How and Why Illinois Abolished the Death Penalty

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Introduction

The late J. Paul Getty had a formula for becoming wealthy: rise early, work late—and strike oil.[1] That is also the formula for abolishing the death penalty, or at least it is *a* formula—the one that worked in Illinois.

When Governor Pat Quinn signed legislation ending capital punishment in Illinois on March 9, 2011, he tacitly acknowledged the early rising and late working that preceded the occasion. "Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it."[2]

The experience to which the governor referred was not something that dropped like a gentle rain from heaven upon the place beneath and seeped into his consciousness by osmosis. Rather, a cadre of public defenders, pro bono lawyers, journalists, academics, and assorted activists, devoted tens of thousands, perhaps hundreds of thousands, of hours, over more than three decades, to the abolition movement.

All of the work would have been for naught, however, without huge measures of serendipity—the figurative equivalent of striking oil. The gusher, as I call it, was a long time coming. The prospecting began in 1976—a year before the Illinois death penalty was restored after the temporary hiatus ordered by the U.S. Supreme Court in *Furman v. Georgia*[3]—when Mary Alice Rankin, a former high school teacher, organized the Illinois

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1. *See* MICHAEL FRANSEZE, I'LL MAKE YOU AN OFFER YOU CAN'T REFUSE 5 (1999).

2. John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011, at A18; Governor Pat Quinn, Speech Upon Signing Abolition of Death Penalty (Mar. 9, 2011). A video of Governor Quinn's speech is available at http://abclocal.go.com/wls/video?id=8003643.

3. 408 U.S. 238 (1972).

Coalition Against the Death Penalty (ICADP).[4] The goal of the coalition, an umbrella organization of liberal and religious groups, was to prevent reinstatement of capital punishment and, if that failed, as it did in 1977,[5] to campaign for abolition and oppose any executions that might occur under the law.[6]

Rankin subscribed to a thesis espoused by Justice Thurgood Marshall in *Furman*.[7] The majority had held only that the death penalty was being applied in an arbitrary and racially discriminatory manner, violating the Eighth Amendment prohibition on cruel and unusual punishment.[8] Justice Marshall and Justice William Brennan would have gone further, holding that capital punishment was cruel and unusual under all circumstances.[9] In his concurring opinion, Marshall contended that if Americans were better informed of the realities of capital punishment, they would find it unacceptable.[10] Rankin, accordingly, focused on public education, establishing a speakers' bureau, organizing letter-writing campaigns, and convening public forums.[11]

The founding of the ICADP was the first of many serendipitous milestones on the path to abolition in Illinois.[12] While it provided the "passport of morality" that Saul Alinsky had deemed necessary for all effective actions,[13] the movement could not have succeeded without other energizing forces, the most important of which would be the near-death experiences of prisoners who were eventually proven innocent.

4. *See* Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 388 (2005). ICADP was renamed the Illinois Coalition to Abolish the Death Penalty in 2002. *Id.*

5. *See* 38 ILL. REV. STAT. ¶ 9-1(d) (1977) (current version at 720 ILL. COMP. STAT. ANN. 5/9-1 (2008)).

6. Robert McClory, *The Angel of Death Row*, CHI. READER, June 13, 1986, at 1; *see also* Kenan Heise, *Death Penalty Opponent Mary Alice Rankin*, CHI. TRIB., Sept. 11, 1990, § 2 (Chicagoland), at 8.

7. *See Furman*, 402 U.S. at 363–64 (Marshall, J., concurring).

8. *Id.* at 239.

9. *Id.* at 291 (Douglas, J., concurring); *id.* at 358–59 (Marshall, J., concurring).

10. *Id.* at 360–68 (Marshall, J., concurring).

11. Warden, *supra* note 4.

12. On the tenth anniversary of the coalition's founding, a cover story in the *Reader*, a widely read Chicago weekly newspaper, proclaimed: "If there is one person who embodies effective opposition to the death penalty, it is Mary Alice Rankin [who] stirs up something in people's souls that they would rather ignore when confronted by crime and criminals." McClory, *supra* note 6.

13. SAUL ALINSKY, RULES FOR RADICALS 44 (1971).

I. Cavalcade of Exonerations

The first of what would become a cavalcade of post-*Furman* Illinois death row exonerations occurred in 1987 when a young prosecutor, Michael Falconer, came forward with exculpatory evidence that exonerated two condemned Chicagoans, Perry Cobb and Darby Tillis.[14]

It is hard to imagine more fortuitous or improbable events than those that led to the exonerations of Cobb and Tillis, who had been sentenced to death for a double murder that occurred a decade earlier.[15] In 1983, the Illinois Supreme Court reversed and remanded their case because the trial judge had rejected a defense request to give the jury an accomplice instruction.[16] The prosecution's star witness, Phyllis Santini, had driven the getaway car used in the crime—admittedly but, she claimed, unwittingly.[17]

Chicago Lawyer, an investigative publication that I edited at the time, carried a detailed article based on the Illinois Supreme Court opinion and case file.[18] As luck would have it, Falconer, who recently had graduated from law school, read the article, which discussed Santini's testimony in some depth.[19] Years earlier, Falconer had worked with Santini at a factory and, as he would testify, she had told him that her boyfriend had committed a murder and that she and the boyfriend were working with police and prosecutors to pin it on someone else.[20] "I thought to myself, 'Jeez, there's a name from the past,'" Falconer reflected in a *Chicago Lawyer* interview.[21] "I read on and started thinking, 'Holy shit, this is terrible.'"[22] He called a defense lawyer mentioned in the article, reporting what Santini had told him.[23] At an ensuing bench trial in 1987, Cobb and Tillis were acquitted by a directed

14. Norman Alexandroff, *"Thank God for Mike Falconer": A Prosecutor Testifies for the Defense—and Saves Two Innocent Men from Death Row*, CHI. LAW., Feb. 1987, at 1. Tillis was also known as Darby Williams, the name that appears in various official documents pertaining to the case. *See, e.g.,* People v. Cobb, 455 N.E.2d 31, 32 (Ill. 1983) (referring to "Darby Williams").

15. Alexandroff, *supra* note 14.

16. *See Cobb*, 455 N.E.2d at 35–36 (citing People v. Kessler, 315 N.E.2d 29 (Ill. 1974)) (discussing accomplice instructions under Illinois law).

17. *Id.* at 33–34.

18. Flora Johnson Skelly, *Death Derailed*, CHI. LAW., Nov. 1983, at 5–9.

19. Alexandroff, *supra* note 14, at 10.

20. *Id*.

21. *Id.*

22. *Id*.

23. *Id.*

verdict on the strength of Falconer's testimony.[24] By then, Falconer was a prosecutor in a neighboring jurisdiction.[25] Cobb and Tillis eventually received gubernatorial pardons based on innocence.[26]

As serendipitous as the Cobb and Tillis exonerations[27] were, they were no more so than many that would follow. When abolition finally came, there had been 20 Illinois death row exonerations—each involving odds-defying fortuity. The error rate among 305 convictions under the 1977 Illinois capital punishment statute was in excess of 6%.[28]

Following Cobb and Tillis was Joe Burrows, who had been sentenced to death for the 1988 armed robbery and murder of an eighty-eight-year-old farmer in Iroquois County.[29] Burrows's exoneration resulted from an investigation by Peter Rooney, a *Champaign News-Gazette* reporter.[30] Gayle Potter, one of two principal witnesses against Burrows, admitted to Rooney that she alone had committed the crime.[31] The other principal witness was Ralph Frye, a co-defendant with an Intelligence Quotient (IQ) of seventy-six, who had falsely confessed to committing the crime with Burrows.[32] Frye said that, at the time he confessed to police, he had been "sick, under medication, and frightened."[33]

24. *Id*.

25. *Id.*

26. Ray Long & Steve Mills, *3 Ex-Death Row Inmates Can Sue After Pardons by Gov. Ryan*, CHI. TRIB., June 20, 2000, at 3.

27. I have adopted a definition of exoneration formulated by Samuel R. Gross, a distinguished death penalty scholar. Exonerated persons are "those whose convictions were nullified by official acts by governors, courts, or prosecutors because of compelling evidence that they were not guilty of crimes for which they had been convicted." Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533 (2005).

28. Of 285 death row defendants who were not exonerated, 12 were executed, 6 died of natural causes or suicide, one was transferred to Indiana and executed there, 97 were re-sentenced to less than death or awaited retrial or re-sentencing, 158 received executive clemency, and 15 remained under death sentence until Governor Quinn commuted their sentences when he signed the abolition bill. *See* Center on Wrongful Convictions, All Death Sentences 1–7 (unpublished data table) (on file with Law & Inequality) (providing data current through 2003); *see also* ILL. CAPITAL PUNISHMENT REFORM STUDY COMM'N, SIXTH AND FINAL REPORT 22–26 (2010), *available at* http://www.state.il.us/defender/acrobatdocs/CPRSC%20-%20Sixth%20and%20Final%20Report.pdf (containing information on the seventeen defendants sentenced to death after 2003).

29. People v. Burrows, 592 N.E.2d 997, 1025 (Ill. 1992).

30. Peter Rooney, *Chance at Trial: 'New Lease on Life' for Burrows*, CHAMPAIGN NEWS-GAZETTE, May 15, 1994, at A-1.

31. *Id.*

32. People v. Burrows, 665 N.E.2d 1319, 1321 (Ill. 1996).

33. *Id.* at 1323.

After Burrows came the case of Rolando Cruz and Alejandro Hernandez, who had been sentenced to death for the kidnapping, rape, and murder of ten-year-old Jeanine Nicarico in 1983 in DuPage County.[34] Their case, like that of Cobb and Tillis, had been exposed by *Chicago Lawyer*.[35] In all likelihood, Cruz and Hernandez would have been executed had not Brian Dugan, a sociopathic killer, confessed to the crime.[36] Hernandez had made inconsistent and potentially inculpatory statements to the police and others,[37] and detectives claimed—falsely—that Cruz had revealed details of the crime that only someone who took part in it would know.[38]

In the face of Dugan's confession, prosecutors initially contended that he had not been involved in the crime and was inexplicably lying about it.[39] After deoxyribonucleic acid (DNA) testing excluded Hernandez as a source of semen recovered from the victim, but did not exclude either Dugan or Cruz,[40] prosecutors theorized that the three men might have committed the crime together.[41] Cruz and Hernandez were exonerated after a high-ranking police officer admitted that he previously had testified falsely, acknowledging that Cruz had never made the inculpatory statement attributed to him by detectives.[42] Years later, after more advanced DNA testing excluded Cruz as the source of the semen and positively linked it to Dugan, prosecutors acknowledged the wrongful convictions and apologized.[43] Dugan pleaded guilty to the Nicarico murder[44] and was sentenced to death sixteen months before Governor Quinn signed the abolition bill.[45]

34. People v. Cruz, 521 N.E.2d 18, 18–19 (Ill. 1988).

35. Warden, *supra* note 4, at 400; *see also* James Tuohy, *The DuPage Cover-up*, CHI. LAW., May 1986, at 1, 6–15.

36. Warden, *supra* note 4, at 400; *see also* Tuohy, *supra* note 35.

37. People v. Hernandez, 521 N.E.2d 25, 29–31 (Ill. 1988).

38. People v. Cruz, 643 N.E.2d 636, 672 (Ill. 1994).

39. William Grady, *Prosecutors Blast Dugan's Claim that He Killed Jeanine Nicarico*, CHI. TRIB., Apr. 15, 1992, at 3.

40. THOMAS FRISBIE & RANDY GARRETT, VICTIMS OF JUSTICE REVISITED 218–19 (2005).

41. Maurice Possley & Jeffrey Bils, *Dugan May Take Stand in Cruz Trial; Prosecutors Consider a Grant of Immunity*, CHI. TRIB., Nov. 1, 1995, at 1.

42. FRISBIE & GARRETT, *supra* note 40, at 351.

43. Rick Pearson, *Ryan 'Sorry' for Nicarico Mistakes*, CHI. TRIB., Nov. 13, 2009, at 5.

44. Dan Rozek, *Dugan: I Did It; Pleads Guilty to 1983 Murder of Naperville Girl in Hopes of Avoiding Death Penalty*, CHI. SUN-TIMES, July 29, 2009, at 2.

45. Dave McKinney, *Death Row: Now What?; Dugan Is 15th Sentenced to Die Since Ryan Acted—But No One Faces Execution Soon*, CHI. SUN-TIMES, Nov. 16, 2009, at 6.

Next came the exonerations of Dennis Williams and Verneal Jimerson—co-defendants in another case exposed by *Chicago Lawyer*.[46] They had been convicted of a 1977 abduction, rape, and murder in Cook County, largely as a result of a false confession police coerced from a seventeen-year-old borderline mentally retarded co-defendant named Paula Gray.[47] Williams, Jimerson, Gray, and two additional male defendants, were exonerated in 1996 by DNA from a vaginal swab that, fortuitously, had been preserved until advances in technology enabled its testing.[48]

Prosecutors might have argued that the DNA was irrelevant—that perhaps it had come from an additional, unknown participant in the crime, a so-called "unindicted co-ejaculator."[49] This argument would not fly because Northwestern University journalism students working under Professor David Protess had identified the actual killers.[50] Three of these killers would be convicted based largely on detailed confessions, which, unlike Gray's, were corroborated by DNA.[51]

Next to be exonerated was Gary Gauger, a McHenry County organic farmer, who during a protracted police interrogation made statements that police and prosecutors construed as a confession to the murder of his parents in 1993.[52] At Gauger's trial, the prosecution also relied in part on the testimony of a jailhouse informant, a "snitch" in prison vernacular, who claimed that Gauger had admitted the crime.[53] Nine months after Gauger was condemned to die, the trial judge reduced his sentence to life in prison.[54] In an unpublished decision in 1996, the Illinois Appellate Court reversed the conviction on the ground that the purported

46. Rob Warden & Margaret Roberts, *Will We Execute an Innocent Man?*, CHI. LAW., July 1983, at 1.

47. *See* Douglas Holt & Steve Mills, *Ford Heights 4 Figure Pardoned; Woman Surprised by Ryan Action*, CHI. TRIB., Nov. 12, 2002, at 1.

