicles are exempt:

> 1. A driver or passenger frequently stopping and leaving the vehicle or delivering . . . from the vehicle, if the speed between stops does not exceed 15 miles per hour.
>
> 2. A driver or passenger possessing a written statement from a physician [relating inability] for medical or physical reasons . . . .
>
> 3. A driver or passenger possessing an official certificate or license endorse-

Rather, the court concentrated on whether the statute violated a fundamental right of privacy as guaranteed by the fourteenth amendment and on whether the statute violated the due process clauses of the state and federal constitutions by going beyond the police powers of the state.[172]

Reviewing United States Supreme Court precedent, the Illinois Supreme Court held that the Illinois seat belt law did not violate any fundamental constitutional right or privilege.[173] Without a fundamental constitutional right or liberty implicated, the court concluded that the statute was not subject to strict scrutiny and the state need only show a rational relation between the statute and a legitimate legislative purpose.[174] Applying the rational relation

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ment issued by the appropriate agency in another state or county indicating . . . [inability] for medical, physical, or other valid reasons. . . .

4. A driver operating a motor vehicle in reverse.

5. A motor vehicle . . . [manufactured] . . . prior to 1965.

6. A motorcycle or motor driven cycle.

7. A motorized pedal cycle.

8. A motor vehicle . . . not required to be equipped with seat safety belts under federal law.

9. A motor vehicle operated by a rural letter carrier . . . while performing duties. . . .

ILL. REV. STAT. ch. 95 ½, para. 12-603.1(b)(1) to (b)(9) (1985).

Although a failure to wear a seat belt is not to be considered evidence of negligence nor a limitation of liability of an insurer or of recovery for relevant damages, a violation is deemed a petty offense subject to a maximum fine of twenty-five dollars. ILL. REV. STAT. ch 95 ½, para. 12-603.1(c)(d) (1985).

172. *Kohrig*, 113 Ill. 2d at 392-93, 498 N.E.2d at 1160 (citing U.S. CONST. amend. XIV, § 2; ILL. CONST. art. I, § 6).

173. *Id.* at 394-96, 498 N.E.2d at 1161-62. The court disagreed with the conclusion that the right to decide whether to wear a seat belt is either a right implicit in our concept of liberty or justice or a liberty deeply rooted in the country's history. *Id.* at 395, 498 N.E.2d at 1161. The court found no "textual basis" or "clear historical precedent" for the right to wear a seat belt within the language of either the United States or Illinois constitutions, and refused to act as a "super-legislature." *Id.* at 396, 498 N.E.2d at 1162. The court stated that it was unwilling to "graft onto the Constitution" a right of privacy because to do so would place the court in the position of acting as a super-legislature, nullifying laws it did not like. *Id.*

174. *Id.* at 397-98, 498 N.E.2d at 1162-63. Relying on People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969), which held the statute requiring motorcycle drivers and passengers to wear protective helmets unconstitutional, the defendant argued that the decision to wear a seat belt, like the decision to wear a helmet, was "essentially a matter of personal safety." *Kohrig*, 113 Ill. 2d at 398, 498 N.E.2d at 1163. The State presented and the court cited a host of persuasive authorities holding helmet laws constitutional. *Id.* at 398-400, 498 N.E.2d at 1163. The State noted that the overwhelming weight of authority upheld motorcycle-helmet laws as a valid exercise of the State's police powers and persuasively urged the court to overrule the *Fries* decision. *Id.* at 398, 498 N.E.2d at 1163.

The supreme court subsequently distinguished *Fries* and held that the helmet statute, unlike the seat belt statute, was designed only to protect individuals (motorcycle operators and passengers) rather than the general public. *Id.* at 400, 498 N.E.2d at 1163. The

test,[175] the court concluded that the Illinois legislature had several legitimate interests in requiring the seat belt law.[176] First, the state has an interest in protecting persons other than seat belt wearers by aiding drivers to maintain control of their cars.[177] Second, the state has an interest in promoting economic welfare by reducing public and private costs associated with serious automobile-related injuries and deaths.[178] Mindful of the state's broad power to provide for the health, welfare, and safety of its citizens, the court concluded that the seat belt law is rationally related to public safety and, further, that it promotes the state's economic welfare.[179] Accordingly, the court declared the statute constitutional.[180]

8. Disqualification of Reinstatement of Summary Statutory Suspension of Driving Privileges

In *People v. O'Donnell*,[181] the supreme court reviewed the constitutionality of certain provisions of the Illinois driver's license summary suspension and reinstatement procedure. In May, 1986, a trial court declared certain provisions of the statute[182] unconstitu-

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court conceded that the primary goal of the statute at issue was to protect the individual driver and front-seat passenger. It also noted, however, that the law's primary objective was not controlling as long as the law bears a rational relation to a legitimate legislative purpose. *Id.*

175. When a statute implicates a fundamental right or liberty interest, the statute is subjected to strict scrutiny and the State must show a compelling interest which overrides that right. When no fundamental right or liberty is implicated, however, the law will be upheld if it bears a rational relation to a legitimate legislative purpose and is not arbitrary or discriminatory. Under this test, a statute is presumed valid and the challenger bears the burden of proof. *Id.* at 397-98, 498 N.E.2d at 1162-63.

176. *Id.* at 400-05, 498 N.E.2d at 1164-66.

177. *Id.* at 400, 402, 498 N.E.2d at 1164-65.

178. *Id.* at 400, 403-05, 498 N.E.2d at 1165-66.

179. *Id.* The court reviewed significant parts of legislative debates indicating a legitimate legislative intent to protect and promote public safety and economic welfare. *Id.* at 400-01, 403-04, 498 N.E.2d at 1164-65. The court further held irrelevant the interpretation of empirical evidence to support or deny the law's effectiveness. Evidentiary discovery and interpretation are properly the subject for the legislature and not the courts. *Id.* at 405-06, 498 N.E.2d at 1166.

180. *Id.* at 406, 498 N.E.2d at 1166. The court overruled *Fries* to the extent that it was inconsistent with its finding of validity. *Id.*

181. 116 Ill. 2d 517, 508 N.E.2d 1066 (1987). The court considered the challenge upon direct appeal by the Secretary of State. *Id.*

182. A 1985 state law imposes virtually automatic driver's license suspensions for drunken-driving. ILL. REV. STAT. ch. 95 ½, para. 11-501.1.(1985). In People v. Flores, 155 Ill. App. 3d 964, 508 N.E.2d 1132 (1987), the court upheld the statute providing for summary suspension of drivers who either refuse to submit to a breathalyzer test or of drivers who fail the test. *Id.* at 969-70, 508 N.E.2d at 1135-36. The court concluded that

tional on two grounds.[183] First, the trial court found to be unconstitutionally vague a phrase directing reinstatement of driving privileges after a summary suspension "unless the court has evidence that the person should be disqualified."[184] The court reached its opinion of unconstitutional vagueness after concluding that the statute completely failed to provide any procedures or guidelines in determining whether a driver's privileges should be restored.[185] The trial court found that the section did not enumerate the grounds for disqualification[186] and, that the section did not reveal what evidence could be considered.[187] Finally, the section did not indicate who, if anyone, should present the evidence.[188]

Second, the trial court struck down a provision that directed the circuit court to forward reinstatement fees to the Secretary of State. It held the provision unconstitutional as a violation of the separation of powers.[189]

The supreme court reversed and ruled both provisions constitutional.[190] The court first concluded that the charge of vagueness was meritless, and held that the challenged provision was, as a whole, clear enough to permit uniform enforcement.[191] The court found no evidence that the reinstatement provision typically involved either judicial discretion or ex parte inquiry.[192] Rather, the

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the statute serves the state's strong and substantial interest in removing intoxicated drivers from its highways and provides a basis for equal treatment of drivers. *Id.*

In a recent decision, the Illinois Supreme Court reaffirmed the state's authority to impose summary drivers' license suspensions and struck down a claim that the DUI law unfairly discriminated between alcohol impaired drivers and those under the influence of drugs. *See* People v. Cheryl A. Esposito, No. 63868, slip op. at 6-7 (March 23, 1988).

183. *O'Donnell*, 116 Ill. 2d at 520, 508 N.E.2d at 1067. The specific provisions at issue state, in pertinent part, as follows:

> (b) Following a statutory summary suspension of the privilege to drive . . . the circuit court of venue shall restore full driving privileges when all appropriate fees are paid unless the court has evidence that the person should be disqualified, . . . the court shall notify the Secretary of State.
>
> (c) Full driving privileges may not be restored until all applicable reinstatement fees, . . . have been paid to the circuit court and forwarded to the Secretary of State.

ILL. REV. STAT. ch. 95 ½, para. 6-208.1(b)(c) (1985).

184. *O'Donnell*, 116 Ill. 2d at 521, 508 N.E.2d at 1067-68.

185. *Id.* at 521, 508 N.E.2d at 1068.

186. *Id.* at 522, 508 N.E.2d at 1068.

187. *Id.*

188. *Id.* at 521-22, 508 N.E.2d at 1068.

189. *Id.* at 525, 508 N.E.2d at 1070. For text of the challenged provision, see *supra* note 183.

190. *Id.* at 528, 508 N.E.2d at 1071.

191. *Id.* at 523, 508 N.E.2d at 1068-69.

