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# DEAD MEN WALKING<sup>1</sup> – AN ABUSE OF EXECUTIVE CLEMENCY POWER IN ILLINOIS

David A. Wallace\*

Former Illinois Governor George Homer Ryan created a grave injustice by granting blanket clemency to all of the condemned inmates on death row in his state. This comment analyzes this unprecedented exercise of executive power by a state governor. Part I of this article addresses the clemency debate in Illinois and provides some background on Governor Ryan's actions. Part II provides a brief history of the clemency process. It also discusses the underlying purposes of clemency. Part III discusses three of the most egregious capital cases from Illinois. Part IV analyzes Ryan's actions and provides three arguments attacking his decision. Part V provides some parting comments on the propriety of Ryan's actions.

## I. INTRODUCTION

In reference to the current state of capital punishment in the United States, Austin D. Sarat, a renowned professor of political science and law at Amherst College, accurately and insightfully observed “[w]e’re in a period of national reconsideration. . . . People are asking if the death penalty is compatible with values which in the American mainstream are taken seriously: equal protection, due process, protection of the innocent. . . . What was played out in Illinois will be played out across the nation.”<sup>2</sup>

What transpired in Illinois was absolutely amazing. Jeffrey Toobin, CNN legal analyst, noted “Mr. Ryan’s decision will be a ‘turning point’ in the debate over the death penalty, ‘but I’m not sure in which direction.’”<sup>3</sup> On January 11, 2003, the Illinois Governor, in an unprecedented move, issued a blanket grant of clemency,<sup>4</sup> thereby commuting the sentences of all

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<sup>1</sup> *Dead Man Walking* is a 1995 movie starring Sean Penn and Susan Sarandon about the relationship between a condemned inmate and a nun to whom he turns for spiritual guidance prior to his execution. The movie is based upon a book about Sister Helen Prejean who ministered to death row inmates. Amanda Bower, *Dead Men Walking*, Time Mag. 40 (Jan. 20, 2003).

<sup>2</sup> Adam Liptak, *Number of Inmates on Death Row Declines as Challenges to Justice System Rise*, N.Y. Times A13 (Jan. 11, 2003).

<sup>3</sup> Joyce Howard Price, *Death Row Gets Life in Illinois*, Washington Times A01 (Jan. 12, 2003).

<sup>4</sup> Beau Breslin & John J.P. Howley, *The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform? Defending the Politics of Clemency*, 81 Or. L. Rev. 231, 235 (2002).

of the condemned inmates on Illinois' death row to life in prison.

Why did Ryan take such an extraordinary step two days before he left office? According to Ryan, "[o]ur capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die. What effect was race having? What effect was poverty having?"<sup>5</sup> Governor Ryan's decision affected 156 inmates currently on death row in Illinois and 11 others who had been sentenced to death but who were not in the custody of the Illinois Department of Corrections because they are waiting for re-sentencing or trials in other cases.<sup>6</sup>

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[C]lemency refers to the power of an executive to alter the outcome of a judicial decision by diminishing the impact of a defendant's punishment – to change the specifics of a court's judgment by remitting a criminal's sentence or simply pardoning her or his offense. The Supreme Court [in *United States v. Wilson*, 32 U.S. 150, 160 (1833)] has defined clemency as 'an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.'

*Id.*

Each of the 38 states that have the death penalty, the federal government, and the military provide the condemned with an opportunity for clemency. Alyson Dinsmore, Student Author, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. Rev. 1825, 1838 (2002); Robert M. Bohm, *Deathquest* 137 (Anderson Pub. Co. 1999).

Bohm states that there are three types of clemency that are relevant to the death penalty: reprieve, commutation, and pardon. According to Bohm, a reprieve is the most common type of clemency in death penalty cases. A reprieve has the effect of temporarily postponing an execution. Commutation, by contrast, involves the substitution of a lesser punishment. This is what Governor Ryan did with the vast majority of the death row inmates in Illinois. He substituted life in prison for death. The final type of clemency is a pardon. With a pardon, the condemned inmate is entirely freed. *Id.* at 138.

Governor Ryan also pardoned 4 individuals immediately before his blanket commutation. The 4 men pardoned by Ryan were part of the so-called "Burge 10" death row inmates who say they had confessions tortured out of them by police under the direction of Chicago Police Commander Jon Burge. CNN, 'A manifest injustice has occurred', <http://cnn.com/2003/LAW/01/10/illinois.death.row/index.html> (accessed Jan. 14, 2003).

Clemency takes different forms depending on the state. One common characteristic is that it is always vested in the executive branch. In some states, the clemency power is vested in an administrative board with the governor of the state being a member of the board. In other states, a governor has the exclusive power to grant clemency. Within this context, there may be a board that makes a nonbonding recommendation to the governor about the particular case. This is the model in Illinois. Finally, in some states, the power to grant pardons is divided between the governor and an administrative board. In states with a bifurcated system, the governor has the power to grant clemency only after the board makes a recommendation for clemency. Dinsmore, *supra* n. 4, at 1838.

<sup>5</sup> CNN, 'Blanket commutation' empties Illinois death row, <http://cnn.com/2003/LAW/01/11/illinois.death.row/index.html> (accessed Jan. 13, 2003).

<sup>6</sup> *Id.* Interestingly, at least one State's Attorney in Illinois planned to challenge Ryan's clemency order for 10 of the condemned inmates who had been on Death Row but had their sentences vacated and were awaiting a new sentencing hearing. Steve Mills, *Devine disputes clemency for 10*, Chicago Tribune Metro 1 (Jan. 15, 2003). Moreover, Cook and Will County state's attorneys went to court attempting to void 14 of the clemencies on the grounds that the inmates did not ask for clemency. Journal Sentinel Wire Reports, *Effort to void death-row clemencies continues*, Milwaukee Journal Sentinel 4A (Jan. 18, 2003).

So, how unusual were the actions of Governor Ryan? In short, his actions were unprecedented, at least as to their scope. To be sure, a few other governors in the history of the country have done what Ryan did, but certainly not to that degree. Ryan is the fourth governor to empty death row as he departs office. Governor Lee Cruce of Oklahoma spared 22 men in 1915, and Governor Winthrop Rockefeller of Arkansas commuted 15 sentences in 1970.<sup>7</sup> Governor Toney Anaya of New Mexico commuted the death sentences of all five condemned inmates on death row in his state.<sup>8</sup> Anaya's motivation was slightly different than Ryan's. Anaya had a moral objection to the death penalty. He believed it was "morally abhorrent."<sup>9</sup> Similarly, as he was leaving office, Governor Richard F. Celeste of Ohio granted clemency to eight killers in 1991. He cited a "disturbing racial pattern" in death sentencing. Celeste stated that he selected cases for clemency based on the inmates' crimes, the fairness of their sentences, their mental health and IQ, and the length of time they had served.<sup>10</sup>

## II. BACKGROUND ON CLEMENCY

Without question, the power to grant clemency to the condemned has deep historical roots.<sup>11</sup> References to clemency can be traced back to biblical times.<sup>12</sup> Pontius Pilate, an infamous Roman governor, pardoned Barabbas and left Jesus to be crucified on the cross.<sup>13</sup>

The power to grant clemency gave monarchs the power to reduce punishment as an act of mercy.<sup>14</sup> Like the bulk of the legal traditions in the United States, executive clemency was imported from England.<sup>15</sup> In the

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<sup>7</sup> Jodi Wilgoren, *Governor Clears Out Death Row in Illinois*, [http://www.sltrib.com/2003/Jan/01122003/nation\\_w/nation\\_w.asp](http://www.sltrib.com/2003/Jan/01122003/nation_w/nation_w.asp) (Jan. 12, 2003).

