

The Death Penalty: Calling on Jurisdictions to Clean Up Their Act

by Gina Chon

After the death penalty system was described as racist and unfair, the ABA House of Delegates voted for a moratorium on capital punishment until policies are implemented to ensure that death penalty cases are administered fairly and impartially.

The resolution, cosponsored by the Section of Individual Rights & Responsibilities, the Litigation Section, and others, was approved overwhelmingly at the ABA's Midyear Meeting in San Antonio by a vote of 280 to 119.

The resolution calls for an end to executions in the United States until it can be shown that executions are performed in accordance with due process and steps are taken to minimize the risk that innocent persons may be executed.

"We think it significant that lawyers, those closest to the system, stand up and say it's in shambles," said Ronald Tabak, chair of the IR&R Section's Death Penalty Committee. A New York lawyer, Tabak was an architect of the resolution.

Backers of the proposal gained support from 20 of the 24 living former ABA presidents.

"Why should we be in front?" asked Boston lawyer Jack Curtin, a former ABA president and current member of the IR&R Section Council. "Because it is the right thing to do."

The resolution was approved after 45 minutes of debate, during which ABA president N. Lee Cooper urged delegates to defeat the recommendation. Cooper said the association should "not get out of step with the White House, the Justice Department, the nation, and our membership."

"What you really have here is an up-or-down vote on the death penalty," Cooper said. "Folks, bring it in the front door. Don't come in the back door."

The Clinton administration opposed the moratorium and a Justice Department official told the bar group that the proposal was unwarranted, with regard to the federal death penalty. Deputy

Attorney General Jaimie Gorelick voiced concern that the resolution would affect pending cases involving domestic terrorism. The government has decided to seek the death penalty for two men accused in the bombing of an Oklahoma City federal building, and is considering doing so against the Unabomber suspect.

Gorelick addressed the House of Delegates as a guest speaker that morning, then later spoke specifically in opposition to the resolution during the debate before the House. Former Attorney General Benjamin Civiletti, a Litigation Section delegate to the House of Delegates, spoke in support of the resolution in direct response to Gorelick's comments.

Backers of the recommendation say there is ample cause for reform, noting that studies have shown that killers of white victims are more likely to be sentenced to die.

"As reprehensible as a capital crime is, it is equally unacceptable to administer the ultimate punishment in a racially discriminatory way," said Robert Grey, a lawyer from Richmond, Va., and former chair of the ABA's Commission on Opportunities for Minorities in the Profession. Grey addressed specifically the discrimination issue.

In recent years, up to 40 percent of inmates have successfully challenged their sentences or convictions on appeal

ABA Reinigorates Death Penalty Debate

The ABA's approval of a resolution calling on a death penalty moratorium has sparked renewed interest into the problems of capital punishment, serving as an educational tool for lawyers, judges, and the general public.

"The resolution caused a number of people to focus on what exactly it is that the Congress and the courts have done to secure relief for people on death row, many of whose convictions or sentences were obtained unconstitutional," says Ron Tabak, chair of the IR&R Section's Death Penalty Committee.

Although media coverage of the ABA's vote on the resolution was expected, the sheer volume of attention added to the success of the IR&R Section and Litigation Section work in this matter.

"The publicity has been incredibly widespread and it continues," says Estelle Rogers, IR&R's Section Delegate to the House of Delegates, and one of its chief architects. "The death penalty has been a fairly quiet scandal for some time. The ABA has shed some light on the unfair and unjust practices. Even if nothing else happens, that's a big breakthrough."

The next step? "The ABA needs to make an extra effort to convey this information to policymakers at the state as well as the federal level," Rogers added. "The nature of this resolution demands special treatment by the ABA administration."

The resolution has allowed other people to come forward to voice their dissatisfaction with how the death penalty is being carried out.

"It has heartened many of the people in the country who have known how unfair the system was but didn't see anybody raising concern about it in a dramatic fashion," Tabak says. "Those people have come forward. There has also been several expressions of interest by people involved in other professions, such as the medical field."

Rogers says she is optimistic that the moratorium will prompt at least some change.

To have a real impact, Tabak says there needs to be more public education on capital punishment, and the people who do understand the problems with the death penalty's implementation need to get organized.

"We need to get organized so state and local bars can try to persuade legislators in various states, and nationally the ABA can try to persuade Congress and the President that the issues brought up in the moratorium have to be fixed," Tabak says. "We have to have both public education and organization."

—Gina Chon

because of courts' failure to provide due process. Unfortunately, Congress has recently erected barriers that will prevent many unconstitutionally convicted or sentenced death row inmates from securing relief from the federal courts.

