

AFTERNOON PANELS: WHERE DO WE GO FROM HERE?
LARRY FOX:

I don't think we could have a better introduction to this afternoon's work than the words of Senator Feingold, who seems to have been as prescient as one could be. This afternoon, we're going to talk about where we go from here.

It's my pleasure at this time to introduce the moderator of this first panel this afternoon, my good friend, Steve Hanlon. It is not a coincidence that this is the second partner from Holland & Knight, the great Florida now national, law firm, to grace this podium. Steve is Martha Barnett's partner. He is the public service partner for his firm. He has handled capital cases, and he is now turning his attention to systemic litigation that will go at the heart of the serious problems that can't be addressed case by case, but needs to be addressed in the class action setting.

AFTERNOON PANEL A: Survey of **Moratorium** Efforts and Walk Through the Process of Enacting a **Moratorium**.

STEPHEN HANLON:

Thank you, Larry. We're going to talk this afternoon with five speakers about **moratorium** efforts throughout the country and the process of enacting a **moratorium**. We've got folks who have been engaged in this process, with some degree of success, around the country. For those of us who are interested in moving this process down the road, each of these folks has some very interesting stories for us in terms of coalition building, public relations strategies, executive options, legislation, etc.

Our first speaker today I will not spend a great deal of time introducing, because if I introduced her I would tell her story, and I don't want to tell her story. I want her to tell you her story. Some of you may have read it in a piece in the New York Times or seen it on national TV, but we thought it would be a good idea to start off this panel with the face and the consequences of error in the system. So, all I will tell you about Jennifer Thompson is that she is from North Carolina.

JENNIFER THOMPSON:

Thank you. I want to thank everyone for allowing me to be here. Speaking in front of such brilliant people, I feel a bit overwhelmed, like a fish out of water.

I am not a legal expert and I'm not a political mover-and-shaker. I am a mother, a daughter, a wife, and a sister. And I'm also a survivor of a rape.

In 1984, in a little town called Burlington, North Carolina, on a hot July night, I was a college student. And I had the world right in front of me. I had a 4.0 GPA. I was dating and engaged to be married to a dental student. I worked two jobs and was pretty much carrying out the All-American dream until one night, when I was awakened by a stranger in my home. He placed a knife to my throat and he raped me.

During my ordeal, I tried to assess what I could do. I quickly realized that I was of no physical ability to outfight him. I had absolutely no weapons. I was not a violent person. I'm small. He was large. He had a weapon, and I quickly assessed that he had probably done this before. So, I felt like my best attempt to survive was to probably attempt to mentally outwit him.

At that time, I began to study his face. It's a very difficult thing to do when you're being raped--to want to look at your rapist--because your first impulse is to look away and just hope you survive. But I made it a point to look. And I made it a point to look in his eyes. And I made it a point to focus on every little detail that I could find. I looked for tattoos and I looked for scars. I looked for jewelry. I looked for the shape of his nose. I looked for the hairline. I listened to his voice. I tried to pick up on any little thing that he might say that would give him away.

After about 20 minutes of staring at his face, I was able to escape. With nothing more than a blanket wrapped around me, I ran for my life. About an hour later, at the police department, I was asked to come up with a description of my assailant. I recalled every little detail that I could. I sat in front of a composite book of features, of noses and eyes and hairlines and lips and cheekbones, and everything else that you could come up with to put together a composite sketch of what my attacker looked like. And I did.

The picture ran in the paper, and within a couple of days, we had a suspect. I was called down to the police department and was asked to look at a photo array of several men who fit the description, who had criminal backgrounds. I was told not to feel compelled to choose anyone, to take my time. So, I carefully studied the photos, and I picked him out. He was right there in that photo array.

A couple of days later, I was asked to do a physical lineup. I was 22. I had never been involved in any type of police activity in my life. The only things I knew were what I had seen on television. So, as I walked into the police department, expecting to be behind a one-way mirror, I quickly realized that I was in the same room with the man who had violated me. But, he was there and I picked him out. He was standing right in front of me.

In January of 1985, we tried the case. I stood in front of a jury and I stood in front of the defendant and I testified to the best of my ability, without any prejudice, that Ronald Cotton was the man who raped me, that he was the man who broke into my home and destroyed my life and broke my spirit, and he took something away from me that is not anybody's right to take.

Ronald Cotton was convicted and sentenced to life in prison. I was very happy because I was going to be able to put this behind me, and I was going to be able to try to rebuild whatever was left of my life.

I graduated. I didn't have a 4.0. I had a 3.89 GPA.

And I moved on. I met a wonderful man, and we began to date, and very slowly, I could trust him.

In 1987, the Appellate Court overturned the decision and we had to retry the case. Once again, my life was dissected and ripped apart, but with a new twist. Ronald Cotton had overheard a man named Bobby Poole bragging about committing a rape for which Cotton was in prison. Bobby Poole was brought into the courtroom and vehemently denied having bragged or confessed to the crime. And I was asked, 'Jennifer Thompson, do you recognize this man in front of you?' And I said, 'No, sir, I've never seen him before in my life'. 'And Jennifer, can you point out the man who raped you in July of 1984?' And I said, 'Yes, sir, he's sitting right there. It's Ronald Cotton.'

