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Governor Ryan's Capital Punishment Moratorium and the Executioner's Confession: Views from the Governor's Mansion to Death Row

Authors

Norman L. Greene, Governor George H. Ryan, Donald Cabana, Jim Dwyer, Martha Barnett, and Evan Davis

**GOVERNOR RYAN'S CAPITAL
PUNISHMENT MORATORIUM AND THE
EXECUTIONER'S CONFESSION:
VIEWS FROM THE GOVERNOR'S MANSION
TO DEATH ROW**

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GOVERNOR GEORGE H. RYAN[‡]
DONALD CABANA*
JIM DWYER*
MARTHA BARNETT*
EVAN DAVIS[^]

My name is Norman Greene. I chair the Committee on Capital Punishment at the Association of the Bar of the City of New York. We are sponsoring this program along with Ronald Tabak, who is the Chair of the Civil Rights Committee at the Association. This is a night of both joy and sadness. We are delighted that Governor Ryan, New York Daily News Columnist Jim Dwyer and American Bar Association President Martha Barnett are here with us. Unfortunately, one of our speakers, Donald Cabana, was ordered by his doctors to stay home due to his heart condition. Fortunately, Donald Cabana has prepared written remarks to be given after the conclusion of Governor Ryan's talk. The order of presentation will be as follows:

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Governor Ryan will speak to us first, followed by Jim Dwyer. Mr. Dwyer is a Pulitzer Prize winning columnist who has recently published the groundbreaking work "Actual Innocence," with co-authors Barry Scheck and Peter Neufeld.¹ He is also an author of two columns on Donald Cabana. Following Jim Dwyer's presentation, Martha Barnett, the President of the American Bar Association, will speak. Ms. Barnett is making the establishment of a national moratorium the principal goal of her tenure as ABA President. At the end of the program, Evan Davis, President of the Association of the Bar of the City of New York, will make concluding remarks.

Due to his stand on declaring a moratorium in Illinois on executions, Governor Ryan has inspired the nation on one of the most important civil rights movements of our time: the steady movement away from capital punishment. In speaking about Governor Ryan and capital punishment today, I would like to stress two things about his proclamation of a moratorium in the State of Illinois: authenticity and risk. Why does the Governor speak with an authentic voice? And why do we listen to him so closely? It is because he has been in the trenches. He is like the war hero who comes back home—after fighting the enemy—and then goes on to oppose the war. He knows what he is talking about. He has been the holder of the power of life and death; and he has voted in favor of life. Additionally, he has allowed death to happen.

He has held the clemency power, which Governor Pat Brown of California² called "an awesome, ultimate power over the lives of others that no person or government should have or crave." In addition, former Ohio governor Michael DiSalle has called it "a temporary Godlike power."³

¹ BARRY SCHECK, PETER NEUFELD, & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

² See EDMUND G. BROWN WITH DICK ADLER, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* 163 (1989). Governor Pat Brown, who served in the 1950s and 1960s and became an opponent of capital punishment, wrote about it in a book about this issue. See *id.* at 121–22 (describing his decision to commute death sentences to ensure fairness and justice, despite the justifiable anger created by the terrible details of crimes).

³ See MICHAEL V. DISALLE WITH LAWRENCE G. BLOCHMAN, *THE POWER OF LIFE OR DEATH* 5 (1965). DiSalle was the governor of Ohio in the 1960s and an opponent of capital punishment, who allowed some to be electrocuted and granted clemency to others and who also spoke of the power in his book. See *id.*

So where is the risk? Why is it risky to say, as Governor Ryan said: "Until I can be sure, with moral certainty, that no innocent man or woman is facing a lethal injection, no one will meet that fate?"⁴

Why is it risky for him to say that the state's taking of an innocent life is the "ultimate nightmare?" Should that be a risky thing to say—no execution of the innocent? No, that is one of the values that makes this country unique.

Why should it be risky to appoint a commission to provide a comprehensive study of capital punishment as Governor Ryan did? It should not be; but it is. At a time when people have said that favoring capital punishment over abolition is political suicide, Governor Ryan stuck to his values and held out for preserving life.

In an election year where many candidates for public office proclaimed that they favored capital punishment because it is known to be a deterrent to murder, he said: "No more. Stop." And at a time when the leader of his party has a record of numerous executions while he has been governor in his State of Texas, Governor Ryan still asserts: "Not in my state."

Judges have been rejected for confirmation or turned down by voters in judicial elections when they are viewed as opponents of capital punishment, or when they have simply reversed capital convictions. Although the history of capital punishment reflects the execution of the innocent or their near execution, the public opinion polls still say that a majority supports the death penalty.

There are still those who would react as the newspapers in Governor Michael DiSalle's day reacted. DiSalle reported his experiences by stating that: "Most Ohio newspapers cried out in editorial horror and indignation each time I exercised clemency; they spoke in whispers each time I allowed a man to die."⁵

Also, DiSalle recounted that there were times "whenever I

⁴ The most significant moment in the current movement to abolish the death penalty may have been Governor Ryan's halt of executions. See ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH?* 241-42 (2000) (stating that the most significant moment in the current movement to abolish the death penalty may have been Governor Ryan's halt of executions and noting that "it is officials like Ryan—tough-minded but extremely troubled by their personal responsibility—who will ultimately bring an end to executions in this country, much as they did throughout Europe").

