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Righting Illinois' Wrongs: Suggestions for Reform and A Call for Abolition, 34 J. Marshall L. Rev. 469 (2001)

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RIGHTING ILLINOIS' WRONGS: SUGGESTIONS FOR REFORM AND A CALL FOR ABOLITION

SHARONE LEVY*

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* J.D. 2001, University of Iowa College of Law; B.A. 1996, University of Pennsylvania. I would like to thank my family, to whom I am indebted for their abundant love and support, and Jennifer Gates, for challenging my formerly steadfast belief in the justice of the American system of capital punishment. I dedicate this piece in loving memory to Justin D. Simon, my mentor, role model, and friend.

We need to know why 12 innocent men¹ have been sentenced to death, and we need to correct whatever it was that caused this to happen. We need to know why the death penalty process is so arbitrary and subjective; why one person is sentenced to death and another to life without parole for the same offense. We need to know what role political considerations play in the decision whether or not to seek death. We need to know the reason Illinois has the highest percentage of people of color on Death Row² among the 50 states. We need to know what impact race and poverty have in death penalty cases. We need to review and analyze sufficient cases to determine if indeed the death penalty is being reserved for the worst offenders who commit the most heinous crimes. We need to know the role police and prosecutorial misconduct plays in the death penalty . . . What is truly needed in Illinois is a moratorium on state executions, which will allow for a serious, in-depth study and review of all aspects of the administration of the death penalty in Illinois.

Bill Ryan, Chairman, Illinois Moratorium Project³

The moral and social debate on capital punishment will continue for as long as the people of Illinois choose to authorize death as the ultimate sanction for taking life. Important as this debate is to society, the function of the judiciary is to see that capital punishment is administered according to law, and not to serve as a forum for discussion of the broader issues surrounding capital punishment. Accordingly, public comments regarding a moratorium on executions and abolition of the death penalty are forwarded to the Court without comment or recommendation.

Special Supreme Court Committee on Capital Cases⁴

1. At the time of the writing of this Article, the state of Illinois had released *thirteen* men from Death Row: Perry Cobb, Darby Tillis, Joseph Burrows, Rolando Cruz, Alejandro Hernandez, Verneal Jimerson, Dennis Williams, Gary Gauger, Carl Lawson, Ronald Jones, Anthony Porter, Steven Smith, and Steve Manning. Steve Mills & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, at 1. Nationally, seventy-five people as of November 1999 have been exonerated after being wrongly sentenced to death. Naftali Bendavid, *Attendees Assail Capital Punishment; Former Death Row Inmates Honored at NU Conference*, CHI. TRIB., Nov. 15, 1998, at 4.

2. As of March 1999, there were 105 African-Americans, forty-nine Caucasians and eight Latinos on Death Row in Illinois. Rick Pearson, *Moratorium on Executions Gains Favor; Poll Finds Support for Death Penalty Has Slipped*, CHI. TRIB., Mar. 28, 1999, at 1.

3. Bill Ryan, *Voice of the People*, CHI. TRIB., Nov. 22, 1999, at 14.

4. Special Sup. Ct. Committee on Capital Cases, *Supplemental Findings and Recommendations* 94-95 (Oct. 2000) (on file with author) [hereinafter Committee Report].

"We are alive today despite the criminal-justice system's intense efforts to kill us."

Banner signed by seventy-five released Death Row inmates⁵

I. INTRODUCTION

On Monday, January 31, 2000, Illinois Governor George Ryan made the state the first in the nation to impose a moratorium on the death penalty.⁶ In announcing the moratorium, the governor said: "Until I can be sure that everyone sentenced to death in Illinois is truly guilty . . . no one will meet that fate."⁷ Governor Ryan's decision came after thirteen capital convictions were overturned in the state after further evidence illustrated that the accused were not guilty of the crimes for which they had been convicted.⁸ Since Illinois reinstated the death penalty in 1977,⁹ twelve people have been executed,¹⁰ with the most recent execution occurring during Governor Ryan's tenure.¹¹

Of the thirty-eight states that impose the death penalty, Illinois is the first to declare a moratorium on the practice.¹² In

5. See Bendavid, *supra* note 1, at 4 (noting that all seventy-five of the released inmates signed a board with this quotation and gathered together sunflowers as a symbol of their regained freedom).

6. Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure," Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1. Governor Ryan used no formal mechanism in declaring the moratorium. See Press Release From George Ryan, Illinois Governor, *Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System*, (Jan. 31, 2000) (on file with author) (announcing the moratorium and noting that "I believe that a public dialogue must begin on the question of the fairness of the application of the death penalty in Illinois."); *Executive Order Creating the Governor's Commission on Capital Punishment*, Executive Order # 4 (2000) (on file with author) (creating a commission of appointees to study the current system and make recommendations toward further accountability). See also H.R. Res. 60, 91st Gen. Assembly (Ill. 1999) (establishing a commission to study the death penalty in Illinois).

7. Armstrong & Mills, *supra* note 6, at 1.

8. *Id.* (discussing a Chicago Tribune investigative report and the work of students at Northwestern University in uncovering the wrongful convictions).

9. *Id.*

10. William Neikirk, *Clinton Mulls Stay of Federal Executions*, CHI. TRIB., Feb. 5, 2000, at 1.

11. Andrew Kokoraleis, convicted of a mutilation murder, was executed in March 1999 by lethal injection. Steve Mills & Ken Armstrong, *Gov. George Ryan Plans to Block the Execution of Any Death Row*, CHI. TRIB., Jan. 30, 2000, at 1. Governor Ryan did not stop the execution, though it was within his power to grant a reprieve or stay of execution. *Id.*

12. Mills & Armstrong, *supra* note 11, at 1. Based on Governor Ryan's actions in Illinois, Senator Russell Feingold (D-WI) called for President

1999, six states considered imposing a moratorium on capital punishment, but only Nebraska got as far as passing a bill through the state legislature.¹³ The Nebraska legislation was promptly vetoed by the governor.¹⁴

Nationally, states on average are moving toward harsher implementation of the death penalty. For example, in January 2000, the Florida legislature passed legislation that expedites the execution process by reducing the time between sentencing and execution to five years.¹⁵ Florida is the nation's leader in exculpating inmates whose guilt was later doubted after they had already been incarcerated.¹⁶ Because of the reduction of the time between sentencing and execution, people wrongly sentenced to death will have less time to mount a successful appeal. They may not be as lucky as those thirteen in Illinois, all of whose appeals took longer than five years.¹⁷ Additionally, in Texas, one hundred and eleven inmates were executed within former Governor George

Clinton to impose his own moratorium on federal executions until the system can be examined thoroughly for abuses. See Neikirk, *supra* note 10, at 1 (noting that although the federal government's last execution was in 1963, currently there are twenty-one inmates on the federal Death Row and eight on the military Death Row). Clinton declined to follow Senator Feingold's suggestion, noting that a moratorium on federal capital punishment is unnecessary. See Naftali Bendavid, *Clinton Won't Follow Illinois on Executions; But President Praises Ryan as "Courageous"*, CHI. TRIB., Feb. 17, 2000, at 1 (noting Clinton's suggestion that other states follow Illinois' lead). Additionally, the American Bar Association is gearing up for a campaign for a national moratorium on capital punishment, influenced in part by Governor Ryan's actions. See *ABA Praises Possible Stay on Executions*, CHI. TRIB., Feb. 13, 2000, at 19 (commenting that the ABA began its campaign in 1997 and is now actively working on spreading their message).

13. Armstrong & Mills, *supra* note 6, at 1. See also Ken Armstrong & Maurice Possley, *Fatal Judgment In England, A Search For Long-buried Mistakes*, CHI. TRIB., Dec. 31, 2000, at § 2, 1 (noting that Nebraska, Arizona, North Carolina, Maryland, and Indiana have begun assessments of their state capital punishment systems).

