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## Clarence Darrow Keynote Address

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## CLARENCE DARROW KEYNOTE ADDRESS<sup>1</sup>

*Bill Kurtis*

I was on the air when a tornado hit Topeka, but I had left my bar review class—a tax class; God knows I needed it. At the time, [I was] filling in for a friend of mine who wanted to go on vacation early. I had accepted a job at a trial firm, a personal injury firm in Wichita, Kansas, and, all of a sudden, the tornado came through. Yes, I was on the air for about 24 hours. CBS saw me. I sent them a tape afterwards, and the world was saved from another lawyer.

This occasion actually has a lot of meaning for me, because it inspired a similar kind of situation—this book, *Death Penalty on Trial*. And I'll tell you why by reading just the beginning. Don't worry, I'm not going to read all of it, although I am a good reader.

Friday, January 10, 2003, was a turning point for American justice. It was a cold morning in Chicago. Lake Michigan heaved a thick, frosty breath over the city. The automobile arteries into the city's business core were already full. Traffic inched along as the elevated "E1" train rattled through a canyon of skyscrapers. The grinding of metal against metal had barely faded behind the passing train, when a black van pulled alongside the curb in front of the DePaul University Law School on Jackson Boulevard.

Commuters rushed by, barely noticing as the Governor of Illinois emerged from the vehicle, staff assistants and a State Trooper trailing behind him. They couldn't have known the grave importance of Governor George Ryan's mission that day, nor the agonizing journey that had led him to this speech at DePaul. Even his closest associates, while aware that the withering pressure had claimed the Governor's sense of humor in the last few days, still did not know of his final decision.

In the few feet from the curb to the front door of the law school, the party passed a newsstand. All the local papers carried the story. The *Chicago Sun-Times* quoted sources that said the Governor would pardon some death row inmates in his last three days in office. The *Chicago Tribune* also picked up the leak, but its columnists wondered if Ryan would go through with such a radical act.

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1. This is an edited transcript of the remarks given by Bill Kurtis at the Seventeenth Annual DePaul Law Review Symposium, *Protecting a National Moral Consensus: Challenges in the Application of Atkins v. Virginia*.

After all, such pardons would be unprecedented. No one could remember a governor ever doing anything like this.

Ryan would be declaring that America's entire system of lawyers, trial courts, and appellate courts, built on centuries of English common law, could not handle the job. He would be taking justice out of their hands and redefining it himself. What an act of bravado, especially for a non-lawyer.

The governor walked straight to the elevators, offering a quick and easy wave to the security guard. He had been a popular governor and would have easily won reelection but for a nagging litany of corruption charges during his tenure as Illinois Secretary of State. This would be one of two final speeches in a long career in Illinois politics.

A sense of finality hung in the air as the group made its way down a corridor on the eighth floor. They entered the lecture hall. George Ryan strode from the back of the room down the sloping floor to a podium at the center, where he would stand like Cicero lecturing in an ancient amphitheater. Some fifty tables launched up around him, in a tiered pattern, filled with young law students, many swiveling back and forth nervously on their attached seats.

Ryan looked up at their eager faces. He was an approachable, jolly sort of man. His short-cropped, grey-white hair topped a round face, giving him the warm look of a beloved grandfather. But today, his face was rigid and serious. He frowned down at his notes. Then George Ryan took a deep breath and made history. His first words from the podium, carried live on radio and recorded by an array of television cameras, made it clear that he had chosen to leave a remarkable legacy. He would pardon four inmates sitting on death row, he said, because it was, quote, "The right thing to do."

"Three years ago," Ryan said, "I was faced with startling information. We had exonerated not one, not two, but thirteen men from death row. They were found innocent—innocent of the charges for which they were sentenced to die. Can you imagine? We nearly killed innocent people. We nearly injected them with a cocktail of deadly poisons so that they could die in front of witnesses on a gurney in the State's death chamber. That's a pretty gruesome picture." End quote.

