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Practices of Law Enforcement and Prosecutors; Racial Discrimination; Juvenile, Mentally Retarded

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DNA testing and indigent criminal defense. We did get a bill out of the Senate to ban executing the mentally retarded.

It's so hard to get lay people and even lawyers in a state legislative body to focus on these issues. On the bill to ban executing the mentally retarded, it seemed like a no-brainer to me. But a number of my colleagues were asking questions, and sincerely, like, "Well you know, just like most people on death row get religion, if you give someone a test when they're on death row obviously they'll flunk the test to prove that they're mentally retarded." What most people don't realize in lay terms are the distinctions between a bad day and mental health problems, mental retardation, and then mentally insane. A number of my colleagues really didn't understand it. And I would suspect that in most state legislatures that may be a problem.

The challenge for you is simple. The activists have to get active. The demonstrators have to start demonstrating. The lawyers have to do their business lawyering. But, you have to be involved in a process so legislators can legislate. It's not enough to just impact the media and get these issues on the front page. You've got to get into the nitty, gritty mechanics of working state legislatures.

LARRY FOX:

One of the hallmarks of the concern about capital representation and the death penalty in America has been the outstanding scholars from the academy who have gotten involved so heavily in this effort. We've heard from Tony Amsterdam and Jim Liebman. The chair of our next panel is another one of those committed academics — Jim Coleman, a professor at Duke Law School who really does typify, in the best way possible, the mixing of the academic and the practical. Jim has represented capital defendants. Jim has chaired the Individual Rights and Responsibilities Section and has been a leader in the moratorium movement at the ABA and is now a leader in the moratorium movement in North Carolina. It is my great pleasure to introduce him. He will moderate this second panel.

MORNING PANEL B: Practices of law enforcement and prosecutors; racial discrimination; juvenile/mentally retarded.

JAMES COLEMAN:

Thank you. Our panel had a couple of telephone conference calls about this program today, and we agreed that we would just introduce the subjects that we're going to talk about and not try to exhaust them, so we'll see if that works.

Last week, during a Nightline program on the pardon of Earl Washington, the mentally retarded Virginia man who was wrongfully convicted of murder and rape and sentenced to death, Ted Koppel referred to the death penalty as a system where constitutional protections are sometimes confused with being soft on crime. He said it was a system where if you are a 22-year old farmhand with an IQ of a 10-year old and you're black and the victim is white, it may not only seem, but actually be, impossible to get a fair trial. As many of you know, in his dissent in *McCleskey v. Kemp*,¹⁷ Justice Brennan said pretty much the same thing about what a lawyer would have to say to this client in a capital case.

Shortly before his death Justice Lewis Powell, a former ABA president, called the current system of capital punishment an embarrassment for our profession, for the judicial system and for the country. That was Tony Amsterdam's message; that was the message of the first panel and that will be the message of this panel.

As lawyers, public officials and citizens, we have a responsibility to educate ourselves and to educate the public about the administration of the death penalty and to take whatever actions each of us as individuals and all of us collectively can take to make capital punishment and how it is administered fair and unbiased.

Jim Liebman has described the purpose of the two panels this morning. In the second segment of what amounts to an educational program, we're going to discuss some of the things other than inadequate representation of counsel and failed judicial oversight that make the system of capital punishment unfair, arbitrary and discriminatory.

We are fortunate to have an extraordinary panel for that purpose. I will briefly introduce each member of the panel and then we'll get right into the program. The biographies of all the panelists are included in your materials so I won't try to be exhaustive in this respect.

Ken Armstrong is the Legal Affairs Writer for the Chicago Tribune. He co-authored a five-part series on the death penalty in Illinois that Governor George Ryan cited in declaring a moratorium on executions. Mr. Armstrong will provide an overview of the death penalty system from the perspective of someone who has observed it closely but who has not been a part of that system.

David Baldus is a professor of law at the University of Iowa Law School. For the past 25 years, he has studied arbitrariness and dis-

¹⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

crimination in the use of the death penalty in America. He and statistician George Woodworth, also from Iowa, have conducted some of the leading empirical studies on the issue, including the extensive study of race of the victim discrimination in Georgia that was before the Supreme Court in *McCleskey vs. Kemp*. Professor Baldus will discuss race and the death penalty.

David Bruck is a private lawyer in Columbia, South Carolina. Since 1980, he has specialized in capital defense. He serves part time as the Federal Death Penalty Resource Counsel to the federal defender system nationwide. He will discuss the federal death penalty, and also the application of the death penalty to juveniles.

Mike McCann is the elected District Attorney for Milwaukee County, Wisconsin, a position he has held for almost 32 years. Mr. McCann will talk about prosecutorial misconduct.

Larry Marshall is Professor of Law at Northwestern University School of Law in Chicago, where he serves as Director of the Center on Wrongful Convictions. Larry has been involved in the exoneration of seven men off of Illinois' death row and has studied the causes and prevention of wrongful convictions. He will discuss the systemic nature of the problems of race, prosecutorial misconduct and mental retardation in the administration of the death penalty.

And finally, Barry Scheck is a Professor of Law and Director of the Innocence Project at the Benjamin Cardozo School of Law in New York. He and Peter Neufeld have been pioneers in the use of DNA and have used it to gain the release of 42 innocent men wrongfully convicted and sentenced to prison or death. Professor Scheck will discuss how we might learn from the extraordinary number of wrongful convictions that now have become almost commonplace.

KEN ARMSTRONG:

As Jim mentioned, I've been asked to provide an overview of the problems with the death penalty — principally in Illinois — and to do this in 5-7 minutes. This will not be easy, but I'll give it a shot.

Illinois has established a troubling track record of exonerating about as many death row inmates as it has executed. This pattern has continued through the years, with one slightly going ahead of the other, but it's been fairly constant. At the Chicago Tribune, we decided that we wanted to take a look at why this was occurring, why the State was continuing to condemn innocent people. We

decided to take a comprehensive look at all 285 cases where someone had been sentenced to death in Illinois and to look where there might be factors that popped up from one case to another.

What we found is that the system is absolutely riddled with problems. It is riddled with the very elements that regularly contribute to wrongful convictions. These elements are well known to defense attorneys. If you don't know them, I recommend the book co-authored by Barry Scheck, *Actual Innocence*.¹⁸ It lays those problems out chapter by chapter. That book, in many respects, is a broad look at some of the things that we had addressed in Illinois.

An example: defense attorneys. In 33 cases in Illinois, a defendant was sentenced to death after being represented at trial by an attorney who has been disbarred or suspended. One attorney was appointed 10 days after he got his law license back after being suspended for nine months for incompetence and for lying to clients. Another attorney has the dubious distinction of having been the only attorney in Illinois to be disbarred twice. He was disbarred once and reinstated despite concerns about his mental stability and drinking. Then he was disbarred again. In the interim, he represented 4 people who were sentenced to death.

We also found that the kinds of evidence that attorneys know to be unreliable and which frequently lead to wrongful convictions are used prevalently in Illinois. These include the use of jailhouse informant testimony and visual hair comparison evidence.

We also found a number of items which touch upon the issues of racial bias and practices by law enforcement and police which are clearly improper. We found that 35 African American defendants in Illinois had been sentenced to death in trials where the jury was all white. This occurred because of a blend of unscrupulous tactics by prosecutors and also involved the issue of racial bias. Usually in these cases, the prosecution used its preemptory strikes to clear the jury pool of African American jurors. In one case, the prosecution used all 20 of its preemptory strikes to remove blacks from the jury pool. In another case, the prosecution removed 16 blacks; and in another case, it removed 11. The pattern was quite pronounced.

In cases where you had an interracial crime — where you had a black defendant and a white victim — this was even more pronounced. In 21 of 65 cases that fit that profile, the jury was all white. That's nearly a third of those cases.

¹⁸ ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY ACCUSED (2000).

Such racial discrimination during jury selection has long been recognized as being improper. But that's a prohibition that's only enforced haltingly by the courts. In Illinois, despite those 35 cases of all-white juries, there's only been 1 reversal in a capital case because such racial discrimination had occurred during jury selection.

Police misconduct: At present, there are 10 men on death row in Illinois who have alleged that they were put there through a confession that was tortured out of them. There are common elements to these 10 men's cases. They claim that they were tortured by police officers working under a now infamous commander in Chicago named John Burge. He has since been fired. They claimed that they were tortured through such means as electroshock; through being nearly suffocated by having a plastic typewriter bag put over them; by being stripped down where they had no shirt, then having their chest placed against a hot radiator so they would have burns which would not be evident when they were dressed but were obviously quite evident when they were not.

These cases have a certain amount of credibility because the department itself has acknowledged that police working under Commander Burge did engage in systematic torture. The Office of Professional Standards, which is an internal watchdog group within the Police Department, determined in 1990 that systematic torture did occur. Ten years later, there has been very little movement on those cases, to reopen them and see if these men are on death row through false confessions that were tortured out of them.

This may be Pollyanna-ish on my part, but it would seem that with such report in hand, police and prosecutors would want to reopen cases and see if innocent people were on death row because of torture tactics used by these police officers. That hasn't happened. They have fought them case-by-case. Some of these men have evidentiary hearings pending, but of those 10, none has as yet received a new trial.

Prosecutorial misconduct: In Illinois, more than 10% of the people who have been sentenced to death received new trials or sentencing hearings because prosecutors committed misconduct. Misconduct, broadly defined, could be anything from improper argument, improper cross examination, discovery violations, or other things along those lines. Or it could be even more troubling misconduct. Before doing our series on the death penalty in Illinois, we looked at the phenomenon of prosecutorial misconduct nationally. We found 381 cases nationally where a person convicted of

homicide later received a new trial because it was found that prosecutors had concealed evidence that was exculpatory — that could conceivably have led to an acquittal — or because they knowingly used false evidence. These are widely considered to be the 2 most egregious forms of prosecutorial misconduct and the ones that are most clearly likely to lead to wrongful convictions. Sixty-seven of those 381 cases involved the death sentence, and they ran across the country. This is not an issue or problem that is unique to Illinois or any other state. It's a national phenomenon that can be found everywhere.

