



**Defending Liberty
Pursuing Justice**

***TOWARD GREATER AWARENESS:
THE AMERICAN BAR ASSOCIATION CALL FOR
A MORATORIUM ON EXECUTIONS
GAINS GROUND***

A Summary of Moratorium Resolution Impacts
from January 2000 through July 2001

August 2001

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES





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Toward Greater Awareness: the American Bar Association Call for a Moratorium on Executions Gains Ground is the third report produced by the American Bar Association Section of Individual Rights and Responsibilities to summarize legislative, judicial, public policy, and other developments that have occurred since the ABA's adoption of the death penalty moratorium resolution in February 1997. This report, which covers activity from January 2000 through July 2001, is intended to update and complement the two earlier publications issued in September 1998 and January 2000.

The Section expresses its great appreciation to all who have helped research, draft, and produce this report over the past year.

Section Director Penny Wakefield, Assistant Section Director Tanya Terrell-Collier, and Project Director Michael Pates were the primary authors and dedicated many extra hours to drafting and editing the text. Section Staff Assistant Megan Downing assisted unstintingly with all aspects of report production and research throughout the report's development. Section staff had able assistance at various times over the last year from Section law student project assistants Heather Anderson, Brian Della Rocca, Monique Gudger, and Swan Thai; Skadden, Arps, Slate, Meagher & Flom summer associates Bernadette Meyler and Katherine Wilson; and Section undergraduate interns Kelsey Dawson, Jaime Mayer, Jay Millikan, Samantha Newton, Shikka Paul, Sui Sui Song, Misty Thomas, and Aruni Wijetilleke in collecting, organizing, reviewing, and summarizing the voluminous amount of data, including background resources, cases, and statutory provisions, required to develop the report text and appendices.

Immediate Past Section Chair James E. Coleman, Jr., of Duke University School of Law, and Section Council member and Death Penalty Committee Co-chair Ronald J. Tabak, of the New York office of Skadden, Arps, Slate, Meagher & Flom, gave very generously of their time and energy to review and edit numerous drafts of the report and appendices and to draft portions of the text. Their advice and technical expertise were critically important contributions to this report.

The Section drew upon the invaluable work of numerous other organizations in researching this report. Materials and website postings of the Death Penalty Information Center and the Quixote Center/Equal Justice USA, the NAACP Legal Defense and Education Fund, Inc., Amnesty International USA, and the U. S. Department of Justice, Bureau of Justice Statistics, were particularly helpful for researching and verifying data in the report and appendices.

The Section is indebted to the law firm of Skadden, Arps, Slate, Meagher & Flom for its generous assistance with the production of the report.

In this publication the Section has attempted to note as accurately as possible all pertinent legal, public policy, and legislative developments of which the Section has become aware during the 18 months since publication of its last such report, *A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions*, in January 2000. The Section would appreciate notification of any errors or omissions in this report so that they may be corrected in the next report on death penalty moratorium resolution implementation.

Michael S. Greco, 2000-01 Chair
ABA Section of Individual Rights and Responsibilities

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INTRODUCTION

In February 1997, in the face of pervasive and worsening problems in the administration of the death penalty, the American Bar Association (ABA) House of Delegates adopted a resolution calling for a general moratorium on executions until serious flaws that the ABA has identified in the nation's capital punishment system are eliminated. Four and a half years later, the ABA moratorium resolution and the developments it has triggered have put concern about the fairness of the death penalty at the forefront of the national consciousness where criminal justice is concerned. The public's growing awareness about a malfunctioning criminal justice system that has led to clear miscarriages of justice has greatly increased public understanding of the urgent need for a moratorium.

Since 1976, when the U. S. Supreme Court permitted states to reinstate capital punishment, nearly 100 condemned individuals have been exonerated. Equally disturbing is the fact that, in many of these cases, the system that erroneously convicted these individuals and sent them to death row also failed to discover and correct its errors. Describing the capital punishment system as "fraught with error," Governor Ryan of Illinois declared a moratorium in his state in January 2000, and reviews of the system there are under way. But in most capital jurisdictions, such work has yet to begin.

With its emphasis on presumed innocence and protection of individual rights, our criminal justice system often has served as a model for other nations. But in death penalty cases, the reality is far from the ideal. The ABA, while taking no position on capital punishment *per se*, therefore has urged the federal and state governments to halt executions in order to take a hard look at the growing body of data showing that race, geography, wealth, and even personal politics can be factors at every stage of a capital case—from arrest through sentencing and execution.

The moratorium movement that the ABA's resolution launched in 1997 has gained ground since then. The public is much more aware of and informed about problems in death penalty administration—and much more likely to support a moratorium while problems are corrected—than it was four and a half years ago. More judges are speaking out about systemic issues, and more political bodies are debating proposed reforms and moratorium initiatives on the merits.

At the same time, however, it no longer can be doubted that many of the more than 3,700 death row inmates nationwide, as well as defendants and offenders at other points in the capital punishment system, have not received the quality of legal representation that the severity and the finality of a death sentence demand. Restrictions on meaningful appellate review and inconsistencies in prosecutorial treatment of cases remain serious, even worsening, problems. Racial and ethnic bias still are endemic in the criminal justice system. Mentally retarded individuals still are being executed. Young people still are being tried and sentenced to death for offenses they committed when they were under age 18. And the innocent still are not protected adequately from erroneous conviction.

Indeed, our system cannot protect the innocent unless it is protecting everyone in a criminal justice system that administers capital punishment in a fair and nondiscriminatory way. Until that time, the need for a moratorium remains as urgent as ever, both to prevent further executions of individuals whose convictions and death sentences have been imposed by a system "fraught with error" and unfairness and to ensure an atmosphere conducive to full and objective analysis of systemic problems and remedies.

Accordingly, the ABA is intensifying its own efforts and is working with a growing number of allies to effect a halt in executions nationwide until the fairness and due process concerns raised

in the 1997 moratorium resolution have been addressed satisfactorily. This report, along with other ABA and Individual Rights Section materials that have been developed in the last 18 months, are among these increased efforts.

I. STATE EXECUTIVE AND LEGISLATIVE BRANCH DEVELOPMENTS

State Executive Activity

Since the release of the January 2000 ABA moratorium impact report, state executives have taken important steps in furtherance of moratorium objectives. Most significant was Illinois Gov. George Ryan's declaration of the country's first death penalty moratorium, which helped to illustrate in concrete terms the need for and value of a moratorium in other capital jurisdictions. Governor Ryan's action also has prompted fundamental questions around the country about the reliability of the criminal justice system generally and the large role that human fallibility plays in the malfunctioning of the capital punishment system specifically.

Since 1976, 44 death row inmates have been granted clemency for "humanitarian" reasons, which include doubts about the defendant's guilt, questions about the defendant's mental capacity, rehabilitation of the defendant, or the governor's personal convictions. In recent years, clemency has been granted in substantially fewer cases than it was prior to the U. S. Supreme Court's 1972 decision declaring the death penalty unconstitutional (*Furman v. Georgia*, 408 U.S. 238 (1972)). Among the factors accounting for this decline may be a changing political climate that encourages "tougher" criminal penalties and the erroneous belief that clemency is unnecessary today because death row inmates receive "super due process" in the courts. Yet, in part because of growing unease about wrongful convictions, clemency has been ordered in several cases in recent months.

These and other significant state executive developments are described further below.

Illinois

Statewide Moratorium on Executions

On January 31, 2000, Illinois Gov. George Ryan declared a moratorium on all executions in his state and appointed a broad-based, blue-ribbon commission to review Illinois' capital punishment system. Gov. Ryan repeatedly has asserted that he will not end this moratorium until he "can be sure with a moral certainty that everyone sentenced to death in Illinois is truly guilty and that no innocent man or woman is facing lethal injection."

In a January 2001 interview with *The Nation*, Gov. Ryan noted that when he joined the Illinois legislature in the 1970's, he was an avid "law-and-order man." Soon after Gov. Ryan took office in 1999, however, a death row inmate was exonerated only days before his scheduled execution date. Gov. Ryan thereafter began to question whether the capital punishment system was working fairly. When a *Chicago Tribune* series that year revealed, among other things, that more than one-third of the 285 Illinois capital convictions since 1977 had been reversed because of "fundamental error," Gov. Ryan decided to declare the country's first statewide moratorium on executions.

In July 2001, speaking before the board of the Illinois Death Penalty Education Project, a nonprofit organization that promotes public awareness of the death penalty, Gov. Ryan said that the suspension of executions and the reviews of the death penalty system have raised questions for him about Illinois' entire criminal justice system. He said that he remains reluctant to "push the plunger" on a person convicted of a capital crime and sentenced to death, particularly in light of Illinois' poor track record with wrongful convictions. (Gov. Ryan further summarized his reasons for enacting the moratorium in the Summer 2001 issue of *Human Rights*, the magazine of the ABA Section of Individual Rights and Responsibilities.)

Public opinion polls in Illinois have shown overwhelming support for continuing the moratorium pending a thorough review of the state's death penalty system. The moratorium also has received widespread editorial backing from the news media in Illinois and elsewhere in the country, including those outlets that favor capital punishment in principle, but question its fairness in practice.

Commission on Capital Punishment

In addition to declaring a moratorium, Gov. Ryan created a broad-based, 12-member Commission on Capital Punishment to study how the death penalty has been applied in Illinois and to examine why the "process has failed in the past." The Commission is reviewing all Illinois capital cases tried in the past two decades and examining the state's entire capital case process, from initial police involvement through trial and sentencing, appeals, and post-conviction and clemency proceedings, as well as issues of police and prosecutorial misconduct, attorney incompetence, and the unreliability of testimony by alleged accomplices and jailhouse informants.

The Commission held public hearings on August 2, September 6, and December 13, 2000. Transcripts of the testimony, which generally was strongly critical of the implementation of capital punishment in Illinois, can be found at www.idoc.il.us.gov/ccp.

Indiana

In March 2000, Indiana Gov. Frank O'Bannon called for a review of the state's death penalty system. Specifically, he asked the Criminal Law Study Commission to examine the types and effectiveness of safeguards designed to prevent the conviction of innocent capital defendants; the training and qualifications of capital defense counsel; the efficacy of state and federal review procedures; the comparative costs of capital punishment and life without parole; and the prevalence of race as a factor in the imposition of the death penalty. He also asked the Commission to recommend what changes, if any, the state should make in its death penalty laws and processes. Gov. O'Bannon stopped short of issuing a moratorium on executions, however. As of July 31, 2001, the Indiana study had not been completed.

Maryland

Also in 2000, Maryland Gov. Parris Glendening commissioned a study by the University of Maryland to examine his state's death penalty system for evidence of racial bias. Although he did not support a moratorium on executions pending the study results, Gov. Glendening did commit \$225,000 to completion of the study, which is expected in 2002.

Oklahoma

In Oklahoma, where a governor first must receive the State Pardon and Parole Board's recommendation concerning clemency appeals before granting or denying clemency, the board and Gov. Frank Keating denied an appeal by the European Union to reconsider eight executions that the state had scheduled to be carried out in January and February 2001 (see Chapter VII). But the board subsequently recommended clemency for Phillip Smith, a death row inmate whose execution had been scheduled for March 8, 2001, because of doubts raised about his guilt. The favorable recommendation, based on a 4-1 vote, was the first in an Oklahoma capital case in 35 years and allowed Gov. Keating to consider commuting Smith's sentence to life in prison without parole. Gov. Keating initially granted Smith a 30-day stay of execution and ultimately granted clemency.

Just a few months later, in June 2001, Gov. Keating suggested that a standard of "moral certainty" about guilt replace the "beyond a reasonable doubt" standard currently required to sustain a capital conviction. "[I]f you intend to take another person's life . . . the only way we who believe in it can ensure that it will survive is that no innocent person be mistakenly put to death," Gov. Keating said. "And for us, to raise that bar and require that a capital [conviction] . . . be [subject to] a moral certainty standard, I think is not only appropriate, I think it is essential." Gov. Keating said that he would seek to have the higher standard written into Oklahoma law.

One month later, Gov. Keating refused to grant clemency to Gerardo Valdez, a Mexican national sentenced to death in Oklahoma, despite a United Nations International Court of Justice ruling that, in denying Valdez access to the Mexican consul upon his arrest, Oklahoma had violated Valdez's rights under the Vienna Convention on Consular Relations, to which the United States is a party (see Chapter VII).

Texas

In January 2001, Gov. Rick Perry suggested that Texas lawmakers consider authorizing juries to impose sentences of life without parole as an alternative to the death penalty. "Like a number of death penalty states, we should take a hard look at giving juries the option," said Gov. Perry. "Today, juries have just two options—death or the possibility that a violent criminal may one day be paroled." Under current Texas law, an offender must serve at least 40 years of a life sentence before he is eligible for parole; only 10 years ago, good behavior credits sometimes resulted in the paroling of life-sentenced criminals in as little as six years.

State Legislative Activity

Death penalty-related legislation introduced in state legislatures has increased tremendously in both range and volume over the last 18 months. Although no other state yet has joined Illinois in adopting a moratorium, bills specifically calling for a moratorium now have been introduced in 17 states, and legislation to address death penalty-related concerns raised in the ABA moratorium resolution now has been introduced in 37 of the 38 states that authorize capital punishment.

One of the most remarkable outcomes of moratorium efforts in the states over the past 18 months is that, since January 2000, an additional six states—Arizona, Connecticut, Florida, Missouri, North Carolina, and South Dakota—have enacted legislation barring the execution of mentally retarded individuals. Together with the 12 states that previously had barred such executions and the 12 that do not authorize capital punishment in any circumstances, a majority of states and the federal government now prohibit such executions.

Moratorium Bills

The number of state legislative proposals for moratoriums has nearly tripled since January 2000. In Maryland, an intense effort to establish a moratorium legislatively almost succeeded earlier this year. A moratorium bill that passed the House of Delegates subsequently was approved by the relevant Senate committee, but passage in the full Senate was stymied by a threatened filibuster on the last day of the legislative session. Although the moratorium bill died, the legislature did approve a measure that provides for DNA testing of persons convicted of murder or rape, if a judge believes that the new evidence might establish their innocence.

In 2000, legislators in five additional states—Alabama, Kentucky, Missouri, New Jersey, and Ohio—introduced bills that would have established moratoriums and authorized commissions to

study the death penalty. In Indiana, for example, proposed legislation would have placed a two-year moratorium on executions and would have created an eight-member sentencing committee to review all death penalty trials in the state since 1976, when the U. S. Supreme Court held that certain capital punishment statutes were constitutional. Although none of these bills became law, the increase in moratorium-related legislative activity reflects a growing awareness in these states of the need to examine death penalty systems. In 2001, this legislative pace accelerated, as more than twice as many state legislatures introduced moratorium legislation than had done so in 2000.

The length of proposed moratoriums varies greatly. The bill introduced in Oklahoma, for example, would have established a one-year moratorium, while the bill introduced in New York proposed a seven-year suspension of warrants of execution. In a majority of states, a two-year moratorium was proposed.

