

# MORATORIUM AND REFORM: ILLINOIS'S EFFORTS TO MAKE THE DEATH PENALTY PROCESS "FAIR, JUST, AND ACCURATE"

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*This article provides an overview of recent efforts to reform the death penalty system and its operation in Illinois. Three different stages of the reform process are examined: the Illinois Supreme Court's Special Committee on Capital Cases, which led to changes in supreme court rules in 2001; Governor George Ryan's Commission on Capital Punishment, which studied the capital process from investigation through post-conviction appeals and submitted eighty-five recommendations in 2002; and reform legislation adopted by the Illinois General Assembly in 2003. The Governor's Commission was charged with making recommendations to ensure that the application and administration of the death penalty in Illinois was "just, fair and accurate." Reflecting the concern with wrongful conviction that has driven the reform movement in Illinois, changes implemented since 2000 have done more to improve the accuracy of the trial process than the overall fairness of prosecutors' decisions to seek and impose the death penalty.*

The death penalty came under increasing criticism in the 1990s as capital sentences and executions peaked even as the violent-crime rate decreased (Death Penalty Information Center, 2008). In Illinois, the debate was characterized by a rising level of concern over both the accuracy of the capital-trial process and the fairness of decisions to seek and impose the death sentence. This article will describe the process of reform of the capital-punishment system in Illinois, including changes in required counsel qualifications and pretrial procedure imposed by the Illinois Supreme Court and a series of recommendations for legislative reform put forward by the Governor's Commission on Capital Punishment. It will present information on the implementation of these changes and identify areas where proposed reforms have yet to be adopted.

Undergraduate journalism students at Northwestern University, working under the direction of Professor David Protess, began investigating claims of wrongful conviction in the 1990s. They contributed to the exoneration in 1995 of Rolando Cruz and Alejandro Hernandez, who were being retried on capital-murder charges and also developed evidence that cleared death-row inmates Dennis Williams and Verneal Jimerson (two of the "Ford Heights Four") in 1996 (Warden, 2005). In 1997 the American Bar Association called for a national moratorium on executions. The Chicago Council of Lawyers called for a moratorium in Illinois, and petitioned the Illinois Supreme Court to stop setting execution dates until a study could be completed and its recommendations considered. In 1998, in his dissent in *People v. Bull* (1998), Justice Moses Harrison II of the Illinois Supreme Court wrote:

Despite the courts' efforts to fashion a death penalty scheme that is just, fair, and reliable, the system is not working. . . . The result, inevitably, will be that innocent persons are going to be sentenced to death and be executed in Illinois. A sentencing scheme which permits such horrific and irrevocable results cannot meet the requirements of . . . the United States Constitution . . . or . . . the Illinois Constitution (at 225, 228).

In February 1999, Northwestern University students obtained a confession that exonerated Anthony Porter, a death-row inmate who had come within two days of execution the previous year. Porter's case brought the number of exonerated inmates released from Illinois's death row to ten (Warden, 2003). The Illinois General Assembly also initiated the process of reforming the system in 1999 by adopting the Capital Crimes Litigation Act (Public Act 91-589), which created the Capital Litigation Trust Fund and authorized the state to pay certain capital-case expenses for both defense attorneys and prosecutors. Unless renewed, the Trust Fund authorization would expire in 2004. (For Illinois Public Acts, see General Assembly Web page: <http://www.ilga.gov/legislation/publicacts/default.asp>.)

### THE SPECIAL SUPREME COURT COMMITTEE ON CAPITAL CASES

Just a few weeks after Anthony Porter was exonerated, the Illinois Supreme Court created the Special Supreme Court Committee on Capital Cases ("Special Committee"). The seventeen-member Special Committee was chaired by Thomas R. Fitzgerald, presiding judge of the Cook County Criminal Courts since 1989 and a respected expert in criminal law. The remaining members, all judges, were chosen equally from Cook County and the rest of Illinois. The Special Committee solicited information and recommendations primarily from the legal community. It issued a report in October 1999 in which it recommended specific changes that could be made by the supreme court under its administrative and supervisory authority. Adoption of these changes, the Special Committee said, would "vastly reduce the risk of trial error, and fundamentally improve the capital trial process in Illinois" (Special Committee, 1999:2). The Special Committee held hearings and accepted comments during the next several months, but it made only one substantive change to its original report, recommending that Rule 3.8 of the Illinois Rules of Professional Conduct be amended to state explicitly that the duty of a prosecutor is "to seek justice, and not merely to convict."<sup>1</sup>

The Special Committee identified three major sources of trial errors: prosecutors and defense attorneys who were poorly prepared to try a capital case, often due to general inexperience or limited involvement with serious felony cases; prosecutors

