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The Imposition of the Death Penalty is "Fraught With Error": Where Do We Go From Here?

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THE IMPOSITION OF THE DEATH PENALTY IS “FRAUGHT WITH ERROR”: WHERE DO WE GO FROM HERE?

**(PROGRAM AT AMERICAN BAR ASSOCIATION
ANNUAL MEETING IN NY, JULY 10, 2000)**

LAWRENCE FOX:

I'm Larry Fox from Philadelphia. I have the privilege of chairing the ABA Death Penalty Representation Project, and the even greater privilege of moderating this panel today with this extraordinary group of panelists.

Today's New York Times contains an op-ed, "What Death Penalty Errors?", by James Q. Wilson, who profoundly proclaims that no one has shown that innocent people are being executed. In other words, in the world of James Q. Wilson, you have to be proven innocent beyond a reasonable doubt before you can be spared from execution.

Fortunately, the people on this panel and the American Bar Association as well as the legal community in general, recognize that the way the public thinks about the death penalty is wrong, and that we are facing a crisis. Moreover, public attention is now focused on this issue in a way that it has not been before, and the discussion is reaching a different level.

The purpose of this program is to address the problem and answer the questions, Where do the ABA, the legal community and the larger American community that are concerned about these issues go from here? How do we capitalize on recent developments? Are the advances we are seeing real? What are the real issues in the trenches?

It is extraordinary that the incoming President of the American Bar Association, my dear friend Martha Barnett from Florida, has graced us and agreed to speak first. Martha will become President of the ABA at the end of the London meeting. I know from watching other President-elects that the demands on her time this week are extraordinary. It speaks volumes about her leadership, priorities, integrity, interest as a lawyer and in what is important in America that Martha is here. So it is with great pleasure that I introduce Martha. We could not have picked as ABA President a

person more caring, more understanding, and more committed to what it means to be a lawyer than my good friend Martha Barnett.

MARTHA BARNETT, ABA PRESIDENT-ELECT, TALLAHASSEE, FLORIDA:

I am privileged to be here this morning. I am always hesitant to talk about an issue like this when I know that the real experts on the subject are in the room and at this table.

What I want to do this morning is very briefly to welcome you, thank you, and tell you what I am going to try to do in the coming year to move the debate on this important subject to the next level. As Larry mentioned, we are at a very interesting crossroads in our country's view and review of the death penalty. For the first time in many years, people are asking questions in a new way and are seeking answers with an increased vigor and concern about the implications these questions and the available answers have for our justice system and our society are large.

I remember vividly the ABA House of Delegates' debate in 1997 on the resolution calling for a moratorium on executions. Indeed, I recall that months before that, my partner, friend, and hero, Steve Hanlon, came to tell me that the ABA Section of Individual Rights & Responsibilities was going to raise this issue. I argued with him about it, telling him that I didn't think the time was right and that I didn't think anybody cared. As always, Steve was right and I was wrong, and the House of Delegates enthusiastically adopted that moratorium resolution.

A lot has happened in the last couple of years, but not much in the totality of things — and certainly not enough. It's a very tacky coincidence that the concerns in the general community mirror the concerns that the ABA and Bar leaders, judges and justices have had, and that they are now coming together at a time where we have an opportunity to do something to make the prospect of a moratorium a reality for this country.

I have decided to make this a priority during the year I'm President. I'm now leaving this session to hold the Press Conference that every new President of the ABA gets to hold. This is the issue with which I'm going to start the Press Conference, because I want people to understand this is a priority for me as the incoming President.

What I have been doing to implement that, other than talking about it when the opportunity comes, is to schedule a call-to-action on the implementation of the moratorium. It will be held in October at the Carter Center in Atlanta. Many of the people in this

room have been working long and hard to put that program together so that it will be educational and informative, and will hopefully inspire lawyers and people in the justice system generally to try to implement a moratorium. We are inviting members of Congress, state legislators, proponents of the death penalty, opponents of the death penalty, private lawyers, people in government, prosecutors and defenders. We are trying to get a broad-based group together.

The purpose is not to talk about the death penalty itself, because there is not a consensus on that issue. But we will talk about an issue on which I think there is consensus: the execution of innocent people. I think even the most ardent proponent of capital punishment has zero tolerance for the execution of innocent people.

What we hope will be accomplished through this moratorium call-to-action is to mobilize lawyers to organize their state and local bars and their communities to call on their Legislatures — in states where there is a death penalty — to work to implement a moratorium until we can address the things that matter to lawyers. We can address racial discrimination, fairness, due process, and the most fundamental aspect — the right to a competent lawyer who is adequately funded and has the resources to represent and defend the client. Until those things can be guaranteed, our country should not be putting people to death.

Jack Curtin, a former President of this Association, has a quote that captures it all: “A state that is going to take a life must give justice.” That is what today’s panel is going to talk about. I look forward to reporting back this time next year with some success.

LAWRENCE FOX:

What good hands the American Bar Association is in for the next year!

I’m going to introduce our panel quickly. It is a distinguished group.

Steve Bright is the Director of the Southern Center for Human Rights. He teaches at both Harvard and Yale Law Schools. He has been the leader, for me, on great public policy issues and great legal reasoning.

Tanya Coke is the Director of the *Gideon* Project at the Open Society Institute. She is a former Federal Defender. She has funded our project and has given us grants, which we have to match. She looks at this issue from the perspective of what the

non-governmental, foundation side of the world can do to help in this area.

Steve Hanlon has already been beatified by Martha Barnett, and thus requires very little additional introduction. He is a partner at Holland & Knight. He is bringing a number of test cases challenging systemic problems concerning the representation available in death penalty cases.

Susan Karamanian is an experienced volunteer private lawyer. She has handled one case and is now handling a second case. One of our goals today is to convince those who have cases to take additional cases, and to demonstrate to those of you who haven't been taking cases to follow in the footsteps of Susan Karamanian.

Chief Justice Gerald Kogan is the retired Chief Justice of the Florida Supreme Court and an active member of the National Coalition to Prevent Wrongful Executions. He brings extremely valuable insights as a former key member of the judiciary in a key state.

Steve Mills is not a lawyer. He is an important journalist, with the Chicago Tribune. Steve has uncovered some very important aspects of this problem. For doing so, he will receive the Silver Gavel award from the American Bar Association tomorrow, demonstrating how important good journalism is in this area.

Maurie Levin is paid a pittance by the ABA Section of Litigation to work in the field in Texas. She helps volunteer lawyers to handle these cases, and she handles cases on her own. She is experienced and tough. She is our "senior partner" for volunteer lawyers.