192. *Id.* at 524, 508 N.E.2d at 1069.

court determined that although the specific grounds for disqualification were not enumerated, they could be discovered by reference to other provisions within the statute that clearly enumerated grounds for suspension and revocation.[193] Regarding the presentation of evidence, the court acknowledged that according to the general terms of the Illinois Vehicle Code, the States Attorney would present any evidence against reinstatement.[194] In addition, the court viewed a recent modification in statutory language as a clarification of the provision challenged and held that the court's interpretation was consistent with the newly stated intent.[195]

Regarding the second challenge to the reinstatement provision, the court concluded that the doctrine of separation of powers did not apply.[196] The court held that the collection and forwarding of fees was a routine and ministerial task and merely an example of interbranch communication and administrative cooperation.[197] The court further held that the constitution did not mandate a complete divorce of the three branches of government and did not prohibit any such cooperative arrangement.[198]

9. Highway Solicitation

In *People v. Tosch*,[199] the State charged Susan Tosch with highway solicitation.[200] At trial, the court declared the solicitation stat-

193. *Id.* at 524-25, 508 N.E.2d at 1069 (citing ILL. REV. STAT. ch. 95 ½, para. 6-205, 6-206, (1985) (relating to circumstances meriting mandatory revocation of a license or permit in hardship cases and relating to discretionary authority to suspend or revoke a license or permit with right to a hearing)).

194. *O'Donnell*, 116 Ill. 2d at 524, 508 N.E.2d at 1069. The general duties of the State's Attorney are set out in ILL. REV. STAT. ch. 14, para. 5 (1985). The State's Attorney is required to prosecute violations of the Illinois Vehicle Code by provisions contained in ILL. REV. STAT. ch. 95 ½, para. 16-102 (1985).

195. *O'Donnell*, 116 Ill. 2d at 525, 508 N.E.2d at 1069-70. Public Act 84-1394 § 6-208.1(b) was recently amended. That section now provides that driving privileges "shall be restored unless the person is otherwise disqualified by this Code." ILL. REV. STAT. ch. 95 ½, para. 6-208.1(b) (Supp. 1986). *See also infra* notes 394, 403-04.

196. Following the precedent set in People v. Reiner, 6 Ill. 2d 337, 129 N.E.2d 159 (1955), the court held that the doctrine of separation of powers comes into play only when one branch exerts a substantial power exclusively belonging to another or when the exercise of administrative functions detracted from the performance of essentially judicial activities of the court. *O'Donnell*, 116 Ill. 2d at 527, 508 N.E.2d at 1071. In *O'Donnell*, the court ruled that neither situation was presented. *Id.* at 528, 508 N.E.2d at 1071.

197. *O'Donnell*, 116 Ill. 2d at 527, 508 N.E.2d at 1071.

198. *Id.* at 528, 508 N.E.2d at 1071.

199. 114 Ill. 2d 474, 501 N.E.2d 1253 (1986), *cert. denied*, 107 S. Ct. 3235 (1987).

200. *Id.* at 477, 501 N.E.2d at 1254 (citing ILL. REV. STAT. ch. 95 ½, para. 11-1006 (1985)). The pertinent statute provides, in relevant part, as follows:

> (a) No person shall stand in a roadway for the purpose of soliciting a ride from the driver of any vehicle.

ute unconstitutional and the State appealed.[201]

Although the State charged the defendant with violating two provisions of the statute which prohibit the stopping of automobiles to solicit a ride or business, she challenged a third provision which permits an exemption for charitable solicitations by agencies which have met specific conditions, and which have received express permission by municipal ordinance.[202] The defendant argued that the statute unconstitutionally favored solicitation for charitable contributions over non-charitable businesses and that it improperly favored some charities over others.[203] The circuit court agreed and concluded that the statute resulted in an arbitrary and unreasonable classification.[204]

On appeal, the defendant conceded that prohibiting solicitation was a valid means of keeping the highways safe for travel, and was legitimately related to the state's duty to provide for the health, safety, and welfare of highway travelers.[205] Tosch argued, however, that the statute improperly regulated fundamental first amendment rights.[206] She also argued that the statute created an unreasonable classification which violated the equal protection provisions in the Federal Constitution and the equal protection and special legislation provisions in the Illinois Constitution.[207]

(b) . . . for the purpose of soliciting employment or business . . .
(c) . . . for the purpose of soliciting contributions . . . .

ILL. REV. STAT. ch. 95 ½, para. 11-1006 (1985).

201. *Tosch*, 114 Ill. 2d at 476, 501 N.E.2d at 1253-54.

202. *Id.* at 476-77, 501 N.E.2d at 1254. To qualify for an exemption, the agency soliciting for the contribution must be:

(1) registered with the Attorney General as a charitable organization . . . .
(2) engaged in a Statewide fund raising activity; and
(3) liable for any injuries to any person or property during the solicitation which is causally related . . . .

ILL. REV. STAT. ch. 95 ½, para. 11-1006(c)(1), (c)(2), and (c)(3) (1985).

203. *Tosch*, 114 Ill. 2d at 478-79, 501 N.E.2d at 1254-55.

204. *Id.* Although the complaint did not state whether Tosch was charged under subsection (a) or (b) of the statute, the circuit court held both subsections unconstitutional. *Id.* at 477-78, 501 N.E.2d at 1254. For text of the statute, see *supra* note 200. The court, however, did not specify whether it held the statute invalid because it violated equal protection guarantees or because it was special legislation, but noted that the standards for determining validity for either were the same. *Tosch*, 114 Ill. 2d at 477, 501 N.E.2d at 1254.

205. *Id.* at 478, 501 N.E.2d at 1254-55.

206. *Id.* at 480, 501 N.E.2d at 1255. *See* U.S. CONST. amend. I.

207. *Tosch*, 114 Ill. 2d at 480, 501 N.E.2d at 1255-56. *See* U.S CONST. amend. XIV; ILL. CONST. art. IV, § 13. Special legislation confers a special benefit or exclusive privilege on a person or group discriminating in favor of a select person or group. *Jenkins*, 102 Ill. 2d at 478, 468 N.E.2d at 1167 (citing Illinois Polygraph Society v. Pellicano, 83 Ill. 2d 130, 137-38, 414 N.E.2d 458, 462 (1980)). The court has applied an equal protection analysis in reviewing statutes challenged under the Illinois special legislation provision.

Specifically, Tosch argued that the provision was discriminatory and non-uniform[208] because municipalities, which must grant permission as a prerequisite to the exemption, operated without statutory guidelines to determine how charities were to be favored.[209] Further, the provision permitted a charitable exemption that was unrelated to any legitimate legislative purpose and created an unreasonable classification because the hazard that the statute sought to eliminate was just as great whether the person was soliciting for an exempt charity or for a non-charitable business or personal purpose.[210]

The supreme court upheld the statute's validity.[211] The court first concluded that the statute imposed a valid time, place, and manner restriction on solicitation and refused to find any fundamental first amendment right implicated.[212] Then, following the precedent set in *Jenkins v. Wu*,[213] the court concluded that the state may treat different classes of people differently and, upon a rational basis, may differentiate between persons similarly situated.[214] Moreover, the court recognized the General Assembly's judgment that solicitations by charities resulted in benefits to the

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Jenkins, 102 Ill. 2d at 477-78, 468 N.E.2d at 1167 (citing Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) for providing the reasoning underlying such similar treatment).

208. *Tosch*, 114 Ill. 2d at 478-79, 501 N.E.2d at 1255. The defendant argued that the provision requiring the agency to be involved in statewide fund raising was discriminatory and aimed at protecting against fund raising by religious cults such as the Moonies and Hare Krishna's. *Id.* at 493-94, 501 N.E.2d at 1255.

209. *Id.* at 481-82, 501 N.E.2d at 1256. The defendant argued that she had standing to sue even though she was not a member of the class against whom she claimed the statute discriminates (a charity) because the subsections of the statute are so interrelated. The court, however, rejected her contention and held that she failed to raise on appeal the issue of the statute's validity on discriminatory grounds. *Id.* at 477, 501 N.E.2d at 1255.

210. *Id.* at 482, 501 N.E.2d at 1256.

211. *Id.* at 482-83, 501 N.E.2d at 1257.

212. *Id.* at 480-81, 501 N.E.2d at 1255-56.

213. 102 Ill. 2d 468, 468 N.E.2d 1162 (1984). In *Jenkins*, the court upheld a statute which effectively denied medical malpractice plaintiffs access to the records of medical review committees, but permitted such access to physicians whose staff privileges were under attack. *Id.* at 477, 468 N.E.2d at 1166. The court reasoned that the fourteenth amendment did not deny a state the power to treat different classes of persons differently and, in the absence of a fundamental right or suspect classification, a legislature may differentiate between persons similarly situated if there was a rational basis for doing so. *Id.* at 477, 468 N.E.2d at 1166-67 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); People v. Mathey, 99 Ill. 2d 292, 458 N.E.2d 499 (1983); People v. Bradley, 79 Ill. 2d 410, 403 N.E.2d 1029 (1980)). The court upheld the statute as an attempt by the legislature to safeguard physicians' rights to due process and held the exemption constitutional. *Jenkins*, 102 Ill. 2d at 482, 468 N.E.2d at 1169.

