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FACTORS IN AGGRAVATION AND MITIGATION: A TRAP FOR THE SENTENCING JUDGE?

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Disparity in sentencing was a major target of the Illinois anticrime legislation of 1978 known as Class X.[1] The statute was designed to reduce sentencing disparity[2] by imposing specific sentencing criteria in the form of aggravating and mitigating factors.[3] Under Class X, a judge may consider these

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1. Act of February 1, 1978, Pub. Act No. 80-1099, § 1, 1977 ILL. LAWS 3264, 3297-99 (codified at ILL. REV. STAT. ch. 38, §§ 1005-5-1 to 1005-5-3 (1981)).

2. Representative Mike Getty, the sponsor of Class X, noted in addressing the General Assembly:

> On the one hand [Class X] says we are going to come down harder on violent crime and at the same time it says we are going to be fairer and more certain in our criminal system . . . [a]nd it would not straight-jacket [the] judge, it gives him a wide range of sentence to choose from so that the penalty can fit the crime.

H. Deb., 80th Sess., 61st Legis. Day 105-08 (May 19, 1977) (available on microfiche at 62). For a discussion of disparity in sentencing as the major focus of the Class X legislation, see H. Deb., 80th Sess., 103rd Legis. Day 106-22 (Nov. 23, 1977) (available on microfiche at 138).

Sentencing disparity refers to unequal treatment of offenders who are similarly situated. An arbitrary difference in sentences offends the equal protection clause. People v. LaPointe, 88 Ill. 2d 482, 431 N.E.2d 344 (1982). A certain disparity between sentences of codefendants, however, may be justified by differences in rehabilitative potential or degree of participation in the crime. People v. Godinez, 91 Ill. 2d 47, 55, 434 N.E.2d 1121, 1126 (1982); ILL. REV. STAT. ch. 38, § 1001-1-2(a) (1981). Not every offense in a like category calls for an identical punishment, because the past conduct of a particular offender may be considered in sentencing. Williams v. Illinois, 399 U.S. 236, 243 (1970); People v. Hobbs, 56 Ill. App. 2d 93, 98, 205 N.E.2d 503, 506 (1st Dist. 1965). It has been said that sentencing disparity undermines the criminal justice system because it encourages offenders to gamble on the uncertainty of punishment, nurtures a public cynicism towards our penal institutions, encourages white collar offenses, and gives the impression that justice is something different for the rich than for the poor. *See* Kennedy, *Criminal Sentencing: A Game of Chance,* 60 JUDICATURE 208, 210-11 (1976); *see also* Bagley, *Why Illinois Adopted Determinate Sentencing,* 62 JUDICATURE 390, 395 (1979) (the intent behind determinate sentencing was to promote greater uniformity, parity, and certainty in sentencing).

3. ILL. REV. STAT. ch. 38, §§ 1005-5-3.1, .2 (1981). Section 1005-5-3.1(a) provides:

> Factors in Mitigation. (a) The following grounds shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment:
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> (1) the defendant's criminal conduct neither caused nor threatened serious physical harm to another;
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> (2) the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another;
>
> (3) the defendant acted under a strong provocation;
>
> (4) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (5) the defendant's criminal conduct was induced or facilitated by someone other than the defendant;

factors in order to vary the length of a sentence within the range prescribed by the statute. These factors, set forth in sections 1005-5-3.1 and 1005-5-3.2 of the Illinois Code of Corrections, were intended to provide uniformity in the sentencing process while allowing the judge some discretion to tailor the sentence to the individual and the crime before him. In actuality, however, the factors are not easily applied and have contributed little to the achievement of sentencing uniformity.[4]

THE SENTENCING SCHEME PRIOR TO CLASS X

Prior to the Class X amendments, the Unified Code of Corrections provided only general guidelines for the sentencing judge. Although it set forth the goal of sentencing, the statute did not specify the type of evidence to be considered in determining the proper length of a sentence.[5] The judge

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(6) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(8) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) the defendant is particularly likely to comply with the terms of a period of probation;

(11) the imprisonment of the defendant would entail excessive hardship to his dependents;

(12) the imprisonment of the defendant would endanger his or her medical condition.

Section 1005-5-3.2(a) provides:

Factors in Aggravation. (a) The following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence under Section 5-8-1:

(1) the defendant's conduct caused or threatened serious harm;

(2) the defendant received compensation for committing the offense;

(3) the defendant has a history of prior delinquency or criminal activity;

(4) the defendant, by the duties of his office or by his position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice;

(5) the defendant held public office at the time of the offense, and the offense related to the conduct of that office;

(6) the defendant utilized his professional reputation or position in the community to commit the offense, or to afford him an easier means of committing it;

(7) the sentence is necessary to deter others from committing the same crime.

4. *See Foreword,* 13 LOY. U. CHI. L.J. 609, 612 (1982) (Class X has provided harsher sentences but has not increased uniformity in sentencing); Zimring, *Sentencing Reform in the States: Some Sobering Lessons from the 1970's,* 2 N. ILL. U.L. REV. 1, 14 (1981) (the only significant reduction in judicial discretion has been effected by mandatory minimum sentences).

5. *See* ILL. REV. STAT. ch. 38, §§ 1-2(c), 1005-4-1 (1977); People v. Heflin, 71 Ill. 2d 525, 545-46, 376 N.E.2d 1367, 1376-77 (1978), *cert. denied,* 439 U.S. 1074 (1979).

could look to the circumstances of the crime and consider any other facts that he believed aggravated or mitigated the offense.[6] A proper sentence, therefore, was based on *many* factors.[7] The only restriction on sentencing was imposed by the requirement that the evidence be reliable and "not improper."[8]

Those were the "good old days" of sentencing discretion. There was little concern as to whether the sentence was predicated on particular criteria.[9] The judge was not even required to state the reasons for imposing a particular sentence.[10] Thus, the indeterminate sentencing scheme gave judges and parole boards considerable discretion in determining the number of years of imprisonment an offender served.[11] This discretion was thought to be

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6. *See, e.g.*, People v. Adkins, 41 Ill. 2d 297, 300-01, 242 N.E.2d 258, 260 (1968); People v. Dukett, 56 Ill. 2d 432, 452, 308 N.E.2d 590, 601, *cert. denied*, 419 U.S. 965 (1974).