After we finished our work on Illinois, we went and did a 2-part series on the death penalty in Texas. We were prompted by a couple of factors. One is that Texas is the nation's busiest executioner. The other is that Governor Bush had been on record for quite some time saying that the problems in Illinois were unique and did not apply to his own state. We did not find that to be the case. You will find just as many incompetent defense attorneys in Texas — and you've already heard several anecdotes today about some of those attorneys, the sleeping attorneys and what not. We found that in a third of the cases where a person had been executed under Governor Bush, that person had been represented at trial or on direct appeal by an attorney who has been disciplined. That's fully 1/3 of the defendants in those cases. We also found that the types of unreliable evidence I've described were equally prevalent in Texas.

I don't want to use up any more time, but I do want to say that again that what we found in Illinois we also found in Texas. We're quite confident, based upon what you've heard today, that you'd find it in Florida, Alabama, on and on and on. These problems are not unique to Illinois and they're not unique to Texas.

DAVID BALDUS¹⁹:

Good morning. My topic this morning is race discrimination in the administration of death penalty in America. I will focus in particular on the effects of discrimination during the last 15 to 20 years, during which time most of the inmates currently on death row were sentenced to death.

You may naturally and properly ask what we (my co-author George Woodworth and I) mean by race discrimination. We define it in terms of statistically significant race disparities in the rates

¹⁹ Remarks co-authored by George Woodworth, Dept. of Statistics and Actuarial Science, University of Iowa.

at which defendants who are similarly situated in terms of their criminal culpability and the severity of their crimes are sentenced to death. By culpability and the severity of crimes, we refer to the level of violence and the aggravation in cases, such as torture or multiple victims.

When the focus is on race of defendant discrimination, the factual issue is whether black and non-black defendants, whose crimes are comparable in terms of the severity of the offenses, are sentenced to death at comparable rates. When we observe significant disparities in the sentencing rates for these 2 groups, we refer to those race effects as compelling evidence of race of defendant discrimination.

When the focus is on race of victim discrimination, the question is whether killers of black victims and non-black victims, whose crimes are of comparable severity, are sentenced to death at comparable or different rates. If we observe significantly different rates, we characterize those race effects as compelling evidence of race of victim discrimination.

There is today a substantial basis for concern about race discrimination in the administration of the death penalty. For example, research in Georgia in the 1970's, and in Kentucky, New Jersey and Philadelphia in the 1980's and the 1990's, clearly documents the risk of race of defendant and race of victim discrimination. Specifically, our Georgia and Philadelphia research suggests that such discrimination can produce a 25 to 30% excess death sentencing rate compared to what we would see in an even-handed system.²⁰ In 1991, the New Jersey Supreme Court adopted an empirically based system of oversight that allows it to evaluate discrimination claims.²¹ In 1992 and in 1994, the House of Representatives passed a Racial Justice Act that would have permitted defendants to support claims of race discrimination with generally accepted statistical methods. However, both of those measures failed in the Senate.²² In 1992, the Kentucky Legislature authorized an empirical study of its system. Then in 1998, on the basis of

²⁰ DAVID C. BALDUS, GEORGE WOODWORTH, AND CHARLES PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY 154-55 (1990); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, and Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 CORNELL L. REV. 1638, 1727-28, 1766 (1998).

²¹ State v. Marshall, 613 A.2d 1059, 1063 (1992).

²² David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., *Reflections on the "Inevitability" of Racial Discrimination on Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 376-79, 426-30 (1994) [hereinafter *Reflections*].

those results, it approved a Racial Justice Act.²³ In 1995, when the New York Legislature reintroduced the death penalty, its legislation requires the Court of Appeals of New York to review each death sentence imposed for evidence of racial disproportionality.²⁴ In 1999, the Nebraska Legislature funded a comprehensive proportionality study of its system, and earlier this year, the Governor of Maryland did the same thing for his state. In Illinois, the Moratorium Commission is currently considering options to study race questions, and in 1999, the United States Department of Justice undertook a study of race and geographic proportionality in the use of the federal death penalty.

This pattern of decisions in Congress, the Justice Department and in State legislatures, courts, and governors' offices reflects a continuing concern that the risk of racially influenced death sentences and executions is real.

What, then, are the opportunities that a moratorium would present on this issue? We think there would be 2 important opportunities. First, the pause in executions would permit government officials and moratorium commissions to undertake systematic investigations of their systems, free from the pressure of impending executions. What we need in the states are studies like those commissioned in Nebraska and Maryland that provide sufficient time and resources to do a careful and thorough analysis. This is important because nearly all of the existing research that's been done to date is dated. Moreover, there are no systematic studies at all in the states that currently have the highest rates of execution. States should avoid slap-dash investigations that are principally based upon the opinions of the officials who run the system and consider little or no data about its actual operation. It's also crucial that any such investigation reach back far enough in time to embrace the defendants currently awaiting execution.

A second opportunity for accessing the impact of race will exist in those states where systematic race disparities have, in fact, been documented. In such jurisdictions, the investigation should go one step further to identify the individual death row inmates whose death sentences are likely to have been the product of race discrimination. Even if a systemic study establishes that there is a 30% race based excess death sentencing rate in a given jurisdiction, one cannot, without further analysis, identify which defend-

²³ KY Rev. Stat. Ann. Sec 532.300.

²⁴ NY Crim. Proc. § 470.30(3)(b).

ants currently on death row would probably have received life in an even-handed system.

This may appear to be a daunting task, but there is good precedent for just that kind of inquiry in employment discrimination law that's relevant to and could be applied to this question in the capital sentencing context.²⁵ If it were applied, and the death sentences that appear to have been the product of race discrimination were vacated, the public, upon the resumption of executions, would have confidence that the inmates so executed will not have died because of their race or the race of their victim.

In conclusion, we believe that concerns about race discrimination in the use of the death penalty are still highly relevant in America today. We also believe that a moratorium on executions would provide the opportunity for a sober appraisal of the extent of the problem and how any adverse effects of race discrimination might be purged from the system.

DAVID BRUCK:

I think it's worth recalling that in 1997, when the ABA House of Delegates debated whether to approve the call for the moratorium, the Deputy Attorney General of the United States came before the House of Delegates to oppose the resolution. She suggested that it might have escaped the attention of those who supported the moratorium resolution that it would apply not only to states like Alabama, Texas, Georgia and South Carolina, but would also apply to the federal government, which had also reenacted post-*Gregg* death penalty statutes and was starting to apply them. According to the Deputy Attorney General, this showed the overbreadth of the proposed moratorium proposal, because the federal government was doing everything right. She said that the federal statute had been tweaked to insure that relatively high-quality legal representation would be provided to defendants in federal capital prosecutions. Moreover, only a year or two before this debate, Attorney General Reno had instituted a 3-tiered review process to guide and inform the exercise of prosecutorial discretion—which, as all of the studies by David Baldus and many others have shown, is perhaps the single greatest entry point of racial disparity and racial discrimination into any death selection system. The federal government also exempted from the death penalty people with mental retardation (so long as we could identify them), and people under the age of 18. So what was the beef with the federal system?

²⁵ See Reflections, *supra* note 22, at 398-401.

Why, the government asked, did there need to be a moratorium that would cover the federal system?

Even then, those of us who had been tracking the resumption of federal capital prosecutions had already noticed, and the media had begun to notice, that despite all the best intentions, the federal government's death penalty prosecution record was remarkably monochromatic by race. Indeed, before Attorney General Reno instituted the current death penalty protocol for reviewing and checking prosecutorial discretion, all of the first 10 people she had authorized for capital prosecution around the country were black. Concern over that fact had impelled the promulgation of a sophisticated and somewhat cumbersome review process that had to precede every decision by the Attorney General herself to allow a U.S. Attorney to seek the death penalty. The procedure created by the Attorney General involves the production and multi-tiered review of a prosecutorial memo that's as thick as a small phone book in many cases. This was designed to ensure that there wouldn't be the sort of racial disparity that Dave Baldus just described, and that has so long infected the states' death-selection systems.

Well, of course there has been no moratorium on the federal death penalty. In 1994, Congress saw fit to enact the largest expansion of the federal death penalty in the history of the republic. In the 5 1/2 years since the current administration promulgated its "state-of-the-art" system for review of prosecutorial discretion under the 1994 legislation, the Attorney General has personally reviewed well over 600 death penalty cases, and has authorized the death penalty in about 150. There are now 19 people on death row after having been sentenced to death by federal courts.

Now, just a month ago, the Department of Justice released a detailed accounting of what has occurred since this highly sophisticated review process went into effect. It turns out that the racial lopsidedness of federal capital prosecutions is more extreme than anything that we have seen in the modern era in Alabama, Texas, Louisiana, South Carolina or any other state that you could name. The figures show that about 75% of the people that have been indicted for death-eligible crimes and evaluated by this process at the Justice Department in Washington have been members of minorities—about half African-American and the remainder Hispanic and a small number of Asian defendants. Seventy nine percent of those actually on death row are members of racial minorities. Now

you can look wherever you want, but you will find no state that has compiled a record like that.

To her credit, Attorney General Reno ordered, and last month the Department released, an extraordinary head count, broken down by race, of exactly how those cases went through the system. Attorney General Reno made the statement in announcing these numbers on September 12 that an even broader analysis “must be undertaken to determine if bias does in fact play any role in the federal system.”

Tony Amsterdam referred, at the beginning of the morning, to the unknowable nature of this project of divining by law the living from those who should be dead. We now have an admission by the Attorney General of the United States that there is an unprecedented degree of apparent racial disparity in the administration of the most sophisticated, most expensive, most elaborate death-selection system that we have ever seen in this country — and also that the government does not know why.

