

Winter 2005

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Recommended Citation

Rob Warden, Illinois Death Penalty Reform: How It Happened, What It Promises, 95 J. Crim. L. & Criminology 381 (2004-2005)

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ILLINOIS DEATH PENALTY REFORM: HOW IT HAPPENED, WHAT IT PROMISES

ROB WARDEN*

In January of 2003, three years after Governor George H. Ryan declared a moratorium on executions and ten months after he exercised his clemency and pardon power to empty the nation's eighth largest death row,¹ the Illinois General Assembly completed what the *Chicago Tribune* called an "historic reform of death penalty procedures in a state embarrassed by its penchant for choosing the wrong people to die."²

Indeed, of 289 defendants sentenced to death in Illinois after *Furman v. Georgia*,³ seventeen had been exonerated and released—an error rate of 5.9%. An eighteenth former death row prisoner, Gordon Randy Steidl, would be exonerated in May of 2004, pushing the error rate above six percent.⁴

Mistakes in the determination of guilt, however, were only part of the story of the Illinois post-*Furman* experience with capital punishment. As a result of trial errors and omissions, appellate courts had vacated death sentences or ordered new trials for scores of additional death row prisoners. A landmark study found that forty-three percent of Illinois death penalty cases had been reversed on direct appeal or at the post-conviction stage as

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¹ States with larger death rows at the time were California, Texas, Florida, Pennsylvania, Ohio, North Carolina, and Alabama. See CAPITAL PUNISHMENT PROJECT, NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW USA (Winter 2003).

² *At Last, Death Penalty Reform*, CHI. TRIB., Nov. 20, 2003, at 30.

³ 408 U.S. 238 (1972).

⁴ Sarah Antonacci, *From Death Row to Freedom*, ST. J. REG. (Springfield, Ill.), Aug. 29, 2004, at 1. For summaries of the post-*Furman* Illinois exoneration cases, see *infra* Appendix A.

of 1995. Of the cases that graduated to the federal habeas corpus stage, the study found forty percent had been remanded for retrial or re-sentencing.⁵

When Governor Ryan cleaned out death row in 2003, the situation was this: Of the 289 men and women (five of the latter) who had been sentenced to death in the state since *Furman*, twelve had been executed, five had died of natural causes, one had been transferred to Indiana and executed there, thirteen had been exonerated and released from prison, eighty-six had been re-sentenced to something other than death, fourteen had won reversals and were awaiting retrial or re-sentencing, one had been granted executive clemency before Ryan took office, and 157 remained under death sentence.⁶

Stunningly, for each defendant executed in Illinois, 9.5 death sentences had been overturned. Furthermore, because that accounting reflected only mistakes that had been documented—caught, in other words—the actual magnitude of mistakes in the Illinois capital punishment system no doubt was somewhat greater than it ever would be possible to prove.

The capital exonerations illuminated a plethora of factors that contribute to wrongful convictions, the leading factor being snitch testimony—which I define expansively to include not only the testimony of jailhouse informants but also alleged accomplices, alternative suspects, and other witnesses who might be motivated to lie in order to protect friends or relatives. Prosecutors used testimony of that sort to win the convictions of fourteen of the eighteen Illinois capital case exonerees.⁷

The second most prominent factor was false confession, which, again, I define expansively to include not just alleged confessions of the defendants themselves but also those of co-defendants. Not included are cases of defendants who allegedly confessed to snitches—such as the case of Steven Manning, who was alleged to have made incriminating statements to an infamous jailhouse informant.⁸ Included, however, are cases of

⁵ James Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), at 61 tbl.6, 66 tbl.7, available at <http://ccjr.policy.net/cjedfund/jpreport/>.

⁶ Governor Ryan's action removed the specter of execution for 171 prisoners. For the fourteen prisoners awaiting re-sentencing, he barred reimposition of the death penalty. Of 157 prisoners under death sentence, he commuted the sentences of 150 to life without parole and three to forty years in prison. He granted pardons based on innocence to the remaining four prisoners, whose convictions rested primarily on confessions extracted or fabricated by a group of rogue Chicago police officers later found to have engaged in the "methodical" and "systematic" torture of suspects. See Steve Mills & Ken Armstrong, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, at 1.

⁷ See *infra* Appendix B (showing the frequency of the various factors involved in the wrongful convictions of the eighteen exonerated defendants).

⁸ See *infra* Appendix A.

defendants who were not alleged to have confessed personally but who were inculpated by the false confessions of co-defendants—such as Paula Gray, whose false confession to a rape and murder sent Verneal Jimerson to death row. By these criteria, the cases of eleven of the eighteen Illinois death row exonerees are false-confession cases, including eight cases in which prosecutors also employed snitch testimony.⁹

Among other recurring factors, which alone or in concert with other factors led to the wrongful Illinois capital convictions, were erroneous eyewitness identification testimony, forensic fraud or quackery, police perjury, ineffective assistance of counsel, and prosecutorial misconduct.¹⁰

The good news is that all of these factors have been addressed, at least to some extent, by the Illinois reforms,¹¹ which hold the promise—although only the promise at this point—of making the Illinois criminal justice system the fairest and most accurate in the nation. The package, to be sure, is no panacea for the ills of the criminal justice system. Some of the measures are tepid, some apply only to murder cases, and the efficacy of others will depend on how they are implemented—God, as Mies van der Rohe reminds us, is in the details.

In one sense, however, death penalty opponents and criminal justice reformers can take heart that the package leaves something to be desired: the reforms are insufficient in the eyes of Ryan's avowedly pro-death penalty successor, Governor Rod Blagojevich,¹² to justify lifting the moratorium on executions that Ryan ordered in early 2000. The result is to have no immediate prospect of executing anyone but to heighten the impetus for the General Assembly to strengthen the reforms.

For those who would replicate the Illinois result elsewhere, it may be useful to understand not only the reforms and their import but also the evolution and social context of the movement that brought them about—a movement that, for the first time in American history, spawned an effective constituency for the wrongfully convicted.

I. THE REFORM PACKAGE

The reform package comprises a wide-ranging bill overwhelmingly approved by the General Assembly in November of 2003, two narrower but nonetheless consequential bills approved earlier, and changes in Supreme Court rules.

⁹ See *infra* Appendix A.

¹⁰ See *infra* Appendix A.

¹¹ See *infra* Part I.

¹² Rick Pearson, *Governor Says Ban to Stay on Death Penalty*, CHI. TRIB., Apr. 24, 2003, at 1.

The most recent bill¹³ authorizes judges to bar death sentences in cases resting on the testimony of a single eyewitness, informant, or accomplice,¹⁴ creates a pilot project to test a new eyewitness identification protocol that could cut eyewitness error by as much as half,¹⁵ requires trial judges to hold pretrial hearings on any jailhouse informant testimony offered by prosecutors,¹⁶ establishes an administrative procedure for firing police officers who commit perjury,¹⁷ gives the Illinois Supreme Court authority to set aside death sentences it deems "fundamentally unjust" even if there are no procedural grounds for relief,¹⁸ simplifies jury instructions regarding appropriateness of the death penalty,¹⁹ and creates an independent, sixteen-member Capital Punishment Reform Study Committee to assess the impact and effectiveness of the various reforms and report annually to the General Assembly.²⁰

The first of the earlier bills established a taxpayer-funded entity known as the Capital Litigation Trust Fund to provide, *inter alia*, substantially more money for defense and prosecution investigations and independent forensic testing in capital cases.²¹ The second bill directed police throughout the state beginning in mid-2005 to electronically record custodial interrogations of murder suspects and directed trial courts to presume any non-recorded statement inadmissible, except under rare circumstances such as when a suspect agrees to answer questions only if an electronic recording is not made.²²

¹³ For an overview, see John Cullerton et al., *Capital Punishment Reform in Illinois—A Model for the Nation*, J. DUPAGE COUNTY BAR ASS'N., Apr. 2004, available at <http://www.dcba.org/brief/aprissue/2004/art10404.htm>.

¹⁴ 720 ILL. COMP. STAT. 5/9-1H-5 (2004).

¹⁵ 725 ILL. COMP. STAT. 5/107A-10 (2004) (creating the pilot project). For an assessment of the potential reduction in error rates, see Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581 (2000).

¹⁶ 725 ILL. COMP. STAT. 5/115-21.

¹⁷ 20 ILL. COMP. STAT. 705/6.1 (2004).

¹⁸ 720 ILL. COMP. STAT. 5/9-1(i).

¹⁹ 720 ILL. COMP. STAT. 5/9-1(g).

²⁰ 20 ILL. COMP. STAT. 3929/2 (known as the Capital Punishment Reform Study Committee Act). The act states that the committee shall have only fifteen members but proceeds to enumerate sixteen—three appointed by each the president of the Senate and the majority leader of the House of Representatives, two members appointed by the minority leaders of both houses, and one each by the Governor, Attorney General, Cook County State's Attorney, State Appellate Prosecutor, Cook County Public Defender, and State Appellate Defender.

²¹ 30 ILL. COMP. STAT. 105/5.519 (2004).

²² 20 ILL. COMP. STAT. 3930/7.5 (providing grants for police departments to purchase electronic recording equipment); 50 ILL. COMP. STAT. 705/10.3 (2004) (establishing a

The changes in Supreme Court rules, which went into effect in 2001, established minimum standards of experience for attorneys representing capital defendants,²³ required special training for judges involved in capital litigation,²⁴ and laid down ethical rules for prosecutors, including a pointed reminder that the job of prosecutors is to seek justice—not win convictions.²⁵

As imposing as the package sounds, there is less to some of the measures than meets the eye. The eyewitness protocol, for instance, is not a reform but a test. There is no assurance that it will be implemented on a widespread or permanent basis. Pretrial hearings on jailhouse informant testimony and the new procedure for punishing police perjury do not guarantee the curtailment of either. It also is unclear how giving the Supreme Court authority to set aside “fundamentally unjust” death sentences expands its time-honored—if seldom used—authority to overturn “excessive” or “disparate” sentences.²⁶

Other pieces of the package unquestionably are momentous, however. The Capital Litigation Trust Fund, along with other developments, already has helped reduce the clip at which death sentences are imposed in Illinois—from about one a month to one every six months. The electronic recording measure surely will prove an effective safeguard against false confessions whether extracted by torture, psychologically coerced, or simply fabricated.

Another measure with tremendous but unsung potential is the creation of the Capital Punishment Reform Study Committee. Its mandate is not only to assess the effectiveness of the reforms pertaining to the accuracy of determinations of guilt but also to assess whether death sentences are being imposed uniformly—whether the punishment inevitably fits the crime and is applied proportionately from one locale to another.

program to train police in electronic recording techniques); 705 ILL. COMP. STAT. 405/5-401.5 (2004) (creating a presumption of inadmissibility for any statement alleged to have been made during custodial interrogation absent an electronic recording); 725 ILL. COMP. STAT. 5/103-2.1 (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); 30 ILL. COMP. STAT. 8/5-8.27 (establishing the effective date of the electronic recording mandate as July 2005).

²³ ILL. SUP. CT. R. 714 (effective Jan. 1, 2005).

²⁴ ILL. SUP. CT. R. 43 (effective Mar. 1, 2001).

²⁵ ILL. SUP. CT. R. 3.8(a) (amended Mar. 1, 2001, effective immediately).

²⁶ “Excessive” Illinois death sentences occasionally have been vacated. See *People v. Smith*, 685 N.E.2d 880 (Ill. 1996); *People v. Blackwell*, 665 N.E.2d 782 (Ill. 1996); *People v. Leger*, 597 N.E.2d 586 (Ill. 1992); *People v. Johnson*, 538 N.E.2d 1118 (Ill. 1989); *People v. Buggs*, 493 N.E.2d 332 (Ill. 1986); *People v. Carlson*, 404 N.E.2d 233 (Ill. 1980).

Proportionality is an overwhelming question, with substantial ramifications for the future of the death penalty not only in Illinois but also in the other states with death penalties on their books. It was the issue that in *Furman* prompted the U.S. Supreme Court to overturn existing capital punishment laws, which, the court found, were being applied in an arbitrary, capricious, and racially discriminatory manner, in violation of the Eighth Amendment ban on cruel and unusual punishment.

Furman produced a backlash in state legislatures, thirty-eight of which responded by enacting laws purporting to correct the Eighth Amendment problem by bifurcating capital trials into guilt-innocence and sentencing phases and by setting standards to guide juries and judges in the latter phase.²⁷ Despite substantial doubts that the prescribed cures could possibly work in practice, the U.S. Supreme Court and various state courts, including the Illinois Supreme Court, embraced the post-*Furman* laws. They did so, however, in a political climate that was less than conducive of intellectual candor on criminal justice matters. Now, in Illinois at least, the issue of proportionality will be revisited in a different climate—a climate in which there is growing recognition that the death penalty may be too flawed to fix.

As occasional death sentences continue to be imposed,²⁸ Governor Blagojevich remains free to abandon the moratorium, but the impending study is a handy rationale not to do that. In vowing to continue the moratorium in the wake of the November 2003 legislation, he pointedly observed, “We have to now see how these reforms work.”²⁹ How they are working, alas, will not be known for years.

Political acumen seems to cut in favor of maintaining the moratorium, which allows Governor Blagojevich to profess unflagging support for capital punishment, as he does,³⁰ without having to carry it out. His is a politically enviable situation, in view of polls showing that the death penalty is favored by a substantial although dwindling majority of

²⁷ In 1995, New York became the last of the thirty-eight states to restore the death penalty, but its law was struck down in 2004 by the New York Court of Appeals. *See People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). Other states with death penalty laws currently on their books are 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, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

²⁸ Six death sentences had been imposed as of February 1, 2005.

²⁹ *See, e.g.,* Adriana Colindres, *Death Penalty Reformed; But Governor Won't Lift Moratorium*, ST. J. REG. (Springfield, Ill.), Nov. 20, 2003, at 1.

³⁰ *See* Christi Parsons & Ray Long, *Death Penalty Reform Goes to Blagojevich; 'Long Time Coming,' Ex-Gov. Ryan Says*, CHI. TRIB., May 30, 2003, at 1.