Ronald Cotton was sentenced to two life terms, plus 35 years. Ronald was never going to see the light of day. When Ronald was asked whether he had anything he'd like to say, he stood up and sang a song of faith in God. He said he was sorry that I had been raped, but it wasn't him. I thought, 'Gosh, what a horrible beast you are, trying to win the sympathy of a jury in a courtroom when you know what you did to me. You're trying to play the victim here.' I was nauseated.

So when I heard the decision that he was going to be in prison for two life sentences, there was nothing but celebration in my mind. We went back and popped open a bottle of champagne, and we toasted that one less monster, one less human being that could violate another woman, was off the streets forever.

In 1995, I had become a mother. I had given birth to the three most beautiful children on the planet.

I was visited by the detective in my case and the District Attorney of Alamance County. They said that it was being requested that DNA, which was now a household term, be reviewed in my case because Ronald still maintained that he was innocent. 'We may have to try it, Jennifer, we may not. Your blood sample has disintegrated since then. We want to know if you would give another blood sample?' I said, 'Of course I would give another blood sample, because Ronald Cotton is the man who raped me.' I had absolutely no question in my mind. We could prove it once and for all, because DNA was going to prove that Ronald Cotton had done this to me. And then I would never have to deal with this again in my life. This was in March 1995. In the Summer of 1995, I was once again visited by the detective and the District Attorney. They looked at me in the kitchen and said, 'Jennifer, Ronald Cotton was not the man who raped you. It was Bobby Poole.'

I had never felt any shame over being a victim of rape, because I was a good girl and I had not deserved what had happened to me. But, I felt so ashamed and so guilty over what had happened. I didn't mean to make a mistake but I had made a mistake, and it cost someone 11 years of his life. I had moved on in my 11 years, and I had married and graduated and had children. But, Ronald Cotton has spent over 4,200 days in prison for something he had never done.

My guilt was overwhelming. It was going to eat me alive. So, I sought support from family and friends. I said, 'What do I do?' They said, 'Jennifer, if Ronald hadn't been arrested for raping you, he probably would have raped someone else. You probably saved somebody from being raped. So, you really should pat yourself on the back. And he got three meals a day and TV for 11 years. He probably lived better than he would have lived anyway. So don't sweat it.'

But I couldn't let it go. So, in 1997, I participated in a Frontline documentary called 'What Jennifer Saw.' And I watched myself in that documentary. I realized that my last line was, 'I know Ronald Cotton didn't rape me, but in my nightmares, I still see his face.' I realized that that was wrong.

So I asked to meet with Ron. In a little church in Burlington, North Carolina, Ron and his wife and myself and my husband and several other people met. I sat in a room, not knowing what I was going to say. I had never seen Ron Cotton outside of a courtroom. For all those years, he was a monster in my mind because he had hurt me. And in walked a man. I looked him in the eyes, and I said, 'Ron, if I spent every minute of every day for the rest of my life telling you how sorry I am, it wouldn't even come close to how I feel.' Ron looked at me with tears in his eyes, and we wept together. He said, 'Jennifer, I'm not mad at you, and I've never been angry at you, and I forgive you.' At that moment, I realized that I had never healed; that my heart had been fractured all those years; that the only way I was ever going to heal was through forgiveness. I had to learn how to forgive my own rapist.

At that point, I thought, 'Well, this is the end of my journey.' I didn't know that my journey was really just beginning.

In June of this year, I had a phone call from Houston, Texas. I was asked to come down and do a press conference because a man by the name of Gary Graham was going to be executed based on a single eyewitness. I said, 'Sure, I'll come down and talk about eyewitness identification, but let me tell you that I am a supporter of the **death penalty**.' They said, 'That's okay. If you'll come down and speak on eyewitness identification, we'd appreciate it.' I said, 'Okay, I'll come down.'

So I went down to Houston and sat at a big table with 11 men and women whom I had never met in my life. During the course of dinner, each one stood up and told me his or her story. I heard stories of wrongful convictions. Some had been on death row. Some had been imprisoned for eight years, twelve years, fourteen years, eighteen years.

When it came time for me to stand up and introduce myself, I was a bit nervous. I stood up and introduced myself. And I looked at them and said, 'I am an eyewitness, and I made a mistake. And from the bottom of my heart--I can't speak for every person who put you behind bars--but I'm sorry.' A gentleman stood up and said, 'Ms. Thompson, you're the first person that's ever said you were sorry. And I think I can begin to heal now.'

That was the beginning of four months of a journey that I had no idea I was going to take. Thanks to Larry Marshall and the Center of Wrongful Convictions, I have been speaking out against the **death penalty** and for placing a **moratorium** on the **death penalty**. I do so because I want to honor Ronald Cotton. And I speak in honor of Joyce-Anne Brown, Kurt Bloodsworth, Herman Atkins, Kevin Green, and the memory of Gary Graham.