<sup>1</sup> The two reports of the Special Supreme Court Committee on Capital Cases were printed in limited numbers and are not readily available online. The *Executive Summary* of the 1999 report is available at [http://www.illacad.org/special\\_committee\\_report.html](http://www.illacad.org/special_committee_report.html). The author will provide copies of both reports on request in Adobe document form (pdf).

who did not comply fully with the disclosure requirements established in *Brady v. Maryland* (1963) and subsequent cases; and inadequate judicial supervision and control of the capital-trial process. The Special Committee transmitted its final report to the Illinois Supreme Court in October 2000. The supreme court accepted all the recommendations as drafted or with only minor editorial changes, and the new rules were officially filed by a unanimous Illinois Supreme Court on March 1, 2001. (For supreme court rules, see the Illinois courts Web page: <http://www.state.il.us/court/SupremeCourt/Rules.>)

***Improving the Quality of Attorneys.*** The Special Committee devoted more than half its report to recommendations for improving the quality of attorneys who prepare and try capital cases, noting, “No reform, rule, or procedure can substitute for competent attorneys in a capital case” (Special Committee, 1999:3). Its recommendations were similar to those put forward in 1999 by the Illinois State Bar Association. The Special Committee recommended the creation of a Capital Litigation Trial Bar (proposed Supreme Court Rule 714), with both prosecutors and defense attorneys in capital cases required to be members. The only exceptions were the Illinois Attorney General and elected state’s attorneys (county prosecutors).

Lead counsel would be required to have at least five years of criminal litigation experience; to have tried at least eight felony trials, including two murder cases; and to have specialized capital-case training or experience. The proposal also required that two attorneys be appointed for indigent capital defendants once the prosecutor provided notice of intent to seek the death penalty. The Special Committee concluded that imposing this requirement from the start would be “wasteful” of the county’s resources and unnecessary in cases where the state eventually decided not to seek the death penalty but made it clear that only qualified members of the Capital Litigation Trial Bar should be assigned to or accept potential capital cases.

The Special Committee strongly agreed that this requirement must apply to retained counsel. It dismissed concerns that the Capital Litigation Trial Bar requirement might interfere with a defendant’s right to be represented by counsel of choice, noting that the right to retain counsel of choice is not absolute and that the right does not require judges to allow defendants to retain unqualified counsel. The Special Committee noted that the judiciary, and society as a whole, have an interest in the “fair and just administration of capital punishment” that is as important as the defendant’s right to counsel of choice (Special Committee, 2000:7).

The primary objection to these requirements was that some smaller counties might not have enough certified defense attorneys. Attorneys from the Office of the State Appellate Defender (OSAD) were, therefore, allowed to provide trial assistance in capital cases, and private attorneys from outside the county could be appointed as defense counsel (see Burke, 2008). Some prosecutors argued that these standards should apply only to defense attorneys, as they were intended to prevent ineffective assistance of counsel. The Special Committee (2000:11-12) disagreed, noting that while prosecutors “generally perform in a fair and professional manner,” there were

“too many preventable errors to ignore.” It expressed the belief that most instances of “prosecutorial misconduct” were actually errors due to inexperience or lack of training and that they would be reduced as the recommended changes were implemented.

**Discovery and Disclosure.** The Special Committee (1999:34) recommended several procedural changes to encourage “more complete and effective disclosure” of exculpatory or mitigating information. Changes in Supreme Court Rule 416 would create an “affirmative duty” to seek out *Brady* material, material known to the police or prosecution and potentially helpful to the defendant, which must be disclosed to the defense, as first established in *Brady v. Maryland* (1963). Prosecutors would be required to consult with each person involved in investigating or preparing a capital case and to file a certificate of compliance with the court and opposing counsel at least fourteen days before trial. The Special Committee (1999:37) also recommended that prosecutors be required to “specifically identify by description or otherwise” any *Brady* material disclosed, so that the defense would be less likely to be overwhelmed by the sheer volume of discovery materials. It believed these changes would impose only “modest burdens” on prosecutors and would “greatly reduce” the possibility that *Brady* materials would not be disclosed.

Of all the Special Committee’s recommendations, these proposed changes prompted the “most divergent and heated comments” (Special Committee, 2000:40), with sharp divisions between prosecution and defense attorneys. Prosecutors argued that a capital-case investigation might involve as many as one hundred law enforcement officers alone and that the lead prosecutor could not be expected to consult personally with all of them. Acknowledging that its proposals imposed additional burdens on prosecutors, the Special Committee (2000:42) concluded that the burdens were “less onerous than suggested by some” and the possible benefits “far greater than those with reservations . . . would concede.” It rejected an alternative “open file” policy proposed by prosecutors, under which materials favorable to the defense might not be disclosed if they were not in the prosecutor’s file. The failure of police to provide all relevant material to the prosecutor had already emerged as a problem in Chicago’s “street file” cases (Bogira, 2005; see also *Palmer v. City of Chicago*, 1986, and *Jones v. City of Chicago*, 1988). The Special Committee modified its disclosure proposal to require only a “good faith” effort by prosecutors to identify exculpatory information, but left the other requirements intact. In its final report, the Special Committee (2000:85) “respectfully submits that to the extent the proposed rule requires additional effort on the part of prosecutors, it is effort that is necessary to prevent substantial discovery errors.” It also confirmed that these proposed rule changes should apply in all felony cases, not just capital cases (Special Committee, 2000:63, n. 55).