There was no ruling from the Illinois Supreme Court to back Ryan up; no opinion from the state's Attorney General. This was the personal judgment of a former pharmacist, an aging statesman, who had come to his decision the hard way, as the final arbiter over the lives of men he might have sent to their deaths.

George Ryan had only two days left in his term. He could have escaped this difficult decision and driven off toward his hometown of Kankakee, Illinois, leaving the heavy responsibility to the next governor. But Ryan knew there was a serious problem with the

Illinois system and that to walk away would have been a dereliction of duty.

And so he chose to sign off as a whistleblower, knowing he would be pilloried by relatives of the victims of death row inmates, death row proponents, and many in law enforcement. He most likely did not know he would be nominated for the Nobel Peace Prize, and would win praise from governments and individuals around the world. Either way, his decision to speak out instead of remaining quiet was an act of immense courage.

Why did he do it? The short answer is that George Ryan felt deeply betrayed. The system of justice he had always trusted was not working and maybe never did work the way we all had been led to believe. Governor Ryan recited these statistics for his audience: half of the nearly 300 capital cases in Illinois had been reversed for a new trial or resentencing—nearly half. Thirty-three of the death row inmates were represented at trial by an attorney who had later been disbarred or at some point suspended from practicing law. “I’m not a lawyer,” he said. “I don’t think you need to be one to be appalled by those statistics. I have one question: How does that happen?”

The question was the cry of a layman who may not know the details of habeas corpus, or be able to translate *res judicata*, but who has a common sense of right and wrong. How does that happen? What was happening in the process of determining the truth that prevented justice from prevailing? In an assembly plant, the foreman could check the robots, or the individual parts being welded together. Quality control employees could stop the line if they detected anything amiss. If a defective product reached the end of the line, the whole assembly might shut down to find and fix the problem. Why weren’t such checks and balances working in death penalty trials?

The Governor’s voice rose as the emotion of sleepless nights spilled out:

We have executed twelve people since capital punishment was reinstated here in Illinois in 1977. With the thirteenth exonerated inmate in January of 2000, we had released more innocent men from death row than those hopefully guilty people we had executed. Three years ago, I described it as a shameful scorecard, truly shameful. So I did the only thing I could: I called for what is, in effect, a moratorium. A lot of people called that courageous. It wasn’t. It was just the right thing to do. How do you let innocent people march to death row without somebody saying, “Stop the show?”<sup>2</sup>

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2. BILL KURTIS, THE DEATH PENALTY ON TRIAL: CRISIS IN AMERICAN JUSTICE (2004).

The rest is history. Remember those words? I remember them so clearly, and they caused me to take time out from my, quote, “television career” and write a book. How would I do it? [ ] The reason I did it was essentially the same reason that George Ryan did it. I felt betrayed. I hadn’t really thought a lot about the death penalty, primarily because I trusted the legal system to punish the guilty and let the innocent go free. And then I realized, just by the statistics, that maybe that wasn’t happening. So I said, why don’t I choose two cases, and I’ll go from the back to the front and find out that little subjective mistake—there are thousands of them in the course of a trial—but which one determines a wrongful conviction instead of having justice done?

In the course of my reading—I hadn’t been in a law library for a long time—I ran into a dissenting opinion by Supreme Court Justice Thurgood Marshall—1976, *Gregg v. Georgia*—which allowed state legislatures to reinstate the death penalty if they provided proper guidelines. Dissenting, Marshall wrote in *Furman*, “The American people are largely unaware of the information critical to a judgment on the morality of the death penalty. If they were better informed, they would consider it shocking, unjust, unacceptable.” And I said, “Unaware of *what* information?”

So I looked around, and my colleagues here in Chicago had done such a good job, both in journalism and law, in ferreting out the problems of the system in the Chicago area, in Illinois. [Then] I looked elsewhere, and I found sort of the poster boy for wrongful convictions: a white, standup guy named Ray Krone in Arizona.