214. *Tosch*, 114 Ill. 2d at 482, 501 N.E.2d at 1256.

public that offset the inherent risks involved in solicitation.[215] The court concluded, therefore, that the classification was reasonably related to legitimate government objectives.[216]

E. Attorney Disciplinary Proceedings

1. Forgery Warranting Formal Censure

In *In re Levy*,[217] the Chicago Attorney Registration and Disciplinary Commission ("ARDC") successfully charged an attorney, Stephen Levy, with knowingly negotiating a check containing a false endorsement.[218] A review board affirmed the finding and recommended reprimand.[219]

Mercedes Hoffman retained Stephen Levy in her dissolution of marriage action. After her separation, she was injured in an automobile accident. Mr. Hoffman clearly had no monetary interest in this suit. Despite clear instructions from Levy to the insurance company, a settlement check and release were issued in the names of both Mr. and Mrs. Hoffman and sent to Levy's office.[220] After witnessing his client's signature on the release, Levy was called out of the room. On his return, Levy noticed Mr. Hoffman's signature on both Mrs. Hoffman's release and check. He then endorsed his client's check, cashed it, and gave Mrs. Hoffman her share, and returned the release forms to the insurance company. Mr. Hoffman discovered his name had been signed and witnessed falsely and reported Levy to the ARDC.[221]

Relying on the court's definition of fraud in *In re Armentrout*,[222]

215. *Id.* at 482-83, 501 N.E.2d at 1257.

216. *Id.* Chief Justice Clark wrote a dissent longer than the opinion. The Chief Justice concluded that the defendant had standing to sue as a member of an aggrieved class. *Id.* at 485-86, 501 N.E.2d at 1258 (Clark, C.J., dissenting). He asserted that the highway was a public forum which involved fundamental rights protected by the first amendment. *Id.* at 491, 501 N.E.2d at 1258 (Clark, C.J., dissenting). He concluded that the defendant had standing to assert the rights of free speech on behalf of all whose solicitations were penalized under the statute. *Id.* at 487, 501 N.E.2d at 1259 (Clark, C.J., dissenting). Having found a fundamental right, Chief Justice Clark agreed that the statute must be narrowly tailored to meet a compelling state interest, not merely rationally related to a legitimate legislative purpose. *Id.* at 487, 501 N.E.2d at 1260 (Clark, C.J., dissenting). Chief Justice Clark not only viewed the statute as discriminatory, he also failed to see any relationship "whatsoever" to the "safety of the means by which funds are gathered." *Id.* at 483, 501 N.E.2d at 1257 (Clark, C.J., dissenting).

217. 115 Ill. 2d 395, 504 N.E.2d 107 (1987).

218. *Id.* at 396, 504 N.E.2d at 107.

219. *Id.*

220. *Id.* at 397, 504 N.E.2d at 107.

221. *Id.* at 398, 504 N.E.2d at 107-08.

222. 99 Ill. 2d 242, 457 N.E.2d 1262 (1983). *Armentrout* involved a State's Attorney's attempt to induce election officials to place a referendum on an election ballot by

the Administrator claimed that Levy's conduct was fraudulent because he acted dishonestly, fraudulently, and deceitfully, thereby violating the bar's fundamental obligation of honesty.[223] The Administrator sought the attorney's suspension.[224]

The court distinguished *Armentrout* and concluded that the facts clearly indicated that Levy did not have any fraudulent intent to "cause another to assume, create, transfer, alter, or terminate any right, obligation, or power with reference to any person or property."[225] Unlike the defendant in *Armentrout*, Levy lacked the essential element of intent to defraud.[226] The fact that Mr. Hoffman had no interest in the settlement was uncontested, and Levy could not defraud Mr. Hoffman of an interest he did not possess.[227]

The court also distinguished Levy's case from *In re Thebeau*.[228] Unlike the attorney in *Thebeau*, Levy did not fail to disclose pertinent facts to the court and did not permit his client to obtain through forgery anything of value belonging to another. Although Levy's conduct was imprudent, it caused no one harm.[229] After considering several mitigating factors,[230] the court held that Levy's misconduct was serious enough to warrant formal censure rather than reprimand, but not grave enough for suspension.[231]

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forging petition signatures. *Id.* at 245, 457 N.E.2d at 1263. The court ruled that fraud encompasses a broad range of conduct involving dishonesty, deceit, and misrepresentation, including any direct or indirect behavior calculated to deceive. *Id.* at 251, 457 N.E.2d at 1266.

223. *Levy*, 115 Ill. 2d at 399, 504 N.E.2d at 108 (citing *In re* Armentrout, 99 Ill. 2d 242, 457 N.E.2d 1262 (quoting *In re* Lamberis, 93 Ill. 2d 222, 443 N.E.2d 549 (1982))).

224. *Levy*, 115 Ill. 2d at 397, 504 N.E.2d at 107.

225. *Id.* at 399, 504 N.E.2d at 108 (citing ILL. REV. STAT. ch. 38, para. 17-3(b)(1985)).

226. *Id.* (citing ILL. REV. STAT. ch. 38, para. 17-3 (1985)).

227. *Levy*, 115 Ill. 2d at 399, 504 N.E.2d at 108.

228. 111 Ill. 2d 251, 489 N.E.2d 877 (1986). *Thebeau* involved an attorney who, in probating an estate, notarized signatures he had not witnessed, misrepresented facts to a circuit court, knowingly permitted his client to commit forgery, produced no character witnesses on his behalf, and presented no mitigating factors. *Id.*

229. *Levy*, 115 Ill. 2d at 400, 504 N.E.2d at 108. The court has previously disciplined lawyers even though their conduct did not harm any specific individual. *See In re* Armentrout, 99 Ill. 2d 242, 457 N.E.2d 1262 (1983); and *In re* Lamberis, 93 Ill. 2d 222, 443 N.E.2d 549 (1982).

230. In *Levy*, the court found several factors in mitigation. Levy presented several character witnesses, and conducted himself candidly throughout his examination. The court also recognized that the chances of Levy repeating such culpable conduct were very slim. *Levy*, 115 Ill. 2d at 400, 504 N.E.2d at 108-09.

231. *Id.* at 400-01, 504 N.E.2d at 109. The court concluded that Levy was capable of acting in the future with integrity as an attorney and that neither the public nor the profession would be harmed by the continuation of his legal career. *Id.* at 400, 504 N.E.2d at 109.

2. Due Process Requirements for Criminal Contempt Proceedings

In *People v. Waldron*, [232] the court found an attorney, Michael M. Melius, guilty of indirect criminal contempt[233] for his failure to file two briefs in a timely fashion.[234] Melius was appointed by a court to represent certain defendants on appeal.[235] He was granted an extension of time after being denied leave to withdraw as counsel, but the court denied all further motions for extension.[236] Ten months after appellate briefs were due, the appellate court entered a rule to show cause.[237] In compliance with the order for rule to show cause, Melius appeared before the court and presented reasons[238] for having failed to file the required briefs and represented that he would file the briefs within the month.[239] The court subsequently entered an order citing him for indirect criminal contempt.[240]

Melius appealed, alleging that the court had violated due process.[241] He argued that the order for rule to show cause served as insufficient notice of the criminal contempt proceedings against him.[242] Because he had no notice, the defendant alleged that he appeared at the hearing without counsel and was not sufficiently prepared to defend himself against the criminal contempt charge.[243] He claimed further that the proceeding itself did not afford him an opportunity for adequate hearing because he could not present his case through examination of witnesses or presentation of evidence.[244]

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232. 114 Ill. 2d 295, 500 N.E.2d 17 (1986).

233. Indirect criminal contempt is defined generally as wilful conduct outside the court's presence that is calculated to embarrass, hinder, or obstruct a court's administration of justice or derogate its authority or dignity. *Waldron*, 114 Ill. 2d at 297, 302, 500 N.E.2d at 18, 20. *See generally* People v. Javaras, 51 Ill. 2d 296, 281 N.E.2d 670 (1972); People v. Jashunsky, 51 Ill. 2d 220, 282 N.E.2d 1, *cert. denied*, 409 U.S. 989 (1972).

234. *Waldron*, 114 Ill. 2d at 297, 500 N.E.2d at 18.

235. *Id.* at 298, 500 N.E.2d at 18.

236. *Id.*

237. *Id.*

238. The accused advised the court that his office was totally understaffed, that a plan to use law students for research and assistance had failed, and that he had been unable to communicate with the defendants despite diligent efforts. *Id.* at 299, 500 N.E.2d at 19.

239. *Id.* at 298-99, 500 N.E.2d at 18-19.

240. *Id.* at 299, 500 N.E.2d at 19.

241. *Id.*

242. *Id.*

243. *Id.* at 299-300, 500 N.E.2d at 19.

244. *Id.* The State argued that the rule to show cause sufficiently informed Melius of the charges against him; that pleadings in indirect criminal contempt actions need not have all the formalities of a criminal complaint; and that omitting the words "criminal

The court held that in both direct and indirect criminal contempt proceedings, the accused must be accorded sufficient notice and a fair hearing.[245] Because indirect contempt occurs outside the presence of the court, an opportunity to present extrinsic evidence is essential to a fair hearing.[246] The court concluded that the rule to show cause insufficiently notified the defendant of contempt proceedings because it advised only that the accused should show cause why the rules and orders of the court had not been obeyed and not that the accused might be subject to punishment for contempt.[247] Furthermore, the court had conducted proceedings in an informal manner and the accused had not been advised that he could present evidence.[248] Although the court concluded that Melius' conduct failed to meet the standards of the profession, it vacated the order of criminal contempt for the appellate court's failure to comply with the requirement of due process.[249]

III. LEGISLATION

The Illinois General Assembly actively legislated in the area of substantive criminal law during the *Survey* period. The Assembly expanded the offenses of disorderly conduct,[250] retail theft,[251] and criminal trespass.[252] The legislators also amended the residential burglary statute by expanding the definition of "dwelling."[253]

Additionally, the Assembly manifested great concern in the area of fraud and created offenses relating to odometer[254] and home re-

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contempt" from the order to show cause did not automatically violate the notice requirement. *Id.* at 300-01, 500 N.E.2d at 20. The State cited authority from the United States Supreme Court as well as other jurisdictions. *Id.* Finally, the state claimed that Melius waived his due process claim by failing to raise the issue at the time of the proceedings. *Id.* at 301, 500 N.E.2d at 20.

