

AFTERNOON PANEL B: How Can We Join Forces to Achieve a **Moratorium?**

LARRY FOX:

It is now my pleasure to introduce the moderator of the final panel of the conference. I have to be nice to him since he's my moderator. But in fact, it's an easy assignment. Michael Greco is a dear friend, a wonderful lawyer and Chair of the ABA Section of Individual Rights and Responsibilities.

ABA President Martha Barnett was Chair of the Individual Rights and Responsibilities Section. When you pick a chair of the Individual Rights and Responsibilities Section to be President of the ABA, you get a conference like this.

So I'd like to suggest, whether Michael's thought about it or not, that Michael think about convening a conference like this in a few years as President of the **American Bar Association**.

MICHAEL GRECO:

While the other members of the panel come up to the stage, let me first thank Larry Fox for his kind introduction.

I want to thank Estelle Rogers for her presentation earlier today. I had planned to go through the background of how and why the ABA Individual Rights and Responsibilities Section in 1995 initiated the idea of a **moratorium** on executions in this country. Estelle covered it thoroughly and I will not repeat what she said.

I will say, by way of summary, that since the ABA House of Delegates adopted the **moratorium** resolution in 1997, the attention given to **death penalty** administration has been extraordinary, both in this country and abroad. This is a good thing.

When we began to consider the idea of a **moratorium** resolution in 1995, some people said it was not the right time to consider it. Others said that it would never be adopted by the House of Delegates. Nonetheless, we were compelled to act, because of the things that you've heard today about the way the **death penalty** is administered in the United States.

Momentum for the **moratorium** is growing in this country. Make no mistake about it. We in this room must keep the momentum growing.

As the program indicates, the panel is entitled 'How Can We Join Forces to Achieve a **Moratorium**' and the subtitle is, of course, Time does not permit lengthy introductions. The first speaker will be Larry Fox. Larry, Chair of the ABA **Death Penalty Representation Project**, is an experienced trial lawyer who has made prodigious efforts on behalf of the **death penalty moratorium**, in helping to plan this conference, and in everything that he does on the **death penalty** throughout the country.

The second speaker will be the Honorable Sheila Murphy, whom Governor Ryan acknowledged during his luncheon remarks. Judge Murphy, now retired, was Presiding Judge of the Sixth District Court, Cook County, Illinois. She served as a judge for ten years and presided over post-conviction hearings in capital cases. She ordered DNA testing which exonerated four men, two of whom had been sentenced to death. Next will be Thomas A. Gottschalk, Senior Vice President and General Counsel of the General Motors Corporation.

Our fourth speaker and clean-up hitter will be Virginia Sloan. Ginny is Executive Director of the Constitution Project and a member of the National Committee to Prevent Wrongful Executions.

The panelists are representatives from four different areas in our society. Larry Fox will address the role and obligation of U.S. law firms and lawyers in implementing a nationwide **moratorium**. Judge Murphy will address the role of the judiciary in the implementation of a nationwide **moratorium**. Tom Gottschalk will then address the role of corporate leaders in America in implementing the **moratorium**. Finally, Ginny Sloan will discuss what national and state groups, such as the National Committee to Prevent Wrongful Executions, can do to educate and change public opinion by bringing together diverse individuals to speak in support of the **moratorium**.

LARRY FOX:

It's been a long, intense day, and I appreciate the fact that you are still here and still paying attention.

I feel a little bit like playing that game called 'Where's Waldo?' Waldo is the leader of a great American law firm. Maybe the firm has 500 lawyers and six offices, three overseas. Maybe the law firm is planning to set up a strategic alliance with Price Waterhouse or Goldman Sachs. The law firm is very busy. The law firm is very profitable. The law firm is paying its associates unbelievable sums of money. And we wanted Waldo to be here at this conference. But Waldo did not show up.

I know that there are a few leaders of law firms here. But every leader of a law firm whom I see in this room was a convert to the cause and to the representation of those on death row long ago.

However, we have no new recruits. When we sent out our invitations, all of you responded enthusiastically. Among the major law firms in America, we tried to pinpoint leaders or ask them to designate other leaders to attend. You would have thought that the big firm leaders, Waldo and his or her colleagues, would have asked for the fancy boxes. But they didn't.

So, that's a major problem. It is the problem I've been asked to address, but I do not have a solution.