<sup>8</sup> Breslin & Howley, *supra* n. 4, at 237.

<sup>9</sup> *Id.*

<sup>10</sup> Death Penalty Information Center, *Clemency*, <http://www.deathpenaltyinfo.org/article.php?did=126> (accessed Apr. 1, 2004).

<sup>11</sup> Dinsmore, *supra* n. 4, at 1830.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1830, n. 16; Breslin & Howley, *supra* n. 4, at 246.

<sup>14</sup> Daryl Schumacher, *Intruders at the Death House: Limiting Third-Party Intervention in Executive Clemency*, 30 John Marshall L. Rev. 567, 572 (1997).

<sup>15</sup> Dinsmore, *supra* n. 4, at 1830. Dinsmore provides some interesting insights into the role of clemency in England. She explains as follows:

In late-eighteenth and early-nineteenth century England, at a time when the courts had no discretion at sentencing, over two hundred felonies carried mandatory death sentences. Once a defendant was found guilty of a capital offense, the court had no alternative but to sentence the offender to death. To offset the harshness and rigidity of mandatory death sentences, wide

United States, the power of the president and governors to grant clemency has always been a feature of American constitutional law.<sup>16</sup> In 1787, the framers of the Constitution recognized that the King's clemency powers were practically absolute. Accordingly, "[t]he framers adopted that model for the federal Constitution, and the states passed on to their elected governors the clemency power held by the colonial governors."<sup>17</sup>

As a general rule, clemency regulations in the United States give a chief executive an enormous amount of discretion in making his or her decision.<sup>18</sup> Chief executives have historically based their clemency decision upon two grounds: mercy and judicial error correction.<sup>19</sup>

In early America, the death penalty was used to punish a wide range of offenses.<sup>20</sup> "[C]ourts were responsible for determining guilt or innocence, and the executive was responsible for determining a merciful sentence and ensuring that the punishment was appropriate for the crime."<sup>21</sup> "[E]xecutive

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discretion to give clemency was granted to the executive. Clemency from the king was the principal opportunity for relief for convicted criminals and was frequently used as such.

*Id.*

<sup>16</sup> *The Death Penalty in America: Current Controversies*, 18 (Hugo Adam Bedau ed., Oxford University Press 1997). The authority to grant clemency was vested unconditionally in only 5 (of the original 13) governors. States subsequently admitted to the Union all granted the authority to grant clemency to governors. Dinsmore, *supra* n. 4, at 1831.

<sup>17</sup> David S. Olson, *Second Guessing the Quality of Mercy: Due Process in State Executive Clemency Proceedings*: Ohio Adult Parole Authority v. Woodward, 118 *S. Ct. 1244* (1998), 22 *Harv. J.L. & Pub. Policy* 1009, 1021 (1999).

<sup>18</sup> Schumacher, *supra* n. 14, at 572.

<sup>19</sup> *Id.* at 572-73. The author provides some excellent insights into the two grounds for clemency. As to "mercy-based," the author notes that it is essentially arbitrary. The chief executive may grant clemency when someone shows that they have been rehabilitated or "out of a sense of pity." By contrast, as the name implies, clemency for the purpose of correcting judicial error is more justice-based. It serves to correct wrongs that have occurred in the judicial process. In another extraordinarily well written article, David S. Olsen offers the following as the purposes for clemency:

Debate about the purposes of clemency quickly arose and has continued to the present. In this debate, one side typically considers clemency as a subset of justice and the other considers it to be separate from, if not opposed to, justice.

Those who believe that clemency is a subset of justice believe that clemency can have the following purposes: (1) to allow the executive to take into account factors that the judicial system cannot, due to bright line legal or procedural rules; (2) to give weight to repentance on the part of the defendant; and (3) to allow the consideration of new evidence that arises after the conclusion of judicial proceedings, in order to prevent miscarriages of justice. Those who believe that clemency is separate from considerations of justice believe that it can be used to (1) affect the public will through the elected executive; (2) show mercy even though a defendant is deserving of his sentences; (3) affect political purposes; or (4) perhaps even prevent uprisings and civil unrest.

Olsen, *supra* n. 17, at 1021-22.

<sup>20</sup> Dinsmore, *supra* n. 4, at 1830. The author notes that "[a]ll homicide not involuntary, provoked, justified, or excused was necessarily punishable by death." *Id.*

<sup>21</sup> *Id.*

clemency played an important role in achieving rough justice by keeping many lesser offenders off the scaffold.”<sup>22</sup>

Through the course of the past two centuries, the role of executive clemency diminished in the American legal system.<sup>23</sup> There are a number of reasons for the change: (1) the distinction between degrees of murder; (2) capital juries being vested with discretion to determine life or death; (3) routine appellate review of capital cases; and (4) a reduction in the number of capital offenses.<sup>24</sup>

The number of cases in which clemency was granted has decreased even more since the landmark U.S. Supreme Court case of *Furman v. Georgia*.<sup>25</sup> In her excellent analysis of executive clemency, Alyson Dinsmore made the following pre- and post-*Furman* statistical comparison:

Since 1976, only forty-two death row inmates have been granted clemency for humanitarian reasons, compared to nearly six hundred executions. The ratio of executions to commutations is approximately 13.8 to one. This represents a significant decrease from the pre-*Furman* era. In 1970, 133 people received death sentences, while twenty-nine were spared by way of clemency.<sup>26</sup>

Dinsmore proffered several possible reasons for the downward trend. First, since *Furman*, the death penalty in the United States has been applied with “greater precision and more accuracy.”<sup>27</sup> The statutory schemes that were adopted by states post-*Furman* had the effect of narrowing the class of death penalty cases to the worst of the worst offenders. That is, “[d]eath sentences that are rightfully imposed in the first place need not be commuted later.”<sup>28</sup>

A second reason noted by Dinsmore is purely political. The American

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<sup>22</sup> Bedau, *supra* n. 16, at 18.

<sup>23</sup> *Id.* at 18-19.

<sup>24</sup> *Id.*

<sup>25</sup> 408 U.S. 238 (1972). In a consolidated case, the inmates attacked the imposition of their death sentences. The U.S. Supreme Court determined that the central issue was whether the imposition and administration of the death penalty under the laws applicable to the inmates constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In reversing the lower courts’ judgments, the Supreme Court, in one of its longest decisions in history, held that the death penalty did violate the Eighth and Fourteenth Amendments because the application of the penalty was discretionary, haphazard, and discriminatory in that it was inflicted in a small number of the total possible cases and primarily against certain minority groups.

<sup>26</sup> Dinsmore, *supra* n. 4, at 1839-40.

<sup>27</sup> *Id.* The 5-4 decision in the *Furman* case halted all pending executions in the United States. The case, however, left open the door for the return of the death penalty if capital punishment could be applied in a less capricious way. Looking to reinstate the death penalty, 36 states modified their statutory schemes to make them less capricious. Bohm, *supra* n. 4, at 25.

<sup>28</sup> Dinsmore, *supra* n. 4, at 1840.

public strongly favors the death penalty.<sup>29</sup> Governors have little incentive to grant clemency. “Since 1966—the year that death penalty support fell to 42 percent, its lowest level ever—support of capital punishment in the United States has increased an average of more than one percentage point per year. In no year for which polls are available has a majority of Americans opposed capital punishment.”<sup>30</sup> Governors expend political capital by granting clemency in undeserving cases. That is precisely why Ryan, and other governors who have done the same thing but to a lesser degree, took the extraordinary step at the end of their terms in office.

