

2013

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Recommended Citation

Jack M. Beermann, *Jewish Identity and Judging: Seymour Simon of Illinois*, 44 Loy. U. Chi. L. J. 939 (2013).
Available at: <http://lawcommons.luc.edu/lucj/vol44/iss4/1>

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Jewish Identity and Judging: Seymour Simon of Illinois

*Jack M. Beermann**

INTRODUCTION

Seymour Simon was a politician-turned judge who consistently turned away from power in favor of principle. Justice Simon had a long career in public service, having served in the military and in all three branches of government: as an attorney in the U.S. Department of Justice, as an alderman in the City of Chicago, and as judge of the Illinois Appellate Court and justice of the Illinois Supreme Court. He was a brilliant man who had one guiding principle: justice under the law. He did not compromise his principles—which as a judge meant he was the hardest working member of his court—probably filing more dissenting and concurring opinions than all the other justices combined during his time on the Illinois Supreme Court.

Justice Simon's Jewishness was an important part of his identity throughout his life, including his political and judicial career. An Irish-run political machine dominated Chicago politics in the mid-twentieth century, but Jews were elected as representatives of heavily Jewish neighborhoods.¹ Justice Simon was active in his synagogue and in any Jewish civic organization that asked. There is no question that his Jewish identity worked hand in hand with his commitment to social justice as both a politician and judge. His appearance and bearing

* Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law. An earlier version of this Article was presented at the conference on "Jewish Justices: A Comparative Exploration of Jewish Identity to Judging" at Tel Aviv Law School, Tel Aviv, Israel, on December 7, 2010. Thanks to Miles Beermann, Pnina Lahav, and John Simon (Justice Simon's son) for comments on an earlier draft of this Article, and special thanks to John Simon and Lester Munson, ESPN writer who worked with Justice Simon on his uncompleted memoirs, for generously discussing Justice Simon's life and career with me.

1. Jews also held other prominent political positions during this time. Illinois elected a Jewish governor, Henry Horner, who served from 1933 to 1940. Another Jew, Samuel Shapiro, was elected Lieutenant Governor in 1960 and 1964, and served as Governor from 1968 to 1969 when Governor Otto Kerner resigned to become a federal judge. Kerner resigned his judgeship in 1974 after being convicted for taking bribes while governor. Shapiro ran for governor but was defeated by Republican Richard Ogilvie. In 2011, Rahm Emanuel was elected as the first Jewish mayor of Chicago.

brought to mind an image of the righteous Jew pointing the accusatory finger at those who failed to live up to community standards and showering unconditional affection and loyalty on those who did.

Justice Simon made many more friends than enemies during his career. As Ward Committeeman, he held open office hours during which constituents would line up with requests and concerns. No matter the problem or the petitioner's social standing, Justice Simon always did whatever he could to assist constituents in need. His devotion to the problems of every man carried over to his views as a judge, where he fulfilled the basic judicial obligation to dispense justice without regard to persons.

Justice Simon made many contributions to Illinois law, some of which paved the way for legal reforms at the national level. This Article, after providing background on Justice Simon's life, turns to one area of law that was often the focus of Justice Simon's work: the death penalty. While on the Supreme Court, Justice Simon dissented in every case in which the sentence of death was affirmed by the court, on the basis that this ultimate punishment could not be fairly administered. Although he failed to convince his colleagues to strike down the death penalty, his views ultimately triumphed. In 2003, in light of numerous exonerations of convicted criminals, Illinois Governor Ryan commuted all death sentences in the state to life imprisonment. Soon after, the Illinois Legislature passed a bill abolishing the death penalty.

This Article also examines *In re Loss*, a Supreme Court decision to deny a license to practice law to a man who had previously been a heroin addict and a petty criminal. This case led to Justice Simon's departure from the Illinois Supreme Court. Justice Simon, in dissent, accused his colleagues of impropriety in the handling of the case, and his relationship with those colleagues was fatally fractured. A short time after *In re Loss* and three years before the expiration of his term, Justice Simon resigned from the Illinois Supreme Court, thus ending the judicial career of one of the great jurists of the Illinois courts. Justice Simon then returned to private practice, but remained active in political and civic causes until his death in 2006 at the age of 91.

I. SEYMOUR SIMON: THE MAN AND POLITICIAN²

Seymour Simon was raised in the Albany Park neighborhood of Chicago. This neighborhood has long been home to immigrants and was predominantly Jewish between the 1910s and 1950s.³ Justice Simon attended local public schools, including Roosevelt High School, which at the time had a largely Jewish population. He was a member of a Reform synagogue, Temple Beth Israel of Albany Park, which has since moved to Skokie, Illinois. The synagogue apparently had a left-wing orientation.⁴ Interestingly, Temple Beth Israel was also reportedly the synagogue of future Israeli Supreme Court Justice Shimon Agranat (although it is unknown whether Justices Simon and Agranat ever met).⁵ Justice Simon was an active member and supporter of the synagogue and developed a close personal relationship with its rabbi. He also supported other synagogues and Jewish organizations regardless of whether they were affiliated with the reform, conservative, or orthodox communities. He lent his name and his support to virtually every Jewish civic organization that asked.

Justice Simon graduated first in his class from Northwestern University School of Law in 1938. He had a brilliant mind with a

2. The information on Justice Simon's life and career, unless noted otherwise, is drawn primarily from four sources: telephone conversations with John Simon, Justice Simon's son; a conversation with Lester Munson, an ESPN writer who worked with Justice Simon on his uncompleted memoirs; an interview of Justice Simon reported in MILTON RAKOVE, *WE DON'T WANT NOBODY NOBODY SENT: AN ORAL HISTORY OF THE DALEY YEARS 331-45* (1979); and my personal recollections.

3. Chicago is a notoriously segregated city, although perhaps less so now than in the early- to mid-twentieth century. For example, in 1930, the Albany Park neighborhood was 99.9 percent white, while in 1960 it was 99.6 percent white (and none of the other 0.4 percent of the residents was black). See *Albany Park*, ENCYCLOPEDIA OF CHI., <http://www.encyclopedia.chicagohistory.org/pages/36.html> (last visited Mar. 28, 2013). Today, Albany Park has an enormously diverse immigrant population with Mexicans being the largest single group. *Id.*

4. Evidence of the synagogue's left-wing orientation includes the fact that it co-sponsors a lecture named in honor of one of Justice Simon's rabbis together with the Labor Zionists of America organization, a socialist-Zionist group. See *Study*, TEMPLE BETH ISRAEL, <http://www.tbiskokie.org/study.cfm> (describing the purpose of the lecture as inviting lecturer "to speak on issues of social, political and religious justice, the modern state of Israel, and the ways in which Progressive Jews interact with one another").

5. See IRVING CUTLER, *THE JEWS OF CHICAGO: FROM SHTETL TO SUBURB* 238 (1996) ("Shimon Agranat, one of its members, later became one of the Chief Justices of Israel, and another member, Seymour Simon, became a Justice of the Illinois Supreme Court."). Justice Agranat attended the Von Humboldt Public Elementary School and Tuley Public High School, which means he was probably living in the Humboldt Park neighborhood, located about five miles south of the Albany Park neighborhood. See PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE AGRANAT AND THE ZIONIST CENTURY* 10 (1997). Both neighborhoods have long attracted immigrant populations. Today, Humboldt Park is known as "Little Puerto Rico" due to the Puerto Rican origins of its largest population group.

scholarly orientation that was evident in his judicial writings. After law school, he served in the Antitrust Division of the U.S. Department of Justice until 1942, when he began service in the Navy for the duration of World War II. In 1946, he began a career in private practice that lasted nearly thirty years, practicing antitrust law in Chicago.