48. *See* Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at A6.

49. *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE 321 (2d ed. 2003).

50. Terry, *supra* note 48. The forensic DNA age had dawned in an Illinois case. *See* Larry Green, *12-year Legal Nightmare at an End; Recanted Testimony, High-tech Help to Clear Gary Dotson*, L.A. TIMES, Aug. 15, 1989, at 1. On August 14, 1989, the emerging technology established that Gary Dotson, a hapless high school dropout from suburban Chicago, did not commit a rape of which he had been convicted a decade earlier. *Id.*

51. DAVID PROTESS & ROB WARDEN, A PROMISE OF JUSTICE 226–28 (1998).

52. Charles Mount, *Doubt Told in Murder Conviction Confession Coerced, Gauger Lawyer Says*, CHI. TRIB., Feb. 7, 1996, § 2 (McHenry County), at 1.

53. *Id.*

54. *Id.*

confession should have been suppressed at trial because it was the fruit of an arrest without probable cause.[55]

Without the confession, prosecutors had to drop the charges, but they continued to insist that Gauger was guilty.[56] His innocence became apparent a year later, however, when a federal grand jury in Wisconsin indicted two members of a motorcycle gang on multiple counts of racketeering, including the killing of Gauger's parents.[57] One of the gang members, James Schneider, pleaded guilty and the other, Randall E. Miller, was convicted by a jury.[58] At Miller's trial, prosecutors introduced a recording of a conversation in which Miller boasted that Illinois authorities would never link him and Schneider to the Gauger murders because they had worn hairnets and gloves to avoid leaving physical evidence at the crime scene.[59]

The next exoneree, the ninth, was Carl Lawson, who had been sentenced to death for the murder of his former girlfriend's eight-year-old son in 1989 in St. Clair County.[60] Bloody shoe prints consistent with shoes Lawson owned were found at the scene.[61] Even if the prints were his, Lawson claimed that he must have left them when he and others entered the apartment after the body was found—hours after the murder.[62] Based on the degree of drying in ninety-three-degree heat, however, a state crime scene analyst testified that the prints had been left at the time of the murder.[63]

Before trial, Lawson made a pro se motion for independent forensic testing, but it was denied.[64] Holding that the motion should have been granted, the Illinois Supreme Court granted

55. Charles Mount, *Lawyer Protests New Murder Trial*, CHI. TRIB., Apr. 11, 1996, § 2 (McHenry County), at 1.

56. *Gary Gauger*, CENTER ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/cwc/exonerations/ilGaugerSummary.html (last visited Mar. 4, 2012).

57. *Id.*

58. Dave Daley, *Biker Guilty of '93 Killings in Richmond*, CHI. TRIB., June 16, 2000, § 2 (McHenry County), at 3.

59. *See* Dave Daley, *Biker Discusses Killings on Tape Played in Court*, CHI. TRIB., Apr. 25, 2000, § 2 (Metro), at 2 (quoting Miller as saying "I had stuff on, I kept my [expletive deleted] hair clean . . . I had this all [expletive deleted] covered.").

60. People v. Lawson, 644 N.E.2d 1172, 1174 (Ill. 1994).

61. *Id.*

62. David Protess & Rob Warden, *Nine Lives: The Justice System Sentenced These Men to Death. The Justice System Ultimately Set Them Free. Is That Justice?*, CHI. TRIB., Aug. 10, 1997 (Magazine), at 20.

63. *Lawson*, 644 N.E.2d at 1175.

64. *Id.* at 1187.

Lawson a new trial in 1994,[65] by which time an alternative suspect had been identified and the state's shoe print theory had been discredited by an independent expert hired by Lawson's attorneys.[66] Prosecutors nonetheless retried Lawson twice.[67] At the first retrial, the jury deadlocked eleven to one for acquittal.[68] At the second retrial, Lawson was acquitted.[69] The alternative suspect died without being charged.[70]

II. Raising the Salience of Wrongful Convictions

The nine exonerations prompted Lawrence C. Marshall,[71] a Northwestern University law professor who had been instrumental in five of them,[72] to organize an extraordinary event—the National Conference on Wrongful Convictions and the Death Penalty at Northwestern University School of Law in November 1998.[73]

It was a bleak time for the death penalty abolition movement.[74] In the wake of the bombing of the Murrah Federal Building in Oklahoma City,[75] Congress had overwhelmingly approved and President Bill Clinton had signed the Antiterrorism and Effective Death Penalty Act.[76] This Act sharply curtailed the

65. *Id.* at 1192 ("We find that a shoeprint expert's opinion was necessary to defendant's proving crucial issues in this case and that the lack thereof therefore prejudiced him. Accordingly, we find that the trial court abused its discretion by denying defendant's motion for funds for expert assistance.").

66. Protess & Warden, *supra* note 62.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Marshall is now Professor of Law and Associate Dean for Clinical Education at Stanford University Law School. *Lawrence C. Marshall: Professor of Law, Associate Dean for Clinical Education and David & Stephanie Mills Director of the Mills Legal Clinic*, STAN. L. SCH., http://www.law.stanford.edu/directory/profile/40/Lawrence%20C.%20Marshall/ (last visited Mar. 4, 2012).

72. Marshall represented two of the exonerees, Rolando Cruz and Gary Gauger. Warden, *supra* note 4, at 400, 402. His work on the Cruz case was instrumental in the exoneration of Alejandro Hernandez. *See id.* at 400. He represented Willie Rainge, a co-defendant of Dennis Williams and Verneal Jimerson. *Id.* at 401. His work on behalf of Rainge was instrumental in the Williams and Jimerson exonerations. *Id.* at 402.

73. Kevin Davis, *Hope Sought for Innocents Sentenced to Die; Conference Will Feature Their Stories*, USA TODAY, Nov. 13, 1998, at 14A.

74. *See* Naftali Bendavid, *Escaping Execution*, CHI. TRIB., Nov. 13, 1998, at 3.

75. *See* John Kifner, *At Least 31 Dead, Scores are Missing after Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building; 12 Victims were Children in 2d-Floor Day-Care Center*, N.Y. TIMES, Apr. 20, 1995, at 1.

76. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered

rights of prisoners to seek federal review of their convictions[77] and federal funding was eliminated for twenty capital resource centers, which provided resources for death penalty appeals.[78] In 1997 the number of post-*Furman* executions rose to a staggering eighty-five,[79] and, according to the Gallup Poll, Americans favored the death penalty by a margin of more than two to one.[80]

Fortunately, Marshall was not deterred by the unpopularity of his cause. If he had been, it is highly unlikely that the Illinois death penalty could have been abolished thirteen years later. The National Conference on Wrongful Convictions and the Death Penalty drew more than six hundred defense lawyers, legal academics, journalists, and thirty-one of the seventy-four men and women who had been released from the nation's death rows based on compelling claims of actual innocence.[81] The high point of the conference came on the second day when the thirty-one exonerees walked one by one across a stage, each with slight variations telling the spellbound audience: "My name is . . . . If the state had its way, I'd be dead today."[82]

While wrongful convictions in capital cases were not unprecedented prior to the 1998 conference,[83] they generally had been brushed aside as simply too rare to warrant concern.[84] Some

sections of 28 U.S.C.). The vote was 91 to 8 in the Senate and 293 to 133 in the House. *S. 735: 104th Antiterrorism and Effective Death Penalty Act of 1996*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s104-735 (last visited Mar. 4, 2012).

77. Stephen Labaton, *New Limits on Prisoner Appeals: Major Shift of Power from U.S. to States*, N.Y. TIMES, Apr. 19, 1996, at B8.

78. Eric Zorn, *Cutting Subsidy for Death Appeals to Cost Time, Funds*, CHI. TRIB., Feb. 21, 1996, § 2 (Metro), at 1.

79. *Executions by Year*, DEATH PENALTY INFO. CENTER (Jan. 6, 2012), http://www.deathpenaltyinfo.org/executions-year.

80. *Are You in Favor of the Death Penalty for a Person Convicted of Murder?*, GALLUP POLL, http://www.gallup.com/poll/1606/death-penalty.aspx (last visited Mar. 4, 2012).

81. Davis, *supra* note 73.

82. Andrew Gumbel, *Death Row Survivors Call for Abolition*, THE INDEP. (London), Nov. 16, 1998, at 12.

83. One of the first documented wrongful convictions in a United States capital murder case occurred in 1819 in Manchester, Vermont, where Jesse and Stephen Boorn had been sentenced to death for the murder of their brother-in-law, Russell Colvin. LEONARD SARGEANT, THE TRIAL, CONFESSIONS AND CONVICTION OF JESSE AND STEPHEN BOORN FOR THE MURDER OF RUSSELL COLVIN AND THE RETURN OF THE MAN SUPPOSED TO HAVE BEEN MURDERED (1873). A wrongful execution was averted because Colvin was discovered alive in New Jersey. *Id.* In 1887, in Beatrice, Nebraska, William Jackson Marion was hanged for the murder of his best friend, John Cameron. ROB WARDEN, WILKIE COLLINS'S THE DEAD ALIVE 157–58 (2005). Cameron turned up four years later, alive and well in Kansas. *Id.*

84. Tracey Tyler, *Death Row Survivors Compare Notes; Wrongful Conviction*

officials even denied that wrongful convictions were possible.[85] The conference challenged those who minimized the problem and, judging from the tone of the news coverage, persuaded most journalists who covered the event that innocent men and women had been sentenced to death with unsettling frequency.[86]

III. Two Disquieting Scandals

For years preceding the National Conference on Wrongful Convictions and the Death Penalty, two scandals had been unfolding that—in concert with the state's penchant for sending the wrong people to death row—had eroded public confidence in the fairness and accuracy of the Illinois death penalty apparatus. One of the scandals involved torture of suspects in the back rooms of police stations;[87] the other involved judicial corruption of the worst degree.[88]

Beginning in 1973, Jon Burge, a Chicago police area commander, and detectives working under him, had systematically tortured crime suspects to obtain confessions that sent several men to death row.[89] Burge and his men employed ruthless

Gathering a 'Wake-up Call,' TORONTO STAR, Nov. 14, 1998, at A24.

85. "Innocent men are never convicted," a Massachusetts district attorney once said. EDWIN M. BORCHARD, CONVICTING THE INNOCENT, at vii (1932). "Don't worry about it. . . . It is a physical impossibility." *Id*.

86. *See, e.g.*, Jim Dwyer, *The System's Dead Wrong Tales of Bad-Rap Capital Cases*, N.Y. DAILY NEWS, Nov. 17, 1998, at 8; Frank Green, *Freed Inmates Tell Their Stories; Death Row Residents Wrongfully Convicted*, RICHMOND TIMES DISPATCH (Va.), Nov. 15, 1998, at A1; Boaz Herzog, *Wrongly Convicted People Lead Death Penalty Protest*, DETROIT FREE PRESS, Nov. 16, 1998, at 4A; Debbie Howlett, *Time Lost to Death Row Scars Ex-Inmates; Forum Puts Faces on Wrongly Convicted*, USA TODAY, Nov. 16, 1998, at 5A; Arlene Levinson, *Former Death Row Inmates Talk of Survival; First Meeting of the Wrongly Convicted Draws More than 30 Former Prisoners, 800 Lawyers and Activists*, AUSTIN AM. STATESMAN (Tex.), Nov. 15, 1998, at A6; Carolyn Tuft, *Ex-Death Row Inmates Attack Capital Punishment, Courts*, ST. LOUIS POST-DISPATCH, Nov. 16, 1998, at A1; Tyler, *supra* note 84; Henry Weinstein, *Death Penalty Foes Focus Effort on the Innocent*, L.A. TIMES, Nov. 16, 1998, at 1; Mitchell Zuckoff, *Death-Row Survivors Tell How Justice Errs; Conference Puts Death Penalty on Trial*, B. GLOBE, Nov. 15, 1998, at A1.

87. Rob Warden, *Tough Prosecutor Daley Can Be Suspiciously Soft*, CRAIN'S CHI. BUS., Feb. 20, 1989, at 11.

88. *See* Matt O'Connor, *Judge Maloney Found Guilty in Corruption Case*, CHI. TRIB., Apr. 17, 1993, at 1.

89. Warden, *supra* note 87. The first known Burge torture occurred in May 1973. *Id.* The victim, Anthony Holmes, testified at Burge's federal criminal trial twenty-eight years later that Burge and two of his men tortured him into confessing to a murder he did not commit by placing a plastic bag over his head, tightening it, and then running electric current to wires that were attached to his handcuffed wrists and ankles. Brief of Persons Concerned About the Integrity of the Illinois Criminal Justice System as Amici Curiae in Support of Petitioner-Appellee at 12–13, People v. Wrice, 940 N.E.2d 102 (Ill. App. Ct. 2010) (No. 1-08-

techniques—electrical shocks to the ears, lips and genitals; cigarette burns to the arms, legs, and chest, plastic bags over heads, shackling to hot radiators, and gun barrels in mouths.[90] The Chicago Police Board terminated Burge and suspended two of his underlings in 1993.[91]

Just three months after the Burge firing, Thomas Maloney, a retired Cook County Circuit Court judge who had sent six men to death row, was convicted on federal charges of taking bribes to acquit defendants in murder cases.[92] It was alleged that, in order to deflect suspicion that he was soft on crime, Maloney engaged in "compensatory bias"—that is, he came down hard on defendants who had not bribed him.[93] Among defendants Maloney had sentenced to death were Perry Cobb and Darby Tillis, the first of the post-*Furman* Illinois death row exonerees.[94]

IV. Prosecutorial Misconduct Exposé

Two months after the 1998 conference, the *Chicago Tribune* published a ground-breaking, five-part series exposing one of the principal causes of wrongful convictions—prosecutorial misconduct.[95] The series documented 67 U.S. capital cases and 314 other murder cases in which prosecutorial misconduct had led to reversals of convictions over the previous quarter century.[96] The first installment began:

> With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases.