What I had learned was this: people aren't born bad, society makes them bad, and there are people who are redeemable, and we can't just dispose of them. And I learned that people are more than their past mistakes. I learned that there are mistakes being made and that we can't throw these people away--because they are my friends, and they are daddies and mothers and husbands and wives and sons and daughters.

I will continue to speak out until there's a **moratorium** placed to save these beautiful people. The world is richer for them, and I am blessed to have them as my friends. Thank you.

STEPHEN HANLON:
Thank you, Jennifer.

I have served with Estelle Rogers at the Section of Individual Rights and Responsibilities of the **American Bar Association**. I have often remarked to myself that I would hate to have her on the other side of a case. She is a tireless advocate, and when she wants to get something done, she gets it done.

Fortunately, she was a real key point person for us in 1997, in the efforts to have the ABA adopt the **moratorium** resolution. We've asked Estelle to come up and give us an idea of what went on back there in 1997. Estelle Rogers.

ESTELLE ROGERS:
Thank you, Steve.

I was warned not to follow Jennifer Thompson, but it was my suggestion that she go first on this panel. What she just did was what we call 'framing the issue.'

I will discuss what led up to the passage of the ABA's **moratorium** resolution in February of 1997. I was at that time privileged to be the delegate to the ABA House of Delegates from the Section of Individual Rights and Responsibilities. As many of you know, the Section of Individual Rights and Responsibilities has often been called 'the conscience of the ABA.' We wear that as a badge of honor. A lot of people think we're a big pain because we bring to the House of Delegates many of the most difficult and controversial issues that the House ever takes up. And this was one of them.

By the time this resolution came before the House, it had been years in the making. It was a big group effort. I am hardly the only one who made it happen. In fact, if I were inclined to take full credit, this would not be the room in which to do it, because it's full of people who participated in this effort, many of them for a lot longer than I did.

I want to talk to you about the kinds of political strategizing that went on before the voting in the House of Delegates, and about what's happened since.

At that point, in 1997, the ABA had an eighteen plus year history of having its House of Delegates pass **death penalty** policies. These policies were actually on the face of the resolution. They included policies about the right to counsel and the compensation of counsel, and policies about the disparate treatment of racial minorities. The only abolitionist policies that the ABA had ever passed were about the execution of the mentally retarded and children under age 18 at the time of the crime. Other than that, the policies that the ABA had passed, over many years, had all been about how the system should be working, and they were implicitly a recognition that the system was far from working perfectly.

Over the years that I had been active in the Section of Individual Rights and Responsibilities, which was about ten years then, we had had many cases brought to our attention, and requests for the ABA to file amicus briefs in certain **death penalty** cases. We came to the realization over a number of years that the system wasn't getting any better, that there were deep systemic problems, and that if we wanted to do anything about them, and to bring the ABA's prestige to bear, we would have to do something a little more dramatic than the piecemeal approach in which we had been participating for those many years.

The debate in the Section of Individual Rights and Responsibilities was among people who were probably almost unanimously against the **death penalty**. The question was whether the ABA should be asked to take a position against the **death penalty** or whether we should advocate that the ABA do something different from that. Many of us, even fervent opponents of the **death penalty**, believed that the ABA's role as a provider of counsel in post-conviction proceedings, and as the voice of the Bar on this issue and in the criminal justice system generally, would be compromised by an abolitionist position on the **death penalty**. In other words, if the ABA became an opponent of the **death penalty**, that would in some ways detract from its position as a critic of the process. We felt that the ABA had a certain kind of power that was provided by its ability to say, 'We take no position on the **death penalty**.' We have seen this borne out in the years since the passage of the **moratorium** resolution.

We also debated in our Section's council proceedings whether the resolution should use the word '**moratorium**'. Others within the ABA advised us against including that word, because they thought that many people considered that to be a scary, divisive word whose inclusion would make the resolution too political. Accordingly, our resolution did not include the word '**moratorium**'. I have been very amused by how that word has taken a life of its own and has really caught on since 1997. The Republican Governor of Illinois has called for a **moratorium**. So much for its being scary, political, and divisive.

So, we came to the wording that we presented to the ABA House of Delegates in February 1997. It basically says that states and the Federal government that have capital punishment in place should cease executions until we are assured that various policies that the ABA has passed over an 18-year period have been complied with. Our decision to present this at the February 1997 House of Delegates meeting in San Antonio, Texas was not coincidental. We thought there was something fitting about raising this issue and having this debate in the state of Texas, even at that time. Prior to the convening of the House of Delegates, we did what any political operatives would do. We put together a list of co-sponsors, sections in the ABA that cared about this issue, to give the resolution some power and some breadth. We put together a letter from former ABA Presidents who were on both sides of the **death penalty** issue but who all believed that the system was hopelessly broken, that it was time to do something more drastic than we had been doing, and that we should call for a time-out

on executions.

These and other activities leading up to the actual presentation to the House of Delegates were brewing over a period of months. We were talking. We were preparing talking points. People were writing pieces on this issue, including the report that accompanied the resolution itself, which was written by a law professor in Massachusetts whose name didn't ever appear on anything.