The Special Committee also recommended that trial judges be allowed to approve discovery depositions of prosecution witnesses “upon a showing of good cause” (proposed additions to Rule 416), that a standardized discovery process for DNA evidence before and after trial be established (proposed Rule 417), and that all discovery rules apply to the capital-sentencing hearing as well as the trial itself (pro-

posed Rule 411). The most controversial of these proposals was the one to allow the deposition of prosecution witnesses. The Special Committee (2000: 66) emphasized the need to improve the reliability and accuracy of capital trials and sentencing procedures, taking the position that pretrial depositions would provide better and more complete access to information and “substantially improve the truth seeking function of capital trials.”

**Decision to Seek the Death Penalty.** Illinois prosecutors have great discretion in deciding whether to seek the death penalty. Prosecutors could wait until after the trial verdict to announce that decision; in *People v. Gaines* (1981) and *People v. Brown* (1996), the Illinois Supreme Court ruled that due process was satisfied by pretrial notice that capital punishment might be sought (see Bienen, 1998). The Special Committee (1999:47-48) recommended that notice be given well before the trial began, resulting in “more efficient” use of capital-case resources and “fairer proceedings for the defendant.” Proposed Rule 416 required the prosecution to give notice within 120 days of arraignment and to specify the eligibility factors that would be alleged. If the prosecution failed to give timely notice, the trial judge was required to treat the case as one in which the death penalty would be sought, triggering all capital-case requirements. Some defense attorneys were concerned that prosecutors might use the new rule to justify routinely waiting the full 120 days to announce their intentions, depriving capital defendants of the benefit of other reforms during the early months of the case. The Special Committee expressed confidence that prosecutors could—and would—announce this decision before the deadline in most cases.

The Special Committee recommended that a case management conference be held during this same period to confirm attorney qualifications and establish a schedule for discovery and other pretrial activities. Case management conferences would help “in focusing the attention of counsel on their pretrial duties . . . well in advance of trial” (Special Committee, 1999:55). The Special Committee recommended specialized training for all judges who might hear capital cases (Proposed Rule 43).

The Special Committee also gathered comments and information on a number of proposals that could not be implemented directly by the Supreme Court, including reducing the number of aggravating factors that made cases eligible to be capital cases. It refused to support a “residual doubt” standard that would prohibit imposition of the death penalty if jurors had even a “lingering uncertainty” about facts in the case. However, members agreed that “the death penalty should be imposed only when the fact finder is convinced to a moral certainty of the defendant’s guilt” (Special Committee, 2000:101).

## GOVERNOR RYAN’S MORATORIUM AND THE COMMISSION ON CAPITAL PUNISHMENT

In January 2000, Illinois governor George Ryan declared an open-ended moratorium on executions in Illinois, the first full moratorium on executions in the United States. Governor Ryan stated that while he still believed the death penalty was a proper pun-

ishment for some crimes, he was putting the moratorium in place because he had “grave concerns about our state’s shameful record of convicting innocent people” (“Governor Ryan Declares,” 2000). He added, “Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate.” At the same time he announced his intent to create a Governor’s Commission on Capital Punishment (“the Governor’s Commission”) to study the problem and make recommendations. The moratorium on executions remained in place through the remainder of Ryan’s term as governor.

On March 4, 2000, Governor Ryan announced the creation of that commission. Noting that thirteen death-row inmates had by then been exonerated and released from prison, Ryan said it was time to conduct a “thorough review of the death penalty process” (“Governor Ryan Names Judge McGarr,” 2000). As specified in Ryan’s Executive Order, the Governor’s Commission was charged with determining why the capital-punishment process had failed in Illinois, resulting in the wrongful conviction of innocent people; considering how to provide safeguards and make improvements throughout the process; reviewing recommendations made by other bodies studying these problems; and making recommendations to ensure that “the application and administration of the death penalty in Illinois is just, fair and accurate” (Governor’s Commission, 2000:1).

