Open Discussion: Capital Crime

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to come after me. We don’t do that in Texas. If there is a Brady violation, as clearly
there was in this case, nobody is going to come after those prosecutors and say you’re
going to have to come before the Board of Discipline.”

And what about the judge? What about judges who allow people to sleep? Has
anybody gone after that judge and said, “Should we have a recall?” Was there even an
impaneling of a judicial inquiry board? Not at all. He retired with great plaudits. So, if
we’re going to consider the death penalty, there has to be some sanctions for
misbehavior by the police, prosecutors, defense lawyers, judges, everyone. Otherwise,
we are saying it’s alright.

The elected District Attorneys—I, commend you for saying that we should have a
statewide review. One case I’m helping on is in Harris County, and if Harris County
were a state, it would be the third most populous state for the death penalty in America.
The rest of the country with a death penalty should emulate what you’ve done in your
fine Report. But let us again go back to the psychological. State review board or not, if
there is a death penalty, there is a status issue. Let me give you an example: Former
prosecutors put down how many cases they’ve prosecuted and won on their resumes. I
was asked to help get a position for someone in Ireland. That individual sent his
resume without showing it to me, and on the resume it said how many cases he’d
prosecuted and won. I got a call from Dublin that said don’t ever send anyone like that
to us again. “Your people view practicing law as a football game.” They were
horified. They thought it was unethical and outrageous. I’m still trying to make it up to
this Dean for this atrocity. And he talks about it wherever he goes, and I don’t blame
him. So think about the difference in our system from the Irish system, or the Scottish,
or the English system.

For example, we took students to the Old Bailey. One of our judges went down right
after the verdict came in and the verdict was a not guilty. And this judge asked the
Queen’s Counsel, “How do you feel? Are you terribly disappointed? Do you wish
you’d done something different?” This Queen’s Counsel leaped back away from him
like he was a leper and said, “I am responsible for putting on the case. I am not
responsible for the outcome.” This is an example of the horror they have for what we
consider ordinary conduct. If you were to go into the courthouse where I was the
presiding judge, and go into the State’s Attorneys Office, you would see a wall of half-
cut neckties and scarves cut up for the prosecutors who won their cases. So I ask you, if
you’re considering doing the death penalty, be very careful of the psychological
ramifications.

I just want to say, in closing, that the model death penalty, in my view, is an
oxymoron. I don’t think it can happen. But I commend every single person who
worked on it, and I think the rest of the country should emulate many of your ideas.

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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.