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PROTECTING THE INNOCENT: THE MASSACHUSETTS GOVERNOR'S COUNCIL REPORT

JOSEPH L. HOFFMANN*

This is a difficult time for the death penalty in America. The past five years have witnessed the development of a severe “crisis of confidence” in the death penalty that shows few signs of abating.¹ The crisis was initially precipitated by the shocking revelations that at least thirteen persons on Illinois’s Death Row, and many more nationwide, were innocent of the crimes for which they were sentenced to die.² And it was exacerbated by a major academic study at Columbia University, revealing that more than two-thirds of all death sentences imposed since 1972 eventually have been reversed, either on appeal or in post-conviction hearings.³ The conclusions of the Columbia study, which were widely reported in the national media,

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¹ See, e.g., DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1150>.

² See *id.* at App. 4, available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#App04>.

³ At about the same time as the Illinois innocence cases were gaining national attention, a massive study of appellate and habeas reversals in capital cases was released by James Liebman, Valerie West, and Jeffrey Fagan of Columbia University. This study, which examined all capital cases starting with the Supreme Court’s *Furman* decision in 1972, concluded that the overall reversal rate on appeal and habeas in such cases was a staggering sixty-eight percent. James Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), available at <http://ccjr.policy.net/cjedfund/jpreport/finrep.PDF>.

To be sure, the study did not focus on innocence claims. In fact, as I have previously argued elsewhere, the study did not even prove that all, or most, or any, of the documented reversals were based on substantive rather than purely procedural errors. See Joseph L. Hoffmann, *Violence and the Truth*, 76 IND. L.J. 939 (2001). But see Valerie West, Jeffrey Fagan & James S. Liebman, *Look Who’s Extrapolating: A Reply to Hoffmann*, 76 IND. L.J. 951 (2001). The only thing the reversal rate proved was that lots of capital cases needed to go back for a new trial or sentencing hearing—but this does not necessarily prove anything about the substantive justice of the original death sentences in those cases.

resonated with the Illinois experience, and contributed to a growing national concern that the system of capital punishment in America is not producing, and may even be incapable of producing, acceptably reliable substantive results.

This crisis of confidence has produced a massive shift in the terms of the national death-penalty debate. Ten years ago, that debate was dominated by moral/religious arguments, by disputed claims about the extent of personal moral responsibility and free will manifested by capital defendants, and by concerns about distributional injustice in death sentencing.⁴ Today, the debate has re-focused on substantive issues of guilt and innocence: DNA exoneration evidence, mistaken eyewitnesses, lying informants, and the real or perceived risk of executing an innocent person.⁵

Responses to the crisis have varied. In some states, the death-penalty machine marches on as if unaffected by all of the recent concern about substantive errors.⁶ Some prosecutors, for example, continue to fight requests for access to DNA testing by death-row inmates, apparently oblivious to the crucial difference between such requests and the traditional technical-procedural-legal arguments that historically have been made by defense lawyers in opposition to a death sentence.⁷

In other settings, however, growing concern about substantively erroneous death sentences has become a potent catalyst for reform of the death penalty in particular, and the criminal justice system in general. A new and powerful constituency for death penalty reform seems to be emerging—one that includes such strange bedfellows as Ted Kennedy and Orrin Hatch.⁸

Finally, in at least a few places, abolition of the death penalty is no longer unthinkable. Courts in New York and Kansas, for example, undoubtedly influenced by the innocence issue, recently struck down their

⁴ See Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990's*, 20 FLA. ST. U. L. REV. 7 (1992).

⁵ Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty: Justice Rethinking Laws She Shaped*, CHI. TRIB., July 4, 2001, at 1.

⁶ Steve Mills, *Death Sentences, Executions Decline; Still, Public Backs Capital Punishment*, CHI. TRIB., Dec. 31, 2004, at 1 (reporting that Texas conducted twenty-three executions in 2004, more than one-third of the national total).

⁷ See Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at 1.

⁸ In 2000, Senator Hatch agreed to co-sponsor federal legislation to expand the rights of death-row inmates to obtain DNA evidence that might prove their innocence. See Helen Dewar, *Support Grows for Execution Safeguards: Exonerations Spur Bills in Congress*, WASH. POST, June 16, 2000, at A1.

respective state death penalty statutes.⁹ Several state legislatures seem poised to take up the question of abolition—either because of the unrelentingly high cost of capital punishment,¹⁰ or because the risk of a substantive mistake no longer seems worth taking. Even prominent conservatives like Pat Robertson¹¹ and George Will¹² have taken up the anti-death-penalty stance.