14. Armstrong & Possley, *supra* note 13, at § 2, 1; Clarence Page, *Closing the Margin of Error*, CHI. TRIB., Feb. 2, 2000, at 19 (stating that of the thirty-eight states that have a death penalty, only Nebraska considered passing a moratorium similar to that of Illinois). Republican Governor Mike Johanns of Nebraska noted that imposing a moratorium "would be poor public policy" and a vehicle for inmates to file "unnecessary" appeals. *Nebraska Execution Moratorium Vetoed*, CHI. TRIB., May 27, 1999, at 24. The legislature's bill would have imposed a moratorium for two years to examine the state's execution of the death penalty. *Id.*

15. Page, *supra* note 14, at 19. Page noted that most successful appeals take longer than five years to realize. *Id.* Florida imposed a one year stoppage of executions after its electric chair caught fire during an electrocution in 1997. *Nebraska Execution Moratorium Vetoed*, *supra* note 14, at 24.

16. Page, *supra* note 14, at 19.

17. Isaac Cohen, *Voice of the People* (letter to the editor) CHI. TRIB., Jan. 13, 2000, at 22

W. Bush's tenure, as of January 2000.¹⁸ The former governor did not pardon a single Death Row inmate within his tenure in office, making the state one of the leaders in executions.¹⁹

In Illinois, Governor Ryan's move finalizes action taken in the state legislature in 1999.²⁰ At that time, the Illinois House of Representatives passed a moratorium bill that was later defeated in the Republican-controlled Senate.²¹ Ryan, himself a Republican, noted that some of his colleagues would disagree with his present action:

There's going to be a lot of folks who are firm believers in the death penalty who may not agree with what I'm doing here today But I am the fellow who has to make the ultimate decision whether someone is injected with a poison that's going to take their life.²²

Despite imposing the moratorium, Ryan continues to support the death penalty in certain cases,²³ and the moratorium does not preclude prosecutors from seeking the death penalty in on-going murder trials.²⁴ However, it does immediately affect inmates who are nearing the end of their appeals process and imminently facing lethal injection.²⁵

18. *Id.*; Page, *supra* note 14, at 19.

19. Cohen, *supra* note 17, at 22; Page, *supra* note 14, at 19.

20. Mills & Armstrong, *supra* note 11, at 1. Though the Illinois Supreme Court has never found the state's death penalty law unconstitutional, current Chief Justice Moses Harrison II suggested a moratorium a year before the governor passed the current moratorium. *Id.* Chief Justice Harrison is the only justice at this writing who believes that the state death penalty is unconstitutional. *Id.*

21. Armstrong & Mills, *supra* note 6, at 1.

22. *Id.* Governor Ryan is receiving support from some of his Republican colleagues. *Id.* Republican state Senator Kirk Dillard noted that:

My guess is virtually every member of the Senate Republican caucus supports the death penalty, and I don't know how any of us could oppose the governor wanting to make sure that the death-penalty system, the most important cornerstone of Illinois criminal law, is working properly. How can you not want to make sure?

Id. However, a March 18, 1999 Chicago Tribune article cited a statement by the Illinois Senate Judiciary Committee Chairman after the execution of Andrew Kokoraleis that the majority of Illinois legislators opposed the idea of a moratorium. Cornelia Grumman & Rick Pearson, *Ryan Agonized, But Confident He "Did the Right Thing"*, CHI. TRIB., Mar. 18, 1999, at 1. Critics of the moratorium include victims' family members. Ruth A. Adcock, *Victim Families Want Death Penalty*, CHI. TRIB., (letter to the editor) Feb. 9, 2000 at 16. Wrote one: "We challenge Gov. Ryan to support the victims and surviving family members of violent crimes by taking actions other than a moratorium . . . spending our tax money to prolong the lives of killers on Death Row is wrong." *Id.*

23. *Id.*

24. Janan Hanna & Art Barnum, *Prosecutors to Seek Death Penalty for Lemak*, CHI. TRIB., Feb. 3, 2000, at 1.

25. Armstrong & Mills, *supra* note 6, at 1. At this writing the next inmates in line for execution are Willie Enoch and Walter Thomas. *Id.* Governor Ryan

Critics who argue against elongating the capital appeals process assert that such action imposes both financial and emotional costs on taxpayers and the victims' families.²⁶ Illinois Supreme Court Justice Heiple, in a dissent challenging the majority's reversal of a capital defendant's murder conviction, noted the difficulty of conducting a new trial with aged evidence and faded memories.²⁷ Years after the murder, the file must be reopened, with many potential evidentiary costs to the prosecution. Though such a burden may be necessary to protect the rights of the accused, it is difficult for all parties involved.²⁸ Courts are aware of these burdens. The Illinois Supreme Court, in remanding Rolando Cruz, one of the thirteen men released from Death Row, for retrial, addressed this issue in its conclusion:

We are profoundly aware of the impact our decision will have upon Jeanine Nicarico's surviving family and friends. We are not insensitive to their personal anguish and tragedy. Not only have they suffered the unspeakable nightmare of her loss, but they are denied closure by our justice system, again and again. We deeply regret any role we play in prolonging their struggle and grief. Yet, we are duty bound to play a larger role in preserving that very basic guarantee of our democratic society, that every person, however culpable, is entitled to a fair and impartial trial. We cannot deviate from the obligations of that role. The resulting loss to our *entire* society would be too great.²⁹

It is up to the courts to reconcile justice for the victims with justice for the defendants. Here, justice for Rolando Cruz required allowing him a new trial, by which he finally proved his innocence.³⁰

Commentators have noted that Governor Ryan's actions may have come in response to the growing concern of Illinois citizens about how the death penalty is meted out in the state,³¹ and the overwhelming number of inmates who have been exculpated after

also commented on the possibility of Edgar Hope, Jr. being exonerated in the near future because of new evidence implicating a different man. *Id.*

26. *Illinois v. Cruz*, 643 N.E.2d 636, 688 (Ill. 1994) (Heiple, J., dissenting).

27. *Id.*

28. *See id.* at 426-27 (noting the difficulty of reopening a case where witnesses may have died or disappeared, new prosecutors are unfamiliar with the facts of the case and the victims' families have to go through the pain of seeing their loved ones' killers retried).

29. *Id.* at 667 (emphasis in original).

30. *Id.*

31. *See Mills & Armstrong, supra* note 11, at 1 (noting a Tribune poll taken in March 1999 where fifty-four percent of the state's voters were in favor of a moratorium on the death penalty, although most polled were supporters of the death penalty). A more cynical explanation offered for the governor's action was that he was trying to draw attention away from recent scandals within his administration. Editorial, *An Apology from the Governor*, CHI. TRIB., Feb. 1, 2000, at 12.

spending years on Death Row.³² In November 1999, the Chicago Tribune ran a five-part series entitled "The Failure of the Death Penalty in Illinois."³³ The series was the result of a Tribune investigation into Illinois death penalty cases dating to the reinstatement of the punishment in 1977. The Tribune journalists found "bias, error and incompetence throughout" the Illinois death penalty process.³⁴

This Article will examine the challenges to Illinois' current death penalty statute and recount various instances in which judges and juries have sentenced innocent³⁵ people to death. This Article will not argue against the constitutionality of the death penalty in Illinois or the death penalty in general. Such arguments have been made countless times before by a plethora of well-versed scholars. Indeed, it is this Article's argument that the issue of capital punishment should be removed from the realm of the courts and instead brought into the state legislatures. This Article asserts that there is no relief available for wrongly accused death row inmates in the courts, but rather it is up to the individual state legislatures to remedy the problems of their justice systems and ultimately determine whether to do away with the death penalty, state by state.