0425), *appeal allowed*, 949 N.E.2d 664 (Ill. 2011), *aff'd as modified and remanded*, No. 111860, 2012 WL 312121 (Ill. Feb. 2, 2012) [hereinafter Brief in Support of Petitioner-Appellee].

90. Brief in Support of Petitioner-Appellee, *supra* note 89.

91. *Id*. at 8; *see* Andrew Herrmann, *Wilson's Story: Shock Treatment*, CHI. SUN-TIMES, Feb. 11, 1993, at 5; Brian Jackson, *Cop Loses Job over Torture*, CHI. SUN-TIMES, Feb. 11, 1993, at 1. For a comprehensive account of Chicago police torture see JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE (2000).

92. United States v. Maloney, 71 F.3d 645, 650 (7th Cir. 1995); O'Connor, *supra* note 88.

93. Bracy & Collins v. Schomig & Cowan, 286 F.3d 406, 409 (7th Cir. 2002).

94. Linnet Myers, *4 Years on Death Row Trial After Trial, It All Became a Painful Joke*, CHI. TRIB., Sept. 3, 1988 (Tempo), at 1.

95. Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win* (pts. 1–5), CHI. TRIB., *The Verdict: Dishonor*, Jan. 10, 1999 [hereinafter *The Verdict*, pt. 1], *The Flip Side of a Fair Trial*, Jan. 11, 1999, *Prosecution on Trial in DuPage*, Jan 12, 1999, *Reversal of Fortune*, Jan 13, 1999, *Break Rules, Be Promoted*, Jan. 14, 1999.

96. *The Verdict*, pt. 1, *supra* note 95, at 1.

> They have prosecuted [B]lack men, hiding evidence the real killers were [W]hite. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.
>
> They do it to win.
>
> They do it because they won't get punished.[97]

V. The Pivotal Exoneration

Shortly after the *Chicago Tribune* series appeared came perhaps the single most significant development in the history of the Illinois abolition movement—the exoneration of Anthony Porter, a Chicagoan who five months earlier had come within two days of lethal injection for a 1982 double murder.[98] Like the nine exonerations that preceded it, Porter's resulted from the convergence of a series of lucky events. He would have died by lethal injection on September 24, 1998, had the Illinois Supreme Court not granted a stay of execution sought by a volunteer legal team.[99] The stay was granted not out of concern that Porter might be innocent but rather because he had scored so low on an IQ test—fifty-one—that he might not be capable of understanding why and for what he was being executed.[100]

That anyone had given Porter an IQ test was itself highly serendipitous. His lead attorney, Daniel Sanders, observed:

> The only reason Mr. Porter was ever evaluated mentally was to determine whether he was losing his mind because of the pendency of the execution. It was an accident that he was even evaluated for competency to be executed.
>
> The doctor who did the evaluation came back and said, "You know, you have got a guy here with an IQ of fifty-one." Suddenly, I had a major legal issue that for sixteen-and-a-half years nobody had noticed, and that I had noticed somewhat accidentally.[101]

97. *Id.*

98. *See* George H. Ryan, *The Role of the Executive in Administering the Death Penalty*, 2003 U. ILL. L. REV. 1077, 1079 (2003); Mark LeBien & Charlie Meyerson, *Porter Freed from Prison*, CHI. TRIB., Feb. 5, 1999 (Evening Update), at 1. Upon Governor Quinn's signing of the Illinois abolition bill in 2011, Steve Mills wrote: "If there was one moment when Illinois's death penalty began to die, it was on Feb. 5, 1999, when a man named Anthony Porter walked out of jail a free man." Steve Mills, *Illinois Bans Death Penalty; Moral Arguments Give Way to Concerns About Mistakes*, CHI. TRIB., Mar. 10, 2011, at 1.

99. Christi Parsons, *Court Stalls Execution, Asks if Killer Is Smart Enough to Die*, CHI. TRIB., Sept. 22, 1998, at 1.

100. *Id.*

101. Ctr. for the Study of Disability Ethics Cmty. Bd. Forum, *Execution of the*

The stay of execution was intended only to allow time for further testing to determine Porter's fitness for execution, but the interval was put to a different use: Professor David Protess and a team of undergraduate journalism students working with private investigator Paul Ciolino launched a reinvestigation of the case and—amazingly—obtained a corroborated, videotaped confession from the actual killer, thereby establishing Porter's innocence.[102]

On February 5, 1999, Porter walked out of jail, released on his own recognizance.[103] The drama prompted calls for a moratorium on Illinois executions,[104] but left the system's apologists undaunted. "The process did work," said David Urbanek, a spokesman for the recently installed Republican governor, George H. Ryan. "Sure, it took 17 years, but it also took 17 years for that journalism professor to sic his kids on that case."[105] Avis LaVelle, a campaign spokesperson for Chicago Mayor Richard M. Daley, the former Cook County State's Attorney whose office had prosecuted Porter, similarly intoned, "[i]f anything, this case demonstrates that the system does work."[106]

Urbanek's remark raised the ire of *Chicago Tribune* columnist Clarence Page, who asked rhetorically: "Is it the fault of Protess' journalism students that Porter sat so long on Death Row for a double murder it now appears he did not commit?"[107] The sentiment from officials, as expressed by both Urbanek and LaVelle, also provoked a pointed response from *Tribune* columnist Eric Zorn, who wrote: "Inevitably, gallons of innocent blood will

Mentally Disabled: A Discussion of Medical and Legal Perspectives, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 195, 203 (2001).

102. Bradley R. Hall, *From William Henry Furman to Anthony Porter: The Changing Face of the Death Penalty Debate*, 95 J. CRIM. L. & CRIMINOLOGY 371, 378 n.47 (2005).

103. LeBien & Meyerson, *supra* note 98.

104. Adrienne Drell & Dave McKinney, *Pressure Building to Halt Executions; Porter Case Raises Concern*, CHI. SUN-TIMES, Feb. 7, 1999, at 1. Two years earlier, the American Bar Association had called for a national moratorium. Saundra Torry, *ABA Endorses Moratorium on Capital Punishment*, WASH. POST, Feb. 4, 1997, at A4.

105. Clarence Page, *Forget Spin; 'The Process' Doesn't Work*, CHI. TRIB., Feb. 10, 1999, at 23. As a new state legislator in 1977, Ryan voted to reinstate the death penalty and in 1999 was chairman of the presidential campaign of his pro-death penalty fellow Republican governor, George W. Bush, of Texas. *Ryan's New Perspective Changes His Death Penalty Views*, ST. J.-REG. (Springfield), Dec. 10, 2000, at 15; Paul Merrion, *Bush Boosts Ill. Campaign, Won't Slate TV Ads—for Now; an Automated Phone Call from Barbara Bush*, CRAIN'S CHI. BUS., Oct. 23, 2000, at 3.

106. *Id.*

107. Page, *supra* note 105.

grease such a 'system,' and my poor thesaurus alone will be inadequate to address the smug reassurances of the politicians who oversee it."[108]

The *Tribune* followed with a biting editorial calling for a moratorium. "[W]hat saved Anthony Porter was not 'the system,' as apologists have said piously, but a spit-and-chewing-gum network of volunteers, enterprising Northwestern University journalism students—and an eleventh-hour mental competency hearing, which provided enough of a delay for his supporters to dig up new evidence," said the editorial. "That's not a 'system,' but happenstance: the charity of concerned strangers and sheer luck."[109]

Governor Ryan and Mayor Daley promptly distanced themselves from their spokespersons' comments.[110] Ryan said, "I think there's got to be some kind of another check put into place. I'm just not sure yet what it is."[111] Daley's press office issued a statement saying that, while he continued to support the death penalty, he favored a moratorium on executions.[112] Religious leaders and prominent attorneys echoed Daley's call,[113] but the notion was promptly rejected by those empowered to suspend executions—the governor,[114] the state legislature,[115] and the Illinois Supreme Court.[116]

Just two weeks after the Porter exoneration, the Illinois Supreme Court reversed the conviction and barred a retrial of

108. Zorn, *supra* note 105. Among the "inadequate" words Zorn's thesaurus did yield were "obscene," "ignorant," "brutal," "bizarre," "blind," "infamous," "grotesque," "delusional," "barbaric," "illusory," "desperate," "shameful," "fatuous," "disingenuous," "Kafkaesque," "surreal," "daft," and "astonishing." *Id.*

109. Editorial, *Fatal Flaws of Capital Punishment*, CHI. TRIB., Feb. 12, 1999, at 26.

110. Rick Pearson & Cornelia Grumman, *A Change of Heart on Execution Cases*, CHI. TRIB., Feb 11, 1999, at 1.

111. *Id*.

112. *Id.*

113. Cornelia Grumman, *Lawyers Press Ryan for a New Study on Death Penalty—and a Moratorium*, CHI. TRIB., Mar. 11, 1999, at 6; David Mendell, *Religious Leaders Call for Halt to Executions*, CHI. TRIB., Mar. 15, 1999, at 3. A *Tribune* poll of a random sample of Illinois voters found 54% in favor of a moratorium, compared with 37% opposed and 8% undecided or having no opinion. Rick Pearson, *Moratorium on Executions Gains Favor*, CHI. TRIB., Mar. 28, 1999 (Metro), at 1.

114. Grumman, *supra* note 113.

115. Joe Mahr & Dean Olsen, *Death Penalty Moratorium Rejected by Senate Committee*, ST. J-REG. (Springfield), Mar. 3, 1999, at 10.

116. *Justices Reject Plea for Execution Halt*, CHI. TRIB., June 5, 1999 (Metro), at 5.

Steven Smith, a Chicagoan who had been convicted and sentenced to death based solely on one eyewitness account that, according to the court, "no reasonable trier of fact could have found . . . credible."[117]

VI. A Possible Wrongful Execution

At this point, Illinois death row exonerations and executions were tied at eleven[118]—but a twelfth execution was in the wings: Andrew Kokoraleis was scheduled to die on March 17, 1999, for the murder of a young DuPage County woman named Lorraine Borowski.[119] Kokoraleis was a serial killer, no doubt about it,[120] but there was colorable doubt that he had committed the Borowski murder, the only crime for which he had been sentenced to death.[121] Kokoraleis admittedly was a member of a satanic cult known as "the Chicago Rippers"—to which prosecutors attributed nearly a score of sadistic murders of women in Cook and DuPage counties to the cult during the 1980s.[122]

Two members of the cult initially had told police that the cult leader, Robin Gecht, had killed Borowski, but they later changed their stories; perhaps out of fear of Gecht, and blamed Kokoraleis.[123] Kokoraleis's attorneys filed a last-ditch appeal and

117. People v. Smith, 708 N.E.2d 365, 371 (Ill. 1999).

118. Those executed were Charles Walker, *see* Rob Karwath & William Grady, *Walker Becomes 1st Execution in 28 Years*, CHI. TRIB., Sept. 12, 1990, at 1; John Wayne Gacy, *see* Rob Karwath & Susan Kuczka, *All Appeals Fail; Gacy Is Executed*, CHI. TRIB., May 10, 1994, at 1; James Free & Hernando Williams, *see* Alex Rodriguez & Lou Ortiz, *2 Killers Executed: Williams and Free Get Lethal Injections for 1978 Crimes*, CHI. SUN-TIMES, Mar. 22, 1995, at 1; Girvies Davis, *see* Alex Rodriguez, *Davis Put to Death; Killer Is 3rd Executed in Illinois This Year*, CHI. SUN-TIMES, May 17, 1995, at 1; Charles Albanese, *see* Alex Rodriguez, *Albanese Executed; Angry Final Statement*, CHI. SUN-TIMES, Sept. 20, 1995, at 1; George Del Vecchio, *see* Terry Burns, *Killer Put to Death Delvecchio Pays Ultimate Price*, ST. J.-REG. (Springfield), Nov. 22, 1995, at 1; Raymond Lee Stewart, *see* Andrew Herrmann & John Carpenter, *Blessed by Cardinal, Killer Dies*, CHI. SUN-TIMES, Sept. 18, 1996, at 2; Walter Stewart & Durlyn Edmonds, *see* Cornelia Grumman, *State Executes 2 After Appeals Fail; Clemency Denied in South Side, Berwyn Murders*, CHI. TRIB., Nov. 19, 1997 (Metro), at 3; and Lloyd Wayne Hampton, *see* Christopher Wills, *State Executes Texas Man for 1990 Torture-Murder*, CHI. SUN-TIMES, Jan. 21, 1998, at 17.

119. People v. Kokoraleis, 547 N.E.2d 202, 294 (Ill. 1989).

120. *See, e.g.*, Dave McKinney, *State's Last Execution: An Unforgettable Moment*, CHI. SUN-TIMES, Mar. 10, 2011, at 15.