Studies of the Fairness of Capital Punishment Systems

Like the governors noted above, several state legislatures have initiated studies to consider the fairness of the application of capital punishment (see Appendix D).

Arizona

On July 30, 2001, a commission formed by Arizona Attorney General Janet Napolitano issued an interim report recommending the creation of a statewide public defender's office for capital cases, commutation of death sentences in all instances in which a defendant is found incompetent to be executed following issuance of a death warrant, and an end to the execution of juveniles who were under age 18 when they committed capital offenses. Although General Napolitano disagreed with the proposal to commute sentences of mentally incompetent offenders, she endorsed most of the other recommendations, stating, "If the State wants to continue to have the death penalty, [it] better fund some of these things."

Connecticut

In Connecticut, a bill signed into law in early July 2001 creates a Commission on the Death Penalty to study issues of fairness, equity, disparity, cost, and judicial and administrative process in the imposition of the death penalty in that state.

Illinois

In Illinois, independent of Gov. Ryan's moratorium, the Illinois House of Representatives' Special Committee on Prosecutorial Misconduct, chaired by Republican Representative James Durkin, studied Illinois' Capital Punishment System for a year and drafted proposed reforms, including pretrial screening of all jailhouse informant testimony; automatic grants of new trials in capital cases where prosecutors have knowingly withheld evidence helpful to the defense; and authorization for defense counsel to take pretrial depositions of certain witnesses. The *Chicago Tribune* endorsed these reforms, but also urged limiting eligibility for capital punishment to the most heinous killers; videotaping felony suspects' entire interrogations and confessions; ending the execution of people with mental retardation; and creating a permanent special committee to study wrongful convictions to ascertain where the criminal justice system has failed and help correct systemic errors. The State Senate's Special Committee on the Death Penalty introduced numerous reform proposals as well, but they died without ever being referred to a regular Senate committee for action.

Nebraska

On July 31, 2001, the Nebraska Commission on Law Enforcement and Criminal Justice pre-released a report entitled, *The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis*, the principal focus of which was to examine, through statistical analysis, potential disparities in decisionmaking in 177 death-eligible homicides processed between 1973 and 1999. The study did not find significant evidence of racial disparities in the sentencing process, and it reported that significant geographical disparities in charging and plea bargaining practices were largely counterbalanced after 1982 by different geographical disparities in death-sentencing rates. The study, however, also found significant disparities in the treatment of defendants based on the socio-economic status of the victim; the wealthier the victim, the more likely the defendant was to receive the death penalty. The report notes that, compared to other states, Nebraska's capital punishment system is reasonably consistent in limiting death sentences to the most culpable offenders.

Nevada

In Nevada, lawmakers passed a bill directing a legislative commission to conduct an interim study of death penalty-related issues, including the use of DNA testing; the cost of implementing the death penalty as opposed to life imprisonment; and the application of capital punishment to juvenile or mentally retarded offenders.

North Carolina

In December 2000, a Legislative Research Commission appointed by the North Carolina General Assembly issued a report recommending that the legislature enact laws barring execution of mentally retarded offenders and creating a Racial Justice Act to provide a remedy for capital defendants whose sentences may have been influenced by race. The Commission also recommended that the legislature impose a moratorium on the death penalty until a study could be conducted to determine whether the death penalty is being administered fairly. As of the end of July 2001, the legislature had adopted the Commission's recommendation to end execution of mentally retarded offenders, but had not yet acted on the other two recommendations.

Other Study Proposals

Legislation that would have required examinations of the fairness of capital punishment systems has been introduced, although not adopted, in several other states (see Appendix D).

Tennessee

In Tennessee, legislators who have supported moratorium legislation intend to push forward later this year with an effort to create a Death Penalty Fairness Committee—a group of 15 state officials, including legislators, prosecutors, defense attorneys, and gubernatorial appointees—that would examine the fairness of that state's capital punishment system.

Washington

A bill introduced in the Washington legislature would have commissioned the Washington State Institute for Public Policy to study administration of the death penalty there. The study would have addressed, among others things, "the concerns raised by the American Bar Association policy of February 3, 1997, and the resolution of the Washington State Bar Association of August 4, 2000." Similarly, legislators in Delaware sought (unsuccessfully) to establish an independent,

non-partisan commission charged with studying all aspects of the death penalty system. Under the proposed legislation, an 11-member panel would have delivered its report and recommendations to the governor, legislature, and state Supreme Court by January 8, 2002.

Other Legislation

Since January 2000, legislation has been introduced in many states to address specific concerns that underlie the ABA's call for a moratorium on executions.

Racial Discrimination

In Ohio, legislation was introduced that would permit introduction of evidence in capital case appeals that the death penalty has been imposed in a "demographically disparate manner." The bill also would have required that demographic statistics be included in a death penalty report to be published annually by the state attorney general.

In Georgia, civil rights leaders supported a bill under which a death sentence could have been overturned upon a determination that race was a factor leading to its imposition.

Execution of Mentally Retarded Offenders

Since January 2000, six states have enacted laws prohibiting the execution of people with mental retardation. In 2000, South Dakota was the only state to pass such legislation. One year later, however, legislation was enacted in the five additional states of Arizona, Florida, Connecticut, Missouri, and North Carolina.

In Texas, legislation similar to that signed by Gov. Jeb Bush in Florida passed the Texas legislature, but failed to become law when Gov. Rick Perry refused to sign it. As of July 2001, legislation precluding the execution of mentally retarded offenders was pending in several other states as well.

With 18 of the 38 states that authorize capital punishment now banning the execution of the mentally retarded, along with the 12 states that do not authorize capital punishment at all, 30 (or 60 percent) of the states and the federal government now prohibit execution of mentally retarded offenders.

Execution of Juvenile Offenders

In 2001, legislation that would have prohibited the execution of offenders who were under the age of 17 or 18 (depending upon the state) when they committed capital offenses was introduced in eight states: Arizona, Arkansas, Florida, Indiana, Kentucky, Mississippi, South Carolina, and Texas. As of July 31, 2001, none of the bills had been enacted. The Arkansas bill, which would have prohibited the death penalty for defendants under 17 years of age, passed the Senate on an 18-15 vote, but subsequently was defeated in the House Judiciary Committee.

Defense Services

Since January 2000, legislation dealing with defense services and counsel competency issues in capital cases, in both the trial and the post-conviction phases of the process, has been introduced in numerous states. In some, legislators have drafted bills to establish specific qualifications for both defense attorneys and judges involved in capital cases.

A Virginia bill that improves standards for capital attorneys with indigent and non-indigent clients passed unanimously in both Houses of the legislature, and Gov. James Gilmore signed the bill into law in March 2001.

In April 2001, Oklahoma enacted two pieces of legislation concerning counsel issues. One established an office of public defender, and another set up an indigent defense system.

In Texas, a "Texas Fair Defense Act" signed into law in June 2001 requires that indigent capital defendants be provided with an attorney no later than five days following arrest and establishes statewide standards for counsel. Many important provisions that were in the original bill were not enacted, however; for example, trial judges will continue to use local rules in selecting counsel.

In North Carolina, a law was enacted in 2000 to create a statewide Office of Indigent Defense Services. In summer 2001, however, a lawsuit was filed seeking to prevent this office from playing a role in the selection and oversight of counsel.

In Arizona, a bill that would have created a statewide public defender's office to assist with death penalty cases was approved in the Senate, but was defeated in the House.

Similar legislation was defeated in Alabama.

In June 2001, the Pennsylvania General Assembly appropriated \$300,000 to train lawyers to appeal death penalty cases. The program is scheduled to begin in September 2001.

And the Illinois legislature enacted two laws intended to improve the system's ability to determine innocence in capital cases. One law gives death row inmates greater access to DNA testing where it might exonerate them. The other law appropriated \$20 million for the Capital Litigation Trust Fund to help support both State and defense counsel work in death penalty trials.

Post-conviction Evidence

Because of the growing number of exonerated death row inmates and the widespread public attention to DNA use in capital cases that was created by the publication in 2000 of *Actual Innocence*, by DNA experts Jim Dwyer, Barry Scheck, and Peter Neufeld, the amount of legislation authorizing post-conviction DNA testing has increased tremendously over the last 18 months. In 2000, Delaware enacted legislation under which convicted felons could request biological testing of evidence that might prove their innocence. Passage of this measure paved the way for more DNA legislation in 2001 in other states. In all, bills providing for post-conviction DNA testing were introduced in 23 states and were adopted in 13 states, including Illinois.

With important restrictions, a new Virginia law allows death row inmates and other felons to have biological evidence tested after their convictions, if the evidence was not known or tested at the time of the conviction and the newly discovered or untested evidence is likely to prove innocence. In cases where testing conclusively shows innocence, the governor may grant a pardon. Beginning in November 2002, those convicted of the most serious felonies could also petition the state Supreme Court for freedom, but that provision requires an amendment to the Virginia Constitution.

Prosecutorial Discretion

A North Carolina law enacted in May 2001 gives prosecutors the discretion in first-degree murder cases to seek life in prison without parole rather than the death penalty. Previously, a prosecutor was required to seek the death penalty in all first-degree murder cases in which there was evidence of any aggravating circumstance.

Ending or Expanding the Death Penalty

The increased focus on death penalty-related issues also has led more state legislatures to entertain the possibility of abolishing capital punishment altogether. Such legislation was introduced in 15 states, but was debated in few states and enacted in none. In New Hampshire, where in 2000 the legislature passed an abolition bill that the governor later vetoed, a similar bill failed by several votes in 2001. In New Mexico, an abolition bill came within one vote of passage in the Senate Judiciary Committee.

Conversely, although much of the capital punishment-related legislation introduced in 2000-01 dealt with issues addressed in the ABA moratorium resolution, the 2000 and 2001 legislative sessions also brought proposals to expand the scope of the death penalty. In Florida, the legislature passed a measure that, if approved in a referendum in 2002, would amend Florida's Constitution to preclude the Florida courts from interpreting the state constitution as more protective of people facing the death penalty than is the United States Constitution. One result of this provision would be to permit the execution of juveniles who committed capital crimes at age 16, which the Florida Supreme Court has held is prohibited by the state constitution (but which the U. S. Constitution would permit under current U. S. Supreme Court holdings).

Some states have approved legislation that establishes additional aggravating circumstances in capital cases. In February 2001, for example, Arkansas enacted a law providing that murder of a person under the age of 12 is an aggravating circumstance weighing in favor of the death sentence. Oregon enacted a law permitting capital punishment for the murder of witnesses in juvenile victim cases. The Illinois legislature approved a measure expanding the applicability of the death penalty to cover certain gang-related murders. And the new Connecticut law that eliminates the death penalty for people with mental retardation also extends the applicability of the death penalty in an additional circumstance, while eliminating it for an earlier existing circumstance.

II. FEDERAL EXECUTIVE AND LEGISLATIVE BRANCH DEVELOPMENTS

Executive Branch

Executive branch activity at the federal level since January 2000 has been driven by concerns about racial bias in death penalty administration even as the federal government prepared to carry out the first federal executions in nearly four decades. Despite considerable national and international pressure for a federal moratorium, the federal government executed “Oklahoma City bomber” Timothy McVeigh on June 11, 2001. Eight days later, it executed Juan Raul Garza. The discovery of mishandled evidence in McVeigh’s case and the currency of racial bias issues in Garza’s heightened awareness about and discussion of the critical issues that a federal moratorium on executions would address.

On September 12, 2000, then-U. S. Attorney General Janet Reno released the U. S. Department of Justice (DOJ) report, “The Federal Death Penalty System: A Statistical Survey (1988-2000).” The survey’s purpose was to describe the DOJ’s decisionmaking process in seeking the death penalty and to present statistical information focusing on defendants’ and victims’ racial, ethnic, and geographic distribution at specific stages of that process.

The DOJ reported that minorities are over-represented at every stage of the federal death penalty process. According to the survey, 14, or 79 percent, of the 19 individuals who were on federal death row as of July 2000 were minorities. From 1995 (when U. S. attorneys first were required to submit all capital-eligible cases for review by the Attorney General) to 2000, U. S. attorneys were almost twice as likely to recommend seeking the death penalty for a black defendant in cases where when the victim was not black as they were in cases where the victim was black.

The survey also reported large disparities in the frequency of recommendations to seek the federal death penalty, depending upon the location of the case. In the period from 1995 to 2000, 42 percent (287 out of 682) of capital-eligible cases submitted for the Attorney General’s review were originated with only five of the 94 federal districts, and capital-eligible minorities in those five districts were less likely to receive plea bargains than were their white counterparts. By contrast, in 40 of the 94 districts, U. S. Attorneys never recommended the death penalty for any defendant.

Gen. Reno expressed serious concern about the racial and geographic patterns revealed in the DOJ’s self-examination and called for more detailed study of the federal death penalty system by academic experts from outside the Justice Department. To that end, on January 10, 2001, the National Institute of Justice (NIJ) convened a meeting of practitioners, researchers, and government representatives to discuss the how to conduct the study. At his confirmation hearing to serve as U. S. Attorney General in the new Bush administration, John Ashcroft indicated that such a study would be undertaken.

In early May 2001, Gen. Ashcroft delayed McVeigh’s scheduled May 16 execution to enable his lawyers to study documents that the government had discovered the Federal Bureau of Investigations had failed to turn over to the defense. The disclosure that thousands of pages of documents had been mishandled in this high-profile case led to increased speculation about what could happen in a capital case where the defendant had fewer resources and less visibility than McVeigh had.

Also pending at this time was the execution of Garza, a Hispanic on federal death row in Texas. The case had raised many concerns about the fairness of the sentence in light of the facts of the case and the reported racial disparities in sentencing in federal cases.

On June 6, 2001, shortly before the new execution date for McVeigh, the Attorney General released a second DOJ document entitled, “The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review.” In announcing the release of this document before the House Judiciary Committee, Gen. Ashcroft testified that “[o]ur conclusion is, as the Reno study concluded, that there is no evidence of racial bias in the administration of the federal death penalty.”

The document’s conclusions were criticized sharply during a hearing held on June 13, 2001, by the Senate Judiciary Committee’s Subcommittee on the Constitution, Federalism, and Property Rights, concerning apparent racial and geographic disparities in the death penalty system. Senator Russ Feingold (D-WI), subcommittee chairman, urged a re-examination of the federal death penalty in light of these disparities, and rejected Gen. Ashcroft’s conclusions as premature, given the pendency of the NIJ study.

Gen. Ashcroft subsequently directed the NIJ to study the issue further in order to “assure public confidence and guarantee that our future efforts in the enforcement of the federal death penalty are consistent with the high standards of fairness that are required in charging, trying and sentencing those accused of federal death-eligible murders[.]” He declined, however, to delay either the McVeigh or Garza executions until the NIJ study could be completed.

Legislative Branch

The most prominent federal death penalty legislative initiatives introduced since January 2000 are the Innocence Protection Act and the National Death Penalty Moratorium Act, both of which address core fairness principles embodied in the ABA moratorium resolution. (See Appendix H for information on other federal death penalty legislation.)