To this end, Part II explains past defendants' arguments that the Illinois death penalty statute is unconstitutional, arguments that have failed before the current Illinois Supreme Court. Part III examines the findings of Chicago Tribune reporters who launched a large-scale inquiry into the state's death penalty system. Part IV alleges that Illinois' system is unjust and should be abolished because it puts innocent people at risk of being sentenced to death, a punishment that is irreversible. This section will specifically examine how rampant problems within Illinois' system, including unsubstantiated testimony from unreliable or mistaken witnesses, coerced confessions as bedrock for convictions, and faulty circumstantial evidence used liberally and prejudicially

32. Pearson, *supra* note 2, at 1. Anthony Porter - the eleventh man freed from Death Row, was exonerated a mere forty-eight hours before his scheduled execution. *Id.* Pearson further noted that Governor Ryan rejected the possibility of problems within Illinois' system when he allowed Andrew Kororaleis to be executed in March 1999. *Id.*

33. Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois*, (pts. 1-5), CHI. TRIB., Nov. 14-18, 1999, at 1, available at <http://www.chicagotribune.com/go/deathpenalty>.

34. Page, *supra* note 14, at 19. Page commented that Illinois is not the leader in wrongful convictions and therefore "it would be foolhardy to presume that its problems are unique." *Id.* Florida leads the nation in wrongful convictions with twenty known as of February 2000. *Id.*

35. The Author realizes that "innocent" is a loaded term. However, this article uses the term "innocent" to refer to individuals who are not guilty of the crime for which they have been convicted, not to make general character assessments.

by prosecutors, resulted in thirteen men narrowly escaping death by lethal injection. Part IV further proposes solutions to help legitimize the current system in lieu of abolition, but argues that no solution may prove to be infallible. Part V concludes that the Illinois system is indicative of a nationwide problem with the execution of the death penalty, and is currently a system brimming with uncertainties that have the potential effect of sending innocent people to their death. It further proposes a nationwide moratorium on *all* executions until the arbiters of the system can guarantee that innocent people will not face death at the hands of the state.

II. *ILLINOIS V. BULL*: ARE EXECUTIONS OF INNOCENTS INEVITABLE UNDER ILLINOIS' DEATH PENALTY STATUTE?

In 1992, a jury convicted Donald Bull of seven counts of first degree murder, two counts of concealment, and one count of aggravated arson in the deaths of Donna Tompkins and her three year old daughter Justine.³⁶ According to the trial testimony, Bull confessed that he had had a relationship with Donna Tompkins and had gone to her house for a late night liaison after he had been drinking.³⁷ Bull stated that he had taken Donna's key from her mailbox and entered the apartment where she rebuffed his requests for sex and slapped him.³⁸ Maintaining that he remembered nothing of what had occurred, Bull said that he awoke on top of the victim and realized that she was dead.³⁹ Bull then heard the cries of Justine in another room and killed her.⁴⁰ According to evidence, both victims died of strangulation.⁴¹ Bull then left the victims' home after setting fire to the apartment.⁴² The prosecution's key evidence at trial consisted of matching Bull's DNA to the sperm taken from the victim's body.⁴³

After the jury convicted Bull, the defense waived a jury for sentencing.⁴⁴ Finding no mitigating factors, and only one aggravating factor, the trial judge sentenced Bull to death.⁴⁵ On

36. *Illinois v. Bull*, 705 N.E.2d 824, 828 (Ill. 1998).

37. *Id.* at 830.

38. *Id.* at 830-31.

39. *Id.* at 831.

40. *Id.*

41. *Bull*, 705 N.E.2d at 829.

42. *Id.* at 831.

43. *Id.* at 830.

44. *Id.* at 831.

45. *Id.* at 830-32. The judge found the aggravating factor of murder of two or more individuals and rejected mitigating evidence regarding Bull's below average IQ, brain dysfunction, history of alcohol and drug abuse, and unhappy childhood. *Id.* at 831-32.

appeal, Bull challenged the state's death penalty statute, alleging that it was unconstitutional "because the death penalty will inevitably be applied to innocent persons . . . [and] the irreversibility of the death penalty 'makes the inevitability of error in the imposition of the death penalty constitutionally unacceptable.'"⁴⁶ The Illinois Supreme Court rejected Bull's constitutional challenge, holding that Bull's objections were against the punishment itself, and not the manner in which the state statute was carried out.⁴⁷ The court noted that the American criminal justice system has important safeguards to ensure the defendant's right to a *fair* trial, but not to a *perfect* trial, acknowledging that errors occur during trial: "Whatever the number of safeguards in the system, the American criminal justice process is necessarily imperfect because it is operated by people and people are imperfect."⁴⁸ The court cited procedures such as the rights to counsel, an impartial jury, appellate review, and habeas corpus as important system safeguards.⁴⁹ The court admitted, however, that "trials cannot be conducted without error, and that perfection in trial procedure is virtually unattainable."⁵⁰ Nevertheless, the Illinois Supreme Court made it clear that in its opinion, the noted safeguards would flush out any errors.⁵¹

In a powerful dissent, now Chief Justice Harrison criticized the majority's assertion that the American criminal justice system is the best in the world, noting that the majority of "civilized" nations have abolished the death penalty completely.⁵² Indeed, Justice Harrison noted that the death penalty is not just, fair, or reliable in its execution and that consequently, innocent people are

46. *Bull*, 705 N.E.2d at 832, 840.

47. *See id.* at 843 (noting that the United States Supreme Court has repeatedly upheld the death penalty, finding that it does not constitute "cruel and unusual" punishment under the Eighth Amendment).

48. *Id.* at 840-41.

49. *Id.* at 840. The court additionally cited a new law passed by the Illinois Legislature which allows DNA testing of evidence that could not have been tested previously. *Id.* at 842. However, in cases where the defendant is claiming actual innocence, the accused will not necessarily get habeas review on the federal level. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) (holding that claims of actual innocence will not be heard on habeas unless there is a separate constitutional claim).

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation . . . [t]his rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.

Id.

50. *Id.* at 841 (citing *People v. Agnello*, 176 N.E.2d 788, 793 (Ill. 1961)).

51. *Bull*, 705 N.E.2d at 846.

52. *Id.* at 225 (Harrison, J., dissenting).

facing death.⁵³ The men who had been exculpated in Illinois “survived *despite* the criminal justice system, not because of it.”⁵⁴ The dissent further cited the measures passed in Illinois that have expedited the period between sentencing and execution, leaving little time for exculpatory evidence to be gathered and appeals to be waged.⁵⁵ In summary, Justice Harrison decried what he saw as the blatant unconstitutionality of Illinois’ death penalty statute:

A sentencing scheme which permits such horrific and irrevocable results cannot meet the requirements of the [E]ighth and [F]ourteenth [A]mendments . . . [i]t is no answer to say that we are doing the best we can. If this is the best our state can do, we have no business sending people to their deaths.⁵⁶

Justice Harrison, soon after dissenting in *Bull*, called for a statewide moratorium on the death penalty.⁵⁷

The *Bull* majority, however, stated that the defendant’s argument that the Illinois Death Penalty statute was unconstitutional would be better made to the legislature:⁵⁸

One must be careful not to elevate personal beliefs above thoughtful constitutional analysis. The question of whether it is enlightened to assess the ultimate penalty against those who commit the most heinous of crimes is simply not subject to our review. . . . In a democracy, the legislature, not a court, is established to respond to the will and moral values of the people.⁵⁹

Whereas *Bull*’s argument that the Illinois statute is unconstitutional because it fails to protect against the possibility of the state executing an innocent person failed in the courts, it is this argument that laid the groundwork for the current moratorium. *Bull* is a poignant example that the task of solving the unjustness of the capital punishment system lies in the hands of legislatures, not the courts.

III. “THE FAILURE OF THE DEATH PENALTY IN ILLINOIS”⁶⁰

In a five-part series in November 1999, the Chicago Tribune investigated the ills of the Illinois death penalty system. The reporters looked at Illinois’ 285 death penalty cases dating from 1977 and found that “[c]apital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and

53. *Id.* at 847 (Harrison, J., dissenting).

54. *Id.* (Harrison, J., dissenting) (emphasis added).

