

THE QUALITY OF JUSTICE IN CAPITAL CASES: ILLINOIS AS A CASE STUDY

LEIGH B. BIENEN*

My colleagues are decent and good people. Just as the execution of an innocent person is inevitable, it is inevitable that one day the majority will no longer be able to deny that the Illinois death penalty scheme, as presently administered, is profoundly unjust. When that day comes, as it must, my colleagues will see what they have allowed to happen, and they will feel ashamed.¹

I

INTRODUCTION

The federal constitutionality and moral authority of state capital punishment schemes are predicated upon the assumption that the system of state court appeals is thorough, reliable, and honest.² The relatively recent restrictions on the availability of federal habeas corpus has removed the possibility of federal court review to “correct,” or adjust for deficiencies in, the administration of justice at the state level. By 1998, the procedural restrictions in capital cases on federal habeas corpus, which were designed to restrict constitutional challenges to state-imposed death sentences, had had their intended effect: It is now very difficult to receive a hearing in federal court on a constitutional challenge to a state death sentence.³ At the same time, the politics surrounding the election and retention of state judges has made it more difficult for judges to overturn or to refuse to impose death sentences without losing their judge-

Copyright © 1998 by Law and Contemporary Problems

This article is also available at <http://www.law.duke.edu/journals/61LCPBienen>.

* Senior Lecturer, Northwestern University School of Law.

The author would like to thank the Northwestern University School of Law for research and other support, and especially Dean David Van Zandt and Professors Thomas Geraghty and Lawrence Marshall at the Northwestern Legal Clinic. The author would like to extend a special thank you to the School of Law Library, especially Librarians Marcia Lehr and Pegeen Bassett, and the many others who provided facts, guidance, and assistance.

1. *People v. Bull*, 705 N.E.2d 824, 848 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part). After this opinion was released, another person, Anthony Porter, was found to have spent 16 years on death row for two murders of which he was totally innocent. See Pam Belluck, *Convict Freed After 16 Years on Death Row; State Is Examining New Evidence in 10th Case of Apparent Error*, N.Y. TIMES, Feb. 6, 1999, at A6.

2. “[S]ome form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges. . . . Meaningful appellate review is an indispensable component of the Court’s determination that the State’s capital sentencing procedure is valid.” *Pulley v. Harris*, 465 U.S. 37, 59 (1984) (Stevens, J., concurring).

3. See, e.g., *infra* notes 101-109 and accompanying text; Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, 61 LAW & CONTEMP. PROBS. 171 (Autumn 1998); Symposium, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523 (1996).

ships.⁴ Recent analyses of juror decisionmaking in capital cases, moreover, suggest that jurors may be more fallible than previously thought.⁵

Despite these difficulties, most Americans assume that when innocent persons are sentenced to death, or when death sentences are imposed in an unfair trial (for example, because of inadequate representation or prejudice and bias), the matter will be corrected when these facts come to the attention of appellate courts or the press. This article asks whether such assumptions about the quality of justice are warranted.⁶ It will do so by examining, as an example, the quality of appellate review in a single state, Illinois, since its reenactment of the death penalty in 1974.

The Illinois cases show us the contemporary death penalty in a large northern industrial state. The Illinois capital statute⁷ is typical—it provides for the imposition of the death penalty upon the request of the prosecution only for first-degree murder, only after the consideration of statutory aggravating and mitigating factors, and may be imposed by a jury or by a judge without a jury. In theory, all the procedural due process protections are in place. Yet a recent study by the *Chicago Tribune* documented over 300 cases of prosecutorial misconduct in Illinois, including many in capital cases.⁸ The constitutional issues concerning the application of the capital statute, furthermore, have been extremely divisive in the Illinois Supreme Court and in the federal Court of Appeals for the Seventh Circuit (which has jurisdiction over federal collateral challenges to Illinois capital cases). At different points, some aspects of the Illinois capital statute have been declared unconstitutional by both federal and

4. Elected trial judges are under intense political pressure to impose death sentences, and even to override jury sentences of life. "Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty." *Harris v. Alabama*, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting). For specific examples of the role played by the death penalty in the outcome of many judicial elections, see Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

5. The decisions of actual jurors in the penalty phase of capital cases in 14 states was the subject of extensive and detailed analysis by the Capital Jury Project. The recent findings of this project confirm that jurors are confused about instructions, and that they bring misinformation and misconceptions, and their irrational fear of the defendant's imminent release, into the decision of life or death. The research demonstrates how much more is known about juror decisionmaking and how much juror attitudes have changed since the United States Supreme Court decided *Witherspoon v. Illinois*, 391 U.S. 510, in 1968. See William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Cases*, 77 TEX. L. REV. 605 (1999); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Attitudes, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998). In Illinois, a challenge to the comprehensibility of capital jury instructions resulted in the federal district court finding that jurors were inadequately guided by these instructions. This result was later overturned by the Seventh Circuit. See *United States ex rel. Free v. Peters*, 806 F. Supp. 705 (N.D. Ill. 1992), *rev'd*, 12 F.3d 700 (7th Cir. 1993).

6. See also Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996).

7. 720 ILL. COMP. STAT. ANN. 5/9-1 (West 1993 & Supp. 1998).

8. The results appeared in a five-part series of articles by Ken Armstrong and Maurice Possley. See *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1; *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 1; *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at 1; *Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at 1; *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1.

state judges. Those rulings ultimately have always been overturned. Even when four of seven sitting Justices on the Illinois Supreme Court simultaneously believed that the statute was unconstitutional, neither the statute nor its application were held to violate federal or state constitutional principles.⁹

Twenty years after the first constitutional challenge to the capital statute reached the Illinois Supreme Court in 1979, the state's capital sentencing structure remains intact. The infirmities challenged repeatedly have remained basically unchanged. Capital issues are still the source of bitter and divisive exchanges between the Justices of the Illinois Supreme Court.¹⁰ The opinions, for all of their "consideration" and "argument" over constitutional issues and for all of their rhetoric, have left in place a capital case processing system in which death sentences are rarely overturned.

II

THE ILLINOIS EXPERIENCE

The history of capital punishment in Illinois is in many respects unexceptional. The state has a long practice with the death penalty and has not engaged in any innovative experiments in its jurisprudence. Illinois is a large Midwestern state and includes Chicago, one of the nation's legal centers. Illinois is not a traditional death penalty stronghold like Texas, Florida, California, or New York, nor is it in the South. Like most states, it elects judges and prosecutors.¹¹ It also has a strong and active defense bar, an especially active ACLU, and a long tradition of *pro bono* representation in capital cases.

Illinois has sentenced innocent persons to death and has set aside death sentences when the convictions were found to be wrongfully imposed.¹² Illinois did

9. See *infra* notes 27-44 and accompanying text. Nor has the legislature responded to appeals from the defense bar to amend the procedures or functioning of the Illinois capital case processing system.

10. Recently, for example, Justice Miller wrote the following:

Justice Harrison frequently chooses, as he does in this case, to impugn the integrity of other members of the court and to impute improper motives to those with whom he disagrees. . . . Baseless and unfounded imputations of improper motives to those members of the court who support a majority opinion are unjustified and demean the court. . . . When rancor eclipses reason, the quality of the debate is diminished, the bonds of collegiality are strained, and the judicial process is demeaned.

People v. Bull, 705 N.E.2d 824, 845 (Ill. 1998) (Miller, J., concurring specially).

11. See 31 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1996-97, at 133-35. Only Connecticut, New Jersey, and Delaware do not elect prosecutors. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice?"*, 87 J. CRIM. L. & CRIMINOLOGY 130, 206 n.269 (1996).

12. See Alan H. Gray & Courtenay Edelhart, *Judge Rules Cruz Innocent: Finally, "The Whole Case Just Fell Apart"*, CHI. TRIB., Nov. 4, 1995, at 1.

For retired Illinois State Police Maj. Ed Cisowski, the acquittal of Rolando Cruz on Friday at his third trial, was vindication for 10 years of doubt. For lawyer Scott Turow, it offered a fresh blast of hope for his client, Alejandro Hernandez, who like Cruz, has also been convicted of the murder of 10-year-old Jeanine Nicario of Naperville. For Illinois Atty. Gen. Jim Ryan, who was deeply involved in the case for years as a three-term DuPage County state's attorney, it was a bitter pill he reluctantly swallowed while expressing regrets the "nightmare" will continue for the victim's family. But for the Cruz family, it was a moment of triumph and

not rush to execute one of the most notorious serial killers, John Wayne Gacy.¹³ In January 1996, Governor Edgar commuted the death sentence of Guinevere Garcia, the first death sentence commuted by the governor elected in 1994 on a strong pro-death penalty platform.¹⁴ The case received national attention, but not nearly so much as was paid to the case of Karla Faye Tucker in Texas, who was ultimately executed in 1998.¹⁵ Most recently, on November 27, 1998, the Illinois Supreme Court stayed the execution of Willie Enoch to allow for additional DNA testing. Newly elected Governor George Ryan now faces the decision whether to order the next execution; Ryan also campaigned as a strong supporter of the death penalty.¹⁶

tears. They hugged one another and wept for five or more minutes in the Wheaton courtroom after the verdict was rendered before being ushered out by bailiffs. Less than an hour later, Cruz left the DuPage County Jail carrying plastic bags of belongings in both hands and was immediately engulfed again by weeping family members.

Id.

13. In one of his appeals, the Seventh Circuit summarized the factual and legal history of the case as follows:

John Wayne Gacy is a serial killer. Between 1972 and 1978 he enticed many young men to his home near Chicago for homosexual liaisons. At least 33 never left. . . . The discovery of so many skeletons, several with rags stuffed in the victims' mouths, created a national sensation. Gacy regaled the police with stories about his exploits, which he attributed to "Jack," an alternative personality. A jury convicted Gacy in March 1980 of 33 counts of murder, rejecting his defense of insanity. The same jury sentenced Gacy to death for 12 of those killings, the only 12 that the prosecution could prove had been committed after Illinois enacted its post-*Furman* death penalty statute. . . . Opinions in this case already exceed 200 pages. We spare readers further recapitulation and turn directly to the four arguments Gacy has culled from more than 100 raised at one or another stage of this litigation, now 14 1/2 years old. Gacy has in this sense already escaped the 12 judgments of execution, for judge and jury cannot decide *whether* a murderer will die, but only *how soon*.