### III. CONDEMNED INMATES IN ILLINOIS

Who are some of the death row inmates in Illinois that arguably benefited from Governor Ryan’s blanket commutation? Although none of the condemned inmates are household names outside of Illinois, the offenses are, in some cases, very disturbing. Out of the 167 cases, the following three particular cases were the ones cited by the media with some degree of regularity following the blanket commutation.

#### A. *Danny Edwards*

Edwards, a small-time drug dealer and electrician in Kankakee, Illinois, kidnapped a local businessman, Stephen B. Small. Edwards buried Small alive in a wooden box, which had a small air hole. Then, Edwards attempted to extort a million dollars from Small’s wealthy family. Over a

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<sup>29</sup> *Id.* at 1841.

<sup>30</sup> Bohm, *supra* n. 4, at 187. Dinsmore, in her research, notes that there has been a recent decline in public support for the death penalty among the American public. She states that recent public opinion polls (polls conducted in 2000) showed that 67 percent of the American public supports the death penalty which is down from 77 percent in 1995. Dinsmore, *supra* n. 4, at 1841. A recent Gallup poll found the following results:

- Only 53% of those polled believe the death penalty is applied fairly, while 40% say it is applied unfairly. Among non-white respondents, 54% believe the death penalty is applied unfairly
- When given the sentencing alternative of life without the possibility of parole, 52% of Americans support the death penalty and 43% favor life imprisonment
- 82% of respondents oppose the death penalty for the mentally retarded
- 73% oppose the death penalty for those who are mentally ill
- 69% of Americans oppose capital punishment for juvenile offenders
- In general, 72% of Americans favor the death penalty for defendants convicted of murder and 25% opposed it

Death Penalty Information Center, *Summaries of Recent Poll Findings*, <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210> (accessed Apr. 1, 2004).

four hour period, Small slowly suffocated to death in the box.<sup>31</sup> Edwards was tried, convicted, and sentenced to death for the gruesome and brutal murder of Small.<sup>32</sup> Interestingly, Edwards did not want any favors from Ryan. Edwards wrote to the governor and asked him not to commute his sentence because he did not want to live the rest of his life in prison.<sup>33</sup>

*B. Fedell Caffey and Jacqueline Williams*

Then there is the horrific case of Fedell Caffey and Jacqueline Williams. Fedell Caffey and Jacqueline Williams decided they wanted to have a baby. On November 16, 1995, Debra Evans was fatally shot and stabbed in the presence of her young children: Samantha, age 10, Joshua, age 8, and Jordan, age 2. Debra was nine months pregnant, and the baby that she was carrying, Elijah Evans, was carved from Debra's womb with scissors. Samantha was also brutally murdered in the apartment with her mother because she could be a potential witness against Caffey and Williams. Joshua and Elijah were taken from the apartment, and Jordan (because he was only two and would not be a witness against them) was left

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<sup>31</sup> Abdon M. Pallasch et al., *Gov. Ryan empties Death Row of all 167*, Chicago Sun Times News Special Ed. 2 (Jan. 12, 2003); *People v. Edwards*, 144 Ill. 2d 108 (1991).

<sup>32</sup> Gov. George Ryan, *Commutation Announcement* (Northwestern L. Sch., Chicago, Ill., Jan. 11, 2003) (available at <http://www.law.northwestern.edu/depts/communicate/newspages/spring03/ryanspeech.htm>) (last modified June 12, 2003). This site contains the entire speech that he made at Northwestern University. In his speech, Governor Ryan specifically talked about his personal experience with the Small case. He said,

As you all know, I grew up in Kankakee, Illinois . . . It is still a small midwestern town, a place where people tend to know each other. And I had a great neighbor and his name was Steve Small. He and his wife would look after our young children . . . [which] wasn't for the faint of heart since Laura Lynn and I had six kids and five of them under the age of three. But he was a bright young man who helped run the family business. And he and his wife had three children of their own. And Laura Lynn was especially close because we knew that we were there for each other.

One September midnight, Steve received a call at his home . . . . And they said there had been [ ] a break in at [the nearby house he was renovating.] And so, he had to leave his house to go sign a complaint with the police. And when he got to the garage and opened the door, there was a man standing there with a gun and they put the gun on him and threw him in the trunk of the car. And they took him out and buried him in a very shallow grave alive and he died before the police could find him.

His killer eventually led police to where Steve's body was buried. The young man's name was Danny Edward. He was also from my hometown of Kankakee. And he now sits on death row. I know his family. I know his brother. I share this story with you so that you know I do not come to this as a neophyte without having experienced the small bit of the bitter pill the survivors of murder must swallow.

*Id.*

<sup>33</sup> *Id.*

alone in the apartment with his dead mother and sister. The day after Debra's and Samantha's murders, police found Joshua's dead body in an alley in Maywood. When police arrested Williams, she was holding Elijah, who was still alive.<sup>34</sup>

### C. *Latasha Pulliam*

Finally, there is the case of Latasha Pulliam. On March 21, 1991, Pulliam took six-year-old Shenosha Richards to her apartment. There, Pulliam placed Shenosha in a bedroom with her boyfriend and codefendant, Dwight Jordan. Pulliam then went to the kitchen to use cocaine. When she returned to the bedroom, Shenosha was on the floor crying with her underwear down to her knees. Jordan was behind her attempting to attain an erection. Jordan then picked up a shoe polish bottle and inserted it into the victim's rectum. Pulliam then placed the straight end of a hammer into Shenosha's vagina while Jordan continued inserting the shoe polish bottle into her rectum. Pulliam and Jordan continued this assault for 10 minutes. Shenosha was crying, and when Pulliam put her hand over Shenosha's mouth, Shenosha attempted to scream. Pulliam then took an electrical cord, wrapped it around Shenosha's neck, and began strangling her.

Pulliam eventually took Shenosha to an empty apartment down the hall, where Shenosha told Pulliam that she would not tell anyone, except she would have to tell her parents. At that point, Pulliam pulled the cord tighter around the victim's neck and continued tightening it for 10 minutes. Because Pulliam heard knocking at her apartment down the hall, she put Shenosha in a closet in the empty apartment. Pulliam returned to the closet a few minutes later and noticed that Shenosha was no longer breathing. Pulliam then hit Shenosha over the head with a hammer three or four times. After placing Shenosha in a garbage can, Pulliam struck the victim over the head with a two-by-four and then attempted to cover the victim's body with garbage.

The medical evidence revealed that in all, Shenosha suffered 42 distinct injuries. She had two puncture wounds to her chest, which damaged her lungs and coronary artery, and lacerations on her head, which penetrated to her skull. She also had numerous lacerations to her anus and vaginal area. Shenosha's injuries were consistent with the conduct described in Pulliam's confession.<sup>35</sup>

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<sup>34</sup> Pallasch et. al., *supra* n. 31; *People v. Williams*, 193 Ill. 2d 306, 314-15 (2000); George F. Will, *Unhealable Wounds*, Washington Post B7 (Jan. 19, 2003).

<sup>35</sup> *State v. Pulliam*, 206 Ill. 2d 218, 224-25 (2002).