He spent nine, ten years in the military—Air Force, security clearance, top 10% of his high school class; he was in the Boy Scouts and Little League. Never been arrested. He decided to get out of the military and stay in Phoenix, Arizona. He became a mailman. Stayed with the government. The little old ladies loved him, and, when he came by, they would give him pumpkin pie on Thanksgiving, that kind of thing.

He went for companionship, I guess, to a place called the CBS Lounge. There’s nothing in that, that’s a coincidence. [The] CBS Lounge . . . was a sports bar, and leagues form, bowling leagues in this case. There was a dart league that he joined, and he met a young woman named Kim Ancona, who was in her thirties—thirty-six, three children.

[She] had a boyfriend, [was] living with someone, had been married several times, [was] attractive. And he actually spent [time] in her company—not with her, but he spent Christmas night at a friend’s

house until 3:00, 4:00 in the morning. They became friends but really [were] not dating. And three days later, he had occasion to be at home. She had occasion to spend that night as the first night of managing the CBS Lounge. Kind of a big day for her. She's now the boss.

So midnight comes, and it was time to close up. And her friend said, "Do you want some help?" She said, "No, Ray is going to come by and help me." At 8:00 the next morning, the manager of the bar came, and he noticed that the door was open. He said, "It's a little strange," since this was the first night of his new manager. And he walked in, and nothing seemed to be upset until he got to the bathroom. The naked body of Kim Ancona was splayed across the tile—her head under the toilets, her feet under the faucet. She was cut in a series of stab wounds, which looked something like a necklace around her throat, and, at first, he thought that she had had her throat cut. In fact, the killing wound was the stab wound in the back.

He called the police. The police came down and cordoned everything off and began what appeared to be a classic, textbook crime scene and investigation. And they, of course, went to her friends. [Someone said], "Oh, the last person to see her was Kelly." Kelly said, "No, she told me that she didn't need any help, that Ray was going to help her."

Well, who is Ray? Well, let's go to her little diary. And they went to her diary and, sure enough, there's Ray Krone's name in it, so they went down to see Ray. Ray was about a mile away. Knocked on the door.

"Do you know Kim Ancona?"

"Well, sort of. We're friends."

"But girlfriend?"

"No, not really. What happened?"

"Well, she was murdered last night."

He was rather shocked. [T]he Sergeant, Gregory, who was looking at the crime, had taken evidence from the body and had found a bite mark right over her breast. Very clear, very distinct. And with that image in his mind, he looked at Ray's teeth, [which] were crooked. And he said, "I see you have crooked teeth."

[Ray] said, "I was in an accident."

He said, "Well, would you mind going down to the police station—it's routine—just so I can ask you some more questions?"

Off they go. On the way, [the Sergeant] stops to get a Styrofoam cup and said, "Do you mind biting into this right there?" Exhibit A. Without the lipstick traces on it. And Ray did. Fully cooperative.

[T]he forensic scientist for the Phoenix P.D. comes in and says, "Well, we'd like to take a dental mold, if you can. This looks like it's going to be a bite mark case." And [Ray] said, "Happy to oblige."

So he takes the dental mold—and he's brand-new, this forensic scientist—and takes it back to the morgue, and goes to the body laid out after the autopsy, and places the mold to see if it fits in the bite mark. Stands to reason. Except we *think* that he touched the body, sticking the . . . the mold into the bite marks. If you make a little scratch like that, you'll notice that your skin pops back, resilient. If you make a mark on a dead body, it's dead, and that mark stays. Now, we believe, he has created evidence that . . . will send Ray Krone to death row once, to the same prison on a retrial—all because of this little guy.

Okay, what happens? It took a lot to find out. And [the new forensic scientist] hasn't admitted it yet, but he doesn't know much about bite marks. He knew enough to call the best bite mark expert in the country, Norman Sperber, and he sends a picture of the photograph of the bite mark taken before he had placed the mold on it. [ ]Sperber takes fifteen minutes and says, "Well, you don't have a match." He said, "The incisors don't line up, and that's the first thing that you have to line up." "I'm sorry," he said, "but I'd keep watching."

