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Welcoming Remarks

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Welcome to the Law School of Indiana University—Bloomington, and to the conference entitled "Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report." On behalf of the Law School, and speaking personally as well, I'm extremely grateful to each of you for your willingness to gather together here and to engage in what I certainly hope will be a productive and a valuable dialogue about both the Massachusetts Report and the future of death penalty reform in America.

This is a difficult time for the death penalty in America. For the past several years, we have been experiencing a crisis of confidence in the death penalty that shows few signs of abating. The beginning stages of this current crisis unfolded in our neighboring state, Illinois, where, in the late 1990s, revelations began to surface about innocent men on death row. Eventually, in January 2003, these revelations led to the commutation of every death sentence in Illinois. In the interim, these revelations also provoked a vigorous effort to reform the Illinois death penalty.

In 2002, a special commission appointed by the Governor of Illinois proposed 85 specific reforms. Although many of these proposals were not adopted by the Illinois legislature, on November 19, 2003, just under a year ago, the legislature did enact a wide-ranging death penalty reform bill. Several of the participants in this conference were centrally involved in one or more of these dramatic developments in Illinois. The Illinois situation has served, and continues to serve, as a potent catalyst for death-penalty reforms elsewhere.

In many states, blue ribbon committees have examined, or are now examining, the possibility of problems in the administration of capital punishment similar to those that existed in Illinois. A few states have made changes in their death-penalty statutes in an effort to deal with these real or potential problems. Here in Indiana, for example, at the request of the late Governor Frank O'Bannon, the Criminal Law Study Commission conducted a two-year study of the Indiana death penalty and issued a report in January, 2002, making several recommendations for statutory changes but failing to reach consensus on a number of other important issues.

Other organizations, such as the American Bar Association's Section on Individual Rights and Responsibilities as well as the Constitution Project, have engaged in similar reform-orientated efforts. I'm happy to extend a special welcome today to two members of the Constitution Project: the Honorable Sheila Murphy (retired), of Illinois, and Professor and Dean Emeritus Norm Lefstein, from our sister law school at Indiana University—Indianapolis.

It was against this background that the Massachusetts Governor's Council was appointed in September of 2003 by Massachusetts Governor Mitt Romney. The mission of the Council was to collect and review the best research available, from all possible sources, and to try to answer the following question: "If the Commonwealth of Massachusetts were to decide that capital punishment should be reinstated, what safeguards would be needed to ensure, as much as humanly possible, that the death penalty would be administered in a fair and accurate way?"

I served as the co-chair of the Massachusetts Governor's Council, and three of my colleagues from the Council are also here to participate in this conference: my distinguished co-chair, Dr. Fred Bieber; U.S. Attorney Michael Sullivan; and Dr. Carl

Selavka, a proud alumnus of Indiana University who now serves as Director of the Massachusetts State Police Crime Lab.

The Governor's Council delivered its report to Governor Romney on May 3, 2004. The report, which was unanimously approved by the Council, contains ten broad recommendations that the Council believed to be essential to the creation of a fair and accurate death penalty system.

In brief summary form, the report's ten recommendations are as follows:

First, the death penalty should be narrowly limited to six kinds of murder: political terrorism murder, murder to obstruct justice, intentional torture murder, multiple murder in one episode, multiple murder in more than one episode, and murder by a person who is already serving a sentence of life without parole for a previous murder. Also, no person should be eligible for the death penalty unless the murder resulted from their own conduct, the conduct of another person under their direction or control, or from a conspiracy to commit murder. In other words, accomplice liability should not be a basis for a death sentence.

Second, the discretionary decision to seek the death penalty in a particular case should be made pursuant to statewide protocols, and each such decision should be reviewed for consistency with other death-eligible homicides by the State Attorney General.

Third, each defendant in a capital case should be represented by two defense attorneys, both of whom meet strict standards for experience, training, and performance established under the supervision of the State Supreme Court.

Fourth, the defendant in a capital case should have the option at the end of the guilt-innocence stage of the trial to request a new jury for the purpose of hearing mitigating evidence and determining the defendant's ultimate sentence. If the defendant chooses this option, the new jury should be given only enough information about the defendant's crime to allow for proper weighing of aggravating and mitigating circumstances and should not be told whether the defendant contested guilt. If the defendant does not choose this option, but chooses instead to proceed with the original jury, the defendant retains the right to raise lingering or residual doubt at the sentencing stage of the trial.