⁵ DISALLE, *supra* note 3, at 27.

extended mercy to a prisoner, the sensational press and my political enemies, knowing I had long been opposed to capital punishment, would accuse me of encouraging crime by coddling criminals.”⁶

This gentleman from the State of Illinois, a Republican Governor, nevertheless said “not in my State you won’t.” This is the essence of courage and the definition of leadership.

Before becoming the Governor of Illinois, Mr. Ryan had a distinguished career in Illinois government. Elected in 1998, it seems like he has been with us even longer than that. Although his term just commenced in 1999, he is a well-known figure in Illinois politics. He is not an attorney; he is a pharmacist. He served as the Secretary of State in Illinois from 1991 to 1999 and as the lieutenant governor from 1983 to 1991. He also served in the Illinois legislature from 1973 to 1983 and was elected to office five times, including two terms as House Republican leader and one term as Speaker of the House of Representatives. Now, I introduce Governor Ryan.

Governor George H. Ryan

I would like to thank Evan Davis, President of the Association of the Bar of the City of New York. I want to acknowledge a real advocate for justice: a woman who I have known for only a few months, but whose passion for improving our country’s justice system is unparalleled in today’s society. This woman is the President of the American Bar Association, Martha Barnett. Martha and I met in Atlanta not too long ago, where some of these folks have heard a lot of this speech tonight. For those of you that tend to nod off, I will know that you have heard it. Last night, I was at Harvard Law School and had an opportunity to speak to some of the law students. There were at least 200 of them, which was very enlightening for me. I also want to recognize Ron Tabak, who has co-chaired the Death Penalty Committee of the American Bar Association’s Section of Individual Rights and Responsibilities. Both Martha and Evan, and perhaps others here, have heard my talk to the American Bar Association Conference on the Death Penalty just a couple of months ago. What I did was share my experience in Illinois and how I was presented with the evidence of a clearly broken justice

⁶ *Id.* at 3.

system when it came to the state's death penalty. Under Martha Barnett's leadership, the ABA is now reviewing its long-standing call for a nationwide moratorium on executions until reforms can be made for that system. I think that the next federal execution is coming up shortly, on the twelfth of December in Indiana.

I never felt it was my place, because I have taken this stand, to tell other governors or other elected leaders, what to do on this difficult issue. I think everybody understands how serious it is, and they have to be comfortable with their own situation and their own laws and understand that laws from state to state vary. I have been asked on many occasions if I would discuss this with [now President, then Governor] George W. Bush because of the number of executions that have gone on in Texas. However, George W. Bush and I have different powers.

My powers are a lot broader and more sweeping than the powers of Mr. Bush. As I understand it, he can only stay an execution for thirty days, while I can commute an execution. In fact, I can do just about anything that I decide to do short of killing somebody. As a result, I have never told other governors or other elected officials what they have to do. They have to be comfortable with their own system, and if they are not, then they have to make some attempt to change. So my topic for discussion tonight is to talk about Illinois' experience with capital punishment and how I reacted to the evidence about how well our system worked (or I should say didn't work).

We all know that there is absolutely no margin for error when it comes to the death penalty and where the state takes the ultimate and the irreversible act of the taking of another person's life. This is what I want to talk to you about tonight. I relate my experience to you and I share it with you because, frankly, I believe it is important that we talk about this issue. Maybe I do not want to talk directly to other elected officials, but maybe we could make them think about what is going on in their state or what we are doing at the federal level about an issue that we all know is very difficult and complicated.

In addition, I want to tell you how honored I am to have the opportunity to come before this prestigious group. This is probably one of the most intellectual bar associations in the country, and I am very honored to have the opportunity to stand before this distinguished group. I have been in public service for more than thirty years. During that time, I was a county board

member, a legislator, an executive office-holder, and always a staunch supporter of the death penalty. However, I also spent forty-three years in the pharmacy business in a little town called Kankakee in Illinois. My family and I had four or five pharmacies, and operated those neighborhood pharmacies for forty-three years, up until 1991. I mention this as a way of background and where much of my thought process evolves from.

Like a lot of other elected officials, I once believed that there were crimes that were so heinous that the death penalty sentence was the only proper societal response. I supported the death penalty when I was in the Illinois General Assembly. I spoke for the death penalty, I voted for the death penalty, and I believed in the death penalty. I was a part of the great American body who saw a nation in the grip of increasing crime rates, inner cities becoming armed camps, and an ever-growing violence in our streets, in our schools, and sometimes even in our places of worship. Tough sentences, longer prison terms, more jails, and strict imposition of the death penalty—those were the answers that we all saw, or at least a lot of us saw. Catch them, convict them, lock them up, and throw away the key—that was good government and that was what the people wanted. That is basically what they got all across America—but at what price?

As a member of the Illinois General Assembly, I can vividly recall back when we reinstated the death penalty in Illinois. I was on the floor of the Illinois House, and I voted to support the bill. As with all assemblies, a board up on the wall indicates what your vote is—green means “yes” and red means “no.” The bill was passing and I was for it and I believed in it, and I punched my button green. I was going to vote for the death penalty, and I did. One of the opponents of the death penalty rose and said, “Would any of you that are supporting this bill be willing to throw the switch?” In those days it was electrocution. “Who would be willing to throw the switch?” Well, I want to tell you, that gave me a great reason to pause and think about what I was doing, but I believed in the death penalty and I thought it was the right thing. So I gave some words of unqualified support to the death penalty that I regret, but it is one of those things that I once believed in.