From that point, follow the bouncing ball. [The new forensic scientist] comes back and does one of three things: [he] tells Noel Levy, the prosecutor heading up a team that is answering to the community and all the television cameras who are parked on his step every day—[he] tells Noel Levy, the prosecutor, and Levy says, "Forget it"; [the forensic scientist] forgets to tell Noel Levy; or the two deliberately suppress the evidence. One of those three.

The trial gets under way. A defense attorney is appointed; He is paid \$500 a day. He is paid \$5,000 for the year, leading up to and including the trial. He knows so little about bite mark evidence that he hires his family dentist to go with him to interview the expert that the prosecution has hired to nail Ray Krone with bite mark evidence—[all] because . . . one [expert] that said, "Oh, yeah, these are his teeth marks."

He was in Las Vegas. He actually was a flamboyant guy, and he loved being sort of a showman. So, the lawyer comes back, and he's talking to Ray after interviewing Dr. Rollins in Las Vegas. And he said, "Ray, are you hiding something from me? You know, they're your teeth marks." Rollins had completely turned him. He said, "Look, I think I can save you the death penalty. We'll get a lesser plea. But you've got to tell me the truth." And Ray says, "He's trying

to convict me right there. He doesn't believe me; he believes their expert witness."

So when it comes time for Rollins to testify, he makes a videotape and brings the videotape to court. And [what] is so unbelievable and effective [is] that the prosecutor submits it the day before they are to go trial. And the judge rightly says, "Too late. You know, it's not on the list, and you didn't give the defense time to adequately prepare." [The prosecutor] waits a week, and the judge lets it in. [I]t happens to be the shot of the body, the shot of the mold, dissolve, mold going into teeth—like that. It was a Rosetta Stone that would sway two juries and result in two convictions. Didn't need anything else, but along the way, why, you have suppressed evidence, [an] incompetent defense attorney, [an] overzealous prosecutor, [a] bad forensic scientist, and god knows how much [more].

[Krone] spends five years on death row. Straight-up guy. Think of it for just a moment: [you're] honest, never even had a traffic ticket. Now you're climbing into a gray jumpsuit to go into this gray, sterile, antiseptic-smelling place where there is no law, really, where the inmates rule. The world has come down on your shoulders. No one believes in you. God is punishing you in some way. How did it happen to me? He had to sleep with his head away from the bars, because they would come along and reach in with their knives. He got in fights, one after the other. [He] finally found religion and tried to help other people, other younger people. He had to get tough and learn to fight back.

[H]e had one hope: he had a cousin who picked up the cause on the outside. And his mother believed him; they always do. [T]he cousin started a newsletter and started raising some money; he had some money that *he* put up for the defense, and [he] just started raising support and questioning along the way. And it kept hope alive for Ray.

And sure enough, the state supreme court comes back and says, "Videotape, it should never have been allowed, so we're going to give you a new trial." New trial. Comes back. This time, they prepare the videotape in another way and submit it. Still use it. [Ray was] convicted for a second time, and he doesn't get the death penalty only because the judge thinks, "Well, something's fishy here," and gives him life.

Now, this happened in 1990. DNA and PCR, polymerase chain reaction, didn't really gain a household name and full use until the mid-90s, so DNA did not play a role in this case—until a defense lawyer picks up the case [who] was an expert in DNA forensics. He tries and



tries to go back to the t-shirt that Kim was wearing at the time, and he sends it to the Denver [lab]. Remember this: Colorado has a good lab. God knows, they've had enough practice out there. [T]hey get a good DNA sample, and it's a third-party sample. That's the basis of a lot of successful appeals.

And [the defense lawyer] goes to court with it. He presents it to the jury. Thought he had hands-down won the case. Verdict comes in guilty. He goes and talks to the jury, and they say, "Well, you know, yeah, we considered that. But that videotape—it's his; it's his bite marks. And that's what convinced us." And they reasoned everything from that videotape. Here's the insidious thing about a mistake: the cancer grows. They said, "If the bite mark is his, then there has to be an explanation for all the other evidence that seems to show his innocence. One, [even] if [DNA from] a third party *was* found on the t-shirt, she was a bartender. [Y]ou know how people kind of spray when they sit across the table? Either that or maybe [she] got the t-shirt at a rummage sale." Okay. Well, you don't have much hope in that regard, in that case.