We presented it to the House of Delegates in February 1997, supported by an all-star list of speakers. There wasn't a huge amount of opposition. But some of the opposition was pretty powerful. As David Bruck mentioned earlier, the Deputy Attorney General of the United States decided to speak against it. Following her presentation we were able to convince Benjamin Civiletti, who happened to be in the House of Delegates and had been an Attorney General of the United States, to speak against her 'defense' of the federal government's use of the **death penalty**. The then-President of the ABA spoke against the resolution, and that somewhat intimidated us--but only a little bit--because we had a power-packed list of speakers, one after another, who spoke with us, including several past Presidents of the ABA.

In preparing for coming here, I managed to find the file I had of the activities of that day. I still have the list of speakers and the notes regarding who was going to go in which order and who was going to answer which points. It is a vivid memory, and one of which I am very, very proud.

After the resolution passed by an overwhelming margin, there was a very hastily called press conference in San Antonio, Texas. The ABA press people put this together. The President of the ABA (who had opposed us) and I each made about a minute or two of remarks. There were lots of cameras flashing, and we were all a little surprised at how much interest there was in the press. We didn't even try and there was press everywhere. It was on CNN and C-SPAN and everywhere else for days after that, as the press reported that the **American Bar Association** had dealt a blow against the **death penalty**.

One of the consistent issues that all of us who work on this issue have experienced is that when you call for a **moratorium**, no matter how many times you say that you're not taking a position on the **death penalty** per se, it is perceived as an **anti-death penalty** position. That has been a slightly uncomfortable position for the ABA to be in. All of us, even those who fervently oppose the **death penalty**, have been quick to correct that misperception.

After the resolution was adopted, the Republican faction of the U.S. Congress put out a position paper that said, 'How the ABA became a leftwing lobbying group; **Anti-death penalty** stance only the latest evidence.' And there was fallout from people who didn't want the ABA taking many of the positions it has taken.

The good news was that a number of state legislatures, state officials, and bar associations around the country began to look again at the **death penalty** and how it was being carried out. In some cases, they called for a **moratorium** in their own states, as the Nebraska legislature and numerous bar associations did. As you heard, one of the high points in our history since was the declaration by the Republican Governor of Illinois of a **moratorium** in his state.

If there is one thing that I am concerned about--and I am as guilty of it as anybody else--it is our fixation on the issue of innocence, as if the innocence of the defendant is the only thing that should compel us to call for a **moratorium**. We all have to pay a lot of attention to how the system works, whether this system works, whether we can have confidence in a system that doesn't do right by its guilty as well as its innocent. We have to realize that the innocent are only a small part of the problem of a system that is very broken indeed.

I feel as strongly about what we did in the ABA in 1997 today as I did then. It was a very exciting and heady experience, especially when one sees over the past three years all the implications and consequences it's had.

I unearthed in my archives the one-minute press statement I made on that day at that hastily-called news conference. It was the proudest day many of us have had in the ABA, and I certainly haven't lost any of the headiness since.

'The ABA has never had a policy for or against the **death penalty**. It still doesn't. But for the past 18 years at least, this country's lawyers have investigated and reported and testified about the rampant unfairness in this country's system of capital punishment, and the situation has only gotten worse. Today we are here to say, 'We mean it'. We lawyers cannot sit by and watch this national scandal continue. We call upon the federal government and all states that have the **death penalty** to stop executions until they get their house in order, until they can ensure that the justice system delivers justice and that the innocent will never be executed again.'

Thank you very much.

STEPHEN HANLON:

Thank you, Estelle.

Our next speaker, Judy Perry Martinez, has something in common with me. We have both tried a post-conviction **death penalty** case although neither one of us had ever before tried a criminal case in our lives. She was assisted by the Volunteer Lawyers' Resource Center, and I was assisted by one of America's great criminal defense lawyers, Jim Russ of Orlando.

We want Judy to talk to you today about her experience in Louisiana concerning post-conviction resources and with the **moratorium** efforts with the Louisiana Bar.

JUDY PERRY MARTINEZ:

Good afternoon.

An experience it certainly was. I place it up in the category of what I call 'personal life events'. Among those events are the birth of my children, the death of my father, and representing somebody all the way through execution in what was probably the fulfillment of the highest professional calling that any of us can have.

The seeds for the **moratorium** efforts in Louisiana were planted shortly after the ABA's February 1997 House of Delegates resolution. There was a great deal of frustration with the lack of resources in my state and the lack of adequate counsel and proper compensation for counsel.

We all live in our own little worlds. As I've sat here throughout the day, I've heard the woes of other states mentioned many times. It wasn't until shortly before lunch that someone mentioned Louisiana. But we think we many times stand alone. It's comforting to know that there are so many people out there who in some ways are fighting the same battles that you're fighting in your state, and to find out that the ABA once again stands as a leader and a supporter in those battles.