245. *Id.* at 302-03, 500 N.E.2d at 21.

246. *Id.* at 302, 500 N.E.2d at 20.

247. *Id.* at 303, 500 N.E.2d at 21. The court distinguished the case at issue from United States v. United Mine Workers, 330 U.S. 258 (1947) and United States v. Joyce 498 F.2d 592 (7th Cir. 1974), in which respondents were advised that they could be held in contempt and were required by a rule to show cause to demonstrate why they should not be so held.

248. *Walden*, 114 Ill. 2d at 304, 500 N.E.2d at 21.

249. *Id.* at 302, 500 N.E.2d at 21.

250. *See infra* notes 278-86 and accompanying text.

251. *See infra* notes 287, 290-91 and accompanying text.

252. *See infra* notes 288, 292-93 and accompanying text.

253. ILL. REV. STAT. ch. 38, paras. 2-6 & 19-3 (Supp. 1987). For a discussion of the amendment to this statute, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 461 (1986).

254. *See infra* notes 297, 299-302 and accompanying text.

pair fraud,[255] as well as public aid wire and public aid mail fraud.[256] Showing concern for general public welfare and safety, the General Assembly expanded the offense of interfering with public utility services[257] and created the offense of tampering with food, drugs, or cosmetics.[258] Recognizing that not-for-profit charitable organizations provide Illinois with important and necessary educational and social services, the Assembly twice amended the Charitable Games Act in an attempt to provide such organizations with much needed fund raising activities.[259]

During the *Survey* year, the legislature exhibited marked concern for children and amended the statutes relating to child abduction,[260] habitual sex offenders,[261] indecent solicitation of a child,[262] sexual relations within families,[263] and child pornography.[264] The legislature also dealt with time limits on prosecution and factors in aggravation[265] and created the Privacy of Child Victims of Criminal Sexual Offenses Act.[266]

In response to the continuing concern in combating ever-present drug and alcohol problems, the General Assembly amended the Cannabis Control Act,[267] the Controlled Substances Act,[268] the Narcotics and Profit Forfeiture Act,[269] and the Liquor Control Act.[270] Legislators effected procedural changes in the statutory summary alcohol and other drug related suspension provisions of

255. *See infra* notes 298, 303-08 and accompanying text.

256. ILL. REV. STAT. ch. 38, para. 17-9 (Supp. 1986). *See supra* note 19 and accompanying text. For a discussion of these two newly created offenses, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 462 (1986).

257. *See infra* notes 309, 311-16 and accompanying text.

258. *See infra* notes 310, 317-18 and accompanying text.

259. *See infra* notes 319-29 and accompanying text.

260. ILL. REV. STAT. ch. 38, para. 10-5 (Supp. 1987). For a discussion of the amended statute relating to child abduction in relationship to violations of visitation rights, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L. J., 435, 459-60 (1986). *See also* ILL. REV. STAT. ch. 38, para. 10-5(b)(1) (Supp. 1987).

261. ILL. REV. STAT. ch. 38, paras. 221-230 (Supp. 1987). For a discussion of the amendment and the creation of the Habitual Child Sex Offender Registration Act, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 460 (1986).

262. *See infra* notes 332, 336-39 and accompanying text.

263. *See infra* notes 333, 340-44 and accompanying text.

264. *See infra* notes 334, 345-52 and accompanying text.

265. *See infra* notes 353-62 and accompanying text.

266. *See infra* notes 335, 363-66 and accompanying text.

267. *See infra* notes 367-78 and accompanying text.

268. *See infra* notes 379-82 and accompanying text.

269. *See infra* notes 384-87 and accompanying text.

270. *See infra* notes 388-89 and accompanying text.

the DUI statute,[271] repealed certain chemical testing,[272] and effected several perfunctory changes in the DUI procedure and judicial driving permit provisions.[273]

Finally, the General Assembly repealed the feticide law, replacing it with a new statute relating to crimes to unborn children,[274] enacted major revisions in the homicide statute,[275] created a new offense to guard against civil disorder,[276] and passed a new Domestic Violence Act.[277]

A. Disorderly Conduct

The General Assembly passed two Public Acts regarding the criminal offense of disorderly conduct[278] relating to the transmission of false reports of abuse or requests for emergency assistance. Public Act 84-1322, now codified and effective September 4, 1986, specifically related to nursing care facilities and amended the sentence to be imposed for disorderly conduct.[279] A person who knowingly transmits a false report to the Department of Public Health under the Nursing Home Care Reform Act of 1979[280] commits disorderly conduct punishable as a Class B misdemeanor.[281]

Public Act 84-1232, now codified and effective January 1, 1987, punishes false reports of victims of violence and abuse and provides that a person who knowingly transmits false requests for police, fire, paramedic, or ambulance assistance, or who transmits requests without a reasonable belief of need, commits disorderly conduct[282] punishable as a Class A misdemeanor.[283] A person who transmits false reports concerning victims of violence and abuse[284] now com-

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271. *See infra* notes 390-93, 405-07 and accompanying text.

272. *See infra* note 408 and accompanying text.

273. *See infra* notes 394-404 and accompanying text.

274. ILL. REV. STAT. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2, 12-3.1, 12-4.4 (Supp. 1987). For a discussion of the repeal and newly enacted statute see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 457-59 (1986).

275. ILL. REV. STAT. ch. 38, paras. 2-8, 9-1, 9-2 (Supp. 1987). For a discussion of major revisions relating to murder and voluntary manslaughter, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 455-56 (1986).

276. *See infra* notes 417-20 and accompanying text.

277. *See infra* notes 409-16 and accompanying text.

278. ILL. REV. STAT. ch. 38, para. 26-1 (Supp. 1987).

279. *Id.* at para. 26-1(a)(8) and 26-1(b).

280. ILL. REV. STAT. ch. 111 ½, para. 4151-101 *et seq.* (Supp. 1987).

281. ILL. REV. STAT. ch. 38, para. 26-1(b)(Supp. 1987); ILL. REV. STAT. ch. 111 ½, para. 4153-702 (Supp. 1987).

282. *Id.* at para. 26-1(a)(9).

283. *Id.* at para. 26-1(b).

284. ILL. REV. STAT. ch. 23, para. 6501 *et seq.* (Supp. 1987). Public Act 84-1232 grants civil immunity to any person who makes a good faith report of the abuse of an

mits disorderly conduct[285] punishable as a Class B misdemeanor.[286]

B. Retail Theft, Criminal Trespass, and Victim's Rights

Public Act 84-1391, now codified and effective September 18, 1986, effected several changes in the offenses of retail theft[287] and criminal trespass[288] and amended the rights of crime victims.[289] The act expands the offense of retail theft and provides that the amendment takes effect upon the act becoming law.[290] A person commits retail theft when he knowingly and falsely represents to a merchant that he is the owner of merchandise that he is returning or attempting to return in exchange for money, credit or other property.[291]

The General Assembly expanded the offense of criminal trespass to land to include criminal trespass to real property.[292] Any person who either enters or remains upon the land or a non-residential building of another after receiving notice to depart commits the Class C misdemeanor of criminal trespass.[293]

The act also added a new right to the list of Rights of Victims.[294] A crime victim may now hire an attorney, at his own expense, in order to receive copies of all notices, motions, and court orders filed in the case as if he were a party to the suit.[295]

C. Fraud

The General Assembly created several new offenses regarding fraud relating to public state aid,[296] automobile tampering,[297] and

elderly individual, but punishes a knowingly false report of such abuse as disorderly conduct. ILL. REV. STAT. ch. 23, paras. 6504, 6504.1 (Supp. 1987).

285. ILL. REV. STAT. ch. 38, para. 26-1(a)(10) (Supp. 1987); ILL. REV. STAT. ch. 23, para. 6504 (Supp. 1987).

286. ILL. REV. STAT. ch. 38, para. 26-1(b) (Supp. 1987).

287. *Id.* at para. 16A-3.

288. *Id.* at para. 21-3.

289. *Id.* at para. 1404.

290. *Id.* at para. 16A-3.

291. *Id.* at para. 16A-3(f).

292. *Id.* at para. 21-3(a).

293. *Id.*

294. *Id.* at para. 1404.

295. *Id.* at para. 1404(19).

296. The General Assembly created two offenses in an attempt to prevent a person from unlawfully obtaining state public aid payments. Public Act 84-1255 created Public Aid Wire Fraud. *Id.* at para. 17-9. Public Act 84-1256 created Public Aid Mail Fraud. *Id.* at para. 17-9. Both acts became effective January 1, 1987. For a discussion of this statute see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 462 (1986).

