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# An Open Letter to Governor George Ryan Concerning How to Fix the Death Penalty System

David McCord\*

Dear Governor:

In January of 2000, you wisely and courageously declared a moratorium on executions in Illinois because the death penalty system had demonstrably malfunctioned so often and so egregiously that it could be fairly termed “broken”—more Death Row prisoners had been exonerated than executed since the mid-1980s.<sup>1</sup> Other governors should seriously consider following your example in light of the recent finding that:

In the past two decades, federal and state courts have overturned 68% of the death sentences they have reviewed because of serious errors in their trials. . . . And in cases sent back for retrials, 82% of convicted capital defendants received new sentences that were other than death—including 7% who were found innocent.<sup>2</sup>

I have studied extensively and taught about capital punishment for several years.<sup>3</sup> As a fruit of these labors, I would like to share with you

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1. Mark Hanson, *Death Knell for Death Row?*, A.B.A. J., June 2000, at 40-41 (“The [death penalty] moratorium movement, which appears to be picking up steam in several states, posted its first victory in January when Illinois Gov. George Ryan called a temporary halt to executions and asked for an investigation of the state’s death penalty system, which has produced more exonerations (13) than executions (12) in the past 13 years.”).

2. Marcia Coyle, *68% Error Rate Found in Death Case Study*, NAT’L. L.J., June 19, 2000, at 1 (reporting on the highly-publicized study by James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000)). The Liebman, Fagan & West study, however, actually covered not “the past two decades,” see Coyle, *supra*, at 1, but twenty-two years, not including the five most recent years. *Id.* Also, the study did not distinguish between reversals of convictions and reversals of sentences. See Barry Latzer & James N.G. Caughen, *Capital Appeals Revisited*, 84 JUDICATURE 64, 65-67 (2000) (arguing that the Liebman et al. study far overstates the seriousness of the problems with the capital punishment system because the study fails to distinguish between conviction reversals and generally less flawed sentence reversals). Nonetheless, the statistics are stunning.

3. My writings regarding the death penalty include the following: David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1 (1998); David McCord, *Is Death “Different” for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of*

the measures that will be necessary to fix the death penalty system for future cases.<sup>4</sup> I must tell you, though, that it was only after much soul-searching that I decided to write this letter. You see, I am a death penalty opponent. Thus, I believe that by far the best way to fix the problems with capital punishment is to abolish the penalty. I feel like a partial traitor to the cause in proposing ideas to make the system better and, thus, potentially more politically and socially acceptable. Perhaps I should simply remain silent and hope that the manifest deficiencies in the system will eventually convince the body politic to abolish capital punishment. But I have decided that it is better to share my ideas with you. I do not see a political will to abolish capital punishment on the near-term horizon. Thus, it seems to me that the question in jurisdictions that have the death penalty is not whether to continue to have it, but whether to have a relatively better or relatively worse system of imposing it. Further, even if the abolition of capital punishment were to eventually come about, it will not happen overnight. In the meantime, persons will be sentenced to death and executed who might not be if these proposals were enacted. Thus, I have decided to share these solutions with you—but with trepidation.

The first and most crucial step is to recognize that there are four goals a death penalty system should seek to achieve. First, the death penalty should be reserved for the absolute worst murderer. Second, the penalty should be consistently and non-discriminatorily applied. Third, death penalty litigation should be scrupulously fair at the trial level, which will lead to reliable verdicts for purposes of appellate review, thus minimizing the frequency of reversals. Fourth, and finally, the system should minimize—to the extent humanly possible, yet consistent with a fair degree of finality—the possibility of executing an innocent person. Each one of these goals dictates certain necessary reforms. Some of the reforms, as I will explain, help achieve more than one of the goals.

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*United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105 (1999); David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. L. REV. 545 (1997); David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, ARIZ. ST. L.J. (forthcoming).

4. Note that this proposal applies only to future cases. The problem you face regarding the approximately 160 defendants already on Illinois' Death Row is one that I will not attempt to address, except to offer a couple of options. The first, and most courageous, option would be to simply commute all the death sentences to life imprisonment on the basis that the system through which they were convicted and sentenced has been shown to be fatally flawed. If you deem this politically infeasible, then I suggest a second option: that you at least review each case of currently condemned inmates and commute those that do not meet the triple aggravator requirement that I propose later in this letter.

What follows should comprise your mandate to the Illinois Legislature: *I, the Governor, will not sign any future death warrant unless the sentence has been imposed pursuant to new statutes that embody all of the following reforms.*

#### GOAL ONE: DEATH FOR ONLY THE ABSOLUTE WORST MURDERERS

Aggravating factors in every jurisdiction are over-inclusive. While they render almost all the absolute worst murderers death-eligible, they also render defendants whose crimes are not as egregious death-eligible. The reason for this over-inclusiveness is that all aggravating factor schemes require the finding of only one aggravating circumstance to render the defendant eligible for the death penalty.<sup>5</sup> But a relatively high proportion of murders have at least one aggravating factor,<sup>6</sup> which means that a disproportionately high number of murderers are included as death-eligible along with those murderers which are, in fact, among the absolute worst. Research has shown that cases in which jurors, as the “conscience of the community,” consistently impose death sentences are those with multiple aggravating circumstances.<sup>7</sup> These terribly heinous, headline-making cases propel death penalty sentiment in this country.<sup>8</sup>

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5. 720 ILL. COMP. STAT. 5/9-1 (1998) (requiring that only one aggravating circumstance be found for death-eligibility).