Having been part of the ABA effort about which Estelle just spoke, and soon thereafter having lost a client to an execution by the state, I had the privilege of being asked to chair the State Post-Conviction Representation Committee. I decided to take an approach that I guess in hindsight was possibly somewhat overly cautious with regard to securing a **moratorium**.

The committee took a three-pronged approach that was guided with good thought: (1) educating the members of the Bar about the epidemic, the crisis that was facing our state and had been facing our state for some time; (2) a significantly stepped-up effort to recruit counsel; and (3) seeking statutory reforms that were crucially necessary in our state, including the provision of minimum support to those who were representing clients in these cases. Of course, the ultimate would be the establishment of a **moratorium**--if we ever got there.

We were lucky to have among us in Louisiana a voice for movement, someone who wasn't satisfied. It was a Lake Charles, Louisiana lawyer named Tom Lorenzi, who is with us here today, and who served as a member of the Committee. He did not let us sit back being happy about the one or two law firms that we were able to recruit in a six-month period, the numbers of judges we were reaching with our message, or the number of times we had articles in the Louisiana State Bar Journal.

He went forward and introduced a series of resolutions that culminated in the success of having our Bar Association become one of the first state bars to pass a **moratorium** resolution.

Our first resolution was passed by the Louisiana State Bar in June 1998. It urged the recognition of the right to counsel in Louisiana for post-conviction habeas proceedings, and also asked the Bar to make the recruitment of pro bono attorneys a priority.

We had very good, earnest discussions about whether our successes in recruiting were in some ways hampering our efforts toward a **moratorium**. But we all decided that we couldn't let one person slip by. I think everybody in this room has come to that same conclusion at some point or another.

Then in March 1999, our Chief Justice, Pascal Calogero, Jr., was joined by three other justices in our Supreme Court --at least two of whom have been labeled the most conservative members of that court. They called together a group of district attorneys, criminal defense counsel, commercial litigators and bar types like me, and said we need to do something about the representation issues: the lack of representation and funding. We said, 'Gosh, Chief Justice, we'll get to it by the next session.' He replied, 'Nope, you can get to it within the next ten days, because that's when the bill is going to be introduced in the legislature.'

We proceeded to work on some reform legislation, which ended up being compromised legislation, which to this day is not funded. But it had a significant effect in educating our bar and our bench about what is necessary.

In June 1999, Tom Lorenzi went to the House of Delegates of the State Bar one more time. He urged the filing of a resolution authorizing us as necessary to file amicus briefs in cases involving issues of inadequate representation, resources for experts, etc. During that same time period, we went forth with our strategy of educating and recruiting. We had significant leadership from the members of the United States Court of Appeals for the Fifth Circuit, who repeatedly allowed us, year after year, to use our state meetings at Circuit Court conferences to implore lawyers to get involved in this movement. I urge you to do the same at your Circuit Court conferences.

Then, in July 1999, the statute on representation passed.

It was not long after that, in January 2000, that Tom once again rose up and had a resolution passed by the State Bar House of Delegates and by the Board of Governors calling for a **moratorium**.

I've gone into this detail about the timeline and the efforts that were going on in our state because it was the awareness that developed within the bar and the bench from a series of resolutions that were brought to our profession in our state that ultimately allowed us to get that **moratorium** resolution. Could we have had a **moratorium** resolution had it been the only resolution we proposed? Possibly. But looking at the fact that not so many other state or local bars have been able to get a **moratorium** resolution passed, none of us in Louisiana would suggest, in hindsight, that we should have changed our path.

The series of resolutions that Tom so bravely and courageously brought have also done something else in our state--to till the ground for the work of Louisiana's greatest secret weapon in post-conviction, the Honorable Ginger Berrigan, a sitting member of the United States District Court for the Eastern District of Louisiana. It is because of Judge Berrigan's credibility, and her consistent beyond-professional approach and treatment of lawyers that out of the 82 law firms recruited to handle capital punishment post-conviction cases since 1988, 14 of those, 18% of the listing, are Louisiana law firms. That says a lot about the efforts that have gone on as a result of the **moratorium** resolution being passed in Louisiana.

Judge Berrigan teamed up some members of our bench who are perceived to be relatively conservative to go to law firms to recruit, and to talk about **moratorium** issues. Judge Berrigan's persuasive powers notwithstanding, her job would have been much more difficult had we not had those three resolutions in place and the backing of the House of Delegates.

You have to understand the context of the backing by the House of Delegates of the Louisiana State Bar. I can brag about them because I have not spent my time there. I have spent my time in the ABA on many issues. This is a bar association that has shied away for many, many years from taking any types of positions on many, many subjects. Yet, the members of the House of Delegates earthed up whatever was in them--and as Tom will tell you, the vote was an outstanding one in favor of the **moratorium** resolution. He remarked to me earlier today that of the known prosecutors in the room, he knows of none that voted against that resolution. They were voting on something about common interests that they all held--not just about innocence, which is absolutely an important subject, but also about fair representation and how we as

lawyers would want to be treated if we ever faced what the people on death row in our own state have faced.