297. ILL. REV. STAT. ch. 38, para. 17-11 (Supp. 1987).

home repair.[298] Public Act 84-1391, now codified and effective September 18, 1986, created the offense of odometer fraud.[299] Any person who intentionally defrauds another by disconnecting, resetting, or altering the odometer of any used motor vehicle commits the Class A misdemeanor of odometer fraud.[300] The statute punishes a second or subsequent violation as a Class 4 felony.[301] The offense does not apply to legitimate automotive parts recyclers who recycle used odometers for resale in legitimate business.[302]

Public Act 84-1270, now codified and effective August 11, 1986, provided for the new offense of home repair fraud.[303] A person commits home repair fraud when he knowingly enters into an agreement or contract in which he misrepresents a material fact, uses a false promise or deception to induce a contract, makes an unconscionable agreement, or fails to comply with the provisions of the assumed name act.[304] A person is liable also when he knowingly damages property with the intent to enter into an agreement for repair or knowingly misrepresents himself as an employee of a governmental agency or public utility to induce such an agreement.[305] The offense is aggravated when a person perpetrates the fraud against a person sixty years of age or older.[306] The statute classifies home repair fraud as either a Class A misdemeanor or a Class 3 or 4 felony;[307] and classifies aggravated home repair fraud as either a Class 2, Class 3, or Class 4 felony.[308]

D. Unlawful Interference and Tampering

The General Assembly dealt with the offenses of interfering with public services[309] and tampering with public safety[310] by passing two recently codified Public Acts. Public Act 84-1444, effective July 1, 1987, expanded the offense of unlawful interference with

298. ILL. REV. STAT. ch. 121 ½, para. 1601-05 (Supp. 1987).
299. ILL. REV. STAT. ch. 38, para. 17-11 (Supp. 1987).
300. *Id.*
301. *Id.*
302. *Id.*
303. ILL. REV. STAT. ch. 121 ½, para. 1601-05 (Supp. 1987).
304. *Id.* at para. 1603(a)(1)-(4).
305. *Id.* at para. 1603(b)(1)-(2).
306. *Id.* at para. 1605. The defendant's reasonable belief that the victim was under sixty years of age is no defense. *Id.*
307. *Id.* at para. 1604(a)-(d).
308. *Id.* at paras. 1605(a)-(c). The classification depends upon the amount of the contract and the statute permits an aggregation of amounts. *Id.*
309. ILL. REV. STAT. ch. 38, para. 16-14 (Supp. 1987).
310. *Id.* at para. 12-4.5.

public utility services.[311] The statute creates a rebuttable presumption that an individual has committed unlawful interference with a public utility service in two situations.[312] First, the presumption will exist when any instrument, apparatus, or device is used to obtain utility services without full payment.[313] Second, the presumption will exist when any meter has been altered, tampered with, or bypassed, thereby causing inaccurate measurement of service on premises controlled by a customer or a direct beneficiary of the utility service.[314] The statute punishes conviction as a Class A misdemeanor;[315] any subsequent conviction is punished as a Class 4 felony.[316]

Public Act 84-1428, codified and effective July 1, 1987, created the new offense of tampering with food, drugs, or cosmetics.[317] Any person who knowingly adds any substance into any food, drug, or cosmetic offered for sale or consumption capable of causing death or great bodily injury commits a Class 2 felony of tampering.[318]

E. Gambling

The General Assembly twice amended the offense of gambling during the *Survey* year. Public Act 84-1303, now codified and effective on September 1, 1986, enacted the Charitable Games Act permitting Las Vegas Night types of fund-raising games for non-profit organizations.[319] These games are exempt from prosecution under the gambling statute.[320] Charitable, religious, and educational organizations and institutions organized and conducted on a non-profit basis that are exempt from federal income taxation qualify for the right to engage in charitable games.[321] A qualified organization receives the right to conduct charitable games upon the payment of a two hundred dollar fee subject to certain licensing

311. *Id.* at para. 16-14. A person unlawfully interferes with a public utility service when he knowingly, and without consent, impairs, interrupts or diverts any public water, gas or power supply, or other public service. *Id.* at para. 16-14(a).

312. *Id.* at para. 16-14(c).

313. *Id.*

314. *Id.*

315. *Id.* at para. 16-14(d)(1). If the offense was committed for remuneration, the individual is charged with a Class 4 felony. *Id.*

316. *Id.* at para. 16-14(d)(2).

317. *Id.* at para. 12-4.5.

318. *Id.* at para. 12-14.5(a),(b).

319. ILL. REV. STAT. ch. 120, paras. 1121-1135 (Supp. 1987).

320. ILL. REV. STAT. ch. 38, para. 28-1(b)(9) (Supp. 1987).

321. ILL. REV. STAT. ch. 120, para. 1122 (Supp. 1987).

requirements.[322] The conduct of the games is also subject to certain restrictions.[323] The act prohibits any person who has been convicted of a violation of Article 28 of the Criminal Code of 1961 from entering the licensed premises.[324] Any person who conducts or knowingly participates in an unlicensed game commits the offense of gambling.[325] Violation of the statute constitutes a Class A misdemeanor, and any subsequent offense constitutes a Class 4 felony.[326]

Public Act 84-1407, now codified and made effective upon becoming law, further amends the gambling statute.[327] The statute now permits the drafting, printing, or publishing of lottery or policy tickets if authorized and conducted pursuant to the laws of Illinois or any other state or foreign government.[328] The statute also adds a new provision permitting the advertisement of lotteries and policy games as long as the activity is related to a lottery, bingo game, or raffle authorized by and conducted pursuant to the laws of Illinois or any other state.[329]

F. Children, Abduction, and Sexual Offenses

The General Assembly exhibited marked concern for child abduction,[330] habitual child sex offenders,[331] indecent solicitation of a

322. *Id.* at para. 1123. An Illinois person, firm, or corporation may provide the premises for the charitable games only after receiving a provider's license upon written application and payment of an annual fifty dollar fee, but cannot provide the same premises for more than four days per year. *Id.* at para. 1125. The provider may receive compensation, but it may not be based upon any percentage of the gross receipts. *Id.* A qualified organization conducting games on its own premises is exempt. *Id.* An Illinois person, firm, or corporation may sell, lease, lend or distribute supplies, devices and other games-equipment only after receiving a supplier's license upon written application and payment of an annual five hundred dollar fee. *Id.* at para. 1126. A qualified charitable organization can own its own equipment, but must be similarly licensed upon written application and payment of a fifty dollar fee. *Id.* Provider's and supplier's licenses are valid for one year. *Id.* Certain persons are ineligible for any license under the act. *Id.* at para. 1127.

323. *Id.* at para. 1128.

324. *Id.* at para. 1130.

325. *Id.* at para. 1132.

326. *Id.*

327. ILL. REV. STAT. ch. 38, para. 28-1 (Supp. 1987)(effective September 19, 1986).

328. *Id.* at para. 28-1(a)(9). The prior statute restricted the drafting, printing, and publishing of Illinois Lottery tickets or policy games only if authorized by the Illinois statutes.

329. *Id.* at para. 28-1(a)(10).

330. ILL. REV. STAT. ch. 38, para. 10-5 (Supp. 1986). For a discussion of the amendment, effective August 15, 1986, which relates to child abduction and visitation violations, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 459 (1986).

child,[332] sexual relations within families,[333] child pornography,[334] and the privacy of a child sexual offense victim.[335]

Public Act 84-1280, now codified and effective August 15, 1986, amended the statute relating to the indecent solicitation of a child.[336] The act increases the penalties for the offense of indecent solicitation under certain circumstances.[337] An act which would have been criminal sexual abuse becomes a Class A misdemeanor.[338] An act that would have constituted criminal sexual assault, aggravated criminal sexual assault, or aggravated criminal sexual abuse becomes a Class 4 felony.[339]

Public Act 84-1280 also amended the statute relating to sexual relations within families.[340] The act provides that an individual commits the Class 3 felony of sexual relations within families[341] when the person commits sexual penetration[342] and knows that he or she is related to the other person as brother or sister, of whole blood, of half blood,[343] or as father or mother, when the child is of whole blood, half blood, or adopted, regardless of legitimacy, or as stepfather or stepmother when the stepchild was eighteen years of age or over when the act was committed.[344]

Public Act 84-1280 provided for the additional sanction of forfeiture upon committing the offense of child pornography.[345] A person who commits child pornography must now forfeit any profits or proceeds and any interest or property acquired or maintained

331. ILL. REV. STAT. ch. 38, paras. 221-230 (Supp. 1986). For a discussion of this new act, effective July 1, 1986, requiring the registration of habitual child sex offenders and confidentiality of information concerning minor victims, see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 462 (1986).

332. ILL. REV. STAT. ch. 38, para. 11-6 (Supp. 1987).

333. *Id.* at para. 11-11.

334. *Id.* at para. 11-20.1.

335. *Id.* at paras. 1451-53.

336. *Id.* at para. 11-6(2).

337. *Id.* at para. 11-6(c)(1)(2).

338. *Id.* at para. 11-6(c)(1).

339. *Id.* at para. (6)(c)(2).

340. *Id.* at para. 11-11.

341. *Id.* at para. 11-11(b).

342. *Id.* at para. 11-11(a)(1). The act of sexual penetration is defined in ILL. REV. STAT. ch. 38, para. 12-12 (Supp. 1987).

343. *Id.* at para. 11-11(a)(2)(i).

344. *Id.* at para. 11-11(a)(2)(ii)-(iii). The amendment simply rewrote former subdivision 11-11(a)(2)(ii) as subdivisions 11-11(a)(2)(ii) and (iii). The former subdivision provided in relevant part as follow: "Father or mother, when the child or stepchild, regardless of legitimacy and either of the whole blood or half-blood or by adoption, was eighteen years of age or over when the act was committed." ILL. REV. STAT. ch. 38, para. 11-11(a)(2)(ii) (1985).