Last but surely not least is Elisabeth Semel. She is the Director of the ABA Death Penalty Representation Project. I've figured out that her pay works out to \$1 an hour. Elisabeth is the driving force that has made the Death Penalty Representation Project what it is. She's raised the money, cajoled the lawyers, met with the journalists, and argued within the ABA.

We'll now start. I hope this will be a trialogue, in that I hope the audience will participate as well.

From my perspective, if we are going to have a death penalty, the single biggest problem is the inadequate representation at the beginning. When our ABA Death Penalty Representation Project gets volunteer lawyers to take a case for habeas proceedings, we're constantly looking back and saying, 'Wait a minute. Why wasn't this person well represented back at the beginning, and what can we do about that?'

Chief Justice Kogan, you have as broad a perspective on this as

anybody. Can you tell us whether you think that is where we should be starting? Should that really be a key focus?

CHIEF JUSTICE KOGAN:

That's one of the places where we certainly should be starting.

You have to understand that I was a Chief Homicide and Capital Crimes Prosecutor in the Miami area. I've also defended these cases. I also sat on the trial bench while these cases were being tried.

The trouble is that around this nation, we have standards in the various states that differ very widely, even within a state. In a particular jurisdiction within a state, a defendant in a capital case may have an outstanding lawyer representing him. I am referring particularly to those areas with well-entrenched public defender offices whose full-time attorneys have experience in handling these cases. In some of the jurisdictions around the country where we do have public defenders constantly working on these cases, the defendants generally get outstanding representation. The problem is that in most of the country, that doesn't exist at all. We have seen from horror stories in the past that we have had lawyers appointed by judges using no criteria at all — except perhaps that they may have contributed to the judges' campaigns; or that no other attorneys in the area would take these particular cases, so the judges went around looking for anyone who would. As a result, we have seen attorneys representing defendants in capital cases who have been under the influence of alcohol or who have slept during the trial. Many attorneys who have represented defendants who ended up on death row have been disbarred because they were not reputable attorneys.

It's right up front where you need this quality representation. What we're doing right now is, for the most part, looking at the far end, after the defendants have been convicted and sentenced to death. The concentration should certainly be on the front end, where we need to have a uniform system of qualified lawyers who can represent these defendants.

This requires not just any lawyer. For example, a lawyer may be very good at trying a personal injury case, but when it comes to a capital case, the lawyer is on a different level, a different plane, in a different world. We really need to get those lawyers who are competent and qualified *in capital cases* to represent these defendants from the very outset. Experience has taught me that when you

have these competent defense lawyers, the death sentences are not sought or imposed as frequently as they are currently.

LAWRENCE FOX:

Steve Bright, do you have a comment on this? Can we fix the system if we assure that there is competent counsel at trial? Is that where the focus should be?

STEPHEN BRIGHT:

Unquestionably. That is the most fundamental protection for minimizing the number of wrongful convictions and correcting a lot of the problems that the American Bar Association and others have identified.

The problem is that in so many states there is no structure for the selection of defense counsel for capital cases. In Texas, Georgia and many other states that send a lot of people to death row, the indigent defense "system" varies from county to county. There is no statewide system. There are no public defender offices. There are no lawyers who are being trained to defend cases. Meanwhile, on the prosecution side, there are lawyers being trained; they start with the less important cases and are trained and supervised before they try the most important cases, the death penalty cases. But on the other side of the courtroom, anybody with a bar card can be appointed to defend one of these cases.

There has been the tremendous resistance in many states to any effort to set-up a public defender system, or to have a system of appointments that is independent of the judiciary – so that you don't have the kinds of problems to which Chief Justice Kogan referred where judges appoint the defense counsel. A recent survey in Texas showed that judges often appointed defense lawyers based on their reputations of moving the cases through the system very promptly, regardless of the competence of the lawyers and based on their campaign contributions. The defense function must be separate from the judicial function.

Obviously, there must be adequate resources. In Mississippi, defense counsel are paid \$1,000 per capital case. You do not usually get very good legal representation for \$1,000 a case. You also do not get good legal representation for \$40 an hour, which is what Alabama and some counties in Georgia pay.

LAWRENCE FOX:

Susan, you've had two cases — one completed and one which you are now working. What perspective do you have about how these cases would have come out if there really had been competent counsel in the beginning?

SUSAN KARAMANIAN:

In the first case we worked on, our primary argument was ineffective assistance of counsel. While you can't predict precisely what would have happened if our client had competent counsel and access to resources, that case illustrates the point that Chief Justice Kogan and Steve Bright made, in terms of rural areas. In Texas in particular, the appointment of defense counsel is decided by the local County Judge. In our case, in Paris, Texas, in Lamar County, the County Judge appointed a defense counsel at the courthouse who had no experience in any capital case. He was appointed shortly after the arrest.

In many instances, capital cases, if funded properly on both the prosecution and defense side, will hurt the county's budget, and in some cases could bankrupt the county. Where is the funding for the defendants? It's not done on a uniform basis.

I favor having a cadre of 100-150 public defenders, paid at the same rate that the DA office's attorneys are paid, and with access to resources. Having investigators is very important. In our case from Lamar County, Texas, the trial counsel, had limited funds for an investigator; and the investigator, from what we could determine, made only one major investigative trip outside the state to gather evidence. He didn't get the evidence that we later found, involving 40 witnesses. None of those witnesses came forward and testified at trial.

LAWRENCE FOX:

Maurie, do you have thoughts about counsel at trial, from your perspective?

MAURIE LEVIN:

I agree with everything everyone has said so far. It's important to remember that the competency of counsel at trial is a package deal. It does not just mean having a good lawyer. It means having a lawyer who can be independent of the appointing judge and not worry about how much money or how many resources he or she is

going to have to ask for, or whether he or she has to worry about getting the next appointment down the road. Unfortunately, such concerns often exist in Texas, where lawyers often pay the price for fighting "too hard" for their clients.

LAWRENCE FOX:

Are there lawyers fighting to get these tiny fees? Is that part of the problem? Are we ending up with people who think that getting \$1,000 to represent a capital defendant is a big deal?

SUSAN KARAMANIAN:

As Steve pointed out, it varies tremendously from county to county. In the larger counties, there are some good lawyers, who do ask for sufficient money. In the small counties, judges may say something like the following in chambers, which apparently occurred in a case I'm litigating: "You're not going to get more than \$500 for investigation and experts in this case, so don't bother asking." This is not said on the record. But it is an understanding that exists: don't ask for more, and if you do, you are not going to get it. So, in some cases, people do ask, and in some they don't because it's well understood that they won't get those funds.