121. People v. Kokoraleis, 707 N.E.2d 978, 979 (Ill. 1999) (Harrison, J., dissenting).

122. McKinney, *supra* note 120.

123. *See* AMNESTY INT'L, AMR 51/39/99, USA: DEATH PENALTY / LEGAL CONCERN: ANDREW KOKORALEIS (1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/039/1999/en/0769119a-e29a-11dd-963a-3b5ccc16a910/amr

a clemency petition arguing that, although their client undoubtedly was guilty of other murders, the only evidence linking him to the Borowski murder was a 150-word confession that did not match the facts of the crime; Kokoraleis alleged that the confession had been beaten out of him.[124]

For Governor Ryan, the decision to proceed was not easy. Cornelia Grumman, who was covering the impending execution for the *Tribune*, repeatedly called his office as the hour approached asking about his intention, until at one point an aide blurted out, "He keeps changing his mind every time someone different goes into his office! He doesn't know what to do!"[125] Finally, he gave the execution a green light, saying: "I must admit that it is very difficult to hold in your hands the life of any person, even a person who . . . has acted so horrendously as to have forfeited any right to any consideration of mercy."[126] Grumman theorized that the governor "hadn't prepared himself for just how profoundly difficult" the decision would be.[127] The experience, Grumman suggested, probably "made him much more open, months later, to consideration of a moratorium."[128]

Two months to the day after the Kokoraleis execution, DNA exonerated Ronald Jones, whose conviction and death sentence for a 1985 rape and murder in Cook County rested solely on a confession that he had insisted from the beginning had been beaten out of him by police.[129] Once again, exonerations and executions were tied.

VII. Efforts to Restore Faith in the System

In the face of a veritable hat trick—the dozen exonerations, the Burge and Maloney scandals, and the exposé of prosecutorial misconduct—the Illinois General Assembly hastily enacted a statute that one of its principal sponsors, Representative James B. Durkin, a Republican ex-prosecutor, assured his colleagues would "go a long way to restore the faith in the criminal justice system in

510391999en.html.

124. Locke E. Bowman, *Desperate Hours; Kokoraleis Execution Places Us at a Moral Crossroads*, CHI. TRIB., Mar. 14, 1999, at 21.

125. E-mail from Cornelia Grumman, *Chicago Tribune* journalist, to author (Mar. 6, 2012, 6:36 A.M.) (on file with Law & Inequality).

126. Christi Parsons & Cornelia Grumman, *Kokoraleis' Execution Carried Out; Torn Ryan Agonizes, but Denies Clemency*, CHI. TRIB., Mar. 17, 1999, at 1.

127. E-mail from Cornelia Grumman to author, *supra* note 125.

128. *Id.*

129. Steve Mills & Ken Armstrong, *Yet Another Death Row Inmate Cleared*, CHI. TRIB., May 18, 1999, at 1.

the people of the State of Illinois."[130] Predicated on the dubious notion that a lack of financial resources was to blame for sending so many innocent men to death row,[131] the bill created a Capital Litigation Trust Fund "for the specific purpose of making funding available for the prosecution and defense of capital cases."[132] The bill was intended not just to rehabilitate the death penalty's tarnished image, but also broaden its use.[133] In the 22 years the law had been on the books, death penalties had been imposed in 55 of the state's 102 counties.[134] Durkin and the principal Senate sponsor of the bill, Senator Carl Hawkinson, a Republican and former prosecutor, told their respective bodies that prosecutors sometimes had not sought the death penalty because the expense was so great it would "bankrupt the county."[135]

"This bill is about seeking truth," Hawkinson added. "It's about equal justice under the law. It's about making sure that adequate resources are available at the trial court level not only to the defense, but also to the prosecution."[136] The vote in both houses was unanimous, even though Hawkinson estimated the costs could run as high as twenty million dollars annually.[137]

The Illinois Supreme Court also enacted new rules establishing minimum standards of experience for attorneys representing capital defendants,[138] requiring special training for judges involved in capital litigation,[139] and laying down ethical rules for prosecutors, including a pointed reminder that their job is to seek justice—not win convictions.[140]

130. 91st Gen. Assemb., 50th Leg. Day, TRANSCRIPTS OF H. DEBS. 22 (Ill. 1999) (statement of Rep. Jim Durkin).

131. Snitch testimony was a factor in ten of the twelve convictions, false confessions in seven, police and/or prosecutorial misconduct in six, erroneous eyewitness identification in six, and ineffective assistance of defense counsel in two. *See* Warden, *supra* note 4, at 426.

132. Criminal Procedure—Capital Crimes Litigation Act, S.B. 574, 1999 Legis. Serv. 91-589 (Ill. 1999); *see also* 720 ILL. COMP. STAT. ANN. 5/9-1(h-5) (2008).

133. *See* S.B. 574 (Ill.) (discussing rationale behind creation of Capital Litigation Trust Fund).

134. Ctr. on Wrongful Convictions, List of Counties (Feb. 4, 2012) (unpublished data table) (on file with Law & Inequality).

135. 91st Gen. Assemb., 50th Leg. Day, TRANSCRIPTS OF S. DEBS. 33 (Ill. 1999) (statement of Sen. Hawkinson).

136. *Id.*

137. *Id.* at 32.

138. ILL. SUP. CT. R. 714 (effective Jan. 1, 2005).

139. ILL. SUP. CT. R. 43 (effective Mar. 1, 2001).

140. ILL. SUP. CT. R. 3.8(a) (amended Mar. 1, 2001, effective immediately).

VIII. Spotlighting Flaws in Capital Punishment

In late 1999, the *Tribune* published a second ground-breaking series—this one exposing gaping flaws in the administration of the Illinois death penalty.[141] Analyzing 285 post-*Furman* death sentences, the *Tribune* found that 33 defendants had been represented at trial by attorneys who had been, or later were, disbarred or suspended from the practice of law;[142] 46, including 4 of the 12 who had been exonerated, had been convicted in whole or in part on jailhouse informant testimony, which was notoriously unreliable;[143] 10 had been convicted on confessions obtained by a group of Chicago police detectives known to have engaged in systematic torture;[144] and that prosecutors had used hair-comparison evidence, also notoriously unreliable, in 20 cases.[145] In sum, the newspaper concluded, the system was "so plagued by unprofessionalism, imprecision and bias that . . . the state's ultimate form of punishment [was] its least credible."[146] Meanwhile, the synergy that led to the creation of the Capital Litigation Trust Fund also enabled Lawrence Marshall and me to launch the Center on Wrongful Convictions, which in years to come would have a substantial impact on the death penalty debate.[147]

In January 2000, the thirteenth Illinois death row exoneration occurred, that of Steven Manning, a corrupt former Chicago police officer whose case had been cited by the *Tribune* as an example of the unreliability of snitch testimony.[148] The only evidence purporting to link Manning to the crime was the

141. Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois* (pts. 1–5), CHI. TRIB., *Death Row Justice Derailed*, Nov. 14, 1999 [hereinafter *Failure of Death Penalty*, pt. 1], *Inept Defenses Cloud Verdict*, Nov. 15, 1999 [hereinafter *Failure of Death Penalty*, pt. 2], *The Jailhouse Informant*, Nov. 16, 1999 [hereinafter *Failure of Death Penalty*, pt. 3], *A Tortured Path to Death Row*, Nov. 17, 1999 [hereinafter *Failure of Death Penalty*, pt. 4], *Convicted by a Hair*, Nov. 18, 1999 [hereinafter *Failure of Death Penalty*, pt. 5].

142. *Failure of Death Penalty*, pt. 2, *supra* note 141, at 1.

143. *Failure of Death Penalty*, pt. 3, *supra* note 141, at 1.

144. *Failure of Death Penalty*, pt. 4, *supra* note 141, at 1. For details of police torture see archive of *Chicago Reader* articles by John Conroy, see http://www.chicagoreader.com/policetorture (last visited Mar. 4, 2012).

145. *Failure of Death Penalty*, pt. 5, *supra* note 141, at 1.

146. *Failure of Death Penalty*, pt. 1, *supra* note 141, at 1.

147. *See* Steve Mills, *The Heroes of the Wrongfully Convicted*, CHI. TRIB., Nov. 16, 2008 (Chicagoland), at 4; Eric Zorn, *A Toast, of Sorts, to the Warriors*, CHI. TRIB., Mar. 10, 2011, at 38.

148. Steve Mills & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, at 1.

uncorroborated testimony of a jailhouse informant whom a federal prosecutor once described as "a pathological liar."[149]

IX. Moratorium on Illinois Executions

By this point, Governor Ryan had seen enough. On January 31, 2000, he declared a moratorium on executions—the nation's first.[150] "[U]ntil I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate," he said.[151] Repeatedly referring to the thirteen exonerations and the *Tribune* series, Ryan said he would appoint a commission to study flaws in the capital punishment system and would not approve any executions until reforms were implemented to address such problems as disbarred lawyers and jailhouse informants.[152]

The moratorium was applauded even by staunch proponents of the death penalty. Republican State Senator Kirk Dillard said, "[m]y guess is virtually every member of the Senate Republican caucus supports the death penalty, and I don't know how any of us could oppose the governor wanting to make sure that the death-penalty system, the most important cornerstone of Illinois criminal law, is working properly."[153] Republican State Senator Chris Lauzen intoned, "What else could we do? Nobody wants to put innocent people on Death Row."[154]

A spokesperson for Republican Illinois Attorney General Jim Ryan,[155] who as a county prosecutor had presided over the travesty of justice that was the Nicarico case,[156] said that everyone "involved in the administration of criminal justice in Illinois want[s] to make sure capital punishment operates fairly. Everyone is working toward the same goal. And if the governor believes the process should continue in an execution-free environment, the attorney general supports that."[157]

A Roper Starch Worldwide poll found that 70% of Illinoisans

149. *Failure of Death Penalty*, pt. 3, *supra* note 141, at 1.

150. Ken Armstrong & Steve Mills, *Ryan 'Until I Can be Sure'; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

151. *Id.*

152. *Id.*; *see also Closing Remarks by Former Illinois Governor George Ryan*, 53 DEPAUL L. REV. 1719, 1723–24 (2004).

153. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty*, CHI. TRIB., Jan. 31, 2000 (Evening Update), at 1.

154. Armstrong & Mills, *supra* note 150.

155. Attorney General Jim Ryan is of no relation to George Ryan.

156. FRISBIE & GARRETT, *supra* note 40, at 189–90.

157. Armstrong & Mills, *supra* note 150.

approved of the moratorium and that there was strong support for reforms long championed by the Center on Wrongful Convictions.[158] For example, requiring electronic recording of interrogations as a safeguard against false confessions was favored by 86% of respondents; 78% favored restricting jailhouse snitch testimony; 87% favored reforming police eyewitness identification; 88% favored providing more defense resources; and 79% percent of Illinoisans favored setting minimum standards of competence and ethics for defense lawyers.[159]

X. Drive To Empty Death Row

Two months after he declared the moratorium, Ryan signed an executive order creating a fourteen-member Commission on Capital Punishment, directing it "[t]o study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people."[160] Frank J. McGarr, former Chief Judge of the U.S. District Court for the Northern District of Illinois, was named Chairman of the Commission, with former U.S. Senator Paul Simon and former U.S. Attorney Thomas P. Sullivan serving as co-chairs.[161]

A few months later, a group of Illinois death penalty lawyers attending a conference in Virginia hatched an intriguing idea—to seek blanket clemency for all death row prisoners.[162] The lawyers thought Governor Ryan might entertain the notion, given his evolving views on the death penalty.[163] It seemed unlikely that Ryan would seek reelection as he was embroiled in a "licenses-for-

158. Roper Starch Worldwide Poll, Sept. 25–Oct. 17, 2000 (unpublished poll) (on file with Law & Inequality).

159. *Id.*

160. Ill. Exec. Order No. 4 (May 4, 2000), *available at* http://www.idoc.state.il.us/ccp/ccp/executive_order.html.

161. *Commission Members*, IDOC.COM, http://www.idoc.state.il.us/ccp/ccp/member_info.html (last visited Feb. 22, 2012). The remaining commission members were Matthew R. Bettenhausen, former Deputy Governor; Kathryn Dobrinic, former Montgomery County State's Attorney; Rita Fry, Cook County public defender; Theodore Gottfried, State Appellate Defender; Donald Hubert, former President of the Chicago Bar Association; William J. Martin, former Cook County felony trial prosecutor; Thomas Needham, former Chief of Staff for the Chicago Police Superintendent; Roberto Ramirez, prominent businessman; Scott Turow, lawyer and novelist; Mike Waller, Lake County State's Attorney; and Andrea L. Zopp, former First Assistant Cook County State's Attorney. *Id.*

162. Telephone Interview with Charles W. Hoffman, Assistant Appellate Defender, 1st Judicial Dist., Office of State Appellate Defender (Dec. 2002).

163. *Id.*

bribes scandal" stemming from his tenure as Illinois Secretary of State before becoming governor in 1999.[164] The scandal would prompt Ryan not to seek a second term[165] and eventually lead to his indictment, conviction, and imprisonment on federal racketeering and mail fraud charges.[166]

After a series of hush-hush meetings at the Office of the State Appellate Defender (OSAD), Northwestern School of Law, DePaul University College of Law, and Chicago-Kent College of Law, the idea conceived of in Virginia coalesced into a plan to begin secretly preparing clemency petitions for every person on death row.[167] Clients would not be told of the plan initially because the lawyers did not want to alert prosecutors to the effort earlier than necessary.[168] Once prisoners learned of it, word would spread quickly.[169]

A serious impediment also would have to be overcome. In the wake of a successful 1996 campaign led by human rights activist Bianca Jagger to obtain executive clemency for a female death row prisoner who had abandoned her appeals,[170] the General Assembly had passed a veto-proof law purporting to bar any governor in the future from granting clemency to any prisoner who did not request it.[171] While most death row prisoners would be willing to ask for clemency, some would not.[172] A few were suicidal, and others, especially those with strong innocence claims, feared that once off death row, they would lose their OSAD lawyers.[173]

Defense lawyers generally viewed the Jagger law as unconstitutional—a view eventually adopted by the state Supreme

164. Laurie Cohen & Ray Gibson, *U.S. Steps up Probe of Trucker Licensing*, CHI. TRIB., Oct. 10, 1998, at 1.

165. Rick Pearson & Ray Long, *Ryan Won't Seek Second Term*, CHI. TRIB., Aug. 9, 2001, at 1.

166. United States v. Warner, 498 F.3d 666, 675 (7th Cir. 2007).

167. Telephone Interview with Charles W. Hoffman, *supra* note 162.

168. *Id.*

169. *Id.*

170. The prisoner, Guinevere Garcia, was a battered woman who had murdered her husband and eleven-month-old daughter. Daryl M. Schumacher, *Intruders at the Death House: Limiting Third-Party Intervention in Executive Clemency*, 30 J. MARSHALL L. REV. 567, 574 (1997). She would have been the first woman executed in Illinois in fifty-eight years if Governor Jim Edgar had not granted the clemency she had adamantly opposed. Sharon Cotliar & Dave McKinney, *Edgar Halts Garcia Death; Her Sex Had No Role in Decision, He Says*, CHI. SUN-TIMES, Jan. 17, 1996, at 1.