Illinoisans—fifty-eight percent in March 2000, down from seventy-eight percent six years earlier³¹—but that the moratorium is favored by a more substantial majority—nearly seventy percent.³²

Moreover, even if the governor were to end the moratorium, capital cases would meander through the appellate process for years, buying time for legal, legislative, and public-education initiatives aimed at further criminal justice reform and, ultimately, abolition of the death penalty.³³

II. THE SETTING OF THE STAGE

The story of the Illinois reforms is reminiscent of J. Paul Getty's three-step prescription for becoming a billionaire—rise early, work hard all day, and strike oil. It is rare, of course, that the crude comes bubblin' up because some hapless Jed Clampett shoots at a varmint and misses. In real life, Getty's first two steps usually precede the third, and the path to Illinois criminal justice reform was no exception.

Serendipity would have led to naught, however, absent the marshaling of a cadre that included traditional abolitionists, who stood their ground against an overwhelming tide of contrary opinion for more than a quarter of a century, public-interest lawyers and activists, who produced the steady stream of death row exonerations, and journalists, who championed the cases of the innocent on death row and exposed prosecutorial misconduct and police torture that would do a third-world dictator proud. Another crucial component was the exonerated, who more compellingly than anyone else championed reform in scores of newspaper, magazine, and television interviews and in testimony before legislative committees.

Nor would reform have occurred without the support of such mainstream groups as the League of Women Voters, the Illinois State Bar Association, and the century-old, very-establishment Union League Club of Chicago, or without the endorsement of prominent individuals who could not be dismissed as card-carrying members of the ACLU—including Thomas P. Sullivan, a distinguished former U.S. Attorney for the Northern

³¹ Ken Armstrong & Steve Mills, *Death Penalty Support Erodes: Many Back Life Term as an Alternative*, CHI. TRIB., Mar. 7, 2000, at 1 (reporting results of polls conducted by Market Shares Corp. of Mt. Prospect, Ill.).

³² Kevin McDermott, *Support Holds for Gov. Ryan's Moratorium on Death Penalty*, ST. LOUIS POST-DISPATCH, Aug. 25, 2002, at A12 (reporting results of a poll conducted by Zogby International of Utica, N.Y.).

³³ Execution-free intervals bode well for the prospect of abolition. The four states that repealed their death penalties most recently—during the 1980s—did so after extended periods with no executions. The interval between the last execution and abolition in Rhode Island was fifty-four years, in Massachusetts thirty-four years, in Vermont thirty-three years, and in the District of Columbia twenty-four years.

District of Illinois, Scott Turow, former federal prosecutor and best-selling novelist, and Andrea L. Zopp, senior vice president and general counsel of Sears Roebuck & Company and former state and federal prosecutor.

Finally, the result hinged on an ironic conjunction of political developments—the metamorphosis of a Republican governor, George Ryan, from a law-and-order man into a death penalty abolitionist,³⁴ followed by an election that wrested control of the Illinois Senate from the Republican party. Heightening the irony, the Republican defeat in 2002 was attributable partly to a mushrooming bribery scandal dating to Ryan's tenure as secretary of state before he became governor.³⁵ After Ryan left office, the scandal would lead to his indictment,³⁶ but the immediate impact was to depose James (Pate) Phillip, a recalcitrant suburban Republican, as majority leader of the Senate in favor of Emil Jones, a progressive Chicago Democrat. The reform package could not have passed if Phillip had remained at helm of the Senate, where he had blocked all previous reform efforts.

III. EVOLUTION OF THE STRATEGY

The seeds of the reform movement were sewn in 1976 when Mary Alice Rankin, a former high school teacher and mother of five, launched the Coalition Against the Death Penalty,³⁷ an umbrella group including the American Civil Liberties Union of Illinois, Amnesty International, and various religious groups. Rankin's goal was to prevent reinstatement of capital punishment in Illinois and, if that failed—as it would the following year—to campaign for its abolition. She subscribed to a thesis espoused by Justice Thurgood Marshall in *Furman* that, if only Americans were better informed of the realities of capital punishment, they would be appalled and reject it.³⁸ Accordingly, she focused on building a grassroots movement—establishing a speakers' bureau, organizing letter-writing campaigns, and convening public forums.

³⁴ As a legislator, Ryan voted to restore capital punishment and thereafter voted to expand the scope of the law. See, e.g., Rob Warden, *On This Day . . . 30 Years of the Death Penalty*, CHI. TRIB., Jan. 12, 2003, § 2, at 1. While in office, Ryan advocated death penalty reform, not abolition. He first called for abolition nine months after leaving office in an address delivered at a convention of the Illinois NAACP on October 12, 2003, in Chicago.

³⁵ For a summary of the scandal, see Andrew Zajac & Flynn McRoberts, *Operation Safe Road: License Scheme Led to Wider Investigation*, CHI. TRIB., Dec. 18, 2003, at 1.

³⁶ Ryan became the sixth Illinois governor to face felony charges. See Dave McKinney, *List of Illinois Governors Who Faced Charges Is Long*, CHI. SUN-TIMES, Dec. 17, 2003, at 18.

³⁷ This group was renamed the Coalition to Abolish the Death Penalty in 2002.

³⁸ See *Furman v. Georgia*, 408 U.S. 238, 363-64 (1972).

Whatever impact Rankin's movement might have had, however, was short-circuited by the untimely emergence of a walking commercial for capital punishment—John Wayne Gacy, who burst into the headlines a few days before Christmas 1978 when the bodies of more than a score of young men were unearthed from the crawl space beneath his home near Chicago.³⁹ The case disrupted Rankin's grassroots organizing efforts and, worse, crushed prospects for overturning the new Illinois death penalty law in the courts—prospects that, it would become apparent, had been surprisingly strong.

The Gacy story broke shortly before the first challenge of the law reached the Illinois Supreme Court in a case known as *People ex rel. Carey v. Cousins*.⁴⁰ The principal issue in *Cousins* was proportionality—whether the 1977 Illinois death penalty statute included sufficient safeguards to assure that the Illinois death penalty would be applied uniformly, as opposed to arbitrarily and capriciously, which the U.S. Supreme Court had held in *Furman* to be cruel and unusual punishment.

The statute gave prosecutors unbridled discretion to seek or not seek the death penalty in any murder case meeting broad criteria. Death-eligible cases included multiple murder, the murder of a police officer or prison employee, and any murder committed in the course of various felonies, such as armed robbery, sexual assault, home-invasion, and burglary. The sweeping scope of the criteria seemed a veritable prescription for caprice, given that there were 102 elected county prosecutors in Illinois, each free to seek the death penalty as he or she saw fit.

In *Cousins*, three of the seven members of the state high court declared that the new law failed to adequately address the problems the U.S. Supreme Court had identified in *Furman* and, therefore, was unconstitutional. The other four justices disagreed, however, and the law was upheld by the slimmest possible margin—which easily might have been inverted in a less emotion-charged atmosphere.

Then, in 1980, Robert Underwood, a member of the *Cousins* majority, retired. Elected to replace Underwood was Seymour Simon, a liberal former Chicago alderman.⁴¹ Because ethical rules for judicial election campaigns forbade discussing issues that might come before the court,

³⁹ See, e.g., Bob Warden, *Bodies of Boys Uncovered in Illinois*, WASH. POST, Dec. 23, 1979, at 1.

⁴⁰ 397 N.E.2d 809 (Ill. 1979).

⁴¹ Simon won a six-way race in the March Democratic primary, see James Tuohy, *Sweatin' Simon Trounces Lorenz*, CHI. LAW., Apr. 1980, at 13, and the November general election with sixty-one percent of the vote in a two-way race. *Complete Election Results*, CHI. LAW., Dec. 1980, at 7.

Simon's position on capital punishment was not an issue. Had it been, he probably could not have been elected—he shared the sentiment of the *Cousins* minority.

Those who assumed that Simon's election spelled doom for the death penalty law, however, were in for a rude awakening. By 1981, when the reconstituted Supreme Court took up its first death penalty challenge in a case known as *People v. Lewis*,⁴² Gacy was on death row. The politics clearly did not bode well for the appellant, Cornelius Lewis. Indeed, the vote came out six-to-one—Simon standing alone. The three justices who had dissented in *Cousins* claimed they were bound by *stare decisis* to switch sides because:

This court, not seven individual justices, has considered the constitutionality of our death penalty statute and this court found it to be constitutional. Those of us who disagree with that conclusion voiced our dissent. Having done so, it is now our obligation to accept the law as pronounced by this court. This is not to say that the holdings of this court are cast in stone and forever unchangeable. However, nothing has changed since this court's decision in *Cousins* except one member of the court that decided *Cousins* has retired. . . . [T]he circumstances which warrant changes in the law do not include changes in personnel of the court. If the law were to change with each change in the makeup of the court, then the concept that ours is a government of law and not of men would be nothing more than a pious cliché.⁴³

Stare decisis did not impress Justice Simon, who noted that it seldom, if ever, gave the court pause in revisiting past decisions. The former minority's flip-flop, he noted, left the court "faced with the strange spectacle of . . . adhering to the *Cousins* decision although a majority of its judges have stated that it does not represent the correct conclusion."⁴⁴

Subsequent developments in the Lewis case raised a pair of troubling issues—ineffective assistance of counsel and prosecutorial misconduct: based on an inaccurate FBI rap sheet, the prosecution had mistakenly informed the jury that the defendant had two prior convictions for violent felonies. Without demanding proof, Lewis's lawyer stipulated to the accuracy of the rap sheet. In fact, one of the cases had been dismissed and the other reduced to a misdemeanor.

When prosecutors discovered the error, they covered it up; the truth would emerge only through arduous efforts of the NAACP Legal Defense Fund. Lewis's death sentence was then overturned by U.S. District Court Judge Harold A. Baker.⁴⁵ However, the defense lawyer's misfeasance and

⁴² 430 N.E.2d 1346 (Ill. 1981).

⁴³ *Id.* at 1364 (Clark, J., concurring).

⁴⁴ *Id.* at 1377 (Simon, J., dissenting).

⁴⁵ *United States ex rel. Lewis v. Lane*, 656 F. Supp. 181 (C.D. Ill. 1987).

the prosecution's malfeasance—which the U.S. Court of Appeals for the Seventh Circuit branded “reprehensible”⁴⁶—went unpunished.

Although unchecked prosecutorial misconduct and ineffective assistance of counsel surely were among the issues that Justice Marshall had wistfully assumed would awaken the public to the realities of capital punishment, the Lewis case caused not so much as a ripple in the news media and, consequently, had no impact on public opinion.

* * *

My initiation to the issue began in 1981 when a letter bearing the return address “Condemned Unit, Box 711, Menard, Illinois” arrived at *Chicago Lawyer*, a publication that I had launched jointly with leaders of the Chicago Council of Lawyers, a small liberal bar association, three years earlier. The principal purpose of *Chicago Lawyer* was to promote the Council's goal of improving the quality of the local judiciary by replacing the political judicial selection system—“selection by connection”—with an apolitical merit-based process.

Although that goal was not to be realized, *Chicago Lawyer* soon branched into investigating an inevitable consequence of a wayward justice system—wrongful convictions. It was that endeavor that attracted the attention of my correspondent from Menard, a twenty-four-year-old African American, Dennis Williams. “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, proceeding to relate that Williams and two friends, Kenny Adams and Willie Rainge, had been convicted by an all-white jury of murdering a young white couple in 1978.⁴⁷

The three men had been implicated in the crime by a borderline mentally retarded seventeen-year-old girl, Paula Gray, who had been held incommunicado and interrogated for two days and two nights in two motels. After initially denying knowledge of the crime, Gray told her interrogators that she had held a disposable cigarette lighter burning continually—providing the only light in an abandoned townhouse—while Williams, Adams, Rainge, and a fourth man, Verneal Jimerson, serially raped the female victim. Then, according to Gray's statement, Williams shot the victims to death and threw the murder weapon into a nearby creek.

The four seemed unlikely suspects. None had a criminal record, except Williams, who apparently had taken a motorcycle for a joy ride as a

⁴⁶ *Lewis v. Lane*, 832 F.2d 1446, 1459 (7th Cir. 1987).

⁴⁷ Letter from Dennis Williams, to *Chicago Lawyer* (Sept. 16, 1981) (on file with the Center on Wrongful Convictions).

teenager; Jimerson was—literally—a choir boy. Nonetheless, according to Gray, Williams, Rainge, and Jimerson each raped the woman twice and Adams raped her once.

Testing disposable lighters confirmed my suspicion that Gray could not possibly have held the burning lighter for the period she claimed.⁴⁸ After burning three minutes, the lighters simply were too hot to hold. Gray's claim about Williams throwing the murder weapon into the creek also was dubious. Police had drained the creek, but no weapon was found.

A few weeks before the trial was scheduled to begin, Gray recanted the statement, saying police had forced her to lie. Prosecutors' response to the recantation was to charge Gray with murder and perjury. Without her testimony and without physical evidence linking Jimerson to the crime, prosecutors were forced to dismiss the charges against him, but were able to proceed against the others, including Gray, on the strength of other purported evidence.

All four were tried before the same judge at the same time but before two juries—one for Gray, a separate one for the men. When Gray's confession implicating the men was presented, the men's jury was excused. As incredible as it sounds, one privately retained lawyer, Archie Benjamin Weston, represented three of the defendants—Williams, Rainge, and Gray; Adams had separate privately retained counsel.

The principal prosecution witness was a man named Charles McCraney, whom prosecutors compensated with cash and other favors. McCraney claimed that around the time of the crime he had seen Williams, Adams, Rainge, and Gray outside the abandoned townhouse and had heard shots a little later.

There was a large problem with McCraney's testimony—or rather there would have been if only the defense had been diligent or the prosecution scrupulous: McCraney initially had fixed the time of the events he claimed to have witnessed in relation to a television show he was watching. The trouble was, that turned out to be far too early—about two hours, in fact, before the victims had been abducted. McCraney's testimony, hence, easily could have been construed as exculpatory, but the jurors—as a result of a breathtaking lapse by the defense—were not informed of the time problem.