345. ILL. REV. STAT. ch. 38, para. 11-20.1 (Supp. 1987).

as a result of the offense.[346] In addition, the offender forfeits any interest, security, claim, and property or contractual right of any kind affording a source of influence over any enterprise he established, operated, conducted, or controlled in relation to child pornography.[347] The Attorney General or State's Attorney may commence forfeiture upon conviction[348] and may petition the court following sentencing for a forfeiture hearing proving its case for forfeiture by a preponderance of evidence standard.[349] The Act authorizes the Attorney General to seize and sell all forfeited property and other interests.[350]

The act further creates a business offense in relation to child pornography.[351] A commercial film or photographic print processor who, within the scope of his professional capacity, has knowledge of, or observes and fails to report, any sexual act or simulation involving a person whom he knows, or should reasonably know, to be under the age of eighteen years commits a business offense and is subject to a one thousand dollar fine.[352]

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346. *Id.* at para. 11-20.1(f)(1)(A).

347. *Id.* at para. 11-20.1(f)(1)(B).

348. *Id.* at para. 11-20.1(f)(2)(C).

349. *Id.* at para. 11-20.1(f)(2)(A). The circuit court may also conduct a non-jury forfeiture hearing upon the People's petition for any restraining order, injunction, or prohibition in connection with any property or interest subject to forfeiture. *Id.* at para. 11-20.1(f)(2)(B). The People must establish that there is probable cause, that the person charged with the offense did, indeed, commit child pornography, and that there is probable cause that the property or interest involved is, indeed, subject to forfeiture. *Id.* The hearing may be conducted simultaneously with a preliminary hearing, or upon the People's motion, at any stage of the proceedings. *Id.* The probable cause standard may be met by the filing of an information charging the offense or by the return of a grand jury indictment. *Id.*

350. *Id.* at para. 11-20.1(f)(2)(C), (D). Following a deduction for the expenses of administration and sale, *id.*, the Attorney General distributes the proceeds equally to the unit or units of government whose personnel conducted the investigation into child pornography and effected the arrest and prosecution leading to the forfeiture. *Id.* at para. 11-20.1(f)(3).

351. *Id.* at para. 11-20.2.

352. *Id.* at para. 11-20.2(vi). An individual is subject to the statute when the sexual act is depicted on any film, photograph, videotape, negative or slide, *id.* at para. 11-20.2, and depicts the child actually or by simulation engaged in any act of:

> (i) . . . sexual intercourse with any person or animal; or
> (ii) . . . sexual contact involving the sex organs of the child and the mouth, anus, or sex organs of another person or animal or [vice-versa], or
> (iii) . . . masturbation; or
> (iv) . . . lewd fondling, touching, or caressing involving another person or animal; or
> (v) . . . excretion or urination within a sexual context; or
> (vi) . . . [being] portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context. . . .

Id. at para. 11-20.2(i)-(vi).

Public Act 84-1280 enacted two important amendments relating to the time limitation for prosecution[353] and aggravating factors in sentencing.[354] Public Act 84-1428, now codified and effective July 1, 1987, also added a paragraph expanding upon the permissible factors for consideration in extended term sentencing.[355]

Added to the offenses receiving extended limitations within which a prosecution must be commenced are the offenses of indecent solicitation of a child, soliciting for a juvenile prostitute, juvenile pimping, and child exploitation.[356] The statutes of limitations for these offenses do not run until one year after the child reaches eighteen years of age and the time for prosecution cannot expire less than three years after the commission of the offense.[357] The limit is similarly expanded for the prosecution of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse when committed against a victim under eighteen years of age.[358]

The act also expanded factors in aggravation that may be considered in sentencing an individual for a criminal sexual offense.[359] A court may now consider the fact that the defendant held a position of trust with a victim who is under eighteen years of age as an aggravating factor subjecting the defendant to a more sever sentence under section 1005-8-1.[360] Public Act 84-1428 added yet another aggravating factor for consideration in sentencing.[361] A court may now impose an extended term sentence under section 5-8-2 upon an offender who was at least seventeen years of age at the time of the crime, and who is convicted of aggravated criminal sexual assault upon a victim who was under eighteen years of age.[362]

With the approval of Public Act 1428, the General Assembly created the Privacy of Child Victims of Criminal Sexual Offenses Act.[363] The act defines a child as any person under eighteen years

353. *Id.* at para. 3-6.
354. *Id.* at para. 1005-5-3.2.
355. *Id.*
356. *Id.* at para. 3-6(d.). Child pornography was already among the list of offenses meriting extended limitations for prosecution. ILL. REV. STAT. ch. 38, 3-6(c)(1985).
357. ILL. REV. STAT. ch. 38, para. 3-6(d) (Supp. 1987).
358. *Id.*
359. *Id.* at para. 1005-5-3.2(a)(12).
360. *Id.* The position of trust or supervision includes, but is not limited to, teacher, scout leader, baby sitter, or day care worker. *Id.* To be considered an aggravating factor, the defendant must have violated section 11-6, 11-11, 11-15.1, 11-19.1, 11-19.2, 11-20.1, 12-13, 12-14, 12-15, or 12-16 of the Criminal Code of 1961. *Id.*
361. *Id.* at para. 1005-5-3.2.
362. *Id.* at para. 1005-5-3.2(c).
363. *Id.* at paras. 1451-53.

of age[364] and protects the confidentiality of law enforcement and court records.[365] The inspection and copying of law enforcement records relating to any investigation or proceeding relating to a criminal sexual offense is restricted to exclude the child victim's identity.[366]

G. Cannabis Control, Controlled Substances, Narcotics, and Forfeiture

The General Assembly responded to the continuing problem of cannabis control by twice amending the Cannabis Control Act.[367] Public Act 82-1233, now codified and effective January 1, 1987, rewrote a paragraph of the act.[368] A person who knowingly produces or possesses the cannabis sativa plant now violates the Cannabis Control Act.[369] The statute punishes the unlawful production or the unauthorized possession of under five cannabis sativa plants as a Class A misdemeanor.[370] A person who produces or possesses more than five, but less than twenty plants is guilty of a Class 4 felony.[371] A person who produces or possesses more than twenty, but less than fifty plants, is guilty of a Class 3 felony.[372] A person who produces or possesses more than fifty plants is guilty of a Class 2 felony, is fined up to $100,000, and is subject to the costs of the investigation and eradication of the plants.[373] A person who engages in a calculated criminal cannabis conspiracy[374] after one or

364. *Id.* at para. 1452.

365. *Id.* at para. 1453.

366. *Id.* The provision does not generally affect access to such records by a judge, state's attorney, assistant state's attorney, psychologist, psychiatrist, social worker, doctor, parent, defendant or defendant's attorney. *Id.* The court, however, may prohibit any person or agency present at court proceedings to further disclose the child victim's identity for the child's protection and upon a showing of good cause after notice and hearing to all affected parties. *Id.* In making its decision, the court will consider both the best interests of the child and the existence of any compelling state interests. *Id.* at para. 1453 (a)-(b).

367. ILL. REV. STAT. 56 ½, paras. 708-09, 715.1, 716.1 (Supp. 1987).

368. *Id.* at para. 708.

369. *Id.*

370. *Id.* at para. 708(a).

371. *Id.* at para. 708(b).

372. *Id.* at para. 708(c).

373. *Id.* at para. 708(d). The forfeited money is collected as compensation for the expenses of enforcement which is made available to the law enforcement agency that conducted the investigation or contributed to the prosecution. *Id.* Receipts are to be used in enforcing laws regulating controlled substances and cannabis. *Id.* Proceeds awarded to the state treasury are deposited in a special Drug Traffic Prevention Fund. *Id.*

374. A person engages in calculated criminal cannabis conspiracy when he possesses or produces more than twenty cannabis sativa plants with two or more persons and ob-

more convictions for the production or possession of more than fifty plants will be guilty of a Class 1 felony.[375]

Public Act 84-1362, now codified and effective September 10, 1986, added two paragraphs to the Cannabis Control Act.[376] Section 15.1 provides that any cannabis derivative that is designated, rescheduled, or deleted as a controlled substance under federal law may be controlled in accordance with the Illinois Controlled Substance Act.[377] Section 16.1 creates an affirmative defense for prosecution under the Cannabis Control Act that the substance possessed was regulated as a controlled substance under the act.[378]

The General Assembly also twice amended the Controlled Substances Act.[379] Public Act 84-1314, now codified and effective January 1, 1987, expanded the nature of prohibited substances by including analogs among the prohibited substances.[380] An analog is now treated in the same manner as the controlled substance to which it is similar.[381]

Public Act 84-1475, now codified and effective February 5, 1987, added a new paragraph providing that any person eighteen years or older who violates the act by using, engaging, or employing a person under eighteen years of age to deliver a controlled, counterfeit, or look-alike substance could be sentenced for a term up to twice the maximum authorized amount found in the pertinent sections.[382]

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tains anything of value greater than five hundred dollars from the act, or when he organizes, directs, or finances the violation or conspiracy. *Id.* at para. 709(b)(1)-(3).

375. *Id.* at para. 709(a)(1).

376. *Id.* at paras. 715.1, 716.1.

377. *Id.* at para. 715.1(a)-(c). The newly-added section also provides procedures for written objections to the designation or deletion of a controlled substance and for the hearing of such objections. *Id.*

378. *Id.* at para. 716.1. The defendant must give the State notice of his affirmative defense not less than seven days prior to trial. *Id.*

379. ILL. REV. STAT. ch. 56 ½, para. 1401 (Supp. 1987); ILL. REV. STAT. ch. 38, paras. 1003-3-2, 1003-8-2, 1005-5-3 (Supp. 1987).