171. 730 ILL. COMP. STAT. ANN. 5/3-3-13(c).

172. Warden, *supra* note 4, at 408.

173. *Id.*

Court.[174] The Illinois Constitution gives the governor unbridled authority to "grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper."[175] Even assuming that the law was unconstitutional, however, a major problem remained: appellate defenders who represented the death row prisoners could not bring petitions against their clients' wishes.[176] Nothing, however, would bar other lawyers from seeking clemency on behalf of non-cooperators.[177] Acting under this theory, the Center on Wrongful Convictions and the MacArthur Justice Center at the University of Chicago Law School[178] agreed to file a petition on behalf of the non-cooperators, who, it turned out, would number twenty-three.[179]

In March 2002, at a death penalty conference in Oregon, Governor Ryan described the flaws that had led to the Illinois wrongful convictions in capital cases. When asked if he would consider blanket clemency, he replied, "[t]hat's not something that's out of the question. I'll consider that." Acknowledging that his remarks were sure to anger police, prosecutors, and victims' survivors, Ryan added, "I'd rather have somebody angry than an innocent person killed."[180]

The following month, the Commission on Capital Punishment released a 207-page report containing sweeping recommendations for reforming the criminal justice system.[181] The principal recommendations included requiring, as a safeguard against coerced confessions, that police interrogations be electronically

174. People *ex rel.* Madigan v. Snyder, 804 N.E.2d 546, 556 (2004) ("The Governor's clemency powers granted by the constitution 'cannot be controlled by either the courts or the legislature. His acts in the exercise of the power can be controlled only by his conscience and his sense of public duty.'").

175. ILL. CONST. art. V, § 12.

176. *Snyder*, 804 N.E.2d at 551–53. "A clemency application cannot be commenced on behalf of a person who has been sentenced to death, unless that person has consented." *Id.* at 551.

177. Warden, *supra* note 4, at 408.

178. The MacArthur Justice Center later moved to Northwestern University School of Law and changed its name to the Roderick MacArthur Justice Center. *See About Us*, RODERICK MACARTHUR JUST. CENTER, http://www.law.northwestern.edu/macarthur/about/ (last visited Feb. 22, 2012).

179. *See* Amended Petition for Executive Clemency in the Interest of Harold Bean, et al., 2002, *available at* http://www.law.northwestern.edu/macarthur/documents/deathpenalty/NonCoopClemencyPet.pdf

180. Ray Long & Steve Mills, *Ryan to Review Death Row Cases; Governor May Commute Terms*, CHI. TRIB., Mar. 3, 2002, at 1.

181. COMM. ON CAPITOL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf. It was widely reported by news media that the report contained 85 recommendations.

recorded[182] and, as a safeguard against prompting witnesses to identify suspects from lineups or photo spreads, that police identification procedures be administered by someone who does not know who the suspect is.[183] Other major recommendations included, as a safeguard against arbitrary and capricious application of the death penalty, creating a statewide review committee to decide whether to seek a death sentence in any given case, thus removing that discretion from the individual elected county prosecutors;[184] eliminating felony murder—a murder committed in the course of another felony—as an aggravating factor that qualifies a defendant for a death sentence;[185] reducing the number of death-qualifying aggravating factors from twenty to five;[186] and requiring trial judges to hold pretrial hearings to determine the reliability and admissibility of informant testimony proffered by the prosecution.[187]

A study of the effects of race and geography on Illinois death sentencing was included as an appendix to the report.[188] Its principal finding was that the state's 1977 capital punishment law, like those struck down by *Furman,* was being applied arbitrarily and discriminatorily—arbitrarily in that defendants in rural counties were more than twice as likely to be sentenced to death as those in urban counties,[189] and discriminatorily in that defendants convicted of killing White victims were three times as likely to be sentenced to death as were defendants convicted of killing Black victims in similar cases.[190]

182. *Id*. at 27.

183. *Id.* at 48.

184. *Id.* at 84–85 (explaining that the committee would be composed of the Attorney General or designee, the Cook County State's Attorney or designee, a State's Attorney from another County selected by lottery, the current President of the Illinois States' Attorneys Association, and a retired judge).

185. *Id.* at 66–68.

186. *Id.*

187. *Id.* at 122.

188. COMM. ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT technical app. § 1A (2002) *available at* http://www.idoc.state.il.us/ccp/ccp/reports/techinical_appendix/entire_technical_appendix.pdf. For a stand-alone version of the study, see Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, CHI. JUST. PROJECT (Mar. 20, 2002), http://www.chicagojustice.org/foi/relevant-documents-of-interest/illinois-governor-george-ryans-commission-on-capital-punishment/a_race_region_death.pdf.

189. Pierce & Radelet, *supra* note 188, at iii. Holding constant for aggravation, death sentences were imposed in 8.4% of first-degree murder convictions in rural counties, but in only 3.4% in urban counties. *Id.*

190. *Id.* at 7. Of all first-degree murder convictions with death-qualifying circumstances, 9.4% involving at least one White victim resulted in death sentences, compared with only 3.0% involving Black victims. *Id.*

In the time he had remaining in office, Ryan came under extreme pressure to reject blanket clemency, particularly during Illinois Prisoner Review Board hearings on the clemency petitions in October 2002.[191] Scores of murder victims' anguished survivors tearfully told their loved ones' stories to the Board and, in some cases, to receptive media.[192] The *Tribune* editorialized:

> The hurry-up clemency hearings that were supposed to highlight flaws in this state's capital punishment system instead have drenched Illinois citizens in vivid, painful reminders of why the death penalty exists. As a result, Gov. George Ryan's threat to unilaterally commute all current death sentences has backfired in his face and undermined the crucial cause of capital punishment reform.[193]

In response, the Center on Wrongful Convictions, the Illinois Coalition Against the Death Penalty, and Murder Victims Families for Reconciliation jointly launched a three-pronged public education initiative in December 2002.[194] It began with a "National Gathering of the Death Row Exonerated" at Northwestern University—an event initially scheduled for the following year to commemorate the fifth anniversary of the National Conference on Wrongful Convictions and the Death Penalty.[195]

Forty death row refugees from around the country attended the gathering and signed a letter imploring Ryan to grant blanket clemency.[196] Beginning just after four a.m. the next day, the ex-prisoners carried the letter on a thirty-seven-mile relay trek from Stateville Correctional Center, where most of the state's post-*Furman* executions had taken place, to Chicago, where they presented the letter to a Ryan aide.[197] The initiative was capped by the Chicago premiere of the celebrated off-Broadway play *The Exonerated* starring Richard Dreyfuss, Danny Glover, and Mike Farrell, and attended by the governor, his top staff, and several members of the General Assembly.[198] The play, by Jessica Blank

191. *See* John Keilman, *Families Direct Anger at Ryan; Governor Blamed for Stirring Grief at Clemency Bids*, CHI. TRIB., Oct. 18, 2002 (Metro), at 1.

192. *Id.*

193. Editorial, *Halt the Anguish, Gov. Ryan*, CHI. TRIB., Oct. 20, 2002, at 8.

194. Warden, *supra* note 4, at 409.

195. *Id.*

196. Lucio Guerrero, *40 Off Death Row Push End to Executions*, CHI. SUN-TIMES, Dec. 16, 2002, at 7.

197. Jodi Wilgoren, *Appeals Process in Illinois Includes the Exonerated*, N.Y. TIMES, Dec. 17, 2002, at A22.

198. CTR. ON WRONGFUL CONVICTIONS, MAKING HISTORY 10–12 (2003) (on file with Law & Inequality).

and Erik Jensen, featured the stories of six death row exonerees, all but one of whom were in the audience that night.[199]

XI. Pardons and Blanket Clemency—Rage and "Bouquets of Praise"

Four days before leaving office, Ryan appeared at DePaul University College of Law, where he announced that he was granting pardons based on innocence to four victims of Chicago police torture—Madison Hobley, Aaron Patterson, Leroy Orange, and Stanley Howard—who were promptly released from death row.[200] That DePaul was the venue for the announcement was a tribute to Andrea Lyon, a renowned DePaul professor and death penalty foe whom the *Chicago Tribune* once hailed as "the angel of death row."[201]

The next day, Ryan appeared at Northwestern University School of Law to render his decision on blanket clemency.[202] He began by explaining that violence had twice struck close to him.[203] His neighbor, Kankakee media heir Steven Small, had been abducted for ransom and hidden in a shallow hole, where he suffocated.[204] The killer, Danny Edwards, also from Kankakee, had been sentenced to death.[205] Ryan knew the Edwards family as well as the Small family.[206] He also knew the family of Eric Lee, a troubled young man who had been sentenced to death for killing a Kankakee police officer.[207]

Ryan then turned to the evolution of his views on capital punishment. Referring to the exonerations, whose number he had raised to seventeen the previous day, he asked rhetorically: "If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and

199. *Id.*

200. *Excerpts from Ryan Speech at DePaul*, CHI. TRIB., Jan. 12, 2003, at 16.

201. Cheryl Lavin, *Angel of Death Row; for Illinois Prisoners Facing Execution, Andrea Lyon Is the Last Line of Defense*, CHI. TRIB., Feb. 13, 1995, § 5 (Tempo), at 1.

202. Governor George H. Ryan, Clemency Address at Northwestern University School of Law (Jan. 11, 2003), *available at* www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/RyanSpeech.html.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

which deserved to die?"[208] He continued: "Our capital system is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates."[209] With that, Illinois death row was emptied of its 167 remaining occupants.[210]

Blanket clemency drew a predictable outpouring of rage from local prosecutors and friends and families of victims whose killers' lives Ryan had spared,[211] but the international reaction was all "bouquets of praise."[212] The International Commission of Jurists, an organization of judges and senior lawyers from sixty nations dedicated to advancing human rights, issued a statement "thoroughly and emphatically" supporting Ryan's decision.[213] Walter Schwimmer, Secretary General of the Council of Europe, viewed blanket clemency as a reflection of Ryan's "shared . . . belief with the Council of Europe that the death penalty has no place in a civilized society."[214]

XII. Barack Obama's Legislative Reforms

In ensuing months, the Illinois General Assembly enacted legislation based on some of the Commission on Capital Punishment's major recommendations.[215] The reform effort was led by an up-and-coming state senator from Chicago—Barack Obama.[216] The most significant of the reforms—directed at alleviating the problem of false confessions—required police to electronically record interrogations of murder suspects and

208. *Id.*

209. *Id.*

210. *See* Lee Hockstader, *Illinois Clemency Brings Rage to a Remembrance; Victim's Boyfriend Calls Reprieve 'Criminal*,' WASH. POST, Jan. 14, 2003, at A1.

211. *Id.*

212. Peter Finn, *Foreign Leaders Laud Move on Death Penalty in Illinois*, WASH. POST, Jan. 18, 2003, at A19.

213. *See* Barry James, *Clearing of Illinois Death Row Is Greeted by Cheers Overseas*, N.Y. TIMES, Jan. 14, 2003, at 10.

214. *Id.*

215. *See* Barbara J. Hayler, *Moratorium and Reform: Illinois's Efforts to Make the Death Penalty Process "Fair, Just, and Accurate*," 29 JUST. SYS. J. 423, 431–33 (2008) (providing an overview of the legislation enacted by the Illinois General Assembly).

216. *See* Christopher Wills, *Obama Cites Death Penalty Reforms*, MINNEAPOLIS STAR-TRIB. (Nov. 12, 2007), http://www.startribune.com/templates/Print_This_Story?sid=11822461.

directed trial courts to presume any nonrecorded statement(s) inadmissible.[217]

Other reforms authorized judges to bar death sentences in cases resting on the testimony of a single eyewitness, informant, or accomplice;[218] required trial judges to hold pretrial hearings on any jailhouse informant testimony offered by prosecutors;[219] established an administrative procedure for firing police officers for perjury;[220] gave the Illinois Supreme Court authority to set aside death sentences it might deem "fundamentally unjust" even if there were no procedural grounds for relief;[221] simplified jury instructions regarding appropriateness of the death penalty;[222] and created an independent Capital Punishment Reform Study Committee to assess the effectiveness of the various reforms and report annually to the legislature.[223]

Legislators, however, did not act on the Commission's recommendations that police identification procedures be administered by someone who does not know who the suspect is,[224] that a statewide panel be created to decide whether to seek a death sentence in a given case,[225] and that the number of aggravating factors qualifying a defendant for a death sentence be reduced from twenty to five.[226] Rather than eliminating aggravating factors, legislators in fact added one—for homicides occurring in the course of acts of terrorism.[227]

Ryan's successor, Rod Blagojevich, a Democrat and former prosecutor who had campaigned on a pledge of allegiance to capital punishment, was free to abandon Ryan's moratorium, but the impending study was a handy rationale to dodge the politically volatile issue.[228] When asked about it, Blagojevich said that the

217. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2008) (statute applicable to adults); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (statute applicable to minors).

218. 720 ILL. COMP. STAT. ANN. 5/9-1(h-5).

219. 725 ILL. COMP. STAT. ANN. 5/115-2.

220. 50 ILL. COMP. STAT. ANN. 705/6.1(k).

221. 720 ILL. COMP. STAT. ANN. 5/9-1(i).