The fact is, now as governor, I do control the switch; the responsibility is mine, and it is one awesome responsibility. Much has happened since those days to shake my faith in the

death penalty system. Let me tell you that until I voted on this back in 1977, I had not given a whole lot of thought to the death penalty because I did not interact with it, and I think most Americans are like that today. They think that if somebody kills or maims another person, they should pay a pretty heavy price. But in the case of a heinous murder or a crime where they have taken another life, they scream for us to do whatever we have to do to expel them from society. Many people believe this because they have never had a first-hand understanding of the meaning of it, which I can relate to. Until I became governor, I never really had to deal with it first-hand. I thought about throwing the switch when I voted for it; but it was a flash and I never gave it a second thought. I know a lot more now about the administration of the death penalty in Illinois, and of course, the more I have learned, the more troubled I have become.

Earlier this year, in addition to declaring the death penalty moratorium, I established a commission to do a complete re-evaluation of the forty-year old Illinois criminal code. Over those forty years, there has been a lot of crazy patchwork done to our laws—our uniform code in Illinois. It has become contradictory and duplicative, and our sentences have been twisted beyond what was originally conceived, and probably beyond what simple justice really required. Thus, a study of the imposition of sentences can certainly lead any reasonable person to see the discriminatory disparities that are in the system. I offer this so that everyone would know that my concern with the death penalty is not just a singular issue; my concern is with the entire criminal justice system and the entire justice system. Earlier this year, I declared a moratorium on executions in Illinois when I declared, "Until I can be sure with moral certainty that no innocent person would be put to death, nobody would meet that fate as long as I was governor." I appointed a commission to deliberate on the issue and to bring me their recommendation.

That was almost a year ago; it will be a year next month. I will not sign off on any death sentences until I am absolutely certain that the individual is guilty and all rights have been preserved and safeguarded. Now, I do not know if we could ever get to that point. I do not know whether that could ever happen or not, but I think that in all fairness, we have to stop, take a look at it, and put some bright minds into studying it and to make some recommendations, and that is what I did. So until

that is done, nobody is going to be executed in Illinois as long as I am the governor.

I want to take you back to the fall of 1998. That was the year that I was running for the position of Governor of Illinois. At the same time, there was a death row inmate filing a last ditch appeal, an appeal that would set in motion the events that would change the way I viewed the system of capital punishment. In September of 1998, a fellow by the name of Anthony Porter was on death row. He had been convicted in 1982 of the shooting death of a man and woman in the south side of Chicago park. His execution was scheduled for September 23rd of that year. He had ordered his last meal, he had been fitted for his burial clothes, and he was two days away from the death penalty. But two days before he was to die, his lawyer wanted a last minute temporary reprieve because of his I.Q.

He had an I.Q. of fifty-one and there were questions about whether Mr. Porter was competent to understand what was really happening to him and whether he could help in his appeals, let alone face the death penalty. I have never met Anthony Porter, but I have seen him on television. He is kind of a delightful guy if you see him. He is a little different; he wears his hair a little funny and wears a hat. He has probably been in trouble with the law most of his life as a result of the environment where he grew up. But I believe in my heart that he would never kill anybody. Other than what I have seen of him and how he reacts, I had no reason to feel that way. I believe he probably got in the way of some local police people; however, this is not an accusation, only an assumption. They had just had it with Anthony Porter. Most likely, he probably had been in trouble here, there, and everywhere, having been in constant trouble with the law. The police probably said, "Here is our chance to get rid of this kid." This is a somewhat overaggressive proposition, but I think it could really be the case. But with the delay that he received, we had some journalism students from Northwestern University, led by their professor David Protess, who began their own investigation into the Anthony Porter case. Porter's case was then sixteen years old. Here is a fellow that sat on death row for sixteen years, knowing that he was innocent. Maybe he knew—I do not know. He had an I.Q. of fifty-one, so I am not quite sure what he knew. But I do not care what he knew; he was on death row for sixteen years.

With the help of a private investigator, the students picked apart the prosecution of Anthony Porter. Key witnesses, like one who claimed that he saw Porter do the shooting at the crime scene, recanted their testimony. Now the witnesses were saying that Anthony Porter did not do it. The students then followed their lead to Milwaukee, where they had a private detective who obtained a videotaped confession of a man named Allstory Simon. Simon told the private investigator, in a recorded conversation, that he shot the two victims in that park in the south side of Chicago because they were in an argument over drug money.

With that new evidence, the charges were dropped against poor little Anthony Porter, and he was freed in February of last year. The charges against him were wrong; and he was almost put to death wrongfully. Now here is a guy who, when it was all over, spent eighteen years on death row. Sometimes you get aggravated about spending five minutes in a traffic lane someplace. Can you imagine spending eighteen years behind bars for nothing? I cannot imagine it. I cannot imagine a worse nightmare.

I had just been inaugurated into my first term as governor and quite frankly, I was kind of caught off guard. I did not really know how bad the system in Illinois was, and I could not believe that I could come that close to executing an innocent person. I came within two days of killing a man for a crime he did not commit. That is pretty frightening. But for the evidence produced by those highly motivated journalism students from Northwestern University and Professor Protes, Anthony Porter would be dead and buried, killed by the State for a crime he did not commit. This really stunned me. I believed in the death penalty. I felt myself being jolted into a reexamination of all I believed in. If those young people of Northwestern never write or report another story, they have performed the highest order of their profession. They helped save the life of an innocent person.