The prosecution also put on the testimony of a jailhouse snitch, David Jackson, who claimed to have overheard Williams and Rainge talking about

⁴⁸ *Chicago Lawyer* commissioned the testing by J. L. Broutman & Associates, a laboratory associated with the Illinois Institute of Technology. Two Bics, two Scriptos, and a Cricket were tested. The Bics disintegrated in eight minutes at 277 degrees, the Scriptos in ten minutes at 321 degrees, and the Cricket in six minutes at 294 degrees.

how they committed the crime. Jackson was rewarded with the dropping of burglary charges against him—after which he recanted, accusing the prosecution of putting him up to lying.

The only physical evidence purporting to link any of the defendants to the crime was semen and hair. At least one of the rapists was a “type A secretor”—a category said to include Williams and Adams, along with roughly twenty-five percent of the population. Far more important, three Caucasian hairs recovered from the trunk of Williams’s car were said to “match” the victims’ hair. This “evidence” was presented by Michael Podlecki, a state forensic scientist. He told jurors that the odds were in the thousands against a coincidental match of the hairs.

The men’s jury deliberated less than four hours and Gray’s jury just two before returning guilty verdicts. Williams, the purported actual killer of both victims, was sentenced to death, Rainge to life, Adams to seventy-five years, and Gray to fifty years for her role in the crime and ten years concurrent for perjury.

Shortly after *Chicago Lawyer* began investigating the case, the Illinois Supreme Court affirmed Williams’s conviction and death sentence by a six-one vote—Seymour Simon dissented—despite the conflict inherent in one lawyer, Weston, representing multiple defendants with potentially conflicting defenses in a capital case.⁴⁹ What the court did not know at the time was that Weston was on the verge of being disbarred for irregularities in his handling of a probate estate. In fact, he had been under intense investigation during the trial.

After Margaret Roberts, the managing editor of *Chicago Lawyer*, and I wrote an article raising questions about the case and criticizing Weston’s performance,⁵⁰ Justice Simon persuaded his brethren to revisit the case. In November of 1982, Weston was disbarred and a few days later the Supreme Court unanimously granted Williams a new trial based on ineffective assistance of counsel.⁵¹

I was euphoric, harboring a naïve assumption that the prosecution could not proceed, much less prevail, without credible evidence, of which there seemed to me to be none. Certainly it was possible that Paula Gray might be persuaded to recant her recantation in exchange for release from prison. But her story about the lighter was so obviously ludicrous and the fact that she had lied before so plain that a jury would be hard pressed to believe anything she said. David Jackson, the snitch, was no longer in the

⁴⁹ The opinion, filed on April 16, 1982, was withdrawn on November 18, 1982.

⁵⁰ Rob Warden & Margaret Roberts, *Will We Execute an Innocent Man?*, CHI. LAW., July 1982, at 3-8.

⁵¹ *People v. Williams*, 444 N.E.2d 136 (Ill. 1982).

picture, and Charles McCraney's problem regarding the timing rendered him virtually useless. Moreover, a reexamination of the forensic evidence had destroyed its value. Contrary to the forensic testimony at the trial, none of the hairs found in Williams's trunk matched the victims' hair and new blood testing eliminated Williams as the source of the semen recovered from the female victim.

Nonetheless, the prosecution offered Gray a deal, and she agreed to testify not only against Williams but also against Verneal Jimerson. Almost solely on the strength of her testimony, both were convicted at separate jury trials and sentenced to death.⁵² The result was devastating for them—and for me, not that my devastation was in any way comparable to theirs: Before I started meddling in the case, there had been one innocent man on death row. Now there were two.

When I started working on the case, I was, to borrow a phrase Scott Turow would popularize two decades later, a death penalty agnostic.⁵³ Although uneasy with the notion of executing anyone, I believed some criminals richly deserved it. I simply had never imagined, however, that I was living in a society that would condemn two men to death on the word of a mentally challenged teenager who had been given a torturous choice—either say what the prosecution wanted to hear or face what must have seemed to her an eternity behind bars.

My experience moved me solidly into the abolitionist camp, where I cultivated relationships with Mary Alice Rankin and a cadre of criminal defense lawyers with whom I over the next several years worked to expose eighteen wrongful convictions—six in capital cases—and to delve into such issues as police torture, prosecutorial misconduct, racial discrimination in jury selection, judicial corruption, and proportionality in capital sentencing.⁵⁴

* * *

While Williams and Jimerson languished on death row in 1987, two Chicago men, Darby Tillis and Perry Cobb, whose case also had been championed by *Chicago Lawyer*,⁵⁵ became the first defendants to be

⁵² Norman Alexandroff, *Dennis Williams Case—First Confidence, Then Conviction*, CHI. LAW., Mar. 1987, at 7-10.

⁵³ SCOTT TUROW, *ULTIMATE PUNISHMENT* 14 (2003).

⁵⁴ For a more complete account of the Williams-Jimerson case, see DAVID PROTESS & ROB WARDEN, *A PROMISE OF JUSTICE* (1998). See also *infra* Appendix A.

⁵⁵ Flora Johnson Skelly, *Death Derailed*, CHI. LAW., Nov. 1983, at 5-9.

exonerated and released from Illinois death row since *Furman*.⁵⁶ Tillis and Cobb had been convicted and sentenced to death eight years earlier for an armed robbery and double murder that it appeared had been committed by the boyfriend of the principal witness against them.

The Cobb/Tillis case, like that of Cornelius Lewis, illustrated some of the problems that Justice Marshall had assumed would awaken the public to the realities of capital punishment—unchecked prosecutorial misconduct, ineffective assistance of counsel, and reliance on witnesses of dubious credibility. Yet even when the sordid facts were laid out in court records, the cases generated no media coverage and, consequently, had no impact on public opinion.

The *Chicago Tribune* coverage of the Seventh Circuit opinion in *Lewis* comprised all of five sentences in the middle of a column of legal briefs on the third page of the business section. The item said the decision was “notable” because the Seventh Circuit—not unlike the *Tribune* of that era—“tends not to be hypersensitive to criminal defendants or prosecutorial misconduct.”⁵⁷ The Cobb/Tillis exoneration was not covered by the major media period.

Major media similarly gave short shrift to persuasive evidence that began surfacing in 1989 that a band of white Chicago police officers led by an inner-city area commander named Jon Burge had for more than a decade routinely tortured African American suspects in murder cases. The only news outlets that reported the torture story were *Chicago Lawyer*,⁵⁸ *Crain's Chicago Business*,⁵⁹ and the *Chicago Reader*,⁶⁰ an alternative weekly. John Conroy, a *Reader* investigative reporter, interviewed scores of Burge victims, many of whom were released without being charged, but who consistently described how they were shocked with hand-operated generators and cattle prods, beaten, held against hot radiators, and suffocated with plastic bags until they lost consciousness.⁶¹

⁵⁶ Norman Alexandroff, “Thank God for Mike Falconer”: A Prosecutor Testifies for the Defense—and Saves Two Innocent Men from Death Row, CHI. LAW., Feb. 1987, at 1.

⁵⁷ James Warren et al., *Daley Assistant May Face Disciplinary Probe*, CHI. TRIB., Nov. 17, 1987, § 2, at 3.

⁵⁸ Mary Ann Williams, *Torture in Chicago*, CHI. LAW., Mar. 1989, at 1, 13-15.

⁵⁹ Rob Warden, *Tough Prosecutor Daley Can Be Suspiciously Soft*, CRAIN'S CHI. BUS., Feb. 20, 1989, at 11.

⁶⁰ John Conroy, *Torture by Electroshock: Could It Happen in a Chicago Police Station? Did It Happen at Area 2?*, CHI. READER, Jan. 26, 1990, at 1.

⁶¹ After publication of the article cited *id.*, Conroy wrote nine additional cover articles on police torture: John Conroy, *A Hell of a Deal*, CHI. READER, Oct. 12, 2001, at 1; John Conroy, *Annals of Police Torture: What Price Freedom?*, CHI. READER, Mar. 2, 2001, at 1; John Conroy, *Deaf to the Screams*, CHI. READER, Aug. 1, 2003, at 1; John Conroy, *Poison in*

In all, fourteen men were sentenced to death based on confessions the men claimed were extracted by torture, and four of the fourteen ultimately would be granted pardons by Governor Ryan—pardons based on innocence—and released. After an internal investigation, the police fired Burge. But until that happened, mainstream media coverage of the issue was confined to brief descriptions of the allegations and denials by the officers involved—classic he-said/she-said journalism.

Turning a blind eye to developments calling the fairness and accuracy of the criminal justice system into question was not, of course, a propensity peculiar to Illinois media. It was the national norm—best evidenced by the fact that not a single national news organization contemporaneously reported one of the most far-reaching criminal justice developments of the Twentieth Century—the dawning of the DNA-exoneration age.

The first DNA exoneration occurred in 1989 in Virginia. The defendant was a borderline mentally retarded man, David Vasquez, who had falsely confessed and pleaded guilty to raping and murdering—by hanging—a woman five years earlier.⁶² Upon his release, Vasquez said he had falsely confessed after police persuaded him that to do so was his only hope of avoiding the death penalty. He then entered a negotiated guilty plea in exchange for a thirty-year sentence.

The tragedy of the Vasquez case was compounded by the rapes and hangings of three more women before the actual killer was identified through DNA and arrested. As newsworthy as the story may seem in retrospect, it was hardly surprising that it went unreported by the national media in 1989. In those days, most major news organizations simply would not publish stories in any way critical of the criminal justice system.

The nation's second DNA exoneration, which occurred in Illinois later in 1989, partly as a result of *Chicago Lawyer* reporting,⁶³ also received scant attention in mainstream media, even though it came in a case that had been a national sensation. The exonerated defendant was Gary Dotson, a hapless high school dropout from a working-class suburb of Chicago, who

the System, CHI. READER, June 25, 1999, at 1; John Conroy, *Pure Torture*, CHI. READER, Dec. 3, 1999, at 1; John Conroy, *This is a Magic Can*, CHI. READER, May 26, 2000, at 1; John Conroy, *Tools of Torture*, CHI. READER, Feb. 4, 2005, at 1; John Conroy, *Torturers' Logic*, CHI. READER, May 14, 2004, at 1; John Conroy, *Town Without Pity*, CHI. READER, Jan. 12, 1996, at 1. He also wrote a book: JOHN CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE* (2000).

⁶² See, e.g., BARRY SCHECK ET AL., *ACTUAL INNOCENCE* 316 (2003).

⁶³ Keith D. Picher, *Forensic Affidavits in Dotson Case Open Pandora's Box*, CHI. LAW., July 1985, at 3; Rob Warden, *Forensic Testimony in Dotson Case Was False*, CHI. LAW., May 1985, at 1, 3-4.

had been convicted of the 1977 alleged rape of sixteen-year-old Cathleen Crowell.

After becoming a born-again Christian in 1985, the purported victim came forward to say she had concocted the rape story. She said her intent had been not to accuse anyone but rather to create a cover story that she hoped would satisfy her parents if she turned out to be pregnant as a result of consensual sex with her boyfriend. After providing a description of her fictional assailant, she claimed, police goaded her into identifying Dotson. At his trial, her identification was corroborated by a state forensic scientist, Timothy Dixon, who falsely told the jury that semen recovered from Crowell could have come only from a "type B secretor," which Dotson was. B secretors comprise only ten percent of the male population. In truth, the semen could have come from almost anyone.⁶⁴ But the fabrication was not challenged by the defense, and Dotson was convicted and sentenced to twenty years.

Prosecutors refused to accept the victim's recantation, suggesting that she must have gone crazy. The controversy and the lurid details drew massive international news coverage, but Dotson's ultimate definitive exoneration by DNA was brushed off by prosecutors and major media, with the exception of the *Los Angeles Times*,⁶⁵ as nothing more than the dropping of charges in a case where guilt could not be proven beyond a reasonable doubt.

* * *

Shortly after the Dotson exoneration, the publisher of the *Chicago Law Bulletin* approached me and offered to buy *Chicago Lawyer*, of which I had become sole owner. The advertising bases of both of our publications had been cut into recently by a new legal monthly that featured roundtable discussions of lawyers on non-controversial topics, providing a friendly environment for advertising. The situation posed an immediate threat to the survival of *Chicago Lawyer* and perhaps a long-term threat to the *Law Bulletin*. Hence, I had little choice but to sell, although I knew that the sale meant the end of the *Chicago Lawyer* tradition.

* * *

At the beginning of the final decade of the century, with the media apathetic about wrongful convictions and polls showing upwards of seventy

⁶⁴ Kevin Klose, *Witness Failed to Offer Evidence That Could Have Aided Dotson*, WASH. POST, Apr. 21, 1985, at A6.

⁶⁵ Larry Green, *12-Year Legal Nightmare at an End*, L.A. TIMES, Aug. 15, 1989, at 5.

percent of Americans in favor of capital punishment,⁶⁶ the situation looked bleak indeed for abolitionists everywhere. In Illinois, however, there was at least a glimmer of good news—while thirteen other states had engaged in 120 executions since *Furman*, there had been none in Illinois.⁶⁷

The first Illinois execution did not occur until 1990, which was thirteen years after the General Assembly reinstated capital punishment, and that execution was in reality a state-abetted suicide.⁶⁸ The man who was executed, Charles Walker, could have gone on living on death row for years and might never have been executed had he not chosen to abandon his discretionary appeals. But he felt tremendous remorse for his crime—the murder of a young couple he encountered on a secluded river bank near East St. Louis and robbed of money with which he bought beer. He decided the world would be better off without him.⁶⁹ Members of the Coalition Against the Death Penalty intervened in federal court in an ill-fated effort to block the execution.⁷⁰

When Mary Alice Rankin died three years later, at age seventy-three,⁷¹ she could take solace in the fact that no one had been involuntarily executed under the law she had fought, but that, too, was about to change: In May of 1994, John Wayne Gacy became the first Illinois prisoner to be involuntarily executed in Illinois in thirty-two years—since James Dukes died in the electric chair at Cook County Jail in 1962 for the murder of a Chicago police officer.⁷² How it came to pass that the most notorious monster of the era was catapulted to the head of the line at the end of the line was an enigma. Twenty-three prisoners had been on Illinois death row longer than he.⁷³ Abolitionists suspected, but had no way of proving, that the system had been manipulated.

Four months after the Gacy execution, Joseph Burrows, of Kankakee County, became the third Illinois death row prisoner to be exonerated and

⁶⁶ See generally Michael Oreskes, *The Political Stampede on Execution*, N.Y. TIMES, Apr. 4, 1990, at A16.