Innocence Protection Act

Senators Patrick Leahy (D-VT), Gordon Smith (R-OR), Susan Collins (R-ME), and Russ Feingold (D-WI), joined by Representatives William Delahunt (D-MA) and Ray LaHood (R-IL), introduced the Innocence Protection Act of 2001 on March 7, 2001. Both the Senate and House versions of the bill (S. 486 and H. R. 912, respectively) enjoy significant bipartisan support, with 22 co-sponsors in the Senate and 210 in the House (as of July 31, 2001).

In the *Harvard Crimson*, Congressman Delahunt described the legislation as follows:

The Innocence Protection Act is a comprehensive package of concrete reforms that will help reduce the risk that innocent persons will be put to death—and that the guilty will remain at large. [It] includes two principal elements[:]

First, it would ensure eligible federal and state inmates access to DNA testing to establish innocence. Currently, many are denied access to testing and/or prevented from introducing the evidence that would exonerate them—and, in many cases, identify the guilty party. Second, [it] would improve the quality of legal representation for indigent defendants in capital cases through federal incentives to states. Lawyers assigned by the court to these unpopular and unprofitable cases are often inexperienced, overworked or incompetent. It is little wonder that over half of all death sentences are overturned on

appeal or after post-conviction review because of errors at trial. . . . The Innocence Protection Act will help ensure that fewer mistakes are made in capital cases—and that when mistakes are made, they are caught in time.

In June 2001, the Senate Judiciary Committee held a hearing on the bill. Norman Lefstein, Dean and Professor of Law at the Indiana University School of Law at Indianapolis and an expert on issues concerning the representation of indigent people in criminal cases and post-conviction death penalty proceedings, submitted testimony on the ABA's behalf in support of the Act's counsel provisions. He addressed "three fundamental issues" that are bound up in the consideration of the Act: the necessity of standards for the representation of capital defendants, the essential elements of a capital representation system, and the importance of enforcing capital representation standards.

Setting a context for the Committee, Dean Lefstein emphasized the enormous amount of evidence establishing that the quality of legal representation provided to defendants in capital cases in the United States is woefully inadequate. "[O]ne need only recall that nearly 100 persons have been released from death rows in this country, with either substantial or incontrovertible evidence of their innocence," he states in his written testimony. "Ours is a country that prides itself on the quality of its criminal justice system. In the death penalty area, however, it is clear that something has gone wrong. Too often our adversar[ial] system of criminal justice, which requires that the accused be provided a vigorous defense, has not operated as intended."

National Death Penalty Moratorium Act

In April 2000 and again in January 2001, Sen. Feingold introduced the National Death Penalty Moratorium Act. The Act would prohibit the federal government from carrying out the death penalty until Congress considers the final findings and recommendations of a National Commission on the Death Penalty and implements or rejects the guidelines and procedures recommended by the Commission. It also would express the sense of Congress that states should enact a moratorium on executions to allow time to review whether their administration of the death penalty is consistent with constitutional requirements of fairness, justice, equality, and due process. The proposed National Commission on the Death Penalty would be charged with determining whether administration of the death penalty comports with such constitutional requirements and with establishing guidelines and procedures that ensure that death penalty cases are administered fairly and impartially in accordance with due process, minimize the risk that innocent persons may be executed, and ensure that the death penalty is not administered in a racially discriminatory manner.

"[B]efore executing even one more person," Sen. Feingold said in April 2000,

the federal government and the states must ensure that not a single innocent person will be executed, that we have eliminated discrimination in capital sentencing on the basis of the race of either the victim or the defendant, and ensure that we provide for certain basic standards of competency of defense counsel. . . . Let us pause to be sure we are being fair. Let us pause to be sure we are being just. Let us pause to be certain we do not kill a single innocent person. This is not too much to ask of a civilized society.

The bill is pending in the Senate Judiciary Committee. Rep. Jesse L. Jackson, Jr. (D-IL) has introduced similar legislation in the House of Representatives.

III. FEDERAL AND STATE JUDICIAL DEVELOPMENTS

There is now general agreement that serious problems exist in death penalty administration around the United States. While the possibility of wrongful convictions and executions has been an important influence in the growing movement toward reform and moratoriums, fundamental fairness and due process for the innocent and the guilty alike have spurred examinations of state and federal capital punishment systems. Concerns about unfairness in the system have led even well known death penalty proponents to support a moratorium and have reached the highest levels of state and federal justice systems.

In April 2001, U. S. Supreme Court Justice Ruth Bader Ginsburg, noting that she supported a proposed moratorium in Maryland, criticized the inadequate funding for death penalty representation in this country. "People who are well represented at trial do not get the death penalty," she said. Two months later, Justice Sandra Day O'Connor, noting that serious questions are being raised about whether the death penalty is being fairly administered in this country, echoed Justice Ginsburg's view and suggested a "look at minimum standards for appointed counsel in capital cases and adequate compensation for appointed counsel when they are used." And Justice Stephen Breyer commented publicly on the potential of DNA testing to impact the future of capital punishment in the United States.

These and other selected judicial statements and decisions addressing fairness in the administration of capital punishment in the United States are summarized below as a sampling of significant moratorium-related judicial developments.

Federal Judiciary

U. S. Supreme Court

Cases

The U. S. Supreme Court granted *certiorari* to consider several capital punishment cases in its October 2001 Term. Among these are *Mickens v. Taylor* (Docket No. 00-9285), in which an inmate claims the lawyer representing him had a conflict of interest, and *McCarver v. North Carolina* (Docket No. 00-8727), concerning the constitutionality of executing mentally retarded offenders. The ABA is among numerous groups that have filed *amicus curiae* briefs in support of McCarver. (It is possible that the recent enactment of a North Carolina bill intended to bar the execution of mentally retarded offenders could lead to the mooted of *McCarver*. See Appendix D.)

In June 1989, the Court overturned Johnny Paul Penry's murder conviction because the jury was not permitted to consider properly whether Penry's mental retardation mitigated against imposition of the death penalty. *Penry v. Lynaugh*, 492 U. S. 584 (1989). The case was remanded for retrial, and again Penry was sentenced to death. Just hours before his scheduled execution on November 13, 2000, however, the Court issued a stay. On June 4, 2001, it ruled 6-3 that the second jury deciding Penry's punishment also received faulty instructions about considering his mental retardation as a mitigating factor. *Penry v. Johnson*, 121 S.Ct. 1910. The Court reasoned that "although the supplemental instruction made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical." 121 S.Ct. 1910, 1914.

On March 20, 2001, in *Shafer v. South Carolina*, 121 S.Ct. 1263, the Court held 7-2 that a state trial court violated Wesley A. Shafer's right to due process when it refused to clarify for jurors that, were they to sentence Shafer to life imprisonment, there would be no possibility of his being paroled. Writing for the majority, Justice Ginsburg noted that the jury obviously was confused about the meaning of a life sentence under South Carolina law. The jury had sent a note to the trial judge asking if there were "any remote chance" of parole and, in response, the trial court had instructed the jury that "parole eligibility or ineligibility is not for your consideration." 121 S.Ct. 1263, 1269. The jury subsequently had sentenced Shafer to death.

Shafer relies heavily on the Court's holding in *Simmons v. South Carolina*, 514 U.S. 154 (1994), that, whenever the prosecution in a South Carolina capital trial makes an issue of the defendant's future dangerousness, the defendant has the right to an accurate jury instruction that a life sentence means no possibility of release. *Shafer*'s case was remanded to the trial court to determine whether future dangerousness was, in fact, argued by the prosecution.

Comments by Members of the Court Concerning Capital Punishment

Associate Justice Ruth Bader Ginsburg said on April 9, 2001, that she supported a proposed Maryland moratorium on capital punishment. She criticized the often "meager" amount of money spent to defend poor people in capital cases and said she would be "glad to see" Maryland become the second state after Illinois to have a moratorium on executions. (The Maryland legislature ultimately did not vote on the legislation. See Chapter I). Justice Ginsburg added that, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial. . . . People who are well represented at trial do not get the death penalty."

Speaking to the Minnesota Women Lawyers Association on July 3, 2001, Associate Justice Sandra Day O'Connor said on July 3, 2001, that the criminal justice system might be allowing some innocent people to be put to death. O'Connor acknowledged that improvements in DNA testing might prevent such results in some cases, but added that most states have not passed the requisite laws providing for DNA testing after convictions. She also said that defendants with more money receive better defense counsel and suggested that it might be appropriate to re-evaluate the minimum standards for appointed counsel in capital punishment cases.

Noting that Minnesota does not have the death penalty, Justice O'Connor said, "You must breathe a big sigh of relief every day."

A few weeks later, Justice Stephen Breyer told a journalist in France that "there is much more discussion [about the death penalty] in the United States than there was five years ago. I think that DNA is going to make the difference, because if it is found that someone was really innocent, if it can be proved with DNA, perhaps that will make a difference."

Lower Federal Courts

Cases Involving the Anti-terrorism and Effective Death Penalty Act

In *Fahy v. Horn*, 240 F.3d 239 (3rd Cir. 2001), a Pennsylvania capital case, the U. S. Court of Appeals for the Third Circuit held that petitioner was not entitled to *statutory* tolling of the limitations period during the pendency of his fourth state post-conviction application. It ruled that this application could not be deemed properly filed because the state court had held it to be untimely, a ruling that the Third Circuit lacked jurisdiction to review.

The court, however, proceeded to grant *equitable* tolling. After noting that “death is different” and that a denial of tolling would deprive petitioner of any federal review of his claims, the court determined that “because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than ‘extraordinary’ circumstances to trigger equitable tolling of the [Anti-terrorism and Effective Death Penalty Act]’s (AEDPA’s) statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair.” 240 F.3d at 245. Applying this standard, the court noted that the uncertainty present in state law at the time petitioner filed his application and the rigidity with which the Third Circuit has enforced the total exhaustion rule led to a conclusion that the petitioner had acted reasonably in filing that application, even though his judgment proved erroneous.

The Third Circuit thus held that when state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of a reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied for failure to comply with the procedural filing requirement, it would be unfair not to toll the statute of limitations during the pendency of the state petition. Under such circumstances (and where there is no evidence of abuse of process), equitable tolling of AEDPA’s statute of limitations was held to be appropriate. 240 F.3d at 245.

On January 18, 2001, the U. S. Court of Appeals for the Fifth Circuit denied *habeas corpus* relief to Mississippi death row inmate Howard Monteville Neal, despite concluding that Mr. Neal had been deprived of his constitutional right to effective assistance of counsel and that the Mississippi Supreme Court had erred in not granting Mr. Neal relief. The court held that, under the AEDPA, it was precluded from granting relief because, in making its erroneous holding, the Mississippi Supreme Court had not applied Supreme Court precedent in an “unreasonable” way. Since the state court’s decision was incorrect but not “unreasonable,” Mr. Neal still could be executed. *Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001).

DNA Testing

In January 2000, a federal judge ordered DNA testing for Virginia death row inmate Brian Lee Cherrix to permit him to verify his claim that he was wrongfully convicted of killing a pizza delivery woman in 1994. *Cherrix v. Braxton*, 131 F.Supp. 2d 756 (E.D.Va. 2000). Previous DNA testing on sperm found in the victim’s body was inconclusive. The case remained unsolved until Cherrix was arrested on another charge and offered to give authorities information about the killing in exchange for leniency. Police assert that Cherrix then confessed, but Cherrix has denied confessing and says he has an alibi. Cherrix’s attorneys argued, and the district court agreed, that current DNA testing methodologies may prove that Cherrix is actually innocent.

Virginia Attorney General Mark L. Earley asked the U. S. Court of Appeals for the Fourth Circuit to reverse the lower court’s decision on the grounds that the district court had overstepped its constitutional authority when it ordered the commonwealth to turn over the evidence. The Fourth Circuit denied Earley’s request. *In re Braxton*, 2001 WL 789070 (Va. 2001).

Competency of Counsel

On January 22, 2001, the *en banc* U. S. Court of Appeals for the Fifth Circuit reviewed a previous three-judge panel’s divided ruling in *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), that Calvin Burdine, a Texas death row inmate whose “sleeping lawyer” claim drew national attention during the 2000 presidential campaign, did not have an absolute right to an attorney who stays awake during the entire trial. Burdine’s appeal included accounts by jurors and a court clerk that

his original counsel, Joe Frank Cannon, frequently slept during his trial. As of July 31, 2001, the case still was pending.

Equal Protection

In December 2000, the U. S. Court of Appeals for the Fifth Circuit overturned the murder conviction of former Louisiana death row inmate Wilbert Rideau, ruling that selection of the grand jury that indicted him in 1961 was racially biased. (Rideau initially was sentenced to death, but he was resentenced to life imprisonment after the U. S. Supreme Court struck down capital punishment in 1972.) Only one African-American was on the 20-member grand jury that indicted Rideau. The Fifth Circuit held that African-Americans were excluded from the grand jury in violation of the Equal Protection Clause of the 14th Amendment. It remanded the case to federal district court with instructions that the state be given a reasonable amount of time to decide whether to re-indict and retry Rideau. *Rideau v. Whitley*, 237 F.3d 472 (2000), *reh'g denied*, 248 F.3d 1141 (5th Cir. 2001).

Federal District Judge's Commentary

In a July 8, 2001 opinion piece in the *Boston Globe*, a federal district court judge who recently had presided over a federal death penalty trial said that a capital murder trial is so complicated that an innocent person could receive a death sentence. Judge Michael Ponsor said he believes that, in the capital trial over which he presided, the jury was correct in finding the defendant guilty and in declining to impose the death penalty. But the experience convinced him "that a legal regime relying on the death penalty will inevitably execute innocent people. . . . [I]t is simply not possible to do something this difficult perfectly, all the time."

State Courts

Judicial Override of Jury Sentencing Recommendations

Alabama

Nearly three dozen of Alabama's 186 death row inmates received their death sentences from judges who overrode jury recommendations of life in prison without parole. On December 28, 2000, the *Chicago Tribune* reported the view of Alabama Court of Criminal Appeals Judge Pamela Baschab that jury overrides present a troubling area in a part of the law that should be immune to politics. "I think it can give the impression of political influence," the *Tribune* reported she commented. "All judges know, if they're elected, that people may come back and use an issue against them[.] I don't know that we can ever assure the public it's not politically motivated."

In a June 16, 2001, *New York Times* article, William Bowen Jr., the former presiding judge of the Alabama Court of Criminal Appeals, also spoke out against the State's jury override provision. Bowen said most judges would prefer not to have this power because of the political pressure to impose the death penalty—that "judicial politics has gotten so dirty in [Alabama] that your opponent in an election simply has to say that you're soft on crime because you haven't imposed the death penalty enough." Judges run for re-election on that basis, Bowen concluded, because the popular opinion in Alabama is, "'Let's hang 'em.'"

Arizona

In Arizona, a majority of the Arizona Supreme Court indicated in *State v. Ring*, 25 P.3d 1139 (2001), that judges should be allowed to spare a convicted murderer the death penalty if they have any doubts that the jury correctly rendered the conviction. Two of the three justices who expressed this view added that trial judges already have the right to spare a convicted murderer in such circumstances, while the third justice said that it is up to the Arizona legislature to determine what can be considered by judges in imposing sentences.