Fifth, at both the guilt-innocence and the sentencing stages of the trial, the jury should be instructed about the deficiencies and potential inaccuracies of various kinds of human evidence such as eyewitness evidence; statements made by the defendant under police custody, especially if the interrogation was not contemporaneously recorded; and statements made by codefendants or police informants.

Sixth, at the sentencing stage of the trial the jury should be required—as a prerequisite for imposing a death sentence—to find conclusive physical or other associative evidence, reaching a high level of scientific certainty, connecting the defendant to the crime and strongly corroborating the defendant's guilt.

Seven, at the sentencing stage of a capital trial, the jury should be required—as a prerequisite for imposing a death sentence, and unless the defendant has waived the issue—to find that there is "no doubt" about the defendant's guilt. Jurors should be instructed that this standard means that any lingering or residual doubt is sufficient reason to avoid a death sentence.

Eight, a statewide, adequately funded system of independent scientific review should be created to help ensure the proper collection, handling, evaluation, analysis, preservation, and interpretation of all physical or other associative evidence in all death-eligible homicide cases. An advisory committee should develop and implement

policies for the accreditation and certification of crime labs, medical examiner offices, and forensic science providers in all such cases. At the conclusion of any case in which a death sentence is imposed, the advisory committee should appoint a panel of independent experts with expertise relevant to the particular case. This panel should review all of the scientific evidence and should issue a report to the trial judge, both attorneys, and the State Supreme Court.

Ninth, both the trial court and the State Supreme Court should exercise broad authority to overturn any death sentence that the court finds inappropriate on any basis in fact or law, including the court's substantive disagreement with the merits of the jury's decision to impose a death sentence. The State Supreme Court's review authority should be exercised without regard to any procedural defaults or other procedural barriers to relief.

And tenth, a Death Penalty Review Commission should be created to investigate any claim of substantive error in a particular capital case, and to recommend further judicial review if such error may have occurred. The commission also should investigate, and issue public reports about, the causes in general of substantive errors in capital cases.

There are two ideas often mentioned in the literature that did not find their way into our report. One is eliminating the process of death qualification of jurors prior to the guilt-innocence stage of a capital trial. We rejected this idea for three reasons. First, our proposal moves the decision about death eligibility, that is to say the determination of the aggravating circumstances, into the guilt-innocence stage of the trial, thereby necessitating a death-qualified jury even for that stage. Second, we found it impractical to conduct death qualification between the guilt-innocence and sentencing stages of the trial. And third, we felt that there were enough alternative safeguards in the report to ensure that death qualifying the jury at the start of the case would not lead to the improper conviction of an innocent defendant.

The second idea that did not find its way into the report is comparative proportionality review, as part of the appellate review of a capital case. We rejected this idea because we felt that the very concept of comparative proportionality review, which relies on explicit comparisons between different capital cases, was inherently flawed, especially in the context of a statute that would apply the death penalty to such a small number of potential cases. We did not believe that such explicit comparisons would help achieve the goal of substantive justice, and we concluded that broad substantive review of individual capital cases by the State Supreme Court on the merits, and with no procedural barriers, would be a better way to ensure just outcomes.

Whether these recommendations eventually lead to the adoption of a death penalty statute in Massachusetts remains to be seen, and the Governor's Council takes no position whatsoever on the merits of that issue. Even now, I do not know what the other members of the Governor's Council think about the arguments for and against the death penalty. To a person, however, we believe that our report represents the best practices currently available for the administration of the death penalty.

This conference has brought together some of the best thinkers in the United States, including legal academics, forensic science scholars, policymakers, and practicing attorneys with experience and expertise in the area of the death penalty, in the hope of generating a robust discussion about the issues raised by or related to the Governor's Council Report and its recommendations. We will talk about questions such as whether these recommendations can be made to work as intended, whether they might lead to unanticipated consequences, whether there are viable alternatives that should have

been considered or adopted, and whether, at the end of the day, these recommendations can, in practice, serve to produce a fairer and more accurate capital punishment system.