In 1955, a decade after returning from his Navy service and while he continued in private practice, Justice Simon won a seat as a City of Chicago Alderman for the 40th Ward.⁶ During his service as alderman, Justice Simon also became the Ward Committeeman for the Democratic Party. He served as an alderman from 1955–1961, when he was appointed to the Cook County Board to fill a “Jewish seat.” When the President of the County Board became ill and was unable to run again, Mayor Daley and the party leadership decided to slate Seymour Simon for the position. He was elected President of the Cook County Board and served in that role from 1962–1966. This move by Mayor Daley may have been politically motivated—he was facing his only really tough reelection fight, and the Jewish vote substantially contributed to his victory. Justice Simon also served as President of the Cook County Forest Preserve District during his time as County Board President and was a member of the Chicago Public Building Commission from 1961–1967. After his term as County Board President, he returned to the Chicago City Council after being reelected in 1967 to his old seat as 40th Ward Alderman. (He had retained his position as Ward Committeeman during his service on the County Board.) He served in that role until he was elected to the Illinois Appellate Court in 1974.

It is not obvious how remarkable Justice Simon’s political career was without understanding the nature of Chicago politics during this period. Cook County Board President is the second most powerful political office in the Chicago area, after Mayor of Chicago. The reason that Justice Simon did not seek re-election as County Board President in 1974 was that he lost the support of the Democratic Party machine. The Democratic Party, the only party with any electoral power in Chicago, was run in a fashion that we call “machine politics.” The party, headed by Mayor Richard J. Daley, dispensed favors, controlled the city government, and used the largess of government and party discipline to maintain power. Abner Mikva, another Jewish-American judge from Chicago with a long and varied political career, reported that when he went to volunteer at the local Democratic party office, he was asked “who sent him,” to which he replied “nobody.” This exchange led to

6. “Alderman” is the title of Members of the Chicago City Council, the City’s legislative body. There are fifty Wards in the City, and each elects one alderman to the City Council.

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the famous rejection of his offer on the basis that “we don’t want nobody nobody sent.”⁷

Justice Simon lost the support of the machine because he would not go along with the way the machine did business. Apparently, the last straw was that, as County Board President, he refused to push for a zoning change pressed upon him by Alderman Thomas Keane, a powerful and close ally of Mayor Daley.⁸ Keane requested that Justice Simon and the other Democratic members of the County Board vote in favor of rezoning a parcel of land north of Chicago for use as a garbage dump despite vehement local opposition. Keane’s interest was that the lawyer for the owner (a religious order) was a political ally. Keane insisted that the Democrats vote in favor of the ordinance to satisfy his promise to the lawyer, despite Republicans having enough votes to vote it down. Justice Simon refused and Keane urged Mayor Daley to purge Simon from the party.⁹ Without Democratic Party support, Justice Simon knew he could not be re-elected President of the County Board.¹⁰ Although he gave up that position, he remarkably won back his seat as 40th Ward Alderman without the support of the party—a testament to his stellar record and reputation.

Justice Simon’s connection to the common person and his or her problems was instrumental in forming his judicial persona. His years as Alderman and Ward Committeeman forced him to see the world through the eyes of his constituents. One of the practices of the Ward Committeeman was to hold “Ward Nights,” during which constituents would come to open office hours and seek help solving their problems. His concern for society was reminiscent of the empathy for which another Illinois politician, Abraham Lincoln, was famous. As it was described to me, “Each person’s problem became Seymour’s problem. He extended himself for everyone.”¹¹

7. See RAKOVE, *supra* note 2, at 318.

8. Keane eventually went to jail for mail fraud and conspiracy. THOMAS J. GRADEL ET AL., CURING CORRUPTION IN ILLINOIS: ANTI-CORRUPTION REPORT NUMBER 1, at 14 (2009), available at <http://www.uic.edu/depts/pols/ChicagoPolitics/Anti-corruptionReport.pdf>. This Report lists thirty Chicago aldermen who were convicted of corruption-related offenses between 1973 and 2008 and two more who died after being indicted but before trial. See *id.*

9. See Trevor Jensen & Joseph Sjostrom, *Seymour Simon: 1915 – 2006: An Independent Political Mind Chicagoan Was True to His Beliefs in a Career in Politics and Law that Spanned Nearly 70 Years*, CHI. TRIB. (Sept. 27, 2006), http://articles.chicagotribune.com/2006-09-27/news/0609270191_1_death-penalty-illinois-supreme-court-mayor-richard-j-daley.

10. Republican Richard Ogilvie, who had been County Sheriff (also an elected position), defeated the Democratic machine candidate and succeeded Justice Simon as President of the County Board. Ogilvie went on to become Governor of Illinois.

11. Telephone Interview with John Simon, Justice Seymour Simon’s son (Nov. 9–10, 2010).

A pair of the issues that Justice Simon addressed as County Board President and Alderman illustrates his constant concern for everyday people. In a revenue-raising measure, pay toilets were installed at Chicago's O'Hare Airport. As County Board President, Simon led a successful effort to have these removed on the basis that the people should not have to pay a quarter to use the toilet. Given the general tenor of Chicago politics at the time, this likely spoiled the sweetheart deal of some vendor with the contract to install and maintain the toilets. During his service on the City Council, an attempt to raise the rates at city-owned parking garages came before the Council. The garages were maintained by a politically connected person, which likely meant that political clout and other favors were involved. In Alderman Simon's view, the garages were filthy and were not being properly maintained, and therefore he railed in the City Council against the effort to raise fees. That very day, Alderman Simon's car was stolen from a city garage. It is unknown whether the theft was a coincidence or another bit of evidence of the hardball nature of Chicago politics.

Justice Simon's life of experience prepared him well for his service on the Illinois Supreme Court. There has been recent talk about the relatively narrow life experiences of the sitting Justices of the U.S. Supreme Court.¹² Until the recent appointment of Elena Kagan, all nine Supreme Court Justices had been federal appellate judges prior to serving on the nation's highest court. These critics would have viewed Justice Simon as a perfect addition to the Court, with service in the military, the U.S. Department of Justice, private practice, and City and County Governments in Illinois. Seymour Simon's background and credentials certainly contributed to his ability to humanize justice as a member of the Illinois Supreme Court.

II. SEYMOUR SIMON: THE JUSTICE

In 1974, with the backing of the Democratic Party machine, Seymour Simon ran for and was elected to the Illinois Appellate Court.¹³ In

12. See, e.g., Comments of Nina Totenberg, Jim Newton & Frederick A.O. Schwarz, Jr., *Fixing Justice*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/pages/fixing_justice (last visited Jan. 30, 2013) (suggesting that the President add diversity of background and experience to Supreme Court).