⁶⁷ The Death Penalty Information Center maintains a database listing all post-*Furman* U.S. executions at www.deathpenaltyinfo.org/executions.php.

⁶⁸ Rob Karwath & William Grady, *Thompson Won't Stop Execution*, CHI. TRIB., Sept. 11, 1990, at 6.

⁶⁹ Rob Warden, *Kill Me*, CHI. LAW., Aug. 1986, at 1, 6-9.

⁷⁰ *Wilson v. Lane*, 870 F.2d 1250, 1253-56 (7th Cir. 1989).

⁷¹ See Kenan Heise, *Death Penalty Opponent Mary Alice Rankin*, 73, CHI. TRIB., Sept. 11, 1990, Chicagoland, at 8.

⁷² For an account of the Gacy execution, see Rob Karwath & Susan Kuczka, *All Appeals Fail: Gacy is Executed*, CHI. TRIB., May 10, 1994, at 1. For an account of the Dukes case, see ED BAUMANN, *MAY GOD HAVE MERCY ON YOUR SOUL* 423-26 (1993).

⁷³ Supporting data on file at the Center on Wrongful Convictions, Northwestern University School of Law.

released as a result of investigative reporting by Peter Rooney at the *Champaign-Urbana News Gazette*.⁷⁴ True to form, the exoneration drew little attention from media elsewhere in the state and, accordingly, had no discernable impact on public opinion.

The tenor of the times was effectively exploited during the 1994 Illinois gubernatorial campaign by Republican Jim Edgar, who spent \$750,000 on television blasting his opponent's opposition to the death penalty.⁷⁵ In the November election—six months after the Gacy execution and two months after the Burrows exoneration—Edgar captured sixty-four percent of the vote in the largest landslide ever in an Illinois governor's race, defeating Democrat Dawn Clark Netsch, a Northwestern University law professor and incumbent state comptroller.⁷⁶

The next year, Edgar signed five death warrants. Four of the cases evoked little public sympathy, but one case—that of Girvies Davis, of East St. Louis—was different. Davis had signed a confession, but there were serious problems with it: first, it was uncorroborated; second, he was illiterate when he signed it; and third, he also signed confessions to other murders the prosecution acknowledged he could not have committed.

As demoralizing as Davis's execution was for abolitionists, the media attention the controversy drew was encouraging. Two columnists took an interest in the case after Northwestern journalism students, working under the direction of Professor David Protess, investigated it and launched a campaign on Davis's behalf. One of the columnists, Eric Zorn, of the *Chicago Tribune*, wrote nine columns on the case,⁷⁷ branding the execution "obscene."⁷⁸

⁷⁴ Peter Rooney, *The Alibi: Burrows Maintains He Was Watching TV*, CHAMPAIGN-URBANA NEWS GAZETTE (Ill.), May 16, 1994 at A-1; Peter Rooney, *Chance at Trial: 'New Lease on Life' for Burrows*, CHAMPAIGN-URBANA NEWS GAZETTE, May 15, 1994, at A-1; Peter Rooney, *Cold-blooded or Just Troubled? Views Differ*, CHAMPAIGN-URBANA NEWS GAZETTE, May 15, 1994, at A-8; Peter Rooney, *Frye Role in 1988 Murder Still Puzzling*, CHAMPAIGN-URBANA NEWS GAZETTE, May 17, 1994, at A-1; Peter Rooney, *Investigators Talk Again to Principals in Dulin Case*, CHAMPAIGN-URBANA NEWS GAZETTE, May 17, 1994, at A-10; Peter Rooney, *No Physical Evidence Links Burrows to Crime*, CHAMPAIGN-URBANA NEWS GAZETTE, May 16, 1994, at A-14.

⁷⁵ Thomas Hardy & Dorothy Collin, *Netsch Swept Aside by GOP Tide*, CHI. TRIB., Nov. 9, 1994, at 1.

⁷⁶ *Id.*

⁷⁷ Eric Zorn, *Con Who Has Date on Death Row Not Man He Used To Be*, CHI. TRIB., Apr. 16, 1995, § 2, at 1 [hereinafter *Con Who Has Date*]; Eric Zorn, *Davis' Execution May Reveal Folly of Eye for an Eye*, CHI. TRIB., May 18, 1995, Chicagoland, at 1; Eric Zorn, *Death Row Inmate Takes to Airwaves to Fight for His Life*, CHI. TRIB., Apr. 25, 1995, Chicagoland, at 1; Eric Zorn, *Evidence Shows Juries as Fallible as the Rest of Us*, CHI. TRIB., Oct. 4, 1995, Chicagoland, at 1; Eric Zorn, *Girvies is Dead, but There are Some Who are Still Angry*, CHI. TRIB., May 30, 1995, Chicagoland, at 1; Eric Zorn, *Godspeed to All*

Critics might dismiss Zorn as a liberal, which he unabashedly was, but the other columnist, Dennis Byrne, of the *Chicago Sun-Times*, was an arch-conservative, who wrote in a last-ditch plea to save Davis's life:

Great. Just what we need is another con claiming he shouldn't be executed because he didn't do it. And backed up by the usual chorus of sympathizers who want to let him off.

Except, in the case of Girvies Davis, who is set to be executed first thing Wednesday morning, they're right. You'd have to search far to find anyone else condemned to death on evidence that's as flimsy, unreliable, trumped-up or nonexistent.⁷⁹

In a final telephone call a few hours before the execution, Davis beseeched Protesse to look into the case of Dennis Williams,⁸⁰ the case that Margaret Roberts and I had championed in *Chicago Lawyer* in the early 1980s. After the two met on death row, Williams had taught Davis to read and Davis had come to believe that Williams was innocent. Protesse promised to look into the case. Before he could begin, however, two unrelated events raised questions about the accuracy and fairness of the Illinois death penalty more powerfully than anything that had gone before.

The first development came in a case in which *Chicago Lawyer* initially had exposed evidence indicating, rather overwhelmingly, that two innocent men had been sentenced to death.⁸¹ The men, Rolando Cruz and Alejandro Hernandez, were formally exonerated of the rape and murder in 1983 of a ten-year-girl from an upscale neighborhood of DuPage County. Unlike the earlier exonerations, this one was a media sensation.

The defendants' cause had attracted extraordinary *pro bono* counsel, including Northwestern University Law Professor Lawrence C. Marshall,⁸² ex-prosecutor-turned-novelist Scott Turow, two lawyers destined to become federal judges, Matthew F. Kennelly and Nan Nolan, and noted defense lawyer Thomas M. Breen. The case also had major political implications owing to the fact that the prosecutor who presided over the wrongful convictions—DuPage County State's Attorney Jim Ryan—had since been

Who Care to Make Sense of This Riddle, CHI. TRIB., Sept. 12, 1995, Chicagoland, at 1; Eric Zorn, *Man's Not Innocent, but He's Not Guilty Enough to Die*, CHI. TRIB., Apr. 18, 1995, Chicagoland, at 1; Eric Zorn, *Prison Phones Go Dead with Man's Life in the Balance*, CHI. TRIB., Apr. 30, 1995, Chicagoland, at 1; Eric Zorn, *Shadows of Doubt Cast Executions in Different Light*, CHI. TRIB., Mar. 28, 1995, Chicagoland, at 1.

⁷⁸ *Con Who Has Date*, *supra* note 77, at 1.

⁷⁹ Dennis Byrne, *Commute Davis' Death Sentence*, CHI. SUN-TIMES, May 14, 1995, at 33.

⁸⁰ See PROTESSE & WARDEN, *supra* note 54, at 1-12.

⁸¹ James Tuohy, *The DuPage Cover-Up*, CHI. LAW., May 1986, at 1, 6-15.

⁸² Professor Marshall is now a professor of law and the David and Stephanie Mills Director of Clinical Education at Stanford Law School.

elected attorney general of Illinois.⁸³ After DNA evidence excluded Cruz and Hernandez as sources of semen recovered from the victim and after a sheriff's lieutenant admitted that he had lied about a supposed inculpatory statement attributed to Cruz, the judge at Cruz's third trial directed a verdict of acquittal and prosecutors dropped all charges against Hernandez.⁸⁴

The second development was Governor Edgar's decision in January of 1996 to commute the death sentence of Guinevere Garcia fourteen hours before she was to become the first woman to be executed in Illinois in fifty-seven years.⁸⁵ Convicted of murdering her husband and eleven-month-old daughter in DuPage County, Garcia had abandoned her appeals. Edgar's action, which followed a clemency crusade led by celebrity human rights activist Bianca Jagger, raised the specter of caprice: The case of Girvies Davis, for instance, seemed every bit as meritorious as Garcia's, yet he died against his will and she went on living against hers.

As the Garcia drama played out, Protess threw a new crop of journalism students into the case of Dennis Williams and his three male co-defendants, who would become known as the Ford Heights Four.⁸⁶ As previously noted, one of Williams's co-defendants, Verneal Jimerson, also was under sentence of death, and Kenneth Adams and Willie Rainge were serving long prison terms.

When Protess began, only Jimerson had counsel—Mark Ter Molen, of the firm then known as Mayer, Brown & Platt.⁸⁷ Protess's first task, thus, was to recruit lawyers for the others, and he did—Robert Byman, of the firm of Jenner & Block, for Williams, Jeffrey Urdangen, a solo practitioner, for Adams, and Lawrence Marshall and Matthew Kennelly for Rainge.

The first big break came when Protess's students tracked down Paula Gray, who proceeded to admit that she had lied in exchange for favorable treatment for herself. Shortly thereafter, Protess and René Brown, a private investigator working with him, located a witness who had heard the gunshots that killed the victims and seen the killers flee the scene.⁸⁸ The witness had contacted police and identified the killers a week after the crime, but by that time the four innocent men had been charged and the

⁸³ Hardy & Collin, *supra* note 75, at 1.

⁸⁴ Jeffrey Bils & Ted Gregory, "I Just Want to Go Home"; *A Nightmare Ends, One Continues in Nicarico Case*, CHI. TRIB., Dec. 9, 1995, at 1; Jeffrey Bils & Maurice Possley, *Judge Rules Cruz Innocent; Nicarico Case Still Open After 12 Years*, CHI. TRIB., Nov. 4, 1995, at 1.

⁸⁵ Sharon Cotliar & Dave McKinney, *Edgar Halts Garcia Death; Her Sex Had No Role in Decision, He Says*, CHI. SUN-TIMES, Jan. 17, 1996, at 1.

⁸⁶ PROTESS & WARDEN, *supra* note 54, at 119.

⁸⁷ The firm is now Mayer, Brown, Rowe & Maw.

⁸⁸ PROTESS & WARDEN, *supra* note 54, at 160, 163-67.

information was ignored. The Proress group next tracked down one of the actual killers, who ultimately confessed to Brown and then, amazingly, at a press conference.⁸⁹

Over strenuous objections from prosecutors, the defense team persuaded a judge to order DNA testing, which established the innocence of the Ford Heights Four in July of 1996 and forced reluctant prosecutors to reopen the case.⁹⁰ The most culpable of the real killers had since died of an apparent drug overdose, but three others were convicted and sentenced to prison.⁹¹

In October of 1996, three months after the exoneration of the Ford Heights Four, Lawrence Marshall won the release on appeal of another innocent man who had been sentenced to death in Illinois—Gary Gauger, a farmer from McHenry County, north of Chicago, wrongfully convicted two years earlier based on a supposed confession to the murder of his elderly parents. Gauger's release was little noted at the time, but it burst into the headlines eight months later when a federal grand jury in Milwaukee indicted two members of a Wisconsin motorcycle gang on thirty-four acts of racketeering, including the murder of the Gaugers during an armed robbery and home invasion. The evidence in that case, which ended in convictions, included tape-recordings of the motorcycle gang members chortling about how they had committed the crime wearing hairnets and gloves to avoid leaving physical evidence.⁹²

Marshall's experience with those three cases prompted him to convene a national conference on wrongful convictions and the death penalty at the Northwestern University School of Law in November of 1998, when the Illinois death penalty score stood at eleven executed and nine exonerated. The event brought together eight of those exonerated in Illinois and twenty-one from other states. The presence of the twenty-nine death row refugees together on a stage drew considerable local, national, and international news coverage,⁹³ significantly raising the salience of the innocence issue.

⁸⁹ *Id.* at 190-92.

⁹⁰ See, e.g., Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at A6.

⁹¹ PRORESS & WARDEN, *supra* note 54, at 226-28.

⁹² Dave Daley, *17 Bike Gang Members Indicted; Crackdown Targets Outlaws in 3 States*, MILWAUKEE J.-SENTINEL, June 11, 1997, at 1; Gretchen Schuldt, *Former Outlaw Sentenced to 45 Years*, MILWAUKEE J.-SENTINEL, Mar. 10, 2001, at 3B; Gretchen Schuldt, *Outlaw Sentenced to Life in Prison; Judge Says the Motorcycle Club Member Deserves the Death Penalty for His Part in 'Barbaric' Homicides*, MILWAUKEE J.-SENTINEL, Oct. 13, 2000, at 3B.

⁹³ See, e.g., Christopher W. Buckley, *Forum Puts Face on Wrongful-Conviction Risk*, CHI. DAILY L. BULL., Nov. 16, 1998, at 2; Debbie Howlett, *Time Lost to Death Row Scars*

In January of 1999, the *Chicago Tribune*, which historically had shunned stories critical of the criminal justice system, published an unprecedented five-part series,⁹⁴ which began:

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

They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs. They do it to win.

They do it because they won't get punished.