Gacy v. Welborn, 994 F.2d 305, 306 (7th Cir. 1993). On May 10, 1994, Gacy was the second person to be executed in Illinois—20 years after some of his victims were murdered. See NAACP, LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A., Fall 1998, at 11 [hereinafter DEATH ROW, U.S.A.].

14. See Ted Gregory & Christi Parsons, *The Surprise Decision: Edgar's Power Halts Execution of Garcia*, CHI. TRIB., Jan. 17, 1996, at 1. The defendant, a battered woman who killed her spouse, asked to be executed.

15. Interestingly, a Scripps Howard poll conducted shortly after the execution of Karla Faye Tucker, showed a significant drop in support for capital punishment:

A new Scripps Howard Texas Poll found 68 percent of Texans favor capital punishment, down a whopping 18 percentage points from a 1994 survey, the last time the Texas Poll questioned people about their views on the subject.

That is the lowest approval rating the Texas Poll has found in a decade and perhaps the lowest since the 1960s, when executions were carried out by electrocution. A 1953 Gallup Poll found that 63 percent of Texans supported the punishment scheme, and a 1966 poll found only 42 percent favored it.

Kathy Walt, *Death Penalty's Support Plunges to a 30-year Low; Karla Faye Tucker's Execution Tied to Texans' Attitude Change*, HOUS. CHRON., Mar. 15, 1998, at A1.

Assessing public attitudes toward court and judicial acts has always been difficult at best, and not because polling information was lacking or inaccurate. For an excellent summary of the then-major studies of attitudes toward courts, see Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 L. & SOC'Y REV. 427, 466-69 tbl.3 (1977).

16. See Rick Pearson, *Death Row Case Likely in Ryan's Hands Now: Execution Delay Puts Enoch Case in New Term*, CHI. TRIB., Nov. 27, 1998, at 4.

A. Background

Illinois reenacted the death penalty in 1974. The Illinois Supreme Court upheld the capital statute in 1979 and 1981.¹⁷ The first post-reenactment execution in the state did not occur until 1990. As of February 1, 1999, the Illinois death row population was 161, and the state had executed eleven persons.¹⁸

The Illinois capital statute is broad in the scope and inclusiveness of its statutory aggravating factors.¹⁹ The statutory aggravating factors include the relatively narrow (such as the killing of a police officer, corrections officer, or witness; a two-victim homicide; an incarcerated killer; a victim over sixty years old or under twelve years old) and the broad (a drug conspiracy; a cold, calculated, and premeditated manner of the killing; a murder involving torture; a murder involving a drive-by shooting). The felony-murder aggravating factor includes, in addition to the common law felonies, "streetgang criminal drug conspiracy"²⁰ and aggravated stalking, and also encompasses even an attempt to commit any of the enumerated felonies. As in other states, the trend in Illinois in the 1990s has been to expand the list and broaden the scope of statutory aggravating factors;²¹ the number of statutory aggravating factors has risen from seven to seventeen since reenactment. On the other hand, only the persons who committed the homicidal act are eligible for the death penalty, which decreases the range of death eligibility. Nonetheless, the range of potentially death-eligible cases, and consequently the range of the prosecutor's discretion, is broad. In addition, the statute is not specific about the timing of the state's decision to seek the death penalty; it states only that, "where requested by the [s]tate, the court shall conduct a separate sentencing proceeding."²² The judge may conduct the penalty phase without a jury. If a jury is used, Illinois does not allow the judge to override the jury's decision not to sentence to death, but the judge may override the jury's sentence of death and sentence the defendant only to life.

1. Arbitrariness Introduced by Prosecutorial Discretion. Soon after reenactment, the question arose whether the Illinois Supreme Court had authority to review the discretionary decisions of prosecutors or the possibility of arbitrariness or bias caused by different patterns of charging capital cases at

17. See Bienen, *supra* note 11, at 166 tbl.1.

18. Telephone Interview with Office of Communications, Dep't of Corrections, Springfield, Illinois (Feb. 1, 1999); see also DEATH ROW, U.S.A., *supra* note 11, Fall 1998, at 15, 29-30. Illinois accounted for 2.32% of all executions in the United States. See DEATH ROW, U.S.A., *supra* note 11, Fall 1998, at 15.

19. See generally 720 ILL. COMP. STAT. ANN. 5/9-1 (West 1993 & Supp. 1998).

20. *Id.* 5/9-1(b)(6)(c).

21. For example, the aggravating factor for drive-by shootings became effective in 1995. See Ill. Pub. Act 88-678, § 10 (1994), available in Ill. Legis. Serv. (West 1994) (codified at 720 ILL. COMP. STAT. ANN. 5/9-1(b)(15) (West 1993 & Supp. 1998)).

22. 720 ILL. COMP. STAT. ANN. 5/9-1(d) (West 1993 & Supp. 1998).

the local level.²³ Different policies of prosecutors and the county-by-county disparities in capital prosecution and sentencing have long been identified as a source of arbitrariness in patterns of capital sentencing.²⁴ On the national level, the question of a state high court's willingness or power to review such patterns and discrepancies has a long history.²⁵ The fight over whether the Illinois Supreme Court could or would review prosecutorial discretion in the selection of cases for capital prosecution was an important and persistent issue in the state high court's appellate review of the constitutionality of the state's capital punishment statute. The debate split the court.

The issue of prosecutorial discretion is confusing because the Justices have different, but overlapping, perspectives on the bias and arbitrariness introduced by prosecutorial discretion. The broad view is that the exercise of prosecutorial discretion in the selection of cases for capital prosecution within a single local jurisdiction is unlimited, unchecked, and unreviewed and unreviewable. This necessarily introduces arbitrariness because the local districts differ. Some are urban, and some are suburban; some local jurisdictions have few death-eligible homicides, and some have over a hundred each year. A related but distinct analysis is that prosecutors have different attitudes toward the death penalty; some are more zealous than others. Some prosecutors may charge every death-eligible case as a capital case, while others will select only a subset of death-eligible cases for capital prosecution. The individuality of the prosecutors necessarily introduces caprice and disparities. Therefore, whether a case is prose-

23. The Supreme Court of New Jersey was exceptional in immediately declaring its intention to review discrepancies introduced by prosecutorial charging practices, irrespective of their origin. See *State v. Koedatich*, 548 A.2d 939 (N.J. 1988); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases*, 54 ALB. L. REV. 709, 732-35 (1990). In addition, in *State v. Marshall*, 613 A.2d 1059 (N.J. 1992), and *State v. Ramseur*, 524 A.2d 188 (N.J. 1987), the court took it as axiomatic that it had the authority and duty to review prosecutors' charging decisions in the selection of cases for capital prosecution. See generally Bienen, *supra* note 17, at 196-202.

24. See James R. Acker & Charles S. Lanier, *Statutory Measures for More Effective Appellate Review of Capital Cases*, 31 CRIM. L. BULL. 211, 215 n.13 (1995) ("Arbitrariness and discrimination continue to plague the administration of death penalty legislation, and researchers in many different jurisdictions have identified prosecutorial decision making as a primary cause of these problems."). The recent dispute in New York between Governor George Pataki and Bronx County prosecutor Robert Johnson is an unusual and special illustration of the issue. See *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997). Governor Pataki removed Johnson as prosecutor in a potentially death-eligible case involving the murder of a police officer when Johnson refused to charge the suspect with capital murder. A series of law suits followed. The New York Court of Appeals, in a split decision, held that the Governor did have the authority to take the case away from Johnson and appoint a special prosecutor in his place. See *id.* at 1003.

25. The issue has taken a variety of forms in different states. See Bienen, *supra* note 17, at 222-62 (summarizing state laws regarding proportionality review); see also Symposium, *The New York Death Penalty in Context*, 44 BUFF. L. REV. 283 (1996). For a detailed description of disparities in prosecutorial charging practices in Pennsylvania, see Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 22. The article describes how the District Attorney in Philadelphia sought the death penalty in every death-eligible case, while in Allegheny County, which has similar demographics, the prosecutor selected among cases for capital prosecution, producing a much lower rate of capital prosecution.

cuted as a capital case is a matter of chance depending upon the characteristics of the legal jurisdiction where the crime was committed.²⁶

In addition, the Justices considered contrasting arguments based on the separation of powers. On the one hand, by choosing which death-eligible cases will be prosecuted as capital cases, prosecutors are, in effect, engaging in the sentencing decision reserved for judges exclusively. On the other hand, it may violate the doctrine of separation of powers for the judiciary to review the exercise of prosecutorial discretion in the selection of cases for capital prosecution, either in individual cases or for system-wide and systematic arbitrariness and disproportionality.

A series of early cases challenged the constitutionality of the Illinois statute and the operation of the state's capital punishment system.²⁷ Initially, the debate before the state high court focused on the narrow issue of the doctrine of separation of powers.²⁸ Then an unusual and increasingly bitter debate arose over the precedential status of previous opinions by individual Justices on the state high court, some of whom had changed their minds.²⁹

In 1979, a trial court held the Illinois capital punishment system unconstitutional on the ground that the statute granted prosecutors unlimited discretion in the selection of cases for capital prosecution, encroaching upon the exclusive authority of the judicial branch to impose criminal sentences.³⁰ Under the stat-

26. This analysis is articulated in Justice Ryan's dissent in *People ex rel. Carey v. Cousins*, 397 N.E.2d 809, 822-23 (Ill. 1979). The federal district court later cited the argument with approval in *United States ex rel. Silagy v. Peters*, 713 F. Supp. 1246, 1258-59 (C.D. Ill. 1989) (granting relief and declaring statute unconstitutional), *rev'd*, 905 F.2d 986 (7th Cir. 1990). For a formulation of this argument based upon an analysis of 1,017 homicide cases, see Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion*, 19 L. & SOC'Y REV. 587 (1985). For a generalized variation on the same argument, see Leigh B. Bienen, "A Good Murder", 20 FORDHAM URB. L.J. 585 (1993). This issue is also at the core of the New York dispute between Governor Pataki and District Attorney Johnson. See *supra* note 24.