Adequacy of Counsel

Virginia

According to a review conducted by the *Washington Post* and published in March 2001, the Virginia Supreme Court and the federal courts overseeing the Virginia courts recently have subjected several death row cases to unusual scrutiny.

Over several days in March 2001, for example:

- Virginia's high court ordered hearings in a death row appeal—the first time it had done so since 1995. It ordered an Appomattox court to consider evidence that Brandon Wayne Hedrick's first attorneys were so incompetent that he was denied a fair trial on rape and murder charges;
- The U. S. District Court for the Western District of Virginia agreed to hear evidence that Percy Walton was too mentally ill to be competent to stand trial, and that his attorneys who had failed to press that issue had provided ineffective assistance of counsel; and
- Three judges of the U. S. Court of Appeals for the Fourth Circuit issued a rare written dissent in the case of Walter Mickens, Jr. 240 F.3d 348 (4th Cir. 2001). They noted that other circuit courts would have found Mickens entitled to a new trial. (As noted above, the U. S. Supreme Court subsequently granted *certiorari* in Mickens' case.)

On June 29, 2001, the Virginia Supreme Court issued a new set of guidelines for court-appointed counsel. The guidelines suggested that counsel representing a defendant charged with capital murder be paid at a rate of \$125 per hour for in-court work and \$75 per hour for out-of-court work. Many observers have criticized the guidelines because the lower rate included for out-of-court work is insufficient to cover costs of adequate trial preparation and barely meets the costs of keeping a law office open. The rates also fail to reflect the fact that effective attorneys spend more hours working outside the courtroom than inside it.

Calls for a Moratorium

Ohio

Ohio Supreme Court Justice Paul Pfeifer stated in April 2001 that Ohio's high court has not properly monitored death penalty cases and has failed to raise questions about whether capital punishment is evenly imposed. In an article published in *The Plain Dealer*, Pfeifer said that “[o]ne of the things I'm struggling with—and the longer I'm here and the more of these cases I see—is the issue of the Court's oversight in death penalty cases.” (Twenty years ago, then-State

Senator Pfeifer chaired the Ohio Senate committee that helped shape the state's death penalty statute.)

The article explained that Ohio's capital punishment law specifically requires the Ohio Supreme Court to undertake a proportionality review in each case in which it reviews a death sentence. This process is intended to determine whether the death penalty is evenly applied to those convicted of the same crimes. Justice Pfeifer said that this review requirement has been given little more than lip service. He urged that some entity—perhaps the Ohio Supreme Court itself—undertake a more thorough review. According to Court records, the Ohio Supreme Court has overturned three death sentences out of the 136 death penalty cases it has reviewed since Ohio reinstated the death penalty in October 1981.

Justice Pfeifer also expressed concern that statistics appear to show racial and geographic disparities in the imposition of capital punishment in Ohio. For example, of the 201 men on Ohio's death row, 45 are from Hamilton County, the state's third most populous county, whereas the most populous, Cuyahoga County, has 37 men on death row, and Franklin County, the second most populous, has 12. Pfeifer further noted that nearly identical facts result in the death penalty in some cases but not others. "I don't know why this is happening, but maybe if we take a closer look, we can find out if cases across the state are proportional to each other," he said.

Subsequently, however, in *State v. Carter*, 734 N.E.2d 345 (Ohio 2000), the Ohio Supreme Court found, among other things, that the imposition of capital punishment on Carter met the proportionality test—the test that Justice Pfeifer previously had attacked as inadequate. The Court thus rejected Carter's requests for a stay of execution and a statewide moratorium on executions, reasoning that,

[t]he basis for [Carter's] request is that a number of persons were found to be wrongly convicted of capital offenses in Illinois, and that executions are irrevocable. . . . [Carter, however,] has not pointed to anything specific concerning Ohio's application of the death penalty [that would warrant a stay of execution]. Even if there are persons on death row in Ohio who may be innocent of the crimes they are charged with, [Carter] is not one of them. . . . The concerns that may be present in Illinois are not present in this case.

734 N.E.2d at 358.

Delaware

On May 30, 2001, in *Stevenson v. State*, the Delaware Supreme Court said in *dicta* that it "is aware that there is extended debate at the national and local level concerning whether the death penalty is fairly imposed and that there are calls for a moratorium on its use. While the adoption of the death penalty . . . is a legislative prerogative, the judiciary has a special obligation to ensure that the standards governing its application are applied fairly and dispassionately and, just as important, appear to be so." 2001 WL 674166 at 10. The court went on to note that it is required by statute to automatically review death sentences to ensure they are not arbitrarily imposed or that due process was not lacking, even where the defendant sentenced to death has not appealed.

New Jersey

On June 7, 2001, the New Jersey Supreme Court set aside a defendant's death sentence in a 4-3 decision in *State v. Koskovich*, 2001 WL 618579. Four justices cited three errors in jury instructions during the penalty phase as warranting the decision. In a separate concurring

opinion, Justice Virginia Long called on the court to re-think whether the death penalty is "cruel and unusual punishment" and to institute a moratorium in the meantime. A second justice concluded that the death penalty is cruel and unusual punishment when it is applied to an offender who, despite having reached age 18, does not have the emotional maturity of an adult.

In the case of *State v. Timmendequas*, concerning a defendant who, after previously being twice convicted of sex crimes, was convicted and sentenced to death for murdering a seven-year-old girl. 773 A.2d 18 (N.J. 2001), the supreme court held that the death sentence imposed on the defendant was consistent with sentences previously given for the same offense. In dissent, however, Justice Long said the Court's proportionality review was inadequate, and she again urged a moratorium:

It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution. The very exercise of individual proportionality review stands on a fundamentally unstable pediment. It should thus be scrapped and a moratorium declared on the death penalty until a meaningful process is developed. *Id.* at 97.

In an earlier case in which the court upheld a death sentence, Justice Long also expressed her belief that a moratorium on capital punishment should be imposed. In *State of New Jersey v. Richard Feaster*, 757 A.2d 256 (2000), she wrote,

Despite the enormous effort we have expended, it has become apparent that proportionality review does not provide a standard of due process protection commensurate with the gravity of the sentence to be imposed. . . . One reason for that failure is that, despite our efforts to improve proportionality review, we have not yet settled on consistent, meaningful standards for our two tests: salient factors and comparative culpability. Close scrutiny of our opinions reveals that the standards change from case to case. . . . Equally important is the fact that the standards we employ are applied in a haphazard and arbitrary fashion. . . . [Further, as to the imposition of a death sentence in the first instance, t]he competence (or incompetence) of [a] defendant's trial counsel, the resources of the county in which the crime was committed, the popularity of the death penalty in that county, the notoriety of the victim, the defendant's financial resources, the particular policy of the county prosecutor, the race of the defendant and/or victim(s), and the publicity surrounding the crime are probably better predictors of a jury's life or death decision. *See, e.g.*, American Bar Association Death Penalty Moratorium Resolution (Feb. 3, 1997) (citing incompetent counsel and racial discrimination as barriers to fair administration of [the] death penalty)[.]

Id. at 295-303 (internal quotations and citations omitted).

Texas

In Texas, a Senior State District judge who, as a state legislator 30 years earlier had helped write the state's capital punishment laws, recently questioned the fairness of Texas' death penalty. Speaking at a statewide legal seminar in Corpus Christi (as reported in the *Ft. Worth Star-Telegram*), Judge C.C. "Kit" Cooke said he is concerned with possible deficiencies in the system, such as the racial disparity of those executed, lack of access to DNA evidence, and inadequate legal representation.

Judge Cooke said that his perspective on capital punishment has changed since his earlier years in politics. "I was looking [at the death penalty] as a young politician, with about 90% of my

district supporting the death penalty. . . . Now, from a judge's perspective and taking care of people's rights, I think it has a lot of flaws.”

Revised Rules and Procedures

Illinois

On January 22, 2001, the Illinois Supreme Court adopted new and amended rules governing capital cases, and they effective following their publication in March 2001. The rules set minimum standards for lawyers, require training for judges, and remind prosecutors of their duty to seek justice, “not merely [to] convict.” The rules were the result of nearly two years of study, public hearings, and revisions by 17 judges from across Illinois who comprised the Special Supreme Court Committee on Capital Cases.

Although there is no specific provision dealing with attorneys who have been disciplined, the new rules call for the court to refer to a new Capital Litigation Bar the screening of attorneys seeking to handle capital cases. The Capital Litigation Bar, rather than judges, will effectively be responsible for determining a lawyer’s qualifications.

Justice Thomas Fitzgerald, who chaired the committee, said he viewed the new rules as the beginning of the reform process, rather than its conclusion. The rules provide for:

- Minimum training and experience standards for defense counsel and prosecutors, including a requirement that lead defense counsel have five years trial experience, including at least eight felony trials of which at least two are murder trials (New Rule 714; the minimum experience standards will take effect after one year, due to the time involved in creating a system for creating a Capital Litigation Bar roster);
- Appointment of two defense counsel for every indigent capital defendant (New Rule 416);
- Special training and updated training materials for judges handling capital cases (New Rule 48);
- Limiting the amount of time in which a prosecutor must give notice of intent to seek capital punishment to within 120 days of arraignment (New Rule 416);
- Making normal criminal discovery rules applicable to the sentencing phase of capital cases (Amended Rule 411);
- Standards for dealing with DNA evidence (New Rule 417); and
- A specific reminder that the prosecutor's duty "is to seek justice, not merely to convict" (Amended Rule 3.8).

Missouri

In Missouri, the Supreme Court on February 20, 2001, issued an order allowing post-conviction motions for DNA testing not available at trial. Supreme Court Rule 29.17 provides:

[A] person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate the person’s innocence of the crime for which the person is in

custody may file a post-conviction motion in the sentencing court seeking such testing. . .
. The motion must allege facts demonstrating that:

- (1) There is evidence upon which DNA testing can be conducted; and
- (2) The evidence was secured in relation to the crime; and
- (3) The evidence was not previously tested by the movant because:
 - (A) The technology for the testing was not reasonably available to the movant at the time of the trial; or
 - (B) Neither the movant nor his trial counsel was aware of the existence of the evidence at the time of trial; or
 - (C) The evidence was otherwise unavailable to both the movant and the movant's trial counsel at the time of the trial; and
- (4) Identity was an issue in the trial; and
- (5) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and
- (6) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

The court shall order appropriate testing if it finds (1) [a] reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing; and (2) [t]hat the movant is entitled to relief.

The new rule will become effective on September 1, 2001.

Florida

In July 2001, the Florida Supreme Court issued new rules designed to streamline and speed up the appeals process for death row inmates. For example, effective October 2001, each new death penalty appeal will be assigned to a trial judge, who will hold a status conference every 90 days and will be required to hold evidentiary hearings as appropriate. Death row inmates still will have one year in which to file a second appeal after their sentence is upheld.

Judicial Independence

Texas

The Texas State Commission on Judicial Conduct ruled in January 2001 that a Court of Criminal Appeals judge violated the Texas Code of Judicial Conduct when he promised during his GOP primary campaign that he would show no leniency for violent criminals. According to the *Austin-American Statesman*, the judge was running (unsuccessfully) to become chief judge of the court (Texas' highest judicial body for criminal cases, including all death penalty sentences), when he said in campaign literature that he was an "advocate" for victims of crimes, and that "I'm very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim."

The judge himself commended the commission, which handles allegations of judicial misconduct, acknowledging that, "[a]s judges, we have to campaign, and we have been campaigning as politicians, and sometimes that gets us out of whack with what judges are really supposed to be doing."

IV. ACTIVITY WITHIN THE ABA AND THE PROFESSION

In the last 18 months, the ABA and the legal profession have stepped up efforts to promote a moratorium on executions. ABA President Martha Barnett issued a “Call to Action” urging lawyers, legislators, and business and community leaders to join the ABA in advocating for a moratorium nationwide until systemic problems and fairness concerns are fully addressed; the ABA Section of Individual Rights and Responsibilities developed a series of “protocols” to encourage and help ensure full and comprehensive reviews of capital jurisdictions’ laws and processes; the President’s Office issued a “resource kit” to help bar and community leaders develop and implement moratorium initiatives in their states; the ABA’s Death Penalty Representation Project continued aggressively to recruit qualified counsel for death row inmates long without any legal representation; and, significantly, numerous additional state and local bar associations adopted resolutions calling for moratoriums in their respective states.

Presidential Leadership

As she prepared to assume the ABA presidency, President-elect Martha W. Barnett announced in summer 2000 that she would make the moratorium a priority during her year in office. Then-President Bill Paul’s attention to the issue during his tenure set a solid foundation for the efforts to come, particularly in his responding to Illinois Gov. George Ryan’s call for a moratorium in that state and in his writing numerous letters to public officials concerning the ABA’s opposition to execution of mentally retarded individuals and offenders who were under age 18 at the time they committed capital offenses.

Gov. Ryan’s announcement of a moratorium on executions in Illinois had an immediate and resounding impact across the country and was important to the ABA’s efforts to promote the moratorium initiative nationwide (see Chapter I). Said President Paul in response to the announcement, “We commend Governor Ryan for taking this decisive action. In the face of a number of examples of how its system has failed, Illinois [has] acknowledged the intolerably high risk of error and is seeking answers. Governor Ryan’s leadership should be followed by conscientious public officials in other jurisdictions.”

On February 9, 2000, the *Los Angeles Times* published an opinion piece in which President Paul called for a moratorium on executions until fairness and due process could be ensured and expressed again the ABA’s support of Gov. Ryan’s decision to halt executions pending a full review of Illinois’s death penalty procedures. Citing ABA guidelines, Paul wrote that, “the apparent need to resolve these [fairness and due process] concerns should continue to spur more reviews of death penalty systems, with concurrent moratoriums.” He concluded, “[B]oth opponents and proponents of the death penalty are in agreement that we do not want to make a fatal mistake.”

Although the Nebraska legislature had approved a moratorium in that state in 1999, the governor there vetoed the bill. The executive action in Illinois therefore became the first widely recognized result of the ABA’s moratorium initiative. Immediately on its heels came a report of the ABA Section of Individual Rights and Responsibilities, *A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions*, which described the growing public awareness of the risk of error in capital conviction and/or sentencing, the resultant increased tolerance for delay in executions, and the wide range of civic, religious, legal, and non-governmental organizations that supported an initiative to implement an immediate moratorium on executions.

At the ABA Annual Meeting in New York in July 2000, President-elect Barnett called for a moratorium on the federal death penalty and challenged lawyers across the country to work to suspend the death penalty in each state until it can be shown that it is imposed fairly. “No defendant should be executed,” she said, “until we assure that the imposition of the ultimate sanction is not a result of inadequate counsel or lack of due process. We cannot ignore that there is unfairness in the way the death penalty is imposed in this country. Lawyers have the responsibility to solve those problems.”