55. *Id.*

56. *Bull*, 705 N.E.2d at 848.

57. Mills & Armstrong, *supra* note 11, at 1.

58. *See Bull*, 705 N.E.2d at 844 (noting the requirements of judicial restraint and deference to the legislature on the issue of capital punishment).

59. *Id.*

60. This is the title of a five-part series written by Ken Armstrong and Steve Mills that ran in the Chicago Tribune from Nov. 14 to Nov. 18, 1999.

legal incompetence that justice has been forsaken."⁶¹ The report detailed examples of incompetent defense counsel, biased juries,⁶² inconclusive evidence, and error-filled trials.⁶³ The report also noted that the Illinois Supreme Court, as the reviewing body for all death penalty sentences, often ignores errors made at trial or dismisses them as harmless.⁶⁴ This would seem to run contra to the *Bull* court's assertion that safeguards within the system serve to correct errors made within trials and would support a call for abolition.

Ineffective counsel was a dominant theme of the report.⁶⁵ It noted that not only were many counsel unqualified to take cases eligible for the death penalty, they were also inexperienced and not prone to zealous representation.⁶⁶ A system in which innocent people are denied the right to adequate counsel by which to defend themselves is not a just system.

The inadequacy of jailhouse informant testimony was also a prevalent theme among Illinois death penalty cases.⁶⁷ Often, such

61. Ken Armstrong & Steve Mills, *Death Row Justice Derailed; Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment Into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1 [hereinafter *Failure Part I*].

62. The case of Anthony Porter provides a good example of biased jurors. On appeal to the Illinois Supreme Court, Porter argued that he had not been granted a fair trial because one of the jurors knew the mother of one of the victims. *People v. Porter*, 489 N.E.2d 1329, 1333 (Ill. 1986). Though the juror denied that this relationship influenced her, the fact that she attended church with one of the victim's mothers was not revealed until after the jury had rendered its verdict. *Id.* Regardless, the court denied Porter's objection and upheld his death sentence, *id.* at 1337, disregarding the dissent's argument that Porter was refused his constitutional right to a fair trial and an impartial jury. *Id.* at 1338 (Clark, C.J., dissenting).

63. *Failure Part I*, *supra* note 61, at 1. The article detailed one case in which a convicted felon was appointed by the court to represent the defendant. *Id.* Additionally, the presiding judge in that case was later convicted of fixing murder cases, and the appointed counsel was the only lawyer in Illinois to be disbarred twice. *Id.*

64. *Id.*

65. *Failure Part I*, *supra* note 61, at 1.

66. See generally Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts; With Their Lives at Stake, Defendants in Illinois Capital Trials Need the Best Attorneys Available. But They Often Get Some of the Worst*, CHI. TRIB., Nov. 15, 1999, at 1 (detailing cases of shoddy defense counsel) [hereinafter *Failure Part II*]. The article proposed that Illinois follow the lead of at least twelve other states in implementing minimum standards for the defense of capital defendants, such as a minimum of two qualified attorneys per defendant and a special bar for capital cases. *Id.* The Illinois Supreme Court recently passed new rules that implement these suggestions. See ILL. SUP. CT. R. 714 (as amended) available in Committee Report, *supra* note 4, at App. 39-42; *Bar Raised for Capital Case Trials; State High Court Sets Standards*, CHI. TRIB., Jan. 23, 2001, at 1 (noting that the new rules take effect in March, 2001).

67. Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov.

testimony formed the bedrock for the defendant's conviction. For example, in the case of Steve Manning, the thirteenth man to be released from Death Row, the prosecution had little more to tie Manning to the murder than the testimony of his cellmate.⁶⁸ Based on the testimony of this "pathological liar," Manning was sentenced to death for a crime he did not commit.⁶⁹ A system in which a person may be sentenced to death based on the testimony of a known liar is not just.

The Tribune report also examined the prevalence of police brutality and other police misconduct in obtaining confessions.⁷⁰ Infamous among Chicago police officers was Commander Jon Burge, whose territory included an impoverished part of the city that was largely inhabited by people of color.⁷¹ In 1993, the police department fired Burge for his involvement in a case that involved torture of a suspect.⁷² Even before then, however, his use of physical brutality to obtain confessions was well known.⁷³ Though police violence is a common theme among prisoners, it is difficult to prove.⁷⁴

Two of the men released from Death Row had accused the police of coercing their confessions.⁷⁵ However, neither was released on this fact alone,⁷⁶ demonstrating the difficulty in proving that the police are being overzealous in their attempt to solve crimes. A system that sentences people to death because they confessed after growing tired of police beatings or other unscrupulous police conduct is not just.

The Tribune report noted that the above problems were merely an overview of the system's wrongs. Combined with the thirteen men convicted at trial and later exculpated, Governor Ryan was wise to declare a moratorium until lawmakers can remedy the flaws in Illinois' system. The next section will discuss the problems identified by the Tribune in the context of the thirteen exonerated death row inmates and suggest possible reforms.

16, 1999, at 1 [hereinafter *Failure Part III*].

68. *Id.*

69. *See id.* (noting that a federal prosecutor once remarked of this informant that he was "not worthy of the court's trust").

70. Steve Mills & Ken Armstrong, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, at 1 [hereinafter *Failure Part IV*].

71. *Id.*

72. *Id.*

73. *See id.* (noting the comments of United States District Judge Milton Shadur in an appeal of a death sentence that police brutality is used prevalently).

74. *Id.*

75. *Failure Part IV*, *supra* note 70, at 1. Both Ronald Jones and Gary Gauger accused the police of brutality. *Id.*

76. *Id.*

IV. THIRTEEN WEARY MEN

Justice Harrison, in his *Bull* dissent, was not the first critic of the death penalty to observe that the system is not infallible.⁷⁷ Among other scholars, Professor Bedau has noted that errors within the system are inevitable, due to "overzealous prosecution, mistaken or perjured testimony, faulty police work, coerced confessions, the defendant's previous criminal record, inept defense counsel, seemingly conclusive circumstantial evidence, [and] community pressure for a conviction."⁷⁸ Illinois provides a nearly perfect blueprint outlining what is wrong with the capital punishment system nationwide. The following examination of cases of the men released from Illinois Death Row will demonstrate the imperfection of the system as a whole. Drawing from these problems experienced in Illinois' system, this Article will then suggest that nationwide the capital punishment system must either be remedied or abolished through legislative action.

A. *Problems with Testimony: Jailhouse Informants and Other Perjurers*

1. *Joseph Burrows*

A jury convicted Joseph Burrows in 1989 of murder and armed robbery and sentenced him to death.⁷⁹ Burrows and two others were convicted for the murder of William Dulin, an elderly farmer, at his home in rural Illinois.⁸⁰ The police uncovered no evidence linking Burrows to the murder.⁸¹ Instead, Burrows' conviction rested on the testimony of his two alleged accomplices, who put him at the scene and named him as the triggerman.⁸²

77. Indeed, criticism of the death penalty fills its own canon. Because such arguments have extensively been made elsewhere by more experienced, fervent, and dedicated advocates, I respectfully refrain from throwing my own hat into the ring and will instead concentrate on the sense of injustice experienced by the thirteen exonerated men in Illinois, their families, and loved ones.

78. Hugo Adam Bedau, *The Case Against the Death Penalty* (visited Mar. 29, 2000) <http://www.dnai.com/~mwood/deathpen.html>. See also Richard C. Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (visited Mar. 29, 2000) <http://www.essential.org/dpic/inn.html> (discussing Professor Samuel Gross' theories that mistakes are likely because of community pressure on police and prosecutors to solve brutal murders and the lack of eyewitness testimony, among others); Samuel Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFFALO L. REV. 469, 477, 481 (1996).

79. *Illinois v. Burrows*, 665 N.E.2d 1319, 1320 (Ill. 1996).

80. *Id.* at 1321.