It is very hard not to be moved by the senseless brutality committed by the worst of the worst offenders in Illinois. As mentioned, these cases are representative, albeit probably more brutal and senseless than some of the other death row cases in Illinois.

#### IV. ANALYSIS OF GOVERNOR RYAN'S BLANKET COMMUTATION

Did Governor Ryan make the right decision by issuing a blanket clemency (or pardons) for all of the defendants on Illinois' death row? The answer to that question depends, in part, upon how you feel about the death penalty – perhaps the most emotionally charged political and legal issue in America. Those who support Governor Ryan's decision (and most likely oppose capital punishment) will argue that he did not abuse his power or act in an arbitrary and capricious manner. Conversely, those who oppose Governor Ryan's decision will most likely see it as an abuse of power that not only harmed the friends and loved ones of the murder victims, but also did violence to the entire criminal justice system in Illinois.

Under the Illinois Constitution, the "Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."<sup>36</sup> The Illinois General Assembly provides some specific guidance on executive clemency.<sup>37</sup> Illinois State law provides that in evaluating petitions

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<sup>36</sup> Ill. Const. Art. V § 12.

<sup>37</sup> 730 Ill. Comp. Stat. 5/3-3-13 (2004) provides:

Sec. 3-3-13. Procedure for Executive Clemency. (a) Petitions seeking pardon, commutation, or reprieve shall be addressed to the Governor and filed with the Prisoner Review Board. The petition shall be in writing and signed by the person under conviction or by a person on his behalf. It shall contain a brief history of the case, the reasons for seeking executive clemency, and other relevant information the Board may require.

(a-5) After a petition has been denied by the Governor, the Board may not accept a repeat petition for executive clemency for the same person until one full year has elapsed from the date of the denial. The Chairman of the Board may waive the one-year requirement if the petitioner offers in writing new information that was unavailable to the petitioner at the time of the filing of the prior petition and which the Chairman determines to be significant. The Chairman also may waive the one-year waiting period if the petitioner can show that a change in circumstances of a compelling humanitarian nature has arisen since the denial of the prior petition.

(b) Notice of the proposed application shall be given by the Board to the committing court and the state's attorney of the county where the conviction was had.

(c) *The Board shall, if requested and upon due notice, give a hearing to each application, allowing representation by counsel, if desired, after which it shall confidentially advise the*

for executive clemency, an administrative parole and pardon board makes a nonbonding recommendation to the governor for or against clemency.<sup>38</sup> By any measure, the Illinois governor has a very broad grant of clemency power.

Commentators also addressed Ryan's commutation powers. In the debate immediately after Ryan's blanket commutation, Mr. Kendall Coffey, a former U.S. attorney and media commentator, noted "there's nothing that can be done to undo a grant of executive clemency, whether it's two days, or two minutes, once he has issued the commutation of those sentences, that's irrevocable."<sup>39</sup> Likewise, renowned constitutional law scholar and Harvard University Professor Laurence H. Tribe commented that even though victims' families, prosecutors, police, and many members of the public may not like Ryan's decision to grant blanket clemency to death row inmates, there is little they can do about it.<sup>40</sup> As such, the issue is not whether Ryan "could" commute and pardon the sentences of the death row inmates in Illinois, but whether he "should" have exercised his clemency powers in that fashion.

Certainly there are many who support Governor Ryan's decision. For activists who oppose the death penalty, Ryan's pardon and commutation decision was heroic, principled, and courageous. Some believe that he will be nominated for a Nobel Peace Prize because he has, more than anyone

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*Governor by a written report of its recommendations which shall be determined by majority vote. The Board shall meet to consider such petitions no less than 4 times each year.*

Application for executive clemency under this Section may not be commenced on behalf of a person who has been sentenced to death without the written consent of the defendant, unless the defendant, because of a mental or physical condition, is incapable of asserting his or her own claim.

*(d) The Governor shall decide each application and communicate his decision to the Board which shall notify the petitioner.*

...

*(e) Nothing in this Section shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon.*

(emphasis added).

<sup>38</sup> *Lucien v. Preiner*, 967 F.2d 1166 (7th Cir. 1992).

<sup>39</sup> *CNN Saturday Night: Illinois Governor Commutes Death Row Inmates' Sentences*, (CNN Jan. 11, 2003, transcript #011101CN.V88) (TV Broadcast).

<sup>40</sup> Maureen O'Donnell & Mark Skertic, *Constitution, precedent make move final: expert*, Chicago Sun Times News Special Ed. 7 (Jan. 13, 2003). Tribe believes that it would violate the double jeopardy clause of the U.S. Constitution to try to reverse the commutation decision by Governor Ryan. *Id.*

else in recent times, helped build opposition to the death penalty.<sup>41</sup>

Interestingly, international support for Ryan's decision has been immediate and overwhelming. Kamal Samari of Amnesty International said that Governor Ryan's commutation decision marked a "significant step in the struggle against the death penalty" and urged other governors to take similar steps.<sup>42</sup> Walter Schwimmer, the Secretary General of the Council of Europe, commented that the death penalty had "no place in a civilized society."<sup>43</sup> Schwimmer also noted "I sincerely hope that this is a step toward the abolition of the death penalty in the whole of the United States."<sup>44</sup> Likewise, Nobel Peace Prize laureate, Archbishop Desmond Tutu, said, "This is fantastic news."<sup>45</sup>

By contrast, those opposed to Ryan's decision have been extremely critical. Some of Ryan's critics are making this opposition a personal attack on the former governor. For example, some critics contend that he made the commutation decision, in part, to salvage his reputation and divert attention away from his own legal problems stemming from a bribes-for-licenses scandal that occurred on his watch during the time he was Secretary of State of Illinois.<sup>46</sup> Others point out, and Governor Ryan concedes, that he misled victims' families and friends, albeit unintentionally, when he told them that he was leaning away from a decision to issue blanket clemency.<sup>47</sup> Still others believe he displayed an amazing lack of political courage for waiting two days before he left office to announce the decision in order to avoid all of the political heat and pressure resonating from his decision. Furthermore, Ryan was elected to that office as a pro-death penalty candidate, and it is very unlikely the voters in Illinois would have elected him had his position been different.

Other critics focus on the emotional carnage that he created for the families of the victims with his decision.<sup>48</sup> Some of these family members

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<sup>41</sup> *Mob Boss' name on Ryan clout list*, Chicago Tribune 8 (Jan. 31, 2003).

<sup>42</sup> Dominic Evans, *Governor Spares 167 on Illinois Death Row*, National Post (Canada) A12 (Jan. 13, 2003).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Dirk Johnson & Elizabeth Austin, *A Leap of Fate*, Newsweek 34 (Jan. 13, 2003).