A couple of explanations spring to mind. One is that the federal death system just may have singled out the folks who commit federally death-eligible offenses. In other words, the system is fair, but it just so happens that mostly members of minorities commit these crimes. We cannot dismiss that possibility out of hand. It would simply mean, if it is true, that what we are witnessing is the first encounter between the federal “war on drugs” and the death penalty. We already know that the federalization of the drug war has had a disproportionate impact on black and other minority Americans, and it could be that now we are starting to see that show up in the death penalty system. That is the most charitable explanation for why these numbers are the way they are.

Or the explanation may be plain old-fashioned disparate treatment by race by prosecutors and by investigators all the way through the system.

Many of us who have worked in the system for a while suspect that it’s probably some of both.

Whatever the reasons for it are, this is clearly an intolerable state of affairs and it’s one that shows how wise the American Bar Association was to cast the moratorium net broadly, and to lay the burden of proof on all of those that want to keep the death-selection system operating.

The federal death penalty system we have now is unlikely to get much better than it has been. It could be that there will be little more tinkering by the federal government, a few more nips

and tucks at the edges of how the selection system works. But the current system is the product of 25 years of the work of the very best minds in the criminal justice system, and this is the best, apparently, that they have been able to do.

In the meantime, the first federal executions are now finally scheduled. So the question is raised very starkly now, not state-by-state, but on behalf of this entire nation: Is this the face that we want to present to the world? Is this what the United States of America stands for? And that is the question raised by the ABA's call for a moratorium.

Unfortunately, these sorts of questions are often answered by pointing to this or that terrible case. Of course, the most terrible case in the federal system is the Oklahoma City bombing, and the death sentence that was imposed on Timothy McVeigh. We all appreciate how difficult the politics would be of any moratorium that got in the way of that very politically-popular sentence.

When confronted by arguments based on a single case, it is our job as lawyers to point out that what we have here — viewed most charitably — is something like an airline whose planes don't *always* crash. You do not judge an airline by the fact that every now and then one of its planes takes off and lands the way it was designed to. You look at whether the rate of error, the rate of unfairness, is acceptable or not. And when you have a system so fraught with this many problems, I think it's fair to say that you've got in our current death-selection system the legal equivalent of an airline on whose planes neither you nor I would ever think of flying. What is missing from this system is some kind of FAA with the power to ground those planes, and I suggest that that is the very valuable function of the ABA's call for a moratorium.

The issue of juveniles is another issue on which the ABA has spoken, and spoken much earlier than it did on the question of the moratorium. Tony Amsterdam ran off the rogues' gallery of countries, of human rights violators, in whose company we've placed ourselves by our pursuit of the death penalty for people who were of high school age when they committed their crimes. It's sobering to realize that even China — far and away the world's leader in judicial executions — abolished the death penalty for offenders under the age of 18 in 1997. They don't do it anymore, and that just leaves us, along with Bangladesh and Yemen and a couple of others who still do it.

There is an aspect of this that illustrates the wisdom of Tony Amsterdam's point about why a moratorium is needed for any sort

of meaningful reform. All the U.S. jurisdictions that have most recently enacted death penalty laws have exempted juvenile offenders when they did so—the federal government, New York, Kansas, and a few others in the 1990's. In this era, it seems to always be the judgment of American legislatures that we should not become international human rights violators, and should at least exempt kids. And yet scarcely a single amendment to impose new age limitations has passed in any state that already uses the death penalty. The reason for that is well explained by Tony Amsterdam's analogy about a football game. You cannot shorten the field in the middle of the Super Bowl. There's too much competitive juice flowing. People are too angry, and too easily focused on the facts of this or that horrible crime, including ones committed by juveniles. The democratic process breaks down over such cases, and a sober look at the underlying policy issue does not occur.

This is true even for what seem to be the no-brainer issues, like whether or not we ought to join China in abolishing the death penalty for kids. For a dispassionate evaluation of even such modest reforms, the whistle must first be blown, and the whole competitive enterprise of sentencing people to death must be called to a halt. I think that our country's experience of the seeming immutability of the juvenile death penalty further illustrates the tactical wisdom of the moratorium initiative that the ABA has chosen to pursue—an initiative I hope will be advanced by the work we do here today.

MICHAEL McCANN:

It's a real pleasure to be here to share this enterprise and the importance of what the American Bar Association is doing here.

I am a prosecuting attorney. I'm in my 32nd year as a prosecuting attorney, and in our discussion before this, I was asked to address the issue of misconduct by district attorneys. There's an indication from Professor Liebman's very thorough study that 16% of the cases where there have been total reversals are traceable to prosecutorial suppression of evidence and an additional 3% of total reversals are traceable to prosecutorial misconduct. Those results are truly disturbing. They mean that about one out of five of total reversals in capital cases are traceable to misconduct by the sworn District Attorney or one of his or her assistants.

Now we know what that can be—the failure to disclose exculpatory evidence, the failure to provide to the defense the name of a witness when that witness would provide evidence which would contravene the effect of the attempt of the prosecutor to secure a conviction, the failure to provide the defense with a statement by a

prosecution witness which would have an impeachment effect, *e.g.*, where the witness gave a description of a person who assaulted or attacked him or that he observed a slaying and the witness' first description to the police is inconsistent with the actual appearance of the defendant and somehow that statement is not provided to the defense. It may be simply a gross failure of the District Attorney to pursue evidence of an exculpatory nature which is in the hands of the police. And then there are such blatant violations as striking blacks from a panel due to their race; a fevered final argument that puts the jury out of the orbit of sensible judgment; or an unfair argument as to what hair evidence is. Those who follow this forensically all know that hair evidence is not totally indicative of guilt, although it may be useful circumstantial evidence.

The law is very clear. *Brady vs. Maryland*²⁶ held that upon request, a District Attorney must provide exculpatory evidence to the defense. What about when there's no request? That answer has been answered in *United States vs. Agurs*,²⁷ which held that the prosecutor must voluntarily provide exculpatory evidence even if the defendant has not asked for it. Under *United States vs. Bagley*,²⁸ if the prosecutor has evidence that would undercut a particular witness that must be provided to the defense as well.

If the District Attorney pleads that he wasn't aware that the police had evidence of an exculpatory nature, he or she will be held accountable for it, because any evidence in the possession of the police is in effect, by law, in the possession of the prosecutor. So a District Attorney who says, "Well, I really don't want to pursue this evidence or see what's really in the possession of the police" is engaging in misconduct.

In *Wood vs. Bartholomew*,²⁹ the question arose whether there could be circumstances in which inadmissible evidence that could never be presented to the jury nevertheless ought to be given to the defense. My reading of *Wood vs. Bartholomew* indicates that there are such circumstances.

Why would District Attorneys engage in misconduct in capital cases? Professor Amsterdam has touched upon it. I am an elected official. I'm very fond of my office. I can understand a keen desire of a prosecutor to retain his or her office. The pressure on the District Attorney is particularly great in a high profile case, a homi-

²⁶ *Brady v. Maryland*, 373 U.S. 83 (1963).

²⁷ *United States v. Agurs*, 427 U.S. 97 (1976).

²⁸ *United States v. Bagley*, 473 U.S. 667 (1985).

²⁹ *Wood v. Bartholomew*, 516 U.S. 1018 (1995).

cide or a multiple homicide so grievous and so aggravated that there is a hue and a cry and a determination to pursue capital punishment. In some communities, this pressure may be greatest where the victim is an on-duty, perhaps popular, police officer or a child slain by a paroled individual with a prior record of sexual assault on children. Sometimes, a case such as that can fever a community, large or small, particularly if there's agitated press about it. One can see the pressure on a District Attorney and the importance of having men and women in that office who can resist that pressure.

And of course, being a District Attorney handling such cases is oftentimes a stepping stone to higher office. Many District Attorneys have ambitions for becoming judges or state senators or congressmen or governors or United States Senators. The handling of a high profile capital punishment case resulting in a conviction and the execution of the defendant appears, at least to some prosecutors, as an attractive way to advance their political interests.

Of course, some simply don't want to lose their income. Their job is important to them and they feel that if they give this evidence to the defense in a high-profile case, somehow that might result in a not guilty finding which would inure to the disadvantage of the District Attorney.

Then, there are some District Attorneys who are simply incompetent. I can recall reading a Wisconsin case involving a young District Attorney, and the case basically read as follows: The district attorney — after calling a certain number of witnesses — announced to the Court that this would be his last witness, whereupon he called the defendant to the stand. Of course, the judge immediately stopped the proceedings, summoned the District Attorney and the defense into the chambers and excoriated the District Attorney, and then went out and told the jury that they were to ignore what the District Attorney had just said and he proceeded with the case. The conviction in that case was reversed. It wasn't harmless error. This clearly involved an incompetent District Attorney, even as there are incompetent defense attorneys.

So, some of the 16% of the errors due to prosecutorial misconduct involve incompetent District Attorneys. I suspect, however, particularly when clearly exculpatory evidence is involved, that the District Attorney — either by ambition or by the fever of the fight — has determined to act egregiously in violation of his or her oath and to undermine justice in a particular case.

Of course, there are many beautiful summonses to a District

Attorney to be a person of high character. Who cannot feel their hearts warmed by the words of *Berger v. United States*:³⁰ "The United States Attorney is the representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and whose interest therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done." In our state, as in many other states, there's a case, *O'Neill vs. State*,³¹ summoning a District Attorney to his or her duty: "A prosecutor should not act as a partisan eager to convict but as an officer of the court whose duty it is to aid in arriving at the truth in every case. The district attorney is not a mere legal attorney. He is a sworn minister of justice."³² That's the summons to District Attorneys and District Attorneys know it.

There are criminal justice standards for the prosecution. Standard 3.8 sets forth the special responsibility of a district attorney as a prosecutor to make disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. Standard 3.11 states that a prosecutor should not intentionally fail to make timely disclosure to the defense at the earliest feasible opportunity of any evidence tending to negate guilt or mitigate damage.

So the rules are very clear. There can be little doubt about what the rules are, what the law is and what the ethical summons is, what the guidelines are. And yet, the problems continue.

