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AN IDEOLOGICAL ODYSSEY: EVOLUTION OF A REFORMER

ROB WARDEN*

INTRODUCTION

When the U.S. Supreme Court narrowly and temporarily struck down the death penalty in *Furman v. Georgia* in 1972, holding that its arbitrary imposition amounted to cruel and unusual punishment,¹ Justice Thurgood Marshall theorized in a concurring opinion that the average citizen, if fully informed of the realities of capital punishment, would “find it shocking to his conscience and sense of justice.”² The majority’s reasoning resonated with me—as Justice Potter Stewart put it, the death penalty was “so wantonly and freakishly imposed” that it was “cruel and unusual in the same way that being struck by lightning is cruel and unusual”³—but Marshall’s thesis did not.

Growing up in Carthage, Missouri, my view of capital punishment had been all-but-indelibly forged by the crimes of William E. (Billy) Cook Jr., from nearby Joplin.⁴ In December 1950, shortly after my tenth birthday, Cook abducted and murdered a family of five and dumped their bodies into an abandoned mineshaft.⁵ He escaped the death penalty for those murders,⁶ but not for a sixth, which he had committed several days later in California. When he gasped his last breath in the San Quentin gas chamber on December 12, 1952,⁷ it seemed just deserts, pure and simple.

Two decades later, *Furman* brought back memories not just of Cook,

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¹ *Furman v. Georgia*, 408 U.S. 238, 240–57 (1972); *id.* at 306–10 (Douglas, J., concurring); *id.* at 257–306 (Brennan, J., concurring); *id.* at 306–10 (Stewart J., concurring); *id.* at 310–14 (White, J., concurring); *id.* at 314–71 (Marshall, J., concurring).

² *Id.* at 369 (Marshall, J., concurring).

³ *Id.* at 310 (Stewart, J., concurring).

⁴ *Cook is Charged with Killing Five*, JOPLIN GLOBE, Jan. 11, 1951, at 1; *Desperado Admits Killing Family of 5*, N.Y. TIMES, Jan. 20, 1951, at 8.

⁵ *Cook is Charged*, *supra* note 4; *Desperado*, *supra* note 4.

⁶ *Badman Cook Spared; Faces Another Trial*, CHI. TRIB., Mar. 22, 1951, at 1.

⁷ *Cook, Slayer of Six, Dies in Gas Chamber*, L.A. TIMES, Dec. 13, 1952, at 4.

but also of an infamous case I had covered as a reporter at the *Chicago Daily News* in 1966: Richard Speck's murders of eight young women in a townhouse on the city's far south side.⁸ It seemed a shame that, among the some 600 death sentences around the country wiped out by *Furman*,⁹ an exception had not somehow been made for Speck.¹⁰

The criminal justice system's propensity for error barely registered with me at the time, even though I was aware of the wrongful conviction of a man named Lloyd Eldon Miller Jr., who had come within eight hours of execution for the murder of an eight-year-old girl in Hancock County, Illinois, in 1955.¹¹ Miller was saved by a volunteer lawyer who discovered, among a considerable body of exculpatory evidence, that what a state forensic analyst had testified was blood of the victim's type on a pair of jockey shorts presumed to be Miller's actually was paint.¹² The U.S. Supreme Court unanimously reversed Miller's conviction in 1967—declaring that the prosecution had “deliberately misrepresented the truth.”¹³ The charges against Miller were dropped in 1971.¹⁴

It occurred to one of my editors at the *Daily News* that a system capable of making an error of the magnitude of the one that had been made in the Miller case must have made even worse mistakes. I was assigned to write a sidebar on wrongful executions. After a couple of days of research at several libraries and a number of interviews with legal experts, however, I had not found a single case anywhere in the country in which an executed person's innocence had been proven.¹⁵ I did find several cases in which executions

⁸ Rob Warden, *He Was Woman Crazy. Says Monmouth Friend*, CHI. DAILY NEWS, July 18, 1966, at 1.

⁹ Fred P. Graham, *Court Spares 600: 4 Justices Named by Nixon All Dissent in Historic Decision Supreme Court Bars Death Penalty as Now Imposed*, N.Y. TIMES, June 30, 1972, at 1.

¹⁰ William Kling, *Speck Death Order Voided*, CHI. TRIB., June 29, 1971, at 1. Speck was resentenced to life in prison and died on Dec. 5, 1991. Steve Johnson & Sharman Stein, *Speck's Death Fails to End the Pain of Victims' Relatives*, CHI. TRIB., Dec. 6, 1991, at 11.

¹¹ *Miller v. Pate*, 386 U.S. 1 (1967).

¹² WILLARD J. LASSERS, *SCAPEGOAT JUSTICE: LLOYD MILLER AND THE FAILURE OF THE AMERICAN LEGAL SYSTEM* 73, 91, 162–63 (1973).

¹³ *Miller*, 386 U.S. at 6–7 (1967).

¹⁴ *Dismiss 1956 Murder Charge*, CHI. TRIB., Oct. 13, 1971, at B4.

¹⁵ Years later, four executed men were officially exonerated: William Jackson Marion, hanged in Nebraska in 1887, Rob Warden, *A Tragedy of Errors*, PLAYBOY, Jan. 2005, at 56; Thomas and Meeks Griffin, electrocuted in South Carolina in 1913, Leonard Greene, *Race Prof Clears 2 in '13 Slay*, N.Y. POST, Oct. 15, 2009, at 8; and Joe Arridy, electrocuted in Colorado in 1938, Rob Warden, *With the Mind of a Six-year-old, Joe Went to the Gas Chamber, Smiling*, FRIENDSOFJOEARRIDY.COM, <http://www.friendsofjoearridy.com/Joe.html> (last visited May 29, 2015).

had been carried out on flimsy evidence¹⁶ and several others in which wrongfully condemned defendants had survived near-death experiences like Miller's.¹⁷ These cases were not of interest to my editors, however, and I did not write the envisioned sidebar.¹⁸

Nor did I mentally connect the wrongful conviction cases with the larger issue of whether capital punishment itself was justified. Basically, I assumed that the cases I identified were mere anomalies in a well-functioning system under which thousands of doubtlessly deserved executions had been carried out.¹⁹ Not questioning the conventional wisdom that the death penalty deterred crime, I saw no reason that, with safeguards against arbitrary imposition, it should not be restored—a sentiment shared by substantial majorities of Americans.²⁰ Little wonder, in coming years, that the legislatures of thirty-eight states enacted new death penalty laws ostensibly correcting the constitutional infirmities of the previous ones.²¹

¹⁶ Among likely mistaken executions were those of George Engel, Adolph Fischer, Albert R. Parsons, and August Spies, labor activists hanged in Chicago in 1887 for the infamous Haymarket bombing, see HENRY DAVID, *THE HISTORY OF THE HAYMARKET AFFAIR* (1958); Joe Hill, a labor leader executed by firing squad in Utah in 1915, see GIBBS M. SMITH, *JOE HILL* (1969); Nicola Sacco and Bartolomeo Vanzetti, electrocuted in Massachusetts in 1927, see S.J. Micciche, *Lawyer Says Confession Clears Sacco, Vanzetti*, BOS. DAILY GLOBE, Apr. 3, 1959, at 1; and Roosevelt Collins (a.k.a. Roosevelt Wilson), an African American electrocuted in Alabama in 1937 for the rape of a white woman, a crime that probably had not occurred, see William Bradford Huie, *The South Kills Another Negro*, AM. MERCURY, Nov. 1941, at 535–45.

¹⁷ Among these were the cases of Jesse and Stephen Boorn, who escaped execution after the victim of the murder for which they had been condemned in Vermont in 1817 was found alive, EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* 15–22 (1932); Charles F. Stielow, who falsely confessed to and was sentenced to death for the 1915 murder of an elderly neighbor in Orleans County, N.Y., Louis Seibold, *Stielow Framed by Fake Evidence*, N.Y. WORLD, May 10, 1918, at 1; Isadore Zimmerman, whose innocence of a 1937 murder on the Lower East Side of Manhattan was acknowledged by prosecutors in 1962, 'Back From the Grave' After 24 Years, N.Y. HERALD TRIB., Feb. 3, 1962, at 3.

¹⁸ The *Daily News* ceased publication on Mar. 4, 1978. See Rob Warden, *Chicago Daily News: Requiem for a Daily*, WASH. POST, Feb. 19, 1978, at F1.

¹⁹ Between 1608 and 1972, at least 14,489 executions had been carried out lawfully in the United States. See *Espy File*, DEATH PENALTY INFO CTR., <http://www.deathpenaltyinfo.org/executions-us-1608-2002-espys-file> (last visited Oct. 16, 2015) [hereinafter DPIC].

²⁰ Shortly after *Furman*, the Gallup Poll found that 57 percent of Americans favored the death penalty and 32 percent opposed. *Gallup Historical Trends/Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 16, 2015) [hereinafter Gallup]. Over the next four years public support for it rose to 66 percent and opposition fell to 26 percent. *Id.*

²¹ The states were Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina,

It took Illinois longer than most states to reinstate capital punishment,²² but the new, supposedly improved Illinois death penalty was in place in 1978²³ when authorities unearthed the bodies of thirty-two young men and boys from the crawl space beneath the home of John Wayne Gacy, a suburban Chicago building contractor whose case I covered for the *Washington Post*.²⁴ When Gacy was sentenced to death,²⁵ he—like Cook and Speck—was simply more of what I saw as the unobjectionable reality of capital punishment.

My view changed rather abruptly in the early 1980s when, as editor of *Chicago Lawyer*, a monthly journal launched by the Chicago Council of Lawyers,²⁶ my staff and I began investigating wrongful convictions and discovered the realities to which Justice Marshall referred.²⁷ Weighing the pros and cons of capital punishment, I came to regret that my revulsion to the unspeakable acts of Cook, Speck, and Gacy had blinded me earlier to a rational assessment of the death penalty.

The ledger was one-sided—worse than one-sided, really: There was, to my mind at least, not a single discernible benefit in having the death penalty—other than mollifying a visceral urge for revenge. During the ensuing decades, the factors that led to my epiphany grew in strength and number—converting scores of officials who formerly supported the death penalty into, like me, testaments to the Marshall thesis,²⁸ culminating in

South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See *State Information*, DPIC, <http://www.deathpenaltyinfo.org/state-information> (last visited Oct. 16, 2015). The Supreme Court upheld the new laws. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

²² The Illinois General Assembly did enact a death penalty law in 1973, but that law was thrown out in 1975 because it relegated sentencing in capital cases to three-judge panels, a procedure that was held to violate the Illinois Constitution. *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1, 7 (Ill. 1975). In 1977, the General Assembly enacted another new death penalty law assigning sentencing to juries, and the Illinois Supreme Court upheld that law in 1979. *People ex rel. Carey v. Cousins*, 397 N.E.2d 809, 816 (Ill. 1979).

²³ ILL. REV. STAT. (1977), ch. 38, par. 9-1, now 720 ILL. COMP. STAT. 5/9-1 (2011).

²⁴ Rob Warden, *Bodies of Boys Uncovered in Illinois*, WASH. POST, Dec. 23, 1978, at A1; Rob Warden, *Chicago Police Called Lax in Mass Slaying Case*, WASH. POST, Dec. 24, 1978, at A1.

²⁵ Jane Fritsch, *Gacy Sentenced to Death*, CHI. TRIB., Mar. 14, 1980, at 1.

²⁶ A small, liberal bar association founded in 1969 “in reaction to the failures of the established Chicago bar to speak out” regarding, among other issues, police violence surrounding the 1968 Democratic Convention and the ensuing “Conspiracy 7” trial. See, e.g., John R. Schmidt, *John Schmidt’s Personal Appreciation of the Council*, CHI. LAW., May 1984, at B3. In 1988, ownership of *Chicago Lawyer* was transferred to me and I continued as editor until I sold the publication to the Law Bulletin Publishing Co. in 1989. Neil Tesser, *Chicago Lawyer: New Management, Less Muck*, CHI. READER, Sept. 15, 1989, at 4.

²⁷ *Furman v. Georgia*, 408 U.S. 238, 362–69 (1972) (Marshall, J., concurring).

²⁸ In Illinois, seventy-one former state and federal prosecutors and judges signed a letter urging abolition of the death penalty in 2011. Letter from Cynthia Giacchetti et al., Former

abolition of the death penalty in Illinois,²⁹ New York,³⁰ New Jersey,³¹ New Mexico,³² Connecticut,³³ Maryland,³⁴ and Nebraska.³⁵

AMONG THE FACTORS:

The smattering of wrongful death sentences that I had run across in search of erroneous executions in the 1970s cannot be dismissed as anomalies in an otherwise well-functioning and well-intentioned system of justice. The system has condemned scores of innocent defendants whose executions often were averted only by serendipitous discovery of exculpatory new evidence—opening the overwhelming, unanswerable question of how many others were condemned on evidence of the same quality but not exonerated.³⁶ Stunningly, of some 300 defendants sentenced to death in Illinois after *Furman*, twenty death row prisoners were exonerated.³⁷

The death penalty has no demonstrable deterrent effect. If it did, it would follow that having it would result in lower murder rates, but studies spanning

Assistant U.S. Att’y, to Hon. Pat Quinn, Governor of Ill. (Feb. 4, 2011) (on file with *Journal of Criminal Law and Criminology*). Among signers was James R. Thompson, a former federal and state prosecutor who was elected governor in 1976 and signed the post-*Furman* Illinois death penalty law in 1977. Mitchell Locin, *Thompson Signs Death Penalty into Law*, CHI. TRIB., June 22, 1977, at 1.

²⁹ Ray Long & Todd Wilson, *Illinois Bans Death Penalty; Quinn Commutes 15 Sentences to Life, Angering Some Victims’ Families*, CHI. TRIB., Mar. 10, 2011, at 1. For details, see Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245 (2012) [hereinafter *How & Why*].

³⁰ New York was the last state to enact a post-*Furman* death penalty law. Its law was on the books only from 1995 until 2004, when the state’s highest court threw it out based on a minor flaw that the court held might confuse jurors in a subset of capital cases. *People v. LaValle*, 817 N.E.2d 341, 344 (N.Y. 2004). In 2008, New York’s execution chamber was dismantled. Brendan Scott, *Gov Pulls Switch on Death Cell*, N.Y. POST, July 24, 2008, at 22.

³¹ Keith B. Richburg, *N.J. Approves Abolition of Death Penalty*, WASH. POST, Dec. 14, 2007, at A3.

³² Dan Boyd, *Repealed*, ALBUQUERQUE J., Mar. 19, 2009, at 1.

³³ *Death Penalty Abolished*, NEWSDAY, Apr. 26, 2012, at A53.

³⁴ Michael Dresser, *Death Penalty Repeal Signed*, BALT. SUN, May 3, 2013, at 1A.

³⁵ Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, N.Y. TIMES, May 28, 2015, at A1.

³⁶ As of Oct. 12, 2015, 156 post-*Furman* death row prisoners had been exonerated nationally. *Issues/Innocence*, DPIC, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited June 10, 2016). For serendipitous details, see Rob Warden, *Reflections on Capital Punishment*, 4 NW. J. L. & SOC. POL’Y, 329, 335–349 (2009) [hereinafter *Reflections*].

³⁷ *Facts/Illinois*, DPIC, http://www.deathpenaltyinfo.org/state_by_state (last visited Oct. 16, 2015). Nationally, as of October 30, 2015, there has been one exoneration per 9.46 executions—150 of the former, 1,419 of the latter. *Facts About the Death Penalty*, DPIC (Oct. 30, 2015), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

more than a century and a half have found the opposite to be true.³⁸ The studies have consistently shown that proportionately fewer murders occur in states that do not have the death penalty than in states that do³⁹ and, in the latter, that murder rates increase after highly publicized executions.⁴⁰

There can be no doubt that innocent persons have been executed under post-*Furman* laws—despite Supreme Court Justice Antonin Scalia’s assertion in 2006 that there had not been “a single case—not one—in which it is clear that a person was executed for a crime he did not commit.”⁴¹ The most famous example is Cameron Todd Willingham, whose case was brought to light in 2004 as a result of dogged reporting by *Chicago Tribune* reporters Steve Mills and Maurice Possley.⁴²

The death penalty system continues to suffer from what Supreme Court Justice Harry A. Blackman deemed “the virus of racism.”⁴³ Fifteen years after *Furman*, the Court erected an insurmountable barrier to challenging death sentences for racial bias⁴⁴—holding five–four that, despite a thoroughly documented disparity in the imposition of death sentences in Georgia based on the race of murder victims,⁴⁵ an African American on death row was not entitled to relief absent proof that discriminatory intent affected his specific case.⁴⁶ Years later, Justice Lewis F. Powell Jr., the author of the majority opinion in the case, expressed regret, going so far as to say that he would like

³⁸ The phenomenon was documented in 1846 by Robert Rantoul, Jr., the U.S. Attorney for Massachusetts, who studied international murder and execution rates over a forty-year period. MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL, JR. 504 (Luther Hamilton ed., 1854).

³⁹ See, e.g., Raymond Bonner & Ford Fessenden, *States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1; *Deterrence*, DPIC, <http://deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates#stateswithwwithout>.

⁴⁰ See, e.g., William J. Bowers & Glenn Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453, 481–84 (1980) (noting increases in homicides after highly publicized executions).

⁴¹ *Kansas v. Marsh*, 548 U.S. 163, 188 (2006) (Scalia, J., concurring).

⁴² Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004, at 1. For information on other possibly innocent persons executed under post-*Furman* laws before Scalia’s assertion that there had been none, see, for example, *Reflections*, *supra* note 36, at 339–49; Raymond Bonner & Sara Rimer, *A Closer Look at Five Cases That Resulted in Executions of Texas Inmates*, N.Y. TIMES, May 14, 2000, at 1.

⁴³ *Callins v. Collins*, 510 U.S. 1141, 1154 (1994) (Blackmun, J., dissenting from denial of cert.).

⁴⁴ See, e.g., Anthony Lewis, *Bowing to Racism*, N.Y. TIMES, Apr. 28, 1987, at A31.

⁴⁵ David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707–10 (1983).

⁴⁶ *McCleskey v. Kemp*, 481 U.S. 279, 293, 297 (1987).

to abolish the death penalty altogether,⁴⁷ but by then it was too late to help the defendant, Warren McCleskey, who had been executed.⁴⁸ Under the Illinois post-*Furman* law, when *McCleskey* came down in 1991, only three whites had been convicted of killing blacks, while more than ten times as many blacks had been convicted of killing whites⁴⁹—and the white-on-black murders were extraordinarily heinous⁵⁰ compared with black-on-white ones.⁵¹

The distinction between a capital and a non-capital case often is nothing more than an accident of time or geography. Gacy, for example, would not have been eligible for the death penalty either if his last known murder had occurred eighteen months earlier, before the Illinois post-*Furman* law went into effect,⁵² or if his murders had occurred in Iowa, which abolished the death penalty in 1965⁵³ and where he had been convicted of sodomy in 1968 before moving to Chicago.⁵⁴ Conversely, just as geography worked against Gacy,⁵⁵ it took a death sentence off the table for Jeffrey Dahmer, who

⁴⁷ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

⁴⁸ Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991.

⁴⁹ Memorandum from Author to *Journal of Criminal Law and Criminology* Containing Supporting Data Collected by Author (Apr. 11, 2015) (on file with *Journal of Criminal Law and Criminology*).