The month after the *Tribune* series appeared, there was another dramatic development—the exoneration of Illinois death row prisoner Anthony Porter, who had come within forty-eight hours of execution the previous year before a legal team including Marshall persuaded the Illinois Supreme Court to stay the execution. The delay was granted on the ground that Porter might be so severely mentally retarded that he could not understand what was about to happen to him or why. The court ordered IQ testing, which delayed further proceedings long enough for David Protess and yet another group of Northwestern journalist students to reinvestigate the case.⁹⁵ Porter's innocence was established when Paul Ciolino, a private investigator working with the Protess group, obtained a video-recorded confession from the man who had committed the murder for which Porter had been condemned to die.⁹⁶

Then, five weeks after Porter walked free, taxpayers learned that they had more than a moral stake in having a fair and accurate criminal justice system when lawsuits brought by the Ford Heights Four were settled by Cook County for \$36 million⁹⁷—which today, more than five years later,

Ex-Inmates; Forum Puts Faces on Wrongly Convicted, USA TODAY, Nov. 16, 1998, at 5A; John McCormick, *The Wrongly Condemned*, NEWSWEEK, Nov. 9, 1998, at 64; Don Terry, *Survivors Make the Case Against Death Row*, N.Y. TIMES, Nov. 16, 1998, at A14; Henry Weinstein, *Death Penalty Foes Focus Effort on the Innocent*, L.A. TIMES, Nov. 16, 1998, at A1; Mitchell Zuckoff, *Death-Row Survivors Tell How Justice Errs; Conference Puts Death Penalty on Trial*, BOSTON GLOBE, Nov. 15, 1998, at A1.

⁹⁴ Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win* (series), CHI. TRIB., Jan. 10-14, 1999.

⁹⁵ Christi Parsons, *Court Stalls Execution, Asks If Killer Is Smart Enough To Die*, CHI. TRIB., Sept. 22, 1998, at 1.

⁹⁶ Jim Kirk, *Confession Follows News Report on Slayings*, CHI. TRIB., Feb. 4, 1999, Business, at 2.

⁹⁷ Eric Zorn, *\$36 Million Can't Remove the Stain on Justice System*, CHI. TRIB., Mar. 9, 1999, § 2, at 2.

remains the largest civil rights settlement ever in a wrongful conviction case.⁹⁸

The synergy of the developments dramatically changed the media climate and enabled Lawrence Marshall and me, with private funding, to launch the Center on Wrongful Convictions, which in the years ahead added to the stream of Illinois exonerations, keeping the wrongful conviction issue in capital and non-capital cases alike in the media spotlight.⁹⁹

IV. SHAPING THE REFORM STRATEGY

A strategic plan for reform began to take shape in June of 1999 when three philanthropic organizations—the Open Society Institute, the J. Roderick MacArthur Foundation, and the Columbia Foundation—brought several of the nation's leading abolitionists together with leaders of other reform movements and persons with expertise in social reform for a conference at Jenner & Block in Chicago.¹⁰⁰

A consensus emerged from the conference on several basic points: That publicity emanating from the Northwestern conference and the exoneration of Anthony Porter had created immediate opportunities for moratoriums on executions in several states, especially Illinois; that legislative initiatives should pragmatically focus in the short-term on criminal justice reform and limiting application of the death penalty, rather than the currently out-of-reach goal of abolition; that a successful movement would require the services of professionals in the fields of public relations, political advocacy, and public opinion research to develop sophisticated, coordinated media and public education strategies with consistent, well-framed messages responding to mainstream values, including public safety and accountability in the criminal justice system;

⁹⁸ Two and a half years after the Ford Heights Four settlement, a federal jury in Chicago awarded \$15 million to James Newsome, who spent fifteen years in prison for a murder he did not commit. That was, and remains, the largest amount ever awarded to a single plaintiff in a wrongful conviction case. See Matt O'Connor, *Lineup Suit Nets \$15 Million; U.S. Jury Awards Record Amount for 15 Years in Prison*, CHI. TRIB., Oct. 30, 2001, § 2, at 1.

⁹⁹ See, e.g., Antonacci, *supra* note 4; Jeff Coen, *Inmate Free After 10 Years In Prison; Retrial Held In '93 Case After DNA Exonerated Him*, CHI. TRIB., June 7, 2003, § 2, at 18; Adam Liptak, *Judging a Mother for Someone Else's Crime*, N.Y. TIMES, Nov. 27, 2002, at A17; Steve Mills & Jeff Coen, *DNA Tests Gain Release Of 2 In '76 Rape, Slaying; Freedom Sweet for Men in Prison More Than 25 Years*, CHI. TRIB., May 24, 2003, at 1; Bryan Smith, *Mom Owes Freedom to NU Center*, CHI. SUN-TIMES, Dec. 13, 2002, at 6.

¹⁰⁰ Rob Warden, *Strategies for Abolishing the Death Penalty* (June 4, 1999) (on file with Center on Wrongful Convictions) (Report from the Death Penalty Strategy Conference Sponsored by the Open Society Institute, Columbia Foundation, and J. Roderick MacArthur Foundation).

that the message should focus on the public-safety imperative—emphasizing that every time an innocent person is convicted it leaves the guilty person on the street to rape or kill again; that a successful reform or abolition movement would have to attract a diverse constituency, including Republicans and evangelical Christians; and that litigation would continue to be the engine that would drive the reform and abolition movement.

After the Jenner & Block conference, the Center on Wrongful Convictions and the MacArthur Justice Center at the University of Chicago Law School began formulating reform proposals. With the Washington-based Justice Project, the centers established the Death Penalty Education Project to promote the proposals. The project hired an executive director and retained a high-powered public relations firm—Hill & Knowlton.

Since 1977, State Representative Coy Pugh and several exonerated former death row prisoners and abolitionists had been campaigning for a moratorium, but their efforts had been stymied by the General Assembly's Republican leadership.¹⁰¹ The Porter exoneration, however, was an awakening for the one Illinoisan with unilateral power to declare a moratorium—Governor Ryan, a former Kankakee pharmacist described by Scott Turow as “one of the more enigmatic figures in recent local history.”¹⁰²

For eight years before he ascended to the governor's mansion in 1999, Ryan had presided over the huge and notoriously corrupt office of Illinois Secretary of State.¹⁰³ Early in Ryan's gubernatorial term, a licenses-for-bribes scandal erupted, leading eventually to scores of federal indictments, including his own—just before Christmas of 2003—on charges of racketeering, mail fraud, and tax evasion.¹⁰⁴

As a newly elected state representative in 1977, Ryan had voted to reinstate the death penalty for murder of a police officer or firefighter, murder of a corrections employee or prisoner, multiple murder, murder in the course of a hijacking, contract murder, murder of a witness, and murder in the course of a felony. Five years later, as Speaker of the House, he had voted to expand the death penalty to cover the murder of a child under

¹⁰¹ See Ray Long, *Philip All but Dashes Execution Moratorium*, CHI. TRIB., Nov. 19, 1998, § 2, at 1.

¹⁰² TUROW, *supra* note 53, at 16.

¹⁰³ When Secretary of State Paul Powell died in 1970, some \$800,000 was found in shoe boxes in his hotel room. Although his salary never exceeded \$30,000, his estate totaled almost \$2 million. See ROBERT E. HARTLEY, *PAUL POWELL OF ILLINOIS: A LIFELONG DEMOCRAT* (1999).

¹⁰⁴ See *Indicting Gov. Ryan—and Illinois*, CHI. TRIB., Dec. 18, 2003, at 28 (Editorial).

twelve if the crime results from "exceptionally brutal or heinous behavior indicative of wanton cruelty."¹⁰⁵

In March of 1999, shortly after he became governor, Ryan had allowed the only execution during his tenure to proceed—that of Andrew Kokoraleis, a member of a ring of killers who abducted and tortured prostitutes in Cook and DuPage counties.¹⁰⁶ "I must admit that it is very difficult to hold in your hands the life of any person, even a person who, in the eyes of the many, has acted so horrendously as to have forfeited any right to any consideration of mercy," Ryan said. "I have struggled with this issue of the death penalty and still feel that some crimes are so horrendous and so heinous that society has a right to demand the ultimate penalty."¹⁰⁷

Then in January of 2000, following the exonerations of three more death row prisoners—Steven Smith, Ronald Jones, and Steven Manning—Ryan declared the moratorium, which would bring him a nomination for the Nobel Prize.¹⁰⁸ Critics accused him of trying to distract attention from the Secretary of State scandal or trying to create a legacy that at least would overshadow it in history, but as Scott Turow observed, "[f]or Ryan, facing the increasing prospect that he would be in front of a jury himself, locking arms with the most unpopular minority group imaginable—convicted first-degree murderers—was not an appealing course."¹⁰⁹

Although police and prosecutors were critical of the moratorium, the public strongly supported it: A Roper Starch Worldwide poll commissioned by the Death Penalty Education Project found that seventy percent of Illinoisans approved of the governor's action.¹¹⁰ Support for the moratorium was strongest among Democrats and persons who described themselves as liberal, but it also was supported by majorities of Republicans and persons who described themselves as conservatives.¹¹¹

The main purpose of the Roper Starch poll had been to gauge public support for the reforms that the Center on Wrongful Convictions and MacArthur Justice Center were proffering, and the results were encouraging: restricting jailhouse snitch testimony was favored by seventy-

¹⁰⁵ See Warden, *supra* note 34, at 1.

¹⁰⁶ Cornelia Grumman & Rick Pearson, *Ryan Agonized, But Confident He 'Did The Right Thing'*, CHI. TRIB., Mar. 18, 1999, at 1.

¹⁰⁷ Christi Parsons & Cornelia Grumman, *Kokoraleis' Execution Carried Out; Torn Ryan Agonizes, But Denies Clemency*, CHI. TRIB., Mar. 17, 1999, at 1.

¹⁰⁸ Adriana Colindres, *Ryan To Be Nominated for Nobel Peace Prize; U of I Law Professor Cites Position on Death Penalty*, ST. J. REG. (Springfield, Ill.), Jan. 1, 2003, at 1.

¹⁰⁹ TUROW, *supra* note 53, at 94.

¹¹⁰ Roper Starch Worldwide Poll, Sept. 25-Oct. 17, 2000 (on file at the Center on Wrongful Convictions).

¹¹¹ *Id.*

eight percent, electronic recording of interrogations by eighty-six percent, reforming police eyewitness identification procedures by eighty-seven percent, providing more defense resources by eighty-eight percent, setting minimum standards of competence and ethics for defense lawyers by seventy-nine percent, and prohibiting the death penalty when identification is based on a single eyewitness by fifty-nine percent.¹¹²

Since the two centers and the Death Penalty Education Project had set sights on reforming the criminal justice system, with a particular emphasis on improving its accuracy in capital cases, tension arose with activists who opposed reforms on the ground that they could make the death penalty more palatable and, thus, more politically sacrosanct. Eventually, however, as events played out, most abolitionists came to accept the view that reforms could advance the abolition agenda in the long run and save lives in the meantime.

Ryan appointed a fourteen-member Commission on Capital Punishment in March 2000 to review the administration of the capital punishment process in Illinois and recommend ways to improve the fairness and accuracy of the process.¹¹³ Twelve of the Commission's members were lawyers, including Thomas Sullivan, Scott Turow, and Andrea Zopp.¹¹⁴ Eleven were sitting or former prosecutors and nine had criminal defense experience.¹¹⁵ The non-lawyers were former U.S. Senator Paul Simon, a journalist by training, and Roberto Ramirez, a Mexican immigrant who had built a successful janitorial business. Ramirez had first-hand experience with murder and its consequences—his father had been the victim of a politically motivated murder in Mexico, and his grandfather was believed to have arranged the assassination.¹¹⁶

Shortly after Ryan appointed the Commission, a group of Illinois death penalty lawyers attending a conference in Warrenton, Virginia, discussed the possibility of seeking blanket clemency for all death row prisoners. The idea did not coalesce into a plan, however, until the following year after a series of hush-hush meetings at the State Appellate Defender's Capital Litigation office in Chicago, the Northwestern School of Law, DePaul University College of Law, and Chicago-Kent College of Law.

¹¹² *Id.*

¹¹³ Steve Mills & Ken Armstrong, *Ryan Sets Up Panel To Study Death Penalty*, CHI. TRIB., Mar. 9, 2000, § 2, at 1.

¹¹⁴ See TUROW, *supra* note 53, at 25-27.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 27; see also John Chase, *Immigrant's Firm Cleaning Up; Former Janitor Living American Dream by Starting Own Company*, CHI. TRIB., July 6, 1999, Trib. West, at 2.

The lawyers did not want to tip their hands to prosecutors earlier than necessary, but prison grapevines are amazingly swift modes of communication, so the plan could not remain secret for long. Most, but not all, of the men and women on death row could be counted upon to cooperate. Some with strong actual innocence claims would not want to risk losing their Capital Litigation Division lawyers; a few were simply suicidal.

The non-cooperators were a problem because the General Assembly had responded to Bianca Jagger's efforts in the Garcia case in 1996 by passing a law purporting to bar a governor from granting relief to any death row prisoner who did not request it.¹¹⁷ Since their OSAD attorneys could not bring petitions against any such clients' wishes, the Center on Wrongful Convictions and MacArthur Justice Center finally decided to file a petition seeking clemency for the non-cooperators, who turned out to number twenty-three. In the Centers' judgment, the Guinevere Garcia law did not inhibit the governor's power to "grant reprieves, commutations and pardons, after conviction for all offenses on such terms as he thinks proper."¹¹⁸

In March of 2002, at a death penalty conference in Oregon, Ryan described the flaws that had led to the Illinois death row exonerations. When asked whether he would consider blanket clemency, he responded, "That's not something that's out of the question. I'll consider that." Acknowledging that his remarks were sure to anger police, prosecutors, and victims' survivors, Ryan told reporters, "I'd rather have somebody angry than an innocent person killed."¹¹⁹

The following month, the Governor's Commission on Capital Punishment returned a 207-page report, containing eighty-five recommendations for improving the accuracy of the criminal justice system; a good many of the recommendations were redundant or merely called for continuation of previously implemented measures.¹²⁰ The prominence of the Commission members and the considerable effort that went into the report veritably demanded that the General Assembly take it seriously, but doing so would have to await the installation of new Democratic leadership.

¹¹⁷ See 730 ILL. COMP. STAT. 5/3-3-13(a) (2004); see also Christi Parsons, *Keep 'Outsiders' Out of Death Row Clemency Matters, Lawmakers Urge; Bill Would Require Inmate OK for Plea*, CHI. TRIB., Feb. 9, 1996, § 2, at 10.

¹¹⁸ ILL. CONST. art. V, § 12.

¹¹⁹ Ray Long & Steve Mills, *Ryan to Review Death Row Cases; Governor May Commute Terms*, CHI. TRIB., Mar. 3, 2002, at 1.