7. People v. Perruquet, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977).

8. In People v. Crews, *Id.* 331, 231 N.E.2d 451 (1967), *appeal after remand*, 42 Ill. 2d 60, 244 N.E.2d 593 (1969), the Illinois Supreme Court stated:

> Plainly, a judge with the solemn responsibility of determining the punishment of the convicted is to be encouraged to hear and consider all available and pertinent information concerning the person and the crime, so as to enable him to impose a punishment which is appropriate. However, before relying on such information the judge must determine its accuracy and he must take care to shield his mind from what might be the prejudicial effect of unreliable and other improper evidence. If it is shown that the convicted has been prejudiced by the procedure adopted, or material considered by the trial court in conducting its inquiry prior to the imposition of punishment, the resultant penalty will not be allowed to stand.

38 Ill. 2d at 337-38, 231 N.E.2d at 454; *see also* People v. O'Neil, 18 Ill. 2d 461, 466, 165 N.E.2d 319, 322 (1960) (court is not limited by rules of evidence in its inquiry as to aggravating and mitigating factors, but may search anywhere within reasonable limits for factors influencing severity of sentence).

9. Soon after the new Unified Code of Corrections became effective, the review process came under attack. It was felt that a broader standard of review was necessary to enforce compliance with the statutory sentencing criteria. In People v. Choate, 71 Ill. App. 3d 267, 272, 389 N.E.2d 670, 674 (5th Dist. 1979), the court held that strict adherence to the statutory criteria was necessary to reduce judicial discretion in sentencing. It concluded that these guidelines, along with the use of a rebuttable presumption rather than an "abuse of discretion" standard, conferred a broader standard of review of sentences. *Id.* at 273, 389 N.E.2d at 675 (construing ILL. REV. STAT. ch. 38, § 1005-5-4.1 (1977)); *see also* People v. Perruquet, 68 Ill. 2d 149, 158, 368 N.E.2d 882, 886 (1977) (Goldenhersh and Dooley, JJ., dissenting) (it is impossible to implement purposes of Unified Code of Corrections when review court is limited to narrow question of whether trial court abused its discretion in sentencing).

This notion was quickly dispelled by the supreme court in *People v. Cox*, which held § 1005-5-4.1 to be unconstitutional. 82 Ill. 2d 268, 412 N.E.2d 541 (1980). Thus, as under the prior sentencing scheme, the standard applicable to sentence review is the abuse of discretion standard. People v. LaPointe, 88 Ill. 2d at 492, 431 N.E.2d at 348; People v. Perruquet, 68 Ill. 2d at 154, 368 N.E.2d at 883.

10. *See* People v. Vincent, 92 Ill. App. 3d 446, 462, 415 N.E.2d 1147, 1159-60 (1st Dist. 1980); People v. Collins, 36 Ill. App. 3d 269, 275, 343 N.E.2d 550, 553-54 (1st Dist. 1976); People v. Whitehead, 32 Ill. App. 3d 615, 616, 336 N.E.2d 59, 61 (5th Dist. 1975); People v. Taylor, 25 Ill. App. 3d 396, 409, 323 N.E.2d 388, 397 (1st Dist. 1974).

11. An indeterminate sentence prescribes a minimum and a maximum term, providing a period during which the parole board may act. "A true indeterminate sentence is one with

responsible for an unwanted disparity in sentencing, creating a discontent that eventually found expression in the Class X reforms.[12]

THE CLASS X STATUTE

Under the Class X statute, the sentencing judge may consider such circumstances as the harm caused or threatened in the crime, the existence of provocation or other justification, the degree of the defendant's culpability, the defendant's character and background, whether the victim will be compensated, and whether the defendant was hired to commit the crime.[13] These factors express several possible characteristics of crimes and offenders which, if present in a given case, may be utilized to enhance or diminish the severity of the sentence. The factors serve a significant purpose in sentencing because under the scheme, the judge is expected to conduct a balancing test in fixing the proper sentence.[14]

The statute, in addition to enumerating specific factors to be considered in determining an offender's sentence, logically provides that the factors in mitigation should favor minimizing a sentence of imprisonment, and the factors in aggravation should favor a more severe sentence. Thus, the express language of the statute suggests that within the sentencing range prescribed

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a sufficient difference between the minimum and maximum limit which will allow the prisoner an opportunity for parole." People v. Jacque, 131 Ill. App. 2d 364, 366, 266 N.E.2d 514, 515 (1st Dist. 1970). *See generally* McAnany, Merritt & Troman-Hauser, *Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model,* 52 CHI.[-]KENT L. REV. 621, 622-27 (1976) (historical notes on the decline of the determinate sentence).