Within two months of assuming the ABA presidency, Barnett convened an invitational conference, “ABA Call to Action: A Moratorium on Executions.” Hosted by The Carter Center in Atlanta, Georgia, the October 2000 conference brought together both supporters and opponents of capital punishment—including Bar association leaders, lawyers in private practice, state legislators, representatives of the Conference of Chief Justices, prosecutors and defenders, former First Lady Rosalynn Carter, and Gov. George Ryan—to discuss the importance of a nationwide moratorium and, as Barnett put it, “the common values of due process and fairness that are fundamental to all.”

The program included a keynote address by New York University Law Professor Anthony G. Amsterdam and panels on a broad range of death penalty-related issues, including counsel for people facing the death penalty; the loss of state and federal post-conviction review in many cases; the need for an independent state judiciary; prosecutorial and police misconduct; racial discrimination; execution of juveniles and mentally retarded offenders; and the process of enacting a moratorium. (An edited transcript of these discussions will be printed in fall 2001 in the *New York City Law Review*.)

As part of the conference, President Barnett wrote to the governor in every death penalty state, urging him or her to follow Gov. Ryan’s lead and impose a moratorium and/or initiate a comprehensive review of the death penalty in his or her state. “As it stands today,” Barnett wrote, “the administration of the death penalty is far from being fair and consistent. Instead, it is a haphazard maze of unfair practices with no internal consistency. These failures are intolerable and certainly increase the risk that innocent people will be executed.”

Following the Call to Action conference, in an op-ed entitled “Halt Executions Until Fairness is Determined,” published in the *Bucks County Courier Times* (Levittown, Pa.) on Nov. 10, 2000, President Barnett again urged all capital punishment states to follow Illinois’ example and impose a moratorium on executions. She cited the September 2000 U. S. Department of Justice survey revealing possible racial bias in the administration of the federal death penalty (see Chapter II) and a recent public opinion poll indicating that a majority of Americans favor a moratorium until fairness in the administration of the death penalty can be ensured.

In December 2000, President Barnett participated with Gov. Ryan and others in a program at the Association of the Bar of the City of New York on the need for a moratorium on executions and gave press interviews on the subject. At the ABA mid-year meeting in San Diego in February 2001, Barnett renewed her call for a nationwide moratorium.

Meanwhile, the Individual Rights Section and the ABA Death Penalty Representation Project continued work on several important projects that complemented President Barnett’s own initiatives.

“Protocols” for Assessing Death Penalty Laws and Processes

In June 2001, the Individual Rights Section published *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, which the Section developed to assist entities undertaking reviews of state death penalty systems and to assist the public in monitoring the adequacy of such reviews.

These “protocols” address eight specific areas of concern: defense services, procedural restrictions, clemency, jury instruction, judicial independence, racial discrimination, and the sentencing of juveniles and mentally retarded or mentally ill offenders in capital cases. Each protocol contains a brief introductory overview of the issues involved in the topic area, a list of questions to be considered in a comprehensive review, and recommendations for improving administration of the system in the topic area. The subjects covered and the guidance provided are based largely upon principles and policies referenced in the ABA moratorium resolution. At the end of the protocols is a bibliography of selected resources that may be helpful to those designing or undertaking such reviews.

While the protocols are not intended to be exhaustive, they direct attention to areas that experience has shown contribute to the unfair administration of the death penalty. They are intended to help capital jurisdictions meet, in a systematic way, their fundamental obligation to strive for fairness. They also are among the items included in a moratorium “resource kit” issued by the ABA President’s Office in July 2001 to help bar and community leaders develop and implement moratorium initiatives in their states.

Amicus Brief – McCarver v. North Carolina

In June 2001, consistent with longstanding ABA policy opposing the imposition of capital punishment upon mentally retarded offenders, the ABA submitted an *amicus curiae* brief in *McCarver v. North Carolina*, in which the U. S. Supreme Court will consider next term whether a national consensus opposing the execution of mentally retarded offenders has developed, thus rendering the practice “cruel and unusual” punishment prohibited by the Constitution. In its brief, the ABA argues that “[n]umerous defendants with mental retardation have been sentenced to death despite their innocence,” and that, in light of this and other troubling facts relating to the practice, “[a]llowing defendants with mental retardation to be executed subverts the integrity of the adversarial system” of justice in the United States.

ABA Death Penalty Representation Project

The ABA Death Penalty Representation Project, begun in 1986 as a project of the Individual Rights Section and now a separate ABA entity, focuses primarily on increasing public awareness of the lack of representation available to death row inmates and addressing this urgent need by recruiting competent, volunteer attorneys and offering counsel training and assistance.

The Project has intensified its lawyer recruitment program in the last three years. Its recruitment list includes 75 firms that began serving as *pro bono* counsel in capital cases since 1998. Most of these firms are handling post-conviction cases, but several have volunteered to represent individuals in death penalty trials. Another 25 firms and individual lawyers have signed on to represent indigent death row inmates in direct appeals, petitions for *certiorari*, filings of *amicus curiae* briefs in the U. S. Supreme Court, clemency proceedings, and other matters. Since

December 2000, there have been at least three major victories by the Project's *pro bono* counsel, along with a number of other successes by volunteer firms that were not recruited by the Project.

In a July 2001 report, the Project notes that, despite significant progress in these areas, the past year has seen a measurable decrease in firm recruitment as financial pressures and firm reorganizations have taken a toll on the Project's recruitment efforts. The Project also reports that, despite some modest improvements in capital defender programs, *e.g.*, creation of both the Mississippi Office of Capital Post-Conviction Counsel and the Capital Post-Conviction Project of Louisiana, and increased funding for the North Carolina Office of Indigent Defense Services, the gap between the demand for *pro bono* lawyers for death-sentenced prisoners and the supply of such lawyers has never been greater in such states as Pennsylvania, Texas, Alabama, and Georgia.

The Project and the ABA Standing Committee on Legal Aid to Indigent Defendants also have undertaken to revise the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. Originally adopted in 1989, the Guidelines have been cited widely by courts as setting forth the minimum standards for capital defense counsel. As a result of the many judicial and legislative developments that have occurred since 1989, however, a revision is necessary to take into account those changes, as well as the increasing number of state reviews and changes in capital punishment procedures, including addition of standards for capital counsel. An advisory committee comprised of lawyers with expertise in capital trials, appeals, and state and federal *habeas* proceedings is being established to conduct the revision. The goal is to complete the revisions by February 2002.

Testimony

On June 20, 2000, James E. Coleman, Jr., chair of the Individual Rights Section in 1999-2000, testified on the ABA's behalf before the U. S. House of Representatives' Committee on Judiciary Subcommittee on Crime. He expressed the Association's support for the Innocence Protection Act of 2000, which would have encouraged and assisted the States in providing competent legal services at every stage of a capital prosecution. The ABA endorsed the Act because, consistent with ABA policy, it would have reduced the risk of wrongful convictions and executions in capital cases and would have expressed the sense of the Congress that the death penalty should not be applied to juvenile offenders and mentally retarded offenders.

In June 2001, the Senate Judiciary Committee held a hearing on the Innocence Protection Act, which had been re-introduced on March 7, 2001. Norman Lefstein, Dean and Professor of Law at the Indiana University School of Law at Indianapolis, submitted testimony on the ABA's behalf in support of the Act's counsel provisions. Dean Lefstein addressed "three fundamental issues" in the consideration of the Act: the necessity of standards for the representation of capital defendants, the essential elements of a capital representation system, and the importance of enforcing capital representation standards (see Chapter II).

Policy Letters

Federal Death Penalty Survey

On March 3, 2000, President Paul wrote to then-Attorney General Janet Reno to emphasize the importance of ensuring fairness and due process to those facing capital punishment in federal capital cases. Gen. Reno recently had directed the Department of Justice (DOJ) to examine a series of issues relevant to the death penalty, with particular emphasis on racial disparities in

capital punishment procedures, the potential to execute innocent defendants, competency of capital defense counsel, and problems specific to capital sentencing.

On May 2, 2000, President-elect Barnett wrote to President Clinton to express the ABA's support for a review of the administration of the federal death penalty and to urge an executive moratorium on executions pending a thorough examination of the federal capital punishment system.

When the DOJ released its death penalty report in September 2000 (see Chapter II), President Barnett sent a follow up letter to President Clinton, noting that the ABA was "deeply troubled by the report's findings of geographic disparities and racial disparities indicative of bias in the application of the federal death penalty." Barnett again urged President Clinton to impose an executive moratorium on executions. "An open, thoughtful process of re-examination is essential to restore public confidence in our justice system," she said.

Federal Legislation

On March 28, 2001, President Barnett wrote Sen. Patrick Leahy (D-VT), Sen. Russ Feingold (D-WI), and Sen. Gordon Smith (R-OR), to congratulate them for introducing the Innocence Protection Act of 2001, which, she said, "will help ensure that the system of capital punishment in the country is administered fairly and minimizes the risk that innocent people may be executed." On March 29, 2001, President Barnett wrote Representatives William Delahunt (D-MA) and Ray LaHood (R-IL) to thank them for introducing the legislation in the House. Barnett also thanked Sen. Feingold for introducing the National Death Penalty Moratorium Act of 2001, which would place a moratorium on federal executions and would urge the states to halt executions pending a study of their capital punishment systems.

On June 15, 2001, President Barnett wrote to President Bush, urging him to impose a moratorium on federal executions until the NIJ death penalty study ordered by Attorney General Ashcroft is completed (see Chapter II). She noted that most of the members of the ABA House of Delegates had concluded that "systematic problems, including charging decisions, federal *habeas corpus* limitations, and counsel competency issues, have undermined procedural safeguards essential to the fair administration of the death penalty." On the same day, President Barnett also sent a letter to Sen. Feingold, as chair of the Senate Judiciary Committee Subcommittee on the Constitution, Federalism, and Property Rights, to urge him to include her letter to President Bush in the record of the Subcommittee's June 13, 2001, hearing on "Racial and Geographic Disparities in the Federal Death Penalty System" (See Chapter II).

State Moratorium and Death Penalty Reform Legislation

On February 8, 2000, President Paul wrote to Oklahoma Governor Frank Keating requesting that he impose an executive moratorium on executions there pending a thorough examination of the state's death penalty system. The letter also discussed a bill being considered in the Oklahoma legislature that would have imposed a moratorium on executions and commissioned a study of the system. Concerned, however, that the legislation would be voted on only after capital punishment had been administered to certain death row inmates then awaiting execution, President Paul urged that those individuals not be executed pending the legislation's final disposition. (In a letter responding to the ABA's comments, the Office of the Governor confirmed Gov. Keating's continued support for capital punishment.)

On March 30, 2001, President Barnett wrote to Chairman Armbrister of the Texas Senate Criminal Justice Committee and Chairman Hinojosa of the Texas House Criminal Jurisprudence

Committee to support legislative proposals for a moratorium on executions in Texas. On April 16, 2001, she sent letters to State Representatives Dutton and Naishtat and State Senator Shapleigh thanking them for their leadership in sponsoring moratorium legislation in the Texas legislature.

Executing Juvenile Offenders

On May 30, 2000, President Paul wrote to then-Texas Governor George W. Bush, and to the chair of the Texas Board of Pardons and Paroles, seeking clemency for a juvenile offender, Gary Graham, who had presented a serious claim of innocence. In a second letter to both officials, President-elect Barnett reiterated the ABA's long standing objection to the execution of juvenile defendants in general and to Gary Graham, specifically. (Graham was executed on June 22, 2000.)

On August 18, 2000, President Barnett wrote to Georgia Governor Roy E. Barnes, urging clemency for Alexander E. Williams, IV, who was 17 when he committed murder. "Executing Alexander Williams, and others on death row for their crimes committed as children, serves no principled purpose and only demeans our system of justice," wrote Barnett, who cited children's impulsiveness, lack of self-control, inability to fully appreciate the consequences of their actions, and poor judgment as factors that render the adult purposes of retribution and deterrence hollow in juvenile capital cases.

On February 13, 2001, Patricia Puritz, Director of the ABA Juvenile Justice Center, wrote a letter to Arizona Attorney General Janet Napolitano urging the state to abandon the practice of executing offenders for crimes committed before the age of 18. "Adolescence is a transitional period of life where cognitive abilities, emotions, impulse control, and identity are still developing," wrote Puritz. "[T]hat is why we make laws to protect juveniles as a class."

On July 18, 2001, President Barnett sent letters to Gerald Garrett, chairman of the Texas Board of Pardons and Paroles, and Texas Gov. Rick Perry urging that Texas not permit the scheduled August 2001 execution of Napoleon Beazley, who was 17 years old at the time of his crime. "We do not give children full rights in our society until they reach adulthood," Barnett said. "[I]t is deeply troubling that we, as a democratic society, truncate the political rights of this group because they need protection, yet pass laws in order to execute them." (As of July 31, 2001, Beazley's execution still was pending.)

Executing Mentally Retarded Offenders

President Paul wrote to Michael Schilling of the Missouri House of Representatives on May 10, 2000, to express the ABA's support for proposed legislation that would exempt defendants with mental retardation from receiving the death penalty in Missouri. Referring to the 13 states that already had adopted such a ban as of that date, President Paul noted that "a national consensus is emerging against the execution of the mentally retarded." (Missouri enacted such legislation in 2001. See Appendix D.)

President Barnett also wrote a letter to then-Texas Governor George W. Bush expressing the ABA's strong opposition to the execution of defendants with mental retardation. She urged clemency for Oliver David Cruz, a mentally retarded Texas death row inmate, and articulated the ABA's view that execution of mentally retarded individuals is "unacceptable in a civilized society, irrespective of their guilt or innocence." The letter cited American and international organizations with expertise on mental retardation that supported the ABA's position. A similar

letter was sent to the chair of the Texas Board of Pardons and Paroles. (Cruz was executed on Aug. 9, 2000.)

On Nov. 8, 2000, President Barnett wrote to Gov. Bush and to the chair of the Texas Board of Pardon and Paroles on behalf of another mentally retarded inmate, Johnny Paul Penry. President Paul initially had voiced the ABA's concerns in a letter dated Dec. 10, 1999, and President Barnett reiterated the Association's vigorous objection to the imposition of capital punishment upon any mentally retarded defendant. (The U. S. Supreme Court later held that the jury instructions in the sentencing phase of Penry's re-trial were unconstitutional, and remanded his case to the Texas courts. See Chapter III.)

Citing the Supreme Court's grant of *certiorari* in the *McCarver* case, President Barnett wrote to Nevada Gov. Kenny Guinn on March 27, 2001, urging clemency for Thomas Nevius, who is mentally retarded. In neither the guilt or penalty phases of his trial was Nevius' jury ever presented with evidence of his mental retardation. Six of the jurors since have signed affidavits stating that they never would have voted for a death sentence if they had known of Nevius' mental disabilities. The Nevada State Board of Pardons held a hearing in April, at which the case was continued for further proceedings.

On April 2, 2001, President Barnett wrote to Gov. Jeb Bush of Florida commending his announced support of state legislation that would prohibit the execution of mentally retarded offenders in that state. (The governor later signed such legislation into law.)