81. *Id.*

82. See generally *id.* at 1321-22 (laying out the details of Potter and Frye's testimony). In Burrows' first trial, the jury could not come to a consensus on his guilt. *Id.* at 1321 n.1.

Burrows presented an alibi defense and witnesses who testified that Burrows was not at the Dulin home on the night of the murder.⁸³

On appeal, Burrows argued that his conviction was based on the testimony of two admitted perjurers.⁸⁴ Burrows maintained that his alleged accomplices were unreliable and had given inconsistent testimony.⁸⁵ The court rejected the argument, holding that witness credibility was an issue for the jury.⁸⁶

In 1994, Burrows was released after the two witnesses used against him at trial admitted that he was not involved in the crime.⁸⁷ The witnesses had implicated Burrows to avoid the death penalty themselves.⁸⁸ Burrows sat on Death Row for over six years before the prosecution dropped the charges against him due to lack of evidence.⁸⁹

Burrows is arguably an example of a case in which the system eventually corrected itself. On Burrows' final appeal, the Illinois Supreme Court remanded the case for a new trial based on new evidence suggesting that Potter, one of the perjured witnesses, had committed the crime herself and tried to frame Burrows.⁹⁰ However, it is questionable whether the State should have been allowed to rely on Potter's testimony alone to obtain a conviction. Had Potter not finally admitted that she lied in implicating him, Burrows would have been executed by the state for a crime he did not commit.

The danger in relying on the eyewitness testimony of alleged accomplices is that the accomplices have a great motivation to pin the blame elsewhere, especially in cases involving the death penalty.⁹¹ In Burrows' case the accomplices deliberately lied to save themselves, and were sufficiently reliable on the stand to

83. *Id.* at 1322.

84. *Burrows*, 655 N.E.2d at 1324. Both Potter and Frye were questioned at trial about their inconsistent testimony. *Id.* at 1322. Potter admitted lying to the police, and both accomplices admitted that they conversed with each other daily while imprisoned before trial. *Id.* Burrows further argued that evidence that Potter committed the murder alone and tried to frame Burrows for it was unavailable at the defendant's original trial. *Id.* at 1328.

85. *Illinois v. Burrows*, 592 N.E.2d 997, 1010 (Ill. 1992).

86. *Id.* at 1009.

87. Lawrence C. Marshall, *Innocence and Death; Lessons the State Must Heed Before It Kills Again*, CHI. TRIB., Feb. 11, 1999, at 29.

88. *Id.*

89. David Mendell, *Out of Prison and Into a Bind*, CHI. TRIB., Feb. 28, 1999, at 1.

90. *Illinois v. Burrows*, 665 N.E.2d 1319, 1329 (Ill. 1996).

91. See Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 138 (1998) (noting that "if the culprit is suspected and caught, he has more to fear in a capital case: He might get executed").

convince a jury of an innocent's guilt.⁹² A similar motivation exists when jailhouse informants come forward to present evidence against the accused.

2. *Lucky Number Thirteen: Steve Manning*

On January 19, 2000, Steve Manning became the thirteenth Death Row inmate to be released from prison.⁹³ In 1992, Manning was convicted of first-degree murder and armed robbery, and was sentenced by the trial judge to death after a finding of insufficient mitigating factors to preclude the death penalty.⁹⁴ The trial court found the aggravating factor of "murder committed in the course of a felony."⁹⁵

Manning, a corrupt Chicago police officer,⁹⁶ was convicted for the murder of Jimmy Pellegrino, who had been found in the Des Plaines River.⁹⁷ The killing was believed to be drug related.⁹⁸ The defense maintained Manning's innocence and attempted to implicate a different man in the crime.⁹⁹

Manning was convicted on evidence given by a jailhouse informant who had been incarcerated with him on an unrelated charge.¹⁰⁰ The defense contended that this testimony should not be the basis of Manning's conviction without further corroboration, and that without this testimony, the government would never have been able to make its case.¹⁰¹ The informant, who was living out a fourteen-year sentence for theft and firearms, had his prison term reduced to six years in exchange for his testimony.¹⁰²

Jailhouse informants, already serving out sentences, have everything to gain and nothing to lose by fabricating evidence against capital defendants.¹⁰³ Reliance on such testimony, without corroborating evidence, increases the chance that an innocent defendant will be found guilty. As in the case of accomplice testimony, the jury is left to determine the credibility of the witness. However, when dealing with heinous crimes, the jury is

92. Marshall, *supra* note 87, at 29.

93. Salim Muwakkil, *Benetton Takes Aim at Capital Punishment*, CHI. TRIB., Jan. 31, 2000, at 15.

94. *Illinois v. Manning*, 695 N.E.2d 423, 425 (Ill. 1998).

95. *Id.* at 428.

96. *Failure Part III*, *supra* note 67, at 1.

97. *Manning*, 695 N.E.2d at 425.

98. *Id.* at 426.

99. *Id.* at 428.

100. *Id.* at 426-27.

101. *Id.* at 430.

102. *Failure Part III*, *supra* note 67, at 1.

103. See Gross, *supra* note 91, at 138 (explaining the obvious motivation for informants to lie as being reductions in their own sentences); HUGO ADAM BEDAU ET AL., IN SPITE OF INNOCENCE 213-15 (1992) (noting the informant's great incentive of fabricating evidence and the police's reluctance to follow up on the testimony in determining alternate versions of the crime).

more likely to find the defendant guilty.¹⁰⁴ This problem may be exacerbated by the actions of the prosecution.

In the case of Steven Smith, the twelfth man released from Death Row, the court recognized that the prosecution might have improperly swayed the jury with its remarks.¹⁰⁵ The defendant argued that the prosecution introduced unsubstantiated evidence linking Smith to gang activity and led the jury to believe that the murder was an act of revenge against a prison warden who had been tough on gangs.¹⁰⁶ There was no evidence to support this theory, but the court noted that the prosecution's efforts to sway the jury toward conviction were successful.¹⁰⁷ The court commented that the actions of the prosecution entitled Smith to a new trial:

[T]he weight the jury attributed to [the] evidence may well have been influenced by the incompetent and inflammatory evidence and accompanying prosecutorial remarks concerning gang-related activity and motive. The cumulative impact of this . . . may well have improperly prejudiced the jury against the defendant and have constituted a material factor leading to his conviction.¹⁰⁸

A third area in which the credibility of witnesses is jeopardized is where community or police pressure lead the witness to misrepresent what she saw.

3. Verneal Jimerson

In 1978, Verneal Jimerson was convicted of the murders of

104. See generally BEDAU ET AL., *supra* note 103, 197-217 (discussing the idea that most defendants are identified as "guilty at first sight").

105. See generally *Illinois v. Smith*, 565 N.E.2d 900, 906-11 (Ill. 1990) (noting that the evidence was admitted erroneously and had a measured effect on the jury).

106. *Id.*

107. *Id.* The Court noted that: "Improper remarks will not merit reversal unless they result in substantial prejudice to the defendant, considering the context of the language used, its relationship to the evidence, and its effect on the defendant's rights to a fair and impartial trial." *Id.* at 908 (emphasis added).

108. *Id.* at 917. The only direct evidence linking Smith to the murder was the eyewitness account of a woman who claimed she saw Smith's face when he moved out of the shadows. *Id.* at 905. The remainder of the state's evidence was circumstantial. *Id.* Smith was released in February 1999 after the Illinois Supreme Court reversed his conviction. *Id.* at 917. See Mendell, *supra* note 89, at 1 (finding the sole eyewitness unreliable); Anthony Colarossi & Terry Wilson, *Man Cleared in Rape Revels in His Freedom; Attorney Says 2 Convictions May be Dropped*, CHI. TRIB., Feb. 25, 1999, at 1; *Smith*, 141 Ill. 2d at 55 (reversing Smith's conviction and remanding for new trial: "Credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, but is not conclusive. We will reverse a conviction where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt.").