12. As the Illinois Appellate Court for the Fourth District put it, "The consensus of criticism towards the indeterminate sentencing scheme was aimed at the unexplained and seemingly irrational disparity in sentences for what were essentially like offenses. Although such disparity was certainly contemplated and necessarily embodied in the theory of indeterminate sentencing, the goal of tailoring the punishment to the individual offender was hindered by the apparent incongruity and injustice of the results." People v. Cox, 77 Ill. App. 3d 59, 62, 396 N.E.2d 59, 63 (4th Dist. 1979), *rev'd on other grounds,* 82 Ill. 2d 268, 412 N.E.2d 541 (1980). Some scholars believe that Class X attacked judicial discretion not so much because it created undue disparity of sentences, but because it permitted judges to sentence serious offenders moderately. *See* Aspen, *New Class X Sentencing Law: An Analysis,* 66 ILL. B.J. 344, 347 (1978). *Contra* Kennedy, *supra* note 2, at 211 (sentencing disparity is not attributable to "weak" judges who "coddle criminals," but rather can be traced to a lack of guidelines in the sentencing process); McAnany, Merritt & Troman-Hauser, *supra* note 11, at 632 (plea bargaining is the real villain of sentencing disparity); Orland, *Is Determinate Sentencing an Illusory Reform?,* 62 JUDICATURE 381, 386-89 (1979) (legislation purporting to create sentencing equality will only create risks of higher, unequal sentences and a shift of the responsibility for inequality from the judge and parole board to the prosecutor and prison administrator).

13. *See supra* note 3. On the origin of these factors, see McAnany, Merritt & Troman-Hauser, *supra* note 11, at 629-31 nn.53-57.

14. For examples of the "balancing test," see, e.g., People v. Cox, 82 Ill. 2d 268, 278-79, 412 N.E.2d 541, 547 (1980); People v. Lewis, 89 Ill. App. 3d 15, 21, 410 N.E.2d 1047, 1051 (1st Dist. 1980); People v. Piontkowski, 77 Ill. App. 3d 994, 996, 397 N.E.2d 36, 38 (5th Dist. 1979); People v. Meeks, 75 Ill. App. 3d 357, 366, 393 N.E.2d 1190, 1197 (5th Dist. 1979), *rev'd on other grounds,* 81 Ill. 2d 524, 411 N.E.2d 9 (1980).

for each class of crime, there must be a sentence that is proper in view of the unique characteristics of the defendant and the manner in which the crime was committed.[15] Although the statute does not specify this procedure, it was the drafters' intent that when the factors in mitigation outweigh those in aggravation, the sentence should be set in the lower half of the statutory range.[16] Conversely, when the factors in aggravation outweigh those in mitigation, the sentence should be set in the upper half of the range.[17]

Ideally, the judge must first conceive of the typical sentence given for an offense and then adjust the sentence to fit the offense that is before him by considering the aggravating and mitigating factors. The courts, however, have questioned whether any relationship exists between the sentencing factors and the range of sentences,[18] concluding that the judge may impose a sentence of any length as long as it lies within the prescribed range.[19]

THE PROBLEMS OF AGGRAVATING AND MITIGATING FACTORS BEING "INHERENT" IN THE OFFENSE

One troublesome development since 1978 has been the notion that certain aggravating and mitigating factors may be inherent in an offense. In *People v. Conover,*[20] the Illinois Supreme Court held that the sentencing judge may not consider any aggravating factor which is "implicit" in the offense, because to do so would be to enhance improperly the penalty already prescribed for the crime by the legislature.[21] Unfortunately, the supreme court

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15. *See* People v. Barney, 111 Ill. App. 3d 669, 680, 444 N.E.2d 518, 526 (1st Dist. 1982). The *Barney* court, however, criticized the statute for failing to specify what a "more severe penalty" is measured against to determine its severity.

16. *See* People v. Meeks, 75 Ill. App. 3d 357, 366, 393 N.E.2d 1190, 1197 (5th Dist. 1979), *rev'd on other grounds,* 81 Ill. 2d 524, 411 N.E.2d 9 (1980); Bagley, *supra* note 2, at 396. The appellate courts presume that if the sentence imposed is within the lower range of the statutory limits, the sentencing judge must have taken all the proper factors into account, particularly the mitigating factors. *See, e.g.,* People v. Zolidis, 115 Ill. App. 3d 669, 678, 450 N.E.2d 1290, 1297 (1st Dist. 1983).

17. *See supra* note 16.

18. In *People v. Barney,* the court stated:

> In an unfortunately vague piece of dictum, the *Conover* court explained that the legislature considered the factors involved in the crimes when it statutorily established the range of penalties to be imposed, and if it had intended a factor to "be utilized again to impose *a more severe penalty* for those offenses, such intent would be more clearly expressed." . . . It is far more logical to read that opinion to say that it is impermissible to impose a sentence more severe than the sentence that would have been imposed if the impermissible factor had not been considered. Given the language of the applicable statutes, that sentence could be any number of years within the range of penalties provided for each class of felony.

111 Ill. App. 3d at 679, 444 N.E.2d at 525-26 (quoting People v. Conover, 84 Ill. 2d at 405, 419 N.E.2d at 909) (emphasis added by appellate court).

19. *Id.* at 679, 444 N.E.2d at 525.

20. 84 Ill. 2d 400, 419 N.E.2d 906 (1981).

21. *Id.* at 405, 419 N.E.2d at 909. In *Conover,* two cases were consolidated for appeal. In the first case, the defendant was convicted of burglary. In the second, the defendant was

did not articulate any test for determining whether a factor is inherent in an offense. The appellate courts have taken several different approaches to this problem. As a result, the statutory guidelines and the *Conover* doctrine have posed a real dilemma for the sentencing judge, who must ultimately decide which sentencing factors are appropriate in a given case.

In *Conover,* the sentencing judge applied the statutory aggravating factor, the defendant's receipt of "compensation for committing the offense,"[22] to increase the sentence because the defendant had retained the proceeds of the burglary he committed.[23] On appeal, the case turned on the meaning of the term "compensation." The supreme court reasoned that compensation refers to the remuneration received by an offender who has been hired to commit a crime.[24] Therefore, keeping the proceeds of a burglary did not constitute "compensation" for committing the crime.