380. ILL. REV. STAT. ch. 56 ½, para. 1401 (Supp. 1987). Controlled substance analogs are substances intended for human consumption that are substantially similar in chemical structure to controlled substances and specifically designed to produce an effect substantially similar to the controlled substance. *Id.* The chemical classes in which controlled substance analogs may be found include phenethylamines, N-substituted piperidines, morphinans, ecgonines, quinazolinones, substituted indoles, and arylcycloalkylamines. *Id.*

381. *Id.* at para. 1401(a)(1)-(11), (c),(d). The act exempts the manufacture, possession or distribution of a substance complying with the provisions of the Federal Food, Drug, and Cosmetic Act relating to new drug applications or investigational uses. *Id.* at para. 1401.

382. *Id.* at para. 1407.1. The defendant must have violated sections 401, 404, or 405 of the act. *Id.*

Public Act 84-1428 altered the method of trial in criminal cases. The state now essentially possesses the right to a jury trial in criminal prosecutions.[383]

Public Act 84-1428 also amended the Narcotics Profit Forfeiture Act.[384] The amendment creates a rebuttable presumption on the state's behalf, that any property or property interest of a person convicted of narcotics racketeering is subject to forfeiture.[385] To initiate the presumption, the state must first establish by a preponderance of evidence that the defendant acquired the property or interest during the period or within a reasonable time after the violation[386] and that there was no likely alternative source for such property or interest.[387]

H. Liquor Control and Driving Under the Influence

The General Assembly created a Class C misdemeanor by amending the Liquor Control Act through its passage of Public Act 84-1379.[388] As of January 1, 1987, a person who rents a hotel or motel room either for the purpose or with the knowledge that persons under twenty-one years will use it for the consumption of alcohol commits a Class C misdemeanor.[389]

The General Assembly passed two public acts dealing with driving while under the influence of alcohol or drugs.[390] The Secretary of State must revoke the license of a driver who is under the age of twenty-one if convicted of driving while under the influence in vio-

383. ILL. REV. STAT. ch. 38, para. 115-1 (1987). All prosecutions except those in which the defendant pleads guilty or guilty but mentally ill shall be tried by a judge and jury unless the defendant, in writing, waives his right to jury trial. *Id.* In criminal prosecutions in which any charges are felony violations of the Cannabis Control Act or Illinois Controlled Substances Act both the State and the defendant must, in writing, waive the right to trial by jury. *Id.*

384. ILL. REV. STAT. ch. 56 ½, para. 1655 (Supp. 1987).

385. *Id.* at para. 1655(b).

386. *Id.* at para. 1655(b)(1).

387. *Id.* at para. 1655(b)(2).

388. ILL. REV. STAT. ch. 43, para. 131 (1987).

389. *Id.* at para. 131(d). As of September 12, 1986, any person twenty-one years or older who pays for a hotel or motel room or other facility knowing the room will be used by persons under twenty-one years for unlawful alcoholic consumption will be liable to any person injured, in person or property, as a result of the intoxication of the youths involved. *Id.* at para. 135(a). The Liquor Control Act was also amended to extend liability for an Illinois dram shop cause of action to persons who sell liquor outside the State of Illinois. *Id.* at para. 135(a). Any person licensed under any law to sell liquor submits himself to the Illinois jurisdiction if he causes the intoxication of a person, by sale or by gift, who caused injury to another while intoxicated. *Id.* at para. 135(b).

390. ILL. REV. STAT. ch. 95 ½, paras. 6-205, 6-206, 6-206.1 6-208, 6-208.1, 6-303, 11-501.1 (Supp. 1987).

lation of section 11-501 of the Illinois Vehicle Code.[391] After one year, upon application, the Secretary of State has the discretion to issue a restricted driving permit.[392] Following this one-year period, the Secretary may issue a license, at his discretion and upon written application, or may extend a revocable restricted driving permit.[393]

Public Act 84-1394, now codified and effective September 18, 1986, made several changes to the DUI procedure and judicial driving permit provisions.[394] The statute expands the circumstances for issuing a restricted driving permit.[395] Upon conviction of a traffic offense meriting license revocation,[396] the Secretary of State may, at his discretion, issue the offender a restricted driving permit granting the privilege to operate a motor vehicle within the scope of his employment. The Secretary of State may also allow transportation for the petitioner or household member, to receive necessary medical care, or for alcohol remedial or rehabilitative activity.[397]

The General Assembly also made several changes affecting the provisions for granting a Judicial Driving Permit ("JDP").[398] In

391. *Id.* at para. 6-205(d).

392. *Id.* Before issuing the permit, the Secretary must be satisfied that the driver will not endanger the public safety or welfare. *Id.* The restriction may pertain to driving limited to the hours of 5 a.m. to 9 p.m. or as otherwise provided. *Id.*

393. *Id.* The Secretary of State may extend the restricted driving permit at his discretion, in twelve month segments, as many times as he deems appropriate until the driver reaches twenty-one years of age. *Id.* The restricted driving permit is subject to cancellation, revocation and suspension in the same manner as a driver's license. *Id.* The secretary will revoke all driving privileges if the driver is convicted of a second or subsequent traffic offense prior to reaching twenty-one years of age. Such an offender cannot apply either for full reinstatement of driving privileges or for a restricted driving permit until he reaches twenty-one or until one year from the date of his latest conviction, whichever is longer. *Id.*

394. ILL. REV. STAT. ch. 95 ½, paras. 6-205, 6-206, 6-206.1, 6-208.1, 6-303, 11-501.1 (Supp. 1987).

395. *Id.* at para. 6-205(c) (Supp. 1987).

396. *Id.* at para. 11-501 (Supp. 1987) (relating to operating or being in physical control of a vehicle while under the influence of alcohol, other drugs, or combination thereof).

397. *Id.* at para. 6-205(c) (Supp. 1987). The petitioner must, however, demonstrate the absence of any other reasonably alternative means of transportation and that he will not endanger the public safety or welfare. *Id.* The prior statute granted a restricted driving permit for the petitioner's use in operating a vehicle from his home to his place of employment or within "other proper limits," but made no specific provision for operating a vehicle to satisfy the duties of one's employment. ILL. REV. STAT. ch. 95 ½, para. 6-205(c) (1985).

398. ILL. REV. STAT. ch. 95 ½, para. 6-206.1 (1985). In cases of hardship, limited driving privileges are granted under specific circumstances to petitioners whose licenses have been summarily suspended. The court will consider several factors prior to issuing a

its Declaration of Policy regarding judicial driving permits, the General Assembly recently recognized the need to provide for limited driving privileges during the period of suspension, by issuing a JDP to allow the offender to continue his employment and to permit other necessary activities related to drug treatment or medical care.[399] If the Secretary of State suspends or revokes the driving privilege pursuant to the Vehicle Code while the JDP is in effect or pending, he shall, upon notice to the person and ordering court, withdraw all driving privileges including the JDP.[400] The court may consider cancellation of the JDP if the petitioner is cited for a traffic related offense, including operating a vehicle outside the JDP limitation, violating section 6-303, or if he is convicted of any offense during the term of the JDP.[401] The court of venue must forward the JDP to the issuing court if the petitioner commits an offense defined in section 11-501, or similar local ordinance which can be evidenced by the issuance of a Uniform Traffic Ticket.[402]

Legislative enactment also effected changes in the statute relating to the period of statutory summary suspension.[403] Following a statutory suspension, a person will be restored to his full driving privileges unless he is otherwise disqualified by the Code or the court has reason to believe the person's driving privilege should not be restored.[404]

JDP. For a list of these factors see Rogers & Wetzel, *Criminal Law, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 435, 457, note 212 (1986). ILL. REV. STAT. ch. 95 ½, para. 206.1(A)(B) (Supp. 1987). Paragraph 206.1(A) was effective from the date of the act, September 18, 1986, until January 1, 1987. Paragraph 206.1(B) became effective on January 1, 1987. These two sections are nearly identical. The most significant change deals with the issuance of the JDP document. Prior to January 1, 1987, the Secretary of State designed and furnished the courts with an official JDP form which the clerk of the court issued upon direction of the court. ILL. REV. STAT. ch. 95 ½, para. 206.1(A)(d)(1985). As of January 1, 1987, the Secretary of State designs and furnishes the court with an official court order form and the court is permitted to issue an order directing the Secretary of State to issue the JDP. ILL. REV. STAT. ch. 95 ½, para. 206.1(B)(a) and (d) (Supp. 1987).

399. Ill. Rev. Stat. ch 95 ½, paras. 206.1(A), 206.1(A)(c) (Supp. 1986); *Id.* at paras. 206.1(B), 206.1(B)(c) (Supp. 1987). Again, the permit is granted within the bounds of public safety and only when the offender has no reasonably alternative means of transportation. *Id.* at para. 206.1(A) (Supp. 1986); *Id.* at para. 206.1(B) (Supp. 1986). The JDP shall be limited and shall specify the days of the week and the specific hours during which the petitioner may operate a motor vehicle. *Id.* at para. 206.1(A)(c) (Supp. 1986); *Id.* at para. 206.1(b)(c) (Supp. 1987).

400. *Id.* at para. 206.1(A)(a)(3)(iii) (Supp. 1986); *Id.* at para. 206.1(B)(a)(3)(iii) (Supp. 1987).

401. *Id.* at para. 206.1(A)(c) (Supp. 1986); *Id.* at para. 206.1(B)(c) (Supp. 1987).