There are some very bad signs amidst all of our prosperity, amidst all of our busyness. We read in the American Lawyer that 28% of associates say that their law firm's dedication to pro bono has declined. Somebody told me this a different way, saying that 72% percent said their firm's commitment to pro bono has stayed the same. I don't know a business where a 28% decline would be good. A few more years of this and we'll have nobody committed to pro bono.

We also do not have those people assuming leadership roles. Yet, they are essential. It is great to have bar leaders, legislative leaders, and those whom I call '**death penalty junkies**' all participating in this process. But these others are missing, and I do not know how we can get them here. We need them to make this effective.

I have a vision of a gigantic ad campaign for this process. I don't know whether ad campaigns really work, but I am always impressed when a group can get together and run gigantic ads in the Wall Street Journal, the New York Times, and the Chicago Tribune. These ads say to me that the following people really care so much about this issue that they dipped into their pockets, took some money, and paid whatever outrageous sum those newspapers charge for a full-page ad. I would like to see such an ad on this subject, and I would like to see all the people in this room named in that ad. But I would also like to see the leaders of--well, I won't name the firms.

We have to figure out a way of making this a club that the leading firms in America want to join. Some have joined us in terms of representation of death row inmates. We may have to figure out a way of soothing or coddling their egos, or putting stars around them, or having the American Lawyer create a great score card.

I suggest a few things. One, at the moment at least, the law firms are desperately looking for talent. They're hiring huge numbers of associates. That's the reason the salaries have gone so high. Associates for once are in the driver's seat. It may not last. Associates do care about these issues, maybe more than their elders, the people of my generation. So, organizing associates to call on their firms to get involved, to make a commitment to this might be a good idea.

Better than that would be judges. Judge Berrigan in Louisiana has demonstrated the power of the judiciary. When judges call me up and ask me to jump, my response is, 'How high?' To the extent that it is legitimate for judges to get involved in these issues, we ought to look to the judiciary to see if judges can't get the big firms in line. The best, of course, is a man who's going to speak later, Tom Gottschalk, and his colleagues in the corporate bar. Because if for judges we lawyers ask 'How high can we jump for you?', for General Motors we ask not only how high but 'How often? Do you want me to do it on my right foot or my left?' So, if we could organize the corporate in-house bar to help us on this issue, both in their own companies and among the law firms they retain, we might achieve something here.

It's not easy. Getting involved in **death penalty** issues for corporate America is an ambiguous issue at best. Just as the Charlotte City Council's action has been

misinterpreted as opposition to the **death penalty**, General Motors probably doesn't want to be identified one way or the other with the **death penalty**. Yet, in-house counsel have enormous power.

One of my other concerns is that the law firms of America, because they are so busy and prosperous, are not finding the time to do pro bono in the way that they used to do it. Maybe we have to tell the law firms of America that pro bono is not something that's optional during a recession, or when you've got extra associates who are just sort of hanging around. So one real question is whether it is time for us to go to mandatory pro bono. I'll leave you with that thought. It's a thought for another day.

SHEILA MURPHY:

Thank you so much, Larry. That was wonderful and inspirational.

Judge William Bauer of the Seventh Circuit often begins his talks by quoting an infamous advocate of capital punishment, Henry VIII, who was known to have said to his multiple wives, 'I will not keep you long.' I will not be keeping you long, but what I do want to tell you are a few things that I think that the judges in America can do.

First of all, I think as judges we need to reexamine how we look at capital cases--in fact, how we look at all cases in the criminal justice system. Is the term 'harmless error' really a fiction? And if it is a fiction, if harmless error is non-existent, then shouldn't error be acted upon as plain error? I think we have to reexamine the I think that Governor Ryan is right. While today our discussion is on capital punishment, clearly capital punishment in America does not exist in a vacuum. We need to look at our whole judicial system. Judges need to catch some courage. I think there are many judges in this country of great courage. The Chief Judge of Illinois, Moses Harrison, is one. He comes out in every capital case dissenting, saying he thinks the **death penalty** is morally wrong. Not every judge thinks that capital punishment is morally wrong. But if a judge thinks that there are errors in the case, and this is a case where someone could and may well lose his life, doesn't the judge have a different obligation, and shouldn't we rethink the whole reviewing process?

ABA President Martha Barnett and Michael Greco, Chair of the Individual Rights and Responsibilities Section of the **American Bar Association**, are exactly right in calling for a national **moratorium** on the **death penalty**. To address some of the most important issues before our criminal justice system in America, we do need a national **moratorium**. Illinois may be the poster child, but Illinois is not enough.