6. The proportion of murderers who are death-eligible varies greatly from jurisdiction to jurisdiction, depending on how broadly the criteria for death-eligibility are drawn. In the largest study, researchers in Georgia found that about eighty percent of convicted murder defendants were death-eligible. See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 43-44 (1990) (examining 606 murder convictions during a five year period from 1973 to 1978). Those authors also noted, however, that only about twenty percent of Colorado murder and non-negligent manslaughter cases were death-eligible, *id.* at 233-36, and some of the same authors found in a later study that only 227 of over 2,000 New Jersey homicide cases were death-eligible. See David C. Baldus & George Woodworth, *Proportionality: The View of the Special Master*, in 6 CHANCE: NEW DIRECTIONS FOR STATISTICS AND COMPUTING 9, 11 (1993).

7. The same researchers intensively analyzed hundreds of Georgia homicide cases from 1973 to 1978 using over 150 case variables to assign each case one of six ‘case culpability levels.’ The culpability levels ranged from a culpability of one for a low level and a culpability of six for a high level. The researchers found the following death sentencing rates: Level One—6 of 276; Level Two—9 of 65; Level Three—18 of 47; Level Four—22 of 34; Level Five—23 of 27; and Level Six—34 of 34. See BALDUS, WOODWORTH & PULASKI, JR., *supra* note 6, at 92. The triple aggravator requirement proposed in the next paragraph of the letter is meant to roughly correlate to the Level Five and Six cases from this study.

8. Edmund F. McGarrell & Marla Sandys, *The Misperception of Public Opinion Toward Capital Punishment: Examining the Spuriousness Explanation of Death Penalty Support*, 39 AM. BEHAV. SCIENTIST 500, 501, 510 (Feb. 1, 1996), available at 1996 WL 12941064. McGarrell & Sandys state:

Sensationalism sells and thus the most heinous crimes are likely to receive the most

The way to fix the problem of over-inclusiveness is to make a wide-ranging list of aggravating circumstances and require a finding that three of them exist before the defendant is death-eligible (hereinafter, the “triple aggravator requirement”).<sup>9</sup>

Here is a list of appropriate, common aggravating circumstances:

1. The defendant committed multiple homicides.<sup>10</sup>
2. The defendant was incarcerated at the time of the murder.
3. The defendant had been previously convicted of murder, forcible sexual assault, arson, armed robbery, aggravated assault, or kidnapping.
4. The victim was a police officer, firefighter, or paramedic acting in the line of duty at the time of the murder.
5. The victim was a current or past public official, and the murder was motivated by that official status.
6. The victim was 12 years of age or younger.
7. The victim was 75 years of age or older.
8. The victim was significantly less able to defend him/herself than an average person because of a physical or mental handicap or illness.
9. The defendant murdered to prevent an arrest.
10. The defendant murdered to escape from custody.
11. The defendant murdered to eliminate the victim as a witness to a crime.

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media attention. Not surprisingly, some capital cases embody the desired fodder for the evening news reports. As such, people have a distorted view of the typical capital case, and they generalize from the atypical case in forming an attitude toward the death penalty. . . .

The most angered citizens are likely to make their views known to their representatives. The legislators, acting on a biased sample of the most vocal citizens, turn to an endorsement of capital punishment as a means to curb violence, thus overestimating the public’s support for capital punishment.

*Id.*

9. If this seems to narrow the field too much, you could settle for a double aggravator requirement, although at the risk of over-inclusiveness. Another approach would be to create a more complicated system with categories of aggravators and require the presence of several. For example, Category A aggravators, which have a weight of two, would be the most significant aggravators to the determination of whether the defendant is death-eligible, and Category B aggravators, which have a weight of one, would be less significant. Then you could require an aggravator total of three aggravators for death-eligibility.

10. One murder should be designated as the “base murder,” which would not count as an aggravating circumstance, and any additional murder should constitute an aggravating circumstance.

12. The defendant murdered for insurance proceeds, inheritance, a fee, etc.<sup>11</sup>
13. The defendant murdered out of racial, ethnic, or religious hatred.
14. The defendant murdered during a forcible sexual assault.
15. The defendant murdered while committing arson.
16. The defendant murdered during an armed robbery.
17. The defendant murdered during an aggravated assault on someone other than the murder victim.
18. The defendant murdered during a kidnapping.
19. The defendant poisoned the victim.
20. The defendant drowned the victim.
21. The defendant strangled the victim.
22. The defendant hired another person to commit the murder.
23. The defendant separately inflicted three or more grievous bodily wounds.
24. The defendant killed the victim execution-style by one or two gunshot wounds to the head fired at close range.
25. The defendant physically tortured the victim before death.
26. The defendant mutilated the corpse after death.
27. The defendant murdered in a manner that caused a great risk of death to persons other than the victim, as by a bomb, etc.