402. *Id.*

403. ILL. REV. STAT. ch. 95 ½, para. 6-208.1 (Supp. 1986).

404. *Id.* at para. 6-208.1(b). For text of prior statute and an unsuccessful constitu-

During the *Survey* period, the General Assembly made one procedural change to the statutory summary alcohol or other drug related suspension provisions.[405] Effective January 1, 1987, whenever a person is arrested for any violation of section 11-501 or a similar provision of a local ordinance, the Secretary of State, upon receipt of the law enforcement officer's sworn report,[406] shall confirm the statutory suspension by mailing a notice of the effective date of the suspension to the person and the court of venue.[407]

Lastly, the General Assembly repealed section 11-501.3 of the Illinois Vehicle Code relating to the chemical testing of a driver involved in a motor vehicle accident involving personal injury or death.[408]

I. Domestic Violence and Civil Disorder

The Illinois General Assembly created the Domestic Violence Act of 1986 by its passage of Public Act 84-1305, now codified and effective August 21, 1986.[409] The act amended the section relating to child abduction.[410] A person now commits the crime of child abduction if he either intentionally violates the terms of any court

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tional challenge to it see People v. O' Donnell, 116 Ill. 2d 517, 508 N.E.2d 1066 (1987); *supra* note 183 and accompanying text.

405. ILL. REV. STAT. ch. 95 ½, para. 11-501.1 (Supp. 1987).

406. ILL. REV. STAT. ch. 95 ½ para. 11-501.1(d) (1985). In a recent decision, the Illinois Supreme Court struck down a claim that the sworn statements which police send to the circuit courts and the Secretary of State were not really "sworn" because they were not offered before individuals licensed to administer oaths and could thus avoid summary suspension. The court found the fact that police officers "solemnly, sincerely, and truly" declare the truth of their reports sufficient to satisfy the statute's intent and sustain summary suspension. The court further declared its opinion that the summary suspension provisions should be construed liberally to accomplish the legislature's purpose of fostering highway safety. A defendant may insist that an unsworn report be corrected, but cannot escape responsibility for drunk driving by a technical deficiency. *See* People v. Badoud, *et al.*, No. 65485, slip op. at 2, 6-7 (March 23, 1988).

407. ILL. REV. STAT. ch. 95 ½ at para. 11-501.1(i) (Supp. 1987). Confirmation of the statutory summary suspension will not be mailed to the person or entered on the record, if the sworn report is found to be defective. *Id.* A report will be defective if it contains insufficient information or has been completed in error. In such a case, the sworn report is then forwarded to the court of venue with a copy returned to the issuing agency identifying the defect. *Id.*

408. *Id.* at para. 11-501.3.

409. ILL. REV. STAT. ch. 40, paras. 2311-2313 (Supp. 1987). The act effected several changes and additions to the Code of Criminal Law, ILL. REV. STAT. ch. 38, paras. 10-5, 12-30 (Supp. 1987) and accomplished substantial amendments and additions to section 109-1 of the Code of Criminal Procedure (the new sections are codified as ILL. REV. STAT. ch. 38, paras. 112A-1 through 112A-25 (Supp. 1987)).

410. ILL. REV. STAT. ch. 38, para. 10-5 (Supp. 1987).

order granting the child's care or possession to another,[411] or if he intentionally conceals or removes the child from a parent after filing a petition in an action affecting marriage or paternity prior to the issuance of a temporary or final order determining custody.[412] By passing this act, the Assembly also created the offense of Violation of an Order of Protection.[413] A person commits this Class A misdemeanor when he either commits an act prohibited by a court or fails to perform an act in compliance with a court order of protection.[414] The court may either increase the offender's penalty[415] or may impose a minimum penalty of twenty-four hours imprisonment and may additionally order the defendant to pay a fine or make restitution.[416]

Public Act 84-1392, now codified and effective January 1, 1987, created a new offense relating to the training or demonstration in the use, application, or making of firearms, explosives or incendiary devices.[417] The Assembly makes it unlawful for any person to teach or demonstrate the use, application, or making of any firearm explosive, incendiary device, or technique capable of causing injury or death to persons who are known or should have been known to unlawfully employ such training for the purpose of civil disorder.[418] The act further prohibits the assembly of two or more persons for the purpose of training or practicing in the use of firearms, explosives, incendiary devices, or techniques capable of such harm

411. *Id.* The prior statute limited the offense to intentionally violating a court order that granted actual custody of the child. ILL. REV. STAT. ch. 38, para. 10-5(b)(1) (1985).

412. ILL. REV. STAT. ch. 38, para. 10-5(b)(5) (Supp. 1987). The prior statute provided for the offense only if the child was concealed or removed after the actual service of process in an action affecting marriage or paternity. ILL. REV. STAT. ch. 38, para. 10-5(b)(5) (1985).

413. ILL. REV. STAT. ch. 38, para. 12-30 (Supp. 1987).

414. *Id.* at para. 12-30(a)(1). Two conditions must, however, first be satisfied. First, the order must be a valid order of protection authorized by the Illinois Domestic Violence Act of 1986, Section 214, subsection (b), paragraphs (1) and (2). Second, the offender must either have been served with the order or must have actual knowledge of the contents of the order. *Id.* at para. 12-30(a)(1)-(2). The order may have been issued either in a civil or criminal proceeding by any circuit or associate judge in the State of Illinois. *Id.* at para. 12-30(b). The inherent power of the court to enforce orders through civil or criminal contempt proceedings remains unaffected. *Id.* at para. 12-30(c).

415. *Id.* at para. 12-30(d)(1). The court may increase the defendant's penalty over any penalty previously imposed by any court for his prior violation of an order of protection. *Id.*

416. *Id.* at para. 12-30(d)(2). The court is limited in ordering imprisonment only by a showing of manifest injustice to the defendant. *Id.* Section 5-9-1 of the Unified Code of Corrections authorizes such a fine and section 5-5-6 of the Unified Code of Corrections authorizes restitution. *Id.*

417. ILL. REV. STAT. ch. 129, para. 220.94a (Supp. 1987).

418. *Id.* at para. 220.94a (b)(1).

for the purpose of civil disorder.[419] Violations of the statute are punishable as Class 4 felonies.[420]

IV. CONCLUSION

Both the Illinois Supreme Court and the Illinois State General Assembly contributed significantly to the body of Illinois criminal law during the *Survey* period. The court continued to defer greatly to the decisions of trial courts in felony cases, generally upholding findings of guilty beyond a reasonable doubt even when such findings were based upon circumstantial evidence or accomplice witness testimony. The court, however, ruled steadfastly against convictions based upon improper factors and reversed multiple convictions arising from a single act. The court ruled also upon the trial courts' interpretation of lesser included offense instructions to juries and effectively abolished the "reasonable theory of innocence" instruction.

The court directed significant attention to interpreting and ruling upon the constitutionality of several statutes. The court strictly construed the statutes regarding deadly use of force in defense of dwellings, unlawful use of weapons, eavesdropping, and chemical blood analysis for DUI charges. The court specifically held the highway solicitation and seat belt statutes constitutional, but declared a portion of the aggravated arson statute unconstitutional. The court upheld also the penalty provisions for look-alike controlled substances. In addition, the court effected the future course of disciplinary proceedings against attorneys by strictly interpreting the elements of forgery in one case and demanding strict compliance with the requirements of due process for criminal contempt proceedings in another.

Perhaps the most significant development in the body of Illinois criminal law was the court's expressed desire to have both direct and circumstantial evidence treated alike, at both the trial and appellate court levels. Apart from this major development, the individual decisions, though important to the issues decided, do not have a common theme. In truth, the closest they come to a common theme is that many who "won the battle lost the war."

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419. *Id.* at para. 220.94a(b)(2).

420. *Id.* at para. 220.94a(c). The General Assembly provided for specific exemptions for law enforcement officials, federal officials performing official duties, members of the Armed Forces and National Guard and a variety of sporting commissions and clubs whose primary purpose is the safe handling of weapons employed in connection with sporting or other lawful activity. *Id.* at para. 220.94a(d)(1)-(4).

Consider Lego, who won on the merits of his legal argument, but is still facing execution; Sawyer, who was selected as the suitor of preference, but convicted of the voluntary manslaughter of the losing suitor; Upton, who though she did not deal in narcotics but merely a "look-alike substance," subjected herself to more severe penalties; and finally, Emrich, who persuaded the court to affirm the suppression of his blood sample on his DUI charge, only to have the court reverse the suppression order as to the more serious reckless homicide charge.

The Illinois State General Assembly enacted or amended a significant body of law during the *Survey* period. In an effort to protect the safety of its citizenry, the Assembly expanded the crimes of disorderly conduct, amended the residential burglary statute, and enacted major revisions in the homicide statute. The legislature also revised the feticide law and created new offenses relating to civil disorder and domestic violence.

To protect the health of its people, the legislature created the offense of tampering with food, drugs, or cosmetics, amended the Cannabis Control Act, the Controlled Substances Act, the Narcotics and Profit Forfeiture Act, and the Liquor Control Act. In addition, the Assembly continued its battle for highway safety, upholding certain provisions of the DUI statute effecting certain procedural changes in them.

Finally, in order to protect the welfare of its constituents, the Assembly created new offenses relating to fraud and sexual crimes against children. The Assembly expanded the rights of victims of crime, granted the state the right to jury trials, created the Privacy of Child Victims of Criminal Sexual Offenses Act, and legalized charitable games for non-profit organizations.