LAWRENCE FOX:

That's interesting, because we've got an ethics rule that says that if you're paid by a third party, you shouldn't permit that third party to interfere with your professional independence. We often think about it in terms of insurance companies hiring lawyers. But here's the exact same problem. You may not want the third party to influence you, but the third party certainly will influence you simply by the amount of money the third party makes available to you.

Steve Hanlon, do you have any thoughts on this? Can we start mounting test cases to accomplish change?

STEPHEN HANLON:

I will answer your question by particularly directing my remarks to those members of the ABA Section of Litigation who do not currently represent death row inmates.

In my view, lawyers are being asked to do things today that they should not be asked to do. In this context, that means that when a lawyer has, let's say ten cases, and that lawyer really only has

the ability, financially and timewise, to handle two of those cases, that lawyer is in a conflict that he or she cannot resolve. When lawyers, whether publicly funded, on the State payroll, or receiving public funds while in private practice, are asked to do that kind of thing, the whole profession suffers. The whole profession has a strong interest in that not happening.

I'm concerned that we have so many stories of lawyers who have performed inadequately in this area. There's no good reason for it. We have the lawyers who can do this work if they're given sufficient time and sufficient money. But as Lis Semel had said so well, this is the brain surgery of our profession, and it takes great lawyers doing great lawyering.

I've been practicing law for 35 years, I've never tried even a misdemeanor case. I'm a civil trial practitioner. I did my first death penalty case a couple of years ago with one of America's great criminal defense lawyers, Jim Russ, in Orlando, in a post-conviction proceeding. If you want to see a great lawyer doing great work in a courtroom and see a case handled wonderfully, he's the kind of lawyer that you should see.

But that, unfortunately, is not happening. It's not happening because lawyers are being asked to do these cases with inadequate resources. If we get the resources, we will do a hell of a fine job.

LAWRENCE FOX:

Tanya, I'm hearing two things: one, maybe nobody's funding this properly because nobody wants proper funding, out of the belief that we shouldn't be helping those bad people; or two, maybe nobody's funding it properly because we're not really willing to spend the money on that. Is it time for us to start a campaign that says America cannot afford the death penalty, since we are just not willing to spend the necessary dollars? Should that be the next set of headlines, and should your project be thinking about starting a big campaign on that topic?

TANYA COKE:

To answer your first question, which may have been rhetorical, *i.e.*, "Why don't people fund this?," I think it's for both reasons you mentioned. This is a difficult issue politically. The client population for this work does not consist of Fresh Air Fund kids. That makes it a difficult sell, both to government funders and private funders (which have a much smaller pool of dollars). In addition, this is an area rife with government obligations. So, to the extent

one sees as a problem the government's failing to step up to the table and fund the system properly, it's difficult for private funders to see a way into the issue.

As to a campaign, we don't so much do the campaigns as we look for people who want campaigns started. I don't think it's particularly useful to mount a campaign talking about the cost issues – which lawyers see as one of the failures of the system, with the failures of counsel being to a large extent due to the failure of resources. Probably a more useful place to begin a public conversation is about fairness more generally. The public does “get” that.

OSI recently funded some focus groups on indigent defense, which were completed last month, in which the public overwhelmingly said it was concerned about fairness in the criminal justice system. Two things bubbled up again and again in the conversations with the focus group facilitators. The first was the Illinois moratorium and the innocence cases coming out of Illinois. The second was the Gary Graham case. Obviously, some of the events that have been happening in this area are really bubbling up into the public consciousness and changing people's thinking about justice and the lack of justice in many of these cases. Again and again, the focus group participants told us that good, competent counsel is the key to assuring fairness in the criminal justice system. So, that's not something about which we have to convince people. The public is already there. That theme would probably be the place to start, in terms of animating conversations in campaigns.

LAWRENCE FOX:

Steve Mills, should there be a campaign starting tomorrow to say that America cannot afford the death penalty?

STEVE MILLS:

I don't know if that's where one should start, but clearly if you look at the reporting we've done both in Texas and Illinois, there is an unwillingness to fund the defense appropriately. In Illinois, there are numerous cases where judges were simply unwilling to pay the money to have a competent defense even. And you find the same thing in Texas. So, there is certainly evidence that the willingness to fund it is just not there.

Whether people are going to grasp that issue is another question entirely. I don't know that a lot of people necessarily care how death penalty defense is funded.

LAWRENCE FOX:

Lis, we're hearing, among other things, that we're not going to see state legislatures voluntarily funding these kinds of things. As somebody said, capital defendants and death row inmates are not the sunshine children.

That means that there is a failure by lawyers to force the funding. Is there some systemic assault that we as lawyers should be planning to get the funding? I know we've had nothing but bad success in the Supreme Court and elsewhere. But is this the time for a new offensive, in which we say that we can't live with a Constitutional standard that ends up having an inebriated lawyer, or even a very capable lawyer who just can't spend the time and doesn't have the money to do it?

ELISABETH SEMEL:

The ABA took the position, long before the death penalty was even on its radar screen, that with regard to indigent defense at all levels, it's the responsibility of government — whether it be local, state or federal — to insure that poor people receive competent representation. Fundamentally, the ABA as a whole, and its lawyer members, have a responsibility to put governments' feet to the fire.

The question about how that is accomplished is a complex, strategic question. Often, litigation in this area doesn't bear fruit because the courts have frequently been unreceptive to the argument that individual lawyers were ineffective. So, this requires a multi-tier or multi-strategy approach.

This approach should include the kind of work that Steve Hanlon is doing in states like Florida and Mississippi: challenges brought on behalf of counties against funding systems, where the counties say, "We cannot bear the financial responsibility for ensuring competent counsel. It therefore must be born by the state."

In some instances, it's the responsibility of individual lawyers to take on capital punishment cases and, thereafter, tell people what happened. Each case is an important story and can result in the kind of awareness which Tanya was talking about.

In other instances, people will need to go to the Legislature and ascertain what the legislators are willing to do.

Ultimately, the answer to the question is a very simple political answer. It is that our legislators at the state and local level are simply unwilling to fund the kind of representation that Steve Hanlon says we are capable of providing.

CHIEF JUSTICE KOGAN:

People really have to accept the fact that these cases are very expensive propositions. In Florida for example, Attorney General Bob Butterworth has more or less confirmed the 12-year-old statistics that it costs the state of Florida, from arrest to execution, per case, \$3,200,000. That's in the working hours of all the people in the system: the judges, the prosecutors, the public defenders and our collateral representatives after the death warrants are signed. By contrast, in a case where the defendant gets life imprisonment without parole, the cost, from arrest to the end of their life, is only \$600,000.

