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Narrowing the Class of Death-Eligible Crimes

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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

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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

the recent clemency case of Darnell Williams in Indiana sort of demonstrates some of the difficulties for our society that arise when the law makes an individual's personal intent to kill essentially irrelevant.

I also appreciate the efforts to reduce the number of aggravating circumstances. Your Report is dead-on when you talk about "aggravator creep." In Indiana, we have increased our number of aggravators to sixteen. And, as you observed in your Report, many of them have been added in response to an individual, high-profile crime without regard to whether all crimes of that type are, in fact, the most heinous or the worst of the worst.

One aggravator that caught my notice is murder by a prisoner already serving a sentence of life without parole for a prior murder. It seems clear that this fits most people's idea or image of the worst of the worst: an unstoppable, uncontrollable monster who simply can't be prevented from killing except by killing him. But, it's interesting to note that, in Indiana, that has not actually been our experience. We have not had those uncontrollable killers—killing while serving life sentences or killing in prison—who need to be stopped. What we have had is a couple of individuals serving long prison terms in maximum-control facilities who have reached the conclusion that they no longer wanted to live and who viewed our state's death penalty and its provision for the death penalty for those who kill while in prison as essentially a form of state-assisted suicide. So, two men decided to kill another inmate. In both cases they selected someone who, in their moral code, was, I guess, more expendable, or less morally regarded: someone who had been convicted of harming a child. They killed that individual, and then immediately sent letters to the local prosecutor, to the judges, to their state representatives, the Governor, anyone they could think of, to say: "I committed this crime so that I could be executed, and I demand that you give me the death penalty and that you execute me as quickly as possible without any legal mumbo jumbo."

In fact, during our last legislative session, a bill was actually introduced that would allow prisoners serving lengthy prison sentences to essentially volunteer for execution rather than having to kill someone else in prison, because they wanted to take away the inducement that the death penalty seemed to provide to kill while in prison. And my point in telling you about these two cases is to say that I think the death penalty often serves more to address our fears, or our imagination of how we envision our crime problem, than it serves any sort of sound crime prevention purpose.

I will concede that this is a very well-intended, well-crafted, narrow list of aggravating circumstances. But my point is that even the best-intended reforms often can have unintended and unforeseen consequences. I think that, in part, is simply the nature of the death penalty. I want to make this point briefly: I personally believe that it cannot be made workable or fair or foolproof. That being said, if Indiana is going to continue to have a death penalty on its books, I do commend this attempt to narrow the class of killers. And I would certainly support in the legislature an effort to reduce our sixteen aggravators to a group like this.