<sup>47</sup> John Keilman, *Relatives of victims feel 'cheated'*, Chicago Tribune News 1 (Jan. 12, 2003). Ryan told more than 100 victims' family members at a meeting in December that he was leaning away from issuing a blanket clemency order. *Id.*

<sup>48</sup> In George Will's article, he mentions Scott Turow, a Chicago lawyer and novelist, who served on Ryan's commission. In Turow's new novel, *Reversible Errors*, he eloquently discusses the permanent scars murder victims must endure:

Their suffering arose not merely from their loss but also from its imponderable nature. Their plan was not due to some fateful calamity like a typhoon, or an enemy as fickle and unreasoning

feel betrayed and blindsided. Others believe that what he did was a tragedy that showed no respect for police, prosecutors, judges, victims, and their families.<sup>49</sup> State's attorneys in Illinois also did not hold back their harsh comments about Ryan's actions. Cook County State's Attorney Richard Devine called Ryan's decision "stunningly disrespectful to the hundreds of families who lost their loved ones to these Death Row murderers."<sup>50</sup> According to Devine, Ryan had "once again ripped open the emotional scabs of these grieving families."<sup>51</sup>

In addition to many of the arguments already made about Ryan's decision, I believe he was wrong for three separate and distinct reasons from the aforementioned points. First, Governor Ryan abused his clemency power. That is, he used it in a manner in which it was never intended to be used. Second, by taking a one-size fits all approach to the clemency process, he acted in an arbitrary and capricious manner, thereby doing violence to the basic notions of justice and fairness that are at the core of our legal system. Finally, with one foot out the door of the Governor's mansion, he engaged in a scorched earth approach not only to the criminal justice system in Illinois but also to all of its participants.

#### A. Abuse of Executive Clemency Power

Notwithstanding how one feels about the emotionally charged issue of capital punishment, Governor Ryan abused his clemency power. In his remarks to a celebrating audience at Northwestern University, he cited many reasons that prompted his decision. Among his many reasons was the fact that the Illinois General Assembly failed to adopt any substantive reform of the death penalty. Specifically, Ryan said, "I have had also to watch [in] frustration [as] members of the Illinois General Assembly failed to pass even one substantive death penalty reform in the state! Not one! . . . They couldn't even agree on one . . . . [H]ow much more evidence is needed before that General Assembly will take its responsibility in this area seriously."<sup>52</sup> He further condemned the legislature by saying "[w]e are a rudderless ship because they failed to act."<sup>53</sup> Finally, he noted, "[t]he

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as disease, but to a human failure, to the demented will of an assailant and the failure of the regime of reason and rules to contain him." For the grieving, capital punishment meant "an end point, a sense of an awful equilibrium being restored to the world.

Will, *supra* n. 34.

<sup>49</sup> *Id.*

<sup>50</sup> Maurice Possley & Steve Mills, *Clemency for all*, Chicago Tribune News 1 (Jan. 12, 2003).

<sup>51</sup> *Id.*

<sup>52</sup> Ryan, *supra* n. 32.

<sup>53</sup> Ryan, *supra* n. 32.

Legislature couldn't reform it. Lawmakers won't repeal it. And I won't stand for it."<sup>54</sup>

To his credit, Governor Ryan empanelled a blue ribbon commission in March 2000 to study the issue of capital punishment in Illinois. The Commission on Capital Punishment made 85 recommendations. For example, it recommended:

Videotaping of all interrogations of capital suspects conducted in a police facility.

Reducing the number of crimes eligible for a death sentence from twenty to five (cases in which the defendant has murdered two or more persons, where the victim was either a police officer or firefighter, where the victim was an officer or inmate of a correctional institution, when the murder was committed to obstruct the justice system, or when the victim was tortured in the course of the murder).

Forbidding capital punishment in cases where the conviction is based solely on the testimony of a single eyewitness.

Barring capital punishment in cases where the defendant is mentally retarded.

Establishing a state-wide commission – comprised of the Attorney General, three prosecutors, and a retired judge – to confirm a local state's attorney's decision to seek the death penalty.

Intensifying the scrutiny of testimony provided by in-custody informants during a pre-trial hearing to determine the reliability of the testimony before it is received in a capital trial.

Requiring a trial judge to concur with a jury's determination that a death sentence is appropriate; or, if not, sentence the defendant to natural life.<sup>55</sup>

Implicit in Ryan's remarks and actions was the claim that if the

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<sup>54</sup> *Id.* Columnist George F. Will translated Ryan's comments as follows: "The chief executive vowed to not carry out the consensus of the people, as carefully codified by their elected representatives, in conformity with U.S. Supreme Court standards." Will, *supra* n. 34.

<sup>55</sup> Illinois Commission on Capital Punishment, *Illinois Commission Announces Nation's Most Comprehensive Death Penalty Review; Recommends Sweeping Changes to Protect Innocent, Ensure Fairness* (Apr. 15, 2002) (Press Release), (available at <http://deathpenaltyinfo.org/article.php?scid=1&did=382>) (accessed Apr. 1, 2004).

legislature had adopted some or all of the recommendations, Ryan would not have taken such an extraordinary step. In other words, Governor Ryan used the executive clemency power in a manner in which it was never intended to be used: to circumvent the legislative process, the courts, and the will of the people of the State of Illinois. Certainly, Governor Ryan would challenge such a conclusion. He would likely contend that he did not circumvent the legislative process; he acted in the absence of the legislature.<sup>56</sup> In either case, whether he circumvented the legislative process or acted in the legislature's absence, it is the Illinois General Assembly who decides whether the state should have capital punishment.

Fundamental to the notions of our system of government is that legislatures are elected to make laws. The people of Illinois, through their elected representatives in the General Assembly, made the decision that they wanted to join the ranks of the 38 states and the federal government (including the military) that have capital punishment.<sup>57</sup> No one should be shocked by such a decision. The majority of Americans believe that capital punishment is an appropriate remedy. Capital punishment hardly seems too harsh for someone who brutally murders a woman who is nine-months pregnant and then cuts her unborn baby from her womb and then murders two-out-of-three of her children so that they can't be witnesses against them.

It is not like the people of Illinois or other states haven't had experience with these vile offenders. In Illinois, for example, there is John Wayne Gacy. Gacy, a lonely and sadistic contractor committed a variety of psychological and physical acts of torture on his victims before strangling them.<sup>58</sup> In 1978, police in Chicago tracked Gacy down. Investigators found 30 bodies (he was ultimately convicted of 33 murders) buried in the crawl space underneath his house. After being drowned in due process, he remained on Illinois' death row for 14 years before being executed on May 10, 1994.<sup>59</sup> The citizen of Illinois, through their elected representatives, passed laws to protect themselves from predators like Gacy.

Illinois is certainly not alone. We have also seen horrific criminal activity in other parts of the country as well. Recently, snipers terrorized the greater Washington, D.C. area. We also saw terrorists killing thousands of

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<sup>56</sup> The idea for this sentence originated with Joel E. Jebb, Assistant Professor of English, United States Military Academy. Professor Jebb made this paper immeasurably better with all of his helpful comments and insights.

<sup>57</sup> U.S. Department of Justice – Office of Justice Programs, Bureau of Justice Statistics, *Capital Punishment Statistics*, <http://www.ojp.usdoj.gov/bjs/cp.htm> (last updated Feb. 9, 2004).

<sup>58</sup> Cheryl Lavin, *The Final Act With the Curtain About to Fall on John Gacy*, Chicago Tribune Tempo 1 (May 5, 1994).

<sup>59</sup> *Mass Murderer John Gacy Put to Death*, San Francisco Chronicle A1 (May 10, 1994).

our citizens in acts of religious fanaticism and blind hatred. We have seen all stripes of serial killers in virtually every part of the country. Shouldn't elected legislators be the ones empowered to enact laws that mandate an ultimate sanction for such senseless violence? I think the answer is a resounding "yes."