The governor named retired federal judge Frank McGarr to head the fourteen-member Governor’s Commission. Its cochairs were former U.S. senator Paul Simon and Thomas Sullivan, a U.S. attorney under President Jimmy Carter and a senior partner at Jenner & Block with a long record of bar-association activities on behalf of criminal defendants. Other members included six current or former prosecutors and three attorneys active in criminal defense, including the state appellate defender. (For information on all members, see “Governor Ryan Names,” 2000.) The Governor’s Commission was different from the Special Supreme Court Committee in several ways. It had a broader mandate to study all aspects of capital punishment; it reported directly to the governor, who could move its recommendations into the legislative arena; and it had a budget that would allow it to conduct its own studies. (All Governor’s Commission documents are available at <http://www.idoc.state.il.us/ccp/ccp/reports/index.html>.)

**Investigations and Police Procedures.** The Governor’s Commission began by addressing investigative problems that had been dramatically underscored in the exonerations of the Ford Heights Four (Protest and Warden, 1998), Anthony Porter (Warden, 2005), and capital defendants Rolando Cruz and Alejandro Hernandez (Frisbie and Garrett, 1998). Its recommendations included videotaping questioning of suspects and key witnesses, conducting double-blind serial-lineup procedures, and creating an independent state forensic laboratory. The Governor’s Commission presented a total of twenty-six recommendations on investigations and police procedure, almost one-third of the report’s total recommendations

**Capital-Punishment Statute.** When Illinois adopted its current capital-punishment statute in 1977, after the Supreme Court's rulings in *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976), it identified seven factors in aggravation that could make a murder eligible for the death penalty. The Governor's Commission called these "eligibility factors." By 2001, there were twenty eligibility factors. A small number accounted for most capital cases; half of the factors had not been used in a single capital prosecution. The Governor's Commission (2002:67) unanimously condemned this statutory expansion as "unwise." Studies by James Liebman and his colleagues at Columbia University have reached similar conclusions: the wider the range of eligibility factors, the greater the opportunity for sentencing disparity and disproportion (Liebman, 2002; Liebman et al., 2002). However, the Governor's Commission was divided over which eligibility factors to eliminate, and by 2008 the Illinois General Assembly had yet to eliminate any of them.

**Decision to Seek the Death Penalty.** In addition to supporting the Illinois Supreme Court's time limits on the decision to seek or decline the death penalty, the Governor's Commission recommended state standards to increase the consistency of those decisions. Commission members unanimously supported voluntary standards to guide individual state's attorneys. A majority also supported a stronger recommendation for mandatory standards enforced by a state review and approval process.

**Trial Lawyers and Judges.** The Governor's Commission supported the Illinois Supreme Court's rules that created the Capital Litigation Trial Bar and required two defense attorneys in capital cases. It recommended that training for lawyers and judges specifically address trial problems that had been shown to result in wrongful convictions and urged the Illinois Supreme Court to establish a certification process for judges as well as attorneys. The Governor's Commission also reminded judges of their obligation under Supreme Court Rule 63 to report violations of the Rules of Professional Conduct by either prosecutors or defense attorneys. A study of approximately 250 death penalty cases under the Illinois post-*Gregg* statute found that more than 20 percent of the reversals resulted from inadequate representation by defense lawyers and more than 25 percent from improper conduct by prosecutors (Pierce and Radelet, 2002; see also Armstrong and Mills, 1999). A majority of commission members believed that judicial reporting of "improper conduct" by either party would allow it to be "fully investigated, and sanctioned where appropriate" (Governor's Commission, 2002:191).

**Pretrial Proceedings.** The Governor's Commission endorsed the new Illinois Supreme Court rules on discovery, pretrial depositions, and case management conferences, but it urged the court to define "exculpatory evidence" more clearly and provided draft language for this purpose. It recommended that prosecutors be required to prove that proposed testimony by an in-custody informant was reliable and to disclose any discussion with a witness about the benefits of testifying. The Governor's Commission (2002:123) also recommended that judges "carefully scrutinize" interrogations that misrepresent the strength of the case against a suspect, even though such

tactics are lawful, to determine whether the interrogations “would be likely to induce an involuntary or untrustworthy confession.”

**Trial (“The Guilt-Innocence Phase”).** The Governor’s Commission reviewed problems associated with eyewitness testimony, in-custody informants, and witness or defendant statements that are summarized by the police rather than recorded or presented verbatim. It recommended cautionary instructions on the reliability of all three types of evidence and concluded that expert testimony on the reliability of eyewitnesses should be admitted. The Governor’s Commission recommended that perjury by a police officer be grounds to revoke the officer’s state certification as a peace officer. Demonstrably false testimony by at least one police officer had been part of the case against Rolando Cruz, but a subsequent criminal prosecution had ended in jury acquittals of the police officers and prosecutors on trial (Possley and Armstrong, 1999).

