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Open Discussion: Capital Crime

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OPEN DISCUSSION

BAUDE

As I listened to the panelists, there were a couple of questions that seemed to run throughout the presentation, and I invite you to comment on this particularly, as well as anything else you want to talk about. Several of you talked about the problem of aggravator creep as an inevitable political problem. And one of the ways to try to prevent or to discuss it is by asking yourself

whether the statute needs to creep. That is, if the statute doesn't have it exactly right, then the creep is inevitable, apart from the ordinary political process.

This statute is different from the standard death penalty aggravating list in a lot of ways. Conspicuously left off are murders of law enforcement officers, although if the law enforcement officer is murdered for the purpose of obstructing justice, it would be covered by this statute. I also noticed, for example, that murder during torture is capital murder, but that murder during rape is not capital murder. And I'm struck also, by the provision about murder and terrorism. Not that murder and terrorism should be capital murder, but that terrorism was defined as an act against the government of the United States, excluding acts against innocent civilians, which is how we usually think of terrorism. So, as they say, the devil is in the details: Are there some details in this statute that are going to invite aggravator creep?

LEFSTEIN

I think you're right. I think it is such a narrow list that it's almost inevitable the list will be expanded. One of those that we didn't mention, but which I think is not covered by the proposal, is the notion of the mafia hit man who commits an intentional murder. And I kind of asked myself when I read that: Is that person clearly less culpable than somebody who kills while torturing the victim? I'm not convinced that he or she is less culpable. Hence, I don't think the statute, in its narrow focus, would likely be enacted. And it seems to me that even though we're in an academic environment, maybe we need to also think about the real world. Inevitably, I believe the list is going to be expanded at the inception of the statute's enactment.

SITES

One possible procedure for preventing just the sort of knee-jerk responses that many states have had in the face of a particularly high-profile crime would be to only allow aggravators to be added, or the statute be tweaked in that way, after a study by a council that is put together as intentionally as this one was. This thorough study should be performed by a panel of defense lawyers, judges, prosecutors, and academics. I would feel comfortable about that, because the political reality is that when you have a high profile crime, and you only subject that to the legislative process, you tend to add.

SULLIVAN

This was probably the one area that evoked the most debate and discussion during the Council meetings. We kept on being reminded of the Governor's charge to narrowly define the circumstances in which the death penalty could be sought. The point that you raise with regard to law enforcement officers was heavily debated. We talked about vulnerable victims; children

that were subject to kidnapping, ransom, and then murder. The idea of the hit man actually came up also. A hit man would be eligible, provided one of those additional elements was present; the additional element being either obstructing justice or torture by the hit man.

LEFSTEIN

But without that he would not be eligible.

SULLIVAN

That's true. Or, another example is the rape-murder. Whether or not the rape victim who, after that horrific crime, indicates to a rapist that they are not going to get away with it because she is going to the authorities. And he decides that he will kill her because of that. That crime is not covered as well. I think this will be deliberated and debated in the Massachusetts legislature and a number of those issues will be likely be debated. Certain constituency groups and activists would talk about whether or not it would be appropriate to include additional types of offenses in a Massachusetts death penalty statute.