Winter 2005

The Process of the Governor's Council

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And, finally, I want to say a word about compensation. The Report says that there ought to be adequate compensation for defense counsel in death penalty cases. And of course, there should, but the Report doesn't really go beyond this brief statement. The reality in this country is that indigent defendants in criminal cases everywhere are represented by lawyers who are paid at a discount. We just don't provide adequate compensation! Ironically, in Massachusetts there are terrible problems in providing counsel for defendants in criminal cases right now, largely because the compensation paid to defense counsel is so inadequate. There is litigation right now before the Massachusetts Supreme Judicial Court on this issue. The fees paid to assigned counsel—the lawyers upon whom Massachusetts relies very heavily—are $30 an hour in District Court, $39 an hour in Superior Court, and $54 an hour in murder cases. And increasingly, assigned counsel have been refusing to handle criminal cases. Therefore, what you need to do is make certain that you have compensation that is far above what is now being paid in criminal cases in Massachusetts. And we have learned that when you don't have adequate compensation the best lawyers won't take the cases.

In the study that I did in the nineties here in Indiana I interviewed a number of the best criminal defense lawyers in the state who also have private practices. And they told me they would not take a capital case in the state of Indiana. At that time Indiana was paying $70 an hour in capital cases. They said they might be willing to defend a capital case in federal court, which was paying $125 an hour, but they were not sure. We need to understand that the billing rates among the best lawyers in this country, on the average, in a study reported a couple of years ago by Altman and Weil, are $275 an hour for a partner. That's an average throughout the United States for a partner in a major law firm. When you're asking lawyers to defend a capital case—the most important kind of work they can undertake in the criminal area—it is absolutely shameful that they are not better compensated.

The defense of a capital case can take upwards of 500 to 1,000 hours just for the trial itself. That is a half-year's work or more for a criminal defense lawyer. I genuinely wonder whether Massachusetts, which thus far has been unwilling to fund defense counsel at reasonable rates of compensation in other criminal cases, will be willing to do so in the capital area. In Indiana we have increased, incidentally, from $70 an hour. We have a cost of living adjustment built into the rule so that beginning January 1, 2005, the state will pay the grand sum of $96 an hour. And that's much better than most states around the country.

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THE PROCESS OF THE GOVERNOR'S COUNCIL

Michael J. Sullivan

As a member of the Governor's Council I want to briefly touch on the process we went through in producing this Report. First, it was a collection of attorneys, both defense and prosecutors. The judiciary was represented, as was the scientific and the legal scholar community. Professor Hoffmann mentioned that he is not sure even today which members of the Council were death penalty proponents and which members of the Council were adamantly opposed to any type of death penalty proposal in Massachusetts. Quite candidly, I'm not sure either. You might be able to get a sense of this during the course of discussion about the number of aggravating circumstances that
should be considered, or how broad or how narrowly defined the list should be, but everybody's objective ultimately was to ensure, as best as humanly possible, that only those who are guilty could ever be sentenced to death in the Commonwealth of Massachusetts.

Even though there has not been much debate about the oversight by the State Attorney General amongst the eleven elected District Attorneys in the Commonwealth of Massachusetts, it would clearly be new and unusual from the independently elected District Attorneys’ perspective. I think people recognize that it is important to have some level of consistency in the death penalty’s application; it should be narrowly defined and consistently applied so that one area of the state is not going to be treated differently because of either political or philosophical considerations by an elected District Attorney. It will be interesting to see, if this provision is fully debated, whether or not the District Attorneys as a body believe that the State Attorney General is the proper reviewing office or if some other system of review can achieve the same balance.

The other area that I think is quite interesting and potentially controversial is the limited scope of the death penalty under this proposal. Of all the homicide cases in Massachusetts, very few would be eligible under this proposal. In fact, one could argue that the murders that the public become most enraged about, oftentimes murder of the most vulnerable, are the ones that are least represented in these proposals. And when you’re thinking about enacting legislation in a state that does not presently have a death penalty, it appears to me that this proposal does not have any natural constituency groups, whether it’s law enforcement or victim’s families, that would be advocates for this death penalty. I find that very interesting and potentially controversial as well.

I greatly enjoyed the experience. And I really have to compliment Professor Hoffmann and Dr. Bieber for the tremendous leadership that they provided to a very diverse group. The Report suggests eleven members, but, you know, clearly the Governor’s Deputy Chief Legal Counsel, Bill Meade, was a critically important partner in the process as well, and I think he deserves equal recognition also. Thank you.

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THE PSYCHOLOGY OF CAPITAL PUNISHMENT

The Honorable Sheila M. Murphy

The work in Massachusetts is very interesting and important. However, I hope that the death penalty will not be enacted in Massachusetts. I hope that Massachusetts remains free of the death penalty for a number of reasons. First, to do any death penalty, and give it just a modicum level of fairness, would require a great amount of money. It costs almost as much money for the factual investigation as for attorneys. This fact is largely neglected.

Yesterday I received a copy of the police notes of a lineup, as a result of repeated freedom of information requests to Houston on the capital case involving Dominique Green, who faces execution on October 26th. The witness to the lineup said, “I can’t identify the person. It’s either two or four in the lineup. The man who had the gun and stuck me up had a hood. Would you have either number two or number four put on the hood?” And so they had Dominique Green put on the hood. Guess who was charged with the capital crime?