27. See *People v. Lewis*, 430 N.E.2d 1346 (Ill. 1981) (*Lewis I*). The Illinois capital statute was upheld against a number of constitutional challenges in *Lewis I*, the first case which brought a death penalty case to the Illinois Supreme Court. The statute had previously been found constitutional by a divided court, on an appeal from a writ of mandamus, on the narrow issue of how the penalty was to be presented. See *People ex rel. Carey v. Cousins*, 397 N.E.2d 809 (Ill. 1979). The state high court had invalidated an earlier capital statute that had attempted to bypass jury sentencing by creating a streamlined procedure with the death sentence being imposed by a three-judge panel. See *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1 (Ill. 1975).

28. *Cousins*, 397 N.E.2d at 809.

29. See, for example, Chief Justice Goldenhersch's concurring opinion in *Lewis I*, 430 N.E.2d at 1363.

30. The trial court entered an order declaring section 9-1(d) of Illinois's capital punishment statute unconstitutional. This section stated that, "[w]here requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors" warranting the imposition of capital punishment. 38 ILL. REV. STAT. 9-1(d) (West 1977).

The basis for the trial court's holding section 9-1(d) invalid . . . was that the section "vests the prosecution with unlimited discretion to trigger death sentence proceedings," and thereby permits the death penalty to be "wantonly and freakishly imposed." For this reason the section was viewed as contravening the due process clause, the prohibition of cruel and unusual punishments found in the eighth amendment to the Constitution of the United States and the separation of powers provision of article II, section 1, of the Constitution of Illinois.

Cousins, 397 N.E.2d at 811.

ute, only the county prosecutor could request a capital penalty phase hearing after the guilt phase; thus, the prosecutor was effectively engaging in a sentencing decision and intruding into the judicial branch's prerogative.³¹

In *Carey v. Cousins*, the Illinois Supreme Court overturned this outcome and upheld the capital statute despite the prosecutor's unilateral discretion in deciding when to charge a case as a capital one.³² A four-Justice majority of the seven-member court held that this prosecutorial discretion did not differ significantly from the procedures upheld by the United States Supreme Court in *Gregg v. Georgia*.³³ The *Cousins* dissent (Justice Ryan, joined by Justices Goldenhersch and Clark) argued that the statute contained no guidelines to prevent the arbitrary exercise of discretion by the prosecutor. Consequently, the statute violated the separation of powers provision of the state constitution³⁴ because the imposition of a sentence within the limits prescribed by the

31. The challenge to the prosecutor's discretion was based in part upon an analogy to a series of decisions challenging the constitutionality of the prosecutor's unilateral authority to remove a juvenile case to adult court. See *Cousins*, 397 N.E.2d at 811-13 (discussing *People v. Bombacino*, 280 N.E.2d 697 (Ill. 1972); *People v. Handley*, 282 N.E.2d 131 (Ill. 1972)). The Juvenile Court Act, 705 ILL. COMP. STAT. ANN. 405/1-1 to 405/1-16 (West 1993 & Supp. 1998), was subsequently amended to reduce the degree of prosecutorial discretion in this area. See *Cousins*, 397 N.E.2d at 813.

32. *People ex rel. Carey v. Cousins*, 397 N.E.2d 809 (Ill. 1979). *Cousins* reached the Illinois Supreme Court on a writ of mandamus; a death sentence imposed on an individual after a capital trial was not being challenged. See *id.* at 811. Consequently, the multitude of factual wrinkles that often create unique interpretations of constitutional issues in capital cases was not present. Cf. *infra* notes 50-52 (discussing the *Silagy* case). The majority in *Cousins* noted that the broad challenges to the constitutionality of the statute were premature because the case arose on a writ of mandamus addressed to the limited question whether placing the sole power to request the death penalty in the prosecutor usurped the sentencing function of the court. See *id.* at 815.

33. See *id.* at 814-15 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976)). The majority noted that the same argument was made and rejected in *Gregg*. See *id.* at 814. The arguments in *Gregg* addressed the broader question of arbitrariness introduced by unreviewable prosecutorial discretion. It will *always* be the prosecutor who decides whether to seek the death penalty, however, whether that decision is reviewed, reviewable, or subject to external guidelines in addition to the statutory aggravating factors themselves. But see *id.* at 821 (Ryan, J., dissenting) (challenging the majority's view that the Georgia statute upheld in *Gregg* was analogous). The four dissenting Justices argued that the fact that the prosecutor alone could request the death penalty was an encroachment upon the judiciary's exclusive prerogative to sentence. See *id.* at 824.

34. Quoting the Illinois Constitution, Justice Ryan wrote:

"The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." . . . I agree with this contention and would hold that section 9-1(d), which confers upon the prosecutor the discretion to determine whether or not a sentencing hearing shall be held, violated article II, section 1, of the Illinois Constitution of 1970.

Id. at 816-17 (Ryan, J., dissenting).

The Nebraska Supreme Court made the same argument in *State v. Williams*, 287 N.W.2d 18, 29 (Neb. 1979). For a general discussion of this issue, see Bienen, *supra* note 17, at 180-83 & n.173.

legislature is purely a judicial function.³⁵ The language of the dissenting opinion was unequivocal.³⁶

The majority focused on the timing of the prosecutor's decision to seek the death penalty. The dissent emphasized the arbitrariness and county-by-county disparities in the state system as a whole. The timing of the prosecutor's announcement of the decision to seek the death penalty is an unconvincing technicality;³⁷ it does not answer the general objections articulated by the dissent.

Because the prosecutor's decision to request a penalty phase hearing was unguided, the dissent argued that some prosecutors will consider the offense and the offender, while others will consider the statutory aggravating factors but not the mitigating factors. The same potential for arbitrariness exists in the prosecutor's decision to seek the death penalty at the charging stage or at any other time. Indeed, because the defense is under no duty to disclose mitigating evidence prior to the sentencing phase, the prosecutor may be unaware of mitigating factors when deciding whether to seek the death penalty. The dissent concluded that

the statute confers this discretion not upon one individual, but upon the State's Attorney in each of the 102 counties in this [s]tate. In view of the absence of statutory directive to the prosecutor, each State's Attorney is free to establish his own policy as to when sentencing hearings [that is, the imposition of the death penalty] will be requested.³⁸

35. See *Cousins*, 397 N.E.2d at 817 (Ryan, J., dissenting) (citing *People v. Montana*, 44 N.E.2d 569 (Ill. 1942), and other precedent). The argument was that, by possessing the unilateral power to request the death penalty, the prosecutor thereby was approving the penalty in advance of the judicial branch, usurping judicial autonomy by choosing among the appropriate penalties set by the legislature. See *id.* at 819 ("When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.").

36. See *id.* at 819 (Ryan, J., dissenting):

Any attempt by the legislature to confer upon the prosecutor authority to exercise any part of the sentencing function or the authority to limit, interfere with, or to condition the exercise of the judicial function upon a request by the prosecutor is a violation of the doctrine of separation of powers as contained in article II, section 1, of the Illinois Constitution of 1970.

37. In New Jersey, prior to upholding the constitutionality of the statute itself, the state Supreme Court required prosecutors to reveal both the intention to seek the death penalty and the nature and sufficiency of the grounds for statutory aggravating factors at a specified time well prior to the guilt phase of the capital trial. See *State v. McCrary*, 478 A.2d 339 (N.J. 1984).

38. *Cousins*, 397 N.E.2d at 822 (Ryan, J., dissenting) (citations omitted). Justice Ryan continued:

Some prosecutors may look to [the statutory aggravating and mitigating factors] for guidance. Others may consider some of the listed factors controlling and disregard the remaining, while others may totally ignore these sections. . . . There can be no doubt that under this statute some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications will be spared, not as a result of mercy, but because of the uneven application of the law due to the lack of statutory direction to the prosecutor. There will inevitably be cases where there will be no reasonable basis for the distinction between one on whom the penalty of death is imposed and another who is passed over. There will be no reasonable explanation for the distinction between the two convicted offenders except that, because of the personal belief or office policy of one State's Attorney, one offender was chosen as a candidate for the penalty of death, whereas for similar reasons personal to another prosecutor, an equally culpable offender was spared.

Id. (Ryan, J., dissenting) (citations omitted). Similar concerns over county-by-county disparities in charging decisions were expressed by the Supreme Court of New Jersey in *State v. Koedatich*, 548 A.2d 939 (N.J. 1988). See also Rosenberg, *supra* note 25.

Five years later, the Illinois Supreme Court addressed a series of due process and constitutional issues in capital cases in *People v. Lewis (Lewis I)*, including the standard for incompetence of counsel.³⁹ The court again upheld the statute against several challenges to capital case prosecutorial decisionmaking, including the prosecutor's authority to seek the death penalty after the defendant rejects a plea of guilty to a nondeath sentence.⁴⁰

In 1981, however, the character of the court's decision changed. The previous dissenters now voted to sustain the law. Chief Justice Goldenhersh, who had dissented in *Cousins*, now concurred in upholding the statute, stating that the statute as applied was constitutional and that the court had an obligation to follow the holding of *Cousins*.⁴¹ The only Justice new to the court since *Cousins*, Justice Simon, dissented in *Lewis I* on the grounds explained in the *Cousins* dissent.⁴² Justice Simon singled out county-by-county disparities as the overriding constitutional infirmity.⁴³ Thus, four of the seven Justices (the three *Cousins* dissenters and Justice Simon) believed that the statute was unconstitutional, but the court nevertheless upheld it.⁴⁴ The court was at a curious juncture.