⁵⁰ Charles Hattery murdered a young mother and her two children, ages seven months and twenty-two months, in reprisal against the children's father for a drug deal gone wrong. *People v. Hattery*, 488 N.E.2d 513, 513–16 (Ill. 1985). Maynard McCallister killed a man, the man's wife, and their son during a drug transaction. *People v. McCallister*, 737 N.E.2d 196, 199 (Ill. 2000). Edward Spreitzer was part of a gang of sadistic serial killers who tortured and murdered at least five women. *People v. Spreitzer*, 525 N.E.2d 30, 31–32 (1988). Hattery was resentenced to life in prison in 1987. Linnet Myers, *Killer of Mom, 2 Kids Escapes Death*, CHI. TRIB., Feb. 26, 1987, at B3. McCallister and Spreitzer's sentences were commuted to life in 2003. *Death Row Inmates Receive Life*, CHI. TRIB., Jan. 12, 2003, at 18.

⁵¹ For example, Rodney Adkins, a young African American, was sentenced to death for murdering a white woman who surprised him while he was burglarizing her apartment. Victoria Pierce, *Death Sentence in Slaying of Woman in Oak Park*, CHI. TRIB., Aug. 8, 2007, Metro Sect., at 5. He had no record of violence. *Id.* He killed her with a knife from her kitchen. *Id.* Adkins's sentence was commuted to life without parole by Governor Pat Quinn when he signed the 2011 legislation abolishing the death penalty. Long & Wilson, *supra* note 29.

⁵² Gacy's last victim was Bobby Piest, who disappeared on Dec. 11, 1979. Douglas Frantz & Ronald Koziol, *Identify Body as Piest's; Tied to Gacy*, CHI. TRIB., Apr. 10, 1979, at 1. The Illinois post-*Furman* law went into effect on June 22, 1977. Mitchell Locin, *Thompson Signs Death Penalty into Law*, CHI. TRIB., June 22, 1977, at 1.

⁵³ HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 9 (1997).

⁵⁴ Cheryl Lavin, *The Final Act*, CHI. TRIB., May 5, 1994, Tempo Sec., at 1.

⁵⁵ Gacy was executed on May 10, 1994. Susan Kuczka & Rob Karwath, *All Appeals Fail; Gacy Is Executed*, CHI. TRIB., May 10, 1994, at 1.

murdered seventeen young men between 1978 and 1991 and kept some of their heads and torsos in a refrigerator at his Milwaukee apartment.⁵⁶ Had Dahmer committed the murders in Chicago, where he picked up three of his victims, he would have been a prime candidate for a death sentence. Wisconsin, however, had abolished the death penalty in 1853.⁵⁷

Counterintuitive though it may be, the death penalty is far more expensive than life in prison. In Illinois, where the General Assembly established a Capital Litigation Trust Fund in 2000 to defray costs of investigations by both the prosecution and defense into aggravating and mitigating evidence in potential death penalty cases, \$122 million was spent through 2009—a period during which only seventeen death sentences were imposed and there were no executions.⁵⁸ In Maryland, a 2008 study found that the cost of each capital case exceeded the cost of a comparable non-capital murder case by \$1.9 million, not counting costs of cases in which the death penalty was sought but not imposed. When those cases were included, the difference per case was \$2.2 million—and the cost per execution carried out was an astronomical \$37.2 million.⁵⁹

Although executions, according to the Supreme Court, are not cruel and unusual,⁶⁰ neither are they in any sense kind and usual. In 2009, I chronicled sixteen especially gruesome executions carried out by hanging, gassing, electrocution, and lethal injection between 1853 and 1997.⁶¹ Among more recent and better-known examples are the drawn-out and painful executions by lethal injection of Clayton Lockett in Oklahoma⁶² and Joseph Rudolph Wood in Arizona.⁶³

Perversely, the death penalty has resulted in some murders—notably

⁵⁶ Rogers Worthington & Colin McMahon, *A Gruesome Pattern Unfolds*, CHI. TRIB., July 26, 1991, at 1.

⁵⁷ BEDAU, *supra* note 53. Dahmer was murdered in prison in 1994. *Dahmer Slain*, CAP. TIMES, Nov. 28, 1994, at 1A.

⁵⁸ 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, 1326, 1338, 1399 (2010).

⁵⁹ JOHN RONAN ET AL., URBAN INST., *THE COSTS OF THE DEATH PENALTY IN MARYLAND* 2–3 (2008).

⁶⁰ See, e.g., *Baze v. Rees*, 553 U.S. 35, 47 (2008); *Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878).

⁶¹ *Reflections*, *supra* note 36, at 352–58.

⁶² Graham Lee Brewer, *Execution Failure in Oklahoma: Clayton Lockett Dies of Heart Attack After Vein Explodes*, DAILY OKLAHOMAN, Apr. 29, 2014, at 1; Jeffrey E. Stern, *Lethal Injection Is Supposed to Be Clinical and Painless. It Isn't Turning out That Way. The Execution of Clayton Lockett*, ATLANTIC, June 2015, at 71.

⁶³ Michael Kiefer, *2-Hour Execution Took 15 Attempts*, ARIZ. REPUBLIC, Aug. 2, 2014, at A1.

that of one of two Los Angeles police officers who were kidnapped in 1964 after stopping a car because its license plate was not illuminated. The men in the car mistakenly assumed that they were being stopped for armed robberies they had committed. Then, mistakenly believing that the kidnapping itself was a capital offense under the so-called Little Lindberg law,⁶⁴ the robbers decided to kill the officers. They shot one to death, but the other escaped to tell what happened. The killers were convicted and sentenced to death, although never executed.⁶⁵

While false convictions grab headlines, there is another problem of greater numerical significance that receives far less attention—wrongful death sentences. Although the death penalty is supposed to be reserved for “the worst of the worst,”⁶⁶ it often is not⁶⁷—owing to the fact, as Justice John Marshall Harlan observed the year before *Furman*, that it is “beyond present human ability” to identify characteristics of murders and murderers that justify death sentences.⁶⁸ Justice Blackmun belatedly agreed—announcing twenty-two years after his dissent in *Furman*⁶⁹—that he no longer would “tinker with the machinery of death” because the system was incapable of determining accurately and consistently who deserved to die.⁷⁰

The death penalty is too flawed to fix. Even if bad faith could be eliminated,⁷¹ which of course it cannot, mistakes would plague the system. Research indicates, for instance, that eyewitness error—a factor in about a fifth of documented false convictions in U.S. capital cases⁷²—could be reduced by reforming police lineup procedures—but would continue to occur

⁶⁴ Federal Kidnapping Act, 18 U.S.C. § 1201(a)(1) (2012).

⁶⁵ For an account of the case, see JOSEPH WAMBAUGH, *THE ONION FIELD* (1973).

⁶⁶ *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

⁶⁷ See, e.g., JOHN J. DONOHUE, *CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION* (2013).

⁶⁸ *McGautha v. California*, 402 U.S. 183, 204 (1971).

⁶⁹ *Furman v. Georgia*, 408 U.S. 238, 405–14 (1972) (Blackmun, J., dissenting).

⁷⁰ *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting).

⁷¹ Data from National Registry of Exonerations (NRE), which has tracked exonerations since 1989, show that misconduct by police, prosecutors, or other government officials was a factor in 88 of 116, or 75.9 percent, of false convictions in U.S. capital cases from 1989 through February 15, 2016. *National Registry of Exonerations*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Feb. 15, 2016) [hereinafter NRE]. An exoneration, as the term is used by the NRE and in this article, is a case in which the defendant was restored to the status of legal innocence based on exculpatory information that was not presented at his or her trial. *Glossary, National Registry of Exonerations*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Oct. 12, 2015).

⁷² Also as of January 1, 2015, of 111 post-conviction exonerations in capital cases, 23, or 21 percent, involved mistaken eyewitness identifications. *Id.*

in nearly a third of the cases.⁷³

A LETTER FROM DEATH ROW

My death penalty odyssey began on September 16, 1981, when a letter arrived at *Chicago Lawyer* from Dennis Williams, Illinois death row prisoner A-63823, who claimed that he and three friends—Kenneth Adams, Willie Raigne, and Paula Gray, all African Americans—had been convicted of a robbery, kidnapping, rape, and double murder they did not commit. “I hope it would not be too forward of me to ask your mercy and heart in an injustice I have suffered,” the letter began, concluding, “I am not taking your magazine for granted, but I wish you could help me.”⁷⁴

From newspaper accounts of the case,⁷⁵ from an opinion that the Illinois Appellate Court had handed down a month earlier affirming Gray’s conviction,⁷⁶ and from the trial transcript and other records on file at the Appellate Court,⁷⁷ Margaret Roberts, the managing editor of *Chicago Lawyer*, and I distilled the basic facts of the case: The victims were a young, engaged white couple—Lawrence Lionberg and Carol Schmal—who disappeared from a Clark Oil Company filling station in nearly all-white, suburban Homewood, Illinois, in the wee hours of May 11, 1978. Lionberg was the overnight attendant at the station, and Schmal had been visiting him. Their bodies were found the next day, May 12, in nearly all-black East Chicago Heights, later renamed Ford Heights,⁷⁸ where the defendants lived.⁷⁹

Two days later, police obtained a confession from Gray, who was seventeen and whose IQ had been measured at between fifty-five and seventy-five. She said she was present when Schmal was raped seven times in an abandoned townhouse by Williams, Adams, Raigne, and a fourth man,

⁷³ The most authoritative study on the subject found a 41 percent error rate in traditional, simultaneous non-blind photo lineups, compared with a 32 percent error rate in sequential, double-blind photo lineups. Gary L. Wells et al., *Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure*, 39 LAW HUM. BEHAV. 1, 12 (2014).

⁷⁴ DAVID PROTSS & ROB WARDEN, A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN 14 (1998) (original source no longer on file) [hereinafter PROMISE].

⁷⁵ See John O’Brien, *4th Facing Chair: Suburb Couple’s Killer Gets Death*, CHI. TRIB., Feb. 1, 1979, at A2; Phillip Wattlely, *Find Missing Couple Slain*, CHI. TRIB., May 13, 1978, at A1.

⁷⁶ *People v. Gray*, 408 N.E.2d 1150, 1151–52 (Ill. 1980).

⁷⁷ I did not have access to trial transcripts in preparing this article, but the facts presented in this section appeared either in appellate opinions or published accounts of the case and are footnoted accordingly.

⁷⁸ See George Papajohn, *E. Chicago Heights Hopes Ford Name Is a Better Idea*, CHI. TRIB., Mar. 26, 1987, at 1.

⁷⁹ *Gray*, 408 N.E.2d at 1151–53; PROMISE, *supra* note 74, at 15–16.

Verneal Jimerson. Gray claimed—preposterously, it seemed to Roberts and me—that Williams forced her to hold a disposable cigarette lighter burning to provide the only light in the townhouse during the gang rape, after which Williams shot the victims and threw the murder weapon into a nearby creek.⁸⁰

After Gray repeated her confession to a prosecutor and before a grand jury, the four men were charged with the crime. At a preliminary hearing a month later, Gray recanted, claiming that the police had forced her to lie. She then was charged with rape, murder, and perjury. The charges against Jimerson were dropped for lack of probable cause, but the prosecution had another witness who placed the other men at the scene.⁸¹

Gray and the remaining male defendants were tried together before separate juries—one for the men, one for Gray. Roberts and I were stunned to see that Williams, Rainge, and Gray had been represented at the trial by the same lawyer, Archie B. Weston. Representing more than one defendant at a trial, especially in a capital case—Rainge, like Williams, had faced the death penalty—seemed to us an egregious conflict. If the defendants were guilty, it would have been in Gray’s interest—and against the interests of Williams and Rainge—to revert to her initial story, and it would have been in Rainge’s interest—but against the interests of Williams and Gray—to turn state’s evidence. Nevertheless, in affirming Gray’s conviction, the Illinois Supreme Court had branded the conflict only “hypothetical” and “not a *per se* constitutional violation.”⁸²

Gray’s jury, but not the men’s, heard evidence concerning her confession and recantation, and the men’s jury, but not Gray’s, heard testimony from an informant, David Jackson, who claimed that, while he was in jail with Williams and Rainge, he heard them talking about how they had committed the crime—including “a shot of pussy [they] really shouldn’t have took from the lady.” Both juries heard testimony that the victims had been robbed and abducted from the Clark station sometime after 2:30 A.M. on May 11; the time was established by the station manager who spoke to Lionberg by telephone at 2:30.⁸³

Charles McCraney, who lived across a courtyard from the abandoned townhouse where the rape occurred, told both juries that he had been practicing his guitar between 2:30 and 3 A.M. on May 11 when he heard commotion outside, looked out, and saw the defendants. About fifteen minutes later, he saw a group of about eight persons run into the townhouse.

⁸⁰ *Gray*, 408 N.E.2d at 1151–52; PROMISE, *supra* note 74, at 20.

⁸¹ *Gray*, 408 N.E.2d at 1151–52; PROMISE, *supra* note 74, at 21. Jimerson’s name is misspelled as “Jimmerson,” in *Gray*, 408 N.E.2d at 1151–57.

⁸² *Gray*, 408 N.E.2d at 1156; PROMISE, *supra* note 74, at 23–24.

⁸³ *Gray*, 408, N.E.2d at 1151–53; PROMISE, *supra* note 74, at 21–22.

An hour or so later, he heard a gunshot. McCraney did not have a clock, but said he had fixed the time in relation to a rerun of a *Kojak* episode on television. After watching the episode, McCraney said, he played through a guitar “serenade” that he had composed and knew was forty-five minutes long. He had just begun playing the piece again when he looked out and saw the defendants.⁸⁴

Roberts and I noted that McCraney had not mentioned seeing anyone white at the scene, prompting us to wonder if what he saw was related to the crime. The timeframe was tight. The Clark station and murder scene were at least fifteen minutes apart. For the victims to have been in East Chicago Heights at 3 A.M., the abduction would have had to have occurred very shortly after the station manager spoke to Lionberg at 2:30 A.M. Nonetheless, neither Weston nor Kenneth Adams’s lawyer, James F. Creswell, pursued what seemed a crucial issue: What time did *Kojak* end?⁸⁵

Michael Podlecki, a state forensic analyst, testified before both juries regarding semen recovered from Schmal and several Caucasian hairs recovered from the trunk and rear seat of Williams’s car. He said that the semen contained Type A blood antigens, meaning that some of it had come from an “A secretor”—a category that included Williams and Adams and about 25 percent of the male population. The semen also contained Type O antigens, which could have come from Rainge, Jimerson, or, for that matter, Lionberg, and about 40 percent of the male population.⁸⁶

These findings were minimally significant, but potentially devastating in light of Podlecki’s testimony about the hairs, which he had microscopically examined. In “ninety-nine percent of their characteristics,” he told the juries, two of the hairs were indistinguishable from Schmal’s hair and a third was indistinguishable from Lionberg’s hair. He added that a Royal Canadian Mounted Police study placed the odds against a false microscopic match at 4,500 to one.⁸⁷ Since microscopic comparisons obviously involved subjective judgments, Podlecki’s testimony seemed to us as dubious as it was damning, yet Weston and Creswell did not object to its admission into evidence, allowing it to stand un rebutted.

Roberts and I had no opinion about whether the defendants were

⁸⁴ *People v. Rainge*, 570 N.E.2d 431, 437–38 (Ill. 1991); *Gray*, 408 N.E.2d at 1153; PROMISE, *supra* note 74, at 28.

⁸⁵ *People v. Williams (Williams II)*, 588 N.E.2d 983, 991–92 (Ill. 1991); *Gray*, 408 N.E.2d at 1153; PROMISE, *supra* note 74, at 22.

⁸⁶ *People v. Williams (Williams I)*, 444 N.E.2d 136, 140–41 (Ill. 1982); PROMISE, *supra* note 74, at 22–23.

⁸⁷ *Williams I*, 444 N.E.2d at 140–41; *Gray*, 408 N.E.2d at 1153; PROMISE, *supra* note 74, at 22–23.

innocent or guilty, but it was patently obvious that they had not received fair trials—and that a system as shoddy as the one that produced such a dubious result had no business making life-and-death judgments. If the sky had not fallen when Richard Speck’s life was spared, it seemed to me, the death penalty should be abolished.

A JOURNALISTIC INVESTIGATION

Checking the time logs of WBBM-TV, the station that aired *Kojak*, I found that the show had ended at 12:50 A.M.,⁸⁸ whereas Lionberg’s employer testified that he spoke to Lionberg an hour and forty minutes after that—at 2:30 A.M.⁸⁹ Even if McCraney had played through his forty-five minute guitar piece twice, thus, the victims could not have been in East Chicago Heights when he finished. I tracked McCraney down in St. Anne, Illinois, where the prosecution had relocated him, and asked him about the time. “Well,” he answered, “maybe them folks is innocent.”⁹⁰

A month or so later, Roberts and René Brown, a private investigator we hired, interviewed an East Chicago Heights man who told them he had been with two men—whom he called “Johnny” and “Red”—when they abducted the victims from the filling station in a Buick Electra 225 but that he had parted ways with the men before the rape and murder.⁹¹ The man had agreed to the interview only upon Roberts’s promise not to reveal his name, but he said he would testify in exchange for a grant of immunity from prosecution.⁹²

Roberts and Brown knew that immunity was out of the question and were mindful of the man’s dubious credibility, but were eager to pursue any lead. When Roberts asked why he agreed to the interview, he told her, “I’ve done some bad things in my life, but I don’t want to see a brother die for a crime he didn’t do,” adding, after a pause, “You know what’s really fucked up? We left prints all over [the filling station]. I never got it—why the cops didn’t find ’em and bust our asses.”⁹³

Roberts and I discovered that during the trial Archie Weston—the lawyer who represented Williams, Gray, and Rainge—was facing disbarment for mishandling funds in a deceased client’s estate. A month before the trial, a son of one of the heirs had complained to the Illinois Attorney Registration & Disciplinary Commission (ARDC) that Weston had failed to pay taxes on

⁸⁸ PROMISE, *supra* note 74, at 29.

⁸⁹ *Id.* at 22.

⁹⁰ *Id.* at 58.

⁹¹ *Id.* at 41–42.

⁹² *Id.*

⁹³ *Id.* at 42.

a building in the estate and, as a result, the building was sold for nonpayment of taxes, resulting in a loss of several thousand dollars to the decedent's heirs.

Weston was ordered to appear before the Commission on September 1, 1978—less than a month before the trial of Williams, Gray, and Rainge. He secured a continuance until November 3—ten days after the convictions—but again failed to appear. Eventually, he was held in contempt and a default judgment was entered against him in favor of the heirs to the estate for their loss. When the ARDC moved for disbarment before the Supreme Court, Weston asked that the matter be remanded for a hearing, claiming that in November and December 1982 he had no funds with which to hire counsel and personally “did not feel mentally or physically capable” of representing himself.⁹⁴ Four months later, as Roberts and I continued to investigate, the Illinois Supreme Court—evidently unaware of Weston's impending disbarment, even though the matter was pending before it—affirmed Williams's conviction, saying, in a nod to Williams's complaint about Weston's performance that “hindsight often dictates that a different strategy might have produced better results. However, such errors in judgment do not establish incompetency.”⁹⁵

Our article, which appeared in the July edition of *Chicago Lawyer*, focused primarily on Weston's conflict and inept performance, but also laid out the problems with the timeline of the crime and the interview with the man who claimed to have been present when the victims were abducted.⁹⁶ Not long after publication of the article, the Illinois Supreme Court disbarred Weston⁹⁷ and vacated its opinion affirming Williams's conviction, remanding his case for a new trial.⁹⁸ In light of “the newly acquired information” about Weston, said the court, “we can no longer say, with any degree of assurance, that Williams received the effective assistance of counsel guaranteed by the Constitution.”⁹⁹

Roberts and I assumed that it would be only a matter of time until Rainge and Gray won retrials on the same ground. At any retrials, we thought, McCraney's testimony could be impeached, given that his explanation of the

⁹⁴ The foregoing details eventually were reported by the Illinois Supreme Court. *In re Weston*, 442 N.E.2d 236, 238 (Ill. 1982).