Moreover, federal and state courts have spent years reviewing the process, procedures, and merits of the former death row inmates' cases in Illinois. Cook County State's Attorney Richard Devine captured the essence of Ryan's action. Referring to the cases, Devine said, "they were ripped away from (he courts) by a man who is a pharmacist by training and a politician by trade. Yes, the system is broken, and the governor broke it today."<sup>60</sup>

What Governor Ryan did in deciding to issue blanket clemency to all of those on death row is break faith with our system of government. The power to grant clemency was built into the system as a "fail safe."<sup>61</sup> It was built into the system for mercy and judicial error correction in specific cases. Moreover, since *Furman* and the redrafting of capital statutes to provide for individualized consideration of aggravating and mitigating factors, the class of death penalty cases has been sufficiently narrowed, leading to more appropriate and accurate sentences.<sup>62</sup> In Ryan's remarks, he states, "[I]n Illinois last year we had about 1,000 murders and only two percent [of those murder defendants] were sentenced to death."<sup>63</sup> Is that a bad thing? Doesn't that establish that extraordinary measures are being taken to ensure that the death penalty is only being used in the worst of the worst cases after exhaustive reviews?

It is not a perfect system. Clemency is designed to catch those cases that fall through the cracks. It is a shield to protect those limited few for which the system of police, courts, juries, prosecutors, and defense attorneys have failed. It is not to be used as a sword to tear apart the entire system.

Governor Ryan certainly has given some thought to his role in the constitutional system. He said,

The governor has the constitutional role in our state of acting in the interest of justice and fairness. Our state constitution provides broad power to the governor to issue reprieves, pardons and commutations. . . . The last court, the last resort for relief is the

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<sup>60</sup> Cal Thomas, *The Death Penalty: Mend it, Don't end it*, Sun-Sentinel (Ft. Lauderdale) 23A (Jan. 15, 2003).

<sup>61</sup> Dinsmore, *supra* n. 4, at 1827.

<sup>62</sup> *Id.* at 1840.

<sup>63</sup> Ryan, *supra* n. 32.

governor. At times the executive clemency power has perhaps been a crutch for courts to avoid making the kind of major change that I believe our system needs.<sup>64</sup>

Ryan's comments are highly probative of the fact that he fails to appreciate the respective roles of the different branches of the government. It is not the role of the courts to make the kind of major changes that the system purportedly needs. That is the role of the legislature. Likewise, it is not the role of the governor to use his or her broad clemency powers to circumvent the role of the legislature. Governor Michael Easley of North Carolina got it right when he said, "[p]eople give you a certain amount of discretion as governor to avert disaster and to show some mercy in unusual circumstances . . . I think to take advantage of that trust is an abuse of authority the people have entrusted you with."<sup>65</sup>

The bottom line is that Ryan, while not violating the letter of the law, certainly violated the spirit of it by usurping the power of the Illinois Legislature and courts. What was the appropriate action for Governor Ryan, given his feelings on the death penalty? I think it was entirely appropriate to issue a moratorium to study the death penalty in the state. I think a blue ribbon commission to study the death penalty is an excellent idea. If he did not feel comfortable with the system to permit any executions on his watch because he did not have confidence in the system, so be it. I think making proposed changes to the legislature is also an excellent idea whether one agrees with the changes or not. He should not, however, have abused his powers and completely circumvented the system by emptying out death row because the Illinois General Assembly would not adopt his commission's proposals. It is the role of the legislature to make the laws. By abusing his clemency power in the manner in which he did, he completely undermined the legislature and its law-making function.

### *B. Arbitrary and Capricious*

Is the death penalty administered in Illinois in an arbitrary and capricious manner? Governor Ryan believes so. In articulating his views on the state of death penalty jurisprudence in Illinois, Ryan cited two famous quotations on capital punishment from the opinions of Supreme Court Justices Potter Stewart and Harry Blackmun to make it clear that he believed the death penalty is administered in an arbitrary and capricious

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<sup>64</sup> *Id.*

<sup>65</sup> Amy Gardner & Rob Christensen, *Easley: Ryan's Wrong*, News and Observer (Raleigh) B5 (Jan. 15, 2003).

manner.<sup>66</sup> Specifically, Ryan said, “Supreme Court Justice Potter Stewart has said that the imposition of the death penalty on defendants in this country is as freakish and arbitrary as who gets hit by a bolt of lightning.”<sup>67</sup> Ryan summed up his remarks by referring to the famous comments of Justice Blackmun,

Our systemic case-by-case review has found more cases of innocent men wrongfully sentenced to death row, and because our three-year study has found only more questions about the fairness of the sentencing, and because of the spectacular failure to reform the system, because we have seen justice delayed for countless death row inmates with potentially meritorious claims, and because the Illinois death penalty system is arbitrary and capricious, and therefore, immoral, I no longer shall tinker with the machinery of death<sup>68</sup>

I disagree with Ryan’s comments. I do not believe the death penalty has been administered in an arbitrary and capricious manner. It is designed to punish the vilest offenders of societal standards with an ultimate sanction. Like death penalty schemes in other states, Illinois is drowning in due process for offenders to ensure that if mistakes are made in individual cases, they are caught and corrected.

Ryan pointedly attacked the discretion of the 102 Illinois State’s Attorneys, who by law, decide whether the death penalty is appropriate in a

<sup>66</sup> Ryan, *supra* n. 32.

<sup>67</sup> *Id.* Stewart made the remarks in *Furman*, specifically stating:

These death sentences are cruel and unusual in the same way that being *struck by lightning* is cruel and unusual. For, all of the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. (citation omitted). But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and *so freakishly* imposed.

408 U.S. at 309-310 (emphasis added).

In a generally held view of the Supreme Court holding in *Furman*, Charles Black wrote in *Capital Punishment: The Inevitability of Caprice and Mistake* 20 (2d ed., Norton 1981)

The decisive ground of the 1972 *Furman* case anti-capital punishment ruling—the ground persuasive to the marginal justices needed for a majority—was that, out of a large number of persons ‘eligible’ in law for the punishment, a few were selected as if at random, by no stated (or perhaps stutable) criteria, while all the rest suffered the less penalty of imprisonment.

Stephen Nathanson, *An Eye for an Eye, The Morality of Punishing by Death* 44 (Rowman & Littlefield 1987).

<sup>68</sup> Ryan, *supra* n. 32. Blackmun made the remarks in *Callins v. Collins*, 510 U.S. 1141, 1145-46 (1994).

given case. A recent article discussed the decision-making process in a capital case in Kane County, Illinois.

Ms. Gorecki [State's Attorney] and a committee of 15 prosecutors in her office meet once a month to study possible capital cases, reviewing each one at least three times before taking an advisory vote on whether to pursue a death sentence. The group compares the facts of the murder with cases in other counties, examines the evidence, checks the defendant's criminal history, and makes sure the person was the primary offender.<sup>69</sup>

I would submit that a decision by a state's attorney to proceed with a case as a capital prosecution is hardly one done in an arbitrary and capricious manner. Capital cases take years to resolve. Prosecutors must be prepared to endure over a decade's worth of appeals and collateral attacks by condemned inmates up and down the state and federal court systems. Illinois death inmates wait an average of 13 years between sentencing and execution.<sup>70</sup> Additionally, capital cases are enormously expensive. The average cost per execution in the United States ranges from \$2 million to \$3 million. Extraordinary cases can cost much more.<sup>71</sup> By contrast, the average annual cost of incarcerating a prisoner in the United States is \$20,000 a year. In Illinois, it cost \$21,600 a year to house a maximum-security inmate.<sup>72</sup> Moreover, it costs \$27,800 to house someone on death row per year.<sup>73</sup> If an inmate lives 50 years, that would be \$1 million.<sup>74</sup> Accordingly, prosecutors do not make the decision to try a death penalty case lightly.