Judges need to order DNA testing as a matter of course. Judges need to make funds available for investigators. How can a lawyer be expected to defend a capital case if there's no investigation, if there are no funds or resources? Judges need to appoint attorneys who are not only competent but fearless, who are not afraid to sign a motion asking for funds and for an investigator, and to ask that the indictment be dismissed if the facts warrant.

Do judges need more time to decide cases, to look at cases, to read the law? Can they do it adequately? Is doing an adequate job impossible if judges are sandwiching in hearings on a capital case with hearings on a burglary case, a drug case, a prostitution case, and other capital cases? The volume of cases judges have is something we need to look at. Do judges have an obligation to remove or refer lawyers who come to court under the influence of alcohol? Should they be immediately referred, and should a transcript be made to the highest authority for discipline in that state? Or should they at least be referred to the Lawyer's Assistance Program, which almost every state has, so that they can get the help that they need, but in the meantime be removed from the trial of a capital case, or any case?

During a **moratorium**, judges could sit down with prosecutors and examine how judges could be more effective. Judges should be telling young prosecutors that your reputation is the only thing you have; that this is no longer the old boys' club or the old girls' club, and when you come before the bar association and want to be a judge, we're not going to pretend that you didn't try to stack the juries with all white people; we're not going to pretend anymore. Somehow, the truth is going to get out, because people like Ken Armstrong are watching the courts, and the cases that used to be swept under the rug cannot be anymore. Isn't this a time when judges should say to prosecutors and defense lawyers that integrity is important?

In May of this year, I attended a judicial conference in Valley Vaughn, Ireland. There was much excitement there because a great legal scholar from County Cork had just translated Eighth Century rules concerning judges into the Irish language, Gaelic. The first rule for a judge to abide by was the obligation to inquire. Have we forgotten that? Would a national **moratorium** give the judges the opportunity to inquire? Would it give judges the time they need to inquire into the whole system?

Andrea Lyon is here today. She has been a great advocate in this area. She talks in Illinois and other states about Witherspooning judges. Should we look at the assignment of judges to capital cases? How do assignments happen, not just in capital cases, but in other felony cases? Is there some Witherspooning of judicial assignment so the judges who are able and competent may be assigned there? The ones who have compassion will not be assigned there. They'll be over in the civil division. They'll be put off until next year. Next year never comes, and those judges are weaned out of the system.

Should we not also look at the racial profiling that is happening in our nation? I was the presiding judge one week when I got a desperate phone call from a judge who was hearing a traffic case in Riverdale, Illinois. He said, 'Judge Murphy, you told us this morning at the judges' meeting to question everything. Well, I've never questioned this, but I just looked out and the lawyers before me and the clerk are the only white people in this court.' I said to him, 'Tim, what do you think you should do?' And he said, 'I don't want to be part of this.' I said, 'That's right. So what do you do?' He dismissed all the defendants.

Did that send a message? Do we need judges to do that more often? If judges don't see it and don't take action, are they feeding into this process? As they grow up from baby judges to big judges, will they then be part of the process that won't see the numbers of minorities that are being sentenced to death in our country? Does one feed into the other? Could there be early intervention? Isn't that a question that the judges could ask? Instead of spending the money seeking to shouldn't every judge in this country hear Jennifer Thompson speak on misidentification?

In closing, I note that we have formed a committee in Illinois, The Illinois **Death Penalty** Education Project. I urge all of you to go home and form similar efforts in your state and speak out. Tell people that the 15 members of the European Union refuse to accept countries that have the **death penalty**. Tell them how in China they are using the **death penalty** to rationalize their own abuse of human rights. Tell them about the ABA conference that was held here.

Camus said in France in 1947, 'Whenever there is a killing, something within us is killed.' Today, we have begun to heal ourselves. And as we begin to heal ourselves, we begin to heal America.

We thank Rosalynn Carter for hosting this conference. And we thank you, Martha Barnett. In perhaps the worst chapter in American history for the criminal justice system, when we have probably more people incarcerated in this country even than we had in the Civil War, you are our beacon, and for that, we thank you.

THOMAS GOTTSCHALK:

Good afternoon. Judge Murphy, it's a real pleasure to hear your remarks. My initial bar is the State of Illinois bar. I've been very proud today to see people like Governor Ryan and you, Judge Murphy, taking leadership positions on this very important issue.