13. In the vernacular, the Democratic Party "slated" Justice Simon for election, which, due to the Party's dominance in Chicago, all but assured him election. To get a sense of the way the Party controlled judicial elections, consider the following story that I was told while studying law in Chicago. The Democratic Party Convention in Chicago in 1968 was the site of massive protests, mainly by anti-war groups and leftist opponents of U.S. government policy. Mayor Daley famously ordered the police to stop the protests by shooting to kill. Lawsuits were filed over the City's refusal to grant permits for the protestors to use public facilities. (The permit

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Illinois, judges at all levels—trial, appellate, and supreme—are elected by district in partisan elections. Once a judge is elected, he or she must receive sixty percent of the votes cast in periodic retention elections to remain on the bench. At least once, the political machine funded an anti-retention campaign, but Justice Simon received sufficient votes to maintain his position on the Appellate Court.

He immediately distinguished himself as a hard-working, dedicated member of the Appellate Court. His opinions were always clear and well reasoned. After several years on the Appellate Court, Seymour Simon was elected to the Supreme Court of Illinois—this time without the backing of the Democratic Party machine.

In a sense, Justice Simon was banished to the courts for his political sins. Due to Chicago's changing demographics, it is unclear how long he could have retained his seat on the City Council after 1980, especially without the Democratic Party's backing. Any effort for City, County, or State office was virtually hopeless without the backing of the Democrats. Justice Simon was keenly aware of the Party's clout—although early on he had thrived on shouting and finger-pointing in the City Council, over time he began to tire of the fighting and rancor. Yet, the City's loss was the legal system's gain, as Justice Simon was arguably the most able and distinguished judge in Illinois during his time on the Appellate and Supreme Courts. Although Justice Simon found his position as an appellate judge intellectually rewarding, he also felt somewhat isolated and lonely. His new position contrasted starkly with Ward nights and City Council meetings—none of the daily contact with lawyers and parties equaled the closeness and camaraderie Justice Simon felt with his constituents. Justice Simon once said that he wished someone would tell him that one of his opinions stunk just so he would know someone was reading them and that, if he had it to do all over again, he would have stuck to private practice.¹⁴ Instead, he moved up from the Appellate Court to the Supreme Court.

Although much could be written about Justice Simon's contributions to Illinois law, this Article focuses on two elements of his judicial career: his opinions concerning the death penalty, and a case involving the eligibility of a former heroin addict and petty criminal to become a lawyer in Illinois.

denials were a huge mistake since the protests would have moved off the street.) During negotiations to settle the lawsuits, I was told that one of the defendants' initial offers was that the plaintiffs could name three candidates to be slated in the next judicial election. This offer was not accepted.

14. See RAKOVE, *supra* note 2, at 344.

A. Death Penalty

As a justice of the Illinois Supreme Court, Seymour Simon voted against every death sentence that came before him. Since appeal to the State Supreme Court is automatic in death penalty cases, Justice Simon voted against every death sentence imposed in Illinois during his years on the Supreme Court. It is unknown whether his opposition to the death penalty predated his service on the Supreme Court. Justice Simon did not sit on any death penalty case during his fourteen years on the Appellate Court because death penalty appeals went directly to the Supreme Court. Given his generally liberal political orientation, his opposition to the death penalty may have been expected, but the consistency of his voting record and the vehemence with which he expressed his views in death penalty cases may have been surprising.

A brief history of the death penalty in the United States is necessary to set the stage for exploring Justice Simon's views on the death penalty in Illinois. In 1972, the U.S. Supreme Court in *Furman v. Georgia* held virtually all state death penalty statutes unconstitutional on procedural grounds.¹⁵ The Court did not categorically rule that capital punishment was "cruel and unusual punishment" prohibited by the Constitution, but rather the arbitrary manner in which it had been administered made it, under the circumstances, cruel and unusual.¹⁶ Almost immediately, thirty-five states enacted new death penalty statutes. In 1976, the Supreme Court upheld some of these new statutes, but again struck some down as not meeting the concerns that led to its previous ruling.¹⁷

In Illinois, the story is a bit more complicated. Like many other states, the Illinois Legislature quickly passed a new statute to revamp the procedures for imposing the death penalty in accordance with the U.S. Supreme Court's decision in *Furman*. The Illinois Supreme Court, however, struck down the new law in 1975 on procedural and substantive grounds.¹⁸ The first procedural problem the Court found with the new statute was that it designated a three-judge panel to impose sentences in capital cases. This provision, according to the Court, violated the autonomy of each trial judge who could not constitutionally

15. *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring). The Court as a whole issued only a brief per curiam opinion in *Furman*, leaving its reasoning to be gleaned from the various concurring opinions.

16. *See id.* at 274 (Brennan, J., concurring) ("[The principle that a State must not arbitrarily inflict severe punishment] derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.").

17. *Gregg v. Georgia*, 428 U.S. 153, 222 (1976).

18. *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1 (1975).

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be required to act in concert with other trial judges.¹⁹ The second procedural problem the Court found was that the statute provided for review of death sentences by the Appellate Court—contrary to a provision in the Illinois Constitution of 1970 that designated the Supreme Court as the appellate tribunal for capital sentences.²⁰ The Court also found the statute infirm on the substantive ground that its provision regarding mercy was too narrow because it allowed the sentencing body to consider only issues related to the crime, not matters relating to characteristics of the defendant unrelated to the crime.²¹ It also found that the mercy provision lacked sufficient guidelines.²²

Interestingly, the invalidated statute seemed to require the prosecutor to seek the death penalty in all cases of murder when one of a list of aggravating factors was present.²³ In 1977, the State Legislature repealed this provision and amended the statute to read: “[T]he State may either seek a sentence of imprisonment . . . or where appropriate seek a sentence of death.”²⁴ A death sentence is appropriate only where at least one of a number of statutory aggravating factors is found.²⁵ Under U.S. Supreme Court precedent, the defendant is allowed to argue that mitigating factors counsel against imposition of the death penalty, including mitigating factors not listed in the state statute.²⁶ The state, however, must prove the existence of at least one statutory aggravating factor beyond a reasonable doubt for the death penalty to be imposed.²⁷

19. *See id.* at 6 (“The [death penalty statute], therefore, is constitutionally defective because each of the judges constituting the panel is deprived of the jurisdiction vested in him by the 1970 Constitution.”).

20. *See id.* (“The procedure for appellate review established by the statute is clearly unconstitutional.”).

21. *Id.*

22. *See id.* (“[T]he provision is defective because it does not contain standards or guidelines to be considered in determining whether there are ‘compelling reasons for mercy’ and the imposing of a sentence other than a sentence of death.”).

23. *See* 1973 Ill. Laws 2961–63 (repealed and amended by 1977 Ill. Laws 70), *invalidated by* *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1 (Ill. 1975).

24. 1977 Ill. Laws 74.

25. 1977 Ill. Laws 72.

26. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

27. While the U.S. Supreme Court may not have stated this rule in so many words, it appears to be the universal interpretation of the Court’s requirements that the death penalty determination be informed by the circumstances of the crime, the character and attributes of the defendant, and be guided by statutory aggravating factors. *See Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976). *See also Turner v. Murray*, 476 U.S. 28, 52–53 (1986) (discussing the role of a jury in finding the existence of aggravating factors beyond a reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”).