**Sentencing.** In 2000 Illinois’s death penalty law listed five mitigating factors for juries to consider during the sentencing phase, although jurors could consider any relevant information (720 ILCS Art. 5/9-1, available online at <http://www.ilga.gov/legislation/ilcs/ilcs.asp>). The Governor’s Commission recommended adding two mitigating factors: a history of extreme emotional or physical abuse and a defendant’s reduced mental capacity. The Governor’s Commission recommended that mentally retarded defendants be excluded from the death penalty, a prohibition that the U.S. Supreme Court subsequently held in *Atkins v. Virginia* (2002) was constitutionally required. The Governor’s Commission (2000:58) also said that the death penalty should be prohibited when a conviction was based entirely on the testimony of a single eyewitness or accomplice, or on the “uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant.”

The Governor’s Commission supported the application of discovery rules to the capital-sentencing phase and also recommended that defendants be allowed to make a statement during this stage, rather than being limited to formal testimony. Moreover, said the commission, the sentencing jury should be informed of the alternate sentences that would apply if death were not recommended. With studies having shown that jurors were confused by existing language and often uncertain about their responsibilities (Berlow, 2002; Diamond and Levi, 1996), the Governor’s Commission encouraged the Illinois Supreme Court to approve clearer instructions on the jury’s role in the sentencing decision. It also recommended that a death sentence be authorized only when the judge and sentencing jury agreed that this is the appropriate sentence.

**Other Recommendations.** The Governor’s Commission recommended legislation to give the Illinois Supreme Court authority to determine whether a death sentence was improperly imposed due to some arbitrary factor, to conduct an independent assessment of the aggravating and mitigating factors, and to carry out a proportionality review to determine whether a death sentence is excessive or disproportionate compared to similar cases. It lamented the “astonishing lack of data about how the capital punishment system works” and recommended that information be collected and

used to assess “whether the death penalty is, in fact, being fairly applied” (Governor’s Commission, 2002:189). At the end of its report, the Governor’s Commission noted that many of its recommendations also applied to other criminal cases. Although the commission had only been charged with the study of the capital-punishment process, it concluded that recommendations to improve the accuracy and fairness of that process “apply with equal force to cases where non-death sentences are imposed” (Governor’s Commission, 2002:188; see also Sullivan, 2002).

To implement the Governor’s Commission’s recommendations, Illinois would have to make a “significant commitment of resources.” Concluding that “[f]ailure to fund and implement meaningful reform casts doubt upon the reliability of the entire system,” the Governor’s Commission (2002:178) pointed to the Capital Litigation Trust Fund as an important first step and unanimously recommended that the Capital Crimes Litigation Act be made permanent.

### GOVERNOR RYAN’S RESPONSE: LEGISLATIVE REFORM AND EXECUTIVE CLEMENCY

The Governor’s Commission on Capital Punishment presented its final report to Governor Ryan on April 15, 2002. Within a month, he proposed legislation to enact most of its recommendations. However, the lame-duck governor was already mired in a corruption scandal, and an initial spirit of partisan cooperation among state legislators was blunted by election-year politics. The only legislation approved by the Illinois General Assembly actually increased the number of eligibility factors. Governor Ryan vetoed the bill.

In 2002 Governor Ryan announced his intent to review each death penalty case for possible clemency. He asked the Illinois Prisoner Review Board to conduct clemency hearings for all prisoners then under sentence of death and to make recommendations to him. The prisoner review board set up three panels, each of which heard testimony on six cases a day for two weeks in October. The recommendations to the governor were confidential, but public reports at the time suggested that the board had recommended few if any commutations.

In addition to reviewing the board’s recommendations, the governor met with the families of victims and of inmates and also with various advocacy groups (Ryan, 2003). On January 10, 2003, he announced the pardon of four men on the grounds of actual innocence. The four were part of a group known as the “Burge 10,” death-row prisoners who claimed to have been tortured by Chicago Police commander Jon Burge or others under his command. An internal-affairs investigation had confirmed the likelihood of systematic torture in these and other cases (Bogira, 2005; Conroy, 2000). In announcing the pardons, Ryan said: “I believe these men are innocent. . . . There isn’t any doubt in my mind that these four men were wrongfully prosecuted, and wrongfully sentenced to death” (Flock, 2003).

Then, the next day, on January 11, 2003, just days before his term ended, Governor Ryan issued a “blanket clemency” for all 167 inmates under sentence of

death, in which he commuted the sentences to life without parole or, in three cases, to a sentence of forty years to life that matched the sentences received by codefendants. Ryan (2003) explained that although he had originally been concerned about the possibility of error and the conviction of innocent individuals, his study of the capital-sentencing process had led him “to care above all about fairness. . . . If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die?”