These costs are in terms of dollars twelve years ago, and the dollar amounts are much greater now. We in Florida have attempted to sell the Legislature on the fact that it would be a lot less expensive to state taxpayers if you put some of this money up front, by having competent attorneys representing these defendants at trial. In some ways that argument works, but in most ways it doesn't. They are still putting more money on the far end, just before execution. When we ask for more money, essentially what they do is to point to the budgets for the various Capital Collateral Representatives. But that's at the wrong end. More money should be spent up front. But if you can sell these legislators on the fact that it's costing the state a great deal more to wait until the final part of these cases, they may start putting up the dollars at the beginning of the process.

LAWRENCE FOX:

You've not included in the costs the emotional toll.

CHIEF JUSTICE KOGAN:

That's true. One of the most unpopular jobs in Florida is to be a member of one of the CCR, Capital Collateral Representative offices, where you're representing the death row inmate just before execution. CCR lawyers work long hours, seven days a week, with no stop to it. CCR has a high attrition rate. The attorneys just can't take all this, so they're there for a while and then leave.

LAWRENCE FOX:

Steve Bright, is it time and is there a strategy to mount a jurisprudence offensive on the inadequacy of counsel at trial in capital cases?

STEPHEN BRIGHT:

I have been saying so for about twenty years. I do not know if it is going to happen – that the courts are going to enforce the right to counsel.

A good example of the sad shape of the right to counsel is the argument made by Texas in the case of Calvin Burdine to the United States Court of Appeals for the Fifth Circuit recently. A Federal District Judge granted Burdine habeas corpus relief because the court-appointed defense lawyer slept through the trial.¹ Texas appealed to the Fifth Circuit. I watched an assistant Solicitor General for Texas argue that the Fifth Circuit should reverse in that case, and reinstate the conviction and the death penalty, because a sleeping lawyer is no different than a lawyer under the influence of alcohol, a lawyer under the influence of drugs, a lawyer with Alzheimer's, or a lawyer with mental illness. All of those types of legal representation have been upheld as not ineffective. The judges actually engaged the Solicitor General in that argument, asking whether there wasn't a difference between a lawyer who's intoxicated but still functioning even though impaired, and a lawyer who is completely unconscious because he is asleep. I was glad, as a member of the legal profession, that there wasn't a fifth grade class in that courtroom, because that argument and the fact that the court took it seriously is a disgrace to the legal profession.

Judge Edith Jones and Judge Rhesa Barksdale are on the panel in that case. Even with the political attention being paid to the case, I expect that they will reverse the case and let Burdine be executed.²

Texas executed Carl Johnson, even though the same lawyer slept during his trial.³ There just was not as much attention being paid to this back then, because the Governor of Texas was not running for President.

It is time for the judiciary and the bar to admit that the quality of representation — not just in capital cases but across the board — is a scandal, and that we have to do something about it. As Robert Kennedy said when he was the Attorney General, "The poor person accused of a crime has no lobby." There is no political ac-

¹ *Burdine v. Johnson*, 66 F.Supp.2d 854 (S.D. Tex. 1999)

² The Court reversed, 2-1, with Judge Barksdale writing, joined by Judge Jones. *Burdine v. Johnson*, ___ F.3d ___ (5th Cir. No. 99-21034, Oct. 27, 2000). Judge Benavides dissented.

³ David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. Rev. 691 (1996) (describing the representation of Carl Johnson).

tion committee, there are no big contributors to political campaigns at the legislatures, arguing for the funding of indigent defense, which involves two very unpopular groups: people accused of crimes and lawyers. Legislators believe that their constituency does not want those groups to get more resources.

We must say that we are going to do something about the lack of fairness. Anyone close to the system realizes — and I think the public generally realizes — that you're better off in the courts today to be rich and guilty than to be poor and innocent. That's not equal justice. And if we can't do any better than what we are doing now, we should sandblast the words "Equal Justice Under Law" off the Supreme Court building. If the good lawyers serve only rich people and wealthy corporations, leaving the poor to be represented primarily by the bottom-feeders of the profession, then we should acknowledge it.

While there are certainly some very dedicated lawyers who defend poor people zealously and competently, many lawyers who take court appointments do so because they cannot get any other work. That is the only reason they are on the list for appointments. And this is not just in rural areas. In Houston, Texas — which is responsible for more executions than any other jurisdiction in the country other than Texas itself and Virginia — three defense lawyers slept through capital trials. One cannot help but wonder how judges can tolerate such shoddy representation in capital cases. But of the 22 judges in Houston, 21 came out of District Attorney Johnny Holmes' office — the office that seeks the death penalty far more than any other prosecutor's office in the country. Unfortunately, many of those judges have not realized that their role changes when they put on the robe.

LAWRENCE FOX:

Steve Hanlon, do you have a legal strategy for overcoming *Strickland*? How do we put some teeth into the requirement that you get adequate assistance of counsel?

STEPHEN HANLON:

I was at a luncheon last week at which Steve Bright, very courageously, stood up and asked the Attorney General to take that position before the United States Supreme Court. Of course, the Attorney General did not want to comment on a pending case.

But I would like to say this, particularly to the members of the Litigation Section who are here. Twenty-five to fifty years from

now, somebody is going to write the history of this profession, and this, unfortunately, is going to be a very sad chapter in that history. The profession has a huge amount at stake in what's going on here. Because of this, Judges have to realize that the whole profession and the whole system have a stake in what's going on here.

In Justice Kennedy's concurring opinion in *Giarratano*, he said we should see what would happen, because many things were going on in Congress and in the States, and that the ABA was looking at this. What's happened since Justice Kennedy said that? The ABA has adopted its moratorium resolution, Congress has eviscerated the Great Writ and defunded the resource centers, and the States' record has been atrocious. Anybody looking at the state of this system of justice today has to recognize that we must be ashamed of it.

Sometimes you have to take the risk. We ought to be taking risks at all levels, by challenges to *Strickland*, to *Giarratano*, and across the board.

STEPHEN BRIGHT:

Exavious Gibson, a man on Georgia's death row with an IQ that's been tested between 76 and 82, stood alone at his very first postconviction hearing, with no lawyer. When he asked the judge for a lawyer, the judge said, "You're not entitled to a lawyer." This is a man whose trial transcript is just 400 pages long. The postconviction judge went ahead, had the hearing, denied him relief — signed an order prepared by the State, as the judges usually do in Georgia — and the Supreme Court of the United States denied certiorari on the question of whether or not he was entitled to a lawyer, without a single justice dissenting.