Meetings and Conferences

At the 2000 ABA Annual Meeting in New York, the Individual Rights Section and the ABA Death Penalty Representation Project co-sponsored a program entitled, "The Imposition of the Death Penalty is 'Fraught with Error': Where Do We Go From Here?", to discuss how the organized bar, legislators, law firms, and concerned lawyers should respond to the shortage of competent and sufficiently funded counsel. (An edited transcript of this program will be published in the fall 2001 issues of the *New York City Law Review*.)

Also in July 2000, the Individual Rights Section's Death Penalty Committee, *Amicus* Capital Legal Assistance, and others groups organized a discussion on the death penalty in the context of international law as part of the 2000 ABA Annual Meeting in London, England. The program featured experts on capital punishment and international law from both sides of the Atlantic. The European speakers expressed strong support for the ABA's call for a moratorium on executions. (An edited version of this program was later broadcast on NPR's "Justice Talking.") In October 2000, Ronald Tabak, co-chair of the Individual Rights Section's Death Penalty Committee, participated on the ABA's behalf at a conference in Paris, France, in support of a worldwide moratorium on executions.

The Individual Rights Section and the Death Penalty Representation Project planned three programs on capital punishment for the 2001 ABA Annual Meeting in Chicago in August 2001. The first concerns the evolving situation in Illinois, including the work of the commission created by Gov. Ryan to consider the fairness of capital punishment in Illinois, and what, if anything, can be done to ensure both fairness and accuracy. The second program, moderated by Harvard Law School Professor Charles Ogletree, explores what judges, prosecutors, defense counsel, and the bar generally can do about prosecutorial and police misconduct, ineffective performance by defense counsel, and the continuing threats to judicial independence. The third program features representatives of the press discussing what they have learned about the implementation of capital punishment in the course of reporting on various aspects of the death penalty in practice. A

fourth program, organized by the ABA Juvenile Justice Center, discusses the execution of offenders who were juveniles at the time of their crimes. (Transcriptions of some of these programs will be published in law reviews in the next several months.)

State and Local Bar Association Activity

As of January 2000, eight state and local bars—including the Chicago Council of Lawyers and the Pennsylvania, Philadelphia, Connecticut, Ohio State, and Illinois State Bar Associations—had joined the ABA in calling for a moratorium and/or a study of the death penalty system in their respective states. In 2000-01, that number increased substantially to include, among others, the Louisiana State, New Jersey State, North Carolina, Colorado, New York State, Washington State, and Atlanta Bar Associations. Several of these entities have used the ABA resolution as a model for their own (see Appendix B).

Also noteworthy is the fact that many of these resolutions reflected specific problems in death penalty administration in their jurisdictions. For example, the Multnomah (Oregon) Bar Association's resolution points out that the State of Oregon "has never adopted nor made provisions for implementing the American Bar Association's "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" to ensure that those accused of capital crimes receive adequate representation"; that there is "no adequate mechanism in Oregon for insuring that counsel appointed to represent a defendant facing the death penalty has sufficient skill, experience and resources to fully protect such a defendant's interests"; that "Oregon counsel appointed to defend indigent persons charged with the death penalty are compensated at rates inadequate to assure a full and complete defense"; that "serious questions have been raised about the adequacy of Oregon's post-conviction relief process in death penalty cases"; and that "Oregon's death penalty statute may include constitutional flaws that have not been fully examined by the appellate courts charged with that responsibility[.]"

In February 2001, the State Bar of Texas' Committee on Legal Services to the Poor on Criminal Matters released "Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas," which analyzed the state's indigent criminal defense system and found it in serious need of reform. While the report noted that "there are areas where [the system] is working," it went on to say that "there are portions of the state where the system does not work well at all. Recognizing that there are exceptions, we have nevertheless concluded that there are large portions of Texas that fall short of meeting [the criteria] for meaningful systems of indigent defense."

Academia

Law schools and professors are becoming increasingly involved in moratorium-related efforts as well.

The University of California-Berkeley School of Law ("Boalt Hall"), for example, has set up the first death row clinic run by a West Coast university. Boalt Hall professors will supervise students who will investigate cases, interview witnesses, and pursue appeals in state and federal courts. Students need not be opposed to capital punishment to work in the clinic, which currently is headed by the former director of the ABA Death Penalty Representation Project, Elisabeth Semel.

The University of Texas, Brooklyn Law School, and Harvard, Yale, Duke, Cornell, Santa Clara, Washington & Lee, and Temple Universities have set up similar clinics to assist inmates convicted of capital offenses, and other law schools, including the Cardozo School of Law, the University of Wisconsin, the University of Kentucky, and the Thomas M. Cooley Law School,

have established Innocence Projects to assist inmates who credibly claim that they did not commit the offenses of which they were convicted.

Law reviews also have devoted an increasing amount of space to consideration of moratorium-related issues (see Appendix J).

V. COMMUNITY-BASED INITIATIVES

The ABA's first moratorium impact report, issued in October 1998, noted that in the first 15 months after the ABA had adopted its moratorium resolution, many civic, religious, and non-governmental organizations expressed their support for a moratorium on executions. At that time, however, few groups had become actively involved in working for a moratorium. By January 2000, when the second moratorium impact report was issued, grassroots activity to promote a moratorium had emerged and was growing.

Now, another 18 months later, more than 1,800 civic, religious, and community organizations have joined the call for a moratorium. In 36 of the 38 states that authorize the death penalty and in many non-capital states, there are groups dedicated entirely to the moratorium effort.

In states that long have had grassroots organizations involved in death penalty issues, hundreds of groups now are focusing on achieving a moratorium; in California, for example, there are almost 150 such groups and in New York, almost 165. Most significantly, however, since the last report, grassroots efforts in the southern "death belt" states have increased tremendously. According to Equal Justice USA, which tracks local initiatives, North Carolina alone has almost 200 organizations calling for a moratorium on executions. In Texas, which has led the nation in the number of executions for the last several years (although Oklahoma has surpassed it thus far in 2001), more than 160 groups are working on moratorium initiatives.

Religious Groups

Religious groups of all faiths also are a large part of the grassroots effort. Many, such as the Union of American Hebrew Congregations and the Rabbinic Assembly of the Conservative Jewish movement, have a long record of speaking out against the death penalty. Historically, they have considered capital punishment largely a moral issue. Recently, however, groups that have taken no position on the death penalty *per se* also have joined the call for a moratorium, including the Union of Orthodox Jewish Congregations of America, which has focused on fairness issues. Thus, all three major branches of Judaism in this country support a moratorium, as do the Catholic Church and many Protestant denominations.

Traditionally conservative groups such as the Texas Baptist Christian Life Commission have joined the call for a moratorium as well. In fact, the Texas Baptists have convened their own committee to examine the issue of capital punishment in Texas.

In North Carolina, members of various religious groups have come together under the umbrella of People of Faith Against the Death Penalty to launch a statewide campaign for a moratorium. Building upon the public awareness created by earlier grassroots efforts that, as of January 2000, had prompted four local governments in the state (Carrboro, Chapel Hill, Durham, and Orange County) to call for a moratorium, this and other groups since then have created considerable momentum for adoption of a moratorium in that state.

In Mississippi, religious leaders testified before a state legislative committee to ask lawmakers to put the death penalty on hold pending review of Mississippi's death penalty system.

In April 2001, addressing a national audience of millions, conservative religious broadcaster Pat Robertson endorsed a national moratorium, saying the death penalty is not always applied fairly. He had first taken this position in 2000 at a program at the Association of the Bar of the City of New York.

National Civil Rights Organizations

Well known national civil rights organizations also have become more visibly involved in moratorium efforts in the past 18 months. Groups such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) not only have been speaking out on national death penalty issues, but also have begun organizing members to promote state and local moratorium efforts.

These and other national groups provide much needed resources to state and local grassroots organizations. A leading example is Equal Justice USA, which began its *Moratorium Now!* campaign in August 1997, following the ABA's call for a moratorium. It helps local groups develop resolution language, strategies for adoption, and to recruit supporters in their communities.

Local Governments

A particularly noteworthy development is the growing interest of local governments in urging state moratoriums. As of January 2000, the four local governments in North Carolina noted above were the only local governmental bodies that had called for a moratorium in any state. Since that time, more than 50 cities and towns across the country, from Connecticut to California, have adopted moratorium resolutions. While the numbers alone are impressive, they also serve as an informal but real measure of public interest and involvement in the issues raised by the moratorium movement.

In certain states, local government activity has been substantial. In Pennsylvania, eight communities, including the cities of Erie and York, have adopted moratorium resolutions; in Maryland, five communities, including the cities of Mt. Rainier and Takoma Park, have called for moratoriums; and in North Carolina, nine additional communities have joined Carrboro, Chapel Hill, Durham, and Orange County in passing moratorium resolutions.

Moratorium bills introduced in these communities' respective state legislatures also have helped focus attention on the issue. In other states, however, local governments seem to have taken the lead on moratorium efforts when state legislatures have not. In 2001, for instance, the City of Tucson, Arizona, adopted a moratorium resolution, although no state moratorium legislation was introduced during the 2000-01 legislative session. Similarly, in Georgia, the City of Atlanta adopted a moratorium resolution urging the state legislature to act on the issue.

Death Penalty-related Studies

Information about death penalty issues also is evolving from many more sources now than it had in early 2000, and the sources often are at the state, rather than national, level. Such studies help make clear that moratorium-related issues have an impact at the local level. For example, in December 2000, the Texas Appleseed Foundation, a nonpartisan organization, released its "Fair Defense Report: Findings and Recommendations," an extensive examination of the Texas indigent defense system. The study focused particularly on the ways in which indigent defense services have been structured and delivered in Texas' 254 counties.

The study found a "complete absence of uniformity in standards and quality of representation" in the 23 counties it studied. The report also noted a lack of accountability for the quality and structure of indigent defense systems and serious conflicts of interest that the report attributed to

the wide and unregulated discretion that judges have in selecting and compensating defense counsel.

One of the Foundation's goals in conducting the review was to "be an important part of the dialogue surrounding development of indigent defense legislation in Texas in the 2001 Legislative Session." The effort appears to have been at least partially successful, particularly in non-capital cases. In 2001, the Texas Legislature passed the "Texas Fair Defense Act," which created uniform standards for indigent defense counsel and provided funding for indigent defense programs.

Academia

Academics from various fields of study also are joining more traditional grassroots and community-based organizations in examining issues bearing on the moratorium debate. For example, a group of lawyers, criminologists, and sociologists at Columbia University conducted a comprehensive study of the death penalty throughout the country. Led by Columbia Law School Professor James Liebman, the study examined appeals, post-conviction proceedings, federal habeas proceedings and retrials in capital cases from 1973 through 1995. The study found that of all death sentences reviewed, two-thirds were overturned following trial because of prosecutorial misconduct, incompetent counsel, or other prejudicial error. The study also revealed that state appellate courts overturned 47 percent of all cases on appeal; federal courts overturned 40 percent of the remaining capital cases; 75 percent of those whose capital sentences were overturned because of prejudicial error were found on retrial to deserve lesser sentences or, in 7 percent of these cases, were found not guilty.

On April 16, 2001, researchers at the University of North Carolina released "Race and the Death Penalty in North Carolina," the most comprehensive study of North Carolina's capital punishment system ever conducted in the state, and the first substantial study of death sentencing conducted anywhere in the South since 1984. The study examined all homicide cases that occurred in North Carolina over a five-year period, from January 1, 1993, through December 31, 1997. It concluded that racial factors—specifically, the race of the homicide victim—played a "real, substantial, and statistically significant role" in determining who received death sentences in North Carolina and that the odds of receiving a death sentence rose by 3.5 times or more among defendants (of whatever race) who murdered white persons.

In May 2001, the Center on Wrongful Convictions at the Northwestern University School of Law released "How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row," a report that reviewed the cases of 86 death row inmates who were legally exonerated based on strong claims of actual innocence. The study found that in 46 of the cases, eyewitness testimony had played a role in the conviction. In fact, in 33 of the 46 cases, defendants were convicted based solely on eyewitness testimony—32 of them on the testimony of only one witness. Additionally, the study found that 17 of the 86 cases involved police and prosecutorial misconduct; 10 cases involved jailhouse informants; nine involved "junk science"; eight involved false or coerced confessions; and various miscellaneous factors, such as questionable circumstantial evidence and hearsay, played a significant role in 29 other cases.

In addition to academic studies of the death penalty, student organizations on many college and law school campuses increasingly have become active in the moratorium movement. At the University of Arkansas School of Law, the Black Law Students Association adopted a resolution calling for a moratorium in the state; in Louisiana, the School of Social Work at the Southern University of New Orleans called for a moratorium there; in Kentucky, the Berea College Ace League and College Student Government Association both passed resolutions calling for a

statewide moratorium; and in Colorado, the student body at Mercy High School adopted a moratorium resolution.

In sum, grassroots activity over the last two years clearly has had an impact on the number of local governments that have taken official positions supporting moratoriums in their respective states. As such activity grows, and with it the number of local governmental bodies that become involved with the moratorium effort, so may state legislative responses to it.

VI. MEDIA RESPONSE AND ANALYSIS

When the last moratorium impact report was issued in January 2000, only a handful of newspapers were reporting on death penalty issues. Since then, media coverage of death penalty-related issues has increased markedly. Indeed, hundreds of national, statewide, and local publications have written articles and editorials in the past 18 months about problems in death penalty administration. And dozens of newspapers across the country now have called for moratoriums in their respective states. Perhaps the *Arizona Daily Star* put it most directly when it urged lawmakers in an editorial last October to “listen to experts [including the American Bar Association] and impose a moratorium on executions until the state and federal systems can be scrutinized and reformed to protect the innocent.”

Clearly, a major trigger for the increased media attention was Gov. Ryan’s declaration of a moratorium in Illinois in January 2000 (see Chapter I). His expressed concern about a system “fraught with error” and unfairness, and his conclusion that a moratorium was necessary to prevent further wrongs, underscored the reasons behind the ABA’s call for a moratorium. The fact that the Illinois system had sent innocent persons to death row, combined with the recently reported cases of exonerations elsewhere based upon DNA testing or other newly discovered evidence and the publication of *Actual Innocence* by Jim Dwyer, Barry Scheck, and Peter Neufeld, raised fundamental questions about the reliability of the criminal justice system generally and the significant role that human fallibility plays in the malfunctioning of the capital punishment system specifically.

As the media delved further into death penalty administration issues, it also focused more on the extraordinary number of instances of prosecutorial misconduct and incompetent defense counsel in capital cases. For example, there was considerable public outrage when a panel of the U. S. Court of Appeals for the Fifth Circuit denied relief to Texas death row inmate Calvin Burdine, whose attorney slept through much of his murder trial. The court’s ruling led to more questions about a system in which such conduct was left uncorrected.

In addition, several key capital punishment studies were released in this period that created considerable news interest. The most widely covered study was the “Liebman Study,” conducted by a group of lawyers, criminologists, and sociologists at Columbia University (see Chapter V). Most startling to many when the report was released in June 2000 was its finding that, in two-thirds of all death penalty cases reviewed for the study, sentences were overturned on appeal because of prosecutorial misconduct, incompetent counsel, or other prejudicial error.