### GOVERNOR BLAGOJEVICH: CONTINUING THE MORATORIUM, LEGISLATING REFORMS

Governor Rod Blagojevich, elected in 2002, announced that he would continue the Ryan moratorium on executions until he was sure that no innocent person could be sent to death row or executed (Goldstein and Harmon, 2006). A spokeswoman reiterated this position in 2008, stating that the governor would keep the moratorium in place “until it’s clear beyond a doubt that the reforms . . . are adequate and working and there’s no chance that an innocent person will wrongfully be put to death” (Barnum, 2008). Governor Blagojevich has continued to emphasize the accuracy issue, where Governor Ryan began, more than the issue of fair and proportional use of the death penalty, with which Governor Ryan concluded.

In 2003 a death penalty reform bill very similar to the one proposed by Governor Ryan was introduced in the Illinois General Assembly and quickly approved in both houses. After six months of political negotiation over the standard of proof and the reviewing agency in police-perjury allegations, Governor Blagojevich finally signed a death penalty reform bill (PA 93-605) and an accompanying bill specifying the procedures to be used in perjury allegations (PA 93-655) (see Cullerton, Dillard, and Baroni, 2004). The bill authorized decertification of police officers when there was clear and convincing evidence that an officer had knowingly and willingly made a false statement under oath regarding a material fact in a murder case, even if there was no criminal prosecution or conviction for perjury. During the first four years after adoption of the law (2004-07), no formal complaints of police perjury were made.

PA 93-605 incorporated many of the Governor’s Commission’s recommendations, including changes in identification procedures, mandatory recording of custodial interviews with suspects and key witnesses in capital cases, “advisory” guidelines for the decision to seek the death penalty, stiffer disclosure and discovery requirements, judicial screening of an in-custody informant’s (“jailhouse snitch”) testimony, and revisions in capital-jury instructions to clarify jurors’ sentencing options and responsibilities. The new legislation prohibited the imposition of the death penalty on mentally retarded defendants, or in cases based on the uncorroborated testimony of an in-custody informant or a single accomplice or eyewitness. It required trial judges who disagreed with a jury’s decision to sentence a defendant to death to put

their reasons in writing and make them part of the appellate record, but it did not authorize them to override the jury's death sentence. It also gave new authority to the Illinois Supreme Court to overturn any death sentence it considered "fundamentally unjust," even though no specific procedural or constitutional basis existed for that ruling. PA 93-605 also permanently authorized the Capital Litigation Trust Fund and created a Capital Punishment Reform Study Committee ("Study Committee") to study the impact of the reforms and report annually to the Illinois General Assembly for the next five years.

Some of the Governor's Commission's key recommendations were not included in this legislation. Public Act 93-605 did *not*:

- reduce or substantially change the eligibility factors for capital cases;
- create an independent forensic laboratory or establish independent oversight of existing laboratories;
- require double-blind procedures in witness identifications or in forensics testing;
- require mandatory state review or approval of prosecutors' decisions to seek the death penalty;
- authorize the trial judge to impose a non-death sentence when the jury recommended death; or
- establish a system for the systematic collection of data on potential capital cases.

No major reform legislation regarding the death penalty has passed, or even received serious attention, in the four years after 2003. The Study Committee itself was not fully constituted until early 2005, did not submit its first "annual" report until April 2005, and did not hold its first public hearing, as directed by the law, until November 2006. Thomas Sullivan, cochair of the Governor's Commission, was selected as chair. (A complete archive of documents, including minutes of the Study Committee and its subcommittees, reports received by the Study Committee, and its annual reports to the Illinois General Assembly, is maintained at <http://www.icjia.org/public/index.cfm?metasection=dpsrc>.) The Capital Crimes Database Act (PA 95-688), directing the Illinois Criminal Justice Information Authority to collect information on capital-eligible cases, was adopted in 2007, but the authorizing legislation did not include any appropriations to support the project. By mid-2008, there was still no systematic collection or analysis of information on these cases.

## IMPLEMENTING THE REFORMS: 2004-2007

***Custodial Interrogations and Identification Procedures.*** The Study Committee (2006:5) reported that the recording of custodial interrogations was "proceeding without major problems" in Chicago, where the police department had developed a sophisticated system for recording interrogations in most station houses around the city. Many departments in downstate Illinois, some of which investigate only a few murder cases a year, had not yet established a standard recording protocol. After interviewing police, prosecutors, and defense attorneys, the Study Committee con-

cluded that police were generally complying with their obligation to record the entire interview, not just a suspect's final statement. There appeared to be fewer motions to suppress confessions in homicide cases, and fewer disputes about what was said or done during the interrogation. However, the Illinois Coalition Against the Death Penalty (ICADP) reported that Cook County judges had used their discretion to admit unrecorded statements in several capital cases (ICADP, 2008).