A report with the moratorium recommendation criticizes two federal laws, one that significantly curtails federal courts' power to review capital cases from state courts and one that ended federal funding for lawyers helping death row inmates pursue appeals.

"We're calling on every jurisdiction

to clean up its act," said Estelle Rogers, a Washington lawyer and IR&R Section delegate to the House of Delegates.

The resolution calls for jurisdictions to conduct capital cases consistent with provisions previously adopted by the ABA that are designed to help ensure fairness and due process in death penalty proceedings. None of the policies stated are new.

The report also states, "Not only have the ABA's existing policies generally not been implemented, but more critically, the federal and state governments have been moving in a direction contrary to

these policies." The association has never taken a stance on capital punishment, although it has been advocating due process protections for people charged with capital crimes since 1979.

"As lawyers, we think the system ought to be changed, done right and done fairly," said Jim Coleman, a member of the IR&R Section Council and a law professor at Duke University. "Hopefully, this will get lawyers off the sidelines."

Gina Chon is a writer in Chicago.

The Frustrations of Fighting for a Life

By Krista Endres

Rolando Cruz . . . Alex Hernandez . . . Delbert Tibbs.

These are but a few of the men released from prison after years on death row for crimes they did not commit. In Illinois alone, since reinstatement of the death penalty in 1977, eight men have been released from death row after being proved innocent of the crimes that led to their incarceration. We battle to add one more name to that list—Willie Enoch.

Willie Enoch was convicted of murder in 1983 in Peoria, Illinois. In the ensuing years, our overwhelming emotion has been that of utter frustration. Frustration that our courts have found nothing wrong with the fact that Enoch's trial attorney had previously represented, in a criminal case, one of the key prosecution witnesses, who was also the victim's boyfriend and the other prime suspect.

Frustration that the other key prosecution witness was allowed to testify that Enoch had burned the pants he was wearing that night to conceal the fact that they had the victim's blood on them, despite the fact those same pants were collected by police and remain in police custody *to this very day*.

Frustration regarding the trial errors that have never been reviewed as a result of the trial attorney's failure to file a routine post-trial motion—a failure that the Illinois Supreme Court, for the *first* time in a capital case, ruled would bar a full appeal.

Frustration that, due to this ruling, and despite the perception that defendants are afforded an opportunity for multiple appeals and hearings,

we have never had the opportunity to present a single witness or have a single hearing regarding many of the evidentiary issues surrounding Enoch's case.

Frustration in trying to explain to our client how a person could "slip through the cracks" of the justice system and why this occurs more frequently than we wish to believe.

As lawyers we realize that the legal system is imperfect and fallible and perhaps even expect that occasional mistakes will be made. While our system of appeals sometimes allows for correction of these mistakes, in many cases, as in our case, the reviews afforded simply do not offer a meaningful opportunity to present innocence claims. For instance, in a recent Illinois case, four men who had been imprisoned, two of them on death row, for 18 years were released after being conclusively proven innocent. In that case, the system of appeals and reviews was *inadequate* to unearth the truth—only through use of breakthroughs in DNA testing and the recantation of a witness was the truth discovered.

The prosecution was not bound under Illinois law to consider this new evidence or to have DNA testing performed. Solely because of the decision of a courageous prosecutor, perhaps recognizing his duty as a representative of the people of Illinois to seek true justice, were these men prevented from losing their lives for crimes they did not commit.

In our case, we have not yet been

so lucky. Certain items of evidence exist that could shed a great deal of light on Enoch's guilt or innocence. At the time of Enoch's conviction, DNA testing was not available for this evidence. In 1997, such testing *is* available. We have requested that the Peoria state's attorney have such testing performed but thus far have been summarily rejected. We have filed a petition, still pending, in the Circuit Court asking that the state be compelled to perform such testing.

In light of some recent well-publicized cases, the media and the public-at-large have engaged in a great deal of hand-wringing regarding our justice system. Although our frustration in this case continues to mount, we still hope that the justice system can be just that—a system of *justice*. We believe that the prosecutors and courts will agree that the opportunity to discover the most conclusive evidence regarding Willie Enoch's guilt or innocence is too important to ignore, particularly before inflicting an *irreversible* punishment.

We continue to believe that prosecutors and judges, as officers of the court and representatives of the people, truly want justice and do not wish to see *any* innocent person executed.

Randall Adams . . . Darby Tillis . . . Willie Enoch? His execution is scheduled for May 21, 1997.

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