ELISABETH SEMEL:

We've been talking about half of the legal profession that engages in the criminal justice system. There have been allusions, but not any direct discussion, about the other half, the adversarial side, which most governments fund adequately — the prosecutors. Steve Bright called upon the Attorney General to be responsive also to prosecutorial misconduct. Steve Mills has investigated and exposed that misconduct extensively.

In looking at the most recent studies on the causes of wrongful convictions, one half of the equation most certainly is the inadequacy of counsel, and the other half of the equation is police and ultimately prosecutorial abuse and misconduct. That is also a situa-

tion that both the ABA and the entire legal profession needs to address.

LAWRENCE FOX:

But Lis, do you even have to go to that? We have an extraordinary imbalance just in resources. I know there's plenty of prosecutorial misconduct. But this system can't provide a fair fight, in view of the resources available to the defense as compared to the awesome resources available to the prosecuting side.

Steve Mills, is that something that will cause a response from the public? Is the public perfectly happy with the disparity in resources between the prosecution and the defense?

STEVE MILLS:

The answer is clearly yes. While polls show that the public's support for the death penalty has slipped a little bit, the public doesn't seem to mind that DAs who have a constituency — crime victims — are much better funded. I don't know that that's going to change. No matter how many stories the press writes about prosecutorial misconduct and bad lawyers, crime victims are always going to be the better funded constituency.

Nonetheless, there is a story regarding the disparity of resources. A number of newspapers and T.V. stations have done that story. But I don't know that it's one that necessarily resonates with the public.

HARRIET ELLIS:

I just left the American Judicature Society to join an Illinois death penalty moratorium project. The issue we're working on now is prosecutorial misconduct, starting from wrongful charging by the police. There's blatant prosecutorial abuse and police abuse, with very few sanctions. I'd like to hear discussion on that issue.

LAWRENCE FOX:

Tanya, one of the things that's coming out of this discussion is that we've got a trial with inadequate representation of the defendant, and then there's this after-the-fact sort of inquisitorial system that comes into play, in which lots of people take pot shots, trying to decide whether this is the person that did it and whether this person should be executed. It appears that we don't really have an

adversarial system for these people, because you never know what would have happened if this person, at trial, had good lawyering and had good investigators. We're stuck with this after-the-fact kind of thing which is the antithesis of our system.

It's a subtle point. Is that something that we can develop? Is that something to which the public will respond?

TANYA COKE:

As Chief Justice Kogan indicated in his remarks, a potential argument one can make to state legislatures is that it makes much more sense to fund the system properly at the beginning.

But in my mind, one value of the cases that, have been talked about in the death penalty context, because they're high profile cases with lives at stake, is that they are really a window into what's happening in the criminal justice system generally. In capital and non-capital cases, in adult cases, in juvenile cases, in misdemeanor and felony cases, there is a severe crisis in the quality of representation across the country. The public defender offices that give good representation are, unfortunately, more the aberration than the norm.

The other value of looking at these capital cases as a window into diagnosing systemic problems and thinking about reforms, is that when one looks not just at the problems with counsel, but also the other reasons why we have a criminal justice system that is paralyzed. When it comes to giving a decent shot in the system to poor people and others without \$20,000 in the bank to pay for a lawyer, clearly, judicial independence and defender independence are one part of the equation. We tend to talk about judicial independence in terms of the judiciary's ability to rule on cases the way it feels without political interference. But independence goes in the other direction as well: independence for the defense function to be able to fight zealously in a case without having to worry about whether that lawyer is going to get paid in the next case. It goes in both directions.

We know what it takes to give quality representation and to do it right the first time at trial. But we have a political problem. To address this requires a number of different approaches, in terms of public education more generally, marshalling the press and gaining the interest of people like Steve Mills in telling these stories — both what's happening on the defense side and the prosecution side, and where else the system is going wrong.

LAWRENCE FOX:

Steve Mills, is my construct too subtle?

STEVE MILLS:

I don't think it's a subtle problem at all. It's the central problem in all of this. Maurie and I talk about this quite a bit.

Everything seems to be overshadowed by questions of whether anybody has been executed who is innocent, a question that I don't think you can even begin to answer. In fact, the pool of cases you might look at grows astronomically when you start with the thesis that with bad representation, questionable evidence, poor funding and prosecutorial misconduct, the prosecution's evidence has never been challenged, so you don't know what that pool is.

Consider, for example, the Anthony Porter case in Illinois. Anthony Porter came within two days of being executed and was given extra time only because there were questions about his competence to be executed. If you took a glance at the record in that case, he looked completely guilty. It was only after journalism students, their professor and a private investigator went much deeper into it that it emerged that none of the prosecution's case held up.

That's really the key issue in all of this. Instead of chasing innocence cases, which is the Holy Grail to many reporters, our time is sometimes better used by focusing on the *system*. If you can show that the system is broken at every level and in every way, the real questions about the death penalty can be asked. I think a newspaper's proper function is to look at the system that takes a person's life.

MAURIE LEVIN:

The question of an innocent person having been put on death row drives me crazy most of the time. I know it's important because it does catch peoples' attention and opens their ears to listen to the problems in the system.

But I often feel that it's a red herring. Texas Attorney General John Cornyn has been frequently, particularly recently, quoted as saying that people in Texas get "super due process". He then says, slightly differently from Governor Bush, not that no innocent person has been executed in Texas, but rather that there has not been any innocent person *identified* whom Texas has executed. They apparently feel that if they keep on blithely insisting that there's due process in Texas, maybe people will believe it. And frankly, they

might be right about that. In recent national polls, about forty-five percent of the population didn't know Governor Bush's stance on the death penalty, nationally. That's stunning to me. I obviously live in a fairly myopic world, but that says something about the lack of education and knowledge nationally.

So, they keep talking about "super due process" in Texas. Yet, there is an inherent tension between that and the Texas Court of Criminal Appeals' saying, in the sleeping lawyer case, that there was not ineffective assistance of counsel.

SUSAN KARAMANIAN:

Many people say that the system must be working because people have been on death row for fifteen years and have had postconviction attorneys. And *The Dallas Morning News*' lead headline a few Sundays ago said that although people in Texas recognize that somebody innocent may have been executed, this doesn't significantly change their support for the death penalty.

So, it's incumbent upon the lawyers here to educate the public, nationally and at the local level. We have to go into schools and educate about the process. Local bar associations should have forums on this topic. We need to have a groundswell from the bottom up as well as from the ABA level.