After *Furman*, the issue of arbitrariness in death penalty cases was addressed by most state legislatures, including Illinois, in one of two ways. In certain states, death penalty laws were amended to make the death penalty mandatory for certain crimes.<sup>75</sup> The Supreme Court held these

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<sup>69</sup> Jodi Wilgoren, *Illinois Prosecutors Assess Death Penalty's New Era*, N.Y. Times A18 (Jan. 14, 2003).

<sup>70</sup> *Id.*

<sup>71</sup> Bohm, *supra* n. 4, at 109.

<sup>72</sup> Jamie Sotonoff, *Ryan's death row move could save \$1 million*, Daily Herald (Chicago) (Jan. 13, 2003).

<sup>73</sup> *Id.* According to Jane Bohman, executive director of the Illinois Coalition Against the Death Penalty, "[t]axpayers spend millions of dollars a year supporting the state's capital punishment system . . . Taxpayer money is used to pay for things like appeals, multiple hearings and trials, hiring experts and consultants and funding for defense attorneys." *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Nathanson, *supra* n. 67, at 48.

statutory schemes to be unconstitutional.<sup>76</sup> The other legislative scheme designed to eliminate arbitrariness provided for specific guidelines for the court to follow in deciding an appropriate sentence. Typically, these schemes consist of aggravating and mitigating factors.<sup>77</sup> Moreover, these new schemes had other procedural safeguards such as automatic appeals and separate sentencing hearings.<sup>78</sup> In 1976, the Supreme Court in *Gregg v. Georgia*,<sup>79</sup> *Jurek v. Texas*,<sup>80</sup> and *Proffitt v. Florida*,<sup>81</sup> decided that these “guided discretion” statutes were constitutional because they made arbitrariness sufficiently unlikely.

In Illinois, a state with guided discretion statutes, prosecutors may seek the death penalty if the defendant knew the victim was an on-duty policeman or fireman, if the victim was a visitor, inmate or on-duty employee at a state prison, if the defendant was convicted of two or more murders, including prior murders, if the victim was killed during the hijacking of a public conveyance, if the defendant was paid to kill the victim, if the victim was under 12 years of age, if the victim was killed in a drive-by shooting, or if the murder was intended to prevent, or was in retaliation for, testimony in a criminal case, among others.<sup>82</sup> Moreover, the prosecutor must establish an aggravating factor beyond a reasonable doubt at trial.<sup>83</sup>

In addition to the aggravating factors, a court, under Illinois law, is required to consider mitigating factors which are relevant to the imposition of the death penalty. Mitigating factors include the following: (1) that the defendant has no significant history of prior criminal activity; (2) that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution; (3) that the murdered individual was a participant

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<sup>76</sup> *Id.* See *Woodson v. N.C.*, 428 U.S. 280, 281 (1976) (citing *Williams v. New York*, 337 U.S. 241, 247 (1949) the Court stated, “[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender”).

<sup>77</sup> The consideration of aggravating or mitigating factors in a capital case is a method of channeling a jury’s discretion. Bedau, *supra* n. 16, at 202. The use of aggravating and mitigating factors is the most widely used type of death penalty law. Under it, at least one aggravating factor must be found before death can be considered as a punishment. The aggravating factors are weighed against mitigating factors. If the mitigating factors outweigh the aggravating factors, the sentence will be life. If the aggravating factors outweigh the mitigating factors, the sentence is death. Bohm, *supra* n. 4, at 27.

<sup>78</sup> Nathanson, *supra* n. 67, at 48.

<sup>79</sup> 428 U.S. 153 (1976).

<sup>80</sup> 428 U.S. 262 (1976).

<sup>81</sup> 428 U.S. 242 (1976).

<sup>82</sup> 720 Ill. Comp. Stat. 5/9 (2003).

<sup>83</sup> 720 Ill. Comp. Stat. 5/9-1(f) (2003).

in the defendant's homicidal conduct or consented to the homicidal act; (4) that the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm; (5) that the defendant was not personally present during commission of the act or acts causing death.<sup>84</sup>

Last, but certainly not least, the state's governor has clemency power – an “escape valve” – that is often “[s]tandardless in procedure, discretionary in exercise, and unreviewable in result.”<sup>85</sup> When one looks at the decision to pursue a capital case coupled with the statutory factors, the burden of proof at trial, the years of appeals, and finally executive clemency, it is hard to say that the system is arbitrary and capricious. Even Ryan's Potter Stewart quotation from *Furman* was taken from a time before the law was amended in Illinois to ensure that it was not arbitrary and capricious.

The irony of Ryan's blanket clemency order was how much more arbitrary and capricious it was than the death penalty process in Illinois or in any other state or the federal government. Ryan did not, in any meaningful way, discern who was innocent and who was guilty. He did not ascertain culpability on an individual basis. He applied a one-size-fits all remedy to what he believes are systemic failures in the legal system in Illinois. He treated all death row inmates the same while splashing a great deal of mud on everyone involved in the criminal justice system in Illinois.

What will be “freakish” is when death row in Illinois begins to fill up again and Illinois lifts the moratorium and executes someone. The death penalty is still the law, and state's attorneys said they would seek capital punishment in appropriate cases. So whether a particular inmate lives or dies may boil down to timing. Also, for those who were being re-sentenced (and are sentenced to death), there is an extra twist of irony if a court determines they do not qualify for Ryan's commutation. In the truest sense, they may have won a battle but lost the war.

Did he make the decision on a whim? It is hard to say. Certainly Governor Ryan had been wrestling with this issue for some time. But, as recently as December, he told the families of the victims that he did not intend to issue a blanket clemency order. What changed during that short period of time? Moreover, he said that he made the decision on Friday motivated by the fact that he was running out of time.<sup>86</sup> That hardly seems like a valid reason to make such an important decision. I think it would

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<sup>84</sup> 720 Ill. Comp. Stat. 5/9-1(c) (2003).

<sup>85</sup> Breslin & Howley, *supra* n. 4, at 236.

<sup>86</sup> *CNN Saturday* (CNN Jan. 11, 2003) (available at CNN.com, <http://www.cnn.com/TRANSCRIPTS/0301/11/cst.07.html>) (accessed Apr. 1, 2004).

have been much more appropriate for him to turn over the matter to the new governor.

In sum, I believe that it was Governor Ryan who acted in an arbitrary and capricious manner. The death penalty in Illinois or any other state is not perfect. I do not, however, believe it can be fairly criticized for being arbitrary and capricious, especially when that criticism takes the form of an arbitrary and capricious decision.

### *C. Splashing Mud on the Criminal Justice System*

The final point with which I profoundly disagree with Governor Ryan concerns his highly inflammatory and grossly unfair comments regarding the participants in the criminal justice system in Illinois. Ryan went a long way toward completely undermining criminal justice in Illinois and inflaming racial tensions; his decision-making process harmed everyone involved in the system. Among his other comments, he said:

And [in] almost every one of the exonerated 17, we not only have breakdowns in the system with police, prosecutors and judges, we have terrible cases of shabby defense lawyers. There is just no way to sugarcoat what goes on. There are defense attorneys that did not consult with their clients. They didn't investigate the cases they had and they were completely unqualified to handle complex death penalty cases. They often don't put much effort into fighting a death sentence, and if your life is on the line, your lawyer certainly ought to be fighting for you. As I have said before, there's more than enough blame to go around about our failures with this system.

...