Shortly after the Porter case, another death row inmate was exonerated. In this particular case, the Illinois Supreme Court ruled that the prosecution's case against a man named Steven Smith was founded on the testimony of a drug-addicted witness whose testimony had been contradicted by a lot of other witnesses. As a result, Smith was exonerated. At the same time, a case involving an individual by the name of Andrew

Corpialos came to my desk. This was the first case I had in which I had to make a decision about the death penalty. Andrew Corpialos had been charged with the brutal rape and mutilation murder of a twenty-one year old woman that he had just grabbed off the street. He had also been involved with a gang and had committed several other mutilation murders. But after the mistakes that the system had made, especially in the Porter case, I agonized over what I should do. It is a tough decision. I am a father of five daughters and thirteen grandchildren, nine of whom are female. Here is a guy that took a twenty-one year old woman off the street, cut her into pieces, raped her, murdered her, and threw her away. So I agonized to make sure that we had the right guy, that he in fact did do this. I thoroughly reviewed the case files and I consulted with my staff. I called former veteran prosecutors. I talked to my lawyer friends who were involved. I requested information back from the Prisoner Review Board. I sent the case back and requested all of the information that was available for this case. I checked and doubled-checked and I triple-checked. I wanted to be absolutely sure that Andrew Corpialos was guilty of the crime he had been charged with and, in the end, I was sure. There was never a doubt in my mind, he was guilty of a monstrous, unspeakable crime, and he was executed. But it was probably the most emotional experience I have ever been through in my life. It was an exhausting experience and I would not wish it on anybody. It is a terrible power that you have and you have to know how to use it, what to do with it. It all came down to me: to follow the law and to throw the switch.

I am a pharmacist from Kankakee. As I stated earlier, I was in the pharmacy industry for forty-three years. I had the good fortune to get elected Governor of the State of Illinois. Anyone of you here could be elected the governor of your state or another death penalty state. You could be a student from Harvard; a judge or stockbroker from New York; or somebody that is not involved with the law, like myself, that now has that power. Whoever wins the highest office of the state has to make the final decision about death row inmates. Should they live or should they be executed? Should the state exercise that power? The state essentially being the governor, the governor has to decide if he is going to throw that switch. Quite frankly, that might be too much to ask of one person to decide. Whether you

own the drug store in Kankakee, or whether you are a stockbroker from New York, it really does not matter. But that experience was only the beginning of my questioning of the capital punishment system in Illinois and the subsequent torrent of revelations.

In May of 1999, DNA tests exonerated a death row inmate, Ronald Jones, for his involvement in a rape and a murder. As you all know, DNA is a very powerful tool for everybody that is involved in the criminal justice system. It can either convict the guilty or exonerate the innocent. So after the Porter case, I worked with the Illinois General Assembly to pass into law the Capital Litigation Fund to provide more money for public defenders and prosecutors to handle capital cases. It would provide funding for defense attorneys and prosecutors to hire experts to make DNA testing and a great deal of other emerging technologies available for them. To date, I put twenty-one million dollars into that fund, a great deal of money, and it provided resources for our lawyers and our prosecutors. It was a good start but it became very clear to me later that fall that it was really just a bad day for a capital punishment system that was badly broken.

The *Chicago Tribune* conducted an in-depth investigation, which most of you are probably familiar with, of the death penalty cases in Illinois last November.⁷ It is pretty startling. Half of the nearly three hundred capital cases in Illinois had been reversed for a new trial or a sentencing hearing. Half! You can imagine half, fifty-percent. Death row inmates have been represented at trial thirty-three times by attorneys who were disbarred or suspended from the practice of the law.⁸ Now, I am a pharmacist and I don't know how that happens. I cannot imagine that I could go to Indiana and practice pharmacy without a license, or practice law after I was disbarred. With that said, I could never walk into a courtroom and not have to prove my credentials while I am defending a poor, maybe innocent man or even a guilty person in a capital murder case. I still do not know how that happens.

⁷ Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment Into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1 (reporting on the first of a five-part series on the failure of the death penalty in Illinois).

⁸ *Id.*

We have thirty-five African Americans on death row in Illinois who have been convicted and condemned by an all-white jury.⁹ I just do not understand that. In fact, approximately two-thirds of the 160 Illinois death row inmates are African-American. Prosecutors, *The Tribune* found, used jailhouse informers to convict or condemn forty-six death row inmates.¹⁰ Now there is a reliable source of information. Guys have been thrown into jail and told, "If you will tell me about Norman, I give you six months off your penalty or I will make sure you get a pack of cigarettes every week." Whatever the deal is, I do not know. But it was clear that there are a lot of major questions about the system, and questions that I alone could not answer.

In January of this year, the thirteenth death row inmate was wrongly convicted of a murder for which he had been sentenced to die. His name is Steve Manny. He was no angel; believe me. He was an ex-cop who had been accused of corruption in the past and he had been convicted in Missouri of an unrelated kidnapping charge. But in Illinois, he had been sentenced to die for the murder of his former business partner and the conviction was secured by the testimony of a jailhouse informant. The Illinois Supreme Court, to its credit, was troubled by the informant and his testimony and sent the case back for retrial. But without the testimony of the jailhouse informant, the prosecutors dropped their charges against Mr. Manny.

Now I have to tell you, here is another fellow that could have gone to his death. I remember meeting with some of my staff shortly after the thirteenth inmate was exonerated. We were discussing some of the latest developments when I received a call from the Attorney General of the State of Illinois whose name also happens to be Ryan. He informed me that his office would soon have to request an execution date from the Supreme Court for an inmate who had exhausted all of his appeals. In Illinois, when the sentence comes down, the Attorney General has to go to the Supreme Court to get the date, the Court sends the date to us and we follow through with it. He said that he was ready to make the call to the Supreme Court and wanted to let me know. We discussed what to do for several days, and it was then that I

⁹ *See id.*

¹⁰ *Id.*

probably made the decision about what we were going to do with the death penalty because I did not want to go through the exhausting experience that I had been through in the Corpialos case. I knew that that call was going to be one of many that I was going to be receiving from the Attorney General in the next year as inmates exhausted their appeals.