What can we do? What can be done? This gets to the advantage of a moratorium. What would a community, a legislature consider during a moratorium? First, to borrow from the forensic field, there should be autopsies on the cases that went wrong. There should be a thorough autopsy of each case in Cook County about which Mr. Armstrong wrote — not to punish necessarily, but to find out what happened. I frequently get the Chicago Tribune, and no District Attorney of conscience could read any of those cases and not be severely troubled. We need to find out why there is so much prosecutorial misconduct. What is going on? We need to do an autopsy to determine what there is in the system that would seem to cause so many miscarriages of justice to rest with the District Attorney.

What about creating a possibility of civil liability for District Attorneys? Should a District Attorney who conceals evidence be

³⁰ *Berger v. United States*, 528 U.S. 1065 (1999).

³¹ *O'Neill v. State*, 207 N.W. 280 (1926).

³² *Id.* at 281.

subject to civil suit? The United States Supreme Court in *Imbler v. Pachtman*³³ held that prosecutors have civil immunity that extends basically across the board.

I hope I'm a conscientious District Attorney. I would not want to be subject to civil liability. Mistakes are made. We would be constantly, understandably, the subject of suits if we did not have civil immunity. I don't think there's an answer in expanding civil liability.

What about criminal prosecution? In Illinois, there was a criminal prosecution — very rare — of an Assistant District Attorney in the Rolando Cruz case after Cruz's case went up 3 times to the state supreme court and his conviction was overturned. There were many questions about the conduct of police and apparently about an Assistant District Attorney. Eventually, Bill Kunkel, a well-known former prosecutor in Illinois (who prosecuted John Wayne Gacey — a multiple serial slayer in Chicago), was chosen as a special prosecutor and prosecuted an Assistant District Attorney in the county where the Rolando Cruz case was brought. That Assistant District Attorney was found not guilty.

There is no Constitutional problem with criminal prosecution of District Attorneys. But I am not sure such prosecution is a sound idea. It could be considered.

Certainly, there should be statutory, clear-cut discovery rules. If that doesn't already exist, a legislature should consider that during a moratorium. The judge should have the capacity to order discovery specifically. And where there is a bad history in a District Attorney's office or in a state, there should be a special master to direct discovery. Such special masters are appointed in some complex civil cases; why not in a capital punishment case? A special master, appointed by the judge, should be a respected, independent lawyer with nothing at stake who would aggressively ensure that there is full discovery by the District Attorney to the defense. And, of course, a state statute could require each District Attorney internally to have a clear discovery policy.

State legislatures rarely control the discretion of a District Attorney. My state, Wisconsin, controls my discretion in only 2 areas. One, in how I handle a drunk driving case. Secondly, in how I handle domestic violence cases — reducing the discretion of the District Attorney simply to dismiss such cases.

Why not require a written policy on the District Attorney's of-

³³ *Imbler v. Pachtman*, 424 U.S. 409 (1976).

fice, subject to scrutiny by the Attorney General, specifically laying out that there will be full discovery and what the internal disciplinary penalties will be for any assistant district attorney who doesn't follow that policy.

For years, our office has followed an open-file policy in every case that we prosecute — from misdemeanor to first degree murder. I personally prosecuted the Jeffery Dahmer case, and every piece of paper we had on that case was provided to the defense. When that happens, it very much reduces the possibility of there being a miscarriage of justice.

Few states, if any, provide discovery by deposition, except where a person is about to die and there must be compliance with the 6th Amendment right to cross examination. If you have a reluctant District Attorney, perhaps a legislature can — during a moratorium — provide for discovery by deposition either because of a bad record or because of abuses within the state.

A final area involves sanctions by the bar and the judiciary. Where are the bar associations? What has happened to those district attorneys who have engaged in egregious misconduct? Often, they are not named in decisions.

Why don't judges name the prosecutors who concealed evidence? Wouldn't that have somewhat of an effect? Where are the judges? If a prosecutor is in violation of his or her oath with the life of a human being at stake and chooses to conceal exculpatory evidence, should not that person be branded in a report that will remain for his grandson to read or his granddaughter or grandson? Wouldn't it have some prophylactic effect for that prosecutor to be stigmatized? We're talking now about the lives of human beings.

Why isn't the bar acting? Why doesn't the bar provide that if there's a description of concealment in any type of case, that that automatically will bring the attorney involved before the bar. And if that doesn't happen, then the judges themselves should be doing it and pushing at it.

How about the possibility of a rule of one kick at the cat — that if a prosecutor in a capital punishment case conceals evidence and the case is overturned, the prosecutor doesn't get another shot? If a prosecutor is going to engage in concealing evidence in a capital punishment case and it's overturned, should the District Attorney really have the authority to say, "I concealed it the first time and didn't get away with it, but I'm going to try him a second time?"

Those are some of the issues that could be considered during a moratorium — during which we could get away from the heat that Professor Amsterdam so capably discussed, to withdraw and to give these issues consideration.

In the material that introduces me today, the Dahmer case is cited. Of course, I provided that material. Any time when I'm speaking to different groups in our state, I'll profile in the introduction prominent cases that resulted in convictions. A case I never include in such a profile is *State vs. Hemauer*,³⁴ where we convicted a man and put him behind bars for 8 years. I didn't try the case personally, but I was closely following the prosecution. After 8 years in prison, we found out that he was innocent and he was released. He got some money for it, but he had lost 8 years of his life. He had been stigmatized as a sexual assailant who attempted a murder. It was maybe a precursor of DNA through blood typing of secretors with semen. He was released finally. The evidence against him was strong, but he was innocent.

Every possible expansion of DNA should be made available to defendants, and I can't understand why a legislature wouldn't step forward, be willing to do that or why a prosecutor should resist it. Each prosecutor has taken an oath and is summoned to pursue the truth in every case.

The names are well known: Darby Tillis, 8 years between conviction and exoneration; Perry Cobb, 8 years between conviction and exoneration; Joseph Burrows, 5 years; Rolando Cruz, 10 years; Alejandro Hernandez, 10 years; Dennis Williams, 17 years; Verneal Jimerson, 11 years; Carl Lawson, 6 years; Gary Gauger, 2 years; Ronald Jones, 10 years; Anthony Porter, 16 years; Steven Smith, 13 years; Steven Manning, 7 years. These 13 men from Illinois stand among the 88 men and women who have been exonerated from death rows in this country. These are people whom juries once said, beyond any reasonable doubt, were guilty of the most heinous crimes imaginable. These are people whom juries or judges said, beyond any reasonable doubt, were deserving of the ultimate punishment of death. Yet, now these people have been exonerated — they have been released based on the evidence.

What lessons can we learn from these cases? That is one of the primary focuses, in my view, of the ABA's call to action for a moratorium. We have this epidemic of wrongful convictions. We have this epidemic of errors. Something must be done. The whole

³⁴ *State v. Hemauer*, 218 N.W.2d 342 (1974).

point of the death penalty is supposedly to show that society values innocent human life so much that we will invoke the ultimate punishment. How can we perpetuate that system when we know, with certainty, that our death penalty inevitability takes innocent human life in the name of showing how much it values innocent life?

Just as the Illinois cases have spawned the Illinois moratorium, the 88 cases must spawn a national moratorium. I know that in Texas, for example, as Senator Ellis said, support for the death penalty is great. But this is not about whether you support the death penalty. It is about whether you support the death penalty only for the guilty. Do you like the idea that when the innocent are condemned and executed, the guilty are not brought to justice — they often live a carefree life out there and, in many cases, murder again? That is one of the costs that we need to take into account.

Because the evidence from Illinois is so overpowering, those who strongly support the death penalty in its current form have struggled to make arguments to deflect the lessons from Illinois. First, some prosecutors and some death-toting politicians have argued that the Illinois experience really shows that the system works. That if we freed 13 people from death row, while only killing 12, that shows that we provide exceptionally close scrutiny of the cases and that mistaken executions will never happen. This is the same argument that is mounted against Jim Liebman's study — that high reversal rates show a system so committed to weeding out error that we can be secure that those defendants who are actually executed are unquestionably guilty and unquestionably received fair trials and sentences.

The argument is complete and utter hogwash. The way you can see through the argument is by looking at the circumstances through which these exonerations have come about. These people were exonerated through some extraordinary events — you can call it dumb luck; you can call it serendipity; you can call it hand of God; you can call it a miracle, but you can't call it the system working.

In some of these cases the people were exonerated because they were lucky enough that the victim in the case wasn't simply murdered but was also raped. We've had multiple cases where if the victim had simply been murdered, there would have been no DNA available for testing, and the defendant who was wrongly convicted would have gone to death. So, the only reason the person is alive today is because there happened to have been some semen

involved in the case. But for that semen, the innocent defendant would have ended up being dead.

Is that the system working?

In one of the Illinois cases, some semen from the rape kit happened to be left on the side of a test tube. The swab itself had already disintegrated because 12 years had passed, but on the side of the test tube, there was a little bit of material left that could be tested. Again, you can call it a lot of things, but you can't call that the system working.

I used to think the system worked real well. Even as I worked in this area, I had some confidence that the unthinkable – the execution of the innocent – would never happen. That confidence was shaken by the very same thing that shook Governor Ryan's confidence, and that was the Anthony Porter case.

In the Anthony Porter case, Porter had been convicted of a double murder in 1983, and was just 2 days before his scheduled execution in 1998. He had already been measured for a coffin, and his family had been asked what they wished to have done with his remains. As the clock ticked, the lawyers in the case were focusing almost exclusively on issues of his retardation – not on claims of innocence. I was among those lawyers working on the case, and despite my decade-long focus on issues of innocence, I was one of those who took the position that our limited resources would not best be spent pursuing his claim of innocence, which appeared quite unlikely to bear fruit. So we worked on getting a stay based on his very low IQ.