Against this backdrop of turmoil and rapid change, a blue-ribbon panel in Massachusetts—of which I was a member—recently issued a major report about capital punishment that is likely to generate even more controversy. In May 2004, the Final Report of the Massachusetts Governor's Council on Capital Punishment (hereinafter Massachusetts Governor's Council Report) outlined ten bold recommendations for the creation of a new kind of death penalty designed to be as accurate, and as fair, as humanly possible.¹³

The Massachusetts Governor's Council Report has already begun to exert a significant influence on the national death penalty debate.¹⁴ And in the coming months, as draft legislation based on the Report is introduced in the Massachusetts Legislature,¹⁵ the provocative ideas contained in the Report seem likely to garner even more public attention—whether or not they are ever adopted in Massachusetts.

How did the Massachusetts Governor's Council Report come about? What made it possible for the Council to take such a bold stand on so many significant death penalty issues? And how should the Council's recommendations be evaluated—in Massachusetts and elsewhere around the nation? The remainder of this article seeks to address these questions.

⁹ See Mills, *supra* note 6 (reporting about the New York and Kansas decisions).

¹⁰ Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335 (1996); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59 (1989).

¹¹ Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1.

¹² George F. Will, Editorial, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

¹³ MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04%20MassDPReportFinal.pdf> [hereinafter MASSACHUSETTS GOVERNOR'S COUNCIL REPORT].

¹⁴ See Evan J. Mandery, *Massachusetts and the Changing Debate on the Death Penalty*, 2004 CRIM. L. BULL. 518 (2004); Emily Bazelon, *The Foolproof Death Penalty*, N.Y. TIMES, Dec. 12, 2004, § 6 (Magazine), at 73 (labeling the Massachusetts Report as one of the most influential ideas of 2004).

¹⁵ See Mills, *supra* note 6 (reporting Governor Romney's plan to introduce draft death penalty legislation in early 2005).

THE POLITICS OF DEATH PENALTY REFORM
AND THE ILLINOIS EXPERIENCE

As noted above, the opening stages of the current capital punishment crisis unfolded in Illinois, where, in the 1990's, revelations began to surface about innocent men on Death Row.¹⁶ These revelations led then-Governor George Ryan first to declare a moratorium on executions,¹⁷ eventually to be followed, on the Governor's last day in office in January 2003, by the commutation of the death sentences of every person on Death Row in Illinois.¹⁸ Former Governor Ryan's subsequent public statements have made it clear that—for a variety of reasons—he now supports the abolition of capital punishment.¹⁹

In the interim, the same revelations about mistaken death sentences in Illinois also provoked a vigorous effort to reform the Illinois death penalty. In 2002, a special Commission appointed by Governor Ryan proposed eighty-five specific reforms.²⁰ Although many of the Commission's proposals were rejected by the Illinois Legislature, on November 19, 2003, the Legislature did enact a wide-ranging death-penalty reform bill.²¹ Most of those reforms became effective in January 2004.

Despite the reforms, however, the death penalty in Illinois continues to teeter on the brink of de facto abolition. Current Governor Rod Blagojevich has thus far declined to lift the moratorium on executions, and public debate over the issue rages.²² Although new death sentences are now being

¹⁶ Ken Armstrong & Steve Mills, *String of Exonerations Spurs Legislative, Judicial Panels to Study Reforms*, CHI. TRIB., Nov. 16, 1999, at 8; *Special Report: Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshesht Punishment Into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1. Even prior to the Illinois revelations, claims of widespread substantive mistakes in capital cases were made. See, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). But such claims were also hotly contested. See, e.g., Steven J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

¹⁷ Ken Armstrong & Steve Mills, *Ryan: "Until I Can Be Sure"; Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

¹⁸ Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1.

¹⁹ Marc Caro, *Now Starring at Sundance, George Ryan; Indie Film Festival Lionizes Ex-Governor*, CHI. TRIB., Jan. 19, 2004, at 1 (quoting Ryan: "The abolition of the death penalty is really what we need now.").

²⁰ FORMER GOVERNOR RYAN'S COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT (2002), available at <http://www.idoc.state.il.us/ccp/ccp/reports/index.html>.

²¹ See S.B. 472, 93d Gen. Assem., Reg. Sess. (Ill. 2003).

²² See Mills, *supra* note 6 (discussing the ongoing debate over innocence and the Illinois moratorium on executions).

imposed in Illinois capital trials,²³ it remains unclear whether there will ever again be another execution in Illinois.