So I asked myself, how could I go forward when we have so many questions about all this? When out of twenty-five people, we exonerated thirteen that we almost killed, how can we proceed with a system like this? There are a lot of unanswerable questions. There were questions about the fairness of the administration of the death penalty in Illinois, and in my heart, I just knew I could not go forward. I could not live with myself. I could not go through what I went through once already. I asked myself how could we come so close again and again and again, thirteen times in all, to putting a fatal dose of poison into someone's body that had been strapped to a gurney in a death chamber in my state.

I paint that picture because it is a picture that most people do not understand. I am sure you all do; but most people do not understand what it is all about. It was clear to me that when it came to the death penalty in Illinois, there was no justice in the justice system. So, on January the 31st [2000], I told the citizens of Illinois that I was going to declare the moratorium because of the grave concerns I had about the state's shameful record of convicting innocent people and putting them on death row. I cannot support such a system. Its administration has proven to be very fraught with error, and it has come extremely close to the ultimate nightmare. I do not know how to prevent another Anthony Porter. There is a good reason why Anthony Porter should have never gone to prison. Maybe he should have gone to another institution because he had an I.Q. of fifty-one. I really question a system that would prosecute, convict, and send a person with that capacity to his death. I question that entire system and those that are involved with it, as well as other people that may have paid the ultimate price for a crime they did not commit. I could not answer the question and there was no margin for error. I said that a public dialogue had to begin in Illinois on the question of the fairness of the application of the death penalty.

I have to tell you that, beyond my wildest imagination, the

reaction that we have had from around the world has stunned me. I had no idea that we would get the kind of reaction we have gotten from people all over this globe, let alone what we have heard from people here in the United States. I think we have had some discussion in Illinois for almost a year now. In March of this year, I empanelled a commission of fourteen concerned, smart, honorable people—people with legal minds like the former distinguished U.S. Court Chief, Judge Frank McGarr, former United States Attorney Tom Sullivan, and Cook County Public Defender Rita Fry. I called upon author and accomplished attorney Scott Turow. I included citizens like Roberto Ramirez, a first-generation immigrant from Mexico, who came to Chicago as a boy after his father was murdered. Roberto is a concerned, compassionate citizen and a very successful businessman. He has got a good head on him, and I think he is the kind of person who could sit with these legal scholars, judges, and prosecutors and maybe add a little temperament to the whole policy. I pressed back into service and spoke with an old friend of mine, former United States Senator, Paul Simon. Paul and I have been friends for a long time. I asked Paul to sit on that committee because he is a fair and decent guy, and he would add much to that committee.

I think I put together a pretty good group and since I have appointed them, they have had hearings throughout the State of Illinois. They have brought people in, including legal minds, prosecutors, and those that are hell-bent on the death penalty, and they asked them about it. We have had all kinds of people that have come before that commission, and I am anxious to hear what they have to say. All I told them was, "Go out and find out what you think is wrong with this system and tell me if it can be fixed, and if so how do we fix it." I have to know if it can be fixed and then I have to believe that it is fixed, not because they tell me that it is, but I have to know in my own heart that we are not going to nail another innocent person. I do not think there is any question that anybody who runs for public office wants to be tough on crime—that goes with the territory. It is probably the number one or number two issue when you are a candidate for anything. People ask about what your concerns are and they usually consist of education, crime, or transportation. Those are usually the top three, not necessarily in that order, but crime is always at the top of the list.

I am a strong proponent of tough criminal penalties, and I support laws or programs that will help police and prosecutors use their power in the right way to keep the drug-dealers, gunrunners, and dangerous criminals off the street. We have to ensure the safety of our public citizens, but in doing so we have an obligation to make sure that the ends of justice are served. That is what is important here, and you, as lawyers know that. It is fundamental for the American system of justice. When it comes down to the question of fairness, is the system fair? It is easy to be an ardent death penalty supporter when you do not have to make the decision, when you do not have to throw the switch and you do not have to decide who is going to live or die. It is pretty easy to say, "Kill 'em: An eye for an eye." But, when you sit in judgment, when you have the power to decide who is going to live or die, it is an awesome responsibility. In this country, governors have to make that ultimate decision and it is, irrefutably, the worst part of the job. I shudder when I think about going through that decision. I hope it never comes to me again. I never want to go through that again, and I cannot believe that anybody who would serve in public office would want that. Although there probably are some, like Ed Petka in the Senate, who we call "Electric Ed,"¹¹ he would gladly do it in a minute. But this is an awesome burden that we all have to shoulder and one that we have to do.

As we come here to do what we have to do, we have to do it together and that is part of the reason that I am out on this circuit, to talk about it. That is why I am glad to have the opportunity to be here tonight to talk to you about the death penalty. In Illinois, I believe that we did what needed to be done, and I could make that decision again in a heartbeat. I am comfortable knowing that what I did was the right thing. Everybody said here tonight, "What a hero you are," "Oh my God, how courageous that was." There is nothing courageous about it. What is courageous about it? In the paper, the figures jump off the paper and hit you in the face. It is a matter of right and wrong. It was not courageous, but it was the right thing to do.