By reserving death-eligibility for murderers who meet the triple aggravator requirement, the system would render death-eligibility to almost all of the murderers for whom the public envisions the penalty as appropriate, while eliminating those marginal candidates who are nonetheless sometimes sentenced to death under the present single aggravator system.

The second reform that needs to be instituted in order to assure that the death penalty is only imposed upon the absolute worst murderers is to require a suitably blameworthy culpable mental state for death-eligibility. The United States Supreme Court has held that it is permissible to give a death sentence to a defendant who manifested an extreme indifference to human life.<sup>12</sup> This "extreme indifference" culpable mental state is simply not depraved enough to warrant a death

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11. But this would not include armed robbery, which is covered in the separate aggravating factor in number sixteen.

12. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the . . . culpability requirement").

sentence.<sup>13</sup> I believe the only mental states despicable enough to warrant death-eligibility in a single perpetrator case are that the defendant intended to kill the victim or that the defendant knew his actions would kill the victim.

In most triple aggravated, single perpetrator cases, the defendant's intention to kill will be obvious from the nature of the crime itself. The real problem with permitting death-eligibility for the mental state of extreme indifference arises in multiple perpetrator cases. These cases are numerous and are among the most troublesome in death penalty law because it is often unclear which defendant did what with respect to the murders. To ensure that the system is rendering only the absolute worst murderers death-eligible in multiple perpetrator scenarios, the prosecution must be required to prove one of the following for each defendant: that he intentionally killed the victim, attempted to kill the victim, intended that a cohort kill the victim, or knew well in advance that the cohort was going to kill the victim. Only these culpable mental states define the absolute worst murderers and, thus, those who should be death-eligible in multiple perpetrator cases.<sup>14</sup>

Finally, in reserving the death penalty only for the absolute worst murderers, there are three categories of subnormal defendants who should be removed from death-eligibility: those defendants who are under eighteen years of age, mentally retarded, or insane at the time the murder was committed. The triple aggravator requirement guarantees that the system is focusing on the category of the absolute worst murderers both in terms of the murders themselves (e.g., multiple victims) and the defendant's character (e.g., defendant's prior record for serious assault crimes). But the triple aggravator requirement still sometimes results in overbreadth of coverage because youth, retardation, or insanity are powerful enough mitigators to trump even multiple aggravating circumstances and put such a defendant outside the category of those absolute worst murderers for whom the death penalty is appropriate.

Regarding age, no one doubts that there is a certain age below which a person is so young as to not be held fully, or even partially, responsible for his or her actions. The only debate is concerning what that age should be. The Supreme Court has held it constitutional to

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13. This is true because such a mental state at common law was deemed worthy of only second degree murder and, thus, clearly not a high enough level of culpability to make such a murder among the absolute worst.

14. See discussion *infra* GOAL FOUR (discussing limiting the use of accomplice testimony in death sentencing).

execute defendants who were at least sixteen-years-old at the time of the murder.<sup>15</sup> I recommend a minimum age of eighteen for death-eligibility because it is at the high end of the suggested range<sup>16</sup> and, thus, errs on the side of assigning full responsibility only when to do so would be fairly uncontroversial. Illinois has already followed this advice by statute,<sup>17</sup> and, thus, I mention it only for the benefit of other governors who may happen to read this letter. But in light of contemporary brain research, I would urge Illinois to be a pioneer in setting the minimum age higher, at twenty. A recent news headline proclaimed: "Teen-agers' brains not fully developed."<sup>18</sup> Scientists have found that the prefrontal cortex, the part of the brain responsible for self-control and judgment, does not fully mature in many people until age twenty.<sup>19</sup> Thus, teenagers are often not as fully responsible for their actions as those in their twenties and beyond. By making twenty the minimum age for death-eligibility, Illinois could base its law on the best available science, while at the same time avoid the stigma associated with executing teenagers.

The ineligibility of retarded defendants for the death penalty is, likewise, not a matter of principle, but rather of line drawing. Everyone would agree that there are certain levels of retardation so severe that a

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15. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (stating that it is permissible to execute defendant who was sixteen at the time of the murder); *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (stating that it is impermissible to execute defendant who was fifteen at the time of the murder).

16. *See Stanford*, 492 U.S. at 370-71 (finding that as of 1989 no jurisdiction with the death penalty prohibited the execution of persons who are eighteen-years-old at the time the crime was committed). I know of no jurisdiction currently that has changed its position on that issue.

17. 720 ILL. COMP. STAT. 5/9-1(b) (1998) (applying the law to defendants eighteen years of age and older).

18. Mara Rose Williams, *Late Maturing Portion of Brain Linked to Risky Behavior in Teens*, PITTSBURGH POST-GAZETTE, Sept. 25, 2000, at A7, available at 2000 WL 22091125.

19. *Id.*

On the outside, teen-agers appear to be nearly grown up. But inside the skull, a vital part of their brain is closer to a child's than an adult's.

New findings in neuroscience and pediatric psychiatry link brain immaturity to teens making foolish judgments and reckless decisions. . . .

. . . [Researchers] have discovered that one of the last parts of the brain to mature is the prefrontal cortex—the very part responsible for self-control, judgment, emotional regulation, organization and planning. . . .

