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Fairness in the Application of the Death Penalty

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Panel One—The Capital Crime

The Massachusetts Governor's Council Report seeks to prevent errors in capital cases at the earliest possible stage. The proposed narrow definition of capital murder, limits on prosecutorial discretion to seek the death penalty, and guarantees of high-quality capital defense representation, contained in recommendations one, two and three, are examples of this early-prevention emphasis.

Participants: Patrick L. Baude (moderator), Edwin Colfax, Norman Lefstein, Judge Sheila M. Murphy, Paula Sites, Michael J. Sullivan

FAIRNESS IN THE APPLICATION OF THE DEATH PENALTY

Edwin Colfax

First, I would like to commend the Commission for its work on responding to the many problems that have emerged concerning the way the death penalty is administered across the United States. The Commission showed great sensitivity to this issue by looking beyond concerns about guilt and innocence, and the problem of mistaken convictions, to broader concerns about fairness. Specifically, how can we delineate the set of individuals who will receive the death penalty as opposed to those who get life without parole? It's this broader concern about fairness in the application of the death penalty among the guilty that too often takes a back seat in discussions about what's wrong with the death penalty and how we should reform it.

My work has been in Illinois. Our recent experience there shows how important it is to deal with these issues of fairness in the application of the death penalty, and in avoiding arbitrariness at the outset in the strongest possible manner. We have seen some significant successes in Illinois in recent years concerning issues of innocence and guilt and reducing the risk of placing an innocent person on death row. But we've run into some brick walls there in our efforts to reform the system in terms of narrowing the aggravating factors and in terms of getting some statewide review of the individual prosecutor's discretion to seek the death penalty. These issues, related to arbitrariness in the implementation of the death penalty, have proven to be more difficult to address with reforms.

I'm also impressed by the exposition of the problems that have led some jurisdictions to suffer from what I'll call "aggravator creep." This is an analogy to the "mission creep" referred to in military contexts. A statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added. The Commission has expressed a good understanding of how a statute, which might be narrowly tailored at the outset, begins to get away from us.

What I'm less certain about, though, is what solutions are provided to prevent those very forces from exerting themselves on this statute, and thus opening it up to all of the usual concerns about arbitrariness in the application of the death penalty. If we assume for the moment that Massachusetts adopted this statute as it is presented in recommendation number one, the original architecture is quite good; but sooner or later legislative remodelers will come along and there will be great temptations to muck it up—to put it bluntly.

The other recommendation that raises these concerns about arbitrariness in the selection of which people will be eligible for the death penalty is statewide review. The Commission has recommended that the Attorney General review prosecutorial discretion. I think it's essential to have some sort of statewide oversight. The Illinois commission recommended a panel made up of prosecutors and a retired judge appointed by the Governor. Given the politicized nature of so many cases in particular and of the death penalty in general, anything that will push the review process out of the political context is a good thing. I strongly favor the notion of statewide review, but I would suggest that investing that review in a single elected official is not the best way to accomplish the goals that are intended by that recommendation. I would suggest a panel of prosecutors with staggered appointments, or any number of other mechanisms that might smooth out this process.

Another point that I want to raise is related to recommendation five and the narrowness of the scope of the Commission's charge. The Commission was charged with investigating what sort of death penalty statute would best guarantee accuracy and fairness. But in structuring the inquiry in that way it precludes addressing some of the systemic issues that have led to wrongful convictions in other jurisdictions and in non-capital cases in Massachusetts. Concerns about eyewitness error and false confessions are addressed here in terms of special jury instructions which warn jurors to be especially wary of certain sorts of evidence under certain circumstances. These "front-end" concerns, which are created during the investigative phase, are not unique to the cases that involve the death penalty. Problems in the way that eyewitnesses are handled and in the way that line-ups are conducted should not be divorced from this effort. There should be an inclusive effort to look at the process from the investigative stage all the way through the final appeals.

An unfortunate consequence of the way the Governor charged the Commission is that some of these investigative issues cannot be fully addressed through jury instructions. In particular I have doubts regarding the adequacy of jury instructions in dealing with concerns about eyewitness issues and false confessions because many of these concerns are counterintuitive to jurors. It takes a lot to explain how someone might be led to confess to a crime that they were, in fact, innocent of. People have a very intuitive predilection to give great weight to eyewitness testimony when, in fact, the closer you look the more it is undermined. So I think that anything we can do to broaden the effort to address these investigative issues about how eyewitnesses are handled and how line-ups are conducted would be desirable. For example, the taping of interrogations should be required, and we have seen recent developments that are very encouraging in that respect. On the whole, I think that the Commission's work is very commendable.

NARROWING THE CLASS OF DEATH-ELIGIBLE CRIMES

Paula Sites

As I look at the first proposal, I too appreciate the Council's efforts to narrow the class of murderers that are eligible for the death penalty and to try to restrict and reserve it for the worst of the worst. I particularly appreciate the provision restricting the death penalty to those who bear personal responsibility for the killing. And I think