222. 720 ILL. COMP. STAT. ANN. 5/9-1(g).

223. 20 ILL. COMP. STAT. ANN. 3929/2. Thomas P. Sullivan, former co-chair of the Commission on Capital Punishment, would chair the Reform Study Committee. *See* James Warren, *Exposé Hits Hard at Death Penalty System*, CHI. NEWS COOPERATIVE, Nov. 13, 2010, *available at* http://www.chicagonewscoop.org/expose-hits-hard-at-death-penalty-system/.

224. ILL. CAPITAL PUNISHMENT REFORM STUDY COMM., *supra* note 28, at 45–47.

225. *Id.* at 78.

226. *Id.* at 64.

227. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(21).

228. Adriana Colindres, *Death Penalty Reformed; But Governor Won't Lift*

moratorium would remain in place, as if it somehow was beyond his control, because "[w]e have to now see how these reforms work"—which, alas, could not be known for years.[229]

XIII. Death Row Exonerations Total Twenty

After the blanket clemency, three more Illinoisans who had been under death sentences would be exonerated: Gordon (Randy) Steidl, a client of the Center on Wrongful Convictions who had been framed by police in a double murder case in East-Central Illinois;[230] Nathson Fields, who had been railroaded onto death row by the corrupt Cook County Judge Thomas Maloney;[231] and Ronald Kitchen, who along with a co-defendant had confessed, under torture by Jon Burge's men, to a quintuple murder he and his co-defendant did not commit.[232]

New death sentences dwindled down to only two or three a year on average,[233] compared with a record twenty-four in 1986, the banner year for death sentencing in Illinois,[234] while money poured out of the Capital Litigation Trust Fund to the tune of six-to-seven figures annually.[235]

XIV. Two New False Confession Cases: Spotlight Inadequacy of Reforms

In the wake of the reforms, two cases arose that made it painfully obvious that the danger of misapplying the death penalty in Illinois had not been eliminated. In October 2004, Kevin Fox was arrested in Will County for the sexual assault and murder of his three-year-old daughter.[236] Seven months later, Jerry Hobbs

Moratorium, ST. J.-REG. (Springfield), Nov. 20, 2003, at 1.

229. *Id.*

230. Hal Dardick, *Inmate Free After 17 Years*, CHI. TRIB., May 29, 2004 (Metro), at 16.

231. Matthew Walberg, *Judge's Injustice Is Righted—23 Years Later*, CHI. TRIB., Apr. 9, 2009, at 1.

232. Rummana Hussain, *Two Freed: 'It Took 20 Years*,' CHI. SUN-TIMES, July 8, 2009, at 7.

233. ILL. CAPITAL PUNISHMENT REFORM STUDY COMM., *supra* note 28, at 22–26 (chronicling death sentences imposed from 2003 through 2009).

234. Ctr. on Wrongful Convictions, Death Sentences by Year 1 (unpublished data table) (on file with Law & Inequality). The next highest year was 1990, with seventeen, followed by 1983, with sixteen, and 1980 and 1996, with fifteen each. *Id.* The numbers for other years ranged from six to fourteen. *Id.*

235. ILL. CAPITAL PUNISHMENT REFORM STUDY COMM., SIXTH AND FINAL REPORT app. 8 (listing trust fund expenditures totaling $54,314,744.82 from 2003 through 2009, or $3,194,984 for each of 17 death sentence imposed during that period).

236. Dan Rozek, *Dad Charged with Girl's Killing*, CHI. SUN-TIMES, Oct. 28, 2004,

III was arrested in Lake County for the murder of his eight-year-old daughter and a nine-year-old playmate.[237] Following confessions by both fathers, prosecutors in both cases vowed to seek the death penalty.[238] But DNA testing exonerated both fathers and identified the actual killers.[239]

XV. "Sobering Knowledge" of Uncertainty

In March 2007, given Illinois's well-documented proclivity for error in capital cases, the *Chicago Tribune* called for abolition of the death penalty, reversing an editorial position it had established in 1869[240] and reiterated in 1952 and 1976. The editorial stated, "The evidence of mistakes, the evidence of arbitrary decisions, the sobering knowledge that government can't provide certainty that the innocent will not be put to death—all that prompts this call for an end to capital punishment. It is time to stop killing in the people's name."[241]

The paper's public editor noted three weeks later: "[T]he newspaper might have expected a rise out of readers and politicians previously aligned with traditional thinking that favored capital punishment." However, "[t]here was barely a ripple, a few heartfelt letters to the editor, a few calls, and almost all accepting and welcoming the new attitude."[242]

At long last, it seemed that the time was right, to quote Supreme Court Justice John Paul Stevens, a revered Illinois favorite son, "for a dispassionate, impartial comparison of the

at 6.

237. Dan Rozek, *Girls Punched, Stabbed Many Times, Prosecutor Says*, CHI. SUN-TIMES, May 12, 2005, at 3.

238. Deborah Horan & Jennifer Skalka, *Girl's Dad Confessed, Police Say*, CHI. TRIB., Oct. 29, 2004, at 1; Dan Rozek, *Dad's Videotaped Statement Key*, CHI. SUN-TIMES, May 13, 2005, at 18; Bryan Smith, *The Nightmare: A Look at the Riley Fox Case,* CHICAGO, July 2006, at 74.

239. Hal Dardick & Kristen Schorsch, *How Cops Fumbled Riley Fox Evidence*, CHI. TRIB., June 16, 2010, at 1; Tony Gordon, *DNA Match Changes Murder Case*, CHI. DAILY HERALD, July 7, 2010, at 1; Dan Hinkel & Lisa Black, *Dad Freed in Child Slayings*, CHI. TRIB., Aug. 5, 2010, at 1; Annie Sweeney & Scott Fornek, *DNA Evidence Springs Riley Fox's Dad*, CHI. SUN-TIMES, June 17, 2005, at 1.

240. Timothy J. McNulty, *Opinion Shift Passes Quietly*, CHI. TRIB., Apr. 10, 2007, at 13.

241. Editorial, *Abolish the Death Penalty*, CHI. TRIB., Mar. 25, 2007, at 6. Four years earlier, Cornelia Grumman, a *Chicago Tribune* editorial writer, had won a Pulitzer Prize for a series of editorials focusing on flaws in the Illinois capital punishment system. Jon Yates, *Editorialist for Tribune Gets Pulitzer*, CHI. TRIB., Apr. 8, 2003, at 12.

242. *See* McNulty, *supra* note 240.

enormous costs that death penalty litigation imposes on society with the benefits that it produces."[243]

XVI. Propitious Developments

November 2008—the tenth anniversary of the Northwestern Conference on Wrongful Convictions and the Death Penalty and the twenty-ninth anniversary of an Illinois Supreme Court decision narrowly upholding the state's death penalty law[244]—brought two significant serendipitous developments without which abolition would not have occurred when it did. First, ICADP[245] hired a visionary new executive director named Jeremy Schroeder.[246] Second, the governing body of the thirty thousand-member Illinois State Bar Association (ISBA) voted eighty-two to thirty-eight to support abolition.[247] The vote not only added the ISBA's prestige to the cause, but also enabled the organization's formidable director of legislative affairs, Jim Covington, a former Illinois Senate Republican staff member, to work for abolition alongside Schroeder and Mary Dixon, a respected veteran lobbyist for the American Civil Liberties Union of Illinois.[248]

As strategic planning for the legislative campaign to abolish the death penalty was getting under way, a political tragicomedy with immense ramifications for the movement unfolded. In December 2008, Governor Blagojevich was arrested on federal corruption charges after FBI wiretaps caught him scheming with

243. Baze v. Rees, 553 U.S. 35, 81 (2008) (Stevens, J., concurring).

244. People *ex rel.* Carey v. Cousins, 397 N.E.2d 809, 815–16 (1979). Three members of the seven-member Court would have voided the law on the ground that it provided no safeguard against arbitrary exercise of prosecutorial discretion. *Id.* at 816 (Ryan, J., dissenting).

245. ICADP was formerly known as the Illinois Coalition Against the Death Penalty. *See supra* note 4.

246. *See* e-mail from Patrick McAnany, ICADP Bd. Member, to author (Dec. 16, 2011, 3:33 P.M.) (on file with Law & Inequality). Before joining ICADP, Schroeder had been Illinois's and Indiana's legislative director for the Service Employees International, as well as a union and volunteer lobbyist for Amnesty International. *See id.* An ICADP board member instrumental in hiring Schroeder recently reflected: "Not only was Jeremy very good at reaching into the heart of darkness in the Capitol, but he was also a master organizer. He built a team/campaign that combined the elements of outreach, media, literature, and discipline that made ICADP into a larger-than-life reality." *Id.*

247. Minutes of the Assemb. of the Ill. State Bar Ass'n (June 28, 2008), at 4–5 (recording that Thomas P. Sullivan and past ISBA President Terrence K. Hegarty spoke in favor of abolition); *see also* Stephanie Potter, *ISBA Body: End Death Penalty Here*, CHI. DAILY L. BULL., June 30, 2008, at 1.

248. *See, e.g.*, Bethany Krajelis, *Dixon Keeps 'Hope Alive*,' CHI. DAILY L. BULL., May 31, 2011, at 3.

advisers to extract some personal benefit—such as a lucrative job for his wife or post-government job for himself—in exchange for an appointment to the U.S. Senate seat recently vacated by Barack Obama.[249] In January 2009, the state House of Representatives impeached Blagojevich by a vote of 114 to 1, and the Senate unanimously found him guilty of the impeachment charges, immediately removing him from office.[250] He was succeeded by Lieutenant Governor Pat Quinn.[251]

Then ensued two Illinois elections that, had the outcome of either been different, would have derailed abolition. The first was the February 2010 Republican primary election in which an archconservative state senator, Bill Brady,[252] narrowly defeated a reputed moderate colleague, Kirk Dillard.[253] The second was the November 2010 general election in which Quinn narrowly won a

249. John Chase, *FBI Moves in with Phone Call; Agents Waiting at Door to Arrest Blagojevich*, CHI. TRIB., Dec. 10, 2008, at 1; Joseph Ryan & Rob Olmstead, *Indictment Alleges Pervasive Pay-to-Play Corruption in 6-Year Scheme*, CHI. DAILY HERALD, Apr. 3, 2009, at 8.

250. Kurt Erickson & Jason Nevel, *Blagojevich Gives Appeal; Senate Votes for Removal*, PANTAGRAPH (Bloomington), Jan. 30, 2009, at A1; Ray Long & Rick Pearson, *Impeached*, CHI. TRIB., Jan. 10, 2009, at 1. The lone House vote in dissent was that of Blagojevich's sister-in-law, Rep. Deborah Mell. *See Governor's Sister-in-Law Should've Voted 'Present*,*'* PANTAGRAPH (Bloomington), Jan. 16, 2009, at A6. A federal grand jury subsequently returned a twenty-nine count indictment against Blagojevich. *See* Joseph Ryan & Rob Olmstead, *Indictment Alleges Pervasive Pay-to-Play Corruption in 6-Year Scheme*, CHI. DAILY HERALD, Apr. 3, 2009, at 8. In 2010, after fourteen days of deliberation, a federal jury found Blagojevich guilty of only one count, deadlocking on twenty-three other counts. Annie Sweeney et al., *Guilty on 1: Retrial Looms; Jury 1 Vote from Conviction on Selling Senate Seat, Juror Says*, CHI. TRIB., Aug. 18, 2010, at 1. After a 2011 retrial, a jury convicted him of seventeen counts and he was sentenced to fourteen years in prison. *See* Jeff Coen & Bob Secter, *14 Years for Blagojevich*, CHI. TRIB., Dec. 8, 2011, at 1; Bob Secter & Jeff Coen, *Guilty*, CHI. TRIB., June 28, 2011, at 1.

251. Erickson & Nevel, *supra* note 250.

252. *See* Greg Hinz, *Presumptive GOP Nominee Hopes Economic Worries Trump Social Issues in Guv Race*, CRAIN'S CHI. BUS., Feb. 22, 2010, at 2 (reporting that Brady opposed abortion under all circumstances, would allow teaching creationism in public schools, and would permit the carrying of concealed handguns).

253. Monique Garcia & Rick Pearson, *Brady, Quinn Face-off Finalized*, CHI. TRIB., Mar. 6, 2010, at 1 (reporting Brady's .025% victory margin, less than two votes per county). Before the 2008 Iowa caucuses, Dillard cut a television spot for Obama, his former state Senate colleague.

> "Sen[ator] Obama worked on some of the deepest issues we had and he was successful in a bipartisan way," Dillard said in the spot. "Republican legislators respected Sen[ator] Obama. His negotiation skills and ability to understand both sides would serve the very country [sic] well." While Dillard backed John McCain in the general election, he described Obama as "a personal friend [whose] candidacy, whether he wins or loses, is good for Illinois and . . . for the United States."

Eric Zorn, *GOP Foes Smack Dillard's Hand for His Reach Across the Aisle*, CHI. TRIB., Jan. 29, 2010, at 23.

full term over Brady.[254] Had Dillard defeated Brady in the primary, he probably would have won the general election as well[255] and, if given the opportunity, would have vetoed abolition.[256] Likewise, had Brady won the general election, he undoubtedly would have vetoed abolition as well.[257]

As the political drama played out, Jeremy Schroeder obtained grants that enabled ICADP to commission an independent statewide opinion poll and hire a public relations firm—both of which would pay off in spades.[258] The poll, which was conducted by Lake Research Partners, of Washington, D.C., found that more than sixty percent of registered voters preferred sentences of life without parole over death, and Schroeder noted that many Illinoisans felt that public funds spent on the death penalty could be more efficiently spent elsewhere.[259] The public relations firm, Mac Strategies Group, of Chicago, helped procure editorial support from newspapers, which intoned with such comments as, "[w]e must abolish capital punishment in our state, now and forever,"[260] and "[a] state with a record like that [of Illinois] has no business, ever, of resuming capital punishment."[261]

In addition to the formidable lobbying skills of Schroeder, Covington, and Dixon, murder victims' survivors who opposed the death penalty and innocent men who had been condemned to die added their voices to the abolition effort.[262] Among the victims'

254. Ray Long & David Heinzmann, *Quinn Wins Governor Race as Brady Concedes*, CHI. TRIB., Nov. 6, 2010, at 1.

255. *See, e.g.*, *The Illinois Senator Who Could Have Beaten Pat Quinn*, CHI. DAILY HERALD, Nov. 8, 2010, at 17.