The supreme court went on to say that in any case, the characteristics of an offense may not be considered aggravating factors in sentencing.[25] It is for this reason that *Conover* has assumed importance. In *Conover,* for example, the court was confronted with the crime of burglary. Because burglary necessarily involves the taking and retention of proceeds from the crime itself, that factor is implicit in the offense and may not be considered an aggravating factor in sentencing. Although this was a relatively novel concept, the supreme court lent no guidance for the application of this rule. Nevertheless, the decision had obvious implications relating to mitigating and aggravating factors in other courts.[26]

The supreme court left it to the appellate courts to ascertain the meaning of the doctrine, the statutory purpose of the aggravating and mitigating factors, and the degree of discretion reserved to the trial judge applying the factors. In some cases, the appellate courts have declined to follow *Conover,* holding that the factors apply to all offenses.[27] In other cases, the

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convicted of felony theft. In each case, the sentence was enhanced because the defendant was enriched by the proceeds of the offense. The supreme court held that because most burglaries, and all thefts, involve proceeds, the provision should apply only when the defendant receives remuneration for committing the crime, not when he merely shares in the proceeds. *Id.* Therefore, the trial judge improperly considered the defendants' taking of proceeds as an aggravating factor in sentencing. *Id.*

22. ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(2) (1981).

23. 84 Ill. 2d at 402, 419 N.E.2d at 907.

24. The appellate court had held that the term "compensation" meant "proceeds." People v. Conover, 83 Ill. App. 3d 87, 88, 403 N.E.2d 708, 709 (3d Dist. 1980). The appellate court did not consider whether the defendant's receipt of proceeds could be considered in sentencing for crimes involving the wrongful taking of property. *Id.* The supreme court reasoned that "receiving compensation for committing the offense under the statute applies only to a defendant who receives remuneration, other than the proceeds from the offense itself, to commit a crime." *Conover,* 84 Ill. 2d at 405, 419 N.E.2d at 909.

25. 84 Ill. 2d at 404, 419 N.E.2d at 908.

26. *See infra* note 40.

27. People v. Horstman, 103 Ill. App. 3d 17, 22, 430 N.E.2d 523, 527 (5th Dist. 1981) (death of victim properly considered as aggravating factor in sentencing for conviction of reckless homicide); People v. Robinson, 89 Ill. App. 3d 211, 215, 411 N.E.2d 589, 591 (3d Dist. 1980)

courts have struggled to define what is meant by "implicit in an offense." They have looked to the statutory definition of the crime, as well as to the charging instrument.[28] In a number of decisions, the courts have taken judicial notice of the characteristics of typical offenses. Lastly, in avoidance of the rule laid down in *Conover,* some courts have drawn fine distinctions between the elements of the offense and the particular facts surrounding the commission of the offense.[29]

The courts' attempts to define typical crimes have not focused strictly on the statutory elements of an offense but, rather, on a recognition of what the typical offense involves. For example, in *People v. Allen,*[30] the Illinois Appellate Court for the Fourth District held that in sentencing the defendant for burglary, the judge had improperly applied the aggravating factor that "the defendant's conduct . . . threatened serious harm," to evidence of the defendant's dangerous conduct at the scene of the crime.[31] The court considered what an ordinary burglary would involve, concluding that in every burglary the offender endangers himself and the police, but probably not other persons. The court concluded that the threat of harm is a proper consideration in cases in which the burglar engages in combat with the police, enters an occupied dwelling, or confronts the occupants.[32]

Such reasoning has been used in several cases. However, reference to "typical" offenses as a method to discover the characteristics of an offense lacks uniformity of application and, therefore, gives the trial judge little guidance in assessing the particular crime before him.[33]

(seriousness of injury properly considered as aggravating factor in sentencing for conviction of robbery and home invasion); People v. Cox, 77 Ill. App. 3d 59, 67, 396 N.E.2d 59, 68 (4th Dist. 1979) (that defendant's conduct resulted in loss of life was an "unquestionably appropriate" factor to be considered in sentencing for conviction of reckless homicide).

28. *See, e.g.,* People v. Pitt, 106 Ill. App. 3d 117, 120-21, 435 N.E.2d 801, 804 (5th Dist. 1982) (court looked to statutory definition of crime to determine whether factor was implicit in offense); People v. Alejos, 104 Ill. App. 3d 414, 416, 432 N.E.2d 1046, 1047 (1st Dist. 1982) (court looked to informations to determine whether factor was implicit in offense), *appeal docketed,* No. 56461 (Illinois Supreme Court, September Term, 1983).

29. *See generally* People v. Starnes, 88 Ill. App. 3d 1141, 1144-45, 411 N.E.2d 125, 128 (5th Dist. 1980) (construing "compensation" to include fruits of the crime confuses the elements of the crime with the context of its commission).

30. 97 Ill. App. 3d 38, 422 N.E.2d 254 (4th Dist. 1981).

31. The trial judge applied the aggravating factor of "threat of serious harm" provided for in § 1005-5-3.2(a)(1), to evidence that defendant was sticking his body out of a window and then withdrawing it, hiding and ducking. The appellate court reasoned that in every burglary, the perpetrator endangers himself and the police. Thus, this type of harm is inherent in the offense. *Id.* at 40, 422 N.E.2d at 255.

32. The court held that "[f]or an aggravating factor to be applied properly, the risk of harm must be greater than that inherent in almost all burglaries." *Id.*

33. In People v. Johnson, 107 Ill. App. 3d 156, 437 N.E.2d 436 (3d Dist. 1982), the court held that the "seriousness of harm" factor could aggravate a sentence for attempted rape because "[t]here are wide variances in the risk of harm to victims of sexual attacks." *Id.* at 162, 437 N.E.2d at 440. In People v. Smith, 105 Ill. App. 3d 639, 433 N.E.2d 1169 (4th Dist. 1982), it was held proper in sentencing the defendant for armed robbery to consider the defendant's use of a sawed-off shotgun. The court stated that "[t]his combination of weapon and setting

It has been argued that the categorization of offenses into different classes for sentencing purposes evinces legislative consideration of certain factors inherent in those offenses. In *Conover,* the supreme court reasoned that the legislature must have considered the factors implicit in an offense in establishing the range of sentences for that class of crime.[34] Some appellate courts, however, have rejected this argument, holding that the aggravating and mitigating factors apply to all offenses.