In Louisiana, after we have adopted this **moratorium** resolution, a tough road lies ahead to convince our legislature, and maybe even ultimately, if necessary, our Governor, of the need for a **moratorium**. But the Bar's patience, I sense, is growing thin. And the binding together of the criminal defense attorneys, the prosecutors, the commercial litigators, the transactional lawyers, the law students, the paralegals, and the academicians in our state on this issue may become our state's profession's brightest and proudest moment.

That moment will happen if we are able to convince those in power in our state that a **moratorium** is necessary. But I'm afraid that if any of us in our state blinks, that moment when the momentum for the **moratorium** is the greatest will have passed us by. And we certainly can't let that happen. Thank you.

STEPHEN HANLON:

Thank you, Judy.

Governor Ryan brought Matt Bettenhausen down to talk to us today. Matt is Governor Ryan's Deputy Governor for Criminal Justice and Public Safety. He currently directs the commission about which Governor Ryan spoke to us at lunch.

We've asked Matt to talk to us today about the process that he and his Governor underwent at the time the Governor declared the **moratorium**, the legal mechanism they used, and the work of that commission.

MATT BETTENHAUSEN:

Good afternoon. It's a pleasure to be here.

I'm not going to go into a lot of details about the process because I think the Governor explained pretty well in his luncheon comments what his thoughts were and how we ended up where we were at that point. I'll pick up where I came into the picture. The Governor had a lot of questions, as he said today at lunch. And a lot of those questions were unanswerable. I thank God every day that he is not a lawyer, because common sense really should govern a lot of things that we do. Sometimes, common sense gets lost as we do our legal work in the legal system and the criminal justice system. Common sense is something I'll bring up a little bit later when I talk about the word **'moratorium.'**

In Illinois, soon after conviction, an execution date is set. That, of course, is not a real date. But as these cases work their way through the legal system, taking years to go through, at some point, they're exhausted. And when a case reaches exhaustion, when the death row inmate has gone through direct review, post-conviction review in state court, and federal habeas reviews and their appellate rights have been exhausted, the Attorney General goes to the Supreme Court and asks for the final date. And now the race is on. The execution date is within 60 to 90 days. When an execution is coming up and a final date has been set, the Prison Review Board reviews the conviction and the clemency petition that is going to be presented to the Governor for his consideration as to whether to grant a pardon, a reprieve, or a commutation.

For the Governor, that certainly isn't enough time to really be looking at a case. And it certainly isn't enough time, in his opinion, for the Prison Review Board to be reviewing a lot of these issues and looking at a case and making sure that everything has been answered, that every fact has been looked at.

The Governor was unsatisfied with some of the materials he was getting from the Prison Review Board. I don't mean to be critical of the Board. It has time limits. He decided to bring in a group of informal advisors, former prosecutors. At the time, I still was a prosecutor, but I had had extensive experience in habeas litigation. The idea was that we were going to be able to go through these records and help him answer some of his questions.

But as our discussions continued, concerns that he had about the fairness of the criminal justice system and the need for somebody to look after the criminal justice and public safety agencies all of a sudden evolved into 'Bettenhausen, why don't you come over here and be my Deputy Governor?' January 31, 2000, the date that he declared the **moratorium**, was my first day at the office.

Not that I didn't know it was coming. We had spent a lot of time thinking about how we were going to be able to impose the **moratorium**. As the Governor said, once he heard from the Attorney General that the Attorney General was going to be asking for yet another execution date, the Governor wasn't going to go ahead with the execution, given all of the problems that the Governor saw in the system.

In Illinois, the Governor has broad powers to do this. The Constitution in Illinois provides that the Governor may grant reprieves, commutations, and pardons after conviction for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law. There really aren't many laws that regulate it, so you can argue that he could declare a blanket **moratorium**. But, what we told the Attorney General was, 'Attorney General, you can go ahead and ask for your dates, but we are going to grant reprieves in any and all cases that come to the Governor's desk.'

Upon hearing that, the Attorney General voluntarily agreed that he was not going to ask for any more dates from the Supreme Court as long as the Governor was going to be appointing this Commission and that it would be looking at the issues of capital punishment.

So that's how we got to 'the **moratorium.**' We didn't necessarily call it a **moratorium.** To some extent, that's a shortened version that the press often likes to use.

One of our retiring Supreme Court Justices has been saying, since about the time that we imposed 'the **moratorium**', that the word '**moratorium**' is not anywhere in the Constitution, that the Governor doesn't have the right to declare a **moratorium**, and that he is violating the Constitution. You may all wonder why a sitting Supreme Court Justice is saying these things in the press and is encouraging somebody to challenge it in the Supreme Court. You might wonder how he would vote on it if it were to make it to the Supreme Court.

Justice Heiple has accused the Governor and the Attorney General of colluding to violate the Constitution. That simply didn't happen.

The Governor's view has always been that he may have the blanket authority to do it because an inmate doesn't necessarily have to petition for grants of reprieves, commutations, or pardons, although the law provides a process for somebody to make a petition. The language varies. There are terms such as 'he thinks proper.'