CHIEF JUSTICE KOGAN:

One thing that people constantly ask at gatherings is that I simply name one innocent person who has been executed. I respond by saying that if we just look at Illinois, out of the thirteen people released from death row in recent years, five were released because DNA evidence showed that they were not guilty. I state that I'd bet there are scores and scores of people sentenced to death throughout the country who would have the same DNA results, if DNA testing were done.

What would have happened to those five people if we didn't have DNA evidence – which we really haven't had to the point where it's readily accepted by everybody until maybe the last five to ten years? Everybody here knows what would have happened to them. They would have been executed.

Can anyone seriously believe that since 1900, no one who has been innocent has been executed in the United States? If you say that no innocent person has been executed, you are just burying your head in the sand. We now have a scientific method that tells us that there are innocent people on death row, and if we didn't

have this scientific method these people would have been executed.

STEPHEN BRIGHT:

There is every reason to think there are more innocent people on death row than have been determined to be innocent through DNA testing. Misidentification cases are the cases where the most errors are made, and there is no biological evidence for DNA testing in most of those cases. That is where we must depend upon an adversary system working.

Consider the case of Jennifer Thompson, who identified a man as having raped her. After his conviction was reversed, it came to light that another person had bragged that he committed the crime. He was taken before her, but she said that she was sure he was *not* the person. She identified the same man again and he was convicted again. Eleven years later, DNA evidence proved that the perpetrator was the person who had bragged about it and that the wrong man had been in prison. Ms. Thompson was absolutely positive that the first man had done it. If she had been the witness to a murder instead of the victim of a rape, and there was no biological evidence, she would be just as sure today about the defendant's guilt, and the defendant would still be in jail.

I want to say one thing about the bar. When the Attorney General of Texas says that there is "super due process" in Texas, the president of the Texas Bar should say that that is absurd. There is no due process in Texas, let alone "super due process."

MICHAEL GRECO:

I am the incoming Chair of the Section of Individual Rights and Responsibilities of the American Bar Association. I commend everyone on the panel. I cannot disagree with anything that has been said.

We may not win, perhaps, the individual battles regarding inadequate representation or prosecutorial misconduct. But we can persuade more proponents of the death penalty, as we have already persuaded the Governor of Illinois and some conservative commentators, that they cannot, in good conscience, adhere to a system that just is patently unfair.

I once saw a cartoon of the Statue of Liberty with a tear in her eye. That is very apropos of our shameful system of justice with regard to the death penalty in this country. It should make all of us cry. Even representation by all the lawyers in the Litigation Sec-

tion, the Criminal Justice Section, and the Individual Rights and Responsibilities Section of the ABA could not do what needs to be done.

So I ask that everyone, while continuing the battle to get representation for people on death row, work with the ABA on another prong, on which the new ABA President Martha Barnett can lead the charge. That prong is to get this country to adopt a moratorium on the death penalty in every state. After that has been done, we can then talk about adequate resources and solving these other problems. Otherwise, as we're debating these various problems, people will continue to be executed. If we can persuade states to stop the executions, that will give us a little elbow room to discuss these other things.

I am proud to be a lawyer most of the time. But I am not proud to be a lawyer when I talk with people about what this country does on the death penalty.

LAWRENCE FOX:

I appreciate your comments and your optimism. But we should assume that there is going to be at least one state that doesn't adopt a moratorium. So, we have to figure out alternative strategies on this.

I want now to have a discussion about appeals. Steve Bright, could you talk about where we're falling down on appeals? Where there's been a bad result in the court below? Where are the problems?

STEPHEN BRIGHT:

Many of the problems aren't that different, at least in some of the states that are imposing the death penalty the most, from the problems at trial. I will give some examples, although in some respects I hate to do so because they don't really show the overall, day-to-day mediocrity.

George McFarland was represented by two lawyers who spent a total of ten hours preparing for his trial. One of them slept through the trial, but the Texas Court of Criminal Appeals upheld the conviction and death sentence. The appellate lawyer in that case missed three deadlines for filing the brief, and was ordered to show cause why she should not be held in contempt after the third failure to file a brief. Her affidavit in response said that she had been the victim of abuse and was bedridden as a result, and that

she had agreed to do this death penalty appeal because she thought it was something she could do while working in bed.

My last client to be executed, Larry Eugene Heath, was represented on appeal by a lawyer whose brief to the Alabama Supreme Court was one page. It would not have passed an eighth grade writing class, let alone a first year law school writing class. The lawyer did not show up for oral argument. I have never been able to understand how the Alabama Supreme Court, which had the responsibility to hear the cases on direct appeal, could accept a one-page brief and a lawyer that did not show up for the argument. One would think that the Alabama Supreme Court would have said, "We can't do our job as a Court. We must have a capable lawyer on this case, filing a real brief and appearing for oral argument so that we can do our job as judges." But the Court did not do that. It simply affirmed. Then, later, when the case was in Federal Court, every issue was held to have been waived because the appellate lawyer hadn't raised any issues in the appellate brief.

Ricky Kerr was given a lawyer by the Texas Court of Criminal Appeals to handle his post-conviction proceedings. The lawyer had been out of law school only three years. He was not able to go to his office because of medical problems. The lawyer filed a petition that did not raise a single issue. The Federal District Judge in San Antonio said that the Texas Court of Criminal Appeals, in appointing that lawyer, had engaged in a cynical and reprehensible attempt to have Mr. Kerr executed without any pretense of fairness.

ELISABETH SEMEL:

We focus a lot on Texas and Illinois, in part because of the wonderful work of journalists like Steve Mills. But it's important to recognize that the reality in the majority of states replicates and resembles only a smaller scale, and is often exactly like what goes on in Texas. It is not uncommon that the lawyer appointed for the direct appeal is the same incompetent lawyer who mishandled the trial for a reprehensibly small sum of money and never should have been handling a capital case. Where the appellate lawyer is not the same as the trial lawyer, the appellate lawyer is often chosen from the same pool. So the opportunity on appeal to correct errors is often lost, again, for the same reasons we've been discussing.

LAWRENCE FOX:

A criminal defendant has a constitutional right to counsel on

appeal. When we get to postconviction and habeas corpus, a death row inmate no longer has that constitutional right. Moreover, issues not raised on appeal are usually held defaulted when raised by those of us who volunteer to take on these cases later. Could you comment on this, Chief Justice?