In 1979, in *People ex rel. Carey v. Cousins*, the Illinois Supreme Court upheld the death penalty statute against a challenge focusing on the discretion of prosecutors to seek the death penalty.²⁸ Under Illinois law, the prosecutor may seek the death penalty only when one of seven listed aggravating factors are present. But under the 1977 amendment, there are no guidelines concerning when the prosecutor should not seek the death penalty even when one or more aggravating factors is present. If the prosecutor decides not to seek the death penalty in a particular case, there is no possibility that the defendant will be sentenced to death. The majority rejected the contention that this unbridled prosecutorial discretion over whether to seek the death penalty meant that the imposition of the death penalty in Illinois was arbitrary and therefore, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Three of the seven justices dissented from this decision. They explained their view as follows:

In appraising the effect of the prosecutor's discretion, it must be remembered that the statute confers this discretion not upon one individual, but upon the State's Attorney in each of the 102 counties in this State. In view of the absence of statutory directives to the prosecutor, each State's Attorney is free to establish his own policy as to when sentencing hearings will be requested. . . . Such unguided discretion will inevitably lead to an arbitrary and capricious application of the death penalty similar to that condemned in *Furman*. There can be no doubt that under this statute some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications will be spared . . . because of the uneven application of the law due to the lack of statutory direction to the prosecutor. There will inevitably be cases where there will be no reasonable basis for the distinction between one on whom the penalty of death is imposed and another who is passed over.²⁹

Justice Simon's election to the Illinois Supreme Court took place after the *Cousins* decision. Although he had no record on the death penalty as an Appellate Court judge, he had criticized prosecutors in his opinions and was attacked during the campaign as soft on crime. In replacing one of the members of the *Cousins* majority, Justice Simon surely thought that the vote in the next death penalty case would be 4-3 to strike down the Illinois statute on the grounds raised in the *Cousins*

28. *People ex rel. Carey v. Cousins*, 397 N.E. 2d 809, 815 (Ill. 1979).

29. *Id.* at 822 (Ryan, J. dissenting). This reasoning resonates with the theme of a widely read anti-death penalty book, CHARLES BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974). One of Black's themes is that caprice results from the prosecutor's broad discretion in deciding whether to pursue the death penalty in a particular case. *See id.* at 15, 21, 37-44.

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dissent.

One case that had already been argued but not decided when Justice Simon joined the Supreme Court was a death penalty case, *People v. Lewis*.³⁰ Lewis had been convicted of murder and sentenced to death. One of Lewis's grounds for appeal was the same as in *Cousins*: the prosecutor's discretion rendered the penalty too arbitrary to survive Eighth Amendment scrutiny. This time, the court voted 6-1 to reject the challenge to the Illinois death penalty statute.³¹ Incredibly, the three justices who had dissented in *Cousins* continued to express the view that the Illinois statute was unconstitutional, but concluded that *stare decisis* required them to acquiesce in the prior majority decision upholding the provision. As Chief Justice Goldenhersh explained:

I joined Mr. Justice Ryan in his dissent in *People ex rel. Carey v. Cousins* and for the reasons therein stated am of the opinion that the death penalty provisions of section 9-1 of the Criminal Code are unconstitutional. . . .

It is apparent that the General Assembly and a majority of the electorate of this State desire that the death penalty be available as a sanction in certain types of cases. If this court were the final tribunal to determine the validity of the statute in its present form I would continue to dissent in the hope that ultimately a majority of the court would agree or that the General Assembly might be persuaded to effect the amendments which I consider necessary to render the statute valid. In this situation, however, the Supreme Court can grant certiorari and decide the questions on which this court is divided.

Once this court has spoken, I, like any other citizen of Illinois, must acquiesce in its decision. That there be a final decision on the issue is of great importance for the reason that there are now pending before this court [twenty-six] cases wherein death penalties have been imposed. It is essential that the question of the validity of the statute be determined. Consequently, with considerable reluctance, under the compulsion of *People ex rel. Carey v. Cousins*, I concur in the opinion affirming the judgment of the circuit court of Champaign County.³²

Justice Simon did not take kindly to this basis for upholding the death penalty. His dissent proved to be a bad start for any hope of a collegial relationship with his fellow justices. In response to his colleagues' plea for stability in the law, Justice Simon bluntly stated:

30. 430 N.E.2d 1346 (Ill. 1981). It is not clear, however, whether Justice Simon's membership on the court required a re-vote of the case or whether the justices simply maintained the votes they had cast when the case was argued before Justice Simon's election.

31. *Id.* at 1363.

32. *Id.* at 1363-64 (Goldenhersh, J. concurring).

It would be blatant folly for this court to acquiesce in the execution of Cornelius Lewis without disclosing that four of the judges comprising the present court, either now or in the past two years, have viewed the death penalty statute as unconstitutional. How much confidence can any member of the judiciary, any State official or any member of the General Assembly have that this statute will continue to be viewed as constitutional?³³

In addition to forcefully arguing that the death penalty as administered violated the Illinois Constitution, Justice Simon cited numerous examples in which the Illinois Supreme Court had overruled prior decisions, including examples of decisions overruled within a few years due to changes in the Court's membership.³⁴ That is to say, Justice Simon's opinion exposed the prior dissenters' pleas for stability in the law as disingenuous.

Was there a different explanation for the switch in votes by the three former dissenters? It may be that they were comfortable dissenting from a decision upholding the death penalty, but would never have struck down the death penalty statute even if they had secured a majority. (This is the only explanation for Chief Justice Goldenhersh's reference to the desire of the people and the General Assembly to allow the death penalty in Illinois.) Justice Simon, however, raised another possibility. In *Twelve Executions Which Should Not Have Been*, an article published years after he left the Court, Justice Simon speculated that his colleagues' change of heart was related to the conviction of serial killer John Wayne Gacy.³⁵ Gacy killed thirty-three people and was convicted and sentenced to death, after *Cousins* but before *Lewis* reached the Supreme Court.³⁶ Perhaps no judge, especially one who needed to periodically win sixty percent of the vote in a retention election, wanted to be identified as one who helped prevent the execution of a monster like Gacy.

In the article, Justice Simon also pointed out that Cornelius Lewis was not executed for reasons consistent with Justice Simon's view that the death penalty was improperly administered in Illinois. It turned out that Lewis's court-appointed lawyer, who had not tried a criminal case for many years, agreed to the existence of an aggravating factor of two

33. *Id.* at 1370 (Simon, J. dissenting).

34. *See id.* at 1371–72.

35. *See* Seymour Simon, *Twelve Executions Which Should Not Have Been*, 18 CHI. BAR ASS'N RECORD 24 (2004).

36. *See* *People v. Gacy*, 468 N.E.2d 1171, 1208, 1219 (Ill. 1984) (affirming Gacy's 1980 conviction and sentence). Justice Simon dissented from the imposition of the death penalty. *See id.* at 1220 (Simon, J., concurring in part and dissenting in part). *See generally* TERRY SULLIVAN & PETER T. MAIKEN, *KILLER CLOWN: THE JOHN WAYNE GACY MURDERS* (1983).

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prior felony convictions when one was a misdemeanor and another was a charge without a conviction.³⁷ At a resentencing hearing, the jury decided against capital punishment.³⁸

In any case, Justice Simon did not limit his dissenting opinion in *Lewis* to an explication of the merits of the constitutional challenge to the Illinois statute and criticism of his colleagues for hiding behind stare decisis in voting to uphold the death sentence. Justice Simon also declared that the former dissenters' explanation in *Cousins* for why the Illinois statute violates the Illinois Constitution "cannot be surpassed."³⁹ In fact, he reprinted that portion of the *Cousins* opinion as an appendix to his dissent in *Lewis*—a clear message of his righteous indignation for the judges' flip-flop. (Again, not a good start in terms of collegial relations with the rest of the court.)