¹²⁰ FORMER GOVERNOR RYAN'S COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT (2002), available at <http://www.idoc.state.il.us/ccp/reports/index.html> (Apr. 15, 2002).

In the time he had left in office, Ryan came under extreme pressure to reject blanket clemency, particularly during death row clemency hearings before the Illinois Prisoner Review Board in October of 2002. Scores of anguished survivors of murder victims tearfully told the stories of their loved ones before television cameras. The *Chicago Tribune* editorialized:

The hurry-up clemency hearings that were supposed to highlight flaws in this state's capital punishment system instead have drenched Illinois citizens in vivid, painful reminders of why the death penalty exists. As a result, Gov. George Ryan's threat to unilaterally commute all current death sentences has backfired in his face and undermined the crucial cause of capital punishment reform.¹²¹

To counter the bad press, the Center on Wrongful Convictions, the Illinois Coalition Against the Death Penalty, and Murder Victims Families for Reconciliation jointly launched a three-pronged public education initiative in December of 2002. It began with a National Gathering of the Death Row Exonerated at Northwestern School of Law—an event originally scheduled for the following year to mark the fifth anniversary of the National Conference on Wrongful Convictions and the Death Penalty. Forty death row refugees from around the country walked across a stage and signed a letter imploring the governor to leave no one on death row.¹²² Then, beginning at 4:30 a.m. the next morning, the ex-prisoners carried the letter on a thirty-seven-mile relay walk from Stateville Correctional Center, where most of the post-*Furman* executions had taken place, to Chicago where they presented the letter to Ryan.¹²³

The initiative was capped off by the Chicago premiere of the celebrated off-Broadway play *The Exonerated* starring Richard Dreyfuss, Danny Glover, and Mike Farrell and attended by the governor, his top staff, and several members of the General Assembly.¹²⁴ The play, by Jessica Blank and Erik Jensen, featured the stories of six of the death row exonerated, all but one of whom were in the audience that night and joined in a reception afterwards.¹²⁵ Ryan appeared genuinely moved. *Tribune* arts reporter Chris Jones observed the next morning, "Give politicized actors the chance to play for a guy who actually can make a difference and they'll dig

¹²¹ *Halt the Anguish, Gov. Ryan*, CHI. TRIB., Oct. 20, 2002, at 8 (Editorial).

¹²² Lucio Guerrero, *40 Off Death Row Push End to Executions*, CHI. SUN-TIMES, Dec. 16, 2002, at 7.

¹²³ Jodi Wilgoren, *Appeals Process in Illinois Includes the Exonerated*, N.Y. TIMES, Dec. 17, 2002, at A22.

¹²⁴ CENTER ON WRONGFUL CONVICTIONS, MAKING HISTORY 10-12 (2003) (on file with Center on Wrongful Convictions).

¹²⁵ *Id.*

mighty deep into their emotional reservoirs. Most of the time, it looked like the whole show was aimed firmly in Ryan's direction."¹²⁶

Three days before leaving office, and the day after pardoning four Burge torture victims and releasing them from death row,¹²⁷ Ryan came to Northwestern's Lincoln Hall to render his decision.¹²⁸ He told how violence had twice struck close to him. His neighbor, Kankakee media heir Steven Small, was abducted for ransom and hidden in a shallow hole, where he suffocated. The killer Danny Edwards, who was also from Kankakee, was sentenced to death. Ryan knew the Edwards family as well as the Small family.¹²⁹ He also knew the family of Eric Lee, a troubled young man who was under death sentence for killing a Kankakee police officer.¹³⁰

Ryan then asked, rhetorically, "If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die?" And he answered, "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."¹³¹

Although the ensuing reforms were motivated in part by the General Assembly's desire to resume executions, the prospect of that probably is not great, given the continued erosion of public support for capital punishment. The death penalty most likely will be abolished in the not-too-distant future by the least democratic of democratic institutions—the courts—on proportionality grounds.

We have, of course, been there, done that, only to find the rationale of *Furman* too fragile to hold. That, however, was a quarter of a century ago, and the times—Bob Dylan reminds us—they are a'changin'.

The times, in fact, have changed, and the Capital Punishment Reform Study Committee—created by a legislature avowedly bent on resuming executions—just might become an instrument in bringing the American death penalty to what is increasingly seen as its just desserts.

¹²⁶ Chris Jones, 'Exonerated' an Enlightening Evening for Ryan, CHI. TRIB., Dec. 18, 2002, Tempo, at 1.

¹²⁷ Governor George Ryan, Address at the DePaul Univ. College of Law (Jan. 10, 2003), at <http://www.law.northwestern.edu/depts/clinic/wrongful/DepaulAddress.htm>.

¹²⁸ Governor George Ryan, Address at Northwestern Univ. Sch. of Law (Jan. 11, 2003), at <http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm>.

¹²⁹ *Id.*

¹³⁰ John Keilman, *Relatives of Victims Feel "Cheated"*, CHI. TRIB., Jan. 12, 2003, at 1.

¹³¹ Governor George Ryan, *supra* note 127.

APPENDIX A

SUMMARIES OF WRONGFUL CONVICTIONS IN POST-FURMAN ILLINOIS CAPITAL CASES

JOSEPH BURROWS

Burrows was sentenced to death for the 1988 murder and armed robbery of William Dulin, a retired Iroquois County farmer.¹³² The conviction rested on the testimony of the actual killer, Gayle Potter,¹³³ and the false confession of a mildly retarded co-defendant, Ralph Frye.¹³⁴ Six hours after the victim's body was found, Potter was arrested after she attempted to cash a \$4,050 check drawn on Dulin's account at an area bank.¹³⁵ She admitted taking part in the crime, claiming she had committed it with Burrows and Frye.¹³⁶ She said Burrows had been the triggerman.¹³⁷ Potter had a gash on her head that she acknowledged she had suffered during a struggle with the defendant at the time of Dulin's murder.¹³⁸ Her blood was found at the scene.¹³⁹ The murder weapon belonged to her.¹⁴⁰ No physical evidence linked either Burrows or Frye to the crime,¹⁴¹ and four alibi witnesses placed Burrows 60 miles away at the time it occurred.¹⁴² After a lengthy interrogation, however, Frye (who had an IQ of 76¹⁴³) confessed, corroborating Potter's version of events.¹⁴⁴ The Illinois Supreme Court affirmed Burrows's conviction and death sentence.¹⁴⁵ Two years later, Frye recanted his testimony to Peter Rooney, a reporter for the *Champaign-Urbana News-Gazette*, saying that police had intimidated him

¹³² *People v. Burrows*, 592 N.E.2d 997, 1008 (Ill. 1992).

¹³³ *Id.* at 1002-04.

¹³⁴ *Id.* at 1005-06, 1008.

¹³⁵ *Id.* at 1004.

¹³⁶ *Id.* at 1002-04.

¹³⁷ *Id.* at 1003.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1001.

¹⁴⁰ *Id.* at 1004.

¹⁴¹ *Id.* at 1001.

¹⁴² *Id.* at 1006-07.

¹⁴³ *Id.* at 1005.

¹⁴⁴ *Id.* at 1005-06.

¹⁴⁵ *Id.* at 1025-26.

into falsely confessing.¹⁴⁶ Shortly thereafter, Burrows's attorneys discovered a letter Potter had written asking a friend to falsely corroborate her version of events. Confronted with the letter, Potter admitted that she had falsely accused Burrows and Frye to minimize her own culpability.¹⁴⁷ She admitted that she alone had killed the elderly victim in an attempted robbery to obtain drug money.¹⁴⁸ After a hearing at which Frye and Potter testified, Burrows won a new trial.¹⁴⁹ The prosecution unsuccessfully appealed, and eventually dropped the charges.¹⁵⁰

PERRY COBB AND DARBY TILLIS

Cobb and Tillis were sentenced to death for the 1977 murder and armed robbery of the owner and an employee of a restaurant on the north side of Chicago.¹⁵¹ The convictions rested primarily on the testimony of Phyllis Santini, who portrayed herself as an unwitting accomplice in the crime.¹⁵² In addition, Cobb and Tillis were identified by Arthur Shields, a purported eyewitness.¹⁵³ Shields, who was working at a bar across the street when the crime occurred, did not see the actual crime but claimed to have seen the defendants standing in the doorway of the restaurant at about the time the crime was believed to have occurred.¹⁵⁴ Three weeks after the crime, Santini contacted police and accused Cobb and Tillis of committing it.¹⁵⁵ Both men professed their innocence, but police found a watch taken from one of the victims in Cobb's possession.¹⁵⁶ Cobb claimed he had bought the watch from a man named Johnny Brown.¹⁵⁷ After two trials ended in hung juries, Cobb and Tillis were convicted and sentenced to death at their third trial.¹⁵⁸ The Illinois Supreme Court reversed the convictions and remanded the case for a new trial based on judicial error.¹⁵⁹ At that point, *Chicago Lawyer* published a detailed account of the case.¹⁶⁰ Michael

¹⁴⁶ *People v. Burrows*, 665 N.E.2d 1319, 1325 (Ill. 1996).

¹⁴⁷ *Id.* at 1322-23.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1322-23.

¹⁵⁰ *Id.* at 1329.

¹⁵¹ *See People v. Cobb*, 455 N.E.2d 31, 32-34 (Ill. 1983).

¹⁵² *Id.*

¹⁵³ *Id.* at 34.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 33-34.

¹⁵⁶ *Id.* at 34.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 32-33.

¹⁵⁹ *Id.* at 40.

¹⁶⁰ Skelly, *supra* note 55, at 5-9.

Falconer, a recent law school graduate who years earlier had worked with Santini at a factory, happened to read the article. He immediately contacted Cobb and Tillis's defense lawyers to report that Santini had once told him that she and her boyfriend had robbed a restaurant and shot someone. The boyfriend, Falconer recalled, was Johnny Brown, the man from whom Cobb claimed to have purchased the watch. Upon retrial, Cobb and Tillis were acquitted at a bench trial on the strength of the testimony of Falconer, who by then was an assistant state's attorney in neighboring Lake County.¹⁶¹ Fourteen years later, Governor George Ryan pardoned Cobb and Tillis based on actual innocence.¹⁶²

ROLANDO CRUZ AND ALEJANDRO HERNANDEZ

Cruz and Hernandez were twice convicted of the 1983 abduction, rape, and murder of 10-year-old Jeanine Nicarico.¹⁶³ They initially were tried together and sentenced to death based primarily on inculpatory statements attributed to both men by DuPage County authorities.¹⁶⁴ In addition, six witnesses with incentives to lie testified at the trials, four claiming Cruz had admitted the crime and two claiming Hernandez had. False forensic testimony regarding shoe print evidence found at the crime scene also was introduced into evidence.¹⁶⁵ Shortly after the trial, Brian Dugan, a repeat sex offender, admitted that he alone committed the crime.¹⁶⁶ On direct appeal, in which Dugan's confession was not a factor, the Illinois Supreme Court reversed the convictions on the ground that the defendants' trials should have been severed.¹⁶⁷ At separate re-trials, prosecutors contended that Dugan was lying and that, if he had been involved in the crime at all, he had committed it with Cruz and Hernandez.¹⁶⁸ The trials culminated in another death sentence for Cruz and an 80-year sentence for Hernandez.¹⁶⁹ After affirming the second Cruz conviction and death sentence, the Illinois Supreme Court granted a

¹⁶¹ Alexandroff, *supra* note 56, at 1.

¹⁶² Ray Long & Steve Mills, *3 Ex-Death Row Inmates Can Sue After Pardons by Gov. Ryan*, CHI. TRIB., June 20, 2000, § 3, at 3.

¹⁶³ *People v. Cruz*, 643 N.E.2d 636, 639 (Ill. 1994).

¹⁶⁴ *Id.* at 639-40.

¹⁶⁵ Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at 1.

¹⁶⁶ *Cruz*, 643 N.E.2d at 645.

¹⁶⁷ *People v. Cruz*, 521 N.E.2d 18 (Ill. 1988); *People v. Hernandez*, 521 N.E.2d 25 (Ill. 1988).

¹⁶⁸ William Grady, *Prosecutors Blast Dugan's Claim That He Killed Jeanine Nicarico*, CHI. TRIB., Apr. 15, 1992, at 3.

¹⁶⁹ *Id.*

rehearing and reversed the conviction based on judicial error.¹⁷⁰ Subsequently, in an unpublished opinion, the Illinois Appellate Court ordered a new trial for Hernandez on the same ground.¹⁷¹ By now DNA testing had excluded Cruz and Hernandez as sources of biological material recovered in the case and linked Dugan alone to the crime.¹⁷² Even so, prosecutors refused to drop the case and proceeded to try Cruz a third time.¹⁷³ At the trial, a sheriff's lieutenant acknowledged that he had falsely corroborated the inculpatory statement that had been attributed to Cruz at the previous trials.¹⁷⁴ The trial judge then directed a verdict of not guilty for Cruz.¹⁷⁵ Prosecutors subsequently dropped the charges against Hernandez.¹⁷⁶ Both men were granted pardons based on innocence in 2002.¹⁷⁷

GARY GAUGER

Gauger was sentenced to death for the 1993 murder of his parents at their McHenry County farm.¹⁷⁸ The conviction stemmed primarily from an alleged confession that the authorities claimed Gauger made during interrogation.¹⁷⁹ The prosecution also relied in part on a jailhouse informant, a twice-convicted felon, who testified that Gauger admitted the crime. Nine months after the verdict, the trial judge reduced the sentence from death to life in prison.¹⁸⁰ In an unpublished decision in 1996, the Illinois Appellate Court reversed the conviction on the ground that the purported confession should have been suppressed at the trial because it was the fruit of an arrest without probable cause.¹⁸¹ With no remaining

¹⁷⁰ *People v. Cruz*, 643 N.E.2d 636 (Ill. 1994).

¹⁷¹ Art Barnum, *Hernandez Gets Ready for 4th Trial; Nicarico Defendant Back in DuPage Jail*, CHI. TRIB., July 8, 1995, at 5.

¹⁷² Jeffrey Bils & Ted Gregory, *Hernandez Begins Planning for His Future; Prosecutors to Announce Decision on Trial*, CHI. TRIB., Dec. 8, 1995, at 1.