39. *People v. Lewis*, 430 N.E.2d 1346, 1357-62 (Ill. 1981) (*Lewis I*). *Lewis I* was the first constitutional challenge to reach the Illinois Supreme Court through an appeal from the imposition of a death sentence after a capital trial. Although the Illinois Supreme Court did not set aside the death sentence in 1981, the federal district court later set it aside on grounds not related to the constitutionality of procedures for imposing the death penalty. On retrial, Cornelius Lewis was again sentenced to death. On a subsequent petition for habeas corpus, the federal district court issued a writ vacating the second death sentence. See *United States ex rel. Lewis v. Lane*, 656 F. Supp. 181 (C.D. Ill. 1987). The federal appellate court affirmed. See *Lewis v. Lane*, 832 F.2d 1446 (7th Cir. 1987). At the next retrial, the jury did not impose the death sentence. In 1988, Lewis was sentenced to life plus a term of years. The history of the case is reviewed in *People v. Lewis*, 547 N.E.2d 599, 600-01 (Ill. App. Ct. 1989).

40. See *Lewis I*, 430 N.E.2d at 1357-62. The challenge was based on the argument that defendants were being pressured to plead guilty to escape the death penalty.

41. See *id.* at 1366 (Clark, J., concurring):

If we were to decide now, four years after the passage of the act, and after so many persons sit on death row, that the act is unconstitutional, a great disservice to the stability of the law would be perpetrated by this court. . . . Secondly, striking down the death penalty statute at this point on the ground that the statute violated the [s]tate constitutional separation of powers principle would prevent the United States Supreme Court from considering this case or any other capital case arising in Illinois.

Justice Moran also concurred. See *id.* at 1367.

42. "It would be blatant folly for this court to acquiesce in the execution of Cornelius Lewis without disclosing that four of the judges comprising the present court, either now or in the past two years, have viewed the death penalty statute as unconstitutional." *Id.* at 1370 (Simons, J., dissenting). Justice Simons noted that two earlier Illinois capital statutes had been struck down, one on federal grounds in *Moore v. Illinois*, 408 U.S. 786 (1972), and one on state grounds in *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1 (Ill. 1975). See *Lewis I*, 430 N.E.2d at 1371 (Simons, J., dissenting). "So we are faced with the strange spectacle of this court still adhering to the *Cousins* decision although a majority of its judges have stated that it does not represent the correct conclusion." *Lewis I*, 430 N.E.2d at 1373 (Simons, J., dissenting).

43. "The 102 counties in Illinois potentially present 102 different death penalty policies. Executions cannot depend on geography." *Id.* at 1376 (Simons, J., dissenting).

44. A majority of four of the present Justices have said and continue to adhere to the view that they believe the statute is unconstitutional because it allows prosecutors too much discretion in choosing whether to seek the death penalty and that this may result in arbitrary application of the statute. Three of these Justices [Ryan, Goldenhersh, and Clark], however, relying on the doctrine of *stare decisis*, have refused to follow their previously dissenting viewpoint

The same defendant was subsequently resentenced to death. In 1984, the constitutionality of this second death sentence came before the Illinois Supreme Court in *Lewis II*, along with other challenges to the capital statute.⁴⁵ In this appeal, the court considered a compilation of statistics presented by the defense on the application of the death penalty in felony-murder cases; the statistics again raised the question of the arbitrariness introduced by unguided and unreviewable prosecutorial discretion in the selection of capital cases, apparent from the county-by-county disparities.⁴⁶ Although the *Lewis II* appeal primarily focused on the duty of the prosecutor to disclose information favorable to the defense and on the competence of counsel, the majority declared that the statistical evidence of discrimination presented was inconclusive and unreliable (on the basis of the one expert witness called to testify as to the evidence's validity), and ruled that any arbitrariness caused by the exercise of prosecutorial discretion was not unconstitutional.⁴⁷

Lewis's case was then reviewed on a federal habeas corpus petition. The federal district court held for the petitioner on the issue of ineffective assistance of counsel at the sentencing phase, but it did not reach the issue of the constitutionality of the death sentence as applied.⁴⁸ Despite an extraordinary effort by a team of subsequent defense advocates who uncovered shocking evidence of prosecutorial suppression of exculpatory evidence and other serious constitutional violations, the United States Court of Appeals for the Seventh Circuit affirmed, upholding the conviction as to guilt, but overturning the death sentence on the grounds of ineffective assistance of counsel and prosecutorial misconduct at the penalty phase.⁴⁹

after four other members of the court, one of whom (Justice Thomas E. Kluczynski) is no longer a member, ruled in favor of the constitutionality of the statute.

People v. Silagy, 461 N.E.2d 415, 433 (Ill. 1984) (Simon, J., concurring in part and dissenting in part) (citations omitted).

45. See People v. Lewis, 473 N.E.2d 901 (Ill. 1984) (*Lewis II*). There were allegations of ineffective assistance of counsel, prosecutorial misconduct, and the suppression of exculpatory evidence, as well as frontal challenges to the Illinois capital case processing scheme. The court rejected all of the defendant's arguments, relying on its own prior jurisprudence. See *id.* at 914.

46. The court referred to "A Compilation and Comparison of Statistics Concerning Application of the 1977 Illinois Death Penalty and Murder Statute in Felony Murder Cases." See *id.* at 913. (The Northwestern University School of Law Library was not able to obtain a copy of this Report or examine its data, despite numerous calls to agencies and courts.) In *Lewis II*, the court also rejected proportionality review. See *id.* at 913-14. Two Justices dissented on the incompetence of counsel issue. See *id.* at 914. Dissenting Justice Simon restated his view that the death penalty statute and this death sentence were unconstitutional. See *id.* at 920.

47. It is not clear from the opinion what "statistics" or "data" on proportionality were presented. See *id.* at 913. But cf. State v. Marshall, 613 A.2d 1059 (N.J. 1992) (presenting a detailed review of data and evidence).

48. See United States *ex rel.* Lewis v. Lane, 656 F. Supp. 181 (C.D. Ill. 1987). A habeas petition on behalf of Cornelius Lewis under those circumstances probably would be precluded today on procedural grounds. See generally Yackle, *supra* note 3.

49. Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987). The 1979 version of the Illinois capital statute provided that nonslayer participants in a felony murder could not be sentenced to death. See *id.* at 1454 n.2. The circuit court found that the state withheld material evidence regarding the defendant's prior convictions and knowingly made false representations to the court and the petitioner's counsel. See *id.* at 1454-58. The court set aside the defendant's death sentence and did not reach the issue of

The unusually divided character of the Illinois Supreme Court also was evident in another 1984 case, *People v. Silagy*.⁵⁰ The *Silagy* opinion is disturbing for a number of reasons. The extreme nature of the defendant's mental abnormalities, including past and present delusions, appears throughout the opinion, distracting from the court's focus upon the legal technicalities of waiver and other issues. The defendant dismissed his counsel and represented himself at the penalty phase, refusing to submit any mitigating evidence.⁵¹ The defendant even asked to be executed. The prosecution's own psychiatrist referred to the defendant as a psychotic. Despite the defendant's argument that the psychiatric testimony on insanity would have been presented differently at trial had the defense known the prosecution would seek the death penalty, the court reiterated its earlier holding that the defendant did not need to know the state's intention to seek death before the penalty phase.⁵²

The same year, in *People v. Albanese*,⁵³ two of the three Justices who had dissented in *Cousins* concurred specially in again upholding the statute, stating that the majority opinion in *Cousins* was the law until overturned by the United States Supreme Court.⁵⁴ (Ultimately, the United States Supreme Court never reviewed the constitutionality of the Illinois capital statute as applied, or ad-

the constitutionality of the statute as applied. See *id.* at 1458. The number and length of these appeals is an example of how many years, and the amount of diligence and skill on the part of the defense, was required for the evidence of prosecutorial misconduct to be brought before the court.

50. 461 N.E.2d 415, 433-35 (Ill. 1984) (Simon, J., concurring in part and dissenting in part). On federal habeas review, the federal district court declared the Illinois capital statute unconstitutional on the ground of arbitrariness, but the Court of Appeals reversed. See *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *aff'g in part & rev'g in part* United States *ex rel.* *Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989).

51. "The refusal by the defendant to make any record in the sentencing hearing that can provide a basis for his automatic appeal denies this court any meaningful role in the [s]tate's decision to impose the death penalty and turns our reviewing role into a sham." *Silagy*, 461 N.E.2d at 436 (Simon, J., concurring in part and dissenting in part). Cf. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) ("The waiver rule cannot be exalted to a position so lofty as to require this court to blind itself to the real issue—the propriety of allowing the State to conduct an illegal execution of a citizen.").

Dissenting Justice Simon also disagreed with the majority's view that *Cousins* stated the law until the U.S. Supreme Court ruled otherwise, commenting that "[a] person should not be put to death in order to perpetuate the doctrine of *stare decisis*." *Silagy*, 461 N.E.2d at 434. He further pointed out, citing Justice Harlan's separate opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that courts have always been able to reexamine the basis of their constitutional decisions: "I believe it is a violation of due process to execute a person on the basis of a statute that the majority of this court currently believes is unconstitutional, but that three Justices making up the majority support only because of the doctrine of *stare decisis*." *Id.* at 435. Justice Simon considered it reversible error to allow the defendant to defend himself at the capital penalty phase when he presented no mitigating evidence; the defendant's right to represent himself was outweighed by society's interest in "ensuring that the death penalty is only imposed rationally and consistent with our values and traditions." *Id.* at 437.

52. See *Silagy*, 461 N.E.2d at 422 (citing *People v. Gaines*, 430 N.E.2d 1046, 1059 (Ill. 1981)). The defense claimed that, had it known that all of the psychiatric testimony introduced in the guilt phase on the issue of insanity would be automatically admitted at the penalty phase toward proof of future dangerousness, it would have restricted or limited the presentation of psychiatric evidence in the guilt phase. See *id.* at 427, 431.

53. 473 N.E.2d 1246 (Ill. 1984).