I was studying law at the University of Chicago when the Illinois Supreme Court handed down its decision in *Lewis*. It was during this period that I became personally acquainted with Justice Simon. I had several conversations with him about legal issues, and in one such conversation, he asked me what I thought of the *Lewis* Court's application of stare decisis. In turn, I offered to ask Professor Edward Levi for his opinion of *Lewis*. Professor Levi had been Attorney General of the United States under President Ford, brought in to clean up shop after corruption was exposed in President Nixon's Justice Department. Levi also authored a widely read book, *An Introduction to Legal Reasoning*, and taught a course at the University of Chicago called "Elements of the Law," which focused on issues related to the role of precedent and the judiciary's proper role in our legal system.

I approached Professor Levi and asked him his opinion of *Lewis*. His response was to ask me to write the question out and provide supporting materials—i.e., the opinions in the cases. I did so and a few weeks later I received a four-page, single-spaced typed letter in reply with numerous citations to cases and quotations from opinions, all pointing to the conclusion that the Illinois Supreme Court improperly applied the rule of stare decisis in *Lewis*.⁴⁰ I provided a copy of Professor

37. See *Lewis v. Lane*, 832 F.2d 1446, 1455 (7th Cir. 1987); *People v. Lewis*, 547 N.E.2d 599, 602–03 (Ill. App. Ct. 1989).

38. See *Lewis*, 547 N.E.2d at 601.

39. *People v. Lewis*, 430 N.E.2d 1346, 1373–74 (Ill. 1981) (Simon, J., dissenting).

40. It may raise an eyebrow that a Justice was discussing this issue with me since I was not a member of the court's staff. The discussion was not in the context of any particular case pending or likely to come before the court, but was rather of the general sort of discussion of legal theory

Levi's letter to Justice Simon. He later told me that he showed it to his colleagues on the Illinois Supreme Court and informed them that he was going to print it as an appendix to his next dissenting opinion on the constitutionality of the Illinois death penalty. He reported to me that their reaction to this proposal was that "Edward Levi is not a member of this Court." My recollection is that this episode got back to Edward Levi and he was not particularly happy about being dragged into the middle of the dispute. I recall uncomfortably apologizing to Professor Levi for not having sought his permission before providing Justice Simon with a copy of the letter addressed to me.

Justice Simon continued to dissent in every case in which the death penalty was approved in Illinois, always on the same ground: the prosecutor's discretion was contrary to the Illinois Constitution's separation of powers requirement. Further, he would often seize on other procedural issues presented in a death penalty case to argue against imposition of the death penalty in the particular case. He never expressed the view that capital punishment was wrong in principle as cruel and unusual punishment or contrary to human dignity. In the main, Justice Simon pressed two themes: (1) "The state's death penalty statute" is unconstitutional because it "allows prosecutors too much discretion in choosing whether to seek the death penalty and . . . this may result in arbitrary application of the statute";⁴¹ and (2) "A person should not be put to death in order to perpetuate the doctrine of *stare decisis*."⁴²

The prior dissenters must have received Justice Simon's continued focus on *stare decisis* as a personal jab. Justice Simon blamed them for wrongful executions—in essence, he accused his colleagues of being accessories to murder. Years after leaving the Illinois Supreme Court, when Justice Simon again attacked his former colleagues for their *stare decisis* reasoning in *Lewis*, he ruefully observed that if the real reason they changed their votes was to allow for the execution of serial killer John Wayne Gacy, "Gacy has the distinction of taking the eleven other persons who were executed in Illinois before Governor Ryan declared a moratorium on executions to death with him as well as the [thirty-three] young men he murdered."⁴³

that is common for judges to have with lawyers and academics.

41. *People v. Silagy*, 461 N.E.2d 415, 433 (Ill. 1984) (Simon, J., dissenting).

42. *Id.* at 434.

43. *See* Simon, *supra* note 35.

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An obvious question is whether Justice Simon's opposition to the death penalty was influenced by his Jewish identity, either directly as the result of religious views or indirectly as part of the general liberal political orientation of Jews in the United States at the time. It is impossible to say with any confidence whether Justice Simon's religious beliefs or membership in the Jewish community influenced his views on the death penalty. The Reform Movement in the United States opposed the death penalty beginning in at least 1959 when its governing body issued the follow statement:

We believe that there is no crime for which the taking of human life by society is justified and we call upon our congregations and all who cherish God's mercy and love to join in efforts to eliminate this practice which lies as a stain upon civilization and our religious conscience.⁴⁴

One person familiar with Justice Simon stated that "his views on the death penalty were guided by the Jewish conception of value of each human life and the possibility of redemption."⁴⁵

One thing is clear: Justice Simon's opposition to the death penalty was consistent with his overarching commitment to integrity in law, in politics, and in the way he related to people and their problems. Reading Justice Simon's opinions, it is clear that he always viewed them as resolving disputes concerning real people and their lives, not as primarily involving abstract principles of law. His background in local politics and in solving constituents' problems was clearly an influence on his view of the role of a judge. In Justice Simon's view, if the legal system was not working properly, it certainly should not be allowed to decide matters of life and death.

B. The Case of Ed Loss

Justice Simon's constant tension with his colleagues culminated in a decision concerning the application to practice law of a law school graduate named Ed Loss.⁴⁶ Loss graduated from DePaul University College of Law in 1983. One year later, he applied for membership in the Illinois Bar. Bar membership involves two issues: qualifications

44. This resolution was issued by the Union of American Hebrew Congregations, a Reform umbrella organization. The full text of the 1959 resolution is available at <http://www.reformjudaismmag.net/02summer/focus.shtml>. This opposition continues to the present day. See *The Jewish Perspective: Death Penalty through a Jewish Lens*, RELIGIOUS ACTION CTR. OF REFORM JUDAISM, http://rac.org/Articles/index.cfm?id=1665&pge_prg_id=8089&pge_id=2396 (last visited Mar. 28, 2013).

45. Telephone Interview with John Simon, *supra* note 11.

46. *In re Loss*, 518 N.E.2d 981 (Ill. 1987), *appeal dismissed* *Loss v. Supreme Court of Ill.*, 484 U.S. 999 (1988).

and character and fitness. Loss met the standards in terms of qualifications, which essentially require graduation from an accredited law school and a passing score on the state bar examination. Loss ran into trouble, however, in the character and fitness aspect of bar membership. Because of doubts about Loss's character, the state bar referred his application to a committee, which then referred the matter to a second, larger committee that voted in favor of admission (by a narrow 14-13 vote).