[In Illinois,] I have learned, we have 102 decision makers. Each of them are politically elected. Each beholding to the demands of their community and, in some cases, to the media or especially vocal victims' families. . . . [I]n cases that have the attention of the media and the public, are decisions to seek the death penalty more likely to occur? What standards are these prosecutors using?

...

What are we to make of the studies that showed that more than 50 percent of Illinois jurors couldn't understand the confusing and obscure sentencing instructions that were being used? What effect

did that problem have on the trustworthiness of death sentences? A review of the cases shows that often even the lawyers and the judges are confused about the instruction, let alone the jurors sitting in judgment. Cases still come before the Supreme Court with arguments about whether jury instructions were proper.<sup>87</sup>

Not surprisingly, the only ones he treaded lightly on were the condemned murders. “In one stroke, the governor tossed aside the work of trial judges, juries and appellate justices. . . . The system is now indeed broken. And he walks away. But the rest of us remain, and it is up to us to rebuild a criminal justice system that has been seriously undermined in just a few days.”<sup>88</sup> What do Ryan’s comments do to public confidence in the criminal justice system in Illinois? Moreover, there are judicial remedies for trial participants who do not properly perform their roles in the process. Appellate courts grant relief all of the time. They do it, however, on an individual, case-by-case basis. There are also professional sanctions for prosecutors, defense attorneys, and judges who fail to properly perform their duties. Lawyers can be, and are, sanctioned under their applicable rules of professional responsibility.<sup>89</sup>

Regarding the role of the 102 state’s attorneys in Illinois, I am flabbergasted at Ryan’s comments. Is it a bad thing that state’s attorneys are accountable to the citizens? Is it a bad thing that the victim’s families can express their feelings on how they believe the case should be handled? And what standards do state’s attorneys use? They use the standards enunciated under the Illinois Law that Governor Ryan voted to pass in 1977.<sup>90</sup> They look at the facts and circumstances of individual cases and then evaluate aggravating and mitigating factors.

Finally, Governor Ryan tells us that judges, jurors, and lawyers do not understand confusing and obscure sentencing instructions. I would offer these comments on Governor Ryan’s observation. First, I think he is grossly underestimating the ability and competency of the citizens of his state to understand jury instructions. Moreover, at any trial that I have observed or participated in as a litigator, the trial judge asks the jury members (called a panel in the military where I have practiced) whether they understand the instructions. The trial judge only proceeds if everyone affirmatively

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<sup>87</sup> Ryan, *supra* n. 32.

<sup>88</sup> Sean D. Hamill & Kevin Lynch, *Debate is urged on execution law*, Chicago Tribune Metro 1 (Jan. 13, 2003).

<sup>89</sup> See Legal Information Institute, *Illinois Legal Ethics Materials* <http://www.law.cornell.edu/ethics/illinois.html> (accessed Apr. 1, 2004) (providing more information and materials on the Illinois Rules of Professional Responsibility).

<sup>90</sup> In 1977, Ryan, a state legislator, voted to adopt the death penalty law in Illinois. *Fixing the Death Penalty*, Chicago Tribune Editorial 10 (Sept. 29, 2002).

acknowledges that he understands the instructions.

Second, if the instructions are so confusing and obscure, fix the instructions. I have had the privilege of working with many very talented and intelligent attorneys from Illinois, and I believe fixing jury instructions is well within their capabilities. Moreover, if the attorneys or jurors in a particular case had problems with the instructions, address it within the context of that particular case.

Lastly, I would suggest that some defense attorneys, in an attempt to save their client's life, adopt strategies to create error in the capital litigation process. Error, whether it is theirs or someone else's, means delay. Alternatively, even competent, hard-working defense attorneys may have so little to work with in a particular case, that it is very difficult to defend their clients. Given the nature of the crimes committed and the background and character of many of the defendants, that should not be very surprising.

Without question, Ryan also fanned the flames of racial tensions in Illinois by recasting the death debate as an equal protection issue. Among his comments, he said, "no matter how efficient and fair the death penalty may seem in theory, in actual practice, it's primarily inflicted upon the weak, the poor, the ignorant and against racial minorities."<sup>91</sup> "Of the more than 160 death row inmates, 35 were African American defendants, who had been convicted or condemned to die not by a jury of their peers, but by all-white juries. More than two-thirds of the inmates on death row were African Americans."<sup>92</sup>

Ryan also said,

There is no honorable way to kill, and there is no gentle way to destroy. There is nothing good in war, except its ending. That's what Abraham Lincoln said about the blood war between the states. It was a war fought to end the sorriest chapter in American history – the institution of slavery. And while we're not in Civil War now, we're facing what is shaping up to be one of the great civil rights struggles of our time. Stephen Bright of the Southern Center for Human Rights has taken the position that the death penalty is sought with increasing frequency against the poor and minorities.

Our own studies showed that juries were more likely to sentence to death if the victim were white than if the victim were black, three and a half times more likely to be exact, three and a half times more likely. We're not alone. Just this month, the state of Maryland

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<sup>91</sup> Ryan, *supra* n. 32.

<sup>92</sup> *Id.*

released a study [of] their death penalty system[,] and racial disparit[ies] absolutely exist . . . [there too].<sup>93</sup>

My response to Governor Ryan's comments in this regard is that one size does not fit all. If defense attorneys, prosecutors, judges, or juries failed to do their duty, correct the problem in that case. That is justice. If appropriate, sanction the offenders. In terms of race, if there are instances of intentional discrimination, by all means, grant either judicial relief or executive clemency. You have to look at specific cases and make a judgment whether defendant's rights have been violated under the equal protection clause. Sweeping allegations of institutional racism alone is not enough. All it does is inflame an already tense situation.

In sum, Governor Ryan did significant violence to the criminal justice system in Illinois. Even though he is sympathetic to Ryan's choice, Scott Turow still made the following observation: "[t]he stability and reliability of the law as an institution are brought into question when the work of many years by the police, prosecutors, judges, and juries – as well as the implied promise to victims' families – is overturned because of the action of a single individual, no matter how well intended or even necessary."<sup>94</sup>

## V. CONCLUSION

In summary, George Ryan was wrong. His heart may have been in the right place, but he made an extremely poor decision. He was not wrong because he opposes the death penalty. He was wrong because of the method he chose to address the problem. He used a power that was historically a fail-safe to prevent injustice to create a grave injustice. Many will speculate as to his motives. Many, in the course of the coming weeks and months, will speculate as to the effect his action will have on the death penalty debate in the United States. His actions will certainly be a hot topic for scholars, commentators, and "talking heads" on television. In the final analysis, the American public will come to grips and try to make sense out of his actions.

Ironically, Governor Ryan may have inadvertently done far more to hurt the abolitionist cause than any other political actor in recent history. Ryan may have energized pro-death penalty activists and the American public. Activists may push to have gubernatorial clemency powers limited or checked. Moreover, the political fallout from his actions may make other governors very reluctant to use their clemency powers except in the most

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<sup>93</sup> *Id.*

<sup>94</sup> Scott Turow, *Clemency Without Clarity*, New York Times A27 (Jan. 17, 2003).

egregious cases. George Will, in discussing the legacy of Governor Ryan, said, “[h]e will be so remembered, if not for his administration’s improprieties, then for his disregard of democratic values and his cavalier laceration of the unhealable wounds of those who mourn the victims of the killers the state of Illinois condemned.”<sup>95</sup>

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<sup>95</sup> Will, *supra* n. 34. The author would like to 2LT Arron Scheinberg for his research efforts in putting this article together.