Although I didn't get out to the criminal courts on South California Street very often, I don't remember any state court judge quoting Camus to me. This is a first, and I'm glad to hear it.

As Larry said, judges can make private lawyers jump high. Judges can also make corporations jump high. I think it's really vital that judges, such as Judge Murphy, lend their voices, time, talents, and persuasiveness to an issue like this. It's vitally important, Judge Murphy, and sincerely appreciated.

As Larry knows, I began my career with a law firm and spent 27 years with it. So, Larry, I'm tempted to say my name is Waldo. I'm a relatively recent invitee into this issue, and I was asked to talk briefly about the prospects for enlisting corporation support for the ABA **moratorium** initiative. I will come from a personal perspective because I have no mandate from corporate America to speak on this subject, nor for that matter, from General Motors.

I will state the challenge as I see it. Corporations do have a stake in this issue and should become involved. I will discuss how they might be involved, and will suggest five specific action items. There's not enough time to develop any of those points, so I'll just cover them briefly, to lay them out for further consideration at other times.

The challenge for corporate support is the one to which Larry alluded. Realistically, the managements of most U.S. businesses are unlikely to see capital punishment as a priority issue for them from a corporate perspective. They're unlikely to concede that there's any relevance of this issue to their fiduciary duties to their shareholders. They will argue that it is inconsistent with their fiduciary obligations to thrust their company voluntarily into a controversial public policy issue, when by doing so the result might be to antagonize some portion of the consuming public, and even more, as we've heard this afternoon, the country's political leadership.

Obviously, I have to concede that corporations cannot be executed; that the **death penalty**, unlike in China, is not imposed here for financial or commercial crimes; and the corporations here generally enjoy a surfeit of highly qualified counsel. But, I do not concede that corporations have no stake in the **death penalty** issue and that they should, therefore, avoid it.

In fact, I really and sincerely believe that U.S. corporations do have a much greater stake in the **moratorium** initiative than may first appear. I'll try to make two points briefly to indicate where I come from on this issue.

The first reason that I think corporations have a major stake in this issue derives from the effort in corporate America to reform aspects of the U.S. justice system, particularly the civil justice system, and from corporations' own dissatisfactions with the way aspects of the system work. Business is seeking all manner of legal reforms to reduce the cost of the justice system, to make it more predictable and consistent, and to enhance its fairness through procedural protections and the development of a more impartial, well qualified judiciary. The corporate community's calls for reform are and should be based on principle, and not perceived as simply promoting our parochial self-interest, which frankly is how they're most often perceived.

We would be far more effective, more credible, and certainly more principled if we lent our support, as many companies do, to initiatives to improve the access of indigent parties to justice and to improve the procedural and substantive fairness of our legal system for all citizens. Ultimately, the business community has more at stake than any other segment of society in there being a legal system that commands the respect of the public for its accessibility and fairness.

The problems with our administration of capital punishment could certainly erode, if not erase, anyone's confidence in our legal system. It is in our corporate interest to acknowledge that and to encourage our governmental institutions and professional organizations to address those deficiencies. Public confidence in the legal system is something in which we really have a stake. Clearly, what we've heard, and you know

about from your own experiences in the capital punishment system, exposes glaring problems with it that do erode that confidence.

Moving from the home front, my second proposition concerns the international climate, and the reputation that our system has. Today, we've had that alluded to by Rosalynn Carter and Larry Fox.

U.S. companies have a great stake in the rule of law as predictable and stabilizing. That is needed for market economies to flourish, for the protection of investments, respect for contracts and private property, and for the impartial and principled adjudication of disputes.

Around the world, we as corporations actively encourage the adoption of our Constitution and many elements of our legal system. Whether you regard this effort as a noble one or as some new Yankee legal imperialism, U.S. corporations are solidly behind it. The awe and respect that we hope other countries will feel toward the U.S. justice system is no doubt diminished by what are seen to be its abuses and injustices.

Rosalynn Carter commented about Ambassador Rohatyn's statements to the effect that the U.S. is increasingly estranged and isolated from the growing international consensus concerning the basic tenets of the rule of law and human rights because of the glaring deficiencies in our misadministration of capital punishment. I was reminded as we were getting ready for this conference of an experience in 1963, when I was a college student. I was visiting a friend in Scotland who was in school with me. I was taken aside by his father, who spent the whole evening talking about the Caryl Chessman **death penalty** case in California, and what an outrage it was. I still vividly remember the way he used that to epitomize his view of American justice, and how indefensible that was.