Rather than simply admitting Loss to the Illinois Bar (as was the usual practice after committee certification), the Illinois Supreme Court issued an order requiring Loss to file a petition with the Supreme Court for admission to address the issue of his character and fitness to practice law. As the opinions in the case reveal, this was the first time the Supreme Court of Illinois had requested such a petition after committee approval.⁴⁷ The Illinois Supreme Court essentially placed the burden on Loss to show by clear and convincing evidence that he had been rehabilitated and was fit to practice law.⁴⁸ The court found against Loss, concluding that "the evidence does not support the finding that petitioner is presently of good character and sufficiently rehabilitated to be admitted to the practice of law."⁴⁹

The record contains abundant evidence of Loss's poor character and fitness. The court's opinion explained:

[Loss] was involved in juvenile delinquencies, criminal activity, and drug and alcohol addiction. While a student at high school, petitioner was suspended on approximately 23 occasions, and on his first job was discharged for stealing money from vending machines. He was charged with robbery and, as an alternative to conviction, was given an opportunity to enter military service. He enlisted in the Marine Corps. While in the Marine Corps, he was absent without leave for a period of 71 days and ultimately was given an undesirable discharge. Petitioner was also arrested and convicted on charges of disorderly conduct (for stealing money), selling marijuana, and possession of heroin, cocaine and marijuana. The record is not clear as to the number of convictions. He used various aliases. In 1975, petitioner was arrested for possession of marijuana, selling heroin, and for theft from a gasoline station.⁵⁰

It also appears that Loss's bar application, in contrast to his law

47. *Id.* at 987-88.

48. *Id.* at 984.

49. *Id.* at 985. The Court did leave open the possibility that it would reconsider its decision on a later re-application by Loss. *Id.* at 986.

50. *Id.* at 982.

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school application, “candidly reveal[ed] facts and details about his background, including arrests and convictions not previously noted. During his law school years he was an excellent student, started a business by means of which he supported his family, and aided and befriended many of his fellow students.”⁵¹

The court’s opinion does not specify what facts it found persuasive in denying Loss a license to practice law. After reciting facts both in favor and opposing Loss’s claim of rehabilitation, the opinion simply concluded that the evidence did not support a showing of “good character and [sufficient rehabilitation] to be admitted to practice law in Illinois.”⁵²

Justice Simon vehemently dissented from the court’s decision to reject Loss’s bar application on two grounds: (1) The Illinois Supreme Court did not have the power to overturn the Committee on Character and Fitness’s determination regarding Loss’s fitness to practice law, and (2) The Illinois Supreme Court had violated basic procedural norms, including reliance on off-the-record communications.⁵³

Justice Simon began his dissent by quoting the Supreme Court’s rule that, at the time of Loss’s application, stated: “‘If the committee is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.’”⁵⁴ The majority concluded, however, that the power to review the committee’s decision rested in its duty to protect the public from incompetent and dishonest attorneys. In the majority’s view, any other reading of the court’s rules would be absurd.⁵⁵

Justice Simon responded that the court had violated Loss’s due process rights. More specifically, Justice Simon claimed that

[d]ue process demands that we follow our own rules while they remain in force, and they are binding on this court the same as on

51. *Id.* at 983.

52. *Id.* at 985.

53. *Id.* at 985–86 (Simon, J. dissenting).

54. *Id.* at 995 (quoting 107 Ill. 2d R. 708(c)).

55. *See id.* at 984 (majority opinion) (“A rule, like a statute, must be construed to avoid an absurd or unconstitutional result. Were we to construe Rule 708(c) in the manner urged by petitioner we would face the absurd situation that, confronted with the record here, we were powerless to consider the correctness of the decision to certify and would be required to blindly admit petitioner. This does not comport with our duty to protect the People against incompetency and dishonesty on the part of members of the bar. . . . To read literally the language of the rule would divest this court of jurisdiction to review the finding of the committee and thereafter deny admission, resulting in an unconstitutional delegation of our jurisdiction and an abdication of our duty to regulate the bar of this State.” (internal citation omitted)).

litigants. It is no answer to say that Mr. Loss has been afforded a hearing, for the *ad hoc* proceeding ordered by this court was itself fundamentally unfair. In their expressed desire to avoid an absurd and unconstitutional result, my colleagues have wrought just that.⁵⁶

Justice Simon's other major issue involved the open question of how the merits of Loss's application came before the court. Justice Simon emphasized that the court, before *Loss*, had never reviewed a grant of certification by the committee because, as noted above, the Illinois Supreme Court rules make bar admission automatic upon a favorable committee decision.⁵⁷ Thus, Justice Simon noted, the court had never "developed an appropriate standard for reviewing the committee's findings."⁵⁸ Justice Simon further noted that that the Court's order requiring Loss to petition the Court for admission to the bar was issued without explanation and "failed to advise Loss of how this matter even came before us."⁵⁹ Justice Simon elaborated on this problem, moving toward an explosive allegation of misconduct by his colleagues:

Nothing in the record indicates the source of the information which triggered this extraordinary proceeding. Such review has not taken place—in even a single instance—since I have been a member of this court. Moreover, as the majority concedes, there are no formal procedures for keeping the court apprised of an applicant's interaction with the Committee on Character and Fitness. The only way this court could have been advised of Loss'[s] situation, therefore, was through an informal communication. The possibility that this unusual proceeding was initiated on the basis of rumors or gossip turns the entire admission process into a sham. It appears that those who can grab the court's ear and are displeased with an applicant can trigger an additional inquiry, by this court itself, into the applicant's moral character. To adequately address the question of his good character and fitness Loss has a right to know how and why his application was singled out for such special attention.⁶⁰

This passage contains two criticisms of the court's action. The milder critique is that the court did not sufficiently inform Loss of the basis for its concern so that Loss could prepare for the hearing. The second criticism, which goes to the heart of the judicial process, is that the court's decision to hold a hearing was based on "informal communication," "rumors," or "gossip." It would be completely inappropriate for the court to make its decision based on factors outside

56. *Id.* at 996 (Simon, J., dissenting) (internal citation omitted).

57. *See supra* note 34 and accompanying text.

58. *Id.* at 997.

59. *Id.* at 996.

60. *Id.* (internal citation omitted).

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the record, certainly without allowing the parties to address the matters not reflected on the record.

That Justice Simon was accusing the other justices of serious judicial misconduct was not lost on the court, the media, or the general public. Justice Ryan, who was a target of Justice Simon's *stare decisis* missives regarding the death penalty, wrote a long concurring opinion in which he detailed the reasons why he found Loss unfit to practice law. Justice Ryan thought that Loss continued to be dishonest and pointed out that Loss's problem with alcohol continued during his time in law school. Justice Ryan also responded at length to Justice Simon's charge of procedural impropriety:

The author of the dissenting opinion has, inadvertently I hope, used innuendos, general accusations, and emotionally charged language, which were seized upon by segments of the media, expanded and used to create a *cause celebre* over a "reformed drug addict and petty thief" whom this court has refused to license to practice law. I feel I must respond to the misleading and unfortunate statements by the author of the dissent, which have caused the media and the public to challenge the integrity of those who joined in the majority opinion.⁶¹

After quoting the passage from Justice Simon's dissent quoted above, Justice Ryan continued:

I find [the dissent's] language offensive because it implies that there was some clandestine, unethical, and possibly illegal communications from some unspecified person or persons to certain members of the court, which caused Loss' application for admission to the bar to be "singled out for such special attention." Why was it necessary to resort to such damaging innuendos and general accusations? Why was it necessary to invite the public to speculate as to what sinister activity had produced this result and the media to publicly imply that the "fix is in" on the court? . . .

If the following constituted "informal communication, or "rumors or gossip," or grabbing "the court's ear," why did the author of the dissent not complain about it in the conference room, when the matters to which he now apparently alludes were openly discussed?⁶²

Justice Ryan then gave three reasons why it was proper for the Supreme Court to take up the matter.⁶³ First, under the court's rules and organization, the matters heard by the Committee on Character and Fitness are structurally open to scrutiny by the court. Second, the Illinois Supreme Court itself is the final arbiter of any applicant's fitness

61. *Id.* at 986 (Ryan, J., concurring).