Larry Lionberg and Carol Schmal.¹⁰⁹ An accomplice, Paula Gray, a seventeen-year-old girl with questionable mental faculties, provided the testimony that formed the basis of the convictions.¹¹⁰ Jimerson maintained that he was at home when the couple was murdered, and Gray's testimony was unclear as to whether Jimerson was actually at the scene of the crime.¹¹¹ Additionally, there was little to no evidence physically linking Jimerson to the crime.¹¹² In fact, the Illinois Supreme Court found that because Jimerson was convicted only on the basis of Gray's testimony and Gray's testimony was subsequently found to have been perjured, Jimerson was entitled to a new trial.¹¹³

However, Jimerson was able to prove his innocence only by successfully calling into question the legitimacy of Gray's testimony.¹¹⁴ Gray had incentive to lie about the crime because the prosecutor allowed a reduction in her sentence in exchange for her cooperation.¹¹⁵ Because Jimerson had been seen with the others accused of the crime, Gray identified him as a participant in the crime as well, but only after the police suggested his name.¹¹⁶ Here, police pressure influenced Gray to implicate Jimerson in the crime.¹¹⁷ Because she was not certain about the events, because of her low mental capacity, or simply because she was already lying and had nothing more to lose, Gray helped send an innocent man to his death.¹¹⁸ Had the police not suggested Jimerson's name to her,¹¹⁹ the prosecution would not have had the evidence to indict Jimerson, let alone sentence him to death.

109. *Illinois v. Jimerson*, 652 N.E.2d 278, 279-80 (Ill. 1995).

110. *See generally id.* (detailing Gray's testimony and the defense's questioning of her mental capacities).

111. *Id.* at 281.

112. *Id.* at 280-82.

113. *Id.* at 286.

114. *See Jimerson*, 652 N.E.2d at 282 (describing Gray's I.Q. as being equivalent to that of a mentally retarded individual).

115. *Id.* at 283-84.

116. *Id.* at 280-81. After his release, Jimerson and a former co-defendant accused the police officers and prosecutors of misconduct including perjury, obstruction of justice, and the withholding of evidence that could have been used in their defense. Ken Armstrong, *Now Ford Heights 4 Seek Special Prosecutor; Top Criminal Court Judge to Make Ruling*, CHI. TRIB., Apr. 1, 1999, at 1. A year after their release, three different men were convicted of the crime. *Id.*

117. *See Jimerson*, 652 N.E.2d at 282 (explaining how Gray's first statement to police did not implicate the defendant, but after questioning by a second detective Gray then implicated the defendant).

118. *See id.* (describing how Gray's mind "comes and goes" and classifying Gray as mentally handicapped).

119. *See id.* at 287 (explaining that because Gray's first statement did not implicate the defendant, but her second one did, the credibility of Gray's statement is suspect).

4. Anthony Porter

Anthony Porter came within two days of execution for a crime he did not commit.¹²⁰ The lone witness who testified against Porter later admitted that he did not see anything on the night of the murder but testified against Porter under pressure from the public outcry.¹²¹ Porter was a victim of a police force that wanted speedy retribution for a double homicide¹²² and who further convinced a witness that he saw something he did not.¹²³ After Porter was released in February 1999,¹²⁴ questions arose over why the police had narrowed in on Porter without considering other suspects or motives.¹²⁵

Though commentators have argued that the system monitors itself, it was not the courts that recognized Porter's innocence. Porter was exculpated by journalism students who investigated the crime with the help of private investigators, found the real killer, and videotaped a confession.¹²⁶ Here, police and community outrage pressured a man who saw nothing of the crime but happened to be in the vicinity to come forward and send an innocent man almost to his death.¹²⁷

5. A Proposed Solution

One solution to the above problems regarding unreliable witness testimony would be to require prosecutors to corroborate such testimony with further evidence in cases involving the death

120. *Failure Part I*, *supra* note 61, at 1. In fact, Porter came so close to being executed that his family was consulted on how to dispose of his remains, *For a Moratorium on Executions*, CHI. TRIB., Nov. 17, 1999, at 30.

121. *See* Marshall, *supra* note 87, at 29. It has also been suggested that he testified against Porter under pressure from the local police. *See generally* Death Penalty Information Center, *Additional Cases of Innocence and Possible Innocence* (updated Mar. 17, 2000) <http://www.essential.org/dpic/dpicrecinnoc.html>.

122. *For a Moratorium on Executions*, CHI. TRIB., Nov. 17, 1999 at 30.

123. *See id.* (suggesting that police influenced a witness into claiming he saw the defendant commit the crime).

124. Rick Pearson & Cornelia Grumman, *A Change of Heart on Execution Cases; In the Wake of Pressure After Anthony Porter's Release, Both Gov. Ryan and Mayor Daley Now See Serious Flaws in the Death-Penalty Process*, CHI. TRIB., Feb. 11, 1999, at 1. Porter's release served as a catalyst for Governor Ryan's eventual moratorium. *Id.*

125. *Id.*

126. *Failure Part I*, *supra* note 61, at 1. The private investigation led to Alstory Simon. Sabrina L. Miller, *Charge to be Dropped Against Tipster in Porter Case*, CHI. TRIB., Jan. 22, 2000, at 5. Based on the testimony of one person who was not positive that it was Porter he saw, an innocent man was nearly executed. *Id.* Simon's wife kept her husband's guilt a secret for sixteen years while Porter sat on Death Row. *Id.* She revealed the true events of the murders to a class of Northwestern University journalism students. *Id.* Simon later pled guilty. *Id.*

127. *Id.*

penalty. This simple solution would provide a disincentive to witnesses from lying or claiming they saw something they did not because of community or police pressure. Though this solution would increase the burden on the prosecution, it would encourage police to investigate the crimes fully instead of looking for an easy scapegoat. If the prosecution cannot provide corroborating evidence, the death penalty should be precluded as punishment. In this way, even if an innocent person is found guilty, he may continue to fight his sentence without the shadow of the death penalty over him.¹²⁸

B. Coerced Confessions

Professor Samuel R. Gross has observed that the police will often stop at nothing to obtain a "confession," including "all sorts of coercive and manipulative methods . . . powerful techniques . . . [that w]ork to get confessions from guilty defendants—and sometimes from innocent defendants as well."¹²⁹ Gross notes that false confessions are particularly a problem in homicides, because often the police have little to go on besides eyewitness testimony or a confession.¹³⁰ Especially in high-profile cases, the police may feel pressured by the community and prosecutors to solve the case as quickly as possible, and may therefore take shortcuts in bringing in a suspect. As mentioned above, it is not unusual for police to treat a suspect in such a manner that it is simply easier for him to confess, even when the confession is fabricated.¹³¹ Once the confession is made, however, it is difficult for a defendant to prove that it was coerced.¹³²

1. Gary Gauger

Gary Gauger was convicted and sentenced to death in 1993

128. According to the Special Supreme Court Committee on Capital Cases, legislation regarding the use of jailhouse informant testimony is pending in the General Assembly. Committee Report, *supra* note 4, at 94 n.91. Although the proposed legislation would require pre-trial screening of testimony and a required cautionary instruction to the jury, *id.* at 91, this article advocates that requiring corroborating testimony in death penalty cases is the best remedy for problems regarding jailhouse informant and alleged accomplice testimony.

129. Gross, *supra* note 91, at 140. Gross details the different methods that police use: "they play on suspect's fears, biases, guilt, loyalty to family and friends, religion; they exhaust the suspect and wear him down; in some cases, they use violence, even torture." *Id.*

130. *See id.* at 140-41 (noting the difficulties police encounter in solving homicides).

131. *See* Section III, *supra* at 12-15 (discussion of police brutality, *supra* Part III and accompanying footnotes).