Frankly, the situation is probably worse today than it was then.

To try to probe this a little bit more, I sent an e-mail to some of my senior legal staff managers outside the U.S. I asked them for their views on the extent to which the way we mete out the **death penalty** in the U.S. impacts the regard and respect abroad for American justice.

Let me just share briefly their responses. I was impressed, and, frankly, proud of them. First, I note that the General Counsel of Vauxhall Motors in Great Britain sent me his views on international perspectives on the **death penalty**, as well as an article from the Daily Telegraph proposing disinvestment in the U.S. to pressure us to stop using the **death penalty**. In our smugness, we've talked about sanctions against other countries. But there is talk about sanctions against the U.S.

Our General Counsel for Europe, a German national, wrote a long note back to me. I'm just going to quote portions of it, but it makes the point in ways better and more credibly than I could. He talks about the global community vigorously criticizing human rights violations, particularly in developing countries. Then he states:

It's difficult to make a righteous claim for discontinuation of cruelties and ask for **moratoriums** of questionable death sentences while the largest and most powerful country in the world, known for its high appreciation of the legal system, still maintains capital punishment and openly discounts the risk of wrongful convictions and their awesome finality. In most European countries, the U.S. **death penalty** is seen as an anachronism which flaws the U.S.'s claims for human rights in other places. The U.S. legal system, particularly the jury system, mostly known from movies and TV, does not come across as a reliable process where justice finally prevails, but rather is portrayed as a chance forum for ambitious and reckless trial lawyers to make a career on the back of their clients. From a corporate perspective, there is much talk with U.S. companies about ethics, integrity, and other high standards of conduct. A nation cannot claim the highest ethical standards for its corporate society while its legal system still allows killing people even where the trial went wrong. And no justification supports that, even if you claim that 99% of the right ones get executed.

My General Counsel at Opel Espana wrote a brief note noting that there are many objections in the Spanish community about the applicability of the **death penalty** in the United States. He says it's viewed as being somehow contradictory, taking into account the long democratic history of the United States, where the defense of individual and collective liberties is one of the strongest values safeguarded by the Constitution.

Lastly, and most movingly to me, were the comments of a young lawyer in Argentina, who heads our operations down there, Tomas Machado. He wrote at length about the case of Victor Saldano, whose conviction was reversed for a new trial just earlier this year after the intervention of the Argentinean government. There are several cases like that in which apparently a psychologist testified that the defendant should be considered more dangerous because of his Hispanic ethnicity. Machado writes that this is a clear example of the deficiencies of the system, where the color of your skin and the place you were born can determine whether you are sentenced to spend the rest of your life in jail or you are executed. He adds, 'This system impedes the correction of any mistakes, and humans do make mistakes, all the more when the defendant is normally the weaker party in the legal process with a poor defense due to his economic and cultural situation.' That is a pretty good recitation of some of the things I've heard at today's conference.

So I think we have a stake, both domestically and internationally, in terms of our ability to shape the rule of law. And there is accordingly a basis for corporate support for correcting these abuses and having meaningful attention paid to them.

So how, then, do we bring corporations into supporting the ABA **moratorium**? I'll just state five steps very quickly. I won't develop them.

I think the primary avenue is through the corporate legal departments generally, and certainly the General Counsels such as myself, where we can lend our voices and names to be visible and to be heard in support of the call for a **moratorium**. The General Counsels of American companies have led on important public policy issues in the past, including some that certainly go beyond any direct impact on their businesses. These

include the call for greater diversity in our profession, the support for pro bono and access to justice, and particularly the General Councils' letter supporting increased funding for the Legal Services Corporation. The ABA has, within its Business Law Section, a Committee of General Counsel that will be meeting in two weeks. Perhaps we can ask those General Counsel to sign on publicly in support of the **moratorium** effort and to lend their names as General Counsel and professionals to that effort.

Secondly, General Counsel can free up their lawyers to act according to their consciences. They are lawyers of principle, as these comments that I read from my non-U.S. lawyers indicate. They can be encouraged to be more active in state and local bar initiatives, including lobbying the legislatures.