62. *Id.* at 986–87 (internal citation omitted).

63. *Id.* at 986–90.

to practice law. Finally, Loss received due process by virtue of notice concerning what matters were of interest to the committee, the hearing before the committee, and the briefs and argument to the Illinois Supreme Court. Justice Ryan denied that information had reached the court through any channel other than its connection to the established character and fitness committees.

Justice Ryan then went into great detail about what he viewed as overwhelming evidence that Loss was not fit to practice law,⁶⁴ including dishonesty in his bar and law school applications and at least one bout with drunkenness during law school. Justice Ryan also found it difficult to understand the public's outrage over the court's handling of the matter given that, at the time, the Cook County Circuit Court was under federal investigation for corruption and "the media and the public have soundly condemned the legal profession for harboring too many crooks and cheats."⁶⁵ To Justice Ryan, the charges of procedural impropriety would only further weaken the public's confidence in the courts.

Justice Simon would not have any of this. To him, the court had invented a procedure to deny bar membership to an applicant who had met all of the preexisting substantive and procedural requirements in the rules. Worse, Justice Simon believed that the court heard about Loss's application through an *ex parte* contact. Although he did not respond directly to Justice Ryan's invocation of the scandal confronting the Cook County courts, presumably Justice Simon would have denied that violating their own rules and norms of judicial conduct would help restore the public's confidence in the Illinois courts.

After the *Loss* decision, any semblance of a normal, collegial relationship between Justice Simon and other members of the court, especially Justice Ryan, was completely gone. Justice Simon was ostracized by his colleagues—even his involvement in the court's administrative matters did not continue in a normal fashion. At this point, Justice Simon's feeling of comparative isolation as a judge must have been overwhelming. He had no hope of persuading his colleagues to strike down the death penalty in Illinois and he could not have enjoyed the court's tense environment. In January 1988, only a few

64. *See id.* at 990–95.

65. *Id.* at 995. This reference was to the Greylord scandal, which revealed that numerous state court judges in Cook County were accepting bribes. The irony of Justice Ryan's reference to this is that it was common knowledge in Chicago that this activity was ongoing. In fact, one large law firm, since disbanded, was referred to in part as "Bagman." I knew about this as a law student in Chicago and I would thus have to believe that it was widely known in the legal establishment before the federal investigation took place.

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months after the *Loss* decision, Justice Simon announced that he would resign effective February 15, 1988. Although Justice Simon claimed that he was tired of spending sixteen weeks per year in the state capital, it seems more likely that he resigned either over the conduct of his colleagues or because of the effects of the tensions on the court.

III. SEYMOUR SIMON: THE “OUTSIDER”

A theme that often arises in considering the careers of Jewish judges (outside of Israel, of course) is that of being an outsider. Although American society is relatively tolerant, Jews were and perhaps still are considered outside the mainstream Protestant culture. Remarkably, today there are no Protestants on the present U.S. Supreme Court, but rather six Catholics and three Jews.

Seymour Simon presents a puzzling example. He worked within the political establishment to become a City Council member and County Board President. The ethnic politics and residential segregation of Chicago made it inevitable that some Jews would succeed in politics; at the city level, however, the Irish establishment had a pretty firm grip on control, with Italian, Jewish, Polish, and black minorities tagging along. Interestingly, the Irish establishment was Catholic, which may have made them more open to the aspirations of non-Protestant ethnics. The voices of blacks may have been somewhat suppressed relative to their numbers until the ascendancy of Harold Washington as the Chicago’s first black mayor in 1983.

Jews were clearly outsiders in Chicago’s legal establishment during the time of Justice Simon’s political and judicial ascendancy. Jewish lawyers were not hired by the large, established law firms (at least through the 1950s), and many found it necessary to establish their own firms. During the Civil Rights Movement of the 1950s and 1960s, Jews were among the strongest supporters of rights and equality for blacks. In fact, many of the white civil rights lawyers who headed south to aid protesting blacks were Jewish.

Despite this outsider status of Jews, it is difficult to place Justice Simon on an “insider-outsider” spectrum given the ethnic politics of Chicago and Justice Simon’s repeated electoral successes. Other contemporary Jews held powerful positions in Chicago and Cook County politics. Justice Simon worked within the Democratic machine to gain election, and always used the traditional political method of casework and relationship networks to maintain his political position. At the County Board, he was chosen by the machine to fill a seat traditionally reserved for a Jew. He was, however, unable to suppress his values and sacrifice his integrity, and thus assumed the role of the

outsider both as an opposition politician and judicial dissenter. The status of Jews as outsiders may have made it more likely for Justice Simon to assume those roles than, for example, an Irish politician who would have a closer relationship and stronger self-identification with the political machine. It is unlikely that a simple twist of fate led to the demise of Seymour Simon's careers in public service and alienated him from party leadership and his colleagues on the Illinois Supreme Court. There seems to be some quiet, constant reminder of difference that cannot be suppressed.

IV. EPILOGUE

A. *The Death Penalty*

Controversy over the death penalty in Illinois did not end with the departure of Seymour Simon from the State Supreme Court. Slowly but surely, evidence mounted that the administration of the death penalty in Illinois was seriously flawed. Convicts on death row began to be exonerated, first through testimony revealing schemes to implicate innocent persons and later through DNA evidence. The story of the death penalty in Illinois had all of the ingredients of pulp fiction—innocent defendants tortured into confessing, police aiding in capital prosecutions knowing the defendant was innocent, police fabricating confessions, crooked judges taking bribes in some cases and acting tough on crime in others,⁶⁶ and DNA evidence establishing convicts' innocence years after trial. One of the exonerations occurred just forty-eight hours before the scheduled execution.⁶⁷ In 2006, Justice Karmier of the Illinois Supreme Court wrote: "To my knowledge, [eighteen] men were ultimately determined to have been wrongly convicted and sentenced to death."⁶⁸

One of the most striking examples of abuse involving capital punishment in Illinois is the case of George Jones, an eighteen-year-old high school student charged with murder in 1981. Jones was taken to the hospital room of a seven-year-old boy who survived the crime, and when the boy did not identify Jones, the police officers lied and said

66. See *Bracy v. Schomig*, 286 F.3d 406, 419 (7th Cir. 2002) (finding insufficient evidence of compensatory bias to award defendant new trial, but vacating sentence of death on grounds that "it is a fair, if not inevitable, inference that Maloney used the death penalty hearing to deflect suspicion that might be aroused because of, say, his acquittal of another accused murderer who had bribed him").

67. See Rob Warden, *On This Day . . . 30 Years of the Death Penalty*, CHI. TRIB., Jan. 12, 2003, § 2, at 1. Rob Warden is Executive Director of the Center on Wrongful Convictions at Northwestern University School of Law in Chicago, Illinois.

68. *People v. Morris*, 848 N.E.2d 1000, 1012 (Ill. 2006) (Karmier, J. dissenting).

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that he had.⁶⁹ Another Chicago police officer had discovered evidence that Jones was not the killer, but much to the officer's dismay, the state filed murder charges and went forward with the case.