We will also have a plenary address by Professor Franklin Zimring, one of the nation's foremost death penalty scholars, who will give us his views about the broader implications of the entire death penalty reform endeavor.

Those of us who served on the Council fully expect our work to be subjected to strong criticism during this conference. Indeed, just in the short time since the report was issued, our work has already been criticized by death penalty opponents (for failing to solve the problems of capital punishment) and by death penalty supporters (for making the death penalty too expensive and too difficult to impose). One of the key lessons I've learned over the years, in my own life, is that when I'm criticized by people on both sides of a particular issue it probably means I did at least something right.

I, and everyone else on the Council who is present, welcome your criticism and your praise wherever they may be deserved. None of us are here to defend the report. That's not the point of the conference. The report speaks for itself, and will have to speak for itself, both this weekend and in the months and years to come.

In the end, the ultimate goal of the conference can be simply stated: it is to further the ongoing cause of death penalty reform. I strongly believe that both supporters and opponents of the death penalty should be able to agree that the reduction or elimination of errors, and of substantive injustice in the administration of capital punishment, is of the utmost importance. We hope that our report, and this conference, can contribute in some small way to this vitally important effort.

I want to thank Dean Lauren Robel and Associate Dean John Applegate for supporting this conference. Thank you to the Center for the Study of Law, Society, and Culture for co-sponsoring the conference. Thanks to the Indiana Law Journal for its willingness to publish the conference and for logistical support. Thank you to the many Indiana University law faculty members, students, and staff who have given their time to this. And a special thank you to Nikki Rolf, our events coordinator, for her tireless work to make this conference a success. Finally, thanks to all of you, many of whom came from a very long way away to make this conference a success.

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William J. Meade

When Governor Mitt Romney first campaigned for the Massachusettts Governor's office two years ago, he promised to undertake a comprehensive review of our criminal justice system. This was more than just rhetoric. It was a long overdue response to a serious problem. Prosecutors, judges, police, and other law enforcement professionals in Massachusetts were hampered by a system that had not evolved with the times. The Governor fully understood that we needed to make better use of legal and scientific advances in our criminal justice system. In other words, you need twenty-first century technology to effectively fight twenty-first century crime.

In Massachusetts, we had not addressed the issue of legal and scientific advances related to the death penalty since 1984—when our state's Supreme Judicial Court struck down our death penalty statute. When Governor Romney created the Council on Capital Punishment, he wasn't merely looking for a recommendation to fix the 1982 statute. The Council wasn't asked to address any of the moral or ethical considerations

associated with the death penalty. And it wasn't asked to assess the asserted justifications for a death penalty. Instead, the charge to the Council was to look at all of the legal and scientific problems associated with the death penalty. Professor Hoffmann, Dr. Bieber, and the Council were asked to set a new standard of judicial effectiveness and reliability if the death penalty were to be restored in Massachusetts.

The Council members proved to be more than up to the task. Their report is not just a roadmap for Massachusetts. It is, for lack of a better term, the new gold standard for the application of the death penalty in a modern, scientific age. I believe it will become a model for the entire nation. I would have complete confidence in any judgment resulting from the judicial process that follows the guidelines laid out by the Council. In fact, when the Council's report was first released, Governor Romney himself said that he'd stake his life on it.

Among the many things we'll discuss in the next two days, the Council recommended requiring that a defendant's guilt be accompanied by hard, scientific evidence. As all of you know, there have been huge advances in forensic science in recent years. And just as science has effectively been able to prove that certain people previously sentenced to death row were innocent, science can also often confirm who is guilty.

At the same time, however, the Council members didn't just rely on science. They recommended several additional safeguards as well, including the adoption of a higher burden of proof in the sentencing phase of the trial. This was dubbed the "no doubt" standard.

The Council's report also recommended granting broad new powers for both trial and appellate courts to set aside wrongful verdicts, as well as the creation of a death penalty review commission to examine alleged errors in capital cases.

Taken as a whole, the Council's recommendations are the result of hard work. When applied against a narrowed scope of capital crimes, we believe they provide an appropriate roadmap for capital punishment in the future. Professor Hoffmann, Dr. Bieber, and their colleagues have provided an invaluable service. It is now our collective responsibility, especially in Massachusetts, to use their work to help build a more effective and fair capital punishment system in the years ahead.