As I stated earlier, I am not going to tell other governors or elected officials what to do. Each of us has to be comfortable

¹¹ See Michael Sneed, *Scoopsville*, CHICAGO SUN-TIMES, Dec. 7, 2000, at 4.

with our own systems and all I can do is share what we have done in Illinois. We recognized that there were questions, far too many questions, and there are many questions that we still do not have the answers to. That does not mean that we should not engage in a search for the truth. It does not mean that we do not need to clean this system up, and if there are problems in Illinois, then there are probably problems everywhere. Truth and fairness make up the bedrock of our judicial system. Part of the reason that I am rewriting the criminal code is my concern about the innocent person that may be sitting in jail for something less than a capital crime. As I said, I cannot imagine spending years in a prison knowing in your mind that you have not done anything wrong and have to go through that kind of torture. Our criminal justice does not have any room for a quest for convictions without regard for the truth, and our criminal justice system has no room for anything less than a vigorous defense for the criminally accused without a pursuit of the truth.

I have seen people that have been tried and charged with crimes that required the full force of the Federal Treasury. They would hire fifty-two FBI agents, thirty-two IRS agents, and whatever else you want to add. They essentially reach into the treasury and pull out the money they need to do it. On the other hand, you have some individual that may be a truck driver accused of carrying cocaine across the state line; and has to mortgage his house, sell his truck, and destroy his family because he does not have a treasury to reach into. Talk about justice. It is kind of like this, and it is not just in capital cases, it is in every case. Then, when it is over, if he is not found guilty, how does he get his reputation back? Where does he go to get his house and the mortgage back for his house, and how does he get his truck, his life, and his family back in shape? The American people can lead this pursuit by not taking the status quo for granted. Rather, Americans should challenge and question the current situation, and then petition the government to make the requisite changes. That is what this system is about, and the leaders of the American Bar Association can lead that pursuit for the sake of justice.

Your mission now is to look at the legal system in this country to make certain that it works for all people, both the poor people that cannot afford it, as well as the individuals of average income. Look at the system with a very jaundiced eye;

and remember that sometimes prosecutors are a little too zealous. But let me tell you, life is pretty short. When you talk about taking a year or even five minutes out of somebody's life, we are talking about something very important; and that is what it is all about. It is about what we do while we are here to make life just a little bit better for each person.

Norman L. Greene

Donald Cabana has had a long career as a prison warden, including jobs at the Mississippi State Penitentiary, Missouri State Prison for Women, and Alchua County Correctional Institution in Gainesville, Florida, and has served in deputy or acting warden positions at the Missouri State Penitentiary, and has had other experience in corrections.

Mr. Cabana is the author of the acclaimed *Death at Midnight: The Confession of an Executioner*,¹² where he describes, among other things, his two gas chamber executions in Mississippi. In describing these executions, he emphasized his close relationship with Connie Ray Evans, one of the persons he executed, who had become like a son to him. (He participated in a total of four executions, and although some say "only four," he says that "even one" is worth a lifetime.) In 1994, Mr. Cabana was an expert witness in a San Francisco case that challenged the use of the gas chamber in California.

Mr. Cabana has spoken about the death penalty in many university settings, has frequently appeared on television, and has been interviewed in several newspapers throughout the United States and Europe. Most recently, he was featured this morning in an extensive radio interview on WBAI-FM. When asked about the execution of Connie Ray Evans, Mr. Cabana replied: "He was condemned to die, and I was condemned to execute him." Mr. Cabana has also commented on the deleterious effects of capital punishment on the prison staff, including mental breakdowns. He said that every morning, after you are supposed to get up as if nothing happened, "you tuck lots of things away." Finally, he explained that after each execution, he felt as if something had died in him.

¹² DONALD A. CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* (1996).

Donald Cabana's Written Remarks

I am very disappointed that I cannot be with you this evening, but I have written some remarks. Far be it from a warden to miss an opportunity to address a captive audience.

Just a week ago, one of my students said that he would gladly stand in line to pull the switch (for an electrocution), drop the lever (for the gas chamber), or plunge the syringe (for a lethal injection). I am sure that you have heard claims like that before. It is very easy to sit in a classroom or over a cup of coffee at McDonald's, and wax eloquently about what we would do. I have always thought that individuals like this particular student have the comfort of knowing, deep down inside, that they will never be in a position where they have to execute another human being. Prison administrators are not afforded such a luxury.

I do not make excuses for the men and women who commit heinous crimes. They belong in prison, many of them for the rest of their lives. Never once in my long career working in the prison system did I ever forget the victims. Newspapers write about them, prosecuting attorneys display them at trial, and politicians use them. After all, it has become fashionable for everyone seeking public office—from the White House to the local courthouse—to be tough on crime. What better way than to use the death penalty? It translates into votes at the ballot box.

Perhaps nobody remembers victims more than prison officials. When I served as warden of the Mississippi State Penitentiary, I ran an institution that incarcerated 6000 prisoners, scattered around 21,000 acres of land. Because state law required me to live in the warden's residence on the prison grounds, everywhere I looked, twenty-four hours a day, I was constantly reminded of the misery, pain, and suffering that had been caused by the men in my custody.

No one is reminded of the futility of executions more than the warden who performs them, and no one is haunted more by the specter of putting someone to death. Since he performs the execution essentially alone, the warden will never find anyone who can completely understand. He bears this terrible burden with only one other person—the condemned prisoner. It is a walk that he and the prisoner must endure by themselves.