⁹⁵ This decision was withdrawn six months later. *Williams II*, 444 N.E.2d 136 (Ill. 1982). The quotation is from PROMISE, *supra* note 74, at 52. While the Illinois death penalty existed, capital cases were reviewed directly by the Supreme Court without intermediate review. ILL. CONST. 1970, art. VI, § 4(b).

⁹⁶ Rob Warden & Margaret Roberts, *The Dennis Williams Case: Will We Execute an Innocent Man?*, CHI. LAW., July 1982, at 3.

⁹⁷ *In re Weston*, 442 N.E.2d 236, 240 (Ill. 1982).

⁹⁸ *Williams I*, 444 N.E.2d at 143.

⁹⁹ *Id.* at 142.

timing in effect was exculpatory—placing the defendants at the crime scene before the victims could have been there. It also seemed unlikely that Gray, once awarded a retrial, could be reconvicted of rape and murder. The principal evidence against her would be her confession—in which she had stated that Williams forced her into her limited participation in the crime. With day-for-day good time, Gray already had completed her ten-year sentence for perjury, so that would not be an issue.

As we anticipated, Rainge's case soon was remanded based on ineffective assistance,¹⁰⁰ while Adams, who had been represented not by Weston but by James Creswell, lost his direct appeal,¹⁰¹ also as we expected. Gray raised the ineffective assistance issue in a petition for a federal writ of habeas corpus, which was dismissed by a U.S. District Court judge because Gray had not exhausted state remedies. On appeal the U.S. Court of Appeals for the Seventh Circuit remanded her case, declaring, "The interests of justice will be better served if the new trial can be conducted with reasonable promptness"—and directing the district court to grant the writ without further ado.¹⁰² So far, so good, Roberts and I thought.

A SETBACK IN THE QUEST FOR JUSTICE

With the retrials pending, the prosecution offered Gray a certain path to freedom. All she had to do was recant her recantation and turn state's evidence against Williams, Rainge, and Jimerson, against whom charges had been dropped when she recanted in 1978. Gray took the deal, veritably sealing the fates of the three men and creating a seemingly insurmountable barrier to relief for Adams. Roberts and I realized that a jury was likely to view the testimony of Gray and McCraney as mutually corroborative, glossing over or ignoring the timing problem. It would not matter that Jackson, the jailhouse informant who in 1978 had attributed an incriminating conversation to Williams and Rainge, had recanted—saying that he had lied in exchange for dismissal of burglary charges against himself.¹⁰³ Nor would it matter that the incriminating blood and hair evidence used at the first trial had since proved false¹⁰⁴—reminiscent of the phony forensic testimony that

¹⁰⁰ *People v. Rainge*, 445 N.E.2d 535, 547 (Ill. 1983).

¹⁰¹ *Id.* at 547–55.

¹⁰² *United States ex rel. Gray v. Director*, 721 F.2d 586, 598 (7th Cir. 1983).

¹⁰³ PROMISE, *supra* note 74, at 114–15.

¹⁰⁴ Edward T. Blake, a California forensic scientist who on behalf of Williams re-examined the serological evidence, discovered that Michael Podlecki's claim that Williams was a type A secretor was false. Rob Warden, *More Wrong Forensic Evidence—This Time in a Capital Case*, CHI. LAW., Sept. 1986, at 3. Williams in fact was a non-secretor and, thus, could not have been the source of A antigens in the semen recovered from Carol Schmal. *Id.*

sent Miller to death row in the 1950s.

In late 1985, Jimerson was convicted and sentenced to death.¹⁰⁵ At this point, desperate for anything that might save Williams and Rainge, I commissioned forensic tests in the hope that new defense counsel could use them to discredit Gray's seemingly absurd claim that she had held a burning disposable cigarette lighter to provide the only light in the townhouse during the gang rape. As I had no doubt they would, the tests—conducted by a respected laboratory at the Illinois Institute of Technology—determined that Bic, Scripto, and Cricket disposable lighters all reached temperatures in excess of 275 degrees after being lit only six to eight minutes.¹⁰⁶

The testing was for naught. In early 1987, Williams and Rainge were reconvicted at a joint trial, and Williams again was sentenced to death.¹⁰⁷ After the convictions were affirmed on direct appeal,¹⁰⁸ absent unforeseeable developments, two men Roberts and I had come to believe were innocent were destined to go to the electric chair.¹⁰⁹ When we got involved, there was one innocent man on death row—and now, thanks in part to us, there were two.

THE DISCOVERY OF FALSE CONFESSIONS

From the beginning, the element of the case that Roberts and I found most perplexing was Gray's confession. We had long since become convinced that her statements to police and before the grand jury were false, but we did not understand why she would falsely implicate herself and her friends in an unspeakable crime they did not commit.

In late 1986, however, I reported on a case that was the beginning of my enlightenment about the counterintuitive phenomenon of false confessions. That October, twenty-year-old LaVale Burt was convicted in a bench trial of the first-degree murder of one-year-old Charles Gregory, who had been shot

¹⁰⁵ Andrew Fegelman, *Man Sentenced to Death for 1978 Double Murder*, CHI. TRIB., Dec. 11, 1985, at A3.

¹⁰⁶ PROMISE, *supra* note 74, at 81.

¹⁰⁷ Andrew Fegelman, *Killer-Rapist Sentenced to Death a 2d Time*, CHI. TRIB., Mar. 5, 1987, at A6; Andy Knott, *2 Guilty in '78 Double Slaying*, CHI. TRIB., Feb. 14, 1987, at A5. For a description of the trial, see Norman Alexandroff, *Dennis Williams Case—First Confidence, Then Conviction*, CHI. LAW., Mar. 1987, at 7.

¹⁰⁸ *People v. Williams*, 588 N.E.2d 983, 1023 (Ill. 1991); *People v. Rainge*, 570 N.E.2d 431, 446–47 (Ill. 1991); *People v. Jimerson*, 535 N.E.2d 889, 909 (Ill. 1989).

¹⁰⁹ In 1991, the Illinois General Assembly voted to replace electrocution as the prescribed mode of execution with “intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances sufficient to cause death.” Pub. Act 93-379 (codified as amended 725 ILL. COMP. STAT. 5/119-5).

to death on September 19, 1985, while standing in the doorway of his home in a low-rise public housing project on Chicago's south side.¹¹⁰ Neither physical evidence nor eyewitnesses linked Burt to the crime, but he had provided a confession first to police and then to an assistant state's attorney. He said that he had fired a shot with the intention of frightening two rival gang members who had threatened him, missing them and accidentally hitting the child. Under the Illinois felony murder rule, an unintentional death occurring during the course of a felony—in this instance unauthorized use of a weapon—is first-degree murder.¹¹¹

Burt soon recanted the confession—perhaps upon learning of its likely consequences. At the trial, it also came out that the victim's mother, Carolyn Collins, had made conflicting statements about her son's death—and, more disquietingly, after reporting the death, she had been found to have gunpowder residue on her hands, indicating that she recently had fired a gun. Although it seemed to me that there was reasonable doubt, Judge Ronald A. Himel found Burt guilty. In an interview, Himel told me that he had immense respect for Peter Troy, the assistant state's attorney who had taken the confession, and that Burt's lawyers had made a “cardinal mistake” in taking a bench trial, stating:

They were asking a judge to throw out a statement made to an excellent state's attorney. If this man, Peter Troy, was part of any conspiracy to feed the defendant information and force him to make a statement, my ideals would be shattered. They were asking a judge to disbelieve Peter Troy.

The day after finding Burt guilty, Himel received a telephone call from a friend of Josephine Collins, the maternal grandmother of the deceased child. The friend said that Collins had important information that she wanted to bring to Himel's attention. Himel contacted Collins, who said she wanted to clear her conscience and proceeded to relate that she lived with her daughter and had attended the trial, where she learned of the gunshot residue on her daughter's hands. After the trial, she checked a .22-caliber pistol in the home and found a bullet missing. She thereupon confronted her daughter, who admitted that she accidentally had fired the fatal bullet and, ashamed to admit what actually happened, concocted the false scenario to which police somehow obtained a false confession from Burt.

Himel sent police to pick up the weapon, and a ballistics examination indicated that in all probability it was the instrument that killed Gregory. “The ballistics guy convinced me that the gun was the murder weapon,”

¹¹⁰ Linnet Myers, *A Conviction Unravels in Tot Killing*, CHI. TRIB., Dec. 11, 1986, at 1; Rob Warden, *LaVale Burt—Victim of a Modern Form of Torture*, CHI. LAW., Jan. 1987, at 3. The case facts related *infra* are taken from the latter article unless otherwise noted.

¹¹¹ IPI Criminal 4th No. 7.01, based on 720 Ill. Comp. Stat. 5/9-1(a)(3) (2011).

Himel told me. “There is no question in my mind. There was no question in his mind.” Himel reopened the case. Despite the facts favorable to Burt, the lead prosecutor in the case, John T. Groark, continued to profess that Burt did it. “There was no reason for him to give the statement unless he was there and he did do it,” the *Chicago Tribune* quoted Groark as saying.¹¹² Himel told me that he also had trouble understanding why Burt would confess to a crime he did not commit. Nonetheless, after a brief hearing, Himel reversed himself, acquitting Burt. “All these things came together and created such a massive doubt,” Himel said, “that I had no alternative.”

It is hardly surprising that Groark and Himel did not understand. It was not until more than a decade later that studies began to shed light on how and why false confessions occur.¹¹³ When I interviewed Burt, however, I began to fathom what happened. He told me he confessed because detectives persuaded him it was in his interest to do so—that the alternative was a murder conviction. “You’re stupid,” he quoted one detective as saying. “Nobody believe you meant to do it . . . everybody know you’re not a baby killer. You got a good background and you’ll get off with involuntary manslaughter and probation.” Hence, Burt invented the scenario portraying the death as an accident.

The technique that the detectives employed is well known today as “minimization and maximization”—downplaying the consequences of confessing, suggesting that things would go easy if what happened was an accident or self-defense, and overemphasizing the consequences of not confessing, such as mentioning, as Burt told me the detectives in his case did, that the murder of a child could result in a death sentence.¹¹⁴ Although it is impossible to know how many false confessions occur, there is no question that there are far more than ever come to light.¹¹⁵

¹¹² Myers, *supra* note 110.

¹¹³ See, e.g., Welsh S. White, *Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.—C.L. L. REV. 105 (1997).

¹¹⁴ See, e.g., Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confession Evidence: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 45 (2004).

¹¹⁵ Nationally, of 1,740 men and women exonerated of felonies since 1989, 221, or 12.7 percent, had falsely confessed, and another 125, or 7.1 percent, had been implicated by co-defendants’ false confessions. NRE *supra* note 71. The data is current as of February 15, 2016. *Id.* For a more thorough discussion of the phenomenon, see ROB WARDEN & STEVEN A. DRIZIN, TRUE STORIES OF FALSE CONFESSIONS (2009); Steven A. Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

DAWN OF THE DNA FORENSIC AGE

Fortunately for Williams and his co-defendants, the DNA forensic age was on the horizon.¹¹⁶ On August 14, 1989, the emerging technology produced its first exoneration—that of a high school dropout named Gary Dotson who had been convicted a decade earlier of a rape that his accuser and supposed victim, Cathleen Webb, had come forward to admit had not occurred.¹¹⁷

Four years earlier, in *Chicago Lawyer*, I had exposed false forensic testimony that contributed to Dotson's conviction for "the rape that wasn't"¹¹⁸ and written editorials in support of his quest for justice.¹¹⁹ I began looking into the case after Webb recanted to Jim Gibbons, a reporter at WLS-TV, the Chicago ABC station.¹²⁰ Immediately after Gibbons's story aired in March 2005, the judge before whom Dotson had been tried ordered his release on recognizance bond,¹²¹ but prosecutors leaped into action, insisting that the recantation was a lie.¹²² In April, the judge revoked the bond, sending Dotson back to prison.¹²³ Dotson was released again the following month by Illinois Governor James R. Thompson after a televised clemency hearing, but not exonerated until four years later—thanks to DNA.¹²⁴

¹¹⁶ See Sharon Begley, *Leaving Holmes in the Dust*, NEWSWEEK, Oct. 26, 1987, at 81.

¹¹⁷ 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 5. Dotson received a pardon based on innocence in 2003. Steve Mills & Christi Parsons, "The System Has Failed": Ryan Condemns Injustice, Pardons 6; Paves the Way for Sweeping Clemency, CHI. TRIB., Jan. 11, 2003, at 19. It might be argued that Dotson was not the first person to be exonerated by DNA. A few months before Dotson's exoneration, David Vasquez, who was serving life for a Virginia rape and murder, received a gubernatorial pardon after DNA linked a serial killer to a murder that was similar to the murder for which Vasquez had been convicted. See Dana Priest, *Va. Man Pardoned After Five years in Prison*, WASH. POST, Jan. 5, 1989, at 1. However, there was no testable DNA in the Vasquez case itself. *Id.*

¹¹⁸ Rob Warden, *Forensic Testimony in Dotson Case Was False*, CHI. LAW., May 1985, at 1; see also *The Rape that Wasn't—The Nation's First DNA Exoneration*, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> [hereinafter *Rape that Wasn't*].

¹¹⁹ Editorial, *Gary Dotson: Not Guilty & Illinois Crime Lab: Guilty*, CHI. LAW., May 1985, at 8; Editorial, *Theater of the Absurd*, CHI. LAW., June 1985, at 18.

¹²⁰ Gibbons quoted Webb as saying that she faked the rape eight years earlier, when she was sixteen, out of fear that she was pregnant by her boyfriend. Her intent had been to create a plausible explanation, for her parents, in case her fear came to fruition, which it would not, but things got out of hand. *Rape that Wasn't*, *supra* note 118.

¹²¹ Ann Marie Lipinski & John Kass, *Rape Conviction Stands: Judge Sends Dotson Back to Prison*, CHI. TRIB., Apr. 12, 1985, at 1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Green, *supra* note 117.

The Dotson exoneration was the harbinger of hope for scores of prisoners with innocence claims in cases involving biological evidence and the cornerstone of what came to be called “the innocence movement.”¹²⁵ The case also contributed to my evolving perception of the criminal justice system and—along with the Williams-Jimerson case and others—set me on a circuitous path to join Professor Lawrence C. Marshall in launching the Center on Wrongful Convictions at Northwestern University School of Law in 1999.¹²⁶

Among the other cases were those of Steven Paul Linscott, whose wrongful conviction I investigated in 1985,¹²⁷ Rolando Cruz and Alejandro Hernandez, whose false convictions and death sentences were the subject of a *Chicago Lawyer* exposé in 1986,¹²⁸ and Cynthia and David Dowaliby, about whose case I co-authored a book after leaving *Chicago Lawyer* in 1989.¹²⁹ These cases illuminate what can go wrong in the dark reaches of the criminal justice system.

THE LINSCHOTT CASE

Steven Linscott, a U.S. Navy veteran and Bible college student with no criminal record, was convicted and sentenced to forty years in prison in 1982 for the murder two years earlier of twenty-four-year-old Karen Ann Phillips, who lived down the street from Linscott, his wife, and two children in the Chicago suburb of Oak Park.¹³⁰ In 1992, Linscott became the second person in Illinois and the tenth in the nation to be exonerated by DNA.¹³¹

Two days after the crime, Linscott mentioned to an acquaintance that he had dreamt about a brutal murder. At the suggestion of the acquaintance and others—who apparently thought that the dream could be of psychic relevance—Linscott told the police about it. An officer asked him to write an

¹²⁵ See Rob Warden, *The Role of the Media/Public Opinion on Innocence Reform: Past and Future*, WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 39 (Marvin Zalman & Julia Carrano, eds., 2013) [hereinafter *Role of Media*].

¹²⁶ *How & Why*, *supra* note 29, at 252–63.

¹²⁷ Rob Warden, *The Dream Murder Case*, CHI. LAW., Dec. 1985, at 1 [hereinafter *Dream*].

¹²⁸ James Tuohy, *The DuPage Cover-Up*, CHI. LAW., May 1986, at 1 [hereinafter *Cover-up*].

¹²⁹ DAVID PROTESS & ROB WARDEN, *GONE IN THE NIGHT: THE DOWALIBY FAMILY’S ENCOUNTER WITH MURDER AND THE LAW* (1993) [hereinafter *GONE*].

¹³⁰ *People v. Linscott*, 482 N.E.2d 403, 404 (Ill. 1985).

¹³¹ Fegelman, *12-Year Nightmare Ends for Murder Defendant*, CHI. TRIB., July 16, 1992, at 1. Two decades later, Linscott received a gubernatorial pardon based on innocence. Steve Mills & Ray Long, *Cruz, 2 Others Pardoned; Ryan Says 3 Men Were Victims of ‘Justice System Run Amok,’* CHI. TRIB., Dec. 20, 2002, at 1.

account of the dream, which he did and to which he added details in taped interviews. Prosecutors contended that the dream paralleled the crime to the extent that it amounted to a confession and charged Linscott accordingly.¹³² In 1982, a Cook County jury found Linscott guilty, but three years later the Illinois Appellate Court reversed the conviction outright, holding that the evidence had been insufficient as a matter of law to establish guilt beyond a reasonable doubt.¹³³

While that decision was being appealed to the Illinois Supreme Court, I read the trial record, finding the similarities between the dream and the crime vague and underwhelming in light of the dissimilarities.¹³⁴ There was “blood all over the place” in both the dream and the crime; the victims in both had been “bludgeoned,” lived alone, and had stereos; the dream victim “seemed to be religious” and Phillips was studying to become a swami. Among the dissimilarities, the dream victim was black, but the real victim was white; the dream weapon was eight or nine inches long, but the actual weapon was a twenty-five-inch tire iron; the dream crime scene was a large apartment, but the actual scene was a studio; there were no religious articles at the dream scene, although there were several on a make-shift altar at the actual scene. The prosecution also made much of similarities between Linscott and the dream killer, principally that both were blond and muscular. The dream killer, however, was only five-five, while Linscott was six feet tall, and the dream killer was religious, but not Christian, while Linscott was devoutly Christian.¹³⁵

I also explored a significant issue that the Appellate Court had not reached: The lead prosecutor in the case, Jay C. Magnuson, had told the jury that Linscott “left eight to ten hairs in Karen’s apartment” and that Linscott’s blood type “matched” that of semen recovered from Phillips. In fact, the state forensic witness had testified only that a microscopic examination of the hairs in question had not excluded Linscott as their source and that Linscott was among at least 60 percent of the male population who could have been its source.¹³⁶

If the Appellate Court opinion reversing the case based on insufficiency of the evidence had stood, the prosecution would have been barred from retrying Linscott. In 1986, however, the Illinois Supreme Court held that a retrial was not unwarranted and remanded the case to the Appellate Court to

¹³² *Linscott*, 482 N.E.2d at 403–06.

¹³³ *Id.* at 408.

¹³⁴ *Dream*, *supra* note 127.

¹³⁵ *Id.*

¹³⁶ *Id.*

consider issues that it had not reached in its opinion.¹³⁷ On remand, the Appellate Court again reversed the conviction, this time based on prosecutorial misconduct, deeming the description of the hair and blood during closing argument “outright fabrications.”¹³⁸ In 1987, the Supreme Court affirmed the Appellate Court, remanding the case to the Cook County Circuit Court for a new trial.¹³⁹ The case dragged on another five years until prosecutors belatedly ordered DNA testing, which conclusively established that Linscott was not the source of the semen recovered from Phillips’s body.¹⁴⁰

THE CRUZ-HERNANDEZ CASE

Rolando Cruz and Alejandro Hernandez—twice convicted of the 1983 abduction, rape, and murder of ten-year-old Jeanine Nicarico in DuPage County, west of Chicago—were exonerated in 1995. Cruz’s exoneration occurred in the middle of his third trial when a sheriff’s lieutenant, James Montesano, testified that two detectives had falsely claimed at the earlier trials that Cruz had made an incriminating “vision statement” about sodomizing a little girl.¹⁴¹ Hernandez’s exoneration occurred a month later, after his second conviction was reversed and the prosecution dismissed the charges.¹⁴²

The case was contaminated by politics from the start. Less than three months after the crime, the DuPage County State’s Attorney’s office opened a grand jury investigation targeting Cruz, Hernandez, and a third youth, Stephen Buckley. The evidence was weak, however, and indictments were not sought until nearly ten months later—as it happened, twelve days before the March 1984 Republican primary election in which State’s Attorney J. Michael Fitzsimmons faced a scrappy challenger named James Ryan.¹⁴³ The indictments no doubt boosted Fitzsimmons’s campaign, but Ryan handily

¹³⁷ *People v. Linscott*, 500 N.E.2d 400, 424 (Ill. 1985).