In *People v. Hert,*[35] the defendant argued that the legislature considered the factor of "serious harm" when it classified home invasion as a Class 2 felony and that "serious harm" could therefore not be considered as an aggravating factor at sentencing.[36] The Illinois Appellate Court for the Third District responded that only a certain degree of harm was inherent in the offense of home invasion.[37] Thus, the court concluded that "serious harm" was properly considered an aggravating factor for the crime of home invasion.[38]

Similarly, in *People v. Robinson,*[39] the defendant argued that the categorization of armed violence as a Class 2 felony indicated that violence is inherent in the offense. The Illinois Appellate Court for the Fifth District observed that offenses not involving serious injury, such as unlawful manufacture of a controlled substance, are also included with armed violence as a Class 2 felony.[40] Therefore, it cannot be presumed that crimes classed together necessarily bear common elements and require the same sentencing considerations.[41]

The harm factor has been most frequently considered by the courts,

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makes the instant crime one where defendant's conduct clearly threatened serious harm greater than the harm inherent in all armed robberies." *Id.* at 642-43, 433 N.E.2d at 1171; *see also* People v. Griffin, 117 Ill. App. 3d 177, 182, 453 N.E.2d 55, 61 (5th Dist. 1983) (pointing a fully-loaded revolver at a victim during a robbery constituted an aggravating factor); People v. Piontkowski, 77 Ill. App. 3d 994, 997, 397 N.E.2d 36, 38 (5th Dist. 1979) (binding victims in armed robbery properly considered an aggravating factor). *But see* People v. Alejos, 104 Ill. App. 3d 414, 416, 432 N.E.2d 1046, 1047 (1st Dist. 1982), *appeal docketed,* No. 56461 (Illinois Supreme Court, September Term, 1983) (in sentencing for voluntary manslaughter, it was improper to consider an armed violence conviction arising from same incident); People v. Reynolds, 116 Ill. App. 3d 328, 332, 451 N.E.2d 1003, 1007 (2d Dist. 1983) (placing handgun to head of victim found to be exceptionally brutal).

34. *See supra* note 18.

35. 95 Ill. App. 3d 871, 420 N.E.2d 813 (3d Dist. 1981).

36. *Id.* at 874, 420 N.E.2d at 815.

37. *Id.* at 874, 420 N.E.2d at 816.

38. *Id.*

39. 92 Ill. App. 3d 972, 416 N.E.2d 793 (5th Dist. 1981).

40. *Id.* at 977-78, 416 N.E.2d at 798.

41. *Id.* at 978, 416 N.E.2d at 798; *see also* People v. Pitt, 106 Ill. App. 3d 117, 120-21, 435 N.E.2d 801, 804 (5th Dist. 1982) (not every armed violence offense involves death); People v. Vincent, 92 Ill. App. 3d 446, 464, 415 N.E.2d 1147, 1160-61 (1st Dist. 1980) (it is proper for judge to reflect on the classification of PCP as a dangerous drug); People v. Grigsby, 75 Ill. App. 2d 184, 194-95, 220 N.E.2d 498, 504 (4th Dist. 1966) (burglary includes "the most innocuous offenses together with the most aggravated").

although other mitigating and aggravating factors are also probably inherent in some offenses and may be excluded as sentencing considerations under the *Conover* doctrine.[42] Perhaps because almost all offenses against the person, and some offenses against property, involve injury or threat of injury, harm is arguably present in most crimes. Even if an offense does not, by definition, include the term "harm," the courts have inquired whether harm is implied.[43] In considering this factor, the courts have read *Conover* very narrowly, reluctant to find that the harm factor is inherent in *any* offense. The tendency has been to permit the sentencing judge to consider the particular harm inflicted upon the victim of a crime, even when some harm is inherent in the offense.[44]

A line of cases holds that the degree of harm is always a proper aggravating

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42. In *Conover,* the defendant pointed out that the improper enhancement of a sentence had implications for other aggravating and mitigating factors. Appellant's Petition for Leave to Appeal at 12-13, People v. Conover, 84 Ill. 2d 400, 419 N.E.2d 906 (1981). In People v. Lewis, 89 Ill. App. 3d 15, 410 N.E.2d 1047 (1st Dist. 1980), the judge, in sentencing defendant for voluntary manslaughter, refused to consider in mitigation the fact that defendant was provoked into committing the offense. At the sentencing hearing, the judge observed that "the things that you have raised now for probation, are the things that perhaps got you a guilty of voluntary manslaughter rather than murder." *Id.* at 17, 410 N.E.2d at 1049. The extended term factors are also susceptible of improper application under *Conover. See, e.g.,* People v. Hudson, 102 Ill. App. 3d 346, 430 N.E.2d 51 (1st Dist. 1981). These factors, however, are not as vaguely worded as the factors set out in §§ 1005-3-3.1(a) and 1005-5-3.2(a), and they appear to express more extreme characteristics of offenses and offenders. Section 1005-5-3.2(b) provides:

> (b) The following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender who was at least 17 years old on the date the crime was committed:
>
> (1) When a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony, within 10 years, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts; or
>
> (2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty; or
>
> (3) When a defendant is convicted of any felony committed against:
>
> (i) a person under 12 years of age at the time of the offense;
>
> (ii) a person 60 years of age or older at the time of the offense; or
>
> (iii) a person physically handicapped at the time of the offense. . . .