I always found it ironic that I did my work in the middle of the night while everyone else slept. And after each execution, I

would go home and take a shower. I would scrub and scrub, trying to feel clean again. I still have not quite succeeded.

My opposition to the death penalty came gradually. Each time an execution loomed, it became more difficult to deal with. Being Catholic, my religion became a real issue for me. Still, I did my job. But each time I found myself watching a man die because of an order I gave, I wondered, "What do my children think of their father? And when my time comes to be judged, what will my God ask me about my role in these things? And how will I answer?"

The United States is increasingly isolating itself from the rest of the world on the issue of executions. We keep some "lofty" company, with countries such as China and Iran; but I am still optimistic about the future. Because of people like Governor Ryan and Senator Feingold [from Wisconsin], people who are not merely politicians but leaders as well, the death penalty debate has entered a new stage. Americans are a good people at heart; they are compassionate people who want to do the right thing. Recent polls have shown that some cracks are starting to appear in the pro-death penalty wall. Americans have currently been rethinking the death penalty. They have expressed increasing concern about innocent people being executed.

I commend Governor Ryan for taking such a courageous stand. It is no small task for a Republican governor who presumably wants another term in office to do what he has done in Illinois. I hope that others will follow his example.

After I retired from the prison business, I wrote a book about my experiences. I wanted the wardens' view to be heard, because it seldom is. After giving a speech in Chicago one night, a young woman commended me for speaking out and wondered why other wardens did not do the same.

Some did. In the 1930s, New York's own Lewis Lawes, then warden at Sing Sing, published *Twenty Thousand Years in Sing Sing*,¹³ in which he devoted considerable time to assessing the flaws in our legal system that make the administration of death such a frightening prospect. In the 1950s, San Quentin warden Clinton Duffy was quoted as saying that the death penalty is a privilege reserved for the poor.

¹³ LEWIS E. LAWES, *TWENTY THOUSAND YEARS IN SING SING* (Arno Press 1974) (1932).

Between them, these two men executed several hundred men and women. They were outspoken opponents of the death penalty. It might surprise people to know that most wardens are very ambivalent about the death penalty on a personal basis, if not completely opposed to it.

But as much as I admire Governor Ryan, the death penalty in America will ultimately stand or fall not solely on the question of innocence, but on the issue of morality. As I looked into the eyes of the men I executed, I always found myself thinking, "We are supposed to be better than they are. We can be a better nation than this." I am convinced that one of the young men I executed was innocent. Even the governor at the time has recently expressed serious reservations. Nevertheless, the bottom line remains one of morality.

At some point in time, America must look inside her soul and ask herself a difficult question: "Is this who we really are, or who we really want to be?" We can keep the execution machinery cranked up on high, but until we get serious about addressing poverty, racism, drugs, child abuse, domestic violence, and a host of other social problems, we will continue to run in place.

Just hours before I carried out my last execution, I sat at my desk and stared at a picture of Connie Ray Evans. It was a school photo, taken in the third grade, when he was nine years old. He looked like my nine year-old, yours, or the child next door. I remember wondering, "What in the hell goes so wrong, that just nine years later, people like Connie Evans are sitting on death row?" There must be a better solution than death. Perhaps not an easy one, but certainly a better one.

Jim Dwyer

A good friend of mine told me, "New York Governor George Pataki just signed the capital punishment bill and I had applied to be a witness at an execution in Texas. It is coming up next week and I cannot go. Would you like to go?" So after I thought about it for a little while, I called some wise friends and they said, "Yes, you should go and you should write about it." So I flew to Houston and drove down to Huntsville. Those of you who have been to Huntsville know that it is a small town dominated by a prison and a school. If you stay overnight there, you essentially stay in a small college dormitory.

A momentous event is about to take place in the life of our society, for the family of the person killed and for the family of the person about to be killed. On the exterior, there is no whisper or sign of it. The Dairy Queen is running; the diner shuts down at six o'clock; and the traffic rolls along. When you get to the prison yard, and you go inside, you find that there are a couple of people from the local papers, and perhaps there is an AP reporter who has witnessed hundreds of executions. He knows that he can write this story almost in his sleep. There is a Huntsville radio reporter who covers each execution and sometimes there is a reporter from the town where the crime took place. They are segregated in a room with some prison officials and everybody keeps up a friendly banter about the events that are about to take place. Somewhere else in the building, the family of the condemned person is waiting for the execution to begin. Now, although not when I was there, the family of the victim is also awaiting the moment of death.

Something occurred to me while we were hanging around the pressroom, because I had the benefit of speaking to Don Cabana a few months before this event. What occurred to me was the tremendous impact these events must have on the life of the prison employees, the warden, and the regular guards who were there. There was a man there who was sort of the reporter wrangler at these events. As he escorted us in and out of the various rooms that you had to walk through before you got to the execution chamber, I started to probe this issue with him. Now, in public buildings in Texas, there is no smoking allowed, but in this particular room within the Huntsville facility there was a lot of smoking going on and this fellow was doing most of it. I think he smoked close to a pack of cigarettes in the few hours that I was there. When I asked if it was hard to go through this one day of the month year after year, he stopped. I do not remember his exact words, but he insisted that Mr. Cabana's realities were not his, while he lit up another cigarette in a long night of cigarette smoking.

As we were escorted into the room, we walked past a chain-link fence that was covered by a tarp. We were actually outside, being led between one building and another. Behind the tarp, there was the hearse waiting outside. Then we were taken into the room where we would witness what happens. The night I was there, a man named Samuel Hawkins was being executed.