54. See *id.* at 1264 ("The holding in *Cousins* is the law of this [s]tate unless it is reversed by a United States Supreme Court holding that our statute is unconstitutional.").

dressed the issues raised in these cases.⁵⁵) The Chief Justice of the Illinois Supreme Court noted that he had authored several opinions upholding the death penalty statute on the authority of *Cousins*.⁵⁶ Justice Clark stated that he thought that when the court did not strike down the statute as unconstitutional in *Cousins*, the court “permitted prosecutors, the General Assembly, the judiciary, and criminal defendants, as well as the citizens of Illinois, to rely on our pronouncement that the act was constitutional. . . . A great disservice to the stability of the law would be perpetrated by this court [if it now declared the statute unconstitutional].”⁵⁷

Justice Simon again rejected the majority’s (the former *Cousins* dissenters’s) reliance upon the doctrine of *stare decisis*,⁵⁸ noting that the Chief Justice’s specially concurring opinion was delivered to him only “moments before the opinions in this case were made public,”⁵⁹ perhaps indicating the extent of the

55. Were the present U.S. Supreme Court to consider the constitutionality of the Illinois capital sentencing scheme as applied, the outcome would be predictable after *McCleskey v. Kemp*, 481 U.S. 279 (1987). Nor would habeas corpus offer the defendant relief. See James S. Liebman, *More Than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91); Note, *The Evolution of the Supreme Court’s Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 128 (1990).

56. See *Albanese*, 473 N.E.2d at 1264 (Ryan, C.J., specially concurring):

To date, the Supreme Court has not seen fit to grant *certiorari* in any of the cases in which this court has upheld the imposition of the death penalty. . . .

There are 39 capital cases now pending in this court. We cannot wait until the Supreme Court finally passes on our statute before reviewing these cases. We have reviewed 37 capital cases since the *Cousins* decision prior to this term of court. If we would have reviewed no capital cases after *Lewis*, the first case in which the imposition of the death penalty was affirmed, and if we would have waited for a decision of the Supreme Court in that case on the validity of the statute, we would now have a backlog of 75 capital cases. That figure would no doubt exceed 100 before *Lewis* finally works its way to the Supreme Court by way of *habeas corpus*.

Besides the judicial-administration consideration of the backlog problem, common decency requires that we review these cases as rapidly as possible. Of the 37 capital cases we have reviewed prior to this term of court, the penalty of death has been vacated in 20 of those cases. Those individuals upon whom the death penalty will not be imposed deserve to know their fate as soon as possible. It would be unconscionable to needlessly subject them to the uncertainty of their fate until the Supreme Court finally passes on the constitutionality of our statute.

57. *Id.* at 1265-66 (Clark, J., specially concurring) (citing his own concurring opinion in *People v. Lewis*, 430 N.E.2d 1346, 1365-66 (Ill. 1981)).

58. See *id.* at 1267 (Simon, J., concurring in part and dissenting in part). Justice Simon also noted that

[a]t present, however, three members of this court, having expressed their belief that the death penalty statute of this State offends the Federal Constitution, refuse because of *stare decisis* to join me in invalidating that statute. They have thereby exalted *stare decisis* to a position above the Constitution, and allowed a doctrine having no constitutional basis or significance to override the affirmative constitutional guarantees of due process. The result is a clear violation of the supremacy clause.

Second, application of *stare decisis* in this context violates the State supremacy doctrine. . . .

Moreover, this court has specifically acknowledged that the doctrine of *stare decisis* must yield to State constitutional considerations.

Id. at 1267-68.

59. *Id.* at 1263 (Simon, J., concurring in part and dissenting in part).

division of the court on this issue. Justice Simon subsequently resigned from the court.

A considerable amount of prosecutorial discretion still exists in the Illinois death penalty system in 1998.⁶⁰ In Cook County, the county which includes Chicago, the prosecutor is still under no obligation to notify the defense of his intention to seek the death penalty until the first day of trial, when jury selection begins. As a matter of practice, the judge will ask the prosecutor in pre-trial conference whether he is planning to death-qualify⁶¹ the jury, which requires special jury calls. The state may indicate its intention at that point, but is not required to do so. The defense may file a motion requesting the state's intent to seek the death penalty, but the prosecution is under no obligation to reply. The state need not declare its intent at the outset, even if the facts of the case make clear that the defendant's crime is death-eligible.⁶² (Other states have not followed this practice.⁶³) The state may also accept a plea bargain for a sentence less than death until the beginning of the sentencing phase of a capital trial.

60. The summary in this paragraph is derived from Telephone Interview with Shelton Green, Chief, Homicide Task Force, Cook County Public Defender's Office (Dec. 8, 1998).

61. Death qualification is the practice of questioning jurors specifically on their attitudes toward the death penalty prior to a capital trial. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Death qualification was initially designed to remove jurors who were fundamentally opposed to the death penalty for religious reasons. Subsequently, the purpose of death qualification has been described as assuring that "high degree of objectivity, sensitivity, fairness, and impartiality essential to determine criminal guilt and sentence." *Ross v. Oklahoma*, 487 U.S. 81 (1988). A long legal battle, based upon substantial scientific evidence documenting that death qualified juries were more "conviction prone," culminated in *Lockhart v. McCree*, 476 U.S. 162 (1986), in which the U.S. Supreme Court rejected that scientific evidence.

62. Some aggravating factors will be apparent from the indictment; others will not. For example, the presence of the felony-murder factor, that the murder was committed during the course of one of the predicate felonies, would require that the predicate felony be charged in the indictment. That the victim was under 12 years of age, or that there were two victims, would also be information often included in the indictment. Other statutory aggravating factors, on the other hand, such as the fact that the shooting was a drive-by shooting, would not be stated in the indictment. Similarly, nonslayer participants in the crime are not eligible for the death penalty, but the state does not typically identify or charge one defendant as the principal in the indictment.

63. In New Jersey, for example, the issue of the timing of the prosecutor's notice to the defense of the decision to seek the death penalty was resolved even before the state high court upheld the statute. See *State v. McCrary*, 478 A.2d 339 (N.J. 1984); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 73 (1988) (discussing the *McCrary* case in the context of other early cases before the Supreme Court of New Jersey). As in Illinois, the argument centered on the lack of power in the judiciary because of the doctrine of separation of powers to review prosecutorial discretion in the selection of cases for capital prosecution. The Supreme Court of New Jersey, however, considered the review of prosecutorial discretion in the selection of cases for capital prosecution to be fundamental. This separation of powers argument is clearly articulated in *State v. Koedatich*, 548 A.2d 939 (N.J. 1988). In *Koedatich*, the Attorney General of New Jersey argued that the New Jersey Supreme Court would violate the doctrine of separation of powers if it reviewed patterns introduced by differences in prosecutorial charging practices. The court categorically rejected that position. See *id.* at 955. The County Prosecutors' Association adopted "Guidelines for the Selection of Cases for Capital Prosecution" after *Koedatich*. The Guidelines are reprinted in Bienen et al., *supra* note 23, at 791-93.

The federal practice⁶⁴ is in sharp contrast to the standard in Illinois. Under the two federal death penalty statutes, the drug kingpin statute⁶⁵ and the Clinton crime bill,⁶⁶ the decision to prosecute a case as capital in any federal jurisdiction must be approved personally by the Attorney General of the United States in Washington, D.C. The United States Attorney must also serve notice to the defense within “a reasonable time before trial” that the United States intends to seek the death penalty and which statutory and nonstatutory⁶⁷ aggravating factors will be introduced at trial.⁶⁸ After the filing of the notice, additional aggravating factors may not be added without a showing of cause. (The prosecutor may withdraw the notice of factors at any time, however, without the approval of the Attorney General.) In practice, the Notice of Intention to Seek the Death Penalty, including the specific facts of the statutory and nonstatutory aggravating factors, is served soon after indictment because whether the case is capital triggers other important procedural features, including how many defense attorneys will be appointed, their qualifications, the rate at which the defense will be paid, whether the defense counsel will be public defender staff or private counsel from a panel of eligible attorneys, the length of the trial, the number of jurors, and the different character of jury selection in a capital case.

2. *The Aggregate Data on Capital Sentences and Executions in Illinois.* The amount of time and money courts spend on capital appeals has been characterized as “staggering.”⁶⁹ In 1984, the death row population in Illinois was fifty-nine; it increased by 178% between 1984 and 1996.⁷⁰ There had been seven executions by 1996, and 164 persons were on death row. Executions as a percentage of the death row population was four percent in Illinois, compared to forty-two percent in Delaware, thirty-three percent in Utah, and twenty-one percent in Texas.⁷¹ By January 1, 1998, Illinois had executed ten persons, 2.3%

64. The summary in this paragraph is derived from Telephone Interview with Ronald S. Safer, Chief, Criminal Division, United States Attorney's Office, Northern District of Illinois (Dec. 9, 1998).

65. See 21 U.S.C. § 848(e)-(r) (1994).

66. See 18 U.S.C. §§ 3591-3598 (1994).

67. Nonstatutory aggravating factors include victim impact testimony (which is limited to testimony from the victim's immediate family), evidence that the crime was “vile” or “heinous” (neither of which are statutory aggravating factors under the federal statute), and the future dangerousness of the defendant.

68. See 18 U.S.C. § 3593(a) (1994); 21 U.S.C. § 848(h)(1) (1994).

69. *State v. Marshall*, 586 A.2d 85, 222 (N.J. 1991) (Handler, J., dissenting). Justice Handler of the New Jersey Supreme Court added that

[t]he Administrative Office of the Courts [in New Jersey] has estimated that the death penalty will cost over \$7 million per year in court expenses. . . .

[T]he Supreme Court [of New Jersey] itself has consumed untold hours and expended enormous effort in deciding capital cases on direct appeal. . . . The Court's opinions in capital cases alone cover more than 2,000 pages in the printed official reports of the Court's decisions, almost twenty-five percent of all the Court's decisional work-product for that period.

Id. Justice Handler further noted studies in other jurisdictions that suggested that “the price of death is exorbitant.” *Id.*

70. See Bienen, *supra* note 11, at 169 tbl.2.

71. See *id.*

of all executions nationwide, ranking the state tenth in the number of executions.⁷²

The first execution in Illinois after reenactment took place in 1990, nine years after the constitutionality of the death penalty statute was upheld.⁷³ Illinois's death row population ranks at the high end of the middle group of states (with, for example, Pennsylvania, Alabama, North Carolina, and Ohio).⁷⁴ Illinois has a larger death row population than its neighboring state, Indiana, and a larger death row population than some states considered the bedrock of the death belt: Louisiana, Mississippi, and Georgia.⁷⁵

3. *Illinois Supreme Court Reversal and Affirmance Patterns.*⁷⁶ According to the Department of Corrections, a total of 255 death sentences have been imposed in Illinois since 1977.⁷⁷ The Illinois Supreme Court has set aside ninety-four.⁷⁸ The court reversed and remanded for a new trial forty-two convictions; the sentence of death was reversed and remanded for a new penalty hearing in thirty-six cases. In sixteen cases, the court vacated the death sentence and remanded for a sentence less than death.