¹⁷³ Andrew Martin, *New Trial for Cruz is Set in Motion; Order Returns Defendant to DuPage*, CHI. TRIB., Aug. 12, 1994, at 2.

¹⁷⁴ Maurice Possley, *The Nicarico Nightmare; Admitted Lie Sinks Cruz Case*, CHI. TRIB., Nov. 5, 1995, at 1.

¹⁷⁵ *Id.*

¹⁷⁶ Bils & Gregory, *supra* note 84.

¹⁷⁷ 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.

¹⁷⁸ Charles Mount, *Doubt Told in Murder Conviction; Confession Coerced, Gauger Lawyer Says*, CHI. TRIB., Feb. 7, 1996, at 1.

¹⁷⁹ Carolyn Starks, *Ex-Death Row Inmate's Suit Dealt Setback; Wrongful-Prosecution Case Trimmed by Judge*, CHI. TRIB., Apr. 11, 2000, at 1.

¹⁸⁰ Mount, *supra* note 178.

¹⁸¹ Charles Mount, *Lawyer Protests New Murder Trial*, CHI. TRIB., Apr. 11, 1996, at 1.

evidence, other than the jailhouse informant's dubious testimony, prosecutors dropped the charges and set Gauger free, although they continued to insist publicly that he had committed the crime. A year later, Gauger's innocence became apparent when a federal grand jury in Milwaukee indicted two members of a motorcycle gang on multiple counts of racketeering, including the murder of Gauger's parents. One of the Outlaws, James Schneider, pleaded guilty in 1998, and the other, Randall E. Miller, was convicted in June of 2000.¹⁸² At Miller's trial, federal prosecutors played tape recordings in which Miller was heard boasting that the authorities would never link him and Schneider to the murders because they had worn hairnets and gloves to avoid leaving physical evidence.¹⁸³ In 2002, Gauger received a gubernatorial pardon based on innocence.¹⁸⁴

MADISON HOBLEY

Hobley was sentenced to death for setting a 1987 fire that claimed the lives of his wife, infant son, and five other persons at an apartment building on the south side of Chicago.¹⁸⁵ The conviction rested entirely on an alleged confession attributed to Hobley by four Chicago police officers later shown to have engaged in systematic torture of suspects in criminal cases.¹⁸⁶ Hobley consistently maintained his innocence, claiming that four officers had tortured him and, when he still refused to confess, simply fabricated a confession.¹⁸⁷ In addition to the alleged confession, prosecutors presented two witnesses purporting to link Hobley to the purchase of a dollar's worth of gasoline, in a can, less than an hour before the fire.¹⁸⁸ Prosecutors also introduced into evidence a two-gallon gasoline can that a Chicago police detective testified he discovered at the fire scene.¹⁸⁹ Another Chicago police detective, who testified as an arson expert for the prosecution, told the jury that a burn pattern on the floor in front of the Hobley apartment indicated that gasoline had been poured there.¹⁹⁰ The Illinois Supreme Court upheld Hobley's conviction and death sentence,

¹⁸² Dave Daley, *Biker is Convicted of '93 Killings of Richmond Couple Another Outlaw Found Guilty in Murder of Hell's Angel on Northwest Side in '95*, CHI. TRIB., June 16, 2000, at 3.

¹⁸³ Dave Daley, *Biker Discusses Killings on Tape Played in Court*, CHI. TRIB., Apr. 25, 2000, at 2.

¹⁸⁴ Mills & Long, *supra* note 177.

¹⁸⁵ *People v. Hobley*, 637 N.E.2d 992, 996 (Ill. 1994).

¹⁸⁶ *Id.* at 998-99.

¹⁸⁷ *Id.* at 998.

¹⁸⁸ *Id.* at 997.

¹⁸⁹ *Id.* at 999.

¹⁹⁰ *Id.* at 997.

calling the evidence "overwhelming."¹⁹¹ The following year, Hobley's appellate attorneys filed a petition for post-conviction relief in the Circuit Court alleging that the authorities had illegally withheld a forensic report stating that the gasoline can introduced into evidence at the trial had been examined for fingerprints and that Hobley's were not on it.¹⁹² More important, the attorneys discovered that the authorities had withheld a group of reports showing that police had recovered a second gasoline can at the scene of the fire and had destroyed it.¹⁹³ The implication of these reports was not only that the fire had been set by someone other than Hobley but that the can introduced at the trial had been planted to corroborate Hobley's alleged confession. The Illinois Supreme Court found the new evidence sufficiently troubling to order an evidentiary hearing.¹⁹⁴ At the hearing, a defense arson expert testified that the can bore no signs of exposure to extreme heat that destroyed other items in the area where it purportedly had been found; not even the plastic cap on the can had been damaged. The defense expert also testified that, contrary to the prosecution expert's contention at the trial, there was no evidence of burn patterns outside the Hobley apartment. Rather, said the expert, tests showed that the fire started in a stairwell lower in the building. Despite the new evidence, the trial court denied relief. While the denial was being appealed in 2003, Governor George H. Ryan granted a pardon based on innocence. "Madison Hobley was convicted on the basis of flawed evidence," said Ryan. "He was convicted because the jury did not have the benefit of all existing evidence, which would have served to exonerate him."¹⁹⁵

STANLEY HOWARD

Howard was sentenced to death for the 1984 murder of Oliver Ridgell, who was shot and killed three years earlier during an alleged armed robbery as he sat in a parked car on the south side of Chicago in the company of a woman with whom he purportedly was having an affair.¹⁹⁶ Howard's conviction rested primarily on a confession obtained by police officers working under Area 2 Police Commander Jon Burge, who would be fired nine years later based on an internal investigation concluding that he and

¹⁹¹ *Id.* at 1011.

¹⁹² *People v. Hobley*, 696 N.E.2d 313, 325-26 (Ill. 1998).

¹⁹³ *Id.* at 326.

¹⁹⁴ *Id.* at 345.

¹⁹⁵ Governor George Ryan, Address at the DePaul Univ. College of Law, *supra* note 127.

¹⁹⁶ *People v. Howard*, 588 N.E.2d 1044, 1048-49 (Ill. 1991).

various subordinates had systematically tortured criminal suspects.¹⁹⁷ In addition, the woman who had been in the car with Ridgell when he was slain identified Howard as the killer.¹⁹⁸ Until she made the identification, her husband had been the prime suspect in the slaying.¹⁹⁹ On direct appeal, the Illinois Supreme Court affirmed Howard's conviction and death sentence, saying that "the evidence of the defendant's guilt was overwhelming."²⁰⁰ After reviewing the facts in 2003, however, Governor George H. Ryan granted Howard a pardon based on actual innocence.

VERNEAL JIMERSON AND DENNIS WILLIAMS

In what became known as the Ford Heights Four case, Verneal Jimerson and Dennis Williams were sentenced to death for a 1978 double murder in a south suburb of Chicago.²⁰¹ Two other men, Willie Rainge and Kenneth Adams, also were convicted in the case and sentenced to prison for life and seventy-five years, respectively.²⁰² The four became suspects in the murder, kidnapping, and robbery of Lawrence Lionberg and Carol Schmal and the rape of Schmal after police received an anonymous tip from a man who lived near the murder scene.²⁰³ The caller was promptly identified as Charles McCraney.²⁰⁴ He placed Williams, Adams, and Rainge, but not Jimerson, at the scene at about the time the murders were believed to have occurred.²⁰⁵ Based on McCraney's claim, police interrogated seventeen-year-old Paula Gray, who was borderline mentally retarded.²⁰⁶ After lengthy interrogation, Gray confessed. She said she had held a cigarette lighter burning continuously to provide light in an abandoned townhouse while the men repeatedly raped Schmal, who was then shot to death.²⁰⁷ According to Gray's statement, Lionberg was then taken to the edge of a nearby creek where Williams shot him to death.²⁰⁸ Before the men were

¹⁹⁷ *Id.* at 1049-50; MICHAEL GOLDSTEIN, CHICAGO POLICE OFFICE OF STANDARDS REPORT (Sept. 28, 1990); Sharman Stein, *Police Board Fires Burge for Brutality*, CHI. TRIB., Feb. 11, 1993, § 1, at 1.

¹⁹⁸ *Howard*, 588 N.E.2d, at 1049.

¹⁹⁹ *Id.* at 1060.

²⁰⁰ *Id.* at 1062.

²⁰¹ *People v. Jimerson*, 535 N.E.2d 889, 891-92 (Ill. 1989).

²⁰² *Id.* at 892.

²⁰³ *People v. Williams*, 588 N.E.2d 983, 989 (Ill. 1991).

²⁰⁴ *Id.*

²⁰⁵ *People v. Jimerson*, 652 N.E.2d 278, 281 (Ill. 1995).

²⁰⁶ *Williams*, 588 N.E.2d at 989.

²⁰⁷ *Jimerson*, 535 N.E.2d at 893.

²⁰⁸ *Id.*

brought to trial, Gray recanted, saying the police had coerced her to make a false statement.²⁰⁹ In fact, she said, she knew nothing of the crime.²¹⁰

At that point, the charges against Jimerson were dropped, since Gray's confession was the only evidence linking him to the crime.²¹¹ Gray was charged with murder and perjury and put on trial with the men.²¹² Her case was tried simultaneously with the case against the men before the same judge but with separate juries.²¹³ In addition to McCraney's testimony placing the defendants at the scene, the prosecution presented forensic testimony incorrectly indicating that blood tests had included Williams among men who could have been the source of semen recovered from Schmal.²¹⁴ (A competent analysis later excluded Williams.) Gray was convicted along with the three male defendants and sentenced to fifty years for murder and ten years for perjury, the sentences to be served concurrently.²¹⁵ The Illinois Supreme Court affirmed the Adams conviction but reversed and remanded the cases of Williams and Rainge based on ineffective assistance of counsel.²¹⁶ The prosecution then made a deal with Gray to arrange for her release in exchange testifying not only against Williams and Rainge at their retrial but also against Jimerson, against whom capital murder charges then were reinstated.²¹⁷ Based primarily on her testimony, all three men were convicted.²¹⁸ McCraney also testified against all three men, belatedly claiming to have seen Jimerson at the crime scene.²¹⁹ Jimerson and Williams were sentenced to death and Rainge to life.²²⁰ The convictions and sentences were affirmed on direct appeal.²²¹ In post-conviction proceedings, however, Jimerson won a reversal based on prosecutorial misconduct.²²² Shortly thereafter, Gray recanted to Northwestern University journalism students.²²³ With her unavailable to

²⁰⁹ *People v. Williams*, 444 N.E.2d 136, 137 (Ill. 1982).

²¹⁰ *Williams*, 588 N.E.2d at 989.

²¹¹ *Jimerson*, 652 N.E.2d at 280.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Williams*, 444 N.E.2d at 141.

²¹⁵ *Jimerson*, 652 N.E.2d at 280.

²¹⁶ *Williams*, 444 N.E.2d at 143; *People v. Rainge*, 570 N.E.2d 431, 434 (Ill. App. Ct. 1983).

²¹⁷ *Jimerson*, 652 N.E.2d at 280.

²¹⁸ *Id.* at 281; *Williams*, 588 N.E.2d at 988; *Rainge*, 570 N.E.2d at 434.

²¹⁹ *Jimerson*, 652 N.E.2d at 281.

²²⁰ *Id.* at 281; *Williams*, 588 N.E.2d at 988; *Rainge*, 570 N.E.2d at 434.

²²¹ *Jimerson*, 535 N.E.2d at 909; *Williams*, 588 N.E.2d at 988; *Rainge*, 570 N.E.2d at 447.

²²² *Jimerson*, 652 N.E.2d at 288.

²²³ PROTESS & WARDEN, *supra* note 54, at 133-37.

testify, prosecutors agreed to DNA testing in the case. Meanwhile, the journalism students and a private investigator obtained a confession from one of the actual participants in the crime, Arthur (Red) Robinson. DNA testing then excluded Jimerson, Williams, Rainge, and Adams as sources of semen recovered in the case, and established that Robinson had raped Schmal. The innocent men were released and Robinson and two other participants in the crime, Juan Rodriquez and Ira Johnson, were convicted in the case.²²⁴ Cook County settled civil claims brought by the innocent men for \$36 million, the largest sum ever paid in a wrongful conviction case.²²⁵

RONALD JONES

Jones was sentenced to death for the 1985 murder and aggravated criminal sexual assault of a 28-year-old mother of three in an abandoned motel on the south side of Chicago.²²⁶ His conviction rested solely on a confession that he signed seven months after the crime.²²⁷ At trial, detectives testified that the confession was voluntary, but Jones claimed it had been beaten out of him.²²⁸ No physical evidence linked him to the crime; semen recovered from the victim was said to be too minute to test. On direct appeal, the Illinois Supreme Court affirmed the conviction and death sentence.²²⁹ In a post-conviction proceeding in 1997, however, the Supreme Court granted DNA testing, which established conclusively that Jones was not the source of the semen recovered from the victim.²³⁰ Prosecutors dropped all charges against Jones in 1999.²³¹

CARL E. LAWSON

Lawson was sentenced to death for the 1989 murder of his girlfriend's eight-year-old son, whose body was found in an abandoned church in East St. Louis.²³² The conviction rested on Lawson's shoe print found in the victim's blood at the scene.²³³ Lawson claimed he made the print when he discovered the boy's body, but a state forensic expert testified that, based

²²⁴ *Id.* at 226-28.

²²⁵ Zorn, *supra* note 97.

²²⁶ *People v. Jones*, 620 N.E.2d 325, 329 (1993).

²²⁷ *Id.*

²²⁸ *Id.* at 329, 332.

²²⁹ *Id.* at 339.

²³⁰ *People v. Jones*, No. 81357, 1997 WL 1113760, at *1 (Ill. July 30, 1997).

²³¹ Steve Mills & Maurice Possley, *Officials Often Insist Ex-Inmates Are Guilty*, CHI. TRIB., Oct. 27, 2003, at 1.

²³² *People v. Lawson*, 644 N.E.2d 1172, 1174 (Ill. 1994).