132. *See generally Failure Part IV*, *supra* note 70 (commenting on the use of police brutality and the difficulty defendants have in proving such treatment).

for the murder of his parents.¹³³ Morris and Ruth Gauger, both in their early seventies, were found bludgeoned and slashed to death on their farm outside Chicago.¹³⁴ The police picked up Gauger after he called to report that his parents had been murdered.¹³⁵ The police were suspicious of Gauger, a "ponytailed," aging hippie, who calmly tended his tomato plants while the police investigated the scene.¹³⁶

The police found no sign of forced entry or burglary, and convinced of Gauger's guilt, interrogated him for over sixteen hours until he confessed to the murders.¹³⁷ The police told Gauger that he had blood on his pajamas, that he had failed a polygraph test, and that they had enough evidence to link him to the crime.¹³⁸ None of what the police told Gauger was true.¹³⁹ Scared, tired, and afraid that he may have committed the murders in a blackout, Gauger confessed.¹⁴⁰

Gauger was released in 1996 when an Illinois Appellate Court ruled that there had not been sufficient probable cause for his arrest.¹⁴¹ Gauger served three years in prison, eight months of which were on Death Row.¹⁴² A system that sentences a man to death without sufficient probable cause for his arrest should have no place in modern society.

2. Ronald Jones

On appeal for the murder and aggravated criminal assault of Debra Smith, Ronald Jones argued, among other things, that the

133. *Choices for McHenry County*, CHI. TRIB., Mar. 10, 2000, at 14. There are no published opinions, either state or federal, detailing Gauger's conviction.

134. Carolyn Starks, *McHenry Officials in 1993 Case Defended; Wrongful-Prosecution Suit Faces a Challenge*, CHI. TRIB., Dec. 14, 1999, at 8.

135. Mona Charen, *DNA Tests Can Avert Awful Errors*, OMAHA WORLD-HERALD, Feb. 16, 2000, at 26.

136. *Id.*; Sharon Cohen, *Death Row Roulette*, BUFFALO NEWS, Aug. 15, 1999, at 1H.

137. Cohen, *supra* note 136, at 1H. See, e.g., *Choices for McHenry County*, *supra* note 133, at 14 (detailing the events).

138. Gary Wisby, *Exonerated, Yes, But Not Quite Free*, CHI. SUN-TIMES, Feb. 21, 2000, at 20; Cohen, *supra* note 136, at 1H.

139. Cohen, *supra* note 136, at 1H.

140. Wisby, *supra* note 138, at 20.

141. *Choices for McHenry County*, *supra* note 133, at 14; Mitch Martin, *Attack From 2 Sides May Aid Pack in Race*, CHI. TRIB., Mar. 9, 2000, at 1. Gauger subsequently filed a wrongful prosecution suit against the police, accusing them of extracting a confession from him after denying him sleep and lying to him that they had evidence linking him to the murders. Starks, *supra* note 134, at 8. Gauger's situation was complicated by a lack of zealous representation. Marshall, *supra* note 87, at 29. In his original trial, Gauger's defense attorney did not question the propriety of his client's confession. *Id.* His attorneys never questioned that Gauger's confession conflicted with the evidence presented. *Id.*

142. Starks, *supra* note 134, at 8.

prosecution used a confession coerced by the police to convict him.¹⁴³ At trial, Jones had maintained that he confessed only after beatings and other police coercion.¹⁴⁴ Justice Heiple, writing for the majority, upheld Jones' conviction and his death sentence.¹⁴⁵ After addressing and striking down all of Jones' arguments, the court commented on the trial judge's imposition of the death penalty, noting that the punishment will not be overturned if it is supported by the record.¹⁴⁶ The opinion made no comment on whether judicial or prosecutorial errors could effect the imposition of the death penalty.¹⁴⁷ This is a blatant example of the Tribune's observation that the court often ignores errors made at trial¹⁴⁸—an example made even more frightening because Jones was later exonerated. Jones' innocence was proven when the court allowed a DNA test,¹⁴⁹ over objections from the lower court.¹⁵⁰ Before being released for a crime he did not commit, Jones served eight years on Death Row.¹⁵¹ It is frightening to think that Illinois' system is one in which errors made at trial cannot be corrected and can result in sending an innocent person to his death, contrary to the safeguards enunciated by the Illinois Supreme Court.¹⁵²

3. A Proposed Solution

In the case of Gary Gauger, the prosecution's strongest evidence linking Gauger to the brutal murder of his parents was the testimony of the police officers who questioned him for over sixteen hours, forced him to hypothesize a theory of the crime, and

143. *Illinois v. Jones*, 620 N.E.2d 325, 329 (Ill. 1993).

144. *Id.*

145. *Id.* at 339.

146. *Id.* at 338. Justice Heiple rejected Jones' argument that his historical good character and good behavior while incarcerated could make the imposition of the death penalty inappropriate:

Defendant is a high school drop-out, a drug user and an alcoholic, with previous convictions for burglary, robbery and home invasion. He has had his parole revoked twice for refusal to report to his parole officer.

He is now a convicted murder and rapist. The death penalty is supported by the record, and we will not disturb it.

Id. Jones, though not the most upstanding citizen, does not seem to be the type of "monster" that deserves the state's most stringent punishment.

147. *Id.*

148. See discussion *supra* note 63.

149. *Failure Part I*, *supra* note 61, at 1. See also Steve Mills & Ken Armstrong, *Judge Under Fire Takes Himself Off Murder Appeal; Morrissey Once Called Convict's Lawyers "Idiots"*, CHI. TRIB., Jan. 15, 2000, at 1 (detailing the conduct of Cook County Circuit Judge John E. Morrissey, who denied DNA evidence in various trials because he thought it was not credible).

150. *Failure Part I*, *supra* note 61, at 17; Steve Mills, *Cleared Inmate Free After Decade in Prison; Man Leaves Death Row Ready for "True Test"*, CHI. TRIB., Feb. 8, 2000, at 2 [hereinafter *Cleared Inmate*].

151. Mills, *supra* note 150, at 2.

152. See discussion *supra* text accompanying notes 48-51.

then convinced him that he was the murderer.¹⁵³ Gauger's confession was not recorded, nor would he sign it.¹⁵⁴ Therefore, it was up to the jury to decide whom to believe—Gauger, a man accused of a heinous crime, or the police.¹⁵⁵ In the case of Ronald Jones, a "homeless, alcoholic panhandler," the prosecution also relied heavily on his confession, a confession that he later recanted with the explanation that he fabricated his admission to make the police stop beating him.¹⁵⁶ Forced confessions, encouraged by police brutality and lies regarding evidence, are not rare within the system.¹⁵⁷

A radical solution to the problems within the police force is to replace the current force with men and women who would never be tempted to lie about evidence, beat up suspects, or threaten them with other measures. In a perfect world, this would be an ideal solution. A more practical solution would require that interrogations be monitored by a superior and be videotaped or otherwise recorded.¹⁵⁸ By so doing, when the prosecution presents a confession at trial, it will be further substantiated with additional evidence that it was not made under coercion or by any other dubious means. Much like the proposed requirement for corroborating testimony in the case of lone eyewitnesses or jailhouse informants, keeping an unadulterated record of the police interrogation in which a confession was procured would serve to legitimize the system.

C. *Faulty Evidence*

A further area of concern within Illinois' system is in the gathering and presentation of evidence.

1. *Carl Lawson*

Carl Lawson was convicted in 1990 of killing eight-year-old Terrence Jones,¹⁵⁹ and sentenced to death by the trial judge.¹⁶⁰ At

153. *Choices for McHenry County*, *supra* note 133, at 14; Cohen, *supra* note 135, at 1H.

154. *Id.*

155. See Gross, *supra* note 91, at 146-47 for a discussion of factors that prejudice the jury against defendants before sentencing, such as the publicity surrounding the crime at the time it was committed, the death qualification procedure, and the heinousness of the crime.

156. Cohen, *supra* note 135, at 1H.

157. See BEDAU ET AL., IN SPITE OF INNOCENCE, *supra* note 103, at 141-56 (detailing examples of such cases); *Failure Part IV*, *supra* note 70, at 1 (describing the actions of a corrupt police chief).