Thankfully, my colleague David Protess, a professor of journalism who has done remarkable work in uncovering wrongful convictions, was in the room as well. He said, "Well, you know what, I can't do anything on the mental retardation issue. But I happen to have a slot available in my journalism seminar for a new investigation. How about if my students and I take a crack at the case and see if there is anything to his claim of innocence?"

Well, thankfully, the Illinois Supreme Court stayed the execution on the mental retardation claim. And during the time in which Porter's execution had been stayed, Protess and his students blew the case wide open. Not only did they learn that the chief witness against Porter had lied, but they found several witnesses to incriminate the true killer, who ultimately confessed when confronted with the massive evidence against him.

There is no doubt that Anthony Porter would have been killed had he not fortuitously received a stay on an issue having nothing

to do with his innocence. And there is no doubt that he would be dead today had David Protess not had room for a new case, or if the investigation had not proceeded as quickly as it did.

Most defendants are not as lucky as Porter or the others who have been freed. They don't get the journalism professor. They don't get the media advocating on their behalf. They don't find the passionate pro bono lawyer. They don't have any DNA in their cases to test.

This last point is especially important. Biological evidence is available for testing in only a small minority of murder cases. For all the rest, DNA provides no solace. As important as the Innocence Protection Act is, and I support it steadfastly, the fact is that it would affect only a minority of cases unless we learn the critical lesson from the exonerations — unless we say, "Well, wait a minute, if we're seeing these kinds of error rates where DNA is available, what does that tell us about the other 80% of cases or so where there is no biological evidence? Do we really think we only make errors in cases where we can ultimately detect it through DNA, and that in the other cases miraculously no errors are ever committed?"

It is preposterous to proclaim that the state of exonerations proves that the system works. Anybody who looks honestly at how these exonerations came about understands that.

The second major argument that has been invoked to justify ignoring the lessons of Illinois is the claim that Illinois is somehow unique. "You've got a problem in Illinois, but it's unique to Illinois," the argument goes. I have heard this from many prosecutors and legislators across the country.

Indeed, just this past Friday night, Virginia's Governor Gilmore was interviewed on Nightline about the state's dismal failure to provide a mechanism for defendants — capital or other — to establish their innocence once convicted. Ted Koppel confronted the Governor with the fact that Virginia has an average four and one-half years between conviction and execution — far less than the average time that it has taken for evidence of innocence to emerge across the country. Koppel asked whether this fact caused the Governor any pause, and Governor Gilmore responded, "We are somewhat more advanced in our criminal justice system in Virginia than some other states in the union," so Virginia can accomplish in four and one-half years what others may take twenty years in terms of exoneration.

Another example is Governor Bush of Texas. His mantra over the past several months is that each and every person to have been

executed in Texas had full access to the courts and was clearly guilty.

These are obscenely reckless claims. The reason that there are no exonerations in Virginia is because Virginia provides only 21 days to come in with new evidence that shows innocence. It is not easy to do that within 21 days, especially when the exculpatory evidence may not emerge for years. Moreover, in the Joseph O'Dell case, even after it executed Mr. O'Dell, the Commonwealth of Virginia still did everything within its power to keep the evidence from being scrutinized. When O'Dell's next-of-kin and some charitable organizations asked for the evidence from the case so that posthumous DNA testing could be conducted, the Virginia authorities refused to release the evidence, lest any error be exposed.

Instead, the local authorities asked the court for permission to burn the evidence, so that DNA testing could never be conducted. The Virginia courts agreed, and the evidence has now been destroyed, so we will never know whether Virginia executed an innocent man on the night it killed Joseph O'Dell. Of course, as a result of these sorts of policies, Governor Gilmore can get on television and say that Virginia has an advanced criminal justice system, *i.e.*, it has fire with which to burn DNA.

In Texas, the Gary Graham case reveals the utter emptiness of any claim that all the defendants that Texas has killed were clearly guilty and had full access to the courts. In the Graham case, there were 2 key eyewitnesses who were never heard by any jury or any judge or any commission before Graham was executed. These witnesses had long claimed that they saw the killer clearly and that Graham was definitely not that person, but the jury never heard from these witnesses because Graham's incompetent defense counsel never bothered to investigate the evidence. Thus, the jury that convicted Graham only heard from one eyewitness – a woman who saw Graham from a considerable distance, at night, for a few fleeting seconds.

Our Center held a news conference in Houston during the week prior to Graham's execution, in which we presented 13 men and women who were exonerated after having once been convicted based on mistaken eyewitness testimony. We also presented Dr. Elizabeth Loftus, one of the world's leading experts on eyewitness fallibility, as well as Jennifer Thompson, a heroic North Carolina woman whose mistaken eyewitness testimony led to a wrongful rape conviction. Collectively, this group begged Governor Bush to learn the lesson from their ordeals and experiences, and to ask the

Board of Pardons and Parole to hold a hearing at which the eyewitnesses who excluded Graham could finally testify.

Instead of advocating even a one day reprieve so that those witnesses could be heard and an assessment could be made of their credibility, Governor Bush proceeded to go along with the execution at 6:00 p.m. on that day. And having denied any opportunity for people like Gary Graham to establish their innocence, he then has the audacity to stand up and say, "You see, we never kill anyone who's proven himself innocent." Sure, if you never give anyone a chance to prove his innocence, you can then glibly declare you've never killed anyone who has proven himself innocent. It's as easy as that.

The system is broken. The problem is not unique to Illinois. There is no way in the world that Illinois has been convicting more innocent people than other states. The only unique thing about Illinois is the success we have had in discovering some of the errors.

What do we do about all of this? Answering that question is the mission of a moratorium. If we had all the solutions as we stood here today, we wouldn't need a moratorium. We could just impose the solutions.

There are many people, I among them, who believe that if you want to eliminate the risk of executing the innocent, then you have to stop executing people. And that is a solution that should be fair game to look at in the course of a moratorium.

For those who support the continued use of the death penalty, I submit that moratoria are particularly important. If we are going to retain the death penalty, it is clear that we can do a whole lot better than we are doing today.

For example, we could narrow the death penalty to the class of defendant where the evidence is such that no reasonable person could ever, in a million years, suggest that this person is actually innocent. We can require the jury – and the judge – to find as an eligibility factor that there is no doubt whatsoever, no lingering doubts, no residual doubts.

We could refuse to impose a death sentence in cases that are built on single witnesses. We know about eyewitness fallibility. How could we let a death verdict stand on the word of one witness? We can get rid of jailhouse snitches in any death cases. Any case that depends on snitch testimony is surely not so strong as to justify a sentence of death. We can get rid of unrecorded confessions in death cases. So many wrongful convictions have stemmed from

cases in which a simple tape recorder during the interrogation could have prevented grave injustice from ever occurring.

These are just a few examples of the kinds of proposals that must be considered. I would hope that we can all agree that these issues need to be discussed. And I would hope that we can all agree that it is immoral and unacceptable to go on killing before we discuss those issues.

We must go to all the states—even Texas, even Alabama, even Florida — no matter how strongly people want the death penalty, and we must tell the good people of America that the current system is broken, badly broken. Anyone who values innocent human life will be willing to work with us. Although we may disagree on many issues, there can be no disagreement about our sacred duty to protect the innocent.

BARRY SCHECK:

I want to directly echo and follow up on the themes actually that Mike and Larry just enunciated. In terms of the moratorium movement, one very fertile area is to look at the whole notion of criminal justice systems in states and the federal level being accountable for and analyzing their own mistakes.

We have had now 76 post-conviction DNA exonerations — 9 of those individuals off death row. Peter Neufeld, Jim Dwyer and I wrote the book *Actual Innocence*,³⁵ where we go through, chapter-by-chapter, the causes of wrongful convictions: false confessions, mistaken eyewitness identification, prosecutorial and police misconduct, junk forensic science, and the lynchpin, ineffective assistance of counsel. When that breaks down, the whole adversarial system breaks down and all these other causes get worse.

While DNA, as everybody said, is not a panacea, the really wonderful part of this new technology coming in for a small class of cases is that we can learn from these cases. This is a remarkable data set that's never existed before in the history of our criminal justice system where you can say these people are stone cold innocent. We can't argue about it.

Let's learn from it. Mike called for an autopsy. In our book, we call for innocence commissions. I suggest to you, that is really what Governor Ryan did in Illinois when he set up a blue ribbon panel to look at why the people on death row in Illinois included so many innocents and why there were so many problems that Ken

³⁵ *Supra* note 18.

Armstrong exposed. Ken could go to all the other states, as he indicated, and expose similar problems.

We ought to have blue ribbon panels. There's lots of different ways to look at all the wrongful convictions where people were convicted and it turns out they are innocent. There need not be any political agenda to it. Give this group subpoena power and have it write reports about what happened, what went wrong and how we can fix it.

Everyone today has used metaphors. Jim talked about a production system. They are doubling the production and there are design flaws, but they are doubling the production and tying one hand behind the quality control experts. Another example is the airplanes; only some of them land on time. The same analogy I think applies here. We need a National Transportation and Safety Board analysis of the criminal justice system. We have to create these kinds of permanent institutions.

The political climate is right for a call for a moratorium in order to investigate the reasons for our mistakes and the solutions for them. This is not any longer a third rail in American politics, as Senator Leahy was saying the other night. In every solution we laid out in our book, we kept on saying that Republicans and Democrats, prosecutors and defense attorneys — everybody — can support these because they are really mainstream solutions. There are concrete things we can do to minimize mistaken eyewitness identifications. There are things we can do to clean up forensic labs. There are things we can do to make lawyers better, and to cut down on prosecutorial and police misconduct. We can do these things, and it's in everybody's interest to do them because there is a law enforcement imperative behind it. Every time you convict the innocent, a guilty person is out there committing more crimes.