The brain does reach about 95 percent of its maturation by age 5. But the corpus callosum, a cable of nerves that connect[s] the right and left halves of the brain, continues growing beyond 20-something. The corpus callosum is linked to intelligence, consciousness and self-awareness.

The prefrontal cortex matures the most between the ages of 12 and 20.

*Id.*



defendant cannot be held fully responsible for his or her actions. The Supreme Court has drawn the line between those who are severely and profoundly retarded, who are not death-eligible, and those who are moderately or mildly retarded, who remain eligible.<sup>20</sup> The way to fix the system regarding retardation is simply to exclude those with any level of retardation from death-eligibility.<sup>21</sup> As with age, this resolution errs on the side of limiting those who are death-eligible to the undeniably absolute worst murderers.

Finally, as to insanity, few would argue that a defendant who was insane, in terms of not knowing the nature and quality of his actions or not knowing that those actions were wrong,<sup>22</sup> is among the absolute worst murderers for whom death is an appropriate penalty.

Regarding insanity and retardation cases, the key legal issue is which party should bear the burden of persuasion on these issues and by what degree of proof. The prosecution should bear the burden of proving, by clear and convincing evidence, that the defendant is not, in fact, insane or mentally retarded.<sup>23</sup> Placing the burden of proof at such a high level

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20. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989) (stating in dictum, "The common law prohibition against punishing 'idiots' for their crimes suggests that it may indeed be 'cruel and unusual' punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.'). But the Court upheld the death-eligibility of Penry, who was diagnosed as mildly to moderately retarded. *Id.* at 340.

21. Prohibiting execution of the retarded would not be a radical step. See Denis W. Keyes & William J. Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 687, 687 & n.6, 688-93 (1997) (listing the federal government, Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, New Mexico, New York, Tennessee and Washington as jurisdictions that prohibit the execution of mentally retarded persons, with a listing of the statutory provisions in Table Two).

22. This is the traditional *M'Naghten* test for insanity that prevails in most jurisdictions. *M'Naghten's Case*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). Illinois has a version of the *M'Naghten* test. See 730 ILL. COMP. STAT. 5/5-1-11 (1998) ("'Insanity' means the lack of a substantial capacity to appreciate the criminality of one's conduct as a result of mental disorder or mental defect.').

23. A defendant who claims insanity will likely raise this issue in the guilt/innocence phase. Illinois law requires a defendant claiming to be not guilty by reason of insanity to prove that defense by clear and convincing evidence. 720 ILL. COMP. STAT. 5/3-2(b) (1998 & West Supp. 2000); 720 ILL. COMP. STAT. 5/6-2(e) (1998 & West Supp. 2000). Under my proposal, even if the jury rejects the insanity defense at the guilt/innocence phase, the burden is reversed for the penalty phase. The sentencing judge should only find the defendant death-eligible if the judge is persuaded by clear and convincing evidence that the defendant was sane at the time of the offense. (Of course, even if the judge is so convinced, a death-eligible defendant's mental problems should still be considered as possible mitigating evidence in the balancing process to determine whether the defendant should receive a death sentence.)

Mental retardation is much less likely to be an issue at the guilt/innocence phase because it does not constitute an affirmative defense. Its only possible use is to negate the culpable mental state required for conviction, a task as to which it will rarely be plausible in a triple aggravated case. Thus, the sentencing judge will likely be the only actor to resolve this issue. Again, the

again errs on the side of caution by ensuring only defendants with a sufficiently culpable mental state are included in death-eligibility.

#### GOAL TWO: SENTENCE IMPOSED CONSISTENTLY AND NON-DISCRIMINATORILY

Having defined death-eligibility as described in Goal One, the system will be left with a pool of murderers who are almost certainly among the absolute worst. Thus, in order for such murderers to escape the death penalty, they must be required to demonstrate a compelling reason based on their character, record, and/or the circumstances of the offense.<sup>24</sup> The presumption of death-worthiness for such offenders comports with the public sense of justice: murderers in the most aggravated category consistently receive death sentences when jurors are given the opportunity to impose them.<sup>25</sup> To effectuate this presumption of death-worthiness, controls need to be instituted on two

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prosecution must prove by clear and convincing evidence that the defendant was not mentally retarded in order for the defendant to be death-eligible.

Importantly, if a jury is involved in decision making on the issues of retardation and/or insanity (which will be the case if the defendant has not waived the jury at the guilt/innocence phase and asserts the claim at that juncture, or if you reject my advice that the sentencer should always be a judge), then a vote of ten-to-two in favor of the prosecution should be sufficient to reject these defenses. The non-unanimity requirement assures consistency because one or two idiosyncratic jurors cannot control the outcome. Indeed, I would argue for a non-unanimity requirement as to all aspects involving the jury, including the elements of the prosecution's case-in-chief. The requirement of absolute certainty for imposition of a death sentence (proposed *infra* GOAL FOUR) is the proper safety net for innocence.

There are some other affirmative defenses that will rarely be plausible in triple aggravated cases: self-defense (and even more rarely, some other variety of justification defense) and duress (or some more exotic variety of excuse defense). If the defendant does manage to raise a plausible claim of one of these defenses, the prosecution should likewise have to disprove these defenses by clear and convincing evidence. Similarly, in the hard-to-imagine case where a young defendant's birth date is uncertain, the prosecution should have to disprove a claim that the defendant is less than eighteen years of age by clear and convincing evidence.

24. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Court stated that:

[T]he Eighth Amendment[] require[s] that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

*Id.* In fact, in Supreme Court jurisprudence, the "rarest kind of capital case" seems to be nonexistent: the Court has never found it appropriate to preclude the sentencer from considering these kinds of mitigating evidence. Most experts believed that if the Court would ever find a mandatory death sentence appropriate, it would be when applied to a prisoner who was already serving a sentence of life-without-parole. But even in this circumstance, the Court has rejected a mandatory death sentence. *Sumner v. Sherman*, 483 U.S. 66, 85 (1987).

25. See *supra* note 4 and accompanying text (suggesting that all sentences of current Illinois Death Row inmates be commuted to life imprisonment on the basis that the past system under which they were convicted was fundamentally flawed).

factors in the process: (1) prosecutorial discretion; and (2) sentencer discretion. I will explain each of these separately.

*A. Minimizing Prosecutorial Discretion*

The first step toward consistency in sentencing is removing the prosecution of death penalty cases from local county prosecutors and, instead, lodging the responsibility in a newly created special death penalty unit within the Attorney General's office. When a case occurs in any county meeting the triple aggravator requirement, the local prosecutor should be obliged by law to turn the case over to the Attorney General's special death penalty unit. This requirement is necessary to guarantee consistency within the state; if a murderer is deserving of death in Cook County, then he should be equally so deserving in McLean County. Differences in treatment based on local political concerns, local prosecutorial budgets, or other idiosyncratic considerations have no place in the death penalty system.

The second control needed over prosecutorial discretion is to require the prosecutor to seek the death sentence for cases that meet the triple aggravator requirement (unless the defendant is too young). These cases are by definition the absolute worst murder cases and, thus, the prosecutor should not have the discretion to refuse to seek the ultimate penalty.

Further, there must be limitations on the prosecutor's discretion to plea bargain a death-eligible case down to a lesser sentence. Plea bargaining should be permitted only in three circumstances. First, the prosecutor may plea bargain if convinced that even though the defendant is the guilty party, there are deficiencies in the evidence as to the elements of the prosecution's case-in-chief that present a large risk of failure to convict the defendant on the murder charge. Second, the prosecutor may plea bargain if the evidence supporting an affirmative defense—most likely retardation or insanity—is so powerful that there is a large risk that the prosecution will be unable to meet its burden of disproving that defense, as specified earlier herein. And third, the prosecutor should be permitted to plea bargain if the evidence, while sufficient for conviction, is not absolutely conclusive that the defendant is the guilty party.<sup>26</sup> If the prosecutor decides to plea bargain for any of these reasons, the statute must require the prosecutor to put the rationale in a form suitable for publication in terms an interested citizen can

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26. See *infra* GOAL THREE (explaining further the requirement of absolute certainty); see also *infra* GOAL FOUR (minimizing the possibility of executing innocents).

understand. Unexplained plea bargains are an anathema to a system that values consistency and accountability.

### *B. Minimizing Sentencer Discretion*

The second point at which the system needs to be regulated to minimize discretion is at the sentencing phase. Two controls need to be instituted. First, a judge, not a jury, should do the sentencing. The jurors' role as the "conscience of the community" is an important one, but it is rendered unnecessary by the definition of death-eligibility that embodies the triple aggravator requirement, the high culpable mental state, and eliminates the young, retarded, and insane from death-eligibility. What remains is a category of defendants who clearly fall within the category of the absolute worst murderers for whom sentencers have been shown to consistently impose death sentences. Thus, jurors are no longer needed for their "conscience of the community" attribute. As I will point out later, in connection with the goal of fair and reliable litigation, removing jurors from the sentencing phase drastically simplifies the process, thus eliminating many possibilities for error.<sup>27</sup>

The second control that needs to be instituted is to put a heavy burden on the defendant, who is clearly within the category of the absolute worst murderers, to avoid the death sentence. Specifically, such defendants should have to prove by clear and convincing evidence that the mitigating circumstances outweigh the aggravating ones.<sup>28</sup> Presumably, defendants will infrequently be able to meet this burden. Thus, the goal of consistency should be largely achieved.

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27. If for some reason you feel it necessary to continue to have juries as part of the sentencing process, then I recommend that a vote of ten jurors out of twelve in favor of the death sentence should be sufficient for its imposition. This would prevent disruption of the consistency of the system from one or two idiosyncratic jurors voting against the death penalty in an absolute worst case. Because all jurisdictions that have jury death sentencing require unanimity, the Supreme Court has never opined on the issue of whether a non-unanimous death verdict would be constitutional. I would be willing to wager that the Court, if presented with the issue, would find that such a procedure is constitutional.

28. There is no apparent constitutional barrier to requiring the defendant to bear the burden of persuasion and by a rather stiff standard of proof. The Court has approved a death sentencing scheme where the sentencer is merely required to "consider" the aggravating and mitigating circumstances without any direction concerning how to balance them, which leaves the sentencer free to impose the burden on the defendant to a high level of persuasiveness. *Gregg v. Georgia*, 428 U.S. 153, 193-95 (1976) (giving constitutional approval to such a Georgia statute). Further, the Court has approved a statute that requires a death verdict where the jury finds one aggravating circumstance and no mitigators. *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (giving constitutional approval to such a Pennsylvania statute).