ILL. REV. STAT. ch. 38, § 1005-5-3.2(b) (Supp. 1982).

43. *See, e.g.,* People v. Carmack, 103 Ill. App. 3d 1027, 1037-38, 432 N.E.2d 282, 289 (3d Dist. 1982) (although armed robbery, by definition, involves the use of force or the threat of the use of force, the seriousness of the harm or threat is properly considered as an aggravating factor in sentencing for an armed robbery conviction); People v. Burton, 102 Ill. App. 3d 148, 153, 429 N.E.2d 543, 547 (4th Dist. 1981) (harm to victim properly considered in sentencing for conviction of aggravated incest).

44. *See, e.g.,* People v. Dimone, 108 Ill. App. 3d 1015, 1021, 439 N.E.2d 1311, 1315 (2d Dist. 1982); People v. Requena, 105 Ill. App. 3d 831, 838, 435 N.E.2d 125, 130 (1st Dist. 1982), *cert. denied,* 103 S. Ct. 1191 (1983); People v. Burton, 102 Ill. App. 3d 148, 153-54, 429 N.E.2d 543, 547-48 (4th Dist. 1981); People v. Hunter, 101 Ill. App. 3d 692, 694-95, 428 N.E.2d 666, 668 (5th Dist. 1981).

factor. In these cases, the courts conclude that the legislature, by its use of the term "serious harm," did not intend for the mere fact of harm to aggravate the sentence imposed for a crime. For instance, in *People v. Hert,*[45] the Illinois Appellate Court for the Third District stated that although there is some harm inherent in an offense, the degree of harm is a relevant consideration in sentencing.[46] In *People v. Lampton,*[47] the court explained the degree of harm approach in addressing the question of whether the sentencing factors are inherent in some offenses. The court explained that

> [t]he amount of harm sustained by a victim in a given situation varies from case to case. It is not a constant but one of degree. Its consideration depends not on the classification of the offense, but the peculiar conduct of the actor, which is an ever-changing variable. A sentencing judge does not err in considering the amount of harm as a statutory aggravating sentencing factor in such context.[48]

This degree analysis has been applied effectively in cases involving the death of the victim of the offense, even when death is an element of the offense. In *People v. Cox,*[49] it was held that the fact of a victim's death could aggravate the sentence for a conviction of reckless homicide because the Code provides for consideration of the factor "serious harm."[50] This decision disregarded the obvious fact that the victim's death is an element the state must prove in every reckless homicide and, under the *Conover* doctrine, would therefore be considered implicit in the offense and not a proper aggravating factor.

Soon after *Cox,* a contrary result was reached in *People v. Bone.*[51] In *Bone,* the Illinois Court of Appeals for the Third District held that the victim's death, as evincing the seriousness of the harm, could not be considered in sentencing for a murder conviction because serious harm is implicit in the crime of murder. The court noted, however, that the victim's death could aggravate the separate sentence imposed for armed robbery because death of the victim is not inherent in that crime.[52]

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45. 95 Ill. App. 3d 871, 420 N.E.2d 813 (3d Dist. 1981).

46. *Id.* at 874, 420 N.E.2d at 815-16.

47. 108 Ill. App. 3d 41, 438 N.E.2d 915 (3d Dist. 1981).

48. *Id.* at 47, 438 N.E.2d at 919. For additional cases espousing the degree approach in addressing the factor of harm, see People v. Gutierrez, 105 Ill. App. 3d 1059, 1065-66, 433 N.E.2d 361, 367 (2d Dist. 1982); People v. Spearman, 105 Ill. App. 3d 711, 711, 434 N.E.2d 771, 771 (3d Dist. 1982); People v. Reynolds, 105 Ill. App. 3d 698, 705, 434 N.E.2d 776, 781 (3d Dist. 1982), *cert. denied,* 103 S. Ct. 827 (1983); People v. Tolliver, 98 Ill. App. 3d 116, 117-18, 424 N.E.2d 44, 45 (3d Dist. 1981). In *Tolliver,* the court held that the amount of money taken by the defendant is a proper aggravating factor in sentencing for armed robbery. By using a degree approach, the court in *Tolliver* avoided the holding in *Conover* that in sentencing for a robbery conviction, a judge may not consider the fact that the defendant received the proceeds of the crime.

49. 77 Ill. App. 3d 59, 396 N.E.2d 59 (4th Dist. 1979).

50. *Id.* at 69, 396 N.E.2d at 68.

51. 103 Ill. App. 3d 1066, 432 N.E.2d 329 (3d Dist. 1982).

52. *Id.* at 1070, 432 N.E.2d at 329. Relying on *People v. Hert,* the court observed that the degree of harm suffered by the victim of the armed robbery was evidenced by his death.

Subsequent decisions have used the degree approach in concluding that death, as serious harm, may be properly considered at sentencing as long as the judge only considers the manner in which the death was brought about, and not just the fact of the victim's death.[53] Recently, some courts have observed that it is unrealistic to suggest that the judge, in sentencing a convicted murderer, must avoid mentioning the fact that someone has died.[54]

In holding that the judge may always reflect on the manner in which a crime has been carried out, these appellate decisions, interpreting *Conover,* suggest that the judge may avoid improper enhancement of the sentence by making specific observations about the fact of the crime. Nevertheless, it has always been permissible for the sentencing judge to consider the nature and circumstances of the offense.[55]

AVOIDANCE OF THE *CONOVER* DOCTRINE

The legislature's enumeration of particular sentencing factors certainly was not intended to narrow the scope of the sentencing hearing. In fact, the Code still provides that the sentencing judge may weigh the evidence received at trial and all other relevant matters offered in aggravation and mitigation.[56] In this sense, the *Conover* doctrine upsets the statutory scheme by foreclosing the use of certain evidence in aggravation and mitigation.