When, as Rodney Ellis mentioned, we went down to get DNA testing for McGinn, I kept on saying that a Justice Department report says that even though the laws in most states say there is a statute of limitations on new evidence of innocence, all these law enforcement people have agreed in a big, thick report that post-conviction DNA testing ought to be done where you have some biological evidence that could prove there was a wrongful conviction or a wrongful sentence. I said the trial judge is going to decide it that way. And the Texas death penalty defense lawyer said, "You're nuts." But the trial judge did as I'd predicted. Then they said to me, "But the Texas Court of Criminal Appeals, it's going to reverse this, right?" And I said, "That can't be right." But they

were right on that one. By a 6-3 vote, the Texas Court of Criminal Appeals said it would not let him have a test even though it could prove innocence. It reversed the presiding judge in that district. But I was at least right about Governor Bush, who I felt would not allow that execution to go forward without finding out the answer.

The most interesting thing of all is that, when we went down to Texas, Senator Ellis said, "Let's have an Innocence Commission, let's have DNA legislation, let's do something about counsel." And he went on the floor of the State Senate with a fellow named Sibley from Waco who is a Republican. Senator Sibley stood right with Senator Ellis and said, "Yes, we ought to do it."

Then I went and had breakfast with a District Attorney in Austin named Ronnie Earl. He said he'd been looking at this and thought that prosecutors have a responsibility, and "Why should you go through all this process? We are going to start looking at something like 400 old cases where DNA testing can be done to see whether or not we have convicted innocent people, because as a prosecutor, I don't want it to have on my conscience that we convicted an innocent person who is in jail or, God forbid, somebody on death row or somebody executed." I think there are many more District Attorneys who feel as he does.

When we first started doing the DNA testing to get innocent people out of jail, I kept on thinking, are we going to get another one out? Is it going to be slow? Is it really going to happen again? And even though 75% of the time the evidence is lost or destroyed, the numbers are quite remarkable. When we finished writing our book, there had been 62 DNA exonerations. Since then there have been 14 more exonerations. The Wall Street Journal did a survey of laboratories and found that 40% of the time that people demand the test — and these are people who have been claiming they're innocent for many, many years — and finally get the test, it exonerates them. It's quite a remarkable number. Everybody was shocked.

It turns out that a DNA test incriminated McGinn. As that case illustrates, some people that ask for it are guilty. That's hardly surprising.

What is shocking is that at least 40% of the time in that survey and over 50% of the time in our innocence project, when we finally get a result, it exonerates people. That's an incredible number.

We cannot be sure of guilt even in cases where there was a guilty plea and somebody testifying against another in this fashion. A case with a DNA exoneration where somebody had pled guilty

was the case of David Vasquez in Virginia. He pled guilty in order to avoid execution. But since he was mentally retarded, some would argue that only a mentally defective person would somehow get coerced into confessing to a crime.

I think the American people are really seeing this. All the public opinion polling shows that the public knows much of what people have been saying all day. I think people know that the lawyers are not up to the job and that poor people and middle class people are not getting good lawyers; and that if you're poor in this country and innocent, you're in much worse shape than if you're rich and guilty. I think they know that there is misconduct, that evidence is hidden. The polling shows that. I think they know that there is not fairness in the system.

People support the death penalty generally as a morally appropriate response. But I think there's a consensus forming on the issue of fairness. That's why in North Carolina, the polling is showing that people are moving towards support of a moratorium.

To give the moratorium teeth, we have to propose things like innocence commissions where we really look at what the mistakes are, with no political agenda. Was it a bad defense lawyer? Was it a bad prosecutor? Did the judge make a mistake? Was it something in our system? Why can't we make suggestions about how to fix it, when we make a total system failure like that? We would do it with any other institution where the life or liberty of citizens are at stake.

These are common sense proposals that I think people will support when you present it this way because what we're saying is true. The contradictions of the system are really that profound.

Look at George Will. I think he was quite right in what he said in reaction to looking at a lot of this data. He said that in light of all these DNA exonerations, conservatives have just got to look at the criminal justice system.

It can be said, even more emphatically, about the *capital* criminal justice system, that it's just another government program. I think people realize that.

We should look at solutions where we ask for simple accountability. Let's name the prosecutors that hide the evidence and sanction them. Let's have a real investigation. Let's look at how it really works. The more we push that as part of the moratorium movement, the more we put teeth in it, the more progress this is going to make and we really will have a moratorium on the death penalty.

LARRY FOX:

We have a very rich and rewarding luncheon coming up. We are going to have the privilege of hearing from Mrs. Carter and from Governor Ryan, and then we will assemble back here this afternoon for two more programs. Let's have another round of applause for all of our panelists this morning. They were just wonderful.

MARTHA BARNETT:

I want to give you my reaction to the first several hours of the day. I think this has been one of the most stimulating moments in my life, and I want to thank those of you who have made presentations. They've been focused, articulate, informative and inspiring. And so, I think the day is going well. So far, I think this has just been a wonderful program, and the lunch hour proves to be what will be the highlight of the entire program.

When we first started talking about a call-to-action — an actual call-to-action for a moratorium — the planning committee wondered, "Would anyone care? Would anyone come? And if they would, where would they want to come? Where would be the place that we should have it?" It was our hope that we could have it at the Carter Center, for obvious reasons. The Carter Center and the Carter family stand for the kind of principled commitment to human rights that we believe is the underpinning of a call for a moratorium on the death penalty. And we were absolutely thrilled when that hope became a reality and we were able to have this program here.

But the dream was that we would get Mrs. Carter to participate and to join us. We knew of her commitment to a moratorium and her opposition to the death penalty. And it was our dream that we could have her join us and talk with us about some of the things they do in the Carter Center and simply just be in the room with us as an inspiration. And indeed, she's here.

When President Carter was running for President, Mrs. Carter came to Tallahassee, Florida for a campaign stop. And I don't remember why, but I was in the room where the program was going to be early. I think it's probably because I wanted to get a front row seat, and was eager to be there and hear her. I got asked to stand at the podium while they got the microphone ready, to make sure that the mike was the right height for Mrs. Carter and that the lights hit her just right. And so for 20, 30 seconds, I got to pretend I was Mrs. Carter.

It never, ever dawned on me that I would have an opportunity in my life to actually stand at a podium and ask her to come to the podium and introduce her to some of the best lawyers and best people in America. But it is a privilege beyond belief to be able to do that. And so, I introduce to you all someone who everyone in this room knows and loves and respects. Rosalynn Carter.

ROSALYNN CARTER:

I am pleased to have you here. I enjoyed being with you last night, and I am just so happy that you're here to talk about the death penalty. And I want to thank Martha and the American Bar Association for bringing you all together.

I thought before I got into my subject, however, I would tell you a little bit about the Carter Center and the things that we do here. We began the Center in the early 1980's. (Somebody just asked me how old Amy is. That shows you how long we've been gone. Next week, she'll be 33 years old).

So when we started trying to decide what to do at the Carter Center, Jimmy said, "We can have a place to resolve conflicts, because if there had been such a place, I would not have had to take Prime Minister Begin and President Sadat to Camp David." And so that was the idea for the Carter Center.

But you don't just go out and resolve conflicts. So, we had a chance to work on agriculture problems in Africa. Being a farmer, that appealed to Jimmy, so we began agriculture programs. Then Dr. Bill Foege, who had been at the Center for Disease Control while Jimmy was President, came to be our Executive Director, and he attracted health programs. We found that these programs gave us an entrée to the leaders. We got to know the leaders in various countries. So then if there was a conflict, or a potential conflict, Jimmy could talk to the head of state and the leaders in the country and say, "Maybe I can help you with this problem." And so it all works together.

Today all of our programs fall into two categories: peace and health. Our peace programs consist of conflict resolution and promoting democracy. We monitor elections, and we only monitor elections where authoritarian governments are becoming democracies, or in countries where democracy is really fragile. Our health programs are aimed at eradicating and controlling diseases. We're eradicating a horrible disease called Guinea worm, which will be only the second disease ever eradicated. Now, 98% of the cases are already gone. We're working on controlling river blindness and trachoma, which is the leading cause of preventable

blindness in the world. It comes from filth and dirt, and it is so sad to see these little children with flies in their eyes and dirty hands. It's really an educational program. But pharmaceutical companies have helped us so much in giving us medications for river blindness and for lots of these programs that we have. We're working on lymphatic filariasis, which is the same as elephantiasis, schistosomiasis and other diseases. And then our agricultural programs, which we continue — we have about 600,000 small farmers in Africa in our agricultural programs. We consider that a health program because of the value of nutrition and trying to help people have enough to eat. We're in 65 countries in the developing world, 35 of those in Africa. We travel an awful lot working with our programs. Then I have my mental health program here, which is something I've been working on since Jimmy was Governor early in 1971, trying to make life better for people with mental illnesses.

So the overarching policy of the Carter Center — the basic core of our commitment — is human rights. And I think you can see by our programs that we work towards freeing people from oppression and persecution. But we also believe that human rights includes a decent place to live and food to eat and adequate medical care — the basic necessities of life — as well as freedom from discrimination and injustice at home and abroad.

Having been involved for so long in human rights efforts around the world and familiar with the conventions and declarations that make human rights a part of international law, I see the death penalty as an obvious violation of human rights. It's an issue that I feel so strongly about, and one that has bothered me for a very long time. We have had meetings here at the Carter Center to discuss the issue. We had a conference on the 25th anniversary of *Furman vs. Georgia*.³⁶ I have called on the Chief Justice of the Georgia Supreme Court. I write to Governors all the time about people in their states on death row. I worry about the issue.

But I am heartened now by the attention that the death penalty is getting. It's in the news, as you know, regularly. This morning the New York Times had an editorial on death penalty victims. These victims are those who are in the prisons and have to strap people to the tables and to have to deal with those horrible things. We also see stories about high profile cases and articles about the way the death penalty is carried out, with racial discrimination and poor legal representation. We read about judicial errors in cases

³⁶ *Furman*, 408 U.S. 238.

and attorneys pictured as incompetent or indifferent and uninterested.

