

INTRODUCTION: TINKERING WITH DEATH IN ILLINOIS[†]

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I want to talk to you briefly this morning about tinkering with death in Illinois and about the person who has proven most courageous and influential in taking on this awesome responsibility.

Just a few months before he retired from the U.S. Supreme Court, Justice Blackmun—who had consistently voted in favor of the death penalty—authored a shocking and scathing opinion in which he criticized the high Court’s twenty-plus years of jurisprudence on the issue of the death penalty. When I discuss Justice Blackmun’s change of opinion with my students, I remind them of his words. Blackmun said in essence that after more than twenty years of voting in favor of the death penalty, more than twenty years of going along with the majority, more than twenty years of struggling to develop rules and procedures that would make the system just, he was convinced and was forced to concede that the death penalty experiment had failed.¹

Blackmun was steadfast when he authored the now famous words—words that must have been difficult for him at the end of his career. Blackmun wrote: “From this day forward, I no longer shall tinker with the machinery of death.”²

“Tinkering with the machinery of death.” These words, of course, are meant to be chilling. And they are—especially if one considers all the closely decided cases that might have turned out differently if perhaps the Justice had been willing to tinker more seriously with death or to tinker with death earlier in his career.

Justice Lewis Powell, also on the U.S. Supreme Court during much of the early death penalty cases, admitted—after his retirement—that he, too, regretted his vote and opinion on some of the most important death

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1. *See Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting) (dissenting regarding denial of petition for certiorari).

2. *Id.* at 1145.

penalty cases ever decided.³ Not because he believed the death penalty was immoral, but because he thought the system could not be fixed.⁴

One does not have to be a Supreme Court Justice, a criminal law professor, or a capital defendant or victim to know that death penalty systems are broken throughout the country and are very difficult to fix. But one does have to have a special kind of courage to take on the task of tinkering with the death penalty system, and making the decision to do so while still in office. It takes special courage to say, “The buck stops here.” For Illinois it took a lifelong resident of Kankakee, a former pharmacist who has dedicated much of his life to public service, a husband of forty-six years, a father of six, and grandfather of thirteen: George H. Ryan.

Governor Ryan has received much notoriety—good and bad, but mostly good—for his actions on the death penalty issue in Illinois. Some see it as a departure from his lifelong stance in favor of the death penalty. Not true. Before he became famous for the death penalty reforms, among the things for which he was best known is his *insistence* and *advocacy* that Illinois be first. The Governor has spearheaded a series of legislative initiatives that he has coined the “Illinois First” program. Illinois First is essentially a mission to build and improve the state’s roads, transit, schools, environment, and general quality of life for Illinois residents. One can disagree with how the Governor goes about doing things, with some of his ideas and specific legislative proposals. I know that I have. But it is hard to quarrel with the notion that he has in most respects been motivated by the desire to improve the well-being of the State of Illinois.

Seen in this context, the Governor’s actions—including (1) his declaration of a moratorium on the death penalty in Illinois until he could be certain that no innocent people were being executed, (2) his creation of a commission to study the issue, and (3) his avowal to consider clemency for 146 death row inmates sentenced to die under a broken death penalty system—have been consistent with his desire to make Illinois first. By that I mean the notion that that Illinois ought to be first in justice, first in criminal jurisprudence, first in fairness, first in procedural safeguards, and first in taking on the task of tinkering with one of the most difficult issues of our time. And there can be no doubt that the laudable desire to be first in this context has indeed placed Illinois on the national and international forefront.

I want to say just a few words about the Governor and his leadership on the issue of capital punishment. From the time we are in grade school, we are repeatedly told that our system is one of checks and balances. We have all heard by now of the many cases in which defendants

3. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994).

4. *Id.*

have been wrongfully convicted and wrongfully sentenced to die in Illinois—a clear failure of the criminal justice system by any standard.

Well, the question arises: What do we do when the system fails? When the lawyers, the police, the jurors, the judges, the appellate judges, and the legislature all fail in securing justice? Could the state bar have taken it upon itself to lobby for higher standards from its lawyers, and then institute changes? Could law enforcement officials have taken it upon themselves to issue internal protocols and institute changes? Could the judiciary or legislature have identified and acted upon the flaws of the system and instituted changes? What happens when they do not or when what they do is not enough? What is the role and responsibility of the Chief Executive of the State in these instances? Having to bear that burden—the burden of being the final check or balance in a broken system—takes courage. Tinkering—in a serious way—with the machinery of death will require still more courage.

This is what the Governor will talk about today: What ought to be the role of the executive branch in examining and reforming the death penalty system in Illinois?

Let me conclude by saying that many have asked me why I was so determined to invite the Governor to address the College of Law. I think that our Dean, Heidi Hurd, expressed it best. When I enthusiastically approached her about the idea—prepared to present in my best litigator mode a list of pros without cons, she was incredibly supportive, and responded quite simply: “Of course we should do it. What a fabulous *learning opportunity* for our students, for the university, and the community on an important topic.”

With that I invite us to learn together from our esteemed guest. Please join me in welcoming Governor George Ryan.