Public Act 93-605 mandated a pilot program to test the "double-blind, sequential" system for lineups and photo-array identifications (called "photo spreads" in the legislation). After one year, an evaluation concluded that the sequential process was not as accurate as the traditional simultaneous process (Mecklenburg, 2006); this contradicted the results of most previous studies reviewed by the Governor's Commission (O'Toole, 2006; Wells, 2006). The Study Committee (2007:15) concluded that the evaluation did not provide a sufficient basis for conclusions and recommended that "blind" administrators (who do not know which person is the actual suspect) should still be used "whenever practicable." A proposed recommendation that the Illinois General Assembly adopt legislation to require blind administration of lineups and photo spreads was initially included in the Study Committee's *Third Annual Report* (2007), then withdrawn later in 2007 to allow further consideration of the issue by the Study Committee (2008).

***Deciding Whether to Seek the Death Penalty.*** Supreme Court Rule 416 required state's attorneys to announce their intent to seek the death penalty within 120 days of arraignment. Experience with this provision has been mixed. In some cases, the decision has been announced shortly after arraignment, while in others, the decision has been announced at or substantially after the 120-day point. Cook County, where more than 80 percent of the state's capital cases are brought, has often failed to meet the deadline. This has imposed a substantial burden on the public defender's office, which has to treat cases where no decision has been announced as if they will be death penalty cases, even though most are eventually decertified or resolved by guilty pleas to non-capital murder. Some state's attorneys have openly acknowledged keeping the death penalty on the table to encourage defendants to plead guilty (see Ehrhard, 2008). It also appears that some cases may be certified in part to take advantage of the state-funded assistance provided through the Capital Litigation Trust Fund.

The Illinois Attorney General and the Illinois State's Attorney's Association issued voluntary guidelines for prosecutors in February 2006, more than two years after the legislation requiring them was adopted. Rather than providing concrete guidelines for deciding when to seek the death penalty, the document identified "basic factors which should be considered in the exercise of discretion" (quoted in Study Committee, 2007:17). The most important of these were 1) the strength of the state's case, where the prosecutor should have "absolutely no doubt" about the defendant's guilt and should be able to "meet, and even surpass" the burden of proof; 2) the nature of the offense, as to which the prosecutor should resist public pressure to seek the death penalty solely because of the brutality of the crime; 3) the views of defense

counsel, to whom prosecutors should give “a fair opportunity to present valid reasons” why the death penalty is not appropriate in a specific case; and 4) the views of “other experienced prosecutors” (quoted in Sullivan, 2007:954-55).

Thirteen people were sentenced to death in the first five years (2003-07) after Governor Ryan’s mass clemency in January 2003. This compares with a total of more than 275 capital convictions between 1977 and 2003, an average of more than ten death penalty sentences a year. Because there is no state database on capital or potentially capital cases, it is difficult to determine the proportion or types of murder cases that are actually prosecuted as capital cases. Relying primarily on information gathered by the Illinois Coalition Against the Death Penalty (ICADP), the Study Committee found that the vast majority of potential capital cases in Illinois after 2003 have resulted in sentences other than death. Of the sixty-one defendants charged with capital murder in 2006, eight (13 percent) were acquitted at trial, six (10 percent) pled guilty to noncapital offenses, and forty-four (72 percent) pled guilty or were convicted of first-degree murder and received noncapital sentences. Only three defendants (5 percent of the total) were convicted at trial and sentenced to death (Sullivan, 2007). The ICADP (2008) reported a comparable pattern for 2007. Approximately sixty capital cases were resolved during that year, but only one-third of them were actually tried as capital cases. Three defendants (approximately 5 percent of the total) were convicted on capital charges and sentenced to death, while six defendants (approximately 10 percent) were found not guilty at trial. Inconsistent application of the death penalty across the state had also been reported anecdotally (see ICADP, 2008, 2007, 2006, 2005).

**Capital Case Litigation.** The Capital Litigation Trial Bar had several hundred members by the end of 2007. A list of all those certified to try capital cases is maintained online by the Administrative Office of the Illinois Courts and is readily accessible (at [http://www.state.il.us/court/SupremeCourt/Cap\\_Lit/default.asp](http://www.state.il.us/court/SupremeCourt/Cap_Lit/default.asp)). The Capital Litigation Trial Bar requirement has become an accepted part of capital-case litigation, and defense lawyers who have not been certified simply decline to accept these cases. Defendants with adequate private resources may hire an attorney who is not a member of the Capital Litigation Trial Bar as part of the defense team, but the two lead chairs must be filled by certified attorneys. Many smaller counties still have relatively few members of the Capital Litigation Trial Bar, even within the county public defender’s office. When no one in the public defender’s office is certified to try capital cases, the judge must appoint qualified private attorneys who are paid out of the Capital Litigation Trust Fund (see Burke, 2008).