The recent Illinois experience amply illustrates the three divergent paths that characterize modern death-penalty law and policy. The first of these is the path of the status quo, a path that would preserve the death penalty system, for the most part, largely as it has operated in this country for the past three decades.²⁴ The Republican-led Illinois Senate tried to follow this path for most of 2002 and early 2003,²⁵ before ultimately recognizing that faltering public support for the death penalty effectively had eliminated the status quo as a politically viable option in Illinois. In many other states, however, the status quo remains viable.²⁶

The second path is the one ultimately taken by ex-Governor Ryan himself. This is the path of abolition. Its adherents believe that the system for administering capital punishment in America is “broken” and cannot possibly be fixed, and that the system itself therefore must be abandoned. Ex-Governor Ryan is in good company on the path of abolition. Recent U.S. Supreme Court Justices Powell,²⁷ Blackmun,²⁸ Brennan,²⁹ and Marshall,³⁰ as well as most of the other participants in this Conference, have traveled, or are now traveling, along the same path.³¹

The third path is the path of real reform, in pursuit of the Holy Grail of a death penalty that can meet society’s standards for accuracy and fairness. Paradoxically, it may be the path least often taken. The paradox here is that reform is the one option that should be capable of garnering the maximum amount of public and political support. Both proponents and opponents of capital punishment certainly should be able to agree that, so long as the

²³ See, e.g., H. Gregory Meyer, *A New Death Penalty for Killer; Ryan Commuted Earlier Sentence*, CHI. TRIB., May 25, 2004, at 1.

²⁴ Current status quo adherents on the U.S. Supreme Court include Justice Scalia, see *Walton v. Arizona*, 497 U.S. 639 (1990), and Justice Thomas. See *Graham v. Collins*, 506 U.S. 461 (1993).

²⁵ Possley & Mills, *supra* note 18, at 1 (referencing Ryan’s speech that included a passage about Illinois Legislature’s refusal to enact meaningful death-penalty reforms).

²⁶ See Mills, *supra* note 6 (reporting that public support for capital punishment remains high in many locations around the United States, including in Texas).

²⁷ See *Armstrong & Mills*, *supra* note 5, at 1.

²⁸ See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

²⁹ See *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

³⁰ See *Gregg*, 428 U.S. at 231 (Marshall, J., dissenting); *Furman*, 408 U.S. at 316 (Marshall, J., concurring).

³¹ See Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72 IND. L.J. 7 (1996) (describing how Japanese Supreme Court Justice turned to abolition based in part on the inability to ensure accurate outcomes in capital cases).

death penalty continues to exist, the system for administering it should be continually improved in an effort to reduce, as much as humanly possible, the risk of substantive error.

But, in fact, neither group has completely embraced the reform option. Opponents of capital punishment frequently find themselves in the position of advocating reform, at least as an alternative to an entrenched status quo (and as a way of delaying executions). But their advocacy is sometimes tempered by the fear that real reform will merely enhance the legitimacy of the death penalty, which in turn will make abolition—their ultimate goal—more difficult to achieve.³² And even when abolitionists do manage to overcome these fears and advocate passionately for reform, it is hard for them to do so without seeming disingenuous, because it is clear to anyone who knows their true position that they do not really want the death penalty system to become successful.³³

Proponents of capital punishment, on the other hand, distrust real reform, largely because they perceive it to be driven by abolitionists who (in their view) try to impose every possible roadblock in front of a death sentence. Many proponents, including many prosecutors and advocacy groups for crime victims, do not believe that the current death-penalty system is truly “broken.” They therefore tend to oppose reform initiatives, almost reflexively, or at most to support incremental reforms that they view as sufficient to solve any minor problems that may exist.³⁴

As a result, real death-penalty reform turns out to be elusive and difficult at best, and more frequently impossible. Under normal circumstances, the political forces simply do not align in a manner that allows such reform to be achieved.³⁵

A NEW AND DIFFERENT POLITICAL PARADIGM

Enter Massachusetts Governor Mitt Romney. Governor Romney, a Republican, was elected in 2002 in a liberal “blue” state politically

³² See, e.g., Austin Sarat, *The “New Abolitionism” and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343 (2002); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002).

³³ Two notable exceptions, in which leading death penalty opponents make a persuasive (and passionate) case for real death penalty reform, are Douglas A. Berman, Foreword, *Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1 (2002) and James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315 (2002).

³⁴ See, e.g., Evan Osnos & David Heinzmann, *Death Penalty Remains an Option: Ryan’s Execution Halt Won’t Deter Prosecutors*, CHI. TRIB., Jan. 31, 2000, § 2, at 1.

³⁵ See generally David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 U. KAN. L. REV. 443 (1989).

dominated by Democrats.³⁶ Massachusetts has not had a valid death penalty statute since 1984, and has not executed anyone since 1947.³⁷ Governor Romney, during his election campaign, advocated the reintroduction of capital punishment to Massachusetts.³⁸ Many average Massachusetts residents—but not their elected state legislators—seem to agree with the Governor’s position on capital punishment.³⁹

In September 2003, Governor Romney created the Massachusetts Governor’s Council on Capital Punishment.⁴⁰ The Council included experts from law, law enforcement, and forensic science. The stated mission of this Council was to collect and review the best legal and scientific research available, from all possible sources, and to answer, on the basis of such research, the following question: If the Commonwealth of Massachusetts were to decide to enact a new capital punishment statute, what safeguards would be needed to ensure, as much as humanly possible, that the death penalty would be administered in a fair and accurate way? The Governor’s charge to the Council thus included both of the key substantive issues implicated by the death penalty: (1) how best to prevent the execution of an innocent person; and (2) how best to ensure that the death penalty is reserved for the “worst of the worst” crimes and criminals.