And we read about the killing of mentally ill and mentally retarded people, and even children. It grieves me that our country has not signed the Convention on the Rights of the Child. One of the reasons we have not signed it is because we want to continue to execute children. The United States and Somalia, I believe, are the only two countries that have not signed that Convention. There are 80 offenders on death row now that were under the age of 18 at the time of their crimes.

Our country is facing bitter criticism from overseas. Felix Rohatyn, after he became ambassador to France, said that he was surprised and shocked at the harsh criticisms that he hears. He said, "The death penalty has cast a shadow over America." All 15 members of the European Union have outlawed the death penalty. And the accession of new members — Turkey, for instance — is conditioned in part on their abolition of capital punishment.

Our position on the issue puts us in the same category as China, Iran and Iraq. I don't think that's where many of us in our country want to be.

I think all of these things are making an impression on people. I believe people are beginning to recognize that something needs to be done about the system. Myself, I am morally and spiritually opposed to the death penalty. For those who don't share my feelings, the questions that have been raised clearly call for a moratorium on executions, so we can step back and look at all of these issues.

I commend Governor Ryan for having the courage to declare a moratorium in his state and to appoint a commission to review the use of capital punishment. And I commend and support the American Bar Association in calling for a moratorium.

Well, again, I am so pleased that you're here, and so pleased that you're working on this issue, and that the issue has gained the attention it demands so it may be possible for all of us working together to make a difference. Thank you.

MARTHA BARNETT:

Thank you so much. Thank you for caring and for being such a strong voice — quiet and dignified, but a strong voice on this subject.

I think most people in this room believe that we're now at one of those times in political history, or maybe even in the history of

our country, where people from both political parties, from various disciplines and professions, have got to stand up and take a stand on something that's hard. And at this moment, it's the death penalty. We're at that point in this country where it's time for people to take a stand on the death penalty. But it's hard. And we have with us today a person who has been willing to do that.

On January 31st of this year, as you all know, Governor George Ryan of Illinois made a courageous and monumental statement when he declared that there would be a moratorium in Illinois on executions. He did that in part because he learned that Illinois exonerated more people than it executed, and those numbers simply were incomprehensible to him. As a Republican Governor and supporter of the death penalty, his announcement took many people by surprise, but his message was clear — that while there were still strong opinions regarding the death penalty itself, that in the state of Illinois, there was going to be zero tolerance for executing people who were innocent.

Governor Ryan, on behalf of the American Bar Association's 400,000 lawyers — I commend you for your action. It's hard enough to stand up for something. It's even harder when you stand alone.

You remind me of a great Governor of the state of Florida. I want to tell you a story about Governor Leroy Collins. He wrote a book called *Florida's Courageous* — I don't even know if it's in print any more. But it's a history of Florida. And in there, one of the vignettes he talked about in that book was the interesting things you could see as you walked on the beaches. And he was talking about the beaches of North Florida, which are still remote and still have high sand dunes. He said that on one of those walks down the beach, he noticed back up on the hills an isolated pine tree. And there was not another tree within hundreds of yards of that pine. And to Governor Collins, it seemed brave, standing there with its small cluster of limbs, taking all the pressure the wind could offer year in and year out. Governor Collins thought if this tree can grow there, why aren't there others in that area. A tree expert told him that some species of pines depend on a long tap-root which goes straight down about as far as the tree is tall, and that it's nourished by a pool of water that the root finally gets to. That lonesome pine tree reminded Governor Collins of some people he knew — people who have something special about them that enables them to stand high and alone against the wind; people

who draw on a deep pool of something that gives them substance and sustains them.

It's now my honor to introduce you to a man who reminds me of that lonesome pine tree, a man who can stand straight, alone against the wind, and draw on a pool of principles that sustains him and inspires — the Governor of Illinois, Governor Ryan.

GOVERNOR GEORGE RYAN:

Mrs. Carter, not only did you and your husband serve your country with honor and distinction, but you have continued with unsurpassed careers of public service since you left the White House.

Of course, one of your most noteworthy labors of love has been your efforts with Habitat for Humanity. Your work with Habitat for Humanity is just one example of the outstanding contributions you have both made to make the world a better place.

Earlier this year, my wife Lura Lynn helped to build a house for Habitat for Humanity in Springfield. She worked with all the volunteers who followed your example of giving of their time to work with a family to help build them a home and have a chance to live the American dream.

You've continued your good works long after you left the White House. You've been a mental health advocate, and President Carter has continued putting his considerable talents to work to promote peace efforts throughout the world. You and President Carter have made this nation and this world a better place, and my wife and I salute you and wish you the very best in health. We join with the American people in their admiration for all that you've done for our country. Thank you.

Ten months ago, I don't think any of us thought we would be together here today in Atlanta to talk about the death penalty. Today, I stand before one of the most influential assemblies of men and women in American to do just that: talk about the death penalty.

I've been in elective office for more than 30 years. During that time, as a county board member, legislator and executive office holder, I was a staunch death penalty supporter. Like many other elected officials, I have believed there are crimes that are so heinous that the death sentence is the only proper, societal response for the criminals convicted of those crimes in a court of law.

I supported the death penalty. I spoke for it. I voted for it. I believed in it.

I was part of that great body of Americans who saw a nation in the grip of increasing crime rates, inner cities becoming armed camps and ever-growing violence in our streets, schools and even places of worship. Tough sentences, longer prison terms, more jails and strict imposition of the death penalty – those were the answers we saw. Catch them, convict them, lock them up and throw away the key. That is what people wanted, and that is what we got all across America. But at what price?

As a member of the Illinois General Assembly, I vividly remember voting for the death penalty. During the debate, an opponent of the death penalty asked if any of us who supported it would be willing to “throw the switch”. It was a sobering question, and I wish now that I could swallow the words of unqualified support for the death penalty that I offered.

The fact is that now, as Governor, the responsibility is mine. I do “throw the switch.”

Since the time that I voted for the death penalty, a lot has happened to shake my faith in the death penalty system. I know a lot more about the administration of the death penalty in Illinois — and the more I learn, the more troubled I’ve become.

You may not know that earlier this year, in addition to declaring the death penalty moratorium, I established a commission to do a complete reevaluation of the 40-year-old Illinois Criminal Code. Over the years, there has been a crazy patchwork of amendments and new laws. The Illinois Criminal Code has become contradictory and duplicative. Our sentences in many ways have been bent and twisted beyond what was originally conceived, beyond what simple justice requires. A study of the imposition of sentences can certainly lead any reasonable person to see the discriminatory disparities in the system.

I may be a recent convert, but I have committed myself and my administration to the development and establishment of a system of justice that is truly just. I wanted you to know this so that you would know my concern with the death penalty is not just a singular issue. My concern is with our entire system of justice.

Earlier this year, I declared what is, in effect, a moratorium on executions in Illinois. I said that until I can be sure, with moral certainty, that no innocent person would be put to death, no one would meet that fate while I was Governor. I have appointed a commission to deliberate on this issue and bring me their recommendations. I will not sign off on an execution until I can be morally certain that the individual is in fact guilty and all rights have

been preserved and safeguarded. Until then, no individual will be executed in Illinois. I will not sign off on an execution until the special commission I appointed can report to me on if and, if so how, the administration of the death penalty in Illinois can be reformed.

Today, I am going to tell you how we got to this point.

I know the ABA is now renewing its longstanding call for a nationwide moratorium on executions until reforms can be made to the system. I have never felt it was my place to tell other Governors, other elected leaders, what to do on this very difficult issue — so I will not break that practice today.

What I want to do is talk about the Illinois experience with capital punishment and how I reacted to the evidence before me about how well the system has worked — and how fair it is to the people whose lives hang in the balance.

We have to go back to the fall of 1998. I was running for Governor of Illinois then. At the same time, a death row inmate was filing a last ditch appeal — an appeal that over time would set in motion events that would change the way I viewed the system of capital punishment.

In September of 1998, a fellow by the name of Anthony Porter was on death row. He was scheduled to be executed on September 23. He had ordered his last meal and been fitted for his burial clothes. Mr. Porter had been convicted in the 1982 shooting death of a man and woman in a South Side Chicago park. Two days before he was to die, his lawyers won a last minute, temporary reprieve based on his IQ, which his lawyers said was 51. There were questions about whether Mr. Porter was competent to understand what was happening to him, whether he could help in his appeals — let alone face the death penalty.

With that delay, some journalism students from Northwestern University and their professor, David Protess, a powerful champion for justice, had the time to start their own investigation into the then 16-year-old case. With the help of a “private eye”, the students picked apart the prosecution of Anthony Porter. Key witnesses, like one who claimed he saw Porter at the crime scene, recanted their testimony. *Now* those witnesses were saying Anthony Porter didn’t do it. The students then followed their leads to Milwaukee, where a private detective obtained a videotaped confession from a man named Alstory (All-story) Simon. Simon told the private eye that he shot the two victims in an argument over drug money. With that new evidence, the charges against Mr. Porter were

dropped and the innocent Mr. Porter was freed in February 1999. The charges against him were wrong, yet he nearly went to his death for them.

I had just been inaugurated into my first term of office as Governor, and quite frankly, I was caught off guard. I didn't know how bad our system was. I couldn't believe the system that I had believed in could come that close to executing an innocent man — to come within two days of killing a man for a crime he did not commit. But for the efforts of those highly motivated journalism students and Professor Protes, Anthony Porter might be dead, killed by the state for a crime that he did not commit.

I was stunned. I believed in the death penalty. I felt myself being jolted into a reexamination of all I believed in.

If those young people never write or report another story again, they will have performed the highest order of their profession. They helped to save the life of an innocent man.

Shortly after Porter's case, another death row inmate was exonerated — this time by the courts. The Illinois Supreme Court ruled that the prosecution's case against a man by the name of Steven Smith hinged on the testimony of a drug-addicted witness whose testimony had been contradicted by other witnesses. Smith was exonerated.