CHIEF JUSTICE KOGAN:

While ineffective assistance of counsel is a leading cause of reversals in these cases, we can't overlook the fact that even a good appellate lawyer has to go with what's in the record. You can't go outside of the record.

In Florida, a Capital Collateral Representative attorney picks up the case after affirmance on the initial appeal. When CCR gets the case, it really reinvestigates it. It can come up with things that aren't in the record, such as that there were other witnesses who could have proved the defendant's innocence, or that there is other evidence to prove the person innocent.

The appellate attorney, no matter how good, cannot go outside the record when arguing before the Appellate Court. It's not until the habeas level that the real action kicks in. That's when you have really competent attorneys who are either appointed by the State or are working *pro bono* and are really interested in the case, who go out and reinvestigate the case. They come up with all sorts of things, such as that there could have been an insanity defense, or there are witnesses who could have proved that the State's witnesses were lying. Unless you have that kind of representation after the appellate process and you're into habeas corpus, many of these cases will slip right through the system's fingers.

MAURIE LEVIN:

One of the huge problems we have is that the American public hears the word "appeal" and says, "He's had an appeal; what is this habeas corpus stuff? What is this postconviction stuff?" There is a complete lack of understanding that postconviction and habeas present the opportunity to unearth crucial evidence. Indeed, the lack of understanding of the absolutely imperative, vital nature of postconviction review is a problem in recruiting law firms to take on postconviction representation of death row inmates.

LAWRENCE FOX:

And then, Maurie, when dealing with habeas, the judge often says that not all the issues can be heard, and that the Federal Courts are blocked from considering them.

MAURIE LEVIN:

You're moving us on to another area.

I don't think that people realize that most of the horror stories being reported in the press have resulted from heroic efforts during habeas proceedings. That is the only reason these accounts exist, and that's where many instances of innocent people being on death row have been discovered.

When people condemn the years and costs of post-trial proceedings, it's often forgotten that it's during post-conviction and habeas proceedings that these issues get discovered. Particularly in Texas, the death row inmates getting relief are often people represented by *pro bono* firms (many of them recruited by the ABA) that take the cases and pour resources into them. That's what it takes, and that's what brings about relief.

They do so despite the enormous procedural hurdles that make it nearly impossible to raise many of these issues and have them considered on the merits. If they inherit a case at the federal level, and the case has been poorly litigated at the state level, the potential constitutional errors in the case have been waived, and it is nearly impossible to ever get the courts to look at those issues. They are usually held to have been procedurally barred.

STEPHEN HANLON:

As important as postconviction and habeas cases are, these are the areas with which we have the most trouble funding, because there's no constitutional right to counsel in postconviction and habeas. So, we have to scrape and scramble and beg.

Steve Bright calls Florida "the promised land for the postconviction" because we've managed to get some state funding. But we've recently had a state statute that tries to get private lawyers involved in postconviction cases, with caps on their compensation. Already, early on, six of the lawyers who've taken these cases have waived filing for federal habeas. And there has been a postconviction filing — which usually, as Chief Justice Kogan knows, is a very huge filing — that's only three pages long, out of this new system.

So, while Florida may be as good as it gets in postconviction,

we have atrocious problems in precisely the place that presents the last opportunity to pick up these errors.

LAWRENCE FOX:

Tanya, is there a way of getting the American public to understand what we're doing and understand the need?

TANYA COKE:

Unfortunately, I don't think we will do so by talking about habeas corpus, even though I agree with everything Maurie has said about the importance of litigating cases on the habeas level, because that is where abuses at the trial level, in particular, are uncovered.

We as lawyers sometimes need help from communication specialists to help us explain how to make our points in a more compelling way. One of the fabulous things about the press coverage of the Gary Graham execution was that for the first time I heard the term "legal technicality" used in a way that helps on this issue. That was exactly what Steve Hanlon was talking about: the Courts are refusing to hear the merits of these cases and the claims of unfairness because of some of these procedural hurdles. These are the kinds of legal technicalities that people can understand without using Latin words.

Another key point relates to the critical need for the private bar to take these cases in postconviction and habeas proceedings. Although we would like to see criminal justice policy codified on rational argument, sound policy considerations, and at cost/benefit analysis, the fact is that criminal justice policy in this country is made by anecdote. The Soros Foundation has spent many hundreds of thousands of dollars on numerous studies on the economics of crime, on rehabilitation verses incarceration, on race discrimination, etc. They're all very important bases for discussing criminal justice policies that make sense in this country. Unfortunately, those studies are still background noise when it comes time to legislate three strikes laws, or funding for public defenders or capital defenders. The power of the stories about these cases that Steve, Maurie and others can tell is ultimately: what moves the legislators to do something? So, we have to understand and harness the power of the anecdote when we talk about these cases. Private bar involvement is one way of doing that.

LAWRENCE FOX:

Susan, you're a lawyer who volunteered, took one case and now are doing another case. You've experienced the problem of what you can raise on habeas. Could you talk about that?

SUSAN KARAMANIAN:

You can spend five years developing a petition and getting it through the system. When you finally think it's going to get heard on the merits, the first time you ever have a hearing is before the Fifth Circuit. Yet, when, as in the Gary Graham case, you put in evidence that was never discovered before, the Court says the claim is procedurally barred. This gets back to the point you raised earlier: allocating resources at the front end as opposed to the back end.

I would like to follow-up on another point in terms of habeas. A problem in Texas is that we are having difficulty getting qualified attorneys appointed as habeas counsel, because the Texas Court of Criminal Appeals appoints these attorneys. I know of an instance in which that Court was reluctant to appoint a qualified person who had been working on the matter. In order to be appointed, you have to be on the approved panel; but there are no publicly designated standards for competency. Thus, there are no objective standards. This limits the ability of qualified lawyers to be part of the system. There is an immense level of frustration. You won't be able to get the anecdotes of which Tanya spoke unless people are appointed who will put in the time, energy and resources into developing the record that should have been developed in the first instance.

STEPHEN BRIGHT:

I want to say one thing about something else. Many of these problems exist in the North, South, East and West. The problems of counsel are just as bad in many Northern jurisdictions as they are in the Southern jurisdictions.

We have talked a lot about class, because counsel relates to class. A major function of being poor is that you get a court-appointed lawyer.

But we have not talked about the other factor that plays tremendously in all this: race. Ninety-nine percent of the prosecutors in this country are white, and most are making decisions in capital cases without any review by anyone. Most death penalty cases are

resolved with two decisions by prosecutors: whether to seek the death penalty at all, and whether to accept a plea bargain and give life imprisonment in exchange for a guilty plea. In most places, those decisions are being made by one white man. That is a major problem apart from all these things we've talked about.