I was asked to serve as Co-Chair of the Massachusetts Governor’s Council,⁴¹ primarily on the basis of reform work that I previously had done in Illinois.⁴² After some deliberation, I agreed, because I recognized an opportunity—relatively rare, for academics—to make a meaningful contribution to real reform of the death penalty.

³⁶ Frank Phillips, *Election 2002, Massachusetts Votes; Romney Sails to Victory; Staves Off O’Brien as GOP Extends Hold on Governor’s Office*, BOSTON GLOBE, Nov. 6, 2002, at 1.

³⁷ See *Capital Punishment; Massachusetts Panel Offers Possible Guidelines*, FACTS ON FILE WORLD NEWS DIGEST, Dec. 9, 2004, at 969D2.

³⁸ See Elisabeth J. Beardsley & David R. Guarino, *Dems Come Out Swinging at Romney’s Anti-Crime Plan*, BOSTON HERALD, Aug. 21, 2002, at 18; On the Issues, *Mitt Romney on Crime*, at http://www.issues2000.org/Governor/Mitt_Romney_Crime.htm (quoting Romney during the 2002 campaign: “The ultimate penalty should be available in Massachusetts for criminals who commit the most egregious murders.”) (last visited Feb. 8, 2005).

³⁹ Frank Phillips, *Support for Gay Marriage; Mass. Poll Finds Half in Favor*, BOSTON GLOBE, Apr. 8, 2003, at A1 (reporting 53% support for capital punishment, as compared with 41% opposition, in Boston Globe/WBZ Massachusetts public opinion poll).

⁴⁰ Rick Klein, *Science Key in Building Case for Death Law*, BOSTON GLOBE, Sept. 30, 2003, at B1.

⁴¹ The other Co-Chair was Dr. Frederick Bieber, Jr., of the Harvard Medical School.

⁴² See *supra* text accompanying notes 76-83.

The Council was never asked to, and did not, address the question whether the death penalty should exist, in Massachusetts or elsewhere.⁴³ That limitation on the Council's role allowed me—a committed agnostic on capital punishment itself—to participate with a clear conscience. I believed then, and believe now, that the Council's efforts have the potential to move the national debate about reform of the death penalty forward, in ways that are unique in comparison to other similar reform efforts.

When the Massachusetts Governor's Council on Capital Punishment began its work in late 2003, we enjoyed two significant advantages over other death-penalty reform initiatives in other states. First, we followed the similar efforts in Illinois and several other states, so we were able to draw upon the information that had already been gathered by those other study committees.⁴⁴ We did not have to "re-invent the wheel."

Second, and more importantly, we devised our recommendations in the context of a state that did not have an existing death penalty system. This meant that we were free from the constraints of how our recommendations might affect existing law, practice, or institutional structures. We also did not have to worry about whether our recommendations might face resistance from those with a vested interest in such existing law, practice, or institutional structures. We were able to proceed, in other words, on a completely blank slate.

This freedom turned out to be the key component that allowed the Massachusetts Governor's Council to move beyond the more limited kinds of reforms that previously had been advocated by similar groups. We did not have to worry about the political consequences of making bold—or even, in many cases, unprecedented—recommendations.

In fact, in some respects the political context of the Council's work virtually demanded such boldness. Because opposition to capital punishment within the Massachusetts legislature is so well-entrenched,⁴⁵ any proposed death penalty legislation would have to be bold in order to have any chance of serious consideration. Governor Romney, and by extension the Council as well, thus had no choice but to try to produce the most careful, thoughtful, and innovative set of recommendations ever devised for a state capital punishment statute.

⁴³ MASSACHUSETTS GOVERNOR'S COUNCIL REPORT, *supra* note 13, at 4.

⁴⁴ See, e.g., FORMER GOVERNOR RYAN'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 20 (citing various sources).

⁴⁵ Klein, *supra* note 40, at B1 (reporting consistent and strong legislative opposition to death penalty proposals since 1997).

THE MASSACHUSETTS GOVERNOR'S COUNCIL REPORT

The Massachusetts Governor's Council delivered its Final Report to Governor Romney on May 3, 2004. The Report, which was unanimously approved by the Council,⁴⁶ contains ten broad recommendations that the Council believed to be essential to the creation of a fair and accurate death penalty system.⁴⁷

In brief, summary form, the Report's ten recommendations are as follows:

- (1) The death penalty should be narrowly limited to