158. In fact, the Special Supreme Court Committee on Capital Cases has noted in its report the need for this important safeguard. See Committee Report, *supra* note 4, at 103 (noting that legislation in support of this measure has failed to pass the General Assembly).

159. *Illinois v. Lawson*, 644 N.E.2d 1172 (Ill. 1994); Caitlin Lovinger, *Life*

trial, the judge refused to allow Lawson funds to hire an expert witness.¹⁶¹ Lawson was exonerated in 1996 after the Illinois Supreme Court granted a retrial and allowed the defense to present evidence invalidating the sole evidence linking Lawson to the crime.¹⁶² The court held that the trial court, in denying Lawson funds, denied him due process of law.¹⁶³ Lawson was convicted because the police found his footprints in blood at the crime scene.¹⁶⁴ Though the State presented an expert witness to link Lawson and his shoes to the murder, the defense was not allowed to rebut such evidence due to lack of sufficient funds for indigent defense.¹⁶⁵ On retrial, and with proper funds, the defense effectively showed that the blood was still wet when the victim was found, and Lawson, as a member of the crowd, could have easily stepped in the blood and left shoeprints before the police sealed the crime scene.¹⁶⁶ By being denied the financial means to defend himself properly, Lawson also unnecessarily spent time on Death Row—a victim of the system, at fault because of his indigence. A system that denies innocent people the tools by which to defend themselves, especially because they are indigent, is not just.

2. A Proposed Solution

Reviewing the facts of the Lawson case, it seems implausible that footprints found at a crime scene left unsealed by the police would result in a death sentence for an innocent man. However, in hindsight, the convictions of all thirteen of Illinois' exonerated men all seem riddled with problems. The problem detailed in Lawson's case has a relatively simple solution, which the Illinois Supreme Court identified and corrected. However, had the trial judge simply allowed Lawson proper funds to defend himself, he would never have been convicted. Where does that leave Lawson, however, who had to serve time on Death Row until his case

After Death Row, N.Y. TIMES, Aug. 22, 1999, at 4.

160. *Lawson*, 644 N.E.2d at 1173.

161. *9 Others Freed from Death Row*, CHI. SUN-TIMES, Feb. 7, 1999, at 4.

162. Marshall, *supra* note 87, at 29. The Court noted that the State was likely to make the same evidentiary mistake on retrial and foresaw the demise of the State's case on remand. *Lawson*, 644 N.E.2d at 1187.

163. *Lawson*, 644 N.E.2d at 1187.

164. Marshall, *supra* note 87, at 29.

165. *See Lawson*, 644 N.E.2d at 1190-92 ("Moreover, the State possessed an advantage in being able to present its expert's opinion when defendant could not . . . [F]airness demands that defendant be allowed the means to do so . . .") (citations omitted).

166. Marshall, *supra* note 87, at 29. On remand, the defense also showed that Lawson's public defender had been the assistant state's attorney upon his arraignment. Kevin McDermott & Mark Schauerte, *Chicago Man is Freed from Illinois' Death Row*, ST. LOUIS POST DISPATCH, Feb. 6, 1999, at 8. *See also Lawson*, 644 N.E.2d at 1174-75 (detailing facts).

finally reached the state's highest court? Where does that leave the family of the victim, whose killer remained at large while Lawson sat in jail for a crime he did not commit? A solution here would be to caution police to be less clumsy in their work, and to advise trial judges to allow defendants the proper means with which to defend themselves. If the trial judge does a more effective job screening evidence earlier in the process, people like Carl Lawson would not have to spend undeserved time in prison.¹⁶⁷

V. CONCLUSION

Illinois' capital punishment system is not working. It is not working because, in the words of exonerated Death Row inmate Dennis Williams, "[h]ad the state of Illinois gotten its way, I'd be dead today."¹⁶⁸ In the cases of the thirteen exonerated men in Illinois, although the prosecution had mostly circumstantial evidence and unreliable witnesses, it was still able to convince a judge and jury to convict these men of murder and sentence them to death.

No one likes to make mistakes, least of all mistakes that can call into question one's credibility as a fair arbiter of the law. Professors Radelet, Lofquist, and Bedau suggest that regardless of the care the system exercises in preserving fairness, mistakes are inevitable¹⁶⁹ and it is the responsibility of the system to correct such error.¹⁷⁰ Though the Illinois Supreme Court insisted in upholding the constitutionality of the state statute based on a variety of safeguards allegedly in place,¹⁷¹ such safeguards are obviously not working. To reiterate Justice Harrison's point: "[These men] survived despite the criminal justice system, not because of it."¹⁷² This is unacceptable.

Though none of the thirteen men released from Death Row may be called upstanding citizens,¹⁷³ they were not guilty of the

167. There are countless other issues regarding problems with evidence, and though the author recognizes this, it is not feasible to touch upon them all in this Article.

168. Don Terry, *Survivors Make the Case Against Death Row*, N.Y. TIMES, Nov. 16, 1998, at 14.

169. MICHAEL L. RADELET ET AL., *Death Penalty Symposium: Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907, 907 (1996).

170. Radelet and his co-authors note that this is difficult where police, judges, and prosecutors are "extremely reluctant to admit, perhaps even to themselves, that they have been involved in sending a possibly innocent person to death row. . . death row inmates are exonerated 'not because of the system, but in spite of it.'" *Id.* at 920.

171. See generally *People v. Bull*, 705 N.E.2d 824 (Ill. 1998). See also discussion *supra* Part II.A. (detailing the Court's points).

172. *Id.* at 847 (Harrison, J., dissenting).

173. For example, Burrows was known for aggressive behavior while incarcerated, at one time threatening the guard with bodily harm. *State v.*

crime for which the State was prepared to execute them. Professor Gross cautions that in the case of murders, especially heinous murders, the State may be desperate in its approach:

For the most part, the pressure to solve homicides produces the intended results . . . that same pressure can also produce mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and – if they believe they have the killer – perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying and to the extent that it attracts public attention – factors that also increase the likelihood that the murder will be treated as a capital case.¹⁷⁴

Though Professor Gross was not speaking of Illinois' system in particular, he might have well been. The problems rampant in Illinois are not unusual, nor are they isolated. When the United States Supreme Court reinstated capital punishment with *Gregg v. Georgia*,¹⁷⁵ the assumption was that all the problems associated with the system had been remedied. It has become evident in Illinois that this is not the case. If the State cannot guarantee a perfect system of death, as the Illinois Supreme Court announced it could not,¹⁷⁶ the death penalty should be abolished. Governor Ryan, in imposing the moratorium, announced that “[u]ntil I can be sure that everyone sentenced to death in Illinois is truly guilty . . . no one will meet that fate.”¹⁷⁷ If we may take the governor at his word, Illinois will never kill again.

Though Illinois has exculpated thirteen men from Death Row in less than twenty-five years, it is not the nation's leader in releasing innocents. From the above analysis of Illinois' system, it is not difficult to extrapolate and hypothesize that all existing capital punishment systems are as fallible as the one in Illinois. Nationally, states and the federal government should look to Illinois as a model, and use the legislatures to impose a nationwide moratorium on the death penalty, leading either to a guarantee against executing innocents or abolition.

Burrows, 592 N.E.2d 997, 1007 (Ill. 1992). Burrows also had his wife sneak marijuana joints to him when she visited, which he would distribute amongst his co-inmates. *Id.* Steve Manning was a corrupt Chicago Police officer. *Failure Part III*, *supra* note 67, at 1.

174. Gross, *supra* note 91, at 135.

175. 428 U.S. 153 (1976).

176. See *People v. Bull*, 705 N.E.2d 824, 824-842 (Ill. 1998). See also discussion *supra* Part II.A.

177. *Armstrong & Mills*, *supra* note 6, at 1.