The reasons for the reversals included a wide range of appellate issues: errors in judicial instructions and in the finding of statutory aggravating factors, errors in the admission of evidence, many cases of ineffective assistance of counsel, instances of improper and prejudicial conduct by prosecutors, errors in jury selection, and other familiar and commonplace trial errors.⁷⁹

72. See DEATH ROW, U.S.A., *supra* note 13, Winter 1998, at 15, 29, 30. The total number of death row inmates nationwide as of January 1, 1998 was 3,365. See *id.* at 1.

73. See Bienen, *supra* note 11, at 166 tbl. 1. This was neither an exceptionally short nor long period of time in comparison to other states. See *id.*

74. For figures as of January 1, 1998, see DEATH ROW, U.S.A., *supra* note 13, Winter 1998. California, Texas, and Florida, for example, have larger death row populations. For a comparison of states over time, see Bienen, *supra* note 17, at 166 tbl. 1, 169 tbl. 2.

75. Figures are for January 1, 1998. See DEATH ROW, U.S.A., *supra* note 13, Winter 1998.

76. The information in this section is derived from two unpublished manuscripts (on file with author) compiled by the Illinois Office of the State Appellate Defender, Supreme Court Unit: Relief Granted in Death Penalty Cases in the Illinois Supreme Court (listing cases from 1979 to May 1996); List of Illinois Supreme Court Opinions in Death Penalty Cases (listing cases from 1979 to May 1997).

77. See Brief and Appendix *Amicus Curiae* of the Coalition Concerned About the Execution of the Innocent on Behalf of Ronald Kliner at 12, *People v. Kliner*, 750 N.E.2d 850 (Ill. 1998) (No. 81314) (brief filed by Locke E. Bowman, Jean Maclean Snyder, and MacArthur Justice Center, University of Chicago Law School) (on file with author) [hereinafter MacArthur Justice Center Brief]. The Illinois Supreme Court had issued 327 opinions in death penalty cases by May 1996. Some cases were reviewed more than once. See MacArthur Justice Center Brief, *supra*, at 11-12 nn. 6 & 7; List of Illinois Supreme Court Opinions in Death Penalty Cases, *supra* note 76.

78. According to data from the Illinois Coalition Against the Death Penalty, 56 persons sentenced to death have been removed from death row after resentencing. See MacArthur Justice Center Brief, *supra* note 77, at 12 n.7.

79. See, e.g., *People v. Johnson*, 538 N.E.2d 1118 (Ill. 1989). The court, in granting relief, found that the offenses (murder, attempted murder, and armed robbery) were the result of extreme emotional disturbance; the defendant had been fired from his job and previously had led a relatively blameless life. Thus, "the retributive and deterrent functions of the death penalty will not be served by putting [the defendant] to death." *Id.* at 1131.

B. Death Sentences Imposed by Corrupt Judges

In 1996, the United States Court of Appeals for the Seventh Circuit held in *Bracy v. Gramley* that the habeas corpus petitioners, who had been sentenced to death, were not entitled to a new trial or to seek discovery to further examine the possibility that the trial judge had been biased, despite the fact that they had been sentenced to death by Judge Thomas Maloney, who had been convicted of taking bribes during the period when he considered their cases.⁸⁰ The court concluded that a habeas petitioner must show actual bias, not simply the appearance of bias. While refusing to allow the petitioners the opportunity to gather evidence of judicial bias, the majority offered its opinion that the defendants were guilty:

[T]he evidence that was admissible shows that they were guilty and this is important because, with a few exceptions, a person convicted in a state court may not obtain an order for a new trial from a federal court on the basis of constitutional errors committed at the trial unless the errors result in actual prejudice, or, equivalently, unless they substantially influenced the verdict.⁸¹

The Seventh Circuit rejected a large body of law holding that the appearance of justice is as important as the fact of justice, and stated that “for bias to be an automatic ground for the reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, or a possible temptation so severe that we might presume an actual, substantial incentive to be biased.”⁸² For the majority of the Seventh Circuit,

[t]he argument that a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition to persuade us to treat this case as if Judge Maloney had taken a bribe from the government to convict. If the argument is rejected, ours is a case in which there is merely an appearance of impropriety in the judge’s presiding, and an appearance of impropriety does not constitute a denial of due process. Appearance of impropriety there was. We know this because if a judge were under indictment for accepting bribes he would not be permitted to hear any cases.⁸³

80. See 81 F.3d 684 (7th Cir. 1996), *rev’d*, 117 S. Ct. 1793 (1997). After receiving bribes, Judge Maloney rendered acquittals from the bench in two murder cases; in another case, he handed down a verdict for voluntary manslaughter only, acquitting the defendant of felony murder. These verdicts might well have put Judge Maloney in a position where he felt that he needed to impose a death sentence to appear impartial to federal investigators. The *Bracy* defendants’ trial before Judge Maloney coincided with the bribe negotiations in one case and closely followed another murder case that was later proven to have been fixed. The defense attorney asked for a postponement to prepare mitigating evidence at penalty phase. This request was refused. Apparently, the defense attorney appointed by Judge Maloney did not know that the penalty phase of the capital trial would follow immediately upon the guilt phase and that additional and different preparation was required. “It is impossible to say with confidence that Judge Maloney did not deliberately select a less experienced lawyer to represent Petitioner due to a corrupt motive, such as a desire to insure a guilty verdict and a death sentence in a high profile case.” *Bracy*, 117 S. Ct. at 1799 n.11.

81. *Bracy*, 81 F.3d at 688.

82. *Id.* (citation and quotation omitted). For the cases discussing the standard for judicial bias and the relevant empirical research, see Peter David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. LAW & CRIMINOLOGY 887 (1996); Symposium, *The Appearance of Justice: Juries, Judges and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096 (1996).

83. *Bracy*, 81 F.3d at 690 (citing ILL. S. CT. R. 56(a)(1)).

Yet Judge Maloney was not simply indicted for bribery—he was convicted of bribery. If he was unfit to be a judge, why was he not unfit in all the cases he had heard?⁸⁴

Ironically, the fact that the judge took bribes probably would have met the standard for disqualification of the judge prior to trial under the standard for recusal for extrajudicial bias: “Parties seeking to recuse a judge for extrajudicial bias must show only that a reasonable person, aware of the relevant circumstances, might harbor doubts about the judge’s impartiality.”⁸⁵

The Seventh Circuit claimed that it was not minimizing the problem of judicial corruption.⁸⁶ Its reliance on the “guilty anyway” principle, however, itself violates the norms of ethical and principled judicial decisionmaking. Even with the petitioners’ additional proof that the prosecution had knowingly introduced perjured testimony from the principal identifying witness, the Seventh Circuit held that all of the evidence produced was insufficient to grant a new trial.⁸⁷

The opinion of dissenting Judge Rovner is stinging:

No right is more fundamental to the notion of a fair trial than the right to an impartial judge. . . . The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted. The State of Illinois placed the fate of [the defendants] in the hands of a racketeer.⁸⁸

Judge Rovner argued that all the petitioners needed to prove to establish a violation of due process was circumstances “which might lead him not to hold the balance nice, clear, and true between the state and the accused.”⁸⁹

84. The Seventh Circuit majority was influenced by the fact that [a] principled acceptance of [the defendant’s] argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes.

Id. at 689. Significantly, Judge Maloney sentenced more people to death than any other judge in Cook County. See Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231, 1247 (1997).

85. Blanck, *supra* note 82, at 913.

86. “We do not make light of judicial corruption. It has tainted the judicial system of Illinois, caused unjust acquittals, jeopardized convictions, tarnished the legal profession, and raised profound doubts not only about the state’s method of selecting judges but also about the entire political culture of the state.” *Bracy*, 81 F.3d at 691.

87. “The knowing use of perjured testimony by the prosecution, although a very serious infringement of the constitutional rights of a criminal defendant, is not an automatic basis for a new trial. There must be a reasonable likelihood that the violation affected the verdict.” *Id.* at 693-94 (citations omitted).

88. *Id.* at 696 (Rovner, J., dissenting).

89. *Id.* at 698 (Rovner, J., dissenting) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Judge Rovner argued that the proof that Judge Maloney was motivated by his bribe-taking to favor the prosecution would more than satisfy that standard, and would consequently constitute “good cause” to grant the petition to permit discovery. See *id.*

In a similar case involving a corrupt Judge, the then-Chief Justice of the New Jersey Supreme Court noted:

Society invests its leaders with many powers. No power is greater, nor its responsibilities more awesome, than that given a judge. The power to render final judgment is limited only by the law and the judge’s conscience. Society gives this power on condition that judges be

A unanimous United States Supreme Court reversed the Seventh Circuit. The Supreme Court's opinion noted that the evidence the Seventh Circuit had not found "sufficiently compelling" to grant a motion for discovery included the following: testimony from Judge Maloney's accomplice that Judge Maloney's opinions in favor of the prosecution were not unbiased; evidence that the judge took bribes in three other murder cases; evidence that he regularly fixed felony cases when he was a practicing defense attorney; evidence that he assigned as counsel to Bracy's co-defendant a former law associate who, it is not unreasonable to suspect, knew of the judge's proclivities and corrupt habits; and evidence that this former law associate "hurried the case along" at the request of the judge in a manner prejudicial to the defendants.⁹⁰ The Seventh Circuit had reasoned that "[a] judge could be biased and yet the bias not affect the outcome of the case."⁹¹ The Supreme Court disagreed: "[U]nfortunately, the presumption [that public officials have properly discharged their official duties] has been soundly rebutted: Maloney was shown to be thoroughly steeped in corruption through his public trial and conviction."⁹²

After *Bracy*, the Illinois courts reconsidered the case of several convictions for murder and death sentences imposed in 1986 because the judge—Judge Maloney—had accepted a \$10,000 bribe to fix the case.⁹³ At the original trial, the defendants waived their right to a jury for the guilt phase and expected a (bribed) verdict of acquittal from Judge Maloney. The judge changed his mind, however, because he was worried his illegal conduct would be detected. He instead returned the bribe and convicted the defendants of capital murder at a bench trial. The judge then advised the defendants that he was planning to sentence them to death, and the defendants elected a jury sentencing. When the jury found no mitigating circumstances at the penalty phase, the judge sentenced the defendants to death.⁹⁴ The defendants' direct appeals and initial

independent, trusting them and no one else. Respondent sold this power, he sold his judgments, he sold his independence. He not only betrayed his trust, he betrayed New Jersey's tradition of judicial honesty: in the more than 35 years since the creation of our new court system, consisting now of more than 300 judges, only one other judge has been indicted.