Mr. Hawkins had been a serial rapist and had murdered several people, several young children, and he had, I guess, resigned himself towards the end and to make no more appeals. When we arrived in the room, we were seated behind a glass wall. Members of the Hawkins family were there, a few law enforcement people, and a Deputy Attorney General who goes to all the executions. The warden stood at the head of the bed of the gurney where Hawkins was located and it was all very quiet because Hawkins had nothing to say. The warden lifted his glasses, and the execution proceeded.

Martha Barnett

Thank you for inviting me to participate in this program today. This is a very important issue—so much so that I have made it a focus of my ABA presidency.

I live in Tallahassee—"ground zero" for several weeks following the election, during which time the eyes of the country, indeed the world, were on our system of government. At the same time this was going on in Florida, I realized that the eyes of the world were on the United States in another very important area, capital punishment.

One of my duties as President of the American Bar Association is to attend, along with other bar leaders from around the world, the opening of the Paris legal year. The ceremony was a wonderful pageantry, highlighted by the remarks of the Battonier of the Paris bar. They were in French, and although I did not understand a word of it, I was caught up in the melodic cadence of the language.

Imagine my surprise when halfway through his speech, the Battonier paused, looked at my husband and me and began to speak in English. He said, "Welcome, we're glad you're here. You know, the French have a great deal of respect and affection for the Americans because you gave us back our liberty, and because of that we have a special relationship. It is because of our special relationship that we believe we have an obligation to tell you something that is important to us and, we believe, to others."

He went on to say, "We must tell you that we really need you Americans, champions of liberty, to abolish the death penalty. It is the duty of American lawyers to accomplish this immense and magnificent task, to convince the American people and their

governors that the death penalty is useless and disgraceful.”

He continued by saying, “[The death penalty] is unacceptable because it is non-reversible; it is an injury to the fundamental belief that in each man remission is possible. Executions are barbaric.”

Finally, he said to us, “A nation as big as the United States cannot accept the preeminent role that it has in the world leading us without stopping to contemplate the corridors of death created by the death penalty and the horrors that accompany them.” He then immediately lapsed back into beautiful French, and I sat there stunned and deeply moved. I realized the impression the French have of us Americans, and I was embarrassed.

The United States is the most powerful democracy in the world. Yet, we have a system of capital punishment that in the words of Illinois Governor George Ryan is “fraught with error.” This is incomprehensible to the French, as well as the entire world community. In order to continue to claim the leadership role we have in the world today, at a minimum, we should stop executing people until we can make sure that the system is administered fairly.

As we all know, the nature of the death penalty debate has changed dramatically in the past year. In 1997, when the ABA House of Delegates called for a moratorium on executions, many people thought it would fall on deaf ears. They were wrong. The Association did not take a position on the death penalty itself but on its implementation. After more than twenty years of careful examination of capital punishment, the ABA became convinced that the death penalty is not administered fairly to those who received it. Initial anecdotal information, which has now been confirmed with empirical data, shows that our nation’s justice system is not providing many individuals facing capital punishment with fundamental fairness and due process, and that the risk of wrongful execution is real and intolerable.

Americans may disagree on the death penalty, but I suspect that there is universal agreement that none of us wants to execute someone who is innocent. Because of that, I try to speak on this issue every chance I get. Many of you here attended the conference, *ABA Call to Action: A Moratorium on Executions*, which I organized at the Carter Center in Atlanta last October. The meeting brought together leading lawyers and policy makers

representing all sides of the debate to a conference to discuss the significance of a national moratorium and the means to implement one. The lawyers participating included prosecutors, defense counsel, private lawyers, and state and federal officials, including the governors of states with capital punishment.

It was an extraordinary gathering of the best and the brightest on the subject. We more than fulfilled our purposes, which were: (1) to increase the understanding and sense of urgency to a new level; and (2) to motivate people to seek efforts to implement a moratorium.

But we want to do more than just motivate. We also want to mobilize. We want to help those states that have capital punishment to address the underlying problems of the justice system in this regard.

I have created a Post-Conference Task Force to continue the momentum in states where there is moratorium activity, and to work with state bar associations and other groups to stimulate activity where currently there is none.

It is important that we address the moratorium now. In 1972, in his concurring opinion in *Furman v. Georgia*,¹⁴ Justice Potter Stewart wrote, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹⁵ Today, the administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. As lawyers and leaders of the Bar, we have the opportunity, and indeed the obligation, to change this.

Evan Davis

Leadership is a rare commodity, and Governor Ryan has clearly demonstrated it. We gather now and see before us the leadership of others. In his own way as a journalist, Jim Dwyer shows a leadership by bringing this question acutely to the public attention, and Martha, beyond doubt, has shown a great leadership on this issue by making it a hallmark of her administration. And now each American individual has to show leadership as well. There is a federal execution coming up on December the 12th [2000]. I urge each of you to take pen in

¹⁴ 408 U.S. 238 (1972).

¹⁵ *Id.* at 309.

hand and write to the President, not to urge him to grant clemency or commutation on the particular facts of the case, but to commute the sentence because of the uncertainty relating to the application of the death penalty. Tell him to do it generically, to set an example, and to leave his office on a high standard. Forward a copy to your current senator—it may make a difference. For as we have seen recently in politics, certain things make a difference that we never thought would. Each vote counts, each view counts. So please show your leadership as the panelists we have had here today have shown theirs. And I want to thank Norman Greene, the Chair of our Capital Punishment Committee for putting together an evening that I am sure we all wish every member of our profession could have experienced.