By definition, the purpose of the aggravating and mitigating factors is to measure the seriousness of an offense so that an appropriate sentence may be imposed.[57] The utilization of these factors embodies the concept that a sentence should be proportionate to both the offense and the offender.[58]

Id.; see also People v. Pitt, 106 Ill. App. 3d 117, 120, 435 N.E.2d 804, 801 (5th Dist. 1982) (degree of infliction of bodily harm properly considered in sentencing for murder conviction); People v. Gutierrez, 105 Ill. App. 3d 1059, 1065-66, 433 N.E.2d 361, 367 (2d Dist. 1982) (leaving the scene properly considered an aggravating factor in sentencing for "hit and run" accident).

53. *See, e.g.,* People v. Andrews, 105 Ill. App. 3d 1109, 1112-13, 435 N.E.2d 706, 708 (5th Dist. 1982); People v. Hanei, 81 Ill. App. 3d 690, 706, 403 N.E.2d 16, 28 (5th Dist. 1980), *cert. denied,* 450 U.S. 927 (1981).

54. *See* People v. Barney, 111 Ill. App. 3d 669, 679, 444 N.E.2d 518, 525 (1st Dist. 1982); *see also* People v. Martin, 112 Ill. App. 3d 486, 503, 445 N.E.2d 795, 809 (1st Dist. 1983).

55. People v. Lykins, 77 Ill. 2d 35, 40, 394 N.E.2d 1182, 1185 (1979), *cert. denied,* 445 U.S. 952 (1980); People v. Perkins, 40 Ill. App. 3d 933, 936, 353 N.E.2d 360, 362-63 (1st Dist. 1976); People v. Fields, 8 Ill. App. 3d 1045, 1048-49, 291 N.E.2d 258, 260-61 (2d Dist. 1972); People v. Griffin, 8 Ill. App. 3d 1070, 1072, 290 N.E.2d 620, 622 (5th Dist. 1972); People v. Rendleman, 130 Ill. App. 2d 912, 915, 266 N.E.2d 115, 118 (5th Dist. 1971); People v. Drewniak, 105 Ill. App. 2d 37, 44-45, 245 N.E.2d 102, 106 (1st Dist. 1969).

56. ILL. REV. STAT. ch. 38, § 1005-4-1(a), (c) (Supp. 1982). Subsection (b) provides that the judge who presided at the trial or who accepted the plea of guilty shall impose the sentence, thereby insuring that the sentencing judge has a full appreciation of the facts underlying the conviction.

57. *See* Bagley, *supra* note 2, at 397. Implicit in the term "aggravation" is enhancement of the essential elements of the offense. People v. Robinson, 92 Ill. App. 3d 972, 978, 416 N.E.2d 793, 799 (5th Dist. 1981) (*serious* bodily harm not inherent in the offense of armed violence based on aggravated battery).

58. *See supra* note 2.

The factors presume that there are offenses which are ordinary and those which are extraordinary. Strictly construed, the factors would not apply to an offense which is unremarkable. When an offense deviates from the norm (either in the character of the offender or in the manner in which the offense is committed), application of the appropriate aggravating or mitigating factors should generate a degree of individualization in the sentence.[59]

Each of the factors is separate and distinct from the elements of an offense and, as such, should apply to any offense.[60] In fact, the legislature did not exempt any offenses from the scope of the statute, nor did it even suggest that the factors be applied discriminately. Under *Conover,* however, these factors must not be applied to offenses in which they are "implicit." Unfortunately, the Illinois courts have not developed a clear test to determine when a factor is implicit in an offense. Therefore, although the aggravating and mitigating factors were not intended as a trap for the sentencing judge,[61] he may have to resort to certain pre-Class X sentencing procedures, such as mere reference to the facts of the crime, in order to avoid improper enhancement of the sentence under the *Conover* doctrine.

The use of pre-Class X sentencing procedures to avoid the proscription of the *Conover* doctrine is possible because, although the statute requires the judge to state the reasons for the sentence,[62] he need not recite and assess each factor presented at the hearing.[63] In fact, the judge must be wary of a mechanical recitation of the factors in aggravation and mitigation,[64]

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59. Kress, Wilkins & Gottfredson, *Is the End of Judicial Sentencing in Sight?,* 60 JUDICATURE 216, 218-19 (1976).

60. Although holding that the factors could not be applied to certain offenses, the supreme court in *Conover* stated that the statute is generic in nature and applies to all violations of the Unified Code of Corrections. 84 Ill. 2d at 405, 419 N.E.2d at 909.

61. People v. Barney, 111 Ill. App. 3d at 679, 444 N.E.2d at 525; People v. Hunter, 101 Ill. App. 3d at 693-94, 428 N.E.2d at 668.

62. ILL. REV. STAT. ch. 38, § 1005-4-1(c) (Supp. 1982). The purpose of this provision is to eliminate speculation regarding the basis of the sentence, so as to enable a reviewing court to determine whether the sentence was predicated upon the proper criteria. People v. Goodman, 98 Ill. App. 3d 743, 751, 424 N.E.2d 663, 669 (2d Dist. 1981), *aff'd,* No. 82-499 (Illinois Supreme Court, July 6, 1983). Although one court has stated that the statute "clearly" specifies what the trial judge must consider in imposing a sentence for a felony conviction, People v. Rickman, 73 Ill. App. 3d 755, 762, 391 N.E.2d 1114, 1120 (3d Dist. 1979), there is in fact little agreement on what constitutes a proper statement accompanying the pronouncement of sentence.

63. People v. LaPointe, 88 Ill. 2d 482, 493, 431 N.E.2d 344, 349 (1981); People v. Meeks, 81 Ill. 2d 524, 534, 411 N.E.2d 9, 14 (1980); People v. Daniels, 113 Ill. App. 3d 523, 534, 447 N.E.2d 508, 515 (2d Dist. 1983); People v. Lucien, 109 Ill. App. 3d 412, 420, 440 N.E.2d 899, 905 (2d Dist. 1982). *But see* People v. Goodman, 98 Ill. App. 3d 743, 752, 424 N.E.2d 663, 670 (1981) (trial court abused its sentencing discretion by failing to demonstrate adequately on the record that it considered the proper sentencing criteria). A defendant who fails to request a statement of reasons at the sentencing hearing waives error in the judge's noncompliance with this procedural requirement. People v. Davis, 93 Ill. 2d 155, 162-63, 442 N.E.2d 855, 858 (1982).