¹³⁸ *People v. Linscott*, 511 N.E.2d 1303, 1309, 1312 (Ill. 1987); see also Abebola Alaran & Patricia Haller, *A Cook County Prosecutorial Misconduct Sampler*, CHI. LAW., Aug. 1987, at 13 [hereinafter *Sampler*]; Rob Warden, *Daley, Assistants Called Overzealous, Counterproductive*, CHI. LAW., Aug. 1987, at 1.

¹³⁹ *People v. Linscott*, 566 N.E.2d 1355, 1364 (Ill. 1991).

¹⁴⁰ Fegelman, *supra* note 131. The crime has not been solved.

¹⁴¹ Allan H. Gray & Courtenay Edelhart, *Judge Rules Cruz Innocent: Finally, ‘the Whole Case Just Fell Apart,’* CHI. TRIB., Nov. 4, 1995, at 1; Maurice Possley, *The Nicarico Nightmare Admitted Lie Sinks Cruz Case*, CHI. TRIB., Nov. 5, 1995, at 1.

¹⁴² Jeffrey Bills & Ted Gregory, *‘I Just Want to go Home’: A Nightmare Ends, One Continues in Nicarico Case*, CHI. TRIB., Dec. 9, 1995, at 1.

¹⁴³ THOMAS FRISBIE & RANDY GARRETT, VICTIMS OF JUSTICE REVISITED 419 (2005) [hereinafter REVISITED].

won the primary,¹⁴⁴ assuring his election in the heavily Republican county.¹⁴⁵

By the time Ryan took office the following November, the lead detective in the case, John Sam, had become convinced that Cruz, Hernandez, and Buckley had nothing to do with the crime. Sam's concern was not that the three youths had spent months behind bars awaiting trial for a crime they did not commit, but rather that whoever committed the crime remained at large. After Sam raised his concerns to no avail with his superiors and prosecutors, he resigned in disgust.¹⁴⁶

In January 1985—only four days before jury selection began for the defendants' joint trial—the prosecution disclosed Cruz's purported "vision statement" to defense lawyers. Although Cruz allegedly had made the statement to two sheriff's detectives in May 1993, shortly before the grand jury investigation began, the detectives, Thomas Vosburgh and Dennis Kurzawa, had not memorialized it in writing.¹⁴⁷ Although the detectives claimed to have told James Montesano, their supervisor, and Thomas Knight, the prosecutor leading the grand jury investigation, about it, Knight had not brought it to the grand jury's attention.¹⁴⁸

At the trial, after Vosburgh and Kurzawa testified that Cruz had made the statement, Montesano testified that the detectives had told him about it immediately. The prosecution also presented forensic testimony purporting to link Buckley to the crime and the testimony of an array of informants who attributed various incriminating statements to Cruz and Hernandez.¹⁴⁹ Finding the forensic evidence dubious, the jury could not reach a verdict on Buckley,¹⁵⁰ but Cruz and Hernandez were convicted and sentenced to death.¹⁵¹

Ten months after the convictions, Brian Dugan, a repeat sex offender arrested for the abduction, rape, and murder of a seven-year-old girl in nearby LaSalle County, confessed "hypothetically"¹⁵² that he—and he alone—had

¹⁴⁴ *Id.* at 420; Andrew Fegelman & William Presecky, *Ryan Wins Du Page Attorney Race*, CHI. TRIB., Mar. 21, 1984, at 4.

¹⁴⁵ No Democrat had—or has since—been elected state's attorney of DuPage County. *History of the DuPage County State's Attorney's Office*, THE COUNTY OF DUPAGE, http://www.dupageco.org/Staates_Atorney/32381/.

¹⁴⁶ REVISITED, *supra* note 143, at 87–88.

¹⁴⁷ *Id.* at 94–95, 110–111.

¹⁴⁸ *Id.* at 94–95, 113, 313–15, 332–44.

¹⁴⁹ *Id.* at 98–115.

¹⁵⁰ *Id.* at 122.

¹⁵¹ *Id.* at 122–25.

¹⁵² Under a novel arrangement, prosecutors posed questions about the Nicarico crime to Dugan's public defender in LaSalle County, George Mueller, who then consulted with Dugan and provided answers that could not be used against Dugan in court. *Cover-Up*, *supra* note

committed the Nicarico crime.¹⁵³ At that point, Cruz and Hernandez's convictions were on direct appeal, so new evidence, even something as dramatic as Dugan's confession, would not be considered. However, the Illinois Supreme Court remanded their cases for separate retrials on the ground that they should not have been tried together the first time.¹⁵⁴ Meanwhile, the charges against Buckley were dropped.¹⁵⁵

Dugan's confession was full of rich detail of the crime that, it seemed to me, only someone involved would know. He described the Naperville home from which the child had been abducted, the blindfold that had been affixed to her head with a special kind of tape, the murder weapon, and the area where the body had been found. To break into the home, he said, he had kicked the front door twice. Authorities until then had thought it had been kicked only once, but the FBI determined that it indeed had been kicked twice. He described boots he owned of the type that had left prints on the door. Moreover, he had applied for a job at a church near the Nicarico home shortly before the abduction. Then-state-of-the-art DNA technology included him, as well as Cruz, but neither Hernandez nor Buckley, among a relatively small minority of men with the rapist's genetic characteristics.¹⁵⁶

State's Attorney Ryan soon let it be known both that he planned to retry Cruz and Hernandez—and to run for Illinois Attorney General. I editorialized that Ryan had rendered himself “unfit for public office, both the one he now occupies and the one to which he aspires” and that he “has done to the criminal justice landscape what the Exxon Valdez did to Prince William Sound—fouled it irreparably for the foreseeable future.”¹⁵⁷ He, predictably, responded that “to say that I'm prosecuting this case for political reasons is nonsense.”¹⁵⁸ Ryan lost his 1990 bid for the state's highest legal office to Democrat Roland W. Burris,¹⁵⁹ but won reconstructions of Cruz and

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¹⁵³ *Id.*

¹⁵⁴ *People v. Cruz*, 521 N.E.2d 18 (Ill. 1988); *People v. Hernandez*, 521 N.E.2d 25 (Ill. 1988).

¹⁵⁵ Barbara Mahany & John Schmeltzer, *Nicarico Death Suspect Freed with Key Witness Ailing, Buckley Charges Dropped*, CHI. TRIB., Mar. 6, 1987, at 1.

¹⁵⁶ Rob Warden, *Alejandro Hernandez and Rolando Cruz: They Implicated Themselves in the Rape-murder of Young Jeanine Nicarico—a Crime They Almost Certainly Did Not Commit*, CHI. TIMES, Jan.–Feb. 1990, at 17. In 1995, evolving DNA forensic technology eliminated Cruz and identified Dugan as the only suspect in the case who could have been the source of semen recovered from the victim. *See, e.g.*, Ted Gregory & Peter Gorner, *Cruz Didn't Rape Nicarico, DNA Expert Says but Prosecutors Not Moved by New Tests*, CHI. TRIB., Sept. 23, 1995, at 1.

¹⁵⁷ *The Shame of DuPage County*, CHI. LAW., Apr. 18, 1989, at 14.

¹⁵⁸ *Id.*

¹⁵⁹ The vote was 52 percent to 48 percent. Thomas Hardy & Tim Jones, *Edgar Squeaks*

Hernandez, who were sentenced, respectively, to death and eighty years in prison.¹⁶⁰ Before their retrials, Dugan had offered to testify, and to plead guilty, if the prosecution would agree not to seek a death sentence, but Ryan's office refused, contending that Dugan was lying. Cruz and Hernandez were convicted on essentially the same evidence as before.¹⁶¹

As the appeals proceeded separately, it fell to Mary Brigid Kenney, a young assistant attorney general under Burris, to defend the Cruz conviction. After reviewing the voluminous record, Kenney concluded that Cruz had been railroaded onto death row. When she turned to colleagues in the office for advice, the only suggestion was to write a weak brief and hope for the best. "I knew it was terribly wrong," Kenney told me later. "I started to wonder what kind of people I was working with."¹⁶² She resigned,¹⁶³ and the case was assigned to another assistant.¹⁶⁴

In 1992, the Illinois Supreme Court affirmed the conviction, deeming the evidence "overwhelming" and stating that physical evidence linked Cruz to the crime.¹⁶⁵ In fact, however, there was no incriminating physical evidence—as the court would concede after a rehearing urged by religious leaders, local and national bar associations, deans of Illinois law schools, former federal and state prosecutors, and legal scholars.¹⁶⁶ At the hearing, Northwestern Law Professor Marshall, arguing for Cruz, persuaded the court to reverse itself, holding that the trial court had improperly excluded evidence that Dugan had committed the crime. The case was remanded for a third trial.¹⁶⁷

In 1995, DuPage County Circuit Court Judge Ronald Mehling declared Cruz innocent and ordered his release as a result of Montesano's disclosure that Cruz's previous convictions and death sentences had rested on false police testimony.¹⁶⁸ The Illinois Appellate Court reversed Hernandez's

Past Hartigan George Ryan, Burris, Quinn, Netsch Prevail, CHI. TRIB., Nov. 7, 1990, at 1.

¹⁶⁰ Nancy Ryan, *Cruz Sentenced to Die for Nicarico Slaying*, CHI. TRIB., June 7, 1990, at 1; Joseph Sjostrom, *Hernandez Gets 80-year Term in Nicarico Death*, CHI. TRIB., Aug. 17, 1991, at 1.

¹⁶¹ REVISITED, *supra* note 143, at 223–57.

¹⁶² Rob Warden, *Rob Warden*, in MY HERO: EXTRAORDINARY PEOPLE ON THE HEROES WHO INSPIRE THEM 205 (Karen Pritzker et al. eds., 2005).

¹⁶³ Michael Briggs & Thomas Frisbie, *Burris Aide Quits, Hits Nicarico 'Error'*, CHI. SUN-TIMES, Mar. 6, 1992, at 1.

¹⁶⁴ William Grady, *Prosecutors Blast Dugan's Claim that He Killed Jeanine Nicarico*, CHI. TRIB., Apr. 15, 1992, at 3.

¹⁶⁵ *People v. Cruz*, No. 70407, 1992 Ill. LEXIS 221, at *2 (Dec. 4, 1992).

¹⁶⁶ *People v. Cruz*, 643 N.E. 2d 636, 319, 329 (Ill. 1994).

¹⁶⁷ *Id.* at 347–354, 379.

¹⁶⁸ Gray & Edelhart, *supra* note 141.

conviction and remanded his case, as a result of the improper exclusion at trial of evidence that Dugan committed the crime,¹⁶⁹ and the charges against Hernandez were dropped.¹⁷⁰ Then ensued an expensive exercise in futility—the appointment of a special prosecutor, William J. Kunkle Jr., who in 1996 obtained indictments charging four sheriff's officers and three prosecutors—although not Ryan—with conspiring to frame Cruz, Hernandez, and Buckley.¹⁷¹ At the 1999 trial, State's Attorney Joseph E. Birkett sat in the courtroom wearing a lapel pin to show solidarity with the defendants¹⁷²—who were acquitted, two by directed verdict and five by jurors who then joined the defendants and, among others, Birkett in a victory celebration.¹⁷³ Kunkle's fees, paid by the county, totaled \$1.7 million.¹⁷⁴

In 2000, DuPage County settled federal civil rights suits brought by Cruz, Hernandez, and Buckley for \$3.5 million,¹⁷⁵ but that did not end the political madness that long had swirled about the case. In 2005, State's Attorney Birkett, while still refusing to acknowledge that Cruz and Hernandez were innocent,¹⁷⁶ obtained a grand jury indictment, charging Dugan with the Nicarico crime¹⁷⁷—to which Dugan had been willing to plead guilty since 1985 in exchange for immunity from the death penalty.¹⁷⁸ Since Dugan already was in prison for life without parole for the LaSalle County rape and murder to which he had pleaded guilty two decades earlier, all Birkett could accomplish by trying Dugan at this late date was to move him from general population to death row.¹⁷⁹

¹⁶⁹ The opinion was not published, but it and the argument preceding it are described in REVISITED, *supra* note 143, at 328–30.

¹⁷⁰ Bils & Gregory, *supra* note at 142.

¹⁷¹ Ken Armstrong, *Indictments Tear at Prosecutorial Teflon; Misconduct Allegations Almost Unprecedented*, CHI. TRIB., Dec. 13, 1996, at 1.

¹⁷² John Kass, *Birkett Penchant for Blurring Lines Rooted in Politics*, CHI. TRIB., Oct. 3, 2002, at 2.

¹⁷³ Maurice Possley & Ted Gregory, *DuPage 5 Win Acquittal; Jurors Join Courtroom Celebrations After Verdicts*, CHI. TRIB., June 5, 1999, at 1.

¹⁷⁴ Ted Gregory, *DuPage 7 Prosecutor to Keep Fees, Judge also Orders Records Unsealed*, CHI. TRIB. (West ed.), Nov. 10, 1999, at C2.

¹⁷⁵ John Chase, *Angry DuPage Settles Cruz Suits; 3 Former Defendants to Split \$3.5 Million*, CHI. TRIB., Sept. 27, 2000, at 1.

¹⁷⁶ Steve Mills & Christi Parsons, *Birkett Clings to Cruz Link in Killing*, CHI. TRIB., Nov. 15, 2002, at 1.

¹⁷⁷ Ted Gregory & James Kimberly, *DuPage Indicts Inmate in '83 Nicarico Murder; After 2 Decades, Longtime Suspect Dugan is Charged*, CHI. TRIB., Nov. 30, 2005, at 1.

¹⁷⁸ Art Barnum & Mike Arndt, *Plea Deal for Life Term Spares Melissa's Killer*, CHI. TRIB., Nov. 20, 1985, at 1.

¹⁷⁹ *Id.* See also Editorial, *Seeking Death Penalty Is Not Best Use of Tax Dollars*, CHI. SUN-TIMES, Feb. 14, 2010, at A27.

In 2009, Dugan pleaded guilty.¹⁸⁰ After a jury hearing on aggravation and mitigation, he was sentenced to death.¹⁸¹ In early 2010, Birkett, who was angling for an appointment to the Illinois Appellate Court, finally acknowledged that Cruz, Hernandez, and Buckley were innocent, and apologized—though not for anything he had done—for mistakes during the administrations of his predecessors, primarily Ryan.¹⁸² It was not long before Dugan was back where he had been for nearly a quarter century before Birkett undertook to have him executed. On March 9, 2011, when Governor Pat Quinn signed legislation abolishing the Illinois death penalty, he also commuted Dugan's sentence and fourteen other death sentences to life in prison without parole.¹⁸³

THE DOWALIBY CASE

On the morning of September 10, 1998, David and Cynthia Dowaliby reported that their home in the middle-class Chicago suburb of Midlothian had been broken into overnight and that their seven-year-old daughter Jaclyn was missing.¹⁸⁴ When police arrived, the Dowalibys pointed to a broken basement window through which they claimed an intruder might have entered.¹⁸⁵ Based on a visual inspection, however, an Illinois State Police evidence technician concluded that the window appeared to have been broken from inside.¹⁸⁶

Four days after Jaclyn disappeared, her body was found in a wooded area behind the parking lot of an apartment complex in the nearby suburb of Blue Island.¹⁸⁷ In a canvass of the apartments, police interviewed a witness

¹⁸⁰ Dan Rozek et al., *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.

¹⁸¹ *Id.*

¹⁸² Christy Gutowski, *Birkett Clears the Air*, CHI. DAILY HERALD, Feb. 25, 2010, at 1. In November 2010, the Illinois Supreme Court unanimously appointed Birkett to the Appellate Court. Illinois Courts, *Joseph E. Birkett*, ILLINOIS.GOV, http://www.state.il.us/court/AppellateCourt/Judges/Bio_Birkett.asp (last visited Oct. 16, 2015).

¹⁸³ Ray Long & Todd Wilson, *Illinois Bans Death Penalty; Quinn Commutes 15 Sentences to Life, Angering Some Victims' Families*, CHI. TRIB., Mar. 10, 2011, at 1. The costs of Birkett's failed effort to execute Dugan are unknown, but both the prosecution and defense availed themselves to the Illinois Capital Litigation Trust Fund from which slightly more than \$215,000 was expended to investigate aggravating and mitigating evidence in each case in which prosecutors considered seeking the death penalty. *See* Bienen, *supra* note 58, at 1326.

¹⁸⁴ GONE, *supra* note 129, at 1–2.

¹⁸⁵ *Id.* at 2; Joseph Sjostrom, *Girl Missing and Clues Scarce; 7-year-old Vanished from Midlothian Home 3 Days Ago*, CHI. TRIB., Sept. 13, 1988.

¹⁸⁶ GONE, *supra* note 129, at 24, 61, 268; *Broken Window, Missing Girl Not Linked*, CHI. SUN-TIMES, Sept. 14, 1988, at 7.

¹⁸⁷ GONE, *supra* note 129, at 32.

named Everett Mann who said that about 2 A.M. on September 10 he had seen a man “with a large nose, large straight nose” drive away from the location where the body was found.¹⁸⁸ From a photo array, Mann identified David Dowaliby as having a nose resembling the one he had seen—from seventy-five yards away on a dark night.¹⁸⁹ Given the paucity of evidence, prosecutors were reluctant to bring charges until directed to do so by State’s Attorney Richard M. Daley, who was about to run for mayor of Chicago. Based primarily on the nose identification, assistant state’s attorneys obtained indictments charging Jaclyn’s parents with her murder.¹⁹⁰ The next morning’s *Chicago Sun-Times* juxtaposed stories reporting the Dowalibys’ arrest and Daley’s impending announcement of his candidacy for mayor of Chicago.¹⁹¹

Less than a month later, prosecutors received a forensic report positively establishing that the window in fact had been broken from outside,¹⁹² but, undaunted, proceeded to take the case to trial. Cynthia was acquitted with a directed verdict, but David was convicted and sentenced to forty-five years in prison.¹⁹³ The only difference between their cases had been Mann’s nose identification¹⁹⁴—even though, as the *Tribune* quoted an observer as noting, “You couldn’t see Jimmy Durante’s nose from that distance.”¹⁹⁵

On October 30, 1991—by which time former State’s Attorney Daley had been mayor for eighteen months¹⁹⁶—the Illinois Appellate Court unanimously reversed the conviction and barred a retrial, saying: “A conviction cannot be sustained on doubtful, vague, and unreliable identification testimony.”¹⁹⁷

¹⁸⁸ *Id.* at 51.

¹⁸⁹ *Id.* at 52.

¹⁹⁰ *Id.* at 24, 61.

¹⁹¹ Jim Casey & Phillip J. O’Connor, *Parents Accused; Mother, Stepfather Charged with Murdering Midlothian Girl*, CHI. SUN-TIMES, Nov. 23, 1990, at 1; Steve Neal, *Daley Sets Dec. 5 Entry: He’ll Make Mayoral Bid Official*, CHI. SUN-TIMES, Nov. 23, 1988, at 3.