The Governor also believes that it's clear that while the Supreme Court can set execution dates, the Governor can order indefinite reprieves, which suspend, stay the executions until the Governor is satisfied that he knows what went wrong with the system, and if it is at all possible the system has been fixed.

So, with those thoughts in mind, he appointed the Governor's Commission on Capital Punishment, of which I am the Executive Director.

I frankly wonder whether if the Supreme Court were presented with requests to set final execution dates whether its members would actually want to set final dates. The Supreme Court itself recognized that the capital punishment system is broken in Illinois, and it put together its own committee to look at what kinds of changes need to be made in the Supreme Court rules on the operation of capital cases. There has yet to be a final report issued by the Supreme Court's own commission looking into the capital punishment question. And the Governor's commission is looking both at the preliminary recommendations of the Supreme Court and all of these other issues that

are out there. Potentially, there could be a question of whether the Supreme Court would want to set final dates while these issues are still out there and whether due process and justice should allow the capital punishment system to proceed apace. The Commission that we put together has had several public hearings. We're going to be having some more throughout the state. The biggest difficulty is that there is a wealth of information on issues concerning the **death penalty**.

We've also called in experts with whom we have been consulting. Illinois has not had a comprehensive race study since the **death penalty** was reinstated in 1977. A race study done in 1980, only three years after reinstatement, so there was a very limited sample. We know that of the 161 individuals on death row, two-thirds are African-Americans and other minorities. So, there are some issues we'd like to have answered about race-- issues of how the decisions are made that end up with these particular individuals on death row.

In Illinois, we've got 102 counties. So you have 102 separate decisionmakers deciding when a case will be pursued as a capital case. That may well be a good thing for each local county. But when it comes to the Governor's desk, he's not really interested in the particular parochial interest that a county may have. His job is to look at the entire state. So when you have 102 different decisionmakers, you are looking at how these decisions are made throughout Illinois by those 102 decisionmakers.

So, there's a lot of work that we're doing. I'm also chairing the Governor's Criminal Code Rewrite and Reform Commission, so my days are full. Part of my responsibility is to have a sub-cabinet with all of the criminal justice functions of state government. For example, the Prison Review Board reports to me, the Department of Corrections reports to me, the State Police reports to me. There are many issues with the criminal justice system.

We just heard from Senator Feingold. There are things like the Innocence Protection Act that can be done separate and apart from whether or not you are doing or achieve a **moratorium**, things that must be done today. The Innocence Protection Act that is pending before Congress was modeled after much of what we have done in Illinois, in providing for post-conviction DNA testing; in providing compensation for those who it is established have been wrongfully convicted; and in providing new resources for capital cases.

Illinois is one of two states in the nation that allows for post- conviction DNA testing. In fact, it goes beyond just DNA testing. It permits other forensic tests post-trial. And we made sure that while we've got executions on hold, the new cases coming into the system are tried right, with resources there and available. The \$21 million, about which the Governor spoke at lunch, is there so the defense attorneys can hire their own technicians, their own DNA specialists, their own scientists, their own mitigation specialists, their own investigators. It is also there to provide extra compensation for

privately retained attorneys.

A huge problem that we have is that there are too few private attorneys interested in or able to take on the expense of doing these capital cases. That is frustrating for Rita Frye, from the Federal Defender's office here in Chicago. Too often the perception is, 'Well, if I get a public defender, I am somehow getting lesser counsel.' It wasn't true federally. You were getting some of the best counsel that you could get. The same is true in capital cases. The most experienced and best attorneys are those involved with the Public Defender's office.

Whether or not there's a **moratorium**, you can all make differences with regard to ways to improve the criminal justice system. But, from my own personal involvement with this, I can tell you that we've got a forensic crisis in this country. We don't have enough scientists and technicians to do the cases that are coming in. We don't have enough scientists and technicians to do the cases that are still sitting on the shelves. We put an extra \$4.3 million in this last budget to try and address the issue of the backlogs. But the backlogs are going to just keep growing as law enforcement gets better and its evidence collection techniques get better. It takes two years to get a technician trained and certified. So, it's not something you can start throwing money at today to solve the problem because you've got a lag time.

Illinois' backlog problems are not unusual--and we've been putting a lot of money into it. Indeed, Illinois has the third largest forensic science laboratory system in the world. Only the FBI and Scotland Yard are larger.

The Governor's been to Washington. I've been there. I've sent the state Police Director there to testify in favor of the Forensic Science Improvement Act (it was recently renamed). That particular act would provide some \$700 million over ten years to the states so that they can start working on the forensic sciences to improve accuracy. We certainly need support from folks like you to bring the kind of accuracy and fairness to the criminal justice system that forensic science can bring. That's my call to you, in addition to your issues on **moratoriums**. Thank you.

STEPHEN HANLON:

Rod Autrey is a Republican, like Governor Ryan. He supports the **death penalty**. He is a certified public accountant. And he is from Jennifer Thompson's state of North Carolina.

We'd like him to talk to you a little bit about the efforts in Charlotte with respect to a **moratorium**.