There are General Councils now who are of a different mold than you might have expected several years ago. Ken Frasier of Merck handled death row cases from start to finish. He is very familiar with what goes on in this system and could be a very effective spokesperson in support of the **moratorium**.

Thirdly, lawyers in corporate law departments could collaborate with law firms, as Larry suggested, to encourage their active support for **moratorium** efforts.

Fourthly, lawyers in corporate law departments can continue the efforts of corporate America to depoliticize the selection of judges and to resist what I regard as the moral and financial corruption of judicial elections.

Lastly, we lawyers always know good PR opportunities when we see them. In view of the sorts of anecdotes and data that have been compiled and referenced here, the right corporations with the right interest and with PR firms could augment the work of this group and other organizations and launch a public education campaign. That could easily persuade the American public that there are deficiencies here of which they are unaware. It's entirely appropriate to support the politicians who want to have a **moratorium** on the **death penalty**. I really believe we could find some people willing to figure out how to make that happen.

So, with those thoughts, I will close. Thank you very much.

VIRGINIA SLOAN:

Since I'm batting cleanup, I'd like to close by offering everybody in this room some words of encouragement. The charge you've heard from so many people today may seem rather daunting to some of you, especially those of you on the front lines in local communities trying to achieve reforms in the capital punishment system.

Throughout the 1980s and the early 1990s, I was a Counsel to the House Judiciary Committee working to try to save habeas corpus and to prevent the federal government from creating more federal **death penalties**, along with Senator Kennedy's Chief Counsel. Sometimes we felt like we were the only ones, at least on the inside of the process, who had our fingers in the dike. It was a very lonely time for us. A number of

people in this room were absolutely crucial to giving us expert support on the outside. It was a rather depressing time.

In 1993, the Subcommittee on Civil and Constitutional Rights, for which I worked, held a hearing at which five of the men who had been proven to be innocent testified about the importance of habeas corpus and about how it was the key to their freedom. We thought, 'Boy, what a great hearing this is going to be! The press is going to eat it up. The members of Congress are going to eat it up. We'll save habeas.' But nobody came. Nobody cared.

At the hearing, Ruben Carter, 'Hurricane' Carter, testified. It was to me the most compelling testimony that I'd ever heard. He reached into his coat pocket, pulled out his writ, and said, 'If anybody's going to try to get rid of habeas corpus, it's going to have to be over my dead body.'

I'm glad to say that Ruben is doing very well, but the writ of habeas corpus is not. In 1996, Congress basically eviscerated it. It was a very depressing and sad moment for those of us who have labored long in this field.

In 1997, a number of us worked on the ABA **death penalty moratorium** resolution. When it was passed, as Estelle said, it was a very heady experience. But none of us had an inkling that we would be here in this room today, that so much would be going on that is so amazing and positive.

It may take a long time. It takes a lot of hard work. There will be times when you will feel really frustrated. But you can make a difference. That's the message that you heard from everybody today. I urge you to go out and make that difference.

I'll speak in very practical terms about how to work to achieve a **moratorium** or some sort of reform effort in your jurisdiction. There are three essential components to that. One is who's the speaker; two is who's the audience; and three is what's your message. A recent poll commissioned by the Justice Project in Washington gives us very clear guidance about what we should do to achieve reform. It's really remarkable. It shows that a majority of Americans still favor the **death penalty**, but it also shows that by wide margins Americans are increasingly concerned that we are executing innocent people. They are more concerned about that than about whether a guilty person might escape execution. It shows strong support for important reforms, like adequate counsel and DNA, and for informing juries of all of their options. Finally, and perhaps most remarkably, it shows that 64% of all voters favor a suspension of executions until the issue of fairness is studied. This includes 70% of Democrats, 73% of Independents and 50% of Republicans. It also includes 49% of all of those who describe themselves as strong supporters of the **death penalty**.

The message is clear. Abolition, while it may be for many of us the right result, is not a winning argument for most Americans. But reforms along the lines of what you have heard discussed in this conference are a winning argument.

These reforms, as you also heard a number of times this morning, are embodied in the Innocence Protection Act now pending before Congress. That is the kind of legislation that you can start to draft in the states and localities, and that can move forward with your hard work.