Goal Two includes one additional important point. Remember that the goal of these reforms is not just that the death penalty is applied consistently within the category of the absolute worst murderers, but that it is applied non-discriminatorily. The most obvious basis of improper discrimination is race. Gender discrimination is an additional form of improper discrimination. The reforms suggested thus far should largely remedy improper discrimination. Solid research establishes that, in the most aggravated cases, sentencers consistently impose death sentences regardless of the race of the defendant or the race of the victim.<sup>29</sup> There is no reason to believe that the same should not hold true for the defendant's gender and any other irrelevant factors one could imagine. By enforcing the triple aggravator requirement, plus controlling prosecutorial and sentencer discretion, the system would assure that almost all of those convicted of the absolute worst murders receive death sentences, whatever their race or gender and whatever the characteristics of their victims.

#### GOAL THREE: FAIR AND RELIABLE LITIGATION

The death penalty system must be fair in the sense that it should provide both parties with the opportunity to make their strongest cases. It must also be reliable in the sense that the verdict must only infrequently fail to pass appellate muster. When more verdicts are upheld, it reduces the need for new trials and new sentencing hearings, a problem that currently mars most death penalty systems. Obviously, the goals of fairness and reliability are interdependent. A fairly-obtained death verdict should almost always be upheld on appeal.

The best guarantee of fairness and reliability is to assure that everyone involved in the litigation process is well trained in the specialized area of death penalty law. On the prosecution side, this means the establishment of a special unit of prosecutors in the Attorney General's office for death penalty cases, as previously suggested.<sup>30</sup>

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29. *McCleskey v. Kemp*, 481 U.S. 279 (1987). The Court reported the thoughts of foremost death penalty researcher, David C. Baldus, which are based upon his study of thousands of Georgia death penalty cases. *Id.* “[T]he effects of racial bias were most striking in the mid-range [aggravated] cases. [Baldus testified,] ‘[W]hen the cases become tremendously aggravated so that everybody would agree that if we’re going to have a death sentence, these are the cases that should get it, the race effects go away.’” *Id.* at 287 n.5 (citing *McCleskey v. Zant*, 580 F. Supp. 338, 379 (N.D. Ga. 1984)).

30. You might also give serious consideration to requiring legislation that would put a special burden on police and capital prosecutors to disclose all potentially exculpatory evidence to the defense, with stern penalties for failing to do so. See Mark R. Madler, *Illinois Death Penalty Committee Issues Final Report*, AMERICA LAWYER MEDIA, Nov. 3, 2000, available at <http://www.law.com> (stating one of the recommendations of the Illinois Supreme Court's

Next, since jurors are not well trained, they should be eliminated from the sentencing process.<sup>31</sup> Many of the errors in capital cases arise from ill-fated efforts to educate jurors concerning their sentencing duties.<sup>32</sup> The system should additionally require that any judge who presides in a death penalty case receive special training in death penalty litigation.<sup>33</sup>

Finally, and of critical importance, the defendant must be afforded the opportunity to present the best possible defense. This opportunity is

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Committee on Capital Cases is to insert a "good faith" clause into the proposal that prosecutors specifically identify potentially exculpatory evidence during discovery).

31. Whether the new statute should give the jury or the judge the responsibility to determine whether aggravating circumstances exist is a matter of choice. Judge rather than jury sentencing in capital cases is constitutionally permissible. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (holding that procedural safeguards necessary to death penalty sentencing do not require the sentence to be imposed by a jury). Further, the Court has approved a capital sentencing scheme where the judge alone determines whether an aggravating factor exists. *Walton v. Arizona*, 497 U.S. 639, 647 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." (quoting *Clemens v. Mississippi*, 494 U.S. 738, 745 (1990))). And in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), even though the Court expanded the type of findings that are required to be made by a jury rather than a sentencing judge in a non-capital case, it distinguished and reaffirmed *Walton*: "[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 120 S. Ct. at 2366 (Stevens, J., dissenting) (citing *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990)).

I recommend that either the judge be responsible for determining whether aggravating circumstances exist or that the jurors make the determination by a majority of at least ten out of twelve jurors. The non-unanimity requirement protects the goal of consistent and non-discriminatory application of the penalty because it filters out the effects of the behavior of idiosyncratic (and possibly biased) jurors.

32. Much litigation, some of which results in reversals, comes about between the issues of whether a juror through voir dire examination has proven him/herself to be either so anti-death penalty as to be unable to faithfully fulfill a juror's duties under the standard of *Wainwright v. Witt*, 469 U.S. 412, 424-26 (1985) (allowing the excusal for cause of such jurors because their attitudes will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"), and whether a juror is so pro-death penalty as to likely violate his oath in the opposite direction and, thus, be excludable for cause under the standard of *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that excusal for cause is required when "[a] juror . . . will automatically vote for the death penalty in every case [thus failing] in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do").