256. Senate Vote, S.B. 3539, 96th Gen. Assemb., Reg. Sess. (Ill. 2011), *available at* http://www.ilga.gov/legislation/votehistory/96/senate/09600SB3539_01112011_005000C.pdf (documenting Kirk Dillard's vote against the abolition bill).

257. *See* Mark Brown, *Death Penalty Could Figure in Gov Contest*, CHI. SUN-TIMES, Sept. 15, 2010, at 6 (summarizing Brady's position on the death penalty). "No more of this wimpy waiting to make sure we've got the right procedures and legal protections in place before we execute somebody. Brady wants to get back in the business of the state administering lethal injections. Now." *Id.*

258. *See* Doug Finke, *Death Watch*, ST. J.-REG. (Springfield), July 16, 2010, at 1.

259. *Id.* "The poll was used repeatedly to reassure legislators that not only was abolition the right vote, it reflected public opinion. It validated the argument that voting to abolish the death penalty was no longer a third rail of American politics." E-mail from Jim Covington, ISBA Legislative Dir., to author (Jan. 8, 2012, 1:01 P.M.) (on file with Law & Inequality).

260. Editorial, *Our View: Accept No Substitute, Abolish Death Penalty in Illinois*, ROCKFORD REG.-STAR, Nov. 9, 2010, at 9A.

261. Editorial, *Our Opinion: It's Time for State to Abolish Death Penalty*, ST. J.-REG. (Springfield), Nov. 14, 2010, at 14.

262. *See* John Keilman, *A Dying Message Rewrites 2 Lives; 20 Years After Winnetka Killings, Slain Woman's Spirit Lives on in Sisters' Activism*, CHI. TRIB.,

survivors, Jeanne Bishop and Jennifer Bishop Jenkins were especially powerful.[263] Their sister and brother-in-law, Nancy and Richard Langert, had been murdered in their home north of Chicago in 1990.[264] In the words of Bishop Jenkins, "Nancy would never want the memorial to her life to be the death of another human being."[265]

Among the exonerees who joined the lobbying effort, the most impassioned was Randy Steidl, who spent seventeen years in prison, including twelve on death row, before he was exonerated.[266] He told legislators that the death penalty was:

> [A] procedural time clock, and once you run out of procedures, it doesn't matter if you're innocent or not, that sentence is going to be carried out and it's irreversible. You can't have a system in place that convicts the guilty but also convicts the innocent. It's not acceptable collateral damage.[267]

Steidl also effectively rebutted an oft-heard refrain from proponents of capital punishment that some crimes simply are so heinous that no punishment short of death will suffice.[268] One example in support of that argument was John Wayne Gacy, who had been executed in 1994 for murdering thirty-three young men and boys in the 1970s.[269] "If you want to kill John Wayne Gacy," Steidl told legislators, "you have to kill me as well."[270]

Apr. 7, 2010, at 1.

263. *Id.*

264. John W. Fountain & Marja Mills, *Couple Is Found Slain in Winnetka Townhouse*, CHI. TRIB., Apr. 9, 1990, at 1.

265. Keilman, *supra* note 262.

266. Monique Garcia, *Quinn Under Pressure on Executions*, CHI. TRIB., Mar. 2, 2011, at 6.

267. *Id.*

268. *See* Andy Brownfield, *Six State's Attorneys Oppose Bill to Abolish Death Penalty in Illinois*, ST. J.-REG. (Springfield), Jan. 5, 2011, at 16 ("[W]hen certain individuals commit certain crimes, the ultimate punishment should be awarded, and that ultimate punishment is the death penalty." (quoting Sangamon County State's Attorney, John Milhiser)).

269. Karwath & Kuczka, *supra* note 118.

270. E-mail from Jim Covington, ISBA Legislative Dir., to author (Dec. 21, 2011, 10:12 A.M.) (on file with Law & Inequality). Reflecting on Steidl's role, Covington said: "Randy was absolute dynamite. Unfortunately, as you know, race is the fault line of America's original sin (slavery) and of our criminal justice system. You can see that fault line every day. Randy was passionate, eloquent, and [W]hite. Sadly, the errors with the death penalty system or criminal justice system are often privately dismissed because the faces of those wrongfully convicted are usually [B]lack." *Id*.

XVII. Focus on Costs of Capital Punishment

In 2010, the abolition movement was further advanced by the final report of the Capital Punishment Reform Study Committee[271] and publication of a law review article by Leigh B. Bienen, a senior lecturer at Northwestern University School of Law, documenting some two hundred million dollars in expenditures that Illinois likely would have saved if the death penalty had been abolished in 2000.[272] Bienen noted:

> It is not just that this is a waste of taxpayer dollars, at a time when Illinois needs every dollar for other services, but that the money has been spent foolishly, cynically, heedlessly, and without a discernible indication of responsibility to the state or the public. . . .
>
> For example, the state of Illinois wasted millions imposing a death sentence on Brian Dugan, who was already serving life in prison without possibility of parole for another murder. This is not a wise or sober use of public monies. It is no solace to the public, to the thousands of other murder victims' families, or to the professionals committed to a principled criminal justice system. To make matters worse, this prosecution came only after two other people were wrongfully convicted, retried, and convicted again for the crime Dugan admitted to having committed. The state spent millions of dollars prosecuting these capital cases, and then paid out millions more to the men it had wrongfully sentenced to death.[273]

Once it was clear that success was more than a pipe dream,[274] there was no problem recruiting lead sponsors of the abolition legislation—Representative Karen Yarbrough, a Democrat who described herself as a "rabid" abolitionist,[275] and Kwame Raoul, a Democrat who had ascended to Barack Obama's former state Senate seat.[276] However, because supports of abolition would not want to risk a voter backlash before the November 2010 election, however, the effort was put on hold until the General Assembly convened in a post-election, lame-duck session.[277]

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271. ILL. CAPITAL PUNISHMENT REFORM STUDY COMM., *supra* note 28.

272. Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1388 (2010).

273. *Id.* at 1389–90.

274. E-mail from Rep. Karen Yarbrough to author (Dec. 23, 2011, 12:43 A.M.) (on file with Law & Inequality).

275. *Id.*

276. Jodi S. Cohen, *Obama's Springfield Seat Goes to Lawyer*, CHI. TRIB., Nov. 7, 2004 (Metro), at 1.

277. *See* Todd Wilson, *GOP Seeks Curbs on Lame-Duck Sessions*, CHI. TRIB., Mar. 13, 2011, at 10 ("Illinois lawmakers are masters at waiting until after an

There also was no realistic prospect of getting a bill that had not been introduced in the preceding regular session through the veto session—in light of a constitutional requirement of three readings in each house on separate days.[278] Fortunately, there was a way around the problem: a bill that previously had passed by one house and was on its third reading in the other could be amended and approved by the latter on a single day and sent back to the former for approval.[279]

Yarbrough identified an ideal vehicle for an abolition amendment—a bill pertaining to the qualifications of probation officers that had been approved by the Senate and awaited final reading in the House.[280] The only remaining problem—which was rather serious—was lining up the sixty votes needed for passage.[281] Prosecutors and their allies were vociferous in their opposition to abolition, but the arguments on which they had relied in the past had been neutered by the fact that no discernible legitimate benefit could be derived from the death penalty, other than perhaps mollifying a societal hunger for retribution.[282]

One illegitimate argument was advanced in opposition to abolition by, among others, Republican Representative Jim Sacia, a retired FBI agent, who contended that the death penalty should be kept because the threat of using it helped police secure confessions.[283] With memories of the coerced confessions of Kevin Fox and Jerry Hobbs[284] still fresh, Sacia bordered on theater of the absurd when he unabashedly exhorted his colleagues, "Don't take that tool away from law enforcement, ladies and gentlemen."[285]

election to vote on contentious issues . . . that . . . could be used as . . . wedge issue[s] in a tough House or Senate race. But the risk is considerably lower during the lame-duck period. Re-elected lawmakers figure they're either invincible or they've got at least two years to justify a vote that angered folks back home. The defeated lawmakers suddenly become short-timers and can more easily be persuaded to put their votes up for grabs, usually without fear of ever facing a voter backlash again.").

278. *See* ILL. CONST. art. IV, § 8(d).

279. Richard C. Edwards, *Guide to Drafting Legislative Documents*, ILL. GEN. ASSEMBLY (2008), http://www.ilga.gov/commission/lrb/lrbguide.htm.

280. *See* e-mail from Jim Covington to author, *supra* note 270 (explaining the amendment of S.B. 3539).

281. Kiera Manion-Fischer, *House Opts to Abolish Execution in Illinois*, PANTAGRAPH (Bloomington), Jan. 7, 2011, at A1.

282. *See* Rob Warden, *Reflections on Capital Punishment*, 4 NW. J.L. & SOC. POL'Y 329, 329 (2009).

283. *The Senate's Turn*, CHI. TRIB., Jan. 11, 2011, at 12.

284. *See supra*, notes 236–37 and accompanying text.

285. *The Senate's Turn*, *supra* note 283 (statement of Rep. Jim Sacia).

XVIII. Countdown to Abolition

Although the abolitionists unquestionably had the upper hand morally and intellectually, the prospective favorable House vote was stuck for days at 56—four short of a majority of the 118-member body—until January 6, 2011, when Yarbrough at last had the needed sixty votes, or so she thought.[286] No sooner had she called for a vote, however, when Representative Pat Vershoore, a Democrat from western Illinois, approached her quietly and said he had changed his mind and would vote against the amendment.[287] It was too late to stop the vote, and the measure failed.[288] Yarbrough called for reconsideration, but then another of her favorable votes evaporated—Anthony Deluca, a suburban Democrat, said that he would not again vote in the affirmative.[289] Then, in a seemingly miraculous turn of events, Democratic Representative Mike Smith and Republican Representative Bob Biggins, who had voted against the amendment, agreed to support it upon reconsideration.[290] Vershoore also returned to the fold,[291] and the bill passed.[292] Tears filled Yarbrough's eyes as she left the floor and embraced Steidl.[293] "I did this for you," she said.[294]

Five days later, the Senate approved the amended bill by a vote of thirty-five to twenty-two.[295] Kwame Raoul, who had

286. *See* e-mail from Rep. Karen Yarbrough to author, *supra* note 274.

287. *See* Dave Dahl, *Death Penalty Repeal Moves Forward*, WJBC (Jan. 7, 2011), http://wjbc.com/death-penalty-repeal-moves-forward/ (stating that Verschoore did not support the bill when first brought to a vote).

288. *See Bill Status of SB3539; 96th General Assembly*, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/billstatus.asp?DocNum=3539&GAID=10&GA=96&DocTypeID=SB&LegID=51489&SessionID=76 (last visited Feb. 7, 2012) (providing the history of the bill).

289. *See* Tom Kacich, *House Passes Death Penalty Repeal; Senate Vote Likely Monday*, NEWS-GAZETTE (Jan. 6, 2011) http://www.news-gazette.com/news/courts-police-and-fire/2011-01-06/house-passes-death-penalty-repeal-senate-vote-likely-monday.h (stating that DeLuca switched from "yes" to "not voting").

290. *Id*. ("Republican Bob Biggins of Elmhurst and Democrat Mike Smith of Canton, changed their votes from no to yes.").

291. Manion-Fischer, *supra* note 281. Yarbrough asked Verschoore to reconsider his vote and Verschoore later explained, "She's helped me on some legislation I've had through the years, and so I said I'd give her the vote." *Id.*

292. E-mail from Rep. Karen Yarbrough to author, *supra* note 274.

293. Ray Long & Todd Wilson, *House Votes to Repeal Illinois' Death Penalty*, CHI. TRIB., Jan. 7, 2011, at 6.

294. *Id*.

295. Ray Long et al., *Illinois Senate Votes to Ban Death Penalty; Historic Measure Awaits Quinn's Signature*, CHI. TRIB., Jan. 12, 2011, at 1. January 10 was the swearing-in date per state constitutional procedure. ILL. CONST. art. V, § 2. Had Brady won the general election, he would have been sworn in the day before the measure passed the Senate. *Id*.

engineered a bipartisan Senate victory akin to Barack Obama's success on death penalty reform in 2003, saw nothing intrepid in what he had done.[296] He likened his effort to that of William (Refrigerator) Perry, the gargantuan Chicago Bear of the 1980s who reaped glory for carrying the ball a final yard into the end zone—after the team brought it ninety-nine yards downfield.[297] Raoul credited a team for carrying abolition to the one-yard line—among others, ICADP, the Center on Wrongful Convictions, the Illinois State Bar Association, murder victims' survivors, Randy Steidl, and Karen Yarbrough.[298] The ball, to continue the analogy, was two sentences:

> Beginning on the effective date of this amendatory Act of the 96th General Assembly, notwithstanding any other law to the contrary, the death penalty is abolished and a sentence to death may not be imposed.
>
> All unobligated and unexpended moneys remaining in the Capital Litigation Trust Fund on the effective date of this amendatory Act of the 96th General Assembly shall be transferred into the Death Penalty Abolition Fund, a special fund in the State treasury, to be expended by the Illinois Criminal Justice Information Authority, for services for families of victims of homicide or murder and for training of law enforcement personnel.[299]

XIX. Populism, Trepidation, Timidity—and History's Rubbish Heap

The finishing touch would be the governor's signature, which was by no means perfunctory.[300] Throughout his career, Pat Quinn had styled himself as a populist.[301] He was quick with pious pronouncements—"[w]hat's right is not always popular . . . [a]nd what's popular is not always what's right"—but was criticized for teetering between populism and opportunism.[302] He approached criminal justice issues with particular trepidation and timidity, assiduously avoiding actions that might be viewed as soft on crime.[303] In his two years as governor, for instance, he had not

296. E-mail from Sen. Kwame Raoul to author (Dec. 21, 2011, 1:31 P.M.) (on file with Law & Inequality).

297. *Id*.