¹⁹² GONE, *supra* note 129, at 108.

¹⁹³ *Id.* at 334, 358.

¹⁹⁴ *Id.* at 209–21.

¹⁹⁵ Matt O’Connor, *Star Witness Identifies Dowaliby by his Nose*, CHI. TRIB., Apr. 12, 1990.

¹⁹⁶ Steve Neal & Fran Spielman, *It’s Daley’s Day: 45th Mayor Calls for New Era of Teamwork and Cooperation*, CHI. SUN-TIMES, Apr. 25, 1989, at 1.

¹⁹⁷ *People v. Dowaliby*, 582 N.E.2d 1243, 1250–51 (Ill. App. Ct. 1 Dist. 1991). Our book about the case was positively reviewed. *See, e.g., Gone in the Night*, PUBLISHERS WEEKLY, <http://www.publishersweekly.com/978-0-385-30619-5> and http://www.ipt-forensics.com/journal/volume7/j7_1_br8.htm. It was also made into a two-part CBS movie. *Gone in the Night*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0116434/>.

EMBEDDING WITH THE PROSECUTION

In 1990, moving on from *Chicago Lawyer*,¹⁹⁸ I appeared with former prosecutors Patrick A. Tuite and Daniel W. Weil for the taping of a public television program about the case of Dr. John Branion, a once-prominent African American gynecologist in Chicago.¹⁹⁹ Twenty-three years earlier, Tuite and Weil had prosecuted Branion for the murder of his wife—a crime that I believed he did not commit.²⁰⁰ After the taping, Weil offered me a ride home. I accepted. On the way, we discussed a forthcoming Cook County state’s attorney’s race. I told Weil that, although I was a Democrat, I planned to vote for the Republican candidate—Jack O’Malley, a young partner at the Chicago law firm of Winston & Strawn and, unbeknownst to me, close friend of Weil. Weil asked if I would consider helping O’Malley defeat Democrat Cecil A. Partee, whom Daley had anointed as his successor after Daley became mayor.²⁰¹

The idea intrigued me. Partee was an affable African American politician,²⁰² but far from a catalyst for change—which I considered paramount for an office rife with prosecutorial misconduct.²⁰³ After meeting O’Malley, I was impressed. He was progressive on gay and women’s issues,²⁰⁴ endorsed the distribution of clean hypodermic needles to drug addicts to combat HIV/AIDS transmission,²⁰⁵ and favored merit selection of

¹⁹⁸ Tesser, *supra* note 26.

¹⁹⁹ Rick Kogan, *Presumed Guilty*, CHI. TRIB., July 25, 1990, *Tempo*, at 7.

²⁰⁰ See Rob Warden & Patricia Haller, *An American Nightmare*, CHI. LAW., Nov. 1987, at 1.

²⁰¹ Charles Mount & Thomas Hardy, *Partee Starts as State’s Attorney Amid Doubts He Can Be Elected*, CHI. TRIB., Apr. 26, 1989, at 8; Fran Spielman & Steve Neal, *Daley Backs Partee as State’s Atty. Successor*, CHI. SUN–TIMES, Apr. 21, 1989, at 4.

²⁰² See William Braden, *Survivor Is the Word for Partee*, CHI. SUN–TIMES, Apr. 23, 1989, at 28.

²⁰³ Warden & Haller, *supra* note 200, at 1. Daley also had been complicit in what bloomed into one of the worst law enforcement scandals in U.S. history—the torture of scores of African–American murder suspects throughout the 1970s and 1980s by a group of white Chicago police officers led by a commander named Jon Burge. See, e.g., John Conroy, *House of Screams: Torture by Electroshock: Could It Happen in a Chicago Police Station? Did It Happen at Area 2?*, CHI. READER, Jan. 26, 1990, at 1; Rob Warden, *Police Torture and Mayor Daley: Ignoring an Injustice*, CHI. TRIB., Apr. 29, 2007, Perspective Sec. http://articles.chicagotribune.com/2007-04-29/news/0704271277_1_richard-brzeczek-torture-special-prosecutors; Mary Ann Williams, *Torture in Chicago*, CHI. LAW., Mar. 1989, at 1; see also *United States v. Burge*, 711 F.3d 803, 807–808 (7th Cir. 2013).

²⁰⁴ O’Malley was endorsed by the *Windy City Times*, Chicago’s lesbian–gay newspaper, and by the Chicago Chapter of the National Organization for Women. Kathy O’Malley & Dorothy Collin, *O’Malley & Collin INC.*, CHI. TRIB., Nov. 2, 1990, at 28; Kathy O’Malley & Dorothy Collin, *O’Malley & Collin INC.*, CHI. TRIB., Mar. 9, 1994, at 16.

²⁰⁵ Editorial, *O’Malley Attacked on AIDS Issue*, CHI. TRIB., Oct. 22, 1990, at C3.

judges, a cause I had championed at *Chicago Lawyer*.²⁰⁶ Although he favored the death penalty—a prerequisite for a viable state’s attorney candidate—he at least was low-key about it, unlike Daley, who on the day of the state’s first post-*Furman* execution,²⁰⁷ exuded enthusiasm, proclaiming, “I’m pro-death.”²⁰⁸

I became the O’Malley campaign’s issues director—a move that raised eyebrows because I had been critical of several of O’Malley’s principal allies and backers, including former U.S. Attorney Dan K. Webb, former Governor Thompson, former Attorney General Tyrone C. Fahner, and, of course, Ryan.²⁰⁹ Although our relationship had its awkward moments, O’Malley and I worked well together and he handily won the state’s attorney’s office twice.²¹⁰ In 1994, two years into his second term, he offered me an opportunity, which I eagerly accepted, to join the executive staff of the state’s attorney’s office and work on policy research and advocacy.²¹¹

²⁰⁶ See, e.g., *Once More unto the Breach*, CHI. LAW., Apr. 1985, at 14 (opining that “reading *Chicago Lawyer* editorials on merit selection of judges must strike some readers a lot like reading *Wall Street Journal* editorials on supply side economics”).

²⁰⁷ Rob Karwath & William Grady, *Walker Becomes 1st Execution in 28 Years*, CHI. TRIB. (Sept. 12, 1990), http://articles.chicagotribune.com/1990-09-12/news/9003160524_1_death-row-execution-illinois-supreme-court.12. Walker had abandoned his discretionary appeals, in effect committing state-abetted suicide. See Rob Warden, *Kill Me*, CHI. LAW., Aug. 1986, at 1.

²⁰⁸ Fran Spielman & Ray Hanania, *‘I’m Pro-death, Let’s Get on with It,’ Says Daley*, CHI. SUN-TIMES, Sept. 12, 1990, at 7.

²⁰⁹ Editorial, *An Allegedly Crooked Antique Dealer with a Pal in the Right Place*, CHI. LAW., Dec. 1985, at 3; Steve Neal, *O’Malley Hires Critic of His Allies*, CHI. SUN-TIMES, Sept. 24, 1990, at 23; Mark Rust, *The Tylenol Stunt*, CHI. LAW., Nov. 1982, at 1; *Cover-Up*, supra note 128; Flora Johnson Skelly, *Oh, What a Tangled Webb*, CHI. LAW., Dec. 1983, at 3; Rob Warden, *Perjury for the Prosecution*, CHI. LAW., Nov. 1983, at 1.

²¹⁰ David Elsner, *Phelan, Sheahan Win; O’Malley Beats Partee*, CHI. TRIB., Nov. 7, 1990, at 1; John Kass, *O’Malley Trounces O’Connor*, CHI. TRIB., Nov. 4, 1992, at 1.

²¹¹ The job enabled me to pursue the interest that O’Malley and I shared in establishing judicial merit selection. The timing was propitious because, a year earlier, Thomas Maloney, a Cook County felony trial judge, had been convicted on federal charges of taking bribes to fix murder cases. See *United States v. Maloney*, 71 F.3d 645, 650–52 (1995). Maloney—like nine Cook County judges who had been convicted on federal corruption charges in a scandal known as Greylord—was a product of a selection process dominated by the Cook County Democratic Central Committee, which slated judicial candidates—slating being tantamount to election. See Wayland B. Cedarquist, *The Continuing Need for Judicial Reform in Illinois*, 4 DEPAUL L. REV. 153, 158–59 (1955). In 1970, Illinois voters rejected a constitutional provision that would have established merit selection statewide, but the proposition carried overwhelmingly in Cook County. See Robert W. Bergstrom, *Judicial Reform in Illinois*, 53 CHI. B. REC. 9, 20–21 (1971). A viable solution, it seemed to me, would be to permit a local option—allowing Cook County to have merit selection and the rest of the state to keep the elective process—and I constructed a proposal to do that. Andrew Fegelman, *Merit Selection of Cook County Judges Backed by O’Malley*, CHI. TRIB., Mar. 27, 1996, at 8. The proposal,

While working for O'Malley, I also served on the board of directors of the Illinois Coalition Against the Death Penalty²¹²—an act of apostasy in the office. In 1995, I organized a clemency committee of prominent attorneys, religious leaders, and present and former law enforcement officials in an effort to stop the impending execution of Girvies Davis for the 1978 murder of an elderly farmer in downstate St. Clair County—a crime to which Davis claimed that he had been forced to confess at gunpoint.²¹³ At my behest, David Protes, a professor at Northwestern University's Medill School of Journalism, assigned students in an investigative reporting class he taught to investigate the case.²¹⁴ Working with volunteer lawyers from the firm of Jenner & Block, the Protes team discovered that Davis could not have read the confession—he was illiterate—and, furthermore, that he simultaneously had signed confessions to three other murders that the authorities already had conceded he had not committed.²¹⁵

Former Chicago Police Superintendent Richard J. Brzeczek, a member of the clemency committee, memorably told a *New York Times* reporter, "I'm very much in favor of the death penalty, but this is the kind of case that gives capital punishment a bad name."²¹⁶ While the committee and the Medill investigation drew international media coverage,²¹⁷ nowhere did their efforts draw more attention than in Chicago, notably from *Chicago Tribune* columnist Eric Zorn,²¹⁸ who was widely regarded as a liberal, but also from

fell short in the General Assembly. Rick Pearson, *Plan to Make Tax Increases Less Likely Sinks in Senate*, CHI. TRIB., Apr. 24, 1996, at 9. Despite the failure, the concept remained viable and I hoped to prevail in a future session of the General Assembly. I was denied that opportunity, however, when O'Malley was swept out of office in the Democratic landslide of 1996. Andrew Fegelman & Nancy Ryan, *O'Malley Shocked by Devine*, CHI. TRIB., Nov. 6, 1996, at 11.

²¹² Renamed the Coalition to Abolish the Death Penalty in 2002.

²¹³ *People v. Davis*, 447 N.E.2d 353, 364 (Ill. 1983); PROMISE, *supra* note 74, at 7.

²¹⁴ PROMISE, *supra* note 74, at 7.

²¹⁵ *Id.* at 3–4.

²¹⁶ Don Terry, *Diverse Group Tries to Stop Illinois Inmate's Execution: Questions Murder Confession by an Illiterate*, N.Y. TIMES, May 11, 1995, at A14.

²¹⁷ *Id.*; see also Ian Katz, *Brain-Damaged Man Faces Death*, THE GUARDIAN (London) May 17, 1995, at 11.

²¹⁸ Eric Zorn, *Con Who Has Date on Death Row Not Man He Used to Be*, CHI. TRIB., Apr. 16, 1995, Chicagoland Sec., at 1; Eric Zorn, *Davis' Execution May Reveal Folly of Eye for an Eye*, CHI. TRIB., May 18, 1995, Chicagoland Sec., at 1; Eric Zorn, *Death Row Inmate Takes to Airwaves to Fight for his Life*, CHI. TRIB., Apr. 25, 1995, Chicagoland Sec., at 1; Eric Zorn, *Evidence Shows Juries as Fallible as the Rest of Us*, CHI. TRIB., Oct. 4, 1995, Chicagoland Sec., at 1; Eric Zorn, *Godspeed to All Who Care to Make Sense of this Riddle*, CHI. TRIB., Sept. 12, 1995, Chicagoland Sec., at 1; Eric Zorn, *Man's not Innocent, but He's not Guilty Enough to Die*, CHI. TRIB., Apr. 18, 1995, Chicagoland Sec., at 1; Eric Zorn, *Prison Phones Go Dead with Man's Life in the Balance*, CHI. TRIB., Apr. 30, 1995, Chicagoland Sec., at 1; Eric Zorn,

conservative *Chicago Sun-Times* columnist Dennis Byrne.²¹⁹ The man with life and death power in the matter, however, was not swayed—Governor Edgar denied clemency, sending Davis to death at 12:28 a.m. on May 17, 1995.²²⁰

The students who had worked on the case and I spent the evening preceding the execution with Protes at his home lamenting our failure to save Davis. For me, the execution was the most depressing point in my career since 1986, when Dennis Williams was sentenced to death for the second time. My feelings, of course, were trivial compared with the anguish Williams was suffering, but I was concerned that I had allowed my eight-year-old son Billy to develop a friendship with Williams via telephone—a lapse in judgment that haunted me.²²¹ The situation, I told Protes, made saving Williams from Davis’s fate all the more imperative for me.

GOOD NEWS—FOR A CHANGE

Eight days after the Davis execution, a team of *pro bono* lawyers from the firm of Mayer, Brown & Platt²²² won a new trial for Dennis Williams’s co-defendant, Jimerson.²²³ The effort was led by Mark Ter Molen, who had taken Jimerson’s case five years earlier at the behest of his former professor and mentor at the University of Chicago Law School, Albert Alschuler.²²⁴ Ter Molen was not opposed to the death penalty but thought that Jimerson—who had no prior criminal record and was not alleged to have killed either victim—did not deserve it, even if he had taken part in the abduction and gang rape.²²⁵

Comparing the records of the Jimerson trial and the Williams-Rainge retrial, the Mayer Brown team discovered that J. Scott Arthur, the lead prosecutor at both trials, appeared to have suborned perjury by Gray, who had testified at Jimerson’s trial that the prosecution had promised her nothing

Shadows of Doubt Cast Executions in Different Light, CHI. TRIB., Mar. 28, 1995, Chicagoland Sec., at 1.

²¹⁹ Dennis Byrne, *Commute Davis’ Death Sentence*, CHI. SUN-TIMES, May 14, 1995, at 33.

²²⁰ Janan Hanna & Jerry Thornton, *Edgar Rejects Clemency Plea Appeals Denied; Davis Executed by Lethal Injection*, CHI. TRIB., May 17, 1995, at 9.

²²¹ Eight years later, my son described the relationship. Billy Warden, College Entrance Essay (2003) (unpublished manuscript) (on file with *Journal of Criminal Law and Criminology*).

²²² As result of mergers, the firm became known as Mayer, Brown, Rowe & Maw LLP in 2002 and was renamed Mayer Brown in 2007.

²²³ *People v. Jimerson*, 652 N.E.2d 278, 288 (Ill. 1995).

²²⁴ PROMISE, *supra* note 74, at 97–98.

²²⁵ *Id.*

in exchange for her testimony.²²⁶ Arthur had to have known that Gray was lying; during discovery before the Williams-Rainge retrial, Arthur had disclosed that the prosecution had agreed to drop all charges against Gray “if she testifies honestly.”²²⁷ Honoring that promise, the prosecution proceeded to dismiss the murder and rape charges against Gray after the Williams-Rainge retrial.²²⁸

As a result of the perjury and prosecutorial misconduct, the Illinois Supreme Court reversed Jimerson’s conviction and remanded his case for a new trial—citing a long-established principle that, when “a prosecutor knowingly permits perjured testimony, ‘it is incontrovertible that defendant’s trial lacked the fundamental fairness implicit in constitutional guarantees of due process of law, thus entitling him to a new trial.’”²²⁹ By this time, DNA had come into widespread forensic use.²³⁰ Consequently, it did not occur to me that the technology would not now be attempted in the cases of Jimerson and his imprisoned co-defendants. If the seminal evidence recovered from the female victim in the case was testable—a huge “if,” of course—I was confident that it would exonerate all four men. I was stunned when, in response to a post-trial motion seeking DNA testing on Williams’s behalf, the state’s attorney’s office opposed it and the trial judge, Frank Meekins, denied it.²³¹

At the time, defendants had no post-conviction right to DNA testing,²³² but, in my capacity as a member of the executive staff of the state’s attorney’s office, I wrote an internal memorandum urging the testing. If it linked Jimerson to the crime, it would make his reconviction a virtual certainty, I pointed out. “If, on the other hand, it were to exclude all of the defendants as

²²⁶ *Jimerson*, 652 N.E. 2d at 222–23.

²²⁷ *Id.* at 284.

²²⁸ *Id.*

²²⁹ *Id.* at 284–85 (quoting *People v. McKinney*, 201 N.E.2d 431, 432 (Ill. 1964)) (citing *Napue v. Illinois*, 360 U.S. 264 (1959)).

²³⁰ In 1992, the first clinical project dedicated to exonerating falsely convicted defendants with DNA was launched at Benjamin N. Cardozo School of Law. Warden, *supra* note 125, at 44. In 1993, Kary B. Mullis won the Nobel Prize in chemistry for discovering polymerase chain reaction (PCR), the technology that launched the DNA forensic resolution. *The Nobel Prize in Chemistry 1993*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/chemistry/laureates/1993/. In 1994, Congress created the Combined Offender DNA Index System (CODIS). Pub. L. No. 103–322, 108 Stat. 2065 (codified as amended at 42 U.S.C. § 14131–14134). By the beginning of 1995, DNA had exonerated a score of falsely convicted defendants nationally. NRE, *supra* note 71.

²³¹ PROMISE, *supra* note 74, at 114.

²³² Defendants’ post-conviction entitlement to DNA testing was established in 1997. 725 ILL. COMP. STAT. 5/116-3 (1997).

sources of the semen, it would stop a serious miscarriage of justice.”²³³ I was deeply disappointed when the number two person in the office, First Assistant State’s Attorney Andrea Zopp, took a different course of action—offering Jimerson a deal under which, if he would plead guilty, the office would agree to a sentence of time served, setting him free and removing him from jeopardy of returning either to death row or prison.²³⁴

Jimerson would have been tempted to take the offer but for an unacceptable side effect—that it would condemn Williams to death and Adams and Rainge to lives behind bars. A devout Christian, Jimerson was mindful of the Eighth Commandment: “Thou shalt not bear false witness against thy neighbor.” He told Ter Molen, “Tell them to go scratch themselves.”²³⁵

A CLASS ACTION

On January 3, 1996, rallying from the devastation of the Davis execution, Protess threw himself and four students from his latest investigative reporting class—Laura Sullivan, Stephanie Goldstein, Stacey Delo, and Christie Guidibaldi—full throttle into the effort to exonerate the four men.²³⁶ Within days, while the students were familiarizing themselves with the case, Dennis Williams called Protess with a “red alert”—an urgent matter that Williams was uncomfortable discussing on the telephone because authorities recorded prisoners’ calls. Protess had wanted the students to be better steeped in facts of the case before meeting the men, but Williams’s call changed that. On January 15, the students set out for the Menard Correctional Center, where Williams was on death row.

On the way, the students stopped at Danville Correctional Center to interview Adams, who told them that two men from the Cook County state’s attorney’s office had visited him earlier that very day and offered him a deal under which he would be freed if he testified against Jimerson. Adams said he scoffed at the offer. When the students asked what he thought about Gray, he replied, “She was weak, and the cops took advantage of her. As far as I’m concerned, she’s just another victim.”²³⁷

At Menard, Williams revealed that the reason for his “red alert” was that he had received a letter from a lawyer at the Capital Resource Center²³⁸

²³³ PROMISE, *supra* note 74, at 116 (quoting the original memo, which is no longer available).