Newspapers across the country wrote editorials based on the Liebman findings. On June 16, stating that the study had “jarred American confidence in the death penalty,” *The Dallas Morning News* urged Texas lawmakers to provide for DNA testing and to create and fund a state public defender system. “The study proves once again that our death penalty system, buried beneath an avalanche of error and injustice, is too broken to fix,” wrote *USA Today* on June 12. On June 13, *The New York Times* said, “This report should serve to intensify the public debate over capital punishment. By documenting an error rate that would be intolerable in any other government program, Prof. Liebman and his colleagues have shown just how unreliable death-penalty justice really is.” *The Washington Post* compared Liebman’s report to those of social researchers Harrington and Moynihan in the 1960’s in its likely impact on the course of public policy debate.

Growing media attention to these developments led to examinations of how errors in capital cases could occur with such great frequency, as well as consideration of other basic concerns raised in the ABA moratorium resolution. Through detailed reporting, investigations, their own studies, editorials, and opinion pieces, newspapers and other media in the last 18 months have

underscored the fact that the capital punishment system is fundamentally unfair. This increased focus on fairness has helped foster moratorium support.

Editorials

Many editorials have focused on specific problems plaguing the states' death penalty systems. The *Virginian-Pilot* called for a moratorium on executions in Virginia after officials there released death row inmate Earl Washington, Jr., who served 17 years in prison before DNA testing of evidence presented at trial was permitted and indicated that he could not have perpetrated the crime for which he had been sentenced to death. (Washington was saved only by the fortuitous intervention of a major law firm just days before his scheduled execution.) The *Pilot* said that Virginia's existing laws, which severely limited appeals and introduction of after-discovered evidence, were unfair to those who, like Washington, sought to establish their innocence through DNA testing or other means. Virginia subsequently modified its law to extend the time limit for filing a post-conviction appeal under limited circumstances, although many death penalty moratorium advocates have said the law will not be useful to most indigent death row inmates, who frequently have difficulty finding post-conviction representation, and in many instances have mental disabilities (see Chapter I).

In Alabama, following reports of abuses of judicial discretion in death penalty cases there, the *Birmingham News* called upon state lawmakers to adopt clear judicial standards for rejecting or accepting juries' capital sentencing recommendations.

The concern that a state may execute innocent individuals also has prompted many editorials supporting a moratorium. In February 2001, for example, as proposed legislation to impose a moratorium in Missouri awaited review by the state legislature, the *St. Louis Post/Dispatch* called for a moratorium and urged Missouri lawmakers to "at least commission a study to look at evidence that a few of the people Missouri executed were wrongfully convicted."

In July 2001, the *Idaho Falls Post Register* called for a moratorium on executions in Idaho and urged the governor to create a blue-ribbon panel to examine the state's death penalty system after two death row inmates were exonerated within a three-month period. In support of its position, the *Register* cited the Liebman study, which placed Idaho's reversal rate for death penalty cases at 82 percent, the eighth highest rate of the 28 states that imposed a death sentence between 1973 and 1995.

Other newspapers calling for moratoriums have focused on national death penalty issues. Citing the ABA's moratorium resolution and the reasons behind the Illinois moratorium, the *North Carolina News & Observer* has called for a national moratorium on executions. *USA Today*, meanwhile, took a pragmatic approach, calling upon states' lawmakers to adopt provisions allowing life in prison without parole as an alternative to the death penalty because a sentence of life without parole "saves money, avoids fatal error, and keeps criminals off the streets."

Newspaper Studies of State Death Penalty Systems

In addition to the Liebman report and other studies documenting errors and injustices in state death penalty systems, there were a number of studies based upon newspapers' own investigations of state death penalty systems. In June 2000, *The Chicago Tribune* published results of an analysis it had conducted in Texas. The study found that in one-third of the cases of the record 131 Texas death row inmates executed since the beginning of George W. Bush's tenure as governor, the defendant or offender was represented at trial or on initial appeal by an attorney who had been or was later disbarred, suspended, or otherwise sanctioned. The study also found

that 29 of these cases involved testimony in which a psychiatrist, using a hypothetical question describing the defendant's past, predicted the defendant's future dangerousness, a type of assessment that the American Psychiatric Association considers unreliable. Another 23 cases involved jailhouse informants, considered to be among the least credible of witnesses; 23 cases included visual hair analysis, consistently found to be unreliable; and 40 involved trials where the defense attorneys presented either no evidence at all or only one witness during the sentencing phase.

In September 2000, the *Charlotte Observer* (N. C.) conducted an investigation of death penalty cases in North and South Carolina between 1977 and 2000. It found that juries were more likely to impose a death sentence if the murder victim was white; that representation of defendants was often incompetent because of the high stress and low compensation of defense counsel; that the odds that a defendant would receive the death penalty depended greatly upon where the defendant lived because of disparities in the number of death penalty cases sought by county prosecutors; and that the quality and integrity of prosecutions varied significantly from case to case.

In an editorial printed concurrently with the investigation results, the paper emphasized that "[t]he uneven application of the death penalty is the key reason the *Observer* has recommended that North and South Carolina adopt a moratorium on executions until authorities examine the record and take whatever steps necessary to ensure that it is carried out fairly."

In July 2001, the *Tennessean* reported the results of its review of the death penalty in its five-part series examining Tennessee death row cases between 1977 and 2001. The investigation revealed that 39 Tennessee lawyers who have been disciplined by the state for unethical, unprofessional, or illegal activities have represented defendants in capital cases. Twenty of the 39 were temporarily stripped of their law licenses, and 19 were "publicly censured" for ethics or criminal violations. The disciplined lawyers included some who seriously neglected their clients' cases by failing to meet filing deadlines or appear in court (or appearing while under the influence of drugs or alcohol), and others who were convicted of crimes such as theft, obstruction of justice, and bank fraud.

The investigation also uncovered evidence of practices that may have discriminated against minorities. The *Tennessean's* study found, for example, that one in four black defendants was sent to death row by all-white juries despite significant percentages of black residents in the counties in which these inmates were convicted; in one Tennessee county, two black men were tried before all-white juries at a time when the county's black population was 42 percent.

In an editorial printed concurrently with the final installment of the investigation results, the paper concluded that "if [Tennessee] is to have the death penalty, [it] should want a system that contains safeguards to assure that no innocent person is put to death, that every defendant receives competent defense, that there is no racial bias, [and] that officials do their best to see that an even level of justice is applied across the state. Those assurances cannot be made today in Tennessee."

Broadcast Media Coverage

Death penalty-related coverage by television and radio broadcast media also has increased considerably in the last two years. In January 2000, *Frontline* aired "The Case of Innocence," which profiled four cases of inmates who remained in prison despite DNA evidence that would have exonerated them. In September 2000, *Nightline* aired a four-part series, "Crime and Punishment: A Matter of Life and Death," that examined problems in the administration of the death penalty. National Public Radio also has broadcast several programs on the death penalty,

including an “All Things Considered” segment reviewing the Illinois moratorium (Jan. 27, 2001); “Witness to an Execution,” an audio documentary narrated by Warden Jim Willett of Huntsville, Texas, that profiled the men and women who carry out executions (Oct. 12, 2000); a Sept. 18, 2000, Oprah Winfrey Show covering the “Death Penalty Controversy,” including interviews of several innocent men who had been on death row; and “DNA Testing in Capital Cases,” an interview with Diann Rust-Tierney of the ACLU Capital Punishment Project and Richard Dieter of the Death Penalty Information Center about the decline in public support for capital punishment (June 8, 2001).

Impact of Media Coverage on Public Opinion

As a result of the media's investigations and editorial writing on capital punishment issues, the public is far more educated about these issues than it was 18 months ago. Increased public awareness undoubtedly is a major factor in the shift of public opinion toward greater support for moratorium efforts, as reflected in recent polls.

A June 2000 *Newsweek* poll found that 95 percent of Americans believe that states should permit DNA testing in all cases where it might prove a person's guilt or innocence, and 88 percent believe that the federal government should require states to permit DNA testing.

In June 2000, a *CNN/USA Today* poll asked:

Do you believe that the death penalty is applied fairly or unfairly in this country today?

to which 51 percent of respondents answered that the death penalty is applied fairly. Yet in a July 2000 *Harris* poll, 94 percent of respondents answered “sometimes” to the question:

Do you think that innocent people are sometimes convicted of murder, or that this never happens?

In another July 2000 poll, this one conducted by *NBC News* and the *Wall Street Journal*, 63 percent of respondents answered affirmatively to a question that focused specifically on innocence and fairness issues:

As you may have heard, there have been several instances in which criminals sentenced to be executed have been released based on new evidence or new DNA testing. Based on this information, would you favor or oppose a suspension of the death penalty until questions about its fairness can be studied?

Generally, public support of a moratorium on executions has increased significantly in the past year. In an *ABC News* poll in April 2001, 51 percent of Americans supported a moratorium in response to the following question:

Some say there should be a halt in all executions while a commission studies whether the death penalty has or has not been administered fairly. Others say there already are enough safeguards to prevent unfair or mistaken executions. Would you support or oppose a halt in executions while this issue is studied?

Recent polls in North Carolina and Georgia have indicated that at least 60 percent of those asked would support a moratorium in their states to allow time to address fairness issues in their states' capital punishment systems.

Other polls reveal that public opinion on other death penalty issues also is shifting. Given the U.S. Supreme Court's scheduled consideration of *McCarver v. North Carolina*, involving the constitutionality of executing mentally retarded offenders, 67 percent of respondents said they oppose the execution of mentally retarded individuals convicted of premeditated murder.

VII. INTERNATIONAL RESPONSE

Pressure is increasing internationally for the United States to adopt a nationwide moratorium. Canada and France have denied extradition requests in cases where the person sought was subject to the death penalty if tried in the United States; the Inter-American Commission on Human Rights held this spring that Juan Raul Garza's federal death sentence violated articles of the American Declaration of the Rights and Duties of Man, to which the United States is a party; the United Nations' International Court of Justice held recently that the United States had violated the Vienna Convention on Consular Relations when it failed to inform two German nationals of their right to contact the German consulate for assistance upon their arrest in the U. S. and subsequently executed them; and leaders of the countries of the European Union, which bars capital punishment in member nations, have cautioned U. S. officials that continued use of the death penalty will harm diplomatic and business relationships in the future and will jeopardize this country's status as an official observer at EU meetings.

The ABA's focus on the lack of fairness in death penalty administration is echoed in much of the increasing international activity addressing capital punishment. Concerns about the perceived unfairness permeating the United States' continuing imposition of the death penalty have led to international calls for a moratorium on executions. Indeed, since the ABA *Gathering Momentum* report was released in January 2000, international criticism of the United States' implementation of the death penalty has become more pointed and more prevalent. A recent article in *The Nation* used the words, "simple horrified bafflement" to describe the general tenor of international reaction to the continued use of capital punishment in the United States and noted that this sentiment "is not just a matter of cultural opposition. As [a] string of recent court cases suggests, anti-death penalty countries—and not only in Europe—are seeking ways to intervene actively in American law and politics in a systematic and canny fashion."

Calls for a Moratorium

In April 2001, 27 of the 53 members of the United Nations Human Rights Commission approved a European Union motion advocating a moratorium on executions and eventual abolition of capital punishment and urging that the death penalty not be applied to anyone who was under 18 at the time he/she committed a capital crime or to anyone suffering from a mental disorder. The United States joined 17 other countries in opposing the motion, arguing that nothing in international law precludes the death penalty and that each nation should decide for itself whether its domestic law allows capital punishment. Several weeks later, for the first time in Commission history, the United States was not selected for renewed Commission membership.

On May 10, 2001, the Swedish President of the European Union (EU) sent a demarche to the Bush Administration presenting the EU policy seeking to abolish capital punishment worldwide. It recited EU policy toward countries maintaining the death penalty, which aims at progressively restricting its scope, promoting respect for the strict conditions set forth in several international human rights instruments, and expressing the EU's support for establishing and maintaining formal or *de facto* moratoriums on executions. It called upon the United States to impose a moratorium on federal executions and to give clemency to condemned persons who were below age 18 when they committed capital offenses; mentally retarded offenders; foreign nationals whose rights under the Vienna Convention on Consular Relations have not been respected; and to EU citizens, particularly when any of the above issues is involved.

At the first World Conference against the Death Penalty, held in June 2001, the United States was criticized for its continued use of capital punishment. The 43-member Council of Europe, which organized the conference, has obtained a total ban or moratorium on executions in its member

states. Later in June, the Council threatened to revoke observer status from the United States and Japan unless they stop all executions without delay and move to repeal the death penalty. The Council's parliamentary assembly passed a resolution declaring that the United States and Japan would be removed as observers unless they make significant progress on abolishing executions by Jan. 1, 2003, and calling for, among other things, an immediate moratorium on executions.

Also in June 2001, Baktybek Abdrisaev, Ambassador of the Kyrgyz Republic to the United States, noted that, since achieving independence, Kyrgyzstan has overhauled its criminal code to restrict the availability of the death penalty to five crimes and stressed that Kyrgyzstan's executive branch has decided not to impose the death penalty under any circumstances. President Askar Akayev has announced his opposition to the death penalty on ethical grounds and, in commemoration of the 50th anniversary of the Universal Declaration of Human Rights, declared a death penalty moratorium for two years. In 2001, the moratorium was extended for an additional year, and most observers expect that it will continue to be extended until Parliament formally abrogates the death penalty.

In Russia, President Vladimir Putin expressed strong opposition to capital punishment, saying Russia should not restore executions despite public support for them. Russia began a moratorium on the death penalty in 1996, but has not yet banned capital punishment entirely.

Execution of Mentally Retarded Offenders

On January 9, 2001, the EU appealed to Oklahoma Gov. Frank Keating and members of the Oklahoma Pardon and Parole Board to reconsider the eight executions that the state had scheduled to be carried out between January 9 and February 1, 2001. In a letter to Governor Keating and in a press release announcing its objections to the executions, the EU said that it takes a special stand regarding the imposition of the death penalty on persons suffering from a mental disability. Two of the eight persons then scheduled to be executed, Wanda Jean Allen and Dion Smallwood, were considered to be mentally disabled. The EU urged that their sentences be commuted consistent with minimum standards set forth in several international human rights instruments. (Both Allen and Smallwood were executed.)

On March 6, 2001, Amnesty International (AI) called upon Nevada authorities to commute the death sentence of Thomas Nevius. Amnesty's concerns included the inexperience of Nevius's trial lawyer, who failed to present evidence of Nevius's mental retardation and who has conceded that Nevius did not receive the quality of representation that a capital case demands. Earlier this year, six jurors from Nevius's trial signed affidavits stating that they would not have voted for a death sentence if they had known of his mental disability. A further basis for AI's advocacy of clemency for Nevius was that, during jury selection, the prosecutor removed all four African Americans and both Hispanics, ensuring that Nevius, who is African-American, would be tried before an all-white jury for the murder of a white man and the attempted sexual assault of a white woman. (Consistent with its longstanding policy against the execution of offenders with mental retardation, the ABA also expressed to Gov. Guinn its opposition to Nevius' execution (see Chapter IV).