298. *Id*.

299. 725 ILL. COMP. STAT. ANN. 5/119-1 (West 2008 & Supp. 2011).

300. *See* Carol Marin, *Quinn Not Acting Like People's Gov*, CHI. SUN-TIMES, Jan. 16, 2011, at 27.

301. *Id*.

302. *Id.*

303. *See* e-mail from John H. Schomberg, Gen. Counsel to Gov. Quinn, to author

granted a single pardon based on innocence,[304] a prerequisite for an exonerated person to receive state compensation for his or her wrongful conviction and imprisonment.[305] In contrast, Quinn's three immediate predecessors had granted forty-eight innocence-based pardons during the fifteen years before he became governor—an average of more than three a year.[306]

Quinn, a professed Roman Catholic, promptly made it clear that he had not made up his mind about abolition and was in no rush to do so.[307] "I do think the opinion of the members of the General Assembly expressed in the House and Senate is one that is very serious indeed," he said at a press conference.[308] "These are men and women who went before the voters, got elected in their districts, and they voted their conscience. So I intend to follow my conscience, and part of that is careful review and study, something that I think I try to apply to every bill."[309] The bill was formally transmitted to him on January 16, five days after it passed the Senate, and he had sixty days to sign or veto it; if he did neither, it would automatically become law.[310] Thus, he had until March 18 either to act or allow the bill to become law without his signature.[311]

In the weeks ahead, he came under considerable pressure from both sides.[312] He was urged to sign the bill by more than sixty-six former Illinois prosecutors, judges, and public officials, including former Republican Governor James R. Thompson,[313] who

(Jan. 5, 2012, 9:33 A.M.) (on file with Law & Inequality).

304. *Id*.

305. 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2008) (providing compensation up to $199,150 for "time unjustly served in prisons").

306. *BGA/CWC Investigation: Master Spreadsheet*, BGA, https://skydrive.live.com/view.aspx/Pivot%5E_Tables/Master%20Spreadsheet.xlsx?cid=43e6520ba43c0841&sc=documents (last visited Mar. 7, 2012). State compensation of more than $8.2 million had been paid to the 85 exonerees—pardoned or otherwise. *Illinois Taxpayers Forced to Pick up Big "Injustice Tab*," BGA, http://www.bettergov.org/investigations/wrongful_convictions_financial_costs.aspx (last visited Feb. 7, 2012).

307. Dave McKinney, *Quinn Won't Say if He'll Sign Death Penalty Bill*, CHI. SUN-TIMES, Jan. 13, 2011, at 14.

308. *Id.*

309. *Id.*

310. ILL. CONST. art. IV, § 9(b).

311. *Id.*

312. *See* McKinney, *supra* note 307.

313. Letter from Cynthia Giacchetti, former Assistant U.S. Attorney, N. Dist. Ill., on behalf of herself and sixty-five others, to Gov. Quinn (Jan. 11, 2011), *available at* http://www.peopleschurchchicago.org/2011-01%20judges%20letter%20to%20Quinn.pdf.

had signed the Illinois death penalty into law in 1977,[314] South African Archbishop Desmond Tutu, and Sister Helen Prejean, the New Orleans nun noted for her book *Dead Man Walking*.[315] In early March, Quinn went to Washington where he met with President Obama, who, like Quinn, had publicly proclaimed his support for the death penalty in heinous cases.[316] After the meeting, Quinn was quoted by Kwame Raoul, the Senate sponsor of the abolition bill, as saying that the President had "complimented [Quinn] and the state on our work on . . . the death penalty."[317]

On the other side of the issue were Illinois Attorney General Lisa Madigan and the top prosecutors of the state's two largest counties—Cook County State's Attorney Anita Alvarez and DuPage County State's Attorney Robert Berlin.[318] But the most poignant pleas came from murder victims' survivors, such as Cindy McNamara, whose daughter, an Eastern Illinois University student, had been murdered in her off-campus apartment in 2001—a crime for which a man was on death row.[319] "The lifeless body of our precious daughter was . . . left in shocking display in the middle of the room to be found by her roommate immediately upon entering their apartment," McNamara wrote.[320] "We have the death penalty for a reason—this is the reason!"[321]

In contemplating abolition, Quinn also may have considered ominous election results following abolition in New Jersey and New Mexico: in the former, Democratic Governor Jon Corzine, who had championed abolition, had lost his reelection bid to Republican Chris Christie.[322] In the latter, Susana Martinez, a Republican prosecutor and strong proponent of the death penalty, defeated Democrat Diane Denish, who had been Governor Bill

314. Mitchell Locin, *Thompson Signs Death Penalty into Law*, CHI. TRIB., June 22, 1977, at 1.

315. *Quinn: Tutu Lobbied for Execution Ban*, CHI. TRIB., Feb. 25, 2011, at 9.

316. Dave McKinney, *Obama Weighs in on State Death Penalty Bill*, CHI. SUN-TIMES, Mar. 5, 2011, at 5.

317. *Id.*

318. Garcia, *supra* note 266.

319. Dave McKinney, *Pleas to Quinn Come from Cardinal, World Leaders*, CHI. SUN-TIMES, Mar. 2, 2011, at 5.

320. *Id.*

321. *Id*.

322. Josh Margolin & Claire Heininger, *Christie Wins*, RECORD (Bergen County), Nov. 4, 2009, at A1.

Richardson's lieutenant governor when he signed abolition legislation.[323]

In the end, saying that he had drawn inspiration from the Bible, Quinn overcame his trepidation, relegated the Illinois death penalty to the rubbish heap of history, and commuted the sentences of fifteen men then on death row to life in prison without parole.[324] Illinois—which had executed 357 men (no women) after its admission to the union in 1818[325]—thus became the sixteenth state to abolish the death penalty.[326]

Conclusion: The Legacy of the Illinois Death Penalty Experience

The Illinois capital punishment revolution was a defining force in the abolition movements in three other states in which legislatures voted in recent years to end the death penalty—New Jersey,[327] New Mexico,[328] and Connecticut.[329] Going forward it seems to bode well that abolition in those states was not as heavily

323. Leslie Linthicum, *Deathly Debate in Governor Race*, ALBUQUERQUE J., June 10, 2010, at A1; Sean Olson & Rene Romo, *Cruces DA Defeats Democrat Denish*, ALBUQUERQUE J., (Nov. 3, 2010), http://www.abqjournal.com/elex/0314780423elex 11-03-10.htm.

324. *See* Quinn, *supra* note 2.

325. *See Executions is the U.S. 1608–2002: The ESPY File; Executions by State*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/documents/ESPY state.pdf (last visited Feb. 2, 2012).

326. *See* Quinn, *supra* note 2. Michigan became the first state to abolish the death penalty on May 18, 1846. Eugene C. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 765 (1996). New Mexico became the fifteenth on March 18, 2009. Dan Boyd, *Repealed*, ALBUQUERQUE J., Mar. 19, 2009, at 1. Between Michigan and New Mexico were Wisconsin (1853), Maine (1887), Minnesota (1911), North Dakota (1973), Alaska (1957), Hawaii (1957), Vermont (1964), West Virginia (1965), Iowa (1965), New York (2007), Massachusetts (1984), Rhode Island (1984), and New Jersey (2007); the District of Columbia abolished it in 1981. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Feb. 5, 2012).

327. N.J. DEATH PENALTY COMM'N, N.J. DEATH PENALTY STUDY COMMISSION REPORT 39 (2007), *available at* http://www.njleg.state.nj.us/committees/dpsc_ final.pdf. (citing the Illinois moratorium and reforms as an indication of the emergence of a trend toward a national consensus against the death penalty).

328. *See* Steve Terrell, *State Senators Hear from Former Death-Row Inmate*, SANTA FE N. MEXICAN, Mar. 8, 2009, at A.1 (citing New Mexican lobbying effort by Illinois death row exoneree Randy Steidl).

329. *See* S.B. 280 (Conn. 2012); e-mail from Shari Silberstein, Exec. Dir., Equal Justice USA, to author (Apr. 16, 2012, 10:56 A.M.) (on file with Law & Inequality) ("Illinois put the issue of innocence and the death penalty on the map and opened a national conversation about the risk of executing an innocent person"). Equal Justice USA is a national group that worked to repeal the Connecticut death penalty. *See id.*

dependent on serendipity as it had been in Illinois; the primary impetus, rather, was a combination of awareness of the inevitability of death penalty mistakes and the fiscal implications of maintaining the seldom-used punishment.[330]

The future of the movement hinges on how the arguments that carried the day in Illinois, New Jersey, New Mexico, and Connecticut resonate in the thirty-three states where death penalties remain in force but have fallen increasingly into disuse.[331] The most glaring example is California, which has the nation's largest death row, housing more than seven hundred prisoners,[332] and which has not executed anyone since 2006.[333] Since restoring its death penalty in 1978, California has spent an estimated four billion dollars on capital punishment, but has carried out only thirteen executions,[334] at a cost to taxpayers of three hundred million dollars each.

An effort is underway to abolish the California death penalty by popular vote under the state's ballot initiative procedure.[335] The initiative would replace the death penalty with life without parole

330. N.J. DEATH PENALTY COMM'N, *supra* note 327 (finding that a "risk of making an irreversible mistake" and "[t]he costs of the death penalty are greater than the costs of life in prison without parole"); Dalina Castellanos, *States Rethink Capital Punishment; Connecticut Will Be the Fifth to Scrap It in Five Years,* LA Times, Apr. 15, 2012, at 16; Brigid C. Harrison, *Death to Capital Punishment*, N.Y. TIMES, Dec. 2, 2007, at 21 (itemizing New Jersey death penalty costs); Press Release, Governor Bill Richardson, Gov. Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009), *available at* http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf; Megan DeMarco, *N.J. Lawmaker Introduces Bill Reinstating the Death Penalty*, NJ.COM (Jan. 25, 2011), http://www.nj.com/politics/index.ssf/2011/01/nj_lawmaker_introduces_bill_re.html (noting that there had been no New Jersey executions in forty-four years); Dan Boyd, *Thinking It Over*, ALBUQUERQUE J. (Mar. 17, 2009), http://www.abqjournal.com/news/state/17104545077newsstate03-17-09.htm (citing Governor Bill Richardson as being "concerned about the death penalty's cost, how it unfairly targets minorities and cases of prosecutorial abuse").

331. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2011: YEAR END REPORT 1 (2011), *available at* http://www.deathpenaltyinfo.org/documents/2011__Year__End.pdf (showing that U.S. executions fell from 85 in 2000 to 43 in 2011 and that death sentences fell from 224 to 78).

332. CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.: SPRING 2011, at 36–37 (2011), *available at* http://www.naacpldf.org/files/publications/DRUSA_Spring_2011.pdf.

333. *Id.* at 31.

334. Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S51 (2011). Meanwhile, abolition would save California taxpayers $126 million per annum. CAL. COMM'N ON FAIR ADMIN. OF JUSTICE, FINAL REPORT 157 (2008).

335. CAL. CONST. art. II, § 8.

and create a one hundred million dollar fund to help solve murder and rape cases.[336] The effort is led by a coalition known as SAFE California[337] that includes a broad range of former law enforcement officials, activist organizations, faith-based groups, and celebrities.[338]

If the abolition movement prevails in California, it will advance the argument that capital punishment offends evolving standards of decency—the ground on which the U.S. Supreme Court found that laws allowing the execution of intellectually disabled and juvenile killers constituted cruel and unusual punishment.[339] It also would validate Justice Marshall's thesis, the intellectual underpinning of the Illinois abolition movement and, in a broader sense, the fundamental American concept of democracy and social justice.[340] As Thomas Jefferson put it: "[W]henever the people are well-informed, they can be trusted with their own government; that, whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."[341]

336. Cal. Attorney Gen., Death Penalty Repeal, Initiative Statute, Initiative No. 11-0035 (Oct. 20, 2011), *available at* http://www.safecalifornia.org/downloads/2.1.A_titleandsummary.pdf.

337. *See Get the Facts; About the SAFE California Act*, SAFE CAL., http://www.safecalifornia.org/facts/about (last visited Feb. 5, 2012). SAFE is an acronym for "Savings, Accountability, Full Enforcement." *Id*.

338. *Endorsements*, SAFE CAL., http://www.safecalifornia.org/about/endorsements (last visited Feb. 5, 2012) (including former law enforcement officials such as ex-Los Angeles County District Attorney Gil Garcetti, ex-Orange County Superior Court Judge Donald A. McCartin, ex-U.S. Magistrate James Stiven, ex-U.S. Court of Appeals Judge H. Lee Sarokin, and ex-San Quentin Warden Jeanne Woodford, as well as celebrities like Alec Baldwin, Danny Glover, Jane Kaczmarek, Paula Poundstone, Carl Reiner, Susan Sarandon, Gloria Steinem, and Lily Tomlin).

339. *See* Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (invalidating twenty state laws under which persons could be executed for crimes committed before age eighteen); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (banning execution of mentally retarded persons in states that did not expressly prohibit it).

340. *See supra* notes 6–10 and accompanying text.

341. Letter from Thomas Jefferson, U.S. Minister Plenipotentiary to Fr., to Richard Price, author (Jan. 8, 1789), *available at* http://www.let.rug.nl/usa/P/tj3/writings/brf/jefl73.htm.