Further, significant litigation and a fair number of reversals derive from mis-instructions to jurors pertaining to the penalty phase. *E.g.*, *Boyde v. California*, 494 U.S. 370, 380 (1990) (holding that where a jury instruction is ambiguous and subject to an erroneous interpretation, error should be found if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

33. Perhaps this will require the institution of a "boot camp" of intensive training for trial judges in death penalty law.

not only a matter of basic fairness, but also assures that the trial level verdict is reliable by providing excellent defense lawyers. Good defense lawyers will raise all valid claims of error at the appropriate points in the trial process when they can be most appropriately remedied, ensuring fairness. Thus, just as the state should set up a special capital prosecution unit, so the state must set up a special capital defender's unit that is fully staffed and abundantly funded. The staffing must include specially trained capital defender attorneys, investigators and mitigation specialists. Each capital defendant should be entitled to the services of two attorneys, one investigator, and a mitigation specialist, with other experts funded as necessary for the defense.<sup>34</sup> A mistake that many jurisdictions make is to try to do capital litigation "on the cheap." Even leaving aside the unfairness of forcing a defendant to battle for his life with an inferior defense, this strategy turns out not to be cheap in the long run with all of the reversals from shoddy, underfunded defenses and inexperienced judging.

Finally, the state must establish a specially trained appellate capital defender unit, separate and distinct from the trial level capital defender unit. This separation is necessary because the appellate lawyers may have to argue that their counterparts at the trial level were constitutionally ineffective, even though this claim will usually fail because the defendant's right to effective counsel should be resoundingly fulfilled by the special capital defender trial unit's representation. The defendant should be entitled to the services of the appellate defender unit throughout his state and federal appeal process.

#### GOAL FOUR: MINIMIZING THE POSSIBILITY OF EXECUTING THE INNOCENT

The possibility of executing an innocent person is the greatest concern most Americans have with capital punishment. Certainly any fix of the death penalty system must include significant safeguards to minimize this risk.

There are several possible definitions of what it means to be "innocent" of a capital offense. The kind of innocence I am referring to

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34. Serious consideration should be given to allowing even the rare non-indigent death-eligible accused to be represented by this special state-funded unit. When a member of the private bar represents a death-eligible defendant, there is a risk of error because few lawyers are trained in capital litigation. To the extent private lawyers are involved, the state must establish rigorous training and certification procedures. See, e.g., Steve Mills, *Bar Raised for Capital Case Trials: State High Court Sets Standards*, CHI. TRIB., Jan. 23, 2001, §1, at 1, available at 2001 WL 4033171 (outlining the Illinois Supreme Court's recent adoption of new rules setting minimum standards for defense attorneys in capital cases).

here is the most basic kind: the defendant is completely the wrong culprit, that is, the defendant had nothing to do with the murder.<sup>35</sup>

There are four safeguards that must be put into place to protect against executing an innocent person. The first safeguard has already been mentioned, namely, providing the defendant with a top-notch defense team. Providing an excellent defense should maximize the prospects of the defendant's ability to raise doubt about his identity as the culprit.

The second reform is to raise the standard of proof at the sentencing phase to the level of absolute certainty of the defendant's identity as the culprit.<sup>36</sup> Thus, even if the jury correctly determines beyond a

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35. There are three other possible definitions of "innocence" that are either rarely raised or have already been dealt with in this letter. First, the defendant may have lacked a culpable mental state sufficient for death-eligibility. That is, the defendant may have had a mental state ranging from totally blameless (i.e., the homicide was a pure accident—unlikely in a triple aggravator case) to extremely reckless. *See supra* notes 12-14 and accompanying text (requiring proof of the most blameworthy culpable mental states). Because culpable mental state is an element of the prosecution's case, it must be proven beyond a reasonable doubt. Second, the homicide may have been justified or excused. *See supra* notes 15-23 and accompanying text (requiring the prosecution to disprove such affirmative defenses as youth, retardation, or insanity by clear and convincing evidence). The third possible definition of "innocence" is that the defendant is the right culprit who acted with a sufficiently culpable mental state but is nonetheless not among the absolute worst murderers for whom death is appropriate. This possibility has been dealt with by the institution of the triple aggravator requirement. *See supra* notes 9-11 and accompanying text (requiring that either a triple aggravator system be instituted or a more complicated system with categories of aggravators with the presence of several required).

36. This idea has already been suggested in modified form by an academic. *See* Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 *IND. L.J.* 25, 27 (1996). Professor Bradley argues that:

[T]he jury should be instructed that, unless they unanimously agreed that they had no doubt about the defendant's identity as the murderer, they should not sentence him to death. To put it another way, if any juror retained any lingering doubt about the defendant's guilt, the death sentence should not be imposed.

*Id.* (italics omitted). I disagree with the jurors' participation in the sentencing phase, and with the unanimity requirement, but agree with Professor Bradley's primary point about lingering doubt.