²³⁴ *Id.* at 120.

²³⁵ *Id.* at 120–21.

²³⁶ *Id.* at 122–23.

²³⁷ *Id.* at 128–30.

²³⁸ A federally funded program established in 1987 soon to be swept away by hostile

notifying him of the deal that prosecutors had offered Jimerson. Although Williams had received the letter the day he called Protes, it had been written about a month earlier and delayed in the prison mail distribution system. Williams's fear that Jimerson might take the deal, of course, was moot. Not only had Jimerson turned it down, but he already had been released on bond.²³⁹ Although the *Tribune's* Zorn had reported Jimerson's impending release,²⁴⁰ Williams had not seen the column and was greatly relieved when the students shared the news. After going over some of the facts of the case, as the students prepared to leave, Williams mentioned that he hoped Protes could find a lawyer soon.²⁴¹ In fact, Protes already had lawyers in mind to represent not only Williams but Rainge and Adams as well.²⁴²

Upon the students' return, Protes wrote a letter on Northwestern letterhead to Gray, telling her that the students had interviewed Adams, who did not blame her for his plight, and that the students hoped to interview her as well.²⁴³ When the students knocked on her door a few days later, she greeted them warmly and during the ensuing conversation asked them to tell Adams that she was sorry. Sorry for what? "For lyin' on him and the others. We never hurt no white people."²⁴⁴ Based on what Gray told the students, Protes and I prepared an affidavit that we hoped she would sign. Protes and the students took Gray to dinner—she had never eaten in a restaurant before—and went over the affidavit line by line. Although she said that an

political winds. See, e.g., Colman McCarthy, *Clearing the Path to the Death Chamber*, WASH. POST, Oct. 10, 1995, at C12.

²³⁹ PROMISE, *supra* note 74, at 126. Although bail in a capital case was unprecedented, Mark Ter Molen persuaded Cook County Circuit Court Judge Sheila M. Murphy to set Jimerson's bail at only \$25,000, allowing his release after his family posted 10 percent of the amount. In 1963, the Illinois General Assembly reformed the Code of Criminal Procedure to eliminate private bail bondsmen who theretofore had posted the entire amount of defendants' bail in return for a 10 percent fee. Under the new system, defendants could be released upon posting 10 percent of the bail amount with the clerk of the court, 90 percent of which would be returned when the defendants satisfied conditions of the bail. See 725 ILL. COMP. STAT. 5/110-7 (1963).

²⁴⁰ Eric Zorn, *How Yet Another Flimsy Case Ended up on Death Row*, CHI. TRIB., Jan. 23, 1996, Chicagoland Sec., at 1.

²⁴¹ PROMISE, *supra* note 74, at 131.

²⁴² A few weeks later, Robert Byman, of Jenner & Block, with whom Protes and I had worked on the Dowaliby case, agreed to represent Williams. Northwestern Professor Lawrence Marshall, who had represented Rolando Cruz, agreed to represent Willie Rainge, with Matthew Kennelly, who later became a federal judge, as co-counsel. Jeffrey Urdangen, a solo practitioner who had represented Cruz co-defendant Alejandro Hernandez and who later joined the Bluhm Legal Clinic at Northwestern, agreed to represent Adams. *Id.* at 158–59, 175.

²⁴³ *Id.* at 133.

²⁴⁴ *Id.* at 134.

assistant state's attorney had threatened to have her arrested if she changed her story, she signed the affidavit. "I believe God sent y'all so I could lift this burden off my soul," she said.²⁴⁵ In an interview with Zorn, Gray reiterated the facts in the affidavit, vowing that henceforth she was committed to the truth, which, as she put it, was: "I don't know nothin', I didn't see nothin', and they never did nothin'."²⁴⁶

Meanwhile, plowing through thousands of pages of court records, Laura Sullivan and Christie Guidibaldi found a stunning piece of exculpatory evidence that had been overlooked since 1978—a police report of an interview with a witness who identified four alternative suspects. The witness was Marvin Simpson, who lived near the crime scene and, according to the report, claimed to have heard the four men—Dennis Johnson, Ira Johnson, Juan (Johnny) Rodriguez, and Arthur (Red) Robinson—talking about "doing a score, a stickup" the night the victims were abducted. Simpson added that the men were in a Buick Electra 225.²⁴⁷

The names did not register with Sullivan and Guidibaldi, but certainly did with me. Dennis Johnson was the man who told Margret Roberts and René Brown in 1982 that he was present when the victims were abducted in a Buick Electra 225, and who had named two others involved as "Johnny" and "Red."²⁴⁸ Not surprisingly, Johnson, who since had died of a drug overdose,²⁴⁹ had not told Roberts and Brown about Ira, his younger brother. The students soon located Ira at Menard, where he was serving a seventy-four-year sentence for a murder to which he pleaded guilty in 1991.²⁵⁰ Rodriguez, the owner of the Buick Electra, and Robinson still lived in Ford Heights.²⁵¹

Protest enlisted René Brown to go with him to interview Marvin Simpson, who added important details that were not in the police report. In addition to hearing the men talk about "doing a score," Simpson said he had seen them leave in the Buick Electra, which was owned by Rodriguez, and a few hours later heard gunshots and saw Ira Johnson run from the townhouse where Carol Schmal's body was found. Simpson added that, after daybreak, he saw Dennis Johnson and Red Robinson selling cigarettes out of the trunk

²⁴⁵ *Id.* at 135.

²⁴⁶ Eric Zorn, *Shaky to Begin with, '78 Murder Case Just Got a Lot Flimsier*, CHI. TRIB., Feb. 13, 1996, Chicagoland Sec., at 1.

²⁴⁷ PROMISE, *supra* note 74, at 140.

²⁴⁸ *Id.* at 41–42.

²⁴⁹ *Id.* at 143.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 175, 200. Ford Heights formerly was known as East Chicago Heights. See Papajohn, *supra* note 78, at 7.

of Rodriguez's Buick and wearing buckskin vests that Simpson had not seen them wear previously; cigarettes and buckskin vests were among items taken from the filling station from which the victims were abducted.²⁵²

Faced with the mounting evidence that the wrong men had been convicted, the prosecutors finally agreed to DNA testing.²⁵³ It would take months, and there was no guarantee that the eighteen-year-old seminal sample recovered from Schmal would yield a result. Meanwhile, however, in an interview at Menard, Ira Johnson confessed to Delo and Sullivan:

Dennis wanted to do a score, an' asked me to come along. He didn't have a car, so he paid Johnny to drive his deuce and a quarter [Buick Electra 225], an' Red just jumped in. When we got to the gas station, Dennis took the girl 'cause he liked the way she looked—know what I'm sayin'?—an' he took the boyfriend 'cause he couldn't leave no witnesses. We drove around an' went to the townhouse. I seen Dennis rape her. An' Red did her, too. But me an' Johnny didn't touch the girl. Then Dennis makes me an' Johnny take the boyfriend out to the creek an' get rid of him.²⁵⁴

Four months later, David Bing, a geneticist at Harvard Medical School who was conducting the DNA testing, positively eliminated all four of the original defendants as sources of the semen, although Bing did not have DNA samples from either Lionberg or the alternative suspects for comparison purposes. Before dropping the charges, prosecutors insisted on additional testing, but agreed to release Williams, Rainge, and Adams immediately on electronic home monitoring. Although the men were not yet officially exonerated, the *New York Times* pronounced them so in a front-page headline.²⁵⁵

The same day, in an interview with an assistant state's attorney, Robinson confessed to taking part in the crime. He did not admit that he had raped Schmal, but otherwise corroborated the version of events that Ira Johnson had provided to Delo and Sullivan.²⁵⁶ First Assistant State's Attorney Zopp still refused to dismiss charges until Bing completed further DNA testing. Ter Molen, fed up with what he saw as dilatory tactics, filed a motion seeking immediate dismissal of the Jimerson indictment. Over Zopp's objection, Judge Murphy granted the motion, declaring that further delay would be an "egregious denial" of due process to the defendant.²⁵⁷

²⁵² PROMISE, *supra* note 74, at 164–67.

²⁵³ *Id.* at 151.

²⁵⁴ *Id.* at 195.

²⁵⁵ Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at 6.

²⁵⁶ PROMISE, *supra* note 74, at 214–15.

²⁵⁷ Andrew Fegelman, *Death Row Inmate Exonerated, Charges Dismissed Against Man in '78 Rape, Killings*, CHI. TRIB., June 25, 1996, at 1.

The following month, Bing reported that the additional DNA testing on which Zopp had insisted positively linked Robinson to the rape of Schmal and excluded Ira Johnson and Rodriguez as sources of the recovered semen. At that point, Robinson amended his confession, admitting that both he and Dennis Johnson had committed the rape.²⁵⁸ At last, Zopp and O'Malley dropped the charges against the remaining defendants, who had become known as the Ford Heights Four. O'Malley publicly apologized for the "glaring example" of the criminal justice system's fallibility. "I more than regret that there is not more that I can do to undo the injustice," he said. Kenneth Adams pointedly summed up the tragedy: "We are victims of this crime, like Carol Schmal and Lawrence Lionberg. The people in power took a crime with two victims and added four more victims and punished them almost as severely."²⁵⁹

In November 1996, O'Malley was swept out of office in an upset by Democrat Richard A. Devine, who had trailed substantially in the polls but rode President Bill Clinton's coattails to victory.²⁶⁰ The following year, Ira Johnson and Red Robinson pleaded guilty to the murders and Rodriguez was convicted by a jury.²⁶¹

THE CENTER ON WRONGFUL CONVICTIONS

Soon after Protes and I finished a book on the Ford Heights case,²⁶² Lawrence Marshall invited us to participate in an ambitious event at Northwestern University School of Law—the National Conference on Wrongful Convictions and the Death Penalty in November 1998, drawing attention to seventy-four near-fatal mistakes in capital cases nationally,²⁶³

²⁵⁸ PROMISE, *supra* note 74, at 220–21.

²⁵⁹ Andrew Fegelman, *3 Convicted of Murders are Finally Exonerated*, CHI. TRIB. (July 3, 1996), http://articles.chicagotribune.com/1996-07-03/news/9607030109_1_carol-schmal-four-men-murder-and-rape-charges.

²⁶⁰ Clinton carried Cook County by nearly a 20-point margin over Republican Robert Dole. Fegelman & Ryan, *supra* note 211.

²⁶¹ Sharon Cotliar, *Man Guilty in '78 Slaying That Saw Four Wrongly Jailed*, CHI. SUN-TIMES, Apr. 29, 1997, at 10; Ruth E. Igoe, *2nd Trial, 2nd Conviction in 1978 Murders* (Sept. 27, 2000), http://articles.chicagotribune.com/2000-09-27/news/0009270303_1_penalty-death-row-ira-johnson. In 1999, Cook County settled federal civil rights suits brought on behalf of the Ford Heights Four for \$36 million. Robert Becker, *Ford Heights 4 to Get Their Settlement from County*, CHI. TRIB., Mar. 16, 1999, at 3.

²⁶² The book was favorably reviewed. See Jason Berry, *Justice on Trial*, CHI. TRIB., Aug. 16, 1998, Books, at 1; Joe Dirck, *Truth Wins an 18-year Legal Battle*, CLEV. PLAIN DEALER, Aug. 9, 1998, Books, at 11; Neil Steinberg, *A Wrong Set Right: The Trials of Ford Heights 4*, CHI. SUN-TIMES, July 26, 1998, Showcase, at 15.

²⁶³ *CBS Evening News: Eye on America: Death Row Alumni* (CBS television broadcast Nov. 10, 1998); *Men and Women Who Had Been Sentenced to Death Explain How They Were*

including six Illinois cases in which nine innocent men had been sentenced to death.²⁶⁴

At the time of the conference, the future of the death penalty abolition movement was anything but auspicious. The number of executions nationally was on the verge of spiking at a post-*Furman* annual high of ninety-eight.²⁶⁵ Two years earlier, Congress had overwhelmingly approved and President Clinton had signed the Antiterrorism and Effective Death Penalty Act, which curtailed the rights of state death row prisoners to federal review of their convictions.²⁶⁶ Federal funding for capital resource centers had been eliminated in 1995.²⁶⁷ Most ominously, Americans favored the death penalty by a margin of more than three to one.²⁶⁸

Despite all that, the conference was a success.²⁶⁹ Building on it, in April 1999, Marshall and I founded the Center on Wrongful Convictions (CWC) under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law. I became executive director of the Center—a position that enabled me to work effectively both to end the death penalty and to reform the criminal justice system.²⁷⁰

Between the conference and the founding of the CWC, the *Chicago Tribune* published a ground-breaking series documenting sixty-seven U.S. capital cases and more than three hundred other murder cases in which prosecutorial misconduct had led to reversal of convictions in the previous twenty-five years.²⁷¹ One installment in the series profiled Arthur, the

Freed, When New Evidence or Better Lawyers Appeared to Prove Their Innocence (NPR All Things Considered broadcast Nov. 15, 1998) (transcript available on LEXIS); *Nightline: Dead Men Talking* (ABC television broadcast Nov. 18, 1998) (Ted Koppel, anchor).

²⁶⁴ See David Protesch & Rob Warden, *Nine Lives: The Justice System Sentenced These Men to Death. The Justice System Ultimately Set Them Free. Is That Justice?*, CHI. TRIB. MAG., Aug. 10, 1997, at 20.

²⁶⁵ *Executions by Year Since 1976*, DEATH PENALTY INFORMATION CENTER (April 16, 2015), DPIC <http://www.deathpenaltyinfo.org/executions-year>.

²⁶⁶ Pub. L. No. 104–132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.); see also Stephen Labaton, *New Limits on Prisoner Appeals: Major Shift of Power from U.S. to States*, N.Y. TIMES, Apr. 19, 1996, at B8.

²⁶⁷ McCarthy, *supra* note 238.

²⁶⁸ GALLUP, *supra* note 20 (finding in Feb. 1999 that 71% favored it, 22% opposed it, and 7% were undecided).

²⁶⁹ See, e.g., *supra* note 263

²⁷⁰ I retired on Aug. 31, 2014. See Dan Hinkel, *Head of Northwestern Group to Keep Fighting: Center on Wrongful Convictions Director to Resign Next Year but Continue Work*, CHI. TRIB., Sept. 22, 2013, at 14.

²⁷¹ Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win* (pts. 1–5) [hereinafter *Trial & Error*], CHI. TRIB., *The Verdict: Dishonor*, Jan. 10, 1999, pt. 1, <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html#page=1>; *The Flip Side of a Fair Trial*, Jan. 11, 1999, pt. 2, <http://www.chicagotribune.com/news/>

prosecutor most responsible for putting Williams, Jimerson, Rainge, Adams, and Gray behind bars for a cumulative seventy-three years. Arthur was unrepentant, as the *Tribune* reported:

Arthur clings to his belief even though other men have confessed; even though DNA tests implicated one of those who confessed and eliminated Williams and his friends as suspects; even though prosecution witnesses have either recanted or been discredited, and the scientific evidence at the trial exposed as bunk; even though Williams and his friends have received pardons from the governor and apologies from the state's attorney's office.²⁷²

I found Arthur's position distressing, although, having never encountered a prosecutor willing to accept personal responsibility for a miscarriage of justice, unsurprising.²⁷³ More appalling was another installment of the series that exposed racism among Cook County felony prosecutors, who had participated in a contest based on the physical weight of the defendants they convicted. The prosecutors called the contest "Niggers by the Pound."²⁷⁴

A month after the series, a tenth Illinois death row defendant, Anthony Porter, was freed after Paul Ciolino, a private investigator working with Protes and a group of Medill students, obtained a video-taped confession from another man, Alstory Simon, to the crime for which Porter had come within two days of execution.²⁷⁵ Porter's release in February 1999 revived the moribund anti-death-penalty movement in Illinois.²⁷⁶ Seven months later,

watchdog/chi-020103trial2-story.html#page=1; *Prosecution on Trial in DuPage*, Jan. 12, 1999, pt. 3, <http://www.chicagotribune.com/news/watchdog/chi-020103trial3-story.html#page=13>; *Reversal of Fortune*, Jan. 13, 1999, pt. 4, <http://www.chicagotribune.com/news/watchdog/chi-020103trial4-story.html#page=14>; *Break Rules, Be Promoted*, Jan. 14, 1999, pt. 5, <http://www.chicagotribune.com/news/watchdog/chi-020103trial5-story.html#page=1>.

²⁷² Ken Armstrong & Maurice Possley, *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 12, <http://www.chicagotribune.com/news/watchdog/chi-020103trial2-story.html#page=12>.

²⁷³ Although Jack O'Malley apologized for the Ford Heights Four tragedy, he had not been involved in the prosecution of that case. Fegelman, *supra* note 259. Years later, I was heartened when Thomas M. Breen, a former assistant Cook County assistant state's attorney, not only personally accepted responsibility for sending two innocent men to prison a quarter of a century earlier but also helped exonerate them. Steve Mills & Jeff Coen, *DNA Tests Gain Release of 2 in '76 Rape, Slaying*, CHI. TRIB., May 24, 2003, at 1; Steve Mills & Maurice Possley, *Former Foe Having 2nd Thoughts*, CHI. TRIB., Jan. 22, 2003, at 1. When James Ryan ran unsuccessfully for governor in 2009, he belatedly acknowledged that "the system and I failed to achieve a just outcome" in the Cruz-Hernandez case. Dave McKinney & Abdon M. Pallasch, *Ryan Sorry for Wrongful Convictions*, CHI. SUN-TIMES, Nov. 13, 2009, at 3.

²⁷⁴ *Trial & Error*, *supra* note 271, pt. 2.

²⁷⁵ *How & Why*, *supra* note 29, at 256-58.

²⁷⁶ See Adrienne Drell & Dave McKinney, *Pressure Building to Halt Executions; Porter*

Simon pleaded guilty, apologized to the victims' survivors in open court, and was sentenced to thirty-seven years in prison.²⁷⁷ Two months after Simon's sentencing, the movement received a major boost when the *Tribune* published another ground-breaking series, this one focusing on the failure of the death penalty in Illinois.²⁷⁸ The principal conclusion of the series was that the system was so plagued by unprofessionalism, imprecision, and bias that the "state's ultimate form of punishment [is] its least credible."²⁷⁹

In January 2000—by which time more Illinois death row prisoners had been released based on colorable claims of innocence than had been executed²⁸⁰—Republican Governor George H. Ryan declared the nation's first moratorium on executions.²⁸¹ Ryan then named a fourteen-member Commission on Capital Punishment, co-chaired by former U.S. Senator Paul Simon, former U.S. Attorney Thomas P. Sullivan, and former U.S. District Court Judge Frank J. McGarr, to review the administration of the state's capital punishment system and recommend ways to improve its fairness and accuracy.²⁸²

While the commission pondered the issues, Lawrence Marshall and I joined allies from the Office of the State Appellate Defender, the University of Chicago Law School's MacArthur Justice Center,²⁸³ DePaul University

Case Raises Concern, CHI. SUN-TIMES, Feb. 7, 1999, at 1.

²⁷⁷ Tom Ragan, *Years After Death Row Travesty, Killer Gets Due*, CHI. TRIB., Sept. 8, 1999, at 1. In 2014, Cook County State's Attorney Anita Alvarez dismissed the charges against Simon, contending not that he was innocent but that tactics employed by Protess and the private investigator had been improper. Steve Mills et al., *Another Release in Case that Shook Death Penalty; Inmate Freed After Pivotal Murder Conviction Thrown out by Prosecutors*, CHI. TRIB., Oct. 31, 2014, at 1.

²⁷⁸ Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois* (pts. 1–5), CHI. TRIB., NOV. 1999.