In re Coruzzi, 472 A.2d 546, 549 (N.J. 1984) (opinion of Wilentz, C.J.). In a manner similar to Judge Maloney, Judge Coruzzi let it be known that payment to the judge would result in a noncustodial criminal sentence. The judge even persuaded prosecutors not to object to reconsideration of sentence. When caught with a \$12,000 bribe in his jacket pocket, after being taped while accepting the bribe, Judge Coruzzi said that a crazy person had given him the money and he had no idea why. See *State v. Coruzzi*, 460 A.2d 120, 129 (N.J. Super. Ct. App. Div. 1983). This widely reported incident prompted a courthouse wag to quip: "How do you spell Coruzzi? With two z's and 12 G's."

90. *Bracy*, 117 S. Ct. at 1798 & n.9.

91. *Bracy*, 81 F.3d at 688.

92. *Bracy*, 117 S. Ct. at 1799.

93. See *People v. Hawkins*, 690 N.E.2d 999 (Ill. 1998).

94. On the facts of this case, there was no reason merely to speculate about the judge's motivation because the judge himself initiated the return of the bribery money: "[The intermediary] told the [defendant going to trial] that the fix might not go through, that there may have been a leak regarding the fix from the El Rukns to the FBI, and that the judge was scared." *Id.* at 1002. The circuit court entered an order vacating the verdict and convictions and ordered a new trial. *Id.* The Illinois Supreme Court upheld the lower court, finding that the defendants' convictions do not remove the taint introduced into the trial by the bribe: "Having determined that due process was lacking in the criminal

post-conviction proceedings did not mention the bribes. The Supreme Court of Illinois affirmed the death sentences, even though the petitioners argued that the judge “came down hard” in cases where he was not bribed in order to avoid the suspicion (which turned out to be well founded!) that he was “on the take.”

In 1996, a state trial court judge vacated the defendants’ convictions and ordered a new trial because Judge Maloney had held a “direct, personal, substantial, pecuniary interest” in the outcome of the trial.⁹⁵ On appeal, the state argued that the defendants had waived their right to attack their convictions on due process grounds because they themselves had offered the bribe. The state also argued procedural default—because the defendants did not object to the bribery at the time of their conviction, they had waived the right to object—and the doctrine of laches, which bars recovery by a litigant who delays pursuing a remedy. Finally, the state argued that the “unclean hands” doctrine prohibited relief.

The Illinois Supreme Court rejected the state’s arguments. The court argued that “[a] fair and impartial jury cannot be permitted to draw the conclusion that, because a defendant attempted to fix his trial, he is guilty of the offense for which he is being tried.”⁹⁶ Attempting to bribe a judge is a separate and distinct offense, and prosecution for that crime is the proper means for addressing that conduct: “Allowing the [s]tate to execute defendants as ‘punishment’ for their ‘unclean hands’ is not an acceptable alternative.”⁹⁷ The court rejected the state’s argument on “injected error” for similar reasons. Although no bribe would have occurred without the defendants offering the bribe, no bribe would have occurred if the judge had not been willing to accept it. The court concluded that it is impossible to know whether the same verdict would have been rendered by an uncorrupted judge.

The cases involving the corrupt Judge Maloney raise fundamental questions about the integrity of the judicial process. In the period when he was taking bribes, Judge Maloney imposed eight death sentences.⁹⁸ Unfortunately, judicial corruption and questionable ethical behavior also is not unknown on the Illinois Supreme Court.⁹⁹

proceedings, it is impossible for this court to know whether the verdict would have been the same if rendered by an uncorrupted judge.” *Id.* at 1007. The *Hawkins* opinion also refers to a second murder case before another judge also convicted of bribery. That case was remanded by the Seventh Circuit for a hearing on whether a bribe to acquit the co-defendant implicated the result for the defendant who was convicted. *See id.* at 1009 (discussing *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997)). For further discussion of these distinctions, see Ayres, *supra* note 84, at 1231.

95. *Id.* at 1002.

96. *Id.* at 1006 (“Where surrender of a fundamental constitutional right is concerned, our inquiry cannot be focused upon the ‘clean hands’ of the defendant.”).

97. *Id.* (“That defendants may have contributed to the corruption of an impartial fact finder is immaterial to our immediate inquiry of whether they were denied a fair trial.”).

98. These include: Collins, Bracy, Hooper, Tatoni, Gacho, Fields, Hawkins, and Cobb. Some of these death sentences were set aside on other grounds. *See* Telephone Interview of Marcia Lehr, Northwestern University School of Law Librarian, with Marty Carlson, Illinois Appellate Public Defender, Capital Litigation Division (Mar. 25, 1998).

99. *See* Dirk Johnson, *After Censure, Chief Justice of Illinois Quits*, N.Y. TIMES, May 3, 1997, at A11 (“Facing possible impeachment for trying to use his position to escape speeding tickets, James

C. Sentencing Innocent Persons to Death

It is not a rare or infrequent occurrence that innocent persons are convicted of murder.¹⁰⁰ Nor are reversals of such sentences easy to come by.¹⁰¹ According to the United States Department of Justice, twenty-eight men convicted of rape recently have been released when DNA evidence proved their innocence.¹⁰²

This situation is particularly troubling when the innocent person has "confessed" to the capital crime. The idea that an innocent person would confess to a crime, especially a crime such as capital murder, is counterintuitive and extremely difficult for jurors, judges, journalists, and others to understand. Surely, the common sense view is, if someone confessed to a crime, they must be guilty. Yet persuasive scientific and factual evidence exists documenting instances of persons confessing to crimes they did not commit. At the Northwestern Conference on Wrongful Convictions,¹⁰³ more than one person who

Heiple resigned today as chief of the Illinois Supreme Court. He remains on the court as a justice." Cf. also *Pennsylvania Senate Convicts a State Justice*, N.Y. TIMES, Oct. 5, 1994, at A19:

Pennsylvania's Senate convicted a State Supreme Court Justice on impeachment charges today and voted to remove him permanently from the bench.

The Senate convicted the Justice, Rolf Larsen, on a vote of 44 to 5, finding that his decisions on whether to hear cases had been based on recommendations from a lawyer who was a political supporter.

The allegations against Judge Larsen had continued for years before he was impeached. See Michael deCourcy Hinds, *Bitter Feud Among Justices Rocks Pennsylvania Court*, N.Y. TIMES, Dec. 12, 1992, at 8; David Lauter, *Pa. High Court in Turmoil*, NAT'L L.J., June 27, 1983, at 1; Vicki Quade, *Unfit Justice?: Pennsylvania's "Sordid Affair"*, 69 A.B.A. J. 885 (1983).

100. *After 9 years in Prison, Woman Is Acquitted in Husband's Death*, N.Y. TIMES, Jan. 24, 1998, at A16.

101. The jury of eight women and four men, who deliberated for about 10 hours, received the case on Thursday after an emotional display in the courtroom by the woman, Susie Mowbray, who burst into tears and shouted, "I didn't do it! . . ."

In 1988, she was convicted of murder and sentenced to life in prison. But she was released last year after serving nine years when an appeals court ruled that prosecutors had suppressed blood evidence contradicting their homicide theory.

Id.

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

103. On November 13-15, 1998, 1,500 people attended the first national Conference on Wrongful Convictions and the Death Penalty at the Northwestern University School of Law. The Conference assembled in one place 27 men and two women, 16 African Americans and nine whites, who had been sentenced to death but later had been found to have been wrongly convicted of capital crimes and wrongly sentenced to death. National and international coverage of the conference was extensive, including full length programs on ABC's *Nightline* and other national news, and press from Sweden, South Africa, and Switzerland. The 29 men and women who attended the Conference and spoke about their cases were less than half of the 75 people who have been exonerated after having been sentenced to death. Many of these people served decades on death row. See, e.g., Rick Bragg, *In Prison for Three Decades, Man Is Rid of Bars, Not Fears*, N.Y. TIMES, Nov. 23, 1998, at A5.

Those present at the Northwestern Conference included Randall Dale Adams, incarcerated for over a decade, whose case was brought to the attention of the public through the film *The Thin Blue Line*. Many of those who were later found to be innocent were convicted on the basis of false confessions, perjured testimony, and corrupted trials where they were inadequately represented, usually by publicly paid defense counsel. Panelists and speakers addressed death penalty topics including technical questions of federal habeas corpus, the methods for investigating wrongful convictions, the analysis and interpretation of DNA evidence, jury decisionmaking, grassroots mobilization, executive clemency and parole boards, a proposed moratorium on executions, and many other topics. Tapes of panel pres-

had been sentenced to death in spite of being innocent of the offense described how a person could “confess” to a crime he did not commit.¹⁰⁴ Such death sentences, however, may be just as hard to overturn as others.

In Illinois, ten persons have been freed since 1977—eight in the last four years—from Illinois’s death row because of acquittals on retrial or prosecutorial decisions to drop further charges.¹⁰⁵ This constitutes a rate of error of more than three percent. In these cases, perjured testimony or corrupt practices by police and prosecutors were used to obtain the wrongful convictions. Such practices have been tolerated by the Illinois courts.¹⁰⁶

The presumption of innocence vanishes upon conviction and is replaced by presumptions that the trial was fair and that the conviction and sentence were justly imposed. It was due to fortuitous circumstances that the death sentences of innocent defendants were set aside, not because of the diligence of the appellate courts in Illinois.¹⁰⁷ The cruelest irony is the argument that the system works because a person who served years or decades on death row is finally released when found to be totally innocent.