Professor Bradley also explains well the difference between proof beyond a reasonable doubt and proof to a level of absolute certainty:

It may seem fatuous to require a jury to distinguish between guilt "beyond a reasonable doubt" and guilt "with no lingering doubts." However, as a former prosecutor in Washington, D.C., I know that many guilty verdicts are not really "beyond a reasonable doubt" as that term is defined above. The most common armed robbery case involves a stickup of a convenience store. Assuming that the clerk could make a convincing lineup identification of the defendant, and the defendant matched the general description of the robber initially given to the police, my office would have prosecuted the case, and would generally have convicted, even if there were no other eyewitnesses and little more corroborating evidence. But, aware as I was of the fallibility of eyewitness identification, I, and perhaps some of the jurors, could not honestly say that there were no doubts at all about guilt, despite being reasonably confident that the defendant was the true culprit.



reasonable doubt the defendant's identity as the culprit at the guilt/innocence stage, the judge at the sentencing phase must be convinced to an absolute certainty that the defendant is the right culprit before imposing a death sentence. In a single perpetrator case, the judge's separate consideration means that the judge must have no "lingering doubts" about the defendant's identity as the culprit. In a multiple perpetrator case, it means that the judge must have no lingering doubts about the defendant's identity as one of the perpetrators. Any lingering doubts as to identity should result in a sentence less than death.

The third necessary safeguard is to impose a limitation on the kinds of evidence that can be used to support a finding of absolute certainty. Specifically, there are two categories of biased witnesses whose testimony is highly suspect: accomplices who have plea-bargained in return for giving testimony against the defendant and jailhouse snitches. The rule should be that the testimony of neither kind of witness is sufficient alone to support a death sentence and that such testimony must be clearly and convincingly corroborated before the judge can use it (along with other evidence) to conclude with absolute certainty that the defendant is the right culprit.

Fourth, the system must provide for the consideration of newly discovered evidence that would bring the defendant's identity as the culprit in doubt. Two mechanisms should be put in place, one judicial and the other executive. As to the judicial safeguard, the defendant should be entitled to one opportunity, no later than six months after an adverse decision in the defendant's first federal habeas corpus petition, to a hearing before a trial judge to present any newly discovered evidence that the defendant is not the right culprit.<sup>37</sup> The test should be the one traditionally used for motions for a new trial based on newly discovered evidence—i.e., the judge must be convinced by a preponderance that the evidence could not have been discovered before

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Many capital cases involve a similar fact situation, with the added problem that the best witness, the victim, is "not available." My own impression of the "reasonable doubt" standard at work is that it represents about ninety-five to ninety-six percent certainty. If this is so, then there is plenty of room for a further requirement of "no residual doubt" for the death penalty.

*Id.* at 28.

37. Note that no provision is made for a judicial forum for the other kinds of innocence claims outlined in *supra* note 35 (including innocence claims based upon a culpable mental state sufficient for death-eligibility, or the homicide may have been justified or excused or the defendant is not among the absolute worst murderers). The best evidence of those claims is available at the time of trial. Of course, a defendant can still argue such bases of innocence to the governor as a basis for clemency.

trial by due diligence, is material and not merely cumulative or impeaching, and is sufficiently persuasive that it would likely produce an acquittal.<sup>38</sup> Placing the burden on the defendant to prove these facts by a preponderance may seem contrary to the goal of minimizing the possibility of executing the innocent. But the original finding of guilt and death-worthiness should not be easy to overturn. Recall that the conviction and sentence were originally imposed in the face of the defendant's best possible defense, when the evidence was at its freshest. In contrast, a new trial will take place years after the event with stale evidence. Thus, it is appropriate in the interest of finality to place the burden of persuasion on the defendant at that late date.

The second safeguard for innocence, on the basis of newly discovered evidence, should be in the executive branch through the governor's clemency power. Since the governor is the last resort, it is appropriate that the burden of persuasion regarding the possibility of innocence should be lower than in judicial proceedings. The statute should provide for the governor to grant clemency if there is a significant possibility that executing the defendant would mean executing a person who is the wrong culprit. This standard, however, should be enforceable only through the governor's own conscience, not through judicial review. By this point in the process the defendant will certainly have had plenty of judicial review. The governor's decision, as has traditionally been the case, should be solely a matter of his or her own conscience.

#### CONCLUSION

If instituted, these reforms would fix the death penalty system to the extent it is humanly possible. I urge you to maintain the moratorium on executions unless and until the Illinois Legislature enacts a statutory scheme embodying each and every one of these measures.

Sincerely yours,  
David McCord  
Professor of Law

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38. In federal cases, this multi-part test is a judicial gloss derived from the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 33; *see also, e.g.*, *United States v. Garcia*, 19 F.3d 1123, 1126 (6th Cir. 1994) (citing *United States v. Hawkins*, 969 F.2d 169 (6th Cir. 1992)) (setting forth this standard).

cc: Governors of other death penalty states

Governor Don Siegelman, Alabama  
Governor Jane Dee Hull, Arizona  
Governor Mike Huckabee, Arkansas  
Governor Gray Davis, California  
Governor Bill Owens, Colorado  
Governor John Rowland, Connecticut  
Governor Ruth Ann Minner, Delaware  
Governor Jeb Bush, Florida  
Governor Roy Barnes, Georgia  
Governor Dirk Kempthorne, Idaho  
Governor Frank O'Bannon, Indiana  
Governor Bill Graves, Kansas  
Governor Paul Patton, Kentucky  
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Governor Gary Locke, Washington

Governor Jim Geringer, Wyoming