ROD AUTREY:

I'm here to tell you about the most recent experience with a local elected body and its efforts to pass a resolution for a **moratorium**.

On July 24, we had a regular City Council meeting. For the first 30 minutes of our meetings, we allow citizens to come down and speak to us about anything that they would like to talk about. It doesn't have to be on the agenda. A well-organized group came unexpectedly. It wanted to talk to us about a **death penalty moratorium**, and to request that the City Council consider putting on its agenda for adoption a recommendation to our state legislature that we have a **moratorium** for two years and that during that period of time there be an exhaustive legislative process. One individual in that group was Father MacCreish, with St. Peter's Catholic Church in Charlotte.

I didn't know what was going on out there. I didn't even know there was a **death penalty moratorium** movement. They had a good packet of material, which spelled out the problems, the difficulties, the situation in the state of North Carolina. I made a motion to put it on our August agenda, and all hell broke loose. The Mayor became very exacerbated, very animated. The Mayor vigorously argued against this ever being considered by the City Council. He said it was not in our purview, that it was not our business, and that we should not be engaged in it whatsoever. That debate lasted awhile, but ultimately the vote was 8-3 to put it on our agenda in August.

There was a quite heated, contentious, and highly emotional debate in the intervening month and during the meeting on August 28. It was distorted politically, as you would expect, as not being a resolution for a **moratorium** on the **death penalty** calling for a legislative study, but rather as being an effort to take a strong stance against the **death penalty**, even though our particular resolution clearly stated that that was not the case. The Mayor probably earned untold political points because he succeeded in the great distortion of that issue. He brought down the families of slain police officers to make emotionally highly-pitched pleas to us, letting us know that passing the resolution would be a slap in the faces of their slain sons. It was a tough night.

I'm going to read you what I said. I did not script my comments that night. I spoke off the cuff, from the heart. But I've been told that these words perhaps had something to do with our ultimately passing that resolution by an 8-3 vote. Understand that I hadn't known of the **moratorium** movement, had been given information, and had not undertaken a lot of in-depth study. This is what I garnered from the information I received. This is what was important to me, as an elected official in my community. Perhaps my comments will give you a sense of what and how you might push for similar resolutions in other elected bodies:

It is with a great deal of respect for all that I say that you are passionate as to why you are here, and I respect each and every one for that. If this were a resolution to take a position against the **death penalty**, I would not support it, and would fight vigorously against it. If this were a resolution to cease the legal process in terms of giving out a sentence for death, I would be opposed to it. But the resolution does not do that. This resolution says that those who are on death row will stay on death row for two years while a study is done. The legal process will go on, and those that deserve the **death penalty** will still get the **death penalty**.

The reason I support this resolution, and I feel strongly about it, is that the very foundation of our system of government really goes to the fact that justice must at all costs be blind. It may be a panacea, but I think we all must be driven toward reaching the goal of justice being blind. I believe strongly that the current situation does not exhibit that. I do not believe there's a case out there proving where an innocent man was actually executed. And in a strange sort of way, that proves the system has worked many times, as men and women who have been convicted and sentenced to death wrongly are set free because of appeals. Again, there is not a case that I'm aware of where someone that was innocent has been executed. That is not what this is about. It is about equity and fairness. I believe there are some on death row that would not be, if they had adequate resources, adequate defense. I truly believe that there are people that should be on death row but are not because they have extreme resources and extreme defense. I do not think that this is something that any of us can sit back and feel good about.

Hopefully, this **moratorium** and legislative study will move us one step closer to justice truly being blind. We should support this resolution, which asks the state legislature to take two years to see what it might be able to do in order to move us closer to that panacea.

I take exception to the premise that the Council is not involved in this issue. We talked about the police officers being involved in the arrest, and the police officers do an outstanding job in the investigation. The City Council is also very much involved from the standpoint that in our budget that we adopted last year and again this year, there is a significant contribution to the funds of the District Attorney's office. From arrest to investigation and into the District Attorney's office, we are very much involved in the capital case trial process. We have a lot at stake, and I would like to see this Council try to make this a better system, a fairer system, a more equitable system.

There are politicians out there that are willing to get involved. That very first night in July, I had in the back of my mind the Governor of Illinois. I remembered what he had done, although I hadn't really studied it. He was truly an inspiration to me at that moment.

It is appropriate for you to think in terms of local town councils and city councils and boards of county commissioners. They are not going to be the ones to pass legislation. But if you want to educate the public--and all elected officials think very much about what the voters have to think and say about what they're doing--one of the best ways to educate the public is take it to your local town council, your local town board. I promise you that the local newspaper and the local media will cover it. They will have information in there. If you instead go to them and ask them to cover what the ABA has done, they'll turn their heads on it. They're really not going to give the coverage they should. But if you put it in the political arena where politicians have to take the heat, they'll cover it. Hopefully, you won't have a mayor who distorts the issue politically very successfully to the point where the last article that the Charlotte Observer wrote said, 'The City Council took a strong stance against the **death penalty**.'