At trial, the officer explained that the police kept two sets of files, one with inculpatory information that was turned over to the defense before trial, and one, denominated "street files," with exculpatory information that was, contrary to law, not turned over to the defense. Incredibly, after the existence of two sets of files became public, the Police Department issued a notice that *files under the department's control* should be preserved, which some detectives interpreted as instructions to treat their personal investigative notes (i.e., notes not "under the department's control") as their own personal property to dispose of as they saw fit. Further, rather than receive a commendation as the federal court of appeals suggested, the officer who came forward with the exculpatory evidence in the Jones trial was disciplined and demoted for failing to inform prosecutors of his testimony.

It took a series of federal court injunctions to convince the Chicago Police that they should preserve all of their investigative files, including notes that were still being destroyed after the Police Department's initial notice. In their application for injunctive relief, attorneys representing criminal defendants detailed instances in which exculpatory material had not been included in information provided to the defense. Further, the existence of approximately 300 street files was revealed. Although the district court entered a fairly comprehensive preliminary injunction governing the preservation and handling of investigatory material, the Seventh Circuit Court of Appeals in Chicago ultimately overturned much of the injunction on standing grounds.⁷⁰

In early 2000, amid the mounting number of exonerations, media coverage of hundreds of examples of prosecutorial misconduct in Cook County, and the unreliability of death penalty convictions throughout Illinois, Governor George Ryan declared a moratorium on executions. Ryan's primary concern was that innocent people might be executed. In 2002, the Governor's Commission on Capital Punishment issued a report that recommended substantial reforms in the practice of capital

69. See *Jones v. City of Chicago*, No. 83 C 2430, 1987 WL 16611, at *5 (N.D. Ill. Sept. 1, 1987) ("Presumably the jury accepted Attorney Schmeidel's testimony that no identification took place at the hospital.")

70. See *Palmer v. City of Chicago*, 755 F.2d 560, 579 (7th Cir. 1985) (limiting preliminary injunctive relief to those street files in existence at the time). The court ultimately affirmed a jury civil rights damages award of \$801,000 for Jones. *Jones v. City of Chicago*, 856 F.2d 985, 988 (7th Cir. 1988).

punishment.⁷¹ Throughout 2002, evidence continued to emerge of tainted confessions and false convictions for murder—some on death row. In 2003, shortly before the end of his term and at the urging of many public interest groups, Governor Ryan commuted all death sentences in Illinois.⁷² Eight years later, the General Assembly passed a bill repealing Illinois’s capital punishment laws, which Governor Pat Quinn signed it into law in March 2011.⁷³

After thirty years, Justice Simon’s view of the administration of capital punishment in Illinois was vindicated.

B. *Ed Loss*

Ed Loss became a practicing attorney in Arizona, specializing in defense of driving under the influence cases, until his death in 2009. He described his practice as limited to “the aggressive defense of the accused, impaired driver from Misdemeanor DUI cases to Vehicular Homicides in [Arizona].”⁷⁴ Loss was also active in national organizations devoted to the defense of drunk driving cases. In terms of professionalism and ethics, the website advertising his practice, which has been taken over by another attorney, proclaims (still in the present tense): “Ed is proud of his Martindale-Hubbell ‘AV’ rating which identifies him as an attorney of the highest professional expertise and ethical standards.”⁷⁵

CONCLUSION

I thought it would be nice to conclude this Article on a lighter note, which also reveals something about Justice Simon’s character and personality. After I graduated law school, I served as a law clerk at the United States Court of Appeals in Chicago. I continued to live in the same building as Justice Simon, and we would sometimes take the bus or even walk the two miles downtown together. Many people, sometimes dozens, would greet Justice Simon every day, and he seemed to know them all by name. I once saw him shake three people’s hands

71. COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT: GEORGE H. RYAN, GOVERNOR (Apr. 15, 2002).

72. In December 2003, following a long investigation, former Governor Ryan was indicted on charges related to official corruption. He was convicted in 2006 and sentenced to six and one-half years in federal prison. *See United States v. Warner*, 498 F.3d 666, 674 (7th Cir. 2007).

73. Senate Bill 3539, repealing Illinois’s capital punishment laws, was passed by the Illinois legislature on January 11, 2011, and on March 9, 2011, Illinois Governor Pat Quinn signed it into law.

74. *Attorney Edward A. Loss III*, KATHLEEN N. CAREY LAW OFFICES, PLC, <http://www.azduiatty.com/arizona-dui-defense-law-firm.htm> (last visited Mar. 28, 2013).

75. *Id.*

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at once—one with each hand and one with an extended elbow.

Sometime during this period, two friends of mine who were still in law school confided in me that they planned very soon to get married at Chicago City Hall. They had reasons for keeping their marriage a secret. I discouraged them from going to City Hall and promised to ask Justice Simon to perform the ceremony. He readily agreed. I was to be one of the witnesses so I met them at the courthouse (the Richard J. Daley Center) and brought them up to Justice Simon's chambers. There, we were greeted by one of Justice Simon's law clerks who happened to be a law school classmate of mine (we had her swear to secrecy). Justice Simon greeted the couple warmly, and performed a beautiful ceremony, so beautiful that the bride and groom were crying and even I was a bit teary-eyed.

I recounted this story recently to Justice Simon's son. I told him that Justice Simon ended the story by saying something about how he kissed the beautiful bride and then leaned over and kissed my friend. Justice Simon's son then reminded me of the whole story that Justice Simon told—a stock element in the numerous weddings he performed.⁷⁶

The story is that when he was an alderman, Justice Simon and his wife were traveling in France. They arrived at a beautiful building in a small French town and, realizing it was the city hall, decided to go inside. There, in an upstairs corridor, they observed a man in a fancy outfit performing wedding ceremonies one after the other. The Simons watched for a while, and when the official took a break to have a cigarette between ceremonies, Justice Simon asked him if he was the mayor. The man replied that the mayor was away and he was an alderman filling in. Justice Simon identified himself as an alderman from Chicago and then asked him why there were so many weddings. He explained that in France, all couples must have a civil ceremony, which is usually followed by a religious ceremony. Justice Simon then asked him why he kissed some of the brides at the end of the ceremony but not others. Justice Simon reported that the alderman's answer was that he kissed the beautiful ones—at which point Justice Simon would always lean over and kiss the bride in his ceremonies.

As it was described to me, whenever Justice Simon performed a wedding ceremony, the warmth and love that he exhibited, in a sense, married or remarried every couple in the room. Couples would move closer together, hold hands, and fight back the tears. When it was first suggested to Seymour Simon relatively early in his political career that he might want to become a judge, Mayor Daley discouraged him,

76. Telephone Interview with John Simon, *supra* note 11.

saying, “You’re an active fellow, you wouldn’t be happy there.” Perhaps performing wedding ceremonies was the closest Justice Simon had as a judge to those Ward Nights as Committeeman and Alderman when he would meet his constituents and do whatever he could to improve their lot in life.

After resigning from the Illinois Supreme Court, Justice Simon spent the rest of his life in the private practice of law. He remained active in numerous civic organizations, including Jewish groups. In recognition of his contributions to law and justice in Illinois, the Jewish Judges Association of Illinois awards an annual Seymour Simon Justice Award. He was a judge and a man of the people, who was unwilling to compromise on matters of justice. It is no accident, I believe, that his character and personality evoked the image of the great rabbi, the righteous Jew who was beloved and admired, and a little bit frightening at the same time.