In March 2001, Human Rights Watch (HRW) issued its first comprehensive study of the execution of offenders with mental retardation, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, and called upon state legislatures to ban the practice. According to the study, the United States appears to be the only democracy whose laws expressly permit the execution of persons with mental retardation, and at least 35 mentally retarded people have been executed in the United States since 1976. An estimated 200-300 mentally retarded offenders currently await execution on death row. Legislation to prohibit the death penalty for

mentally retarded offenders has been enacted in several states this year and is under consideration in a number of others (see Appendix D).

Judicial and IGO Rulings

Canadian Supreme Court

In February 2001, the Supreme Court of Canada held unanimously that two Canadian men wanted on murder charges in the United States could not be extradited for trial without assurances that the men would not face the death penalty. “[S]uch assurances,” the Court held, “are constitutionally required in all but exceptional cases.” The men, Atif Rafay and Glen Sebastian Burns, were wanted in Washington State for the murder of Rafay's father, mother, and sister.

In its ruling, the Court noted that “[c]oncerns in the United States have been raised by such authoritative bodies as the American Bar Association[,] which in 1997 recommended a moratorium on the death penalty throughout the United States because, as stated in an ABA press release in October 2000:

The adequacy of legal representation of those charged with capital crimes is a major concern. Many death penalty states have no working public defender systems, and many simply assign lawyers at random from a general list. The defendant's life ends up entrusted to an often underqualified and overburdened lawyer who may have no experience with criminal law at all, let alone with death penalty cases. [Further, t]he U.S. Supreme Court and the Congress have dramatically restricted the ability of our federal courts to review petitions of inmates who claim their state death sentences were imposed in violation of the Constitution or federal law. [Moreover, s]tudies show racial bias and poverty continue to play too great a role in determining who is sentenced to death.

United States v. Burns, 2001 SCC 7 (2001), at para. 105. The Court further pointed out that

[o]n August 4, 2000, the Board of Governors of the Washington State Bar Association, being the state seeking the extradition of the respondents, unanimously adopted a resolution to review the death penalty process. The Governor was urged to obtain a comprehensive report addressing the concerns of the American Bar Association as they apply to the imposition of the death penalty in the State of Washington. In particular, the Governor was asked to determine “[w]hether the reversal of capital cases from our state by the federal courts indicates any systemic problems regarding how the death penalty is being implemented in Washington State.

Id. at para. 107. In light of these and other facts, and interpreting applicable provisions of the Canadian Charter of Rights and Freedoms, the Court concluded,

The recent and continuing disclosures of wrongful convictions for murder in Canada, the United States and the United Kingdom provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. When fugitives are sought to be tried for murder by a [capital punishment] retentionist state, however similar in other respects to our own legal system, this history weighs powerfully in the balance against extradition without assurances.

Id. at para. 117.

Inter-American Commission on Human Rights

In April 2001, the Organization of American States' (OAS) Inter-American Commission on Human Rights ruled that the introduction of evidence of four uncharged murders in Mexico in the sentencing phase of Juan Raul Garza's federal capital trial violated his rights to a fair trial and due process under provisions of the American Declaration of the Rights and Duties of Man, to which the United States is a party.

The Commission's ruling marked the first time it had reached a final decision in a U. S. capital case *before* the condemned inmate's execution. Garza's lawyers argued in federal district court that the Commission's decision created a binding obligation on the United States that was enforceable in the United States courts. Although the claim was dismissed on jurisdictional grounds by the district court, the U. S. Court of Appeals for the Seventh Circuit ruled on the merits. It declined to find that Garza's rights were judicially enforceable because, in its view, the parties to the OAS Charter did not intend for the Commission's rulings to create such rights.

At the same time that they were litigating in federal court, Garza's lawyers submitted supplemental clemency memoranda to the Office of the Pardon Attorney of the U. S. Department of Justice (DOJ) and to the White House. The memoranda raised, among other grounds for commutation, evidence that racial and geographic disparities in the administration of the federal death penalty (see Chapter II) played an unacceptable role in the decision to seek the death penalty.

On June 12, 2001, a final supplemental clemency memorandum was submitted following the June 6, 2001, DOJ report, "The Federal Death Penalty System: Supplementary Data, Analysis, and Revised Protocols for Capital Case Review" (see Chapter II). The memorandum contained a point-by-point refutation of the report's conclusion that whatever disparities may exist in who receives the federal death penalty are not the result of racial or ethnic bias in the administration of the system.

Garza's clemency requests ultimately were denied and, on June 18, 2001, the U. S. Supreme Court denied his petition for a writ of *certiorari*. The next day, Garza became the second person since 1963 (after Timothy McVeigh on June 11, 2001) to be executed by the federal government.

UN International Court of Justice

Also in June 2001, the United Nations International Court of Justice (ICJ) issued its ruling in *Germany v. United States of America* (the *LaGrand* case), holding that the U. S. had violated Article 36, paragraph 1(b) and other provisions of the Vienna Convention on Consular Relations (Convention) when it failed to inform Karl and Walter LaGrand of their right to consult with the German consulate immediately following their arrests in Arizona in 1982 for murder and attempted robbery. In 1984, an Arizona court had convicted both LaGrands of first-degree murder and other crimes and sentenced them to death.

The LaGrands were German nationals who had resided permanently in the United States since childhood. As such, they were entitled under the Convention to be informed, without delay, of their right to communicate with the consulate of Germany. The United States acknowledged before the ICJ its obligations under the Convention and agreed that this particular obligation to the LaGrands had not been met.

The LaGrands ultimately were executed, notwithstanding the ICJ's issuance of a provisional order (similar to a stay). In its June 2001 ruling, the ICJ held that its provisional order had a binding

effect upon the United States and that, if the United States ever again failed in its obligation of consular notification to the detriment of German nationals subjected to prolonged detention or convicted and sentenced to severe penalties, an apology would not suffice. In such an event, the ICJ said, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence, taking into account the violation of the rights set forth in the Convention. (The full text of the ICJ opinion can be found at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>).

In another ICJ case, Gov. Keating of Oklahoma advised the Government of Mexico in July 2001 of his decision not to grant a pardon to Gerardo Valdez, a Mexican national convicted of murder and sentenced to death in Oklahoma. Keating did so despite the ICJ's ruling that Oklahoma had violated the Vienna Convention on Consular Relations by failing to inform Valdez of his right to consult the Mexican consulate when he was arrested; the ICJ's issuance of a stay order; and the Oklahoma Pardon and Parole Board's recommendation that Valdez be pardoned. After consulting with the U. S. State and Justice Departments, Gov. Keating concluded that the violation of the Vienna Convention did not affect the outcome of Valdez's case and thus did not merit a pardon.

Mexico was informed about Valdez's arrest, conviction, and death sentence only after his execution date was set—that is, 11 years after his death sentence had been imposed. Mexico promptly secured legal counsel for Valdez and hired an expert to conduct a mitigation investigation, which had not been undertaken previously. The investigation revealed that Valdez is mentally ill.

Valdez's lawyers have petitioned the ICJ to enforce its previous judgment, and are relying on the fact that the United States has agreed to subject itself to the ICJ's jurisdiction over disputes involving the Vienna Convention. At issue is whether the ICJ's judgment is authoritative and constitutes precedent that binds state governments, as would a decision by the U. S. Supreme Court under the Supremacy Clause. The precedential impact of the ICJ's ruling in *LaGrand* and the Inter-American Commission on Human Rights' ruling in *Garza* likely will be argued as well.

Innocents Executed

The Criminal Cases Review Commission (CCRC) is an independent body responsible for investigating suspected miscarriages of criminal justice in England, Wales, and Northern Ireland. Established in 1996, its principal mandate is to review the convictions of those who believe they have been either wrongly found guilty of a criminal offense, or wrongly sentenced. Once an investigation has been completed to the Commission's satisfaction, it decides whether or not to refer the case to the appropriate appellate court.

As reported recently by *The Chicago Tribune*, in 1998 the CCRC exonerated a Somali seaman who was hanged for murder in 1952. Three appellate justices quashed Mahmoud Hussein Mattan's conviction after the CCRC referred his case as a probable miscarriage of justice. Mattan had been convicted and executed for slashing a female shopkeeper's throat based almost exclusively on an eyewitness' supposedly having seen Mattan leave the shop around the time of the murder. The Commission's investigation revealed that this witness had actually identified Tahir Gass, not Mattan, and that Gass, who allegedly was prone to violence against women and obsessed with knives, was tried for a separate murder two years after Mattan's execution and was acquitted by reason of insanity.

The CCRC recounted another case, that of Timothy John Evans, who had an IQ of 68 and could not read or write. After initially confessing to the 1949 strangulation murders of his wife and 14-month-old daughter, he recanted and blamed the murders on John Reginald Halliday Christie,

who lived in the same building as Evans and family. Christie, who denied being the strangler, became the prosecution's main witness against Evans. Evans was convicted and hanged just three months after the bodies were found. Four years later, however, four more strangled bodies were found in the same building. Christie thereafter testified that he had killed seven women in all, including Evans's wife. (He continued to deny killing Evans's daughter.) His confession prompted a reinvestigation of the Evans case and, in 1966, Queen Elizabeth II issued an unconditional, posthumous pardon to Evans, declaring him innocent.

A European Lawyer's Perspective on the Need for a Moratorium on Executions

In a guest editorial in the April 2001 edition of 44TH STREET NOTES, the newsletter of the Association of the Bar of the City of New York, Francis Teitgen, a French lawyer and Barristers President of the Command of Lawyers of Paris, expressed the urgent need for a moratorium on executions until systemic fairness is assured:

[F]or us Europeans, executions in the United States[—]because they fall most often on poor people, members of racial or cultural minorities, people with little social integration, defendants who have not realized fully the guaranties of defense rights[—]raise questions for us. But our questioning is double. On the one hand, these death sentences do not seem just, since statistically, they only fall on a particular part of the American population. On the other hand, and perhaps above all, such a great country whose moral leadership is incontestable in the world community cannot tolerate such a situation without risking precisely the loss of this world leadership.

And it is precisely, as I have solemnly said before, because we Europeans have an immense debt towards the United States that we have the right, even the duty, to question American lawyers about their tolerance of the death penalty. A moratorium is necessary because the discussion about the use of the death penalty in particular cases prevents a deeper and totally indispensable reflection, in the United States as in Europe, on the manner in which we treat both crime and punishment. The passion of the debate on the death penalty blinds the deeper examination of the causes of crime and of the necessity of a punishment that is at the same time a protective measure for the society and a measure for the reinsertion of the person in society. The reflection on such a weighty topic, which is so important to the future, has to be dispassionate and balanced. A moratorium would prevent the taking of extreme positions [that] encourage an excessively emotional debate. The carrying out of executions in the United States adds an excess feeling of urgency incompatible with the time that this discussion on the right approach to crime and punishment will require. A moratorium also has the great advantage that it does not prejudge the response Americans will make to this question.

I have the conviction, because the United States is a great nation, that it will decide at the end to abolish the death penalty. But because we Europeans need to have confidence in you, Americans, it is necessary that you launch this debate on crime and punishment in the best possible conditions, that is to say by first imposing a moratorium on executions. The responsibility of American lawyers is tremendous since it is from them, and from them firstly, that the energy that will convince the American people of this compelling necessity, will come.

And, to the extent of our capacity, we will support you without fail.

CONCLUSION

There is now general agreement that serious problems exist in the administration of the death penalty in the United States. Gov. George Ryan's January 2000 declaration of a death penalty moratorium in Illinois illustrated in concrete terms the need for and value of a moratorium in capital jurisdictions. His expressed concern about a system "fraught with error" and unfairness, and his conclusion that a moratorium was necessary to prevent further miscarriages of justice, underscored the reasons behind the ABA's call for a moratorium. The fact that the Illinois system had sent innocent persons to death row, combined with the number of exonerations of wrongfully convicted individuals based upon DNA testing or other newly discovered evidence, also has helped focus attention on the ultimate consequences of not fixing a broken system. Gov. Ryan's action has raised fundamental questions around the country about the reliability of the criminal justice system generally and points to the significant role that human fallibility plays in the malfunctioning of the capital punishment system specifically—precisely the factors that underlie the ABA's call for a moratorium on executions.

Although concern about the execution of innocent people has been an important element in the growing movement toward reform and moratoriums, the public now recognizes that only fundamental fairness and due process in administration of the death penalty for all defendants can prevent the conviction and execution of the innocent and other miscarriages of justice. Indeed, concern about the system has led even well known proponents of the death penalty to support a moratorium so that serious flaws in the system can be identified and remedied.

Grassroots moratorium campaigns, active in 36 of the 38 states that authorize capital punishment, have involved thousands of civic, religious, and other community-based or religious organizations in promoting moratoriums through constituent education and outreach. These efforts clearly have begun to take hold in many of these states, as numerous local governments now have called for moratoriums and recent polls indicate that a growing percentage of Americans support institution of a moratorium on executions pending examination of the capital punishment system.

News media coverage has been instrumental in educating the public and policymakers about capital punishment system concerns. Reporters and editorial writers have begun delving more deeply into how capital punishment is administered and the ways in which the system has malfunctioned. The print media, particularly, have undertaken their own examinations of the way the death penalty works in specific jurisdictions. A number of these examinations have focused on the issues outlined in the ABA's moratorium resolution, including racial and ethnic discrimination, competency and compensation of counsel, lack of meaningful review in capital cases, and the execution of mentally retarded and juvenile offenders.

Increased awareness about systemic problems in death penalty administration has triggered a tremendous increase in the volume and range of death penalty-related legislation introduced in state legislatures over the last 18 months. In all, death penalty legislation has been introduced in 37 of the 38 states that authorize capital punishment, and bills specifically calling for a moratorium have been introduced in 19 of those states. One of the most remarkable by-products of the moratorium effort is that, since January 2000, six more states have enacted legislation barring the execution of mentally retarded individuals, a position that the ABA has advocated since 1988. A seventh, Texas, passed such legislation, but the governor vetoed it.

Legislation also has been introduced for the first time at the federal level to address specific systemic concerns. As of the end of July 2001, the Innocence Protection Act of 2001, pending in Congress, had garnered 22 co-sponsors in the Senate and 210 in the House.

In light of these developments and increased international pressure on the United States to declare a moratorium, it is critically important that the ABA and others who support a moratorium aggressively press forward to achieve the goal of a moratorium and begin serious reviews of how the death penalty is being administered.

While progress undeniably has been made, the conditions that prompted the ABA to act in 1997 have not improved in most states with capital punishment, and now the federal government has begun to carry out death sentences as well. Indeed, in some respects, the unfairness already endemic in the system has worsened in the last four and a half years as restrictions on *habeas corpus* review and the loss of funding for capital resource centers have begun to have a deleterious impact.

The ABA and the Section of Individual Rights and Responsibilities therefore will intensify their efforts over the next year to promote the moratorium in those states with capital punishment, support moratorium-related initiatives in the Congress, and encourage other bar associations and community leaders to do the same. In view of the threat that a flawed death penalty poses to the integrity of the criminal justice system, a moratorium on executions is now, more than ever, a legal imperative.