²⁷⁹ *Id.*

²⁸⁰ The score was thirteen to twelve. See *How & Why*, *supra* note 29, at 259, 262. On Jan. 17, 2000, Steven Manning, a former Chicago police officer sentenced to die for the murder of a business partner, became the thirteenth to be freed. Steve Mills & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, *Chicagoland Sec.*, at 1. On Mar. 17, 1999, Andrew Kokoraleis, a convicted serial killer, became the twelfth to be executed. Christi Parsons & Cornelia Grumman, *Kokoraleis' Execution Carried Out*, CHI. TRIB., Mar. 17, 1999, at 1.

²⁸¹ Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, *Evening Sec.*, at 1. Twenty-three years earlier, as a freshman legislator, Ryan voted to reinstate capital punishment in Illinois and thereafter voted to expand the scope of the law. See Rob Warden, *On this Day . . . 30 Years of the Death Penalty*, CHI. TRIB., Jan. 12, 2003, *Chicagoland Sec.*, at 1.

²⁸² Steve Binder, *Governor's Panel to Study Death Penalty*, SOUTHERN ILLINOISAN, Mar. 10, 2000, at 1A.

²⁸³ In 2006, the MacArthur Justice Center relocated to Northwestern Law's Bluhm Legal Clinic and subsequently was renamed the Roderick and Solange MacArthur Justice Center.

College of Law, and Chicago-Kent College of Law to develop a strategy to persuade Governor Ryan to commute the death sentences of all death row prisoners to life in prison or terms of years²⁸⁴ before he left office in January 2003.²⁸⁵ In early 2002, the group filed petitions with the Illinois Prisoner Review Board seeking clemency petitions for the 160-plus condemned prisoners.²⁸⁶

In April 2002, the Commission on Capital Punishment issued recommendations for improving the accuracy of the criminal justice system. However, it concluded that, even if all of the recommendations were accepted, there could be no guarantee that innocent defendants would not continue to be sentenced to death.²⁸⁷ Emotional hearings on the clemency petitions put immense pressure on Ryan to deny blanket clemency.²⁸⁸

To counter the pressure, the CWC mounted a series of events, including a program at the law school that featured thirty-six exonerated former death row prisoners from thirteen states, a march from Stateville Correctional Center (where all but one of the state's post-*Furman* executions had taken place²⁸⁹) to the governor's Chicago office, and the local premiere of a celebrated off-Broadway play *The Exonerated*.²⁹⁰ The *Tribune* drama critic noted that "it looked like the whole show was aimed firmly in Ryan's direction"²⁹¹—which indeed it was. In that, it also succeeded. Three days

Roderick and Solange MacArthur Justice Center, NW. UNIV. SCH. OF LAW, <http://www.law.northwestern.edu/legalclinic/macarthur/> (last visited Nov. 15, 2015).

²⁸⁴ See Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 407-08 (2005) [hereinafter *Reform*].

²⁸⁵ Embroiled in a scandal dating to his tenure as secretary of state before he became governor, Ryan did not seek reelection in 2002. After leaving office, he was convicted on federal corruption charges. Matt O'Connor & Rudolph Bush, *Ryan Gets 6½ Years; Ex-governor Regrets Conviction, but Doesn't Admit to Wrongdoing*, CHI. TRIB., Sept. 7, 2006, at 1. Ryan was imprisoned until 2013. Jason Meisner et al., *Ryan Returns Home to Finish Sentence Under House Arrest*, CHI. TRIB., Jan. 31, 2013, at 1.

²⁸⁶ Ray Long & Steve Mills, *Ryan to Review Death Row Cases; Governor May Commute Terms*, CHI. TRIB., Mar. 3, 2002, at 1; Steve Mills, *Clemency Push for all 160 on Death Row; Lawyers Group Pins Hope on Ryan Vow to Consider Cases*, CHI. TRIB., May 16, 2002, at 1.

²⁸⁷ Steve Mills & Christi Parsons, *Ryan's Panel Urges Fixes in Death Penalty; 2-Year Study Says Fatal Flaw Exists*, CHI. TRIB., Apr. 15, 2002, at 1; COMMISSION ON CAPITAL PUNISHMENT, FINAL REPORT (2002), http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf [hereinafter FINAL REPORT].

²⁸⁸ See, e.g., *Halt the Anguish, Gov. Ryan*, CHI. TRIB., Oct. 20, 2002, Editorial Sec., at 8.

²⁸⁹ The exception being that of Andrew Kokoraleis, who was executed at the super-max Tamms Correctional Center. Parsons & Grumman, *supra* note 280; see also Dave McKinney, *State's Last Execution: An Unforgettable Moment*, CHI. SUN-TIMES, Mar. 10, 2011, at 15.

²⁹⁰ Jodi Wilgoren, *Appeals Process in Illinois Includes the Exonerated*, N.Y. TIMES, Dec. 17, 2002, at A22.

²⁹¹ Chris Jones, *'Exonerated' an Enlightening Evening for Ryan*, CHI. TRIB., Dec. 18,

before leaving office, Ryan appeared at Northwestern Law's Lincoln Hall to proclaim: "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."²⁹²

In the aftermath of the blanket clemency—in what a *Tribune* editorial pronounced, "[An] historic reform of death penalty procedures in a state embarrassed by its penchant for choosing the wrong people to die"²⁹³—the General Assembly enacted legislation addressing some of the systemic flaws that had been laid bare by the state's seventeen documented erroneous convictions in capital cases.

Some of the reforms applied solely to capital cases, while others applied more broadly. Among the former were a provision requiring prosecutors to disclose "any deal, promise, inducement, or benefit" offered to informants and authorizing judges to bar any such testimony deemed unreliable.²⁹⁴ Other provisions authorized judges to bar death sentences in cases resting on the testimony of a single eyewitness, informant, or accomplice,²⁹⁵ granted the Illinois Supreme Court authority to set aside "fundamentally unjust" death sentences even absent procedural grounds for relief,²⁹⁶ simplified jury instructions regarding appropriateness of the death penalty,²⁹⁷ and created a Capital Punishment Reform Study Committee to assess the effectiveness and impact of the reforms, with orders to report annually to the General Assembly.²⁹⁸

Among the latter were provisions requiring police throughout the state to electronically record custodial interrogations of murder suspects, directing trial judges to presume any non-recorded statement inadmissible, with rare

2002, *Tempo* Sec., at 1.

²⁹² *The Governor's Remarks*, CHI. TRIB., Jan. 12, 2003, at 1; see Maurice Possley & Steve Mills, *Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison Without Parole; 'There is No Honorable Way to Kill,' He Says*, CHI. TRIB., Jan. 12, 2003, at 1. The "164" in the headline refers to sentences commuted to life without parole. In addition, Ryan shortened the sentences of three death row prisoners to forty years each. *Id.* A day earlier, Ryan granted pardons based on innocence to four Burge torture victims who had been on death row, bringing the total number of exonerated death row defendants to seventeen. *Excerpts from Ryan's Speech at DePaul*, CHI. TRIB., Jan. 12, 2003, at 16. For more information on Burge torture, see *supra* note 203.

²⁹³ *At Last, Death Penalty Reform*, CHI. TRIB., Nov. 20, 2003, at 30.

²⁹⁴ 725 ILL. COMP. STAT. 5/115-21 (2003).

²⁹⁵ 720 ILL. COMP. STAT. 5/9-1(h-5) (2015).

²⁹⁶ *Id.* at 5/9-1(i).

²⁹⁷ *Id.* at 5/9-1(g).

²⁹⁸ 20 ILL. COMP. STAT. 3929/2 (2008).

exceptions,²⁹⁹ establishing an administrative procedure for firing police officers who commit perjury,³⁰⁰ and directing the State Police to evaluate reforming police eyewitness lineup procedures.³⁰¹ But there was nothing in the package expressly addressing prosecutorial misconduct—hardly an oversight, in light of attention the problem had received.³⁰² The General Assembly’s silence on the issue, I believe, occurred because addressing it would incur the wrath of prosecutors, an influential constituency.

During the next five years, three more defendants formerly on Illinois death row—Gordon (Randy) Steidl,³⁰³ Nathson Fields,³⁰⁴ and Ronald Kitchen³⁰⁵—were released based on evidence of innocence, bringing the total number released to twenty, or nearly 7 percent of 289 defendants sentenced to death under the Illinois post-*Furman* capital punishment law.³⁰⁶ Meanwhile, expenditures from the Capital Punishment Litigation Trust Fund continued to soar, topping more than \$200,000 for each case in which

²⁹⁹ 725 ILL. COMP. STAT. 5/103-2.1 (2014) (providing that the presumption of inadmissibility of an unrecorded statement may be overcome by a preponderance of the evidence that the statement was voluntary and reliable).

³⁰⁰ 50 ILL. COMP. STAT. 705/6.1 (2013).

³⁰¹ 725 Ill. Comp. Stat. 5/107A22 (2015)]. For a discussion of best identification practices, see Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581 (2000). The state police ceded responsibility for the project to the Chicago Police Department. The results were controversial. See, e.g., Timothy P. O’Toole, *What’s the Matter with Illinois? How an Opportunity Was Squandered to Conduct an Important Study on Eyewitness Identification Procedures*, 30 CHAMPION 18 (2006). Finally, in 2014, the General Assembly enacted a law requiring police to use blind identification procedures when practical. 725 ILL. COMP. STAT. 5/107A-2 (effective Jan. 1, 2015). I testified in favor of the reform. Rob Warden, *Blind Identification Procedures*, Statement before House Restorative Justice Committee, May 9, 2013 (copy on file with *Journal of Criminal Law & Criminology*).

³⁰² See, e.g., *People v. Linscott*, 511 N.E.2d 1303 (Ill. 1987); *People v. Linscott*, 500 N.E.2d 400 (Ill. 1985); *Sampler*, *supra* note 138; *Trial & Error*, *supra* note 271; James B. Durkin, *Examining Prosecutorial Misconduct in Illinois*, 149 CHI. DAILY L. BULL. 82, at 5 (2003); Eric Zorn, *Sometimes when Prosecutors Win, Justice Loses*, CHI. TRIB., Aug. 23, 1999, *Chicagoland Sec.*, at 1; FINAL REPORT, *supra* note 287, at 191 (reporting that roughly 26% of reversed Illinois death penalty cases involved prosecutorial misconduct). In 2001, the Illinois Supreme Court adopted a rule stating that it is the “duty” of prosecutors “to seek justice, not merely to convict.” IL. SUP. CT. R. 3.8(a).

³⁰³ Framed by police in a double murder in East-Central Illinois. Hal Dardick, *Inmate Free After 17 Years*, CHI. TRIB., May 29, 2004, at 16.

³⁰⁴ Railroaded onto death row by corrupt Cook County Judge Thomas Maloney. Matthew Walberg, *Judge’s Injustice Is Righted—23 Years Later*, CHI. TRIB., Apr. 9, 2009, at 1.

³⁰⁵ Tortured into confessing to a quintuple murder he did not commit. A co-defendant Marvin Reeves was convicted separately, based largely on Kitchen’s confession, and sentenced to life in prison. Reeves was exonerated and freed along with Kitchen. Rummana Hussain, *Two Freed: ‘It Took 20 Years,’* CHI. SUN-TIMES, July 8, 2009, at 7.

³⁰⁶ See *How & Why*, *supra* note 29, at 262.

prosecutors threatened to seek the death penalty.³⁰⁷

The situation reminded me of a short story that I had run across several years earlier—"The Mission" by Bruce Jay Friedman about the lengths to which an adventurer named Flick goes to fulfill the last request of a condemned man. Readers meet Flick somewhere in the heart of Africa. Against daunting odds, he captures an exotic, near-extinct creature known as a Sharpe's grysbok. Then he is on to Paris, where he persuades a retired master chef to indulge in a culinary swan song—preparing one last time his signature dish, *Casseroles de langue de Sharpe's grysbok au champignons*. At the end of the story, Flick arrives at Stateville Correctional Center in Illinois with the coveted casserole. "Good work, Flick," the warden tells him—"and let's hope the next joker is a steak-and-apple-pie man."³⁰⁸

Maintaining the death penalty—rooted in an archaic, oxymoronic notion that it makes sense to kill people to show that killing people is wrong—seemed to me as absurd as Flick's satirical mission, although the real thing, unlike Friedman's story, was not amusing. As it turned out, in 2011, Illinois legislators agreed³⁰⁹ and Governor Quinn consigned the Illinois death penalty to the dust bin of history.³¹⁰

THE DEATH PENALTY ON DEATH ROW

The demise of the Illinois death penalty bodes well for the national abolition movement.³¹¹ Indeed, the uncertainty now seems to be a matter of when—not if—the death penalty will end. In all likelihood, whenever the end comes, it will be by fiat of that least democratic of our democratic institutions—the unelected, life-tenured U.S. Supreme Court—relying on the rationale that judicially sanctioned killing *per se* is cruel, unusual, and offensive to what Chief Justice Earl Warren termed "evolving standards of decency that mark the progress of a maturing society"³¹²

Relying largely on evolving standards, the Supreme Court already has

³⁰⁷ See Bienen, *supra* note 58, at 1326 (showing expenditures of \$109,659,100 on 507 cases, or \$216,290 per case).

³⁰⁸ THE COLLECTED SHORT FICTION OF BRUCE JAY FRIEDMAN 136 (1995).

³⁰⁹ The House vote was 60 to 54. Ray Long & Todd Wilson, *House Votes to Repeal Illinois' Death Penalty*, CHI. TRIB., Jan. 7, 2011, at 6. The Senate vote was 35 to 22. Ray Long et al., *Historic Measure Awaits Quinn's Signature*, CHI. TRIB., Jan. 12, 2011, at 1.

³¹⁰ Long & Wilson, *supra* note 183. I was gratified by public recognition of my role in the abolition movement. See Eric Zorn, *A Toast, of Sorts, to the Warriors*, CHI. TRIB., Mar. 10, 2011, at 23.

³¹¹ See N.J. Death Penalty Study Commission Report 39 (2007) (citing the Illinois experience as an indication of the emergence of a trend toward a national consensus against the death penalty), http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

³¹² *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

banned executions for all crimes other than murder,³¹³ for the intellectually disabled³¹⁴ for the insane,³¹⁵ and for persons who committed murders before age eighteen³¹⁶ or participated in felonies that resulted in murders but neither killed nor intended to kill the victims.³¹⁷ In testing whether a consensus has evolved that would render the death penalty unconstitutional across the board, the Court can be expected to take into account actions by lower courts, legal scholarship, public opinion polls, international opinion, and especially the number of states that permit and prohibit the practice and the trend in that regard over time.³¹⁸

The trend is favorable on all fronts.³¹⁹ Most significantly, nineteen states have abolished the death penalty.³²⁰ New York, the last of thirty-eight states to re-enact a post-*Furman* death penalty law, also was the first to abandon it. Its law was on the books only from 1995³²¹ until 2004, when the state's highest court threw it out based on a flaw that the court held might confuse jurors in a subset of capital cases.³²² After that, the death penalty was not reinstated. In 2008—forty-five years after the state's last execution³²³—the

³¹³ *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (involving rape of a child); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (involving rape and kidnapping); *Coker v. Georgia*, 433 U.S. 584, 599 (1977) (involving rape of adult woman).

³¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³¹⁵ *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

³¹⁶ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

³¹⁷ *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

³¹⁸ See, e.g., David S. Friedman, *The Supreme Court's Narrow Majority to Narrow the Death Penalty*, 28 HUMAN RIGHTS 4, 4–5 (2001).

³¹⁹ Lower courts have overturned the death penalty in New York and California. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Ca. 2014); *People v. LaValle*, 817 N.E.2d 341, 344 (N.Y. 2004). Scholarship has discredited deterrence hypothesis, which traditionally has been the primary rationale for the death penalty. See, e.g., Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 323 (1999) (showing data from 51 U.S. jurisdictions show no deterrent effect); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1806 (2006) (finding no deterrent effect). Public support for capital punishment declined from 79 percent in 1988 to 63 percent in October 2014. GALLUP, *supra* note 20. The death penalty had been legislatively abolished in five states. See Boyd, *supra* note 32; Dresser, *supra* note 34; Long & Wilson, *supra* note 29; NEWSDAY, *supra* note 33; Richburg, *supra* note 31.

³²⁰ States With & Without the Death Penalty, DPIC, available at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

³²¹ James Dao, *Death Penalty in New York Reinstated After 18 Years*, N.Y. TIMES, Mar. 8, 1995, at 1.

³²² *Lavalle*, 817 N.E.2d at 344.

³²³ Clyde Haberman, *Life or Death? More Yawns than Passion*, N.Y. TIMES, May 29, 1988, at B1.

New York death chamber was dismantled.³²⁴

California—home of the nation’s largest death row, housing about 750 prisoners,³²⁵ more than have been executed in the state’s entire history³²⁶—was temporarily without a death penalty for thirteen months ending in August 2015, after U.S. District Court Judge Cormac J. Carney held that systemic delay in carrying out executions rendered the punishment arbitrary and, consequently, cruel and unusual under the Eighth Amendment.³²⁷ Of more than 900 men and women sentenced to death in California since 1978, when the state’s death penalty was restored, only thirteen had been executed, while more than seven times that many—ninety-four—had died on death row of natural causes, suicide, or other causes.³²⁸ Three had been exonerated and released,³²⁹ and thirty-nine death sentences had been overturned and replaced with lesser sentences.³³⁰ The time lapse between sentencing and execution averaged roughly a quarter of a century,³³¹ and no one had been executed since 2006.³³² Although Judge Carney’s decision was overturned, the argument that inordinate delays violate the Eighth Amendment could be made in other states that have operable death penalties; nationally, the delay between sentence and execution averages more than a decade.³³³

³²⁴ Brendan Scott, *Gov Pulls Switch on Death Cell*, N.Y. POST, July 24, 2008, at 22.

³²⁵ *Condemned Inmate List*, CAL. DEP’T OF CORR. & REHAB, http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf (last visited Oct. 27, 2014).

³²⁶ *Executions in the United States, 1608–2002, Espy File*, DPIC, <http://www.deathpenaltyinfo.org/executions-us-1608-2002-espy-file>.

³²⁷ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Ca. 2014). Carney’s decision was overturned in August 2015. *Jones v. Davis*, 806 F.3d 538, 541 (9th Cir. 2015).

³²⁸ *Chappell*, 31 F. Supp. 3d at 1053.

³²⁹ *Exoneration Statistics by State*, DPIC, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st>.

³³⁰ *Chappell*, 31 F. Supp. 3d at 1053.

³³¹ Gerald Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 496 (2009).

³³² *Jones v. Davis*, 806 F.3d 538, 541 (2015); *Inmates Executed, 1978 to Present*, CAL. DEP’T OF CORR. & REHAB, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Oct. 27, 2014).

³³³ *Innocence and the Death Penalty, Death Penalty Focus of Cal.*, <http://www.deathpenalty.org/article.php?id=49>. In Louisiana, Glenn Ford—an innocent man whose trial for a 1983 murder and robbery in Shreveport had been replete with error and malfeasance, including misleading forensic results, perjury by police, suppressed exculpatory evidence, racial discrimination in jury selection, and ineffective assistance of counsel—languished on death row for thirty years before he was vindicated and released in 2014. Vickie Welborn, *Glenn Ford: ‘I’m Trying to Make Every Day Count,’* SHREVEPORT TIMES (Feb. 28, 2015), <http://www.shreveporttimes.com/story/news/local/2015/02/28/glenn-ford-trying-make-every-day-count/24185927/>. In Texas, Ronald Chambers died of apparent natural causes in 2010 while awaiting his fourth trial for the abduction and murder of three college students, a crime for which he had been sentenced to death three times. Richard Abshire,

Moratoria on executions have been ordered by Governors Jay Inslee of Washington,³³⁴ John Kitzhaber of Oregon,³³⁵ and Tom Wolf of Pennsylvania,³³⁶ and *de facto* moratoria are in place in several other states. Among states that still have operable death penalties, Kansas has had no post-*Furman* executions; four states—Colorado,³³⁷ Nebraska, Oregon, and Wyoming—and the federal government have had none in more than a decade; and eight states—Arkansas, California, Indiana, Kentucky, Montana, Nevada, North Carolina, and Tennessee—have had none in the last five years.³³⁸

States that either have abolished the death penalty or have not used it in at least five years comprise 59.6 percent of the U.S. population.³³⁹ The recent crisis resulting from pharmaceutical companies' refusal to provide pentobarbital for the lethal injection process³⁴⁰ is veritably certain to delay and prevent executions that otherwise would occur. Hence, I think it not inordinately optimistic to say that the death penalty itself is on death row. Ending it, unfortunately, will not cure the ills of the criminal justice system. It only will eliminate the worst consequence of the problems that plague it. Although reforms enacted in Illinois and elsewhere are decidedly positive steps, much remains to be done.