One of the reasons the ABA called for a moratorium is arbitrariness and racial discrimination. In the federal system, Attorney General Janet Reno reviewed the decisions to seek the death penalty. She presided over the broadest expansion of the death penalty in the history of the United States. And the racial numbers for the federal death penalty system are worse than in any state. They are even worse than in Alabama.

In New York, you also see arbitrariness, with some prosecutors seeking the death penalty a great deal and some never seeking it. Recently, there was a capital trial in Rochester in which the presiding judge was running for re-election and the prosecutor was running for another judgeship. Don't tell me that case was about law enforcement. It was about what the death penalty is about in Alabama, and everywhere else: politics. People are advancing their careers on the backs of poor people – often people of color.

RONALD TABAK:

The procedural bars that have been discussed didn't come out of thin air. The first death penalty case I handled, which I eventually argued in the United States Supreme Court, was *Francis v. Franklin*, a Georgia case involving a charge to the jury that unconstitutionally shifted the burden of proof from the government to the defendant. Although there was no objection to the unconstitutional charge at trial or on direct appeal, the Eleventh Circuit considered Mr. Franklin's claim, because Georgia procedure had not barred postconviction consideration of claims not raised at trial or on appeal.

However, subsequent to Mr. Franklin's trial and appeal, the Georgia system was changed to prevent people from continuing to get federal habeas corpus relief on meritorious constitutional claims in Georgia cases. Yet, it is not the Constitution that is a technicality; the technicality is, as Tanya said, the procedural bar rule.

An important recommendation of an ABA Criminal Justice Section Task Force in the late 1980's, on which Steve Bright served, and which was adopted as ABA policy, is that States should not have procedural bar rules except where the defendant deliberately withholds a claim from the State Courts. If the states did not apply

these procedural bar rules, then the Federal Habeas Corpus Courts would not be barred from considering meritorious constitutional claims.

One of the main reasons that the ABA has called for a moratorium is because of the trend towards more procedural bars as a matter of state law, which then precludes the Federal Courts from doing anything. That is a travesty.

CHIEF JUSTICE KOGAN:

During my tenure on the Florida Supreme Court, we examined postconviction petitions very very carefully when they came in. If we saw issues that could have changed the outcome of the case, we would take jurisdiction regardless of procedural default, under the all writs provision of our State Constitution. We would not sit still if we saw allegations that, if true, would probably have resulted in a different outcome.

I think the Florida Supreme Court, during my tenure, was perhaps the most cautious of all high courts in the country when it came to reviewing a capital case at any stage.

LAWRENCE FOX:

I have a concern as we come to the end of the program. One of the worst things that has happened, in a way, is the emphasis on innocence and DNA testing. Now, when Lis Semel calls-up a firm and asks it to take on a case, the firm often says that it would be happy to do so as long as it is an innocence case. Meanwhile, people are asserting that we are not executing anybody who is innocent, by which they mean anyone who was in Paris at the time the murder took place in Dallas.

It is very hard to get people to focus on the idea that there are many interim steps between being actually innocent and being eligible for execution. Steve Mills, you know about this. Do you have thoughts on how we can educate the public on this subtle point?

STEVE MILLS:

That's one of the points that we at the Chicago Tribune have tried to get across, *i.e.*, when the system is as flawed as it's been, you can't tell whether somebody is innocent or not. Because the system had become so flawed that he couldn't have that kind of confidence in it, Illinois Governor Ryan didn't want to take part in it anymore. So, he put a stop to it, probably for the rest of his term.

But as Maurie said, the effort to find somebody innocent who has been executed is sort of a red herring. Even if you found such a person, people would call it an isolated case.

So, we at least, feel our time is much better spent looking at the system as a whole and how you cannot tell whether people are innocent or guilty.

ELISABETH SEMEL:

An enormous problem in terms of firms taking cases is that they are putting the cart before the horse and asking the wrong questions.

But the most important difficulty is that because these cases have been so mishandled at trial due to prosecutorial abuse and lawyer incompetence, and because there has been inadequate judicial review, by the time we ask a firm to take a case, the firm is often looking at the record on direct appeal or the direct appeal opinion. But these are the least best indications of the truth of the case — whether or not the individual was wrongfully accused in the first place and factually innocent; whether or not the death penalty ever should have been sought; whether or not the case would have been settled or resolved had the defendant had a competent lawyer; whether or not the defendant would have been found guilty of a capital crime if there had been competent defense counsel; and, certainly, whether or not the defendant would ever have been sentenced to death if there had been competent defense counsel.

There are so many places at which the process is deficient and defective. I can say with confidence that of all the firms we have recruited, I have never had a lawyer say, after investigating a case that the lawyer has failed to find any measure of injustice. Uniformly, once lawyers undertake an investigation, they find many things that went wrong and many ways in which the least measure of justice was denied to the individuals they are now representing.

MELODEE SMITH:

I practice law in Florida, and also in Texas.

Yesterday, I was at the National Governors Conference, where I had the opportunity to talk to seven different Governors who believe this is not a legal problem at all. From their perspective, this is a political problem.

I concur with those who have said this morning that we as lawyers need to educate the public that this is also a legal problem.

Steve Mills is right. The legal system cannot even tell you with confidence whether people are guilty or innocent.

My concern is two-fold. I have had the dubious honor and distinction of representing victims of violent crime who oppose the death penalty. Lawyers need to step-up to the plate, not just to represent defendants, but also victims who need counseling and other types of advocacy when the state seeks the death penalty over their objection.

Second, we need better advocacy in support of clemency. The clemency process these days is just unbelievable.

Larry Roberson, who got a stay of execution last August, had never been evaluated to determine whether or not he was competent at his trial, at the time of the crime, or at the time he was to be executed. We were able to get a stay of execution for just a few months. But again, the process failed.

So, clemency is another aspect of this entire long process with which we have to deal. We need to raise these issues and encourage lawyers to really do a good job.

I witnessed the execution of Judy Bueno Ano, whose lawyers did not even file a clemency petition. She had Alzheimer's disease and scoliosis. Her execution was just horrible, with her leg catching on fire.

I raise these very serious concerns for lawyers. I ask that we, in whatever way we can, work with the mental health community, the religious community and all types of advocates.

LAWRENCE FOX:

Thank you.

The subject of the death penalty and the role of lawyers and the ABA is a topic worthy of a far longer discussion than this one. But I want to thank our extraordinary panel. Any of them could have conducted an entire program by him or herself. Thank you all for coming and sharing your ideas with us.