When death sentences are reversed, it is usually only after extraordinary efforts by persons outside of the criminal justice system, rather than through the operation of “ordinary” appellate procedures.¹⁰⁸ In the Illinois cases, volunteer

entations and a schedule of the conference are available from Teach’Em, 160 East Illinois St., Suite 300, Chicago, IL 60611.

104. For an analysis and documentation of false confessions in capital cases, see Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

105. See MacArthur Justice Center Brief, *supra* note 77, at 11 (nine cases). The most recent (10th) case is Anthony Porter, who served 16 years on death row and came within days of being executed. See Belluck, *supra* note 1, at A1.

In the MacArthur Justice Center Brief, the *amici*, a coalition of religious leaders, bar associations, the ACLU, and a number of individuals, asked the court to appoint a special commission to study this issue. In Illinois, more people have been released from prison because they were wrongfully convicted than have been executed:

Unfortunately, it appears that Illinois, of all the states in the nation, may be in the greatest danger of perpetrating such a miscarriage of justice . . . [Of the] documented 21 cases nationwide in the past four years in which a death row inmate was freed after either a retrial and acquittal or a prosecutorial decision to drop charges as a result of new developments . . . seven—fully one third—are from Illinois.

MacArthur Justice Center Brief, *supra* note 77, at 9-10 (annotating cases and years these defendants spent on death row).

106. See Armstrong & Possley, *The Verdict: Dishonor*, *supra* note 8, at 1 (detailing such behavior in the first of a five-part series, “How Prosecutors Sacrifice Justice to Win”).

107. In four of the cases, a confession by the actual killer was discovered or overheard inadvertently. See MacArthur Justice Center Brief, *supra* note 77, at 23; see also *id.* app. II (Erroneous Illinois Death Sentences and Convictions).

108. See Terry, *supra* note 102, at 6.

[A] team of lawyers, a teacher, investigators and students cared very much. In court today were three young women, senior journalism majors at Northwestern University . . . who along with their professor, David Protess, and a black private investigator, Rene Brown, spent the last six months going through mountains of files and tracking down witnesses in crack houses and prisons. Mr. Brown had been working on the case off and on since 1980, when one of the initial trial lawyers sought his help.

lawyers, investigators, and university professors have been the ones who found the evidence of innocence. In Ohio, the heirs and supporters of Sam Sheppard, whose conviction was overturned after he spent ten years in jail for murdering his wife, have not yet been successful in persuading the state prosecutor to charge another person for the offense, even though the family claims to have DNA evidence linking another suspect to the offense.¹⁰⁹

III

CONCLUSION

It is impossible for the appellate courts to scrutinize relentlessly every aspect of each capital case. At the very least, however, the appearance of justice requires principled decisionmaking by those courts. This must mean more than a routine affirmance of death sentences, when there are so many to review and the procedural and substantive issues are fundamental and complex.¹¹⁰ Murders may have a certain similarity, but each case is different.

Unfortunately, corruption in government exists. While the corrupt judge, the prosecutor who suborns perjury or does not turn over to the defense exculpatory evidence, or the government official who uses his office for personal gain are but a tiny fraction of the hundreds of thousands of loyal and trustworthy public servants with the power to influence the decision to impose a capital sentence in Illinois, their number is not and never will be zero. The United States Supreme Court noted in *Bracy v. Gramley* that while Thomas Maloney might have been the first judge in Illinois to have fixed murder cases, he was not the first judge to be convicted of taking bribes in murder cases.¹¹¹ And unfortunately it is not rare to hear of government officials who have breached the public's trust.¹¹² A corrupt judge who has taken a bribe cannot be trusted with

Id.

109. See Fox Butterfield, *1954 Murder Still Roiling Both Sides in Cleveland*, N.Y. TIMES, Mar. 23, 1998, at A10; see also CYNTHIA L. COOPER & SAM REESE SHEPPARD, *MOCKERY OF JUSTICE: THE TRUE STORY OF THE SHEPPARD MURDER CASE* (1995).

A recent *New York Times* article reports that the Ohio Supreme Court ordered the case involving Sam Sheppard be reopened over the strong objection of the original prosecutor. See Editorial, *Injustices in the Sheppard Case*, N.Y. TIMES, Dec. 4, 1998, at A30.

110. See *State v. Marshall*, 586 A.2d 85, 223 (N.J. 1991) (Handler, J., dissenting) (citation omitted):

One commentator, remarking on the Kansas legislature's rejection of the death penalty, largely because of the tremendous drain of resources that the state would suffer, has noted: "The enormous effort and complex jurisprudence in [capital] cases have produced genuine distortions in the criminal justice systems of states that actively pursue capital punishment."

There may also be an intellectual drain on our criminal-justice system attributable to the enormous commitment of resources and efforts to capital-murder prosecutions. The . . . [Supreme Court of New Jersey] has, I think, failed to anticipate or acknowledge the strength of the gravitational pull of capital-murder jurisprudence on the criminal law itself, as well as on the general administration of criminal justice.

111. See *Bracy v. Gramley*, 117 S. Ct. 1793, 1795 n.2 (citing *Ohio v. McGettrick*, 531 N.E.2d 755 (Ohio 1998); *In re Brennan*, 483 N.E.2d 484 (N.Y. 1985)).

112. See Adam Nossiter, *Ex-Gov. Hunt of Alabama Cleared by Pardon Board: U.S. Attorney Plans Inquiry on the Decision*, N.Y. TIMES, June 12, 1997, at A18:

any judicial decision.¹¹³ Appellate courts call into question their own integrity and credibility when they uphold the outcomes of corrupted capital trials.

The even more troublesome cases involve mentally disturbed and marginally competent defendants and the incompetent or nonexistent presentation of evidence on their mental capacity. Anthony Porter was granted an initial stay of execution, which eventually led to his being found innocent, because his I.Q. of fifty-one raised the question of his competency to be executed.¹¹⁴ Yet the trial court that convicted and sentenced Porter never considered the issue of his fitness to stand trial, his ability to form the requisite criminal intent, or his mental retardation as a mitigating factor.¹¹⁵

What finally can be said about the system for imposing capital sentences in Illinois? Certainly, the courts have been busy with capital cases. Some death sentences unjustly imposed have been reversed. Some persons who were innocent have had their death sentences overturned. Yet the record does not inspire confidence. A system that does not even appear to protect the constitutional rights of defendants when they are sentenced to death, no matter how guilty those defendants may be, or how heinous their crimes, is not tolerable. Ironically, two national commentators have identified Illinois as a state that has followed the United States Supreme Court's injunction to select only the most heinous cases for the death sentence.¹¹⁶

The quality of justice in the trial and appeal of capital cases in Illinois is of a deplorably low standard. Whether this standard is typical of, better than, or

Guy Hunt, the former Governor whose criminal conviction while in office in 1993 stood out even in the rough-and-tumble world of Alabama politics, was exonerated today by the state pardon board he largely appointed. . . .

"The courts at every turn have upheld the conviction, and now this panel of friends in high places have let him off," said State Representative Paul Parker, a Democrat from Hartselle. "If it had been me or you, we'd still be sitting in the jail house. It makes a mockery of our system. . . ."

113. For arguments about whether the courts should make a distinction between extortion and bribery in cases of judicial corruption, see generally Ayres, *supra* note 84. The article discusses the academic literature on bribery and extortion and closes with the observation that the issues raised by judicial corruption also apply to issues of juror or prosecutorial corruption. *See id.* at 1232 n.12. This same article begins with a description of the author's own appearance before Judge Maloney with a motion for recusal due to extortion. *See id.* at 1231.

114. *See* Belluck, *supra* note 1, at A1.

115. *See* *People v. Porter*, 489 N.E.2d 1329, 1332-33 (Ill. 1986).

116. *See* Walter Berns & Joseph Bessette, *Why the Death Penalty Is Fair*, WALL ST. J., Jan. 9, 1998, at A16:

Rather than being arbitrary and capricious, the system now in place serves as a filter, reserving the death penalty for the worst offenders. This is demonstrably the case in Illinois[:]

20% of those on the Illinois death row committed murders during the commission of a rape or sexual assault, compared with well under 1% of all murderers;

10% of the condemned committed murders during a burglary or home invasion, compared with less than 1% of all murders;

13% of the condemned had murdered a child, compared with 4% of all murders;

37% of the condemned committed murders involving more than one victim, compared with 4% of all murders. . . .

There are no barroom brawls here, no domestic disputes that got out of hand, no "heat of passion" crimes that are so common among homicides in the U.S.

worse than the quality of justice in capital cases in other states remains for another day's consideration.¹¹⁷ In the meantime, perhaps the national attention brought to the recent cases of the release of the innocents whose death sentences had been upheld on appeal will result in institutional changes.¹¹⁸ The present system is indeed, in the words of Justice Harrison, profoundly unjust.

117. See, e.g., Marcia Coyle, *Suit: Death Defense Is a Sham*, NAT'L L.J., Dec. 21, 1998, at A1 (discussing legal attacks in the Florida Supreme Court on both the public and private death row counsel systems in that state).

118. See Ken Armstrong & Maurice Possley, *Illinois Courts May End Secrecy: State's Chief Justice Wants Prosecutorial Abuses Made Public*, CHI. TRIB., Feb. 3, 1999, at 1:

The Chief Justice of the Illinois Supreme Court on Tuesday proposed significant changes designed to remove the secrecy that has shrouded prosecutorial misconduct in scores of Illinois court rulings. Responding to a five-part series in the *Tribune* [see *supra* note 8] that detailed more than 300 convictions reversed in Illinois because of prosecutorial misconduct, Chief Justice Freeman argued that prosecutors who commit misconduct be more frequently identified by name in court and that all such cases be sent directly to attorney disciplinary officials.