Texas' Longest-serving Death Row Inmate Dies in Dallas, DALLAS MORNING NEWS (Nov. 16, 2010), http://www.dallasnews.com/news/community-news/dallas/headlines/20101116-texas_longest-serving-death-row-inmate-dies-in-dallas.ece. In Florida, Gary Alvord, who murdered three women in Tampa in 1973, had been on death row almost forty years when he died of natural causes in 2013. See Dan Sullivan, *40 Years on Death Row Ends*, TAMPA BAY TIMES (May 22, 2013), <http://www.tampabay.com/news/publicsafety/crime/nations-longest-serving-death-row-inmate-dies-in-florida/2122196>.

³³⁴ *Inslee moratorium announcement*, DPIC (Feb. 11, 2014), <http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf>.

³³⁵ Kitzhaber Statement on Capital Punishment, OREGONLIVE (Nov. 22, 2011), <http://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf>.

³³⁶ Karen Langley & Kate Giammarise, *Wolf Orders Freeze on Executions; Cites Exonerations, Disproportionate Number of Minorities, and Expense of Decades-long Appeals*, PITTSBURGH POST-GAZETTE, Feb. 15, 2015, at A1.

³³⁷ Stopping short of declaring a moratorium, Gov. John Hickenlooper halted the impending execution of a quadruple murderer in 2013, saying that there was “a legitimate question whether we as a state should be taking lives.” Karen Augé & Lynn Bartels, *Nathan Dunlap Granted “Temporary Reprieve” by Governor*, DENVER POST (May 22, 2013), http://www.denverpost.com/ci_23299865/nathan-dunlap-temporary-reprieve-from-governor.

³³⁸ *Executions by State and Year*, DPIC, <http://www.deathpenaltyinfo.org/node/5741>.

³³⁹ See *Fast Facts Study Guide (State Populations)*, US 50, INC., <http://www.theus50.com/population.php>.

³⁴⁰ See Phil Rosenthal, *Shortages Endangering the Business of Executions*, CHI. TRIB., Mar. 15, 2015, Business, at 1.

CHALLENGES AHEAD

In light of endemic prosecutorial misconduct,³⁴¹ the top item on the reform agenda must be to change public policies that protect prosecutors who conceal exculpatory evidence, fabricate incriminating evidence, and lie to juries or judges. Although the U.S. Civil Rights Act of 1871 makes “[e]very person” who violates another’s civil rights subject to civil liability,³⁴² the U.S. Supreme Court has exempted prosecutors from the every-person category—concluding that, “The public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”³⁴³

The most effective way to curtail prosecutorial misconduct would be to strip prosecutors of the near-absolute immunity they now enjoy. They should have immunity from liability for good-faith mistakes, of course—just not for malicious, malevolent acts.³⁴⁴ While it may be unrealistic to expect the Supreme Court to do more than chip away at the status quo incrementally over time, it might be possible for reformers to bring public pressure to bear on disciplinary agencies, which have been loathe to censure prosecutorial misconduct, much less suspend or disbar even egregious offenders, to do the job that the Supreme Court has said is theirs.³⁴⁵ Public education has been extraordinarily effective in achieving other reforms, including defendants’ rights to post-conviction DNA testing and abolition of the death penalty in Illinois and other states.³⁴⁶

The law regarding testimony of incentivized informants—“snitches,” in the vernacular—also is in urgent need of revision. Like prosecutorial misconduct, to which it is closely related, snitch testimony is an endemic problem.³⁴⁷ Prosecutors routinely entice informants to provide incriminating

³⁴¹ See *Sampler*, *supra* note 138; *Armstrong & Possley*, *supra* note 271.

³⁴² 42 U.S.C. § 1983 (2012).

³⁴³ *Imbler v. Pachtman*, 424 U.S. 409, 424–425 (1972) (internal citations omitted).

³⁴⁴ For a thoughtful discussion of the need for and desirability of reform, see Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 *BYU L. REV.* 53, 123–54, which argues that absolute immunity undermines the integrity of the criminal justice system, denies remedies to victims of egregious misconduct, eliminates the deterrent effect of civil remedies, hinders development of structural remedies to systemic problems, is unnecessary to protect honest prosecutors from vexatious litigation, and introduces unnecessary complexity and confusion into the law.

³⁴⁵ *Imbler*, 424 U.S. at 429 (asserting that “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers”).

³⁴⁶ *Role of Media*, *supra* note 125, at 45, 47–50.

³⁴⁷ See Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, CWC (2005), <http://www.innocenceproject.org/>

information against defendants in exchange for leniency in the informants' own criminal cases. This is permitted even though, under the federal bribery statute, "Whoever . . . offers or promises . . . anything of value" to influence the testimony of a witness commits a felony punishable by fifteen years in prison.³⁴⁸

Despite the blanket, seemingly unambiguous prohibition in the bribery law, prosecutors routinely and with impunity promise leniency, sometimes supplemented with cash,³⁴⁹ to procure testimony that otherwise would not have been provided. Unsurprisingly, some snitches find the incentive irresistible and testify falsely, as one memorably put it, "under the influence of freedom."³⁵⁰

So how can prosecutors make deals with snitches without running afoul of this criminal law? The answer lies in a holding by the U.S. Court of Appeals for the Tenth Circuit that the word "whoever" in the federal bribery statute does not mean everyone, but rather everyone but prosecutors.³⁵¹ The court concluded that an assistant U.S. attorney is "the alter ego of the United States exercising its sovereign power of prosecution" and, thus, the prosecutor and the nation "cannot be separated."³⁵² Since the nation is "an inanimate entity," had Congress intended that the statute cover assistant U.S. attorneys, it would have—I am not making this up—used "whatever" instead of "whoever."³⁵³

As unlikely as it may be that courts or legislatures any time soon will bar prosecutors from rewarding snitches, it might be possible to achieve lesser but nonetheless meaningful reforms, such as requiring prosecutors, when practical, to record would-be snitches' conversations with suspects³⁵⁴

causes—wrongful—conviction/SnitchSystemBooklet.pdf (last visited June 10, 2016); *see also* Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006).

³⁴⁸ 18 U.S.C. § 201 (2012). In Illinois, it is a felony for "A person" to promise or give a witness property or personal advantage with intent to influence his or her testimony. 720 ILL. COMP. STAT. 5/33-1 (2014).

³⁴⁹ *See* Rob Warden, *A Tragic Choice*, CHI. LAW., Oct. 1987, at 1 (reporting that Cook County prosecutors dropped a weapons charge and provided \$66,000 in support to Darryl Moore, a convicted robber and rapist, in exchange for Moore's testimony, subsequently recanted, that was instrumental in sending two men to prison for life and a third to death row).

³⁵⁰ Jeff Coen, *Informant Changes Story in Mob Beatings*, CHI. TRIB., Aug. 28, 2003, at 1.

³⁵¹ *United States v. Singleton*, 165 F.3d 1297, 1301–02 (10th Cir.), *cert. denied*, 527 U.S. 1024 (1999).

³⁵² *Id.* at 1300.

³⁵³ *Id.* at 1300–01.

³⁵⁴ There is precedent in Illinois for wiring snitches. It was done in the Steven Manning case. Extensive recorded conversations between Manning and the government informant, Tommy Dye, were recorded in jail. *See* Steve Mills, *14-year Nightmare Ends for Ex-officer*;

or at least requiring police to electronically record interviews with would-be snitches.³⁵⁵ If recordings were not made, judges could take that into account when deciding whether to allow a snitch to testify.³⁵⁶

If, by some miracle, the courts or legislatures bring prosecutors under bribery laws, prosecutors could continue to reward snitches for information, as long as the information is used solely for investigative purposes—leading, perhaps, to other, more reliable evidence that could be presented in court. Keeping snitches off the witness stand would serve the interests of justice and avoid the bribery issue, since whatever the prosecution provided in exchange for information would not influence testimony.³⁵⁷ Moreover, it would be intellectually honest.

An infusion of intellectual honesty also would be useful regarding recantations of trial testimony by prosecution witnesses.³⁵⁸ Courts cling to a notion that recantations almost invariably are unreliable,³⁵⁹ although recent experience has shown that they often are true.³⁶⁰ The situation is worse in

Once on Death Row, Now Totally Free, CHI. TRIB., Feb. 27, 2004, at 1. Although the conversations were not incriminating, the fact that they were recorded demonstrates the feasibility of the idea. There also is precedent in Illinois for laws requiring procedure when practical. *See* 725 ILL. COMP. STAT. 5/107A-2 (2015) (requiring that lineups “shall be conducted using one of the following methods . . . unless [they] are not practical”).

³⁵⁵ This would not be a huge imposition on law enforcement, given the prevalent police practice of electronically recording custodial interrogations of suspects. *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

³⁵⁶ In Illinois, a law requiring judges to hold pre-trial hearings to determine whether juries should hear informant testimony proffered by the prosecution in capital cases remains in effect, even though the death penalty has been abolished. 725 ILCS 5/115–21 (2003). It would make sense to amend the law to cover all cases.

³⁵⁷ I advanced this notion previously. *See* Rob Warden, *Snitches’ Testimony Undermines Justice*, CHI. SUN–TIMES, Sept. 26, 2004, at 40. However, to my knowledge no court or legislature has ever considered it.

³⁵⁸ *See, e.g.*, Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75 (2008); Sharon Cobb, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969 (1986); Adam Heder & Michael Goldsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, 2012 UTAH L. REV. 99 (2012); Michael McDonnell Hill, Note, *Seen but Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony*, 46 GA. L. REV. 213 (2011).

³⁵⁹ *See, e.g.*, *Batsell v. United States*, 403 F.2d 395, 403 (1968) (“[M]otions based upon the alleged recantation of a material witness should be viewed with disfavor.”); *United States v. Earles*, 983 F. Supp. 1236, 1239 (N.D. Iowa 1997) (“Skepticism greets any recantation of testimony by a witness in a criminal case.”); *People v. Marquis*, 176 N.E. 314, 315 (Ill. 1931) (“Recanting testimony is regarded as very unreliable, and a court will usually deny a new trial based on that ground”); *People v. Shilitano*, 112 N.E. 733, 736 (N.Y. 1916) (“[L]ittle weight should be given to the recanting statements.”).

³⁶⁰ Alexandra E. Gross & Samuel R. Gross, *Witness Recantation Study: Preliminary*

Illinois than elsewhere because the state's perjury statute has been interpreted as permitting the prosecution of a recanting witness based solely upon conflicting statements having been made under oath—even if the recantation itself is not provably false and without regard to time elapsed between the conflicting statements.³⁶¹

The relevant history of Illinois recantations dates to 1931, when the Illinois Supreme Court denied the appeal of a Macoupin County man whom a jury had convicted of shooting his son to death.³⁶² The defendant claimed that his revolver discharged accidentally when he was alone with his son in the dining room of the family home, but the defendant's daughter testified that he emerged from the room moments after the shooting and proclaimed, "I told you I would do that someday and I am going to kill another one before I die."³⁶³

The daughter recanted shortly after the trial.³⁶⁴ After the judge denied a motion for a new trial based on the recantation,³⁶⁵ the Supreme Court affirmed the conviction, finding no reasonable doubt of the defendant's guilt.³⁶⁶ Rather than sticking to the facts of the case, however, the court added, *in dictum*, "Recanting testimony is regarded as very unreliable, and a court will usually deny a new trial based on that ground where it is not satisfied that such testimony is true."³⁶⁷ Somehow, in subsequent cases, that throw-away line seems to have been elevated to precedent.³⁶⁸ That needs to

Findings, NRE 2 (2013), https://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf (finding 250 of 1,068, or 23.4%, false convictions studied, involved recantations); see also Rob Warden, *The Rubin Carter Case, Perjury for the Prosecution—and Lessons Unlearned*, CHI. SUN-TIMES, Web Ed., Apr. 24, 2014; Rob Warden, *Time to Rethink Recantations*, CHI. SUN-TIMES, Web Ed., Nov. 6, 2013.

³⁶¹ The Illinois law, 720 ILL. COMP. STAT. 5/32-2 (2013), states that the prosecution "need not establish which statement is false" and does not require that both statements be made within the statute of limitations.

³⁶² *Marquis*, 176 N.E. at 314.

³⁶³ *Id.* at 315.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 316.

³⁶⁷ *Id.* at 315.

³⁶⁸ Illinois courts have repeatedly cited *Marquis* as authority in recantation cases—including four cases in which relief was denied to four appellants who eventually were exonerated on additional grounds: Gary Dotson, *People v. Dotson*, 516 N.E.2d 718, 720 (Ill. 1987); see also *supra* notes 117-124 and accompanying text; Nathson Fields, *People v. Fields*, 552 N.E.2d 791, 801 (Ill. 1990); see also Walberg, *supra* note 304; Gordon "Randy" Steidl, *People v. Steidl*, 568 N.E.2d 837, 859 (Ill. 1991); see Sarah Antonacci, *From Death Row to Freedom*, ST. J. REG., Aug. 29, 2004, at 1, and Joseph Burrows, *People v. Burrows*, 592 N.E.2d 997, 1010 (Ill. 1992); see also Jeffrey Bilis, *Death Row Battle Ends With Freedom*, CHI. TRIB., Sept. 9, 1994, Chicagoland Sec., at 1.

change.

Such prosecutions for recantations are not merely theoretical. Cook County State's Attorney Anita Alvarez successfully prosecuted a witness named Willie Johnson for recanting incriminating testimony he had given seventeen years earlier in a drug-related double murder.³⁶⁹ The problem, of course, is that—contrary to the public interest in identifying and rectifying false convictions—such prosecutions inevitably will chill truthful recantations.³⁷⁰ It would be a step in the right direction to amend the Illinois law to make it consistent with the federal perjury statute, which permits prosecutions based solely on materially conflicting statements if both were made within the statute-of-limitations.³⁷¹

In addition, given that the power to indict a recanting witness is inherently coercive, perhaps an independent special prosecutor should be appointed to handle prospective perjury cases stemming from recantations. More importantly, however, judges should begin to appreciate the reality that recantations frequently are true.³⁷²

The problem of false recantations, moreover, pales alongside the far

³⁶⁹ True Bill, *People v. Johnson*, Cook County G.J. No. 230, Gen. No. 11–CR–13172, Aug. 2011 (copy on file with *Journal of Criminal Law & Criminology*). In a letter to Cook County State's Attorney Anita Alvarez, twenty-three former judges and prosecutors urged that the indictment be dropped, contending that "the prosecution of Mr. Johnson stands to discourage recantations in general—truthful as well as untruthful." Letter from Warren D. Wolfson, Former Judge, Ill. Appellate Court, First Dist., to Hon. Anita Alvarez, State's Att'y of Cook Cty. (Apr. 24, 2014) (on file with *Journal of Criminal Law & Criminology*). Alvarez refused and the judge to whom the case was assigned, Dennis Porter, held that the state did not have to prove which statement was false. See Frank Main, *Quinn Commutes Sentence of Man Who Lied in Murder Case*, CHI. SUN–TIMES, Jan. 13, 2015, at 6. Having no defense, Johnson pleaded guilty and was sentenced to thirty months in prison, but in 2015, Gov. Quinn granted clemency and Johnson was released. See *id.*

³⁷⁰ See Editorial, *Threat of Perjury Can Chill Testimony*, CHI. SUN–TIMES, Sept. 8, 2011, at 24.

³⁷¹ 18 U.S.C. § 1623(c)(2) (2012).

³⁷² Beginning with the Gary Dotson case, sixteen falsely convicted defendants in Cook County have been exonerated in cases involving post-conviction recantations, but only two, Xavier Catron and Jacques Rivera, were exonerated solely as a result of recantations. The remaining exonerations rested on different exculpatory evidence and, in most cases, occurred long after the recantations had been rejected by the courts. Memorandum from author to *Journal of Criminal Law and Criminology* (Mar. 11, 2014) (on file with *Journal of Criminal Law and Criminology*). For more information on Catron, see Evan Osnos & Raoul V. Mowatt, *Man Leaves Prison, Forgives Accuser who Recanted Story*, CHI. TRIB., Feb. 4, 2000, Chicagoland Sec., at 4. For more on Rivera, see *People v. Rivera*, Post-conviction Case No. 88–CR–15435, Neera Walsh, J., order (Sept. 13, 2011) (copy on file with *Journal of Criminal Law and Criminology*); Rummana Hussain, *Free After 21 Years: 'I Didn't Kill that Young Man'*; *Prosecutors Drop Murder Case After Witness Recants*, CHI. SUN–TIMES, Oct. 5, 2011, at 21.

more persuasively documented problem of police perjury,³⁷³ which is so prevalent that the police themselves have coined a word for it—“testilying.”³⁷⁴ Chicago police have been caught lying in cases where video recordings of arrests clearly appeared to establish perjury.³⁷⁵ In one case, an officer pleaded guilty to a misdemeanor, was suspended for one day, and then reassigned.³⁷⁶ This seems perversely lenient in light of Willie Johnson’s thirty-month sentence.³⁷⁷ Legislative hearings should be convened to assess the problem, and independent special prosecutors should be designated in all police perjury cases.

If my experience has taught me anything it is that there are no panaceas for the systemic problems that result in miscarriages of justice. That said, punishing prosecutorial misconduct, reining in unscrupulous snitches, according deserved credibility to recantations, and cracking down on “testilying” would make the country somewhat safer for the innocent.

CODA

Over the years, I occasionally have been asked whether I ever felt conflicted in my evolution from journalist to advocate. The question is predicated on the assumption that objectivity in journalism behooves its practitioners to stay on the sidelines of public debate. As a journalist covering criminal justice I aspired to objectivity—but passivity simply was not an option once I concluded that Dennis Williams and others similarly situated were in imminent danger of execution for crimes they did not commit. I feel extraordinarily fortunate to have been guided by such clarity—a North Star that trumped all else.

³⁷³ See, e.g., Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, at 596–597 (“Every lawyer who practices in the criminal courts knows that police perjury is commonplace.”).

³⁷⁴ Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996).

³⁷⁵ Alexandra Chachkevitch, *Chicago, Glenview Settle Police Traffic-Stop Suit: Cook County Judge Says ‘All Officers Lied on the Stand,’* CHI. TRIB., Sept. 11, 2014, at 4; Steve Chapman, *Smile, You’re on Cop-Car Camera*, CHI. TRIB., Mar. 15, 2009, at 28; Hal Dardick, *City Mulls \$525K to Settle Cop Cases: One Accused Police Officer Still Works for the Department*, CHI. TRIB., May 7, 2013, at 6; Frank Main, *Does Video Catch Cop in DUI Lie? Video Shows No Staggering, Swaying*, CHI. SUN–TIMES, Mar. 11, 2009, at 13; Jason Meisner, *Video Shows Incident in Police Brutality Lawsuit*, CHI. TRIB., May 20, 2014, at 9.

³⁷⁶ Dardick, *supra* note 375.

³⁷⁷ Main, *supra* note 375.