64. "[T]he mere fact that the trial judge cites compliance with the statutory criteria is not a guarantee against sentencing error. He may merely apply the factors in a mechanical

although some reference to what is called the "statutory framework" is appropriate.[65] The judge should always indicate for the record that he has considered mitigation evidence, and he should demonstrate an awareness of the constitutional objectives of sentencing.[66] The judge need not pigeonhole into statutory categories the evidence he is taking into account in determining the sentence.[67] Rather, he should indicate which factors he accords the most weight, in order to facilitate proper review.[68]

It has been said that requiring the judge to state the reasons for the sentence fosters uniformity in sentencing.[69] As the cases illustrate, however, there is no real nexus between the range of sentences for a class of crimes and factors that affect the sentence imposed within the range. The range sets the parameters of possible sentences but does not set the precise penalty for a given crime. This penalty is governed by the judge's exercise of discretion. The judge may impose any sentence as long as it lies within the range and comports with the proper standards.[70] In fact, there is no requirement that the minimum sentence be imposed in the absence of aggravating factors.[71]

CONCLUSION

As the cases attest, the statute fails to define adequately all of the factual considerations that enter into sentencing.[72] Since *Conover,* it is still not clear

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fashion. . . ." People v. Cox, 77 Ill. App. 3d 59, 64, 396 N.E.2d 59, 64 (4th Dist. 1979) (quoting People v. Choate, 71 Ill. App. 3d 267, 273, 389 N.E.2d 670, 675 (5th Dist. 1979)); *see also* People v. Gardner, 105 Ill. App. 3d 103, 118, 433 N.E.2d 1318, 1328 (5th Dist. 1982); Kress, Wilkins & Gottfredson, *supra* note 59, at 218-19; McAnany, Merritt & Troman-Hauser, *supra* note 11, at 632 n.65.

65. People v. Dimone, 108 Ill. App. 3d 1015, 1021, 439 N.E.2d 1311, 1314 (2d Dist. 1982). The supreme court has suggested that the statutory framework for sentencing consists of the aggravating and mitigating factors, the pre-sentence investigation report, evidence at trial, and evidence of defendant's character. These are the factors "constitutionally and statutorily designated for the trial judge's attention." People v. LaPointe, 88 Ill. 2d 482, 493, 431 N.E.2d 344, 349 (1982).

66. *See supra* note 5; *see also* People v. Goodman, 98 Ill. App. 3d 743, 751, 424 N.E.2d 663, 670 (1981).

67. *See, e.g.,* People v. Lucien, 109 Ill. App. 3d 412, 420, 440 N.E.2d 899, 905 (2d Dist. 1982) (although judge did not make a finding that the crime was exceptionally brutal and heinous, the record supported his conclusion that an extended term was authorized); People v. Morris, 106 Ill. App. 3d 689, 693-94, 435 N.E.2d 1344, 1347 (4th Dist. 1982) (aggravating factors identified in the record justified the sentence; judge recited "in general terms" the factors he relied upon in determining the sentence).

68. *See* People v. Bourke, 96 Ill. 2d 327, 332-33, 449 N.E.2d 1338, 1340-41 (1983); People v. Barney, 111 Ill. App. 3d 669, 679, 444 N.E.2d 518, 526 (1st Dist. 1980).

69. J. HOGARTH, SENTENCING AS A HUMAN PROCESS 6-7 (1971); Frankel, *Lawlessness in Sentencing,* 41 CIN. L. REV. 4 (1972).

70. People v. Barney, 111 Ill. App. 3d 669, 679, 444 N.E.2d 518, 525 (1st Dist. 1980).

71. *Id.; see also* MODEL SENTENCING & CORRECTIONS ACT § 3-108 comment (1983).

72. *See* People v. Brownell, 79 Ill. 2d 508, 525-26, 404 N.E.2d 181, 190 (1980) (construing ILL. REV. STAT. ch. 38, § 9-1 (b)(7) (1977) (current version at ILL. REV. STAT. ch. 38, § 9-1 (b)(8) (Supp. 1982))). Obviously, the Illinois legislature did not consider the problem of improper enhancement, although drafters of similar statutes did. The Model Sentencing and Cor-

which sentencing factors are implicit in certain offenses. Due to the appellate courts' resistance to the *Conover* doctrine, none of the sentencing factors has been absolutely excluded from consideration in a given case. Thus, the doctrine loses vitality as the courts refuse to apply it strictly. The trend favors a liberal interpretation of the statutory sentencing factors and a subtle reversion to some pre-Class X sentencing procedures. A case-by-case reference to the circumstances of the crime and to the background of the individual offender will continue to prevail as an acceptable sentencing procedure under the present Code as long as the Illinois Supreme Court limits the judge's use of the statutory sentencing criteria.

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rections Act provides that aggravating and mitigating factors should be applied only if "appropriate" to the offense:

> Appropriateness may have at least two connotations. The definition of the offense itself may contemplate the existence or non-existence of one or more of the factors—thus the fact that the defendant's conduct did not cause serious bodily harm would not mitigate the penalty for petit larceny. Second, the offense may be so severe that the existence of one of the mitigating factors is not sufficient to warrant a reduced sentence.

MODEL SENTENCING & CORRECTIONS ACT §§ 3-108, 3-109 comment (1983). The Arizona sentencing statute exempts certain factors from application to certain offenses. ARIZ. REV. STAT. ANN. § 13-702 (1982).