The audience is also clear for the message. Unfortunately, arguments in favor of abolition appeal only to a small number of Americans. Most others support capital punishment, either strongly or with some reservations. Within those who support the **death penalty**, most demographic groups are represented. We cannot ignore any audience when we communicate our message in favor of reform. Those who favor abolition should rely on arguments in favor of abolition to secure their base. But we know that there is compelling evidence in favor of reform. You have heard it repeatedly today. You can use those arguments, the demonstrable evidence that the system is broken, to achieve reforms.

That leaves the speaker. Who is the speaker to most effectively communicate your message? The polling research is key here as well. It shows that of all potential communicators of a message about reform, Americans respond best to a group of experts in the system, like former judges, former prosecutors, and others with hands-on experience in the capital punishment system. It was this finding that led the Constitution Project in Washington to create the National Committee to Prevent Wrongful Executions.

This kind of group of experts in the system has great appeal to the media as well. As we all know, the media has a tremendous influence on the public and on policymakers' opinions. Frankly, many reporters who have been involved with this issue either for a long time or who have just come to it recently, don't want to interview people whom they've interviewed so many times in the past. They're looking for surprising voices. The National Committee to Prevent Wrongful Executions is a useful model for anybody who's trying to seek a **moratorium** or other reforms in the system. I will give you a little detail about how you can put together this kind of group.

You have to include proponents of the **death penalty**. Otherwise, the committee will appear to be abolitionist and will be seen as less credible. You can certainly have abolitionists, and on our Committee, we have one of the most eloquent abolitionists in the country, Mario Cuomo. You have to balance that with people who support the **death penalty** but who have serious reservations about how it's working in practice. Second, you have to have a diversity of experience. We have former federal judges, former state judges, former state and federal prosecutors, a former governor, religious leaders, and corporate leaders including Tom Gottschalk. We have a wide diversity of membership so that we can reach out to the wide diversity of communities within America.

As I mentioned, you have to make sure that your members have practical experience with the system. That provides them with the credibility to speak out effectively about this issue.

You have to have members of the victim community. Members of the victim community, or the families of murder victims, have been largely ignored until recently. Their voices are critical to this debate. If you do not bring them onboard and try to achieve some consensus with them, the victim community will not perceive as credible whatever recommendations your committee comes up with. The victim community has a huge impact on public policy in this country. So, I urge you to find families of victims who are open-minded about the **death penalty** or who have concerns about it and bring them onboard your committee.

Of course, racial, ethnic and gender diversity is also very important. You are speaking to all of America, so you need spokespeople who are like all of America.

Finally, you need at least one capital defense lawyer. This is, as we all know, an incredibly complex system. In addition to the prosecutors and judges who know how the system works, you have to have someone from the defense perspective who can walk committee members through the system and show them what issues are important.

What are the risks of creating this kind of committee? For abolitionists, the obvious risk is that the committee will come up with recommendations for reform that will be adopted. Then everybody will say, 'The **death penalty** is great,' and everybody will go home.

What are the chances of that? Probably none. Given the sad state of resistance in so many states and in the federal government to improving the **death penalty** system in this country, it's not likely that many reforms will be adopted. Maybe some will. Maybe we can get counsel provisions passed in the federal government and in some states. Maybe we can get some DNA provisions passed.

But in any event, as long as we have a **death penalty**, and the opinion research shows we're a long way from getting rid of it, isn't it better to try to get decent lawyers and to get DNA testing and some of these other critical reforms; to try to get rid of some of the procedural obstacles that prevent the courts from hearing these cases on the merits? That's the objective of the National Committee.

I urge you to create a committee on your level that has the same or similar objectives. The Constitution Project in Washington would be glad to give you further information about how to put a committee together and to help you in whatever way we can. Don't be discouraged. It's a lot of hard work. But ten years ago I never would have thought I'd be standing here and that you all would be here. It can be done. Thank you all for attending.

MICHAEL GRECO:

Thank you, Ginny. And thank you, the members of the panel, for your excellent presentations.

I want to thank each of you in the audience for coming and staying all day, for being attentive, and for participating in this conference. I also want to thank you for all that you do regarding the **death penalty moratorium** and for what you are going to do, because as we leave here today there's a lot of work to do.

Finally, I want to thank Martha Barnett. Martha, we are all proud of you, not just because your roots are in the ABA's Individual Rights & Responsibilities Section and you have worked with us on this most important IRR initiative which is now a priority ABA policy. We applaud your idea to hold this conference and to invite the people who are here. What you have done is a courageous thing, a necessary thing. I speak for all of us here in thanking you for convening this conference.