At the same time, the case of Andrew Kokoraleis came to my desk. Andrew Kokoraleis had been charged with the brutal rape and mutilation murder of a 21-year-old woman. After the mistakes the system made, especially in the Porter case, I agonized. I thoroughly reviewed the case files, consulted with staff and with veteran former prosecutors. I requested additional information from the Prisoner Review Board. I double-checked and then I triple-checked. I wanted to be absolutely sure, and in the end, I was sure beyond any doubt that Kokoraleis was guilty of a monstrous, unspeakable crime.

But it was a gut-wrenching, exhausting experience. I would not wish that experience on anyone. It all came down to me.

I am a pharmacist from Kankakee, Illinois who had the good fortune to be elected by the people of Illinois to be their Governor. But it could be a lawyer from Chicago or a doctor from Peoria. Whoever wins the highest office in the state has to make the final decision about death row inmates: should they live or should they be executed by the state? The Governor has to decide if he will throw the switch. Quite frankly, that might be too much to ask of

one person to decide, whether you owned a drug store or you had been a law professor or a judge.

But that experience was only the beginning of my questioning of the capital punishment system in Illinois and a torrent of revelations.

In May of 1999, DNA tests exonerated death row inmate Ronald Jones of being involved in a rape and murder. DNA cleared him. DNA is a powerful tool for everyone involved in the criminal justice system: to clear an innocent man *and* to convict the guilty.

After the Porter case, I worked with the Illinois General Assembly to pass into law the Capital Litigation Fund to provide more money for public defenders and prosecutors to handle capital cases, and more money for defense attorneys and prosecutors to hire experts to make available to them DNA testing and other emerging technologies. To date, I have put \$21 million into that fund.

While helping provide more resources for lawyers and prosecutors was a good start, it became clear, later that fall, that it was a mere band-aid for a capital punishment system that was badly broken.

Last November, the Chicago Tribune conducted an in-depth investigation of the death penalty cases in Illinois that was startling. Half of the nearly 300 capital cases in Illinois had been reversed for a new trial or sentencing hearing. Thirty-three of the death row inmates were represented, at trial, by an attorney who has been disbarred or suspended from practicing law. I don't know how that happens. Thirty-five African-American death row inmates had been convicted or condemned by an all-white jury. In fact, 2 out of 3 of our 160 Illinois death row inmates are African-American. Prosecutors used jailhouse informants to convict or condemn 46 death row inmates.

It was clear there were major questions about the system — questions that I alone could not answer.

In January of this year, the thirteenth death row inmate was found wrongfully convicted of the murder for which he had been sentenced to die. Steven Manning was no angel. He was an ex-cop who had been accused of corruption in the past, and he had been convicted in Missouri of unrelated kidnapping charges. But in Illinois, he had been *sentenced to die* for the murder of his former business partner — a conviction secured by the testimony of a jailhouse informant.

The Illinois Supreme Court was troubled by the jailhouse in-

formant testimony and sent his case back for a retrial. Without that testimony, the prosecutors dropped their charges against him.

At that point, I was looking at a shameful scorecard: since the death penalty had been reinstated in Illinois in 1977, 12 death row inmates had been executed, and 13 had been exonerated.

Up until then, with each remarkable, complex and sometimes confusing development, I had resisted calls by some to declare a moratorium on executions. I can remember meeting with some of my staff shortly after the thirteenth inmate was exonerated. We were discussing the latest developments when I received a call from our Attorney General, who informed me that soon his office would have to request an execution date from the state supreme court for an inmate who had exhausted his appeals. Although I discussed what to do for several more days, I probably made the decision then. I knew that call would be the first of many such calls I would receive in the next year as inmates exhausted their appeals.

How could I go forward with so many unanswerable questions about the fairness of the administration of the death penalty in Illinois? In my heart, I knew I could not go forward. I couldn't live with myself. How on earth could we have come so close — again, and again, and again, 13 times — to putting fatal doses of poison into the bodies of innocent people strapped to gurneys in our state's death chamber? It was clear to me that when it came to the death penalty in Illinois, *there was no justice in the justice system.*

On January 31, 2000, I told the citizens of Illinois that I was imposing a moratorium because of grave concerns about our state's shameful record of convicting innocent people and putting them on death row. I cannot support a system which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare: the state's taking of innocent life.

How do you prevent another Anthony Porter situation? How do you prevent innocent people from paying the ultimate penalty for a crime that they did not commit? I said then, and I say today, I cannot answer that question.

What I do know is that there is no margin for error when it comes to putting a person to death. I said that a public dialogue must begin on the question of the fairness of the application of the death penalty. That, surely, has taken place since I announced my decision.

In March of this year I empanelled a commission of 14 concerned, smart, honorable people. The committee includes fine legal minds like distinguished former U.S. District Court Chief Judge

Frank McGarr, former U. S. Attorney Thomas Sullivan, and Cook County Public Defender Rita Fry. I called upon author and accomplished attorney Scott Turow. I named citizens like Roberto Ramirez, a first generation immigrant from Mexico who came to Chicago as a boy after his father was murdered. Roberto is a concerned, compassionate citizen and successful businessman. And I pressed back into public service my old friend, former United States Senator Paul Simon, a man of unquestioned integrity. Speaking of unquestioned integrity, I was delighted when Judge William Webster agreed to serve as our special counsel.

My instructions to the commission were simple: Tell me what has gone wrong. Tell me if it can be fixed, and if so, how.

Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent person is facing a lethal injection, no one will meet that fate. Not on my watch.

All of us in the political arena want to be tough on crime. I am a strong proponent of tough criminal penalties, of supporting laws and programs to help police and prosecutors keep drug dealers, gun runners, and dangerous criminals off the streets. We must ensure the public safety of our citizens. But, in doing so, we must ensure that the ends of justice are served. This concept is fundamental to the American system of justice. It is a question of fairness.

It is easy to be an ardent death penalty supporter when you don't have to make the final decision about who will live or die. But when you sit in judgment, when you have the power to decide who will live and who will die, it is an awesome responsibility.

In this country, Governors have to make that ultimate decision. They must shoulder that awesome burden.

Since I made the decision to impose the moratorium on executions, I have endured my share of attacks from people who don't agree with me — who in some ways think I have betrayed them. That hasn't deterred me one bit. I would make the same decision again. I am comfortable knowing that I did the right thing. I am concerned and saddened that in the debate that has followed, some death penalty proponents have clamored for state-imposed death *regardless of innocence*.

As I said at the outset, I will not tell other Governors or elected officials what to do. Each of us must be comfortable with our own systems. All I can do is share what we have done in Illinois. We recognized that there were questions, far too many questions. I

recognized that we didn't have all the answers. But it is clear that we need answers.

I am honored, I am humbled by your invitation to speak to you today.

Many of the people in this room — lawyers, judges, professors — men and women of character, of integrity, of commitment — are the heroes. It is you and people like you in courtrooms, law schools, and newsrooms across the country whose passionate search for the truth has overtaken those guided by a passionate quest for execution — no matter what the truth might be. Long before this pharmacist from Kankakee, Illinois was given the power to just say no, your voices were being heard. I salute you for blazing the trail. I thank you for leading the way.

Together, guided by honesty, decency and a passion for justice — we will ensure that no innocent person will be executed by the state.

LARRY FOX:

I can give a very short introduction of our next speaker. We invited Senator Feingold to address the group, and he hoped he could join us. As many of you know, Senator Feingold is the leader in federal legislation in this area. The Senator was kind enough to record a video for purposes of this meeting. I look forward to seeing it, and we are going to run it now.

SENATOR RUSSELL FEINGOLD:

Hello, and thank you for inviting me to join you today. I am sorry that I could not be with you in person, but I appreciate your allowing me this opportunity to participate. I am grateful that the ABA has convened this conference on one of the great challenges facing our nation today: the serious deficiencies in the administration of the death penalty. I applaud the ABA for its leadership on capital punishment. The ABA's 1997 resolution calling for a moratorium on executions helped spark today's national re-examination of the death penalty.

Only three years ago, our nation was complacent and eerily silent on the death penalty. Many believed that high crime rates justified it. Too many turned a blind eye to the increasing number of executions, executions disproportionately visited on the poor and minorities. And many were unaware of the flaws in the death penalty system, flaws that have sent innocent people to death row.

But with the ABA's leadership and guidance, all that is beginning to change. We may not all agree on whether to have a death

penalty. But regardless of your view on that, I hope that we can all agree that the administration of the death penalty in America today is fraught with errors and a substantial risk of executing an innocent person. That is a risk we cannot continue to take.

We must work to ensure that our criminal justice system lives up to our highest ideals of justice, fairness, and due process. And what better place to start than with the people in this room: the lawyers and legislators who work with our law. Some of you, as criminal defense lawyers, have first-hand experience with the administration of the death penalty. Some of you, as legislators, have first-hand experience with drafting criminal statutes and rules of procedure. And all of you, as leaders in the legal community, have the knowledge and ability to help guide our nation in our search for justice.

We cannot afford to continue with business as usual. The time to lead our nation is now. Americans are electing a new President and many new Governors, state legislators, and Members of Congress. In a matter of weeks, these new leaders will take office. Tracking the concerns about fairness and due process raised in the ABA's moratorium resolution, and following the thoughtful precedent set by Governor Ryan of Illinois, I have introduced the National Death Penalty Moratorium Act. That bill would place a moratorium on executions while an independent, blue ribbon commission reviewed the death penalty system. I have been working with my colleagues to gain support for this legislation, and it will remain one of my highest priorities in the next Congress. I hope you will encourage your members of Congress to support this critically needed legislation.

As well, I encourage you to raise this issue in your state bars, city councils, and state legislatures. Talk about the need for a timeout on executions and a review of our death penalty system. If you are a representative, I encourage you to introduce a moratorium resolution. We need to work at all levels to educate Americans and push for a moratorium. I believe that a moratorium is the minimum necessary response to the crisis now facing our death penalty system — a system that runs the substantial risk, if we have not done so already, of killing an innocent.

Again, I commend you for your participation in this conference and willingness to lead our nation on this issue. I look forward to working with you. Thank you very much.