So [Krone]'s back in jail. . . . Incidentally, [the lawyers] are the heroes in this saga, not just Ray Krone. Lawyers may get us there—an overzealous prosecutor—but the defense attorneys who pick up the cause bring tears to my eyes and are going to win this issue for us all. But [the defense attorney] goes back to the DNA, and he said, "Look, I'm going to get another one, a more solid one, and this time we're going to run it through a little machine called CODIS." CODIS is the national databank for DNA samples. Fifteen minutes [later], they get a match. That match leads to a sexual predator that lives within 600 yards of the bar that happens to be in jail.

They release Ray Krone from prison. And in the years that have followed, Ray goes back. He collected \$1.4 million from Maricopa County, and they have just convicted—who pled guilty, actually—the man who really did it. If the police had just continued searching for a day, for two days, without closing up when they had Ray Krone and had begun their efforts to build a case against Ray Krone, they may have saved millions of dollars to Maricopa County taxpayers. [The result was] ten years in prison for an innocent man.

I chose a second one, but I really won't take the time to tell you about that. It's an emotional experience because *peripeteia* hit. *Peripeteia* is a Greek word that describes that moment when all that you have believed in, you realize, is wrong. And I realized that our justice system does not work.

But the best quote that I came up with in my conclusion here was from Harry Blackmun, my favorite Supreme Court Justice, who, [after] twenty years [of] playin' it straight and drawing the constitutional finery to the language to support the death penalty—because he believed that it is legal and the Constitution allows it—suddenly, in *Callins v. James*, in 1994, came clean. He said, “[t]he basic question—does the system accurately and consistently determine which defendants ‘deserve’ to die?—cannot be answered in the affirmative.”<sup>3</sup>

“The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must [wrongly] kill some defendants [ ], a system that fails to deliver the fair, consistent, and reliable sentences required by the Constitution.”<sup>4</sup> So, after a lifetime of upholding the constitutionality of the death penalty, [Blackmun] said, “I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.”<sup>5</sup>

So we changed the title, you see, to a much more attractive title—*The Death Penalty on Trial* would not quite sell. And so it's just come out in paperback. I wanted to read it [here], because that's about the only reading it has had yet.

We went ahead and started doing documentaries. We did *The Death Penalty on Trial*, but we also are just finishing up. . . . Well, let me back up and say that, as a reporter over forty years, you'd walk into a jail and everybody was innocent, to hear them talk. And you'd get stacks of letters detailing their crime[s]. And now I look back and said, “My god, how many of those people were telling the truth? How many?” Because Anthony Graves—I don't know if you're involved in that case; you may be representing Anthony Graves—was proven to be innocent, but he remains in jail simply because the community and the prosecutor don't want to believe it. It's just the most egregious kind of problem that we have, growing as a cancer within our midst.

Now, the positive [side] is that you cannot drum, day after day, headlines into the American people [about] DNA exonerations without it having an effect, and I don't think it's too much wishful thinking [to think] that slowly we are eroding the notion that the death penalty is sacrosanct and is always going to be there. And Exhibit A that I offer is [that] Senator Sam Brownback—who is the darling of the conservatives, extreme in every respect—has now changed his stance on the death penalty. [This is] primarily because of the Schiavo case,

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3. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

4. *Id.* at 1145–46.

5. *Id.* at 1145.

Terri Schiavo, and the “Culture of Life” in which they say, “How can you be against abortion and for the death penalty?” So he’s against abortion, but now also against the death penalty with two exceptions—the police and something else. That’s the first step in the compromise that will happen, as it happened in Illinois. Some people, I guess, just want to kill, but ultimately, I think within five years, we’ll see success, thanks to people like Andrea Lyon.

Thank you very much.