**State Funding.** Both prosecutors and defense attorneys agree that the Capital Litigation Trust Fund has done the most to change the way in which capital cases are handled. It established a state-based system of funding to supplement the county-based public-defender system, reducing the dependence of defense counsel on local judges and the county budget. It funds essential investigation, forensic testing, and legal experts during pretrial preparation, trial, sentencing, and postconviction

appeals. Because funds for nonsalary items are available to both prosecution and defense, objections to the trust fund have been minimized.

### IMPLICATIONS OF INCREMENTAL REFORM

The number of capital cases tried in Illinois has decreased since 2000, as has the number of death sentences imposed. Some credit these changes to the reforms adopted since 1999, which make it more likely that capital prosecutions will be vigorously defended. Yet other states that have not adopted major reforms have seen similar patterns (Constitution Project, 2005). The fact that defendants who have spent years in prison continue to be exonerated of the crimes for which they were convicted has led to greater scrutiny of capital cases and more caution in the use of the death penalty. It remains to be seen whether the improvements in the quality of judges and lawyers, and in their preparation for capital cases, will lead to the kinds of systemic changes envisioned by the Illinois Supreme Court and the Commission on Capital Punishment.

The Illinois General Assembly imposed new investigative and reporting requirements on law-enforcement agencies in 2003. In general, judges are responsible for enforcing those requirements. Past experience with attempts to reform the investigative process in Cook County and to apply those reforms to individual criminal cases suggests this will be a slow process. In capital cases heard after 2003, trial judges have been generous in accepting police reports on whether it was “feasible” to videotape or otherwise record full interviews with suspects or key witnesses in murder investigations. However, both police and prosecutors are becoming more supportive of these requirements as they see the benefits of such a record in pretrial negotiations and at trial.

Pretrial depositions of prosecution witnesses have also become standard practice in capital cases. Although judges are authorized under Rule 416 to use their discretion in deciding when to permit discovery depositions, the emerging practice appears to be to approve deposition requests unless there is a clear reason not to do so. Thus, the burden of proof is gradually shifting from the defense (to justify the need for a deposition) to the prosecution (to justify denying a request).

Governor Ryan’s charge to the Commission on Capital Punishment directed it to identify ways to ensure that the capital-punishment system operated in a way that was “just, fair and accurate.” Most of the reforms that were subsequently adopted in Illinois have been designed to increase the accuracy of the capital-case process and prevent the wrongful conviction of innocent defendants. The problem of wrongful conviction in capital cases has also been the focus of reform efforts in other states. By 2005, commissions to study capital punishment had been established in nearly half the states that allow it, and innocence commissions had been created in two states (Gould, 2007). Other states had implemented specific changes without broader study of the overall capital-punishment process.

The charge to make the system more just and fair has been less successful. These are the problems that led Governor Ryan to issue his mass clemency to those on Illinois's death row. Sentences were reduced from death to life imprisonment not because there was evidence that these inmates were innocent of the crimes for which they had been convicted, but because there was no rational basis for sentencing them to death when others convicted of similar crimes did not face even the possibility of such a sentence. These are the same problems that led the Supreme Court to strike down state capital-punishment laws in *Furman* (1972) more than thirty-five years ago. Proposals to reduce discrimination and arbitrariness fall into three general categories: reducing the number of aggravating factors (or "eligibility factors") so that the death penalty is reserved for the worst of the worst; limiting discretionary decision making so that the death penalty is imposed more consistently; and implementing some form of proportionality review that compares death decisions across cases.

The Governor's Commission recommended changes in all three areas. They included mandatory review and approval of prosecutors' decisions to seek the death penalty, a requirement that the Illinois Supreme Court conduct a proportionality review as part of the appellate review of each capital sentence, and the collection of detailed information on all murder cases to better understand the factors that lead to a death sentence being sought and imposed. None of these proposed changes were included in the reform legislation adopted by the Illinois General Assembly. Other states have made limited progress in this area. For example, New Jersey now requires appellate judges to conduct a proportionality review by comparing each death penalty case to other capital cases that resulted in a sentence of death (on reform in New Jersey, see Henry, 2008). Several states, including Washington and Georgia, require each death penalty case to be compared to the overall pool of death-eligible cases (see Kaufman-Osborn, 2008; Constitution Project, 2005).

The Illinois General Assembly declined to impose state standards to control the decision to prosecute certain murders as capital offenses. Instead, it chose to shift the problem to the Illinois Supreme Court, authorizing it to overturn any death sentence it considered to be "fundamentally unjust." This may help to eliminate some of the most obvious cases of arbitrary decision making, but it will inevitably leave others in place. By focusing on wrongful conviction, rather than fair and evenhanded sentencing, Illinois has avoided addressing a core problem in the prosecution of capital cases. **jsj**

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