²³³ *Id.* at 1175.

on the degree of drying in 93-degree heat, the print had been left earlier.²³⁴ Before trial, Lawson made a *pro se* motion for independent forensic testing, but it was denied.²³⁵ The Illinois Supreme Court reversed the conviction and ordered a new trial on the grounds that the motion had been improperly denied and that Lawson's trial counsel was a former prosecutor who had represented the state at Lawson's arraignment.²³⁶ By this time, an alternative suspect had been identified and the state's shoe print theory was called into question. Still prosecutors tried Lawson two more times. At the first re-trial, the jury deadlocked, with eleven of its twelve members favoring acquittal. At the second re-trial, Lawson was acquitted. The alternative suspect died without ever being charged.²³⁷

STEVEN L. MANNING

Manning, a former Chicago police officer and FBI informant, was sentenced to death for the 1990 murder of his former business partner, James Pellegrino.²³⁸ The conviction and death sentence rested primarily on the testimony of a jailhouse informant, Thomas Dye, a cocaine dealer with a record of ten felony convictions dating to 1978.²³⁹ Dye had recently been sentenced to 14 years in prison on theft and firearms charges.²⁴⁰ While Dye and Manning were incarcerated together in the Cook County jail, Dye claimed that Manning had admitted the Pellegrino murder.²⁴¹ Since Dye's uncorroborated claim carried little credibility, prosecutors arranged for Manning to wear a wire during additional conversations.²⁴² In six hours of tape-recorded conversations, Manning said things casting himself in an unflattering light but said nothing incriminating about the Pellegrino murder.²⁴³ Prosecutors nonetheless proceeded with the case.²⁴⁴ At the trial, Dye claimed that Manning had repeated his earlier admission during two brief gaps on the tapes.²⁴⁵ The tape recordings, although irrelevant to the

²³⁴ *Id.*

²³⁵ *Id.* at 1187.

²³⁶ *Id.* at 1184-86, 1192.

²³⁷ David Protess & Rob Warden, *Nine Lives*, CHI. TRIB., Aug. 10, 1997, § 10 (Magazine), at 20.

²³⁸ *People v. Manning*, 695 N.E.2d 423, 428 (Ill. 1998).

²³⁹ *Id.* at 426.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 427.

²⁴² *Id.*

²⁴³ *Id.* at 431.

²⁴⁴ *Id.* at 431-32.

²⁴⁵ *Id.* at 431.

Pellegrino murder, were admitted into evidence.²⁴⁶ After testifying, Dye received a sentence reduction from 14 to six years.²⁴⁷ On direct appeal, the Illinois Supreme Court reversed Manning's conviction, holding that the trial court had erred in admitting the tape recordings and hearsay testimony from the victim's wife.²⁴⁸ Two years later, prosecutors dropped the charges.

LEROY ORANGE

Orange was sentenced to death for four murders that his half-brother, Leonard Kidd, testified he alone committed without Orange's participation or knowledge.²⁴⁹ The conviction rested primarily on a confession by Orange, which he contended had been extracted by torture at the hands of Chicago Police Lieutenant Jon Burge and other officers at Area 2 police headquarters on the city's south side.²⁵⁰ The only corroboration of the confession was a statement, also allegedly obtained through torture, from Kidd blaming the murders on Orange.²⁵¹ Before Orange's trial, Kidd recanted his statement and, against the advice of counsel, testified as a defense witness at Orange's trial, virtually assuring his own conviction and death sentence.²⁵² Although Orange and Kidd were eligible to be represented by the Cook County Public Defender's Office, they jointly retained a private lawyer. Despite the conflict inherent in representing co-defendants with conflicting defenses, the lawyer initially accepted both clients.²⁵³ The attorney did not investigate Orange's allegations that he had been tortured.²⁵⁴ After the jury returned a verdict of guilty, the attorney stipulated that Orange was eligible for the death penalty and presented no mitigating evidence. The conviction and death sentence were affirmed on direct appeal.²⁵⁵ In a post-conviction proceeding, however, Orange won a new sentencing hearing. The hearing was pending when, in 2003, Governor Ryan granted Orange a full pardon based on innocence.

²⁴⁶ *Id.* at 431-32.

²⁴⁷ Steve Mills & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, at 1.

²⁴⁸ *Id.* at 433-34.

²⁴⁹ *People v. Orange*, 521 N.E.2d 69, 71-72 (Ill. 1988).

²⁵⁰ *Id.* at 72.

²⁵¹ *People v. Orange*, 749 N.E.2d 932, 937 (Ill. 2001).

²⁵² *Orange*, 521 N.E.2d at 73.

²⁵³ *Id.* at 76.

²⁵⁴ First Amended Successor Petition for Post-Conviction Relief, *People v. Orange* (Cir. Ct. Cook County Oct. 15, 1991) (No. 85C667).

²⁵⁵ *Orange*, 521 N.E.2d at 81.

AARON PATTERSON

Patterson was sentenced to death for the 1986 murder of an elderly couple found stabbed to death in their home on the south side of Chicago.²⁵⁶ The conviction rested on a confession,²⁵⁷ fabricated by a group of south side police officers later shown to have engaged in systematic torture of suspects in scores of criminal cases. Immediately after signing the confession, Patterson used a paper clip he found to scratch into a metal bench: "Police threatened me with violence slapped and suffocated me with plastic . . . signed false statement to murders."²⁵⁸ Among officers personally involved in obtaining the alleged confession was Jon Burge, then a lieutenant and later Area 2 police commander.²⁵⁹ The only corroboration of Patterson's purported confession was the testimony of a sixteen-year-old girl who was a cousin of an alternative suspect in the case.²⁶⁰ She testified that Patterson had admitted the crime to her but later signed an affidavit saying she had made up the confession because she was afraid of the police.²⁶¹ She said she attempted to recant before testifying, but changed her mind after a prosecutor threatened her with jail. On direct appeal, the Illinois Supreme Court affirmed the conviction, holding that Patterson's confession had been voluntary.²⁶² A month later, a report by the Police Office of Professional Standards was made public documenting "methodical" and "systematic" torture involving the Burge crew.²⁶³ Patterson filed a petition seeking post-conviction relief based on the report.²⁶⁴ The trial court dismissed the petition,²⁶⁵ but the Supreme Court ordered an evidentiary hearing on whether Patterson's trial counsel had been ineffective for failing to present evidence that the confession had been involuntary and "substantial new evidence" supporting Patterson's torture claim.²⁶⁶ The hearing was pending when Governor George Ryan granted Patterson a pardon based on innocence in 2003.

²⁵⁶ *People v. Patterson*, 610 N.E.2d 16, 21-22 (Ill. 1992).

²⁵⁷ *Id.* at 23-25.

²⁵⁸ *Id.* at 28, 33.

²⁵⁹ *People v. Patterson*, 735 N.E.2d 616, 626 (Ill. 2000).

²⁶⁰ *Patterson*, 610 N.E.2d at 23.

²⁶¹ *Id.*

²⁶² *Patterson*, 610 N.E.2d 16.

²⁶³ *Patterson*, 735 N.E.2d at 642.

²⁶⁴ *Id.* at 624.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 646.

ANTHONY PORTER

Porter was sentenced to death for the 1982 murders of two teenagers in Washington Park on the south side of Chicago.²⁶⁷ The conviction resulted from false eyewitness testimony, ineffective assistance of counsel, and apparent police misconduct. Immediately after the shooting, police interviewed a witness, William Taylor, who had been swimming in the park pool.²⁶⁸ Taylor at first said he had not seen the person who committed the crime but later said he had seen Porter run by the pool right after hearing shots.²⁶⁹ Then, after some seventeen hours of interrogation, Taylor told police that he actually had seen Porter shoot the victims. Although it was physically impossible for Taylor to have seen the shooting, Porter's attorney failed to visit the scene or hire an investigator. Taylor's testimony became the principal evidence used to convict Porter, who proceeded to lose his appeals.²⁷⁰ Porter's family made his funeral arrangements and he was just fifty hours away from execution when he won a reprieve from the Illinois Supreme Court. The reprieve was granted not out of concern that Porter might be innocent but solely because he had tested so low on an IQ test that the court was not sure he could comprehend what was about to happen to him, or why. The court's intent was merely to provide time to explore the question of the condemned man's intelligence, but the reprieve had an unanticipated consequence of giving a team of Northwestern University journalism students and a private investigator time to investigate the case and establish Porter's innocence. In late 1998, Taylor recanted, saying he had been pressured by police to falsely identify Porter. In early 1999, the private investigator obtained a video-recorded confession from the actual killer, Alstory Simon. Prosecutors moved to vacate the conviction. They agreed to release Porter on recognizance bond and proceeded to drop all charges. In September of 1999, Simon pleaded guilty to two counts of second degree murder and was sentenced to 37.5 years in prison.

STEVEN SMITH

Smith was sentenced to death for the 1985 murder of an off-duty Illinois Department of Corrections official who was shot to death outside a tavern on the south side of Chicago.²⁷¹ The conviction was the result of

²⁶⁷ *People v. Porter*, 489 N.E.2d 1329, 1329-30 (Ill. 1986).

²⁶⁸ *Id.* at 1331.

²⁶⁹ *Id.* at 1330-31.

²⁷⁰ *Id.* at 1329; *Porter v. Gilmore*, 523 U.S. 1042 (1998); *Porter v. Gramley*, 112 F.3d 1308 (7th Cir. 1997); *People v. Porter*, 647 N.E.2d 972 (Ill. 1995).

²⁷¹ *People v. Smith*, 565 N.E.2d 900, 902 (Ill. 1990).

prosecutorial misconduct and erroneous eyewitness testimony from a witness who had an incentive to lie.²⁷² Smith, who had been drinking in the bar, was charged with the crime after he was identified by a woman who claimed to have seen the crime.²⁷³ Her testimony was dubious for several reasons. First, she admittedly had been smoking crack cocaine.²⁷⁴ Second, she claimed the victim had been alone when the killer stepped out of shadows and fired the fatal shot when in fact two women were standing beside the victim when he was shot.²⁷⁵ Third, the woman's boyfriend had been an alternative suspect in the crime.²⁷⁶ Finally, she had been across the street when the crime occurred,²⁷⁷ and, while she positively identified Smith, the two women standing beside the victim did not identify Smith.²⁷⁸ The prosecution claimed that witnesses had been intimidated by a street gang to which Smith belonged.²⁷⁹ The Illinois Supreme Court ordered a new trial based on "incompetent and inflammatory evidence and accompanying prosecutorial remarks" relating to street gang activity.²⁸⁰ On remand, in a trial that was a replay of the first without the prosecutorial misconduct, Smith was again convicted and again sentenced to death. On direct appeal this time, the Supreme Court unanimously held that no reasonable trier of fact could have found the testimony of the state's star witness credible and reversed the conviction outright, ordering Smith's immediate release.²⁸¹

GORDON (RANDY) STEIDL

Steidl was sentenced to death for the 1986 murders of a newly wed couple in Edgar County. The conviction rested on the testimony of two witnesses, Deborah Reinbolt and Darrell Harrington. Reinbolt claimed to have been present when Steidl and a co-defendant repeatedly stabbed the victims and set their home afire. She was charged with concealing the homicidal deaths and, pursuant to a plea agreement, was sentenced to two years in prison. Harrington claimed to have been in a car outside when the crime occurred. The evidence also included the testimony of a jailhouse

²⁷² *Id.* at 917.

²⁷³ *Id.* at 902-03.

²⁷⁴ *People v. Smith*, 708 N.E.2d 365, 368 (Ill. 1999).

²⁷⁵ *Smith*, 565 N.E.2d at 906.

²⁷⁶ *Id.* at 905-06.

²⁷⁷ *Id.* at 903.

²⁷⁸ *Smith*, 708 N.E.2d at 370.

²⁷⁹ *Smith*, 565 N.E.2d at 911.

²⁸⁰ *Id.* at 917.

²⁸¹ *Smith*, 708 N.E.2d at 371.

informant who claimed Steidl had told him that, if it had occurred to him that Harrington would come forward, "he would have definitely taken care of him." After the trial, Reinbolt recanted her trial testimony before a court reporter. On direct appeal, the Illinois Supreme Court affirmed the conviction.²⁸² Thereafter, Harrington also recanted his trial testimony. Reinbolt again recanted, but subsequently, in a video-taped statement taken by prosecutors, recanted the recantation. The trial court denied Staddle's post-conviction petition and the Supreme Court once again affirmed his conviction but vacated the death sentence as a result of ineffective assistance of counsel at the sentencing phase of the trial. Steidl was re-sentenced to life. Meanwhile, Steidl's appellate attorneys developed new evidence indicating Reinbolt had been at work when the crime occurred and could not have witnessed it, that a knife that Reinbolt had testified was the murder weapon in fact was not (its blade was too short), and that a lamp in the victims' bedroom that Reinbolt testified had been broken during the crime actually was broken by firemen after they extinguished the fire. Based on the new evidence, the U.S. District Court granted a federal writ of habeas corpus, ordering a new trial, on the ground that Steidl's trial attorney had failed to pursue exculpatory evidence. Steidl's "acquittal was reasonably probable if the jury had heard all of the evidence," said the habeas judge.²⁸³ Illinois Attorney General Lisa Madigan declined to appeal and prosecutors dropped the charges against Steidl in 2004.²⁸⁴

²⁸² *People v. Steidl*, 568 N.E.2d 837 (Ill. 1991).

²⁸³ *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003).

²⁸⁴ Steve Mills, *State Won't Appeal Retrial Order*, CHI. TRIB., Mar. 26, 2004, § 3, at 3.

APPENDIX B

FACTORS IN WRONGFUL CONVICTIONS IN POST- *FURMAN* ILLINOIS CAPITAL CASES

Defendant	Cooperating Witness(es)	False Confes- sion(s)	Erroneous Identifica- tion(s)	Ineffective Assistance	Junk Science	Official Misconduct
Burrows	X	X				
Cobb	X		X			
Cruz	X	X				
Gauger	X	X				
Hernandez	X	X				X
Hobley	X	X			X	X
Howard	X	X	X			X
Jimerson	X	X	X			X
Lawson					X	
Jones		X				X
Manning	X					X
Orange		X		X		X
Patterson	X	X		X		X
Porter			X	X		X
Smith	X		X			X
Steidl	X		X	X		
Tillis	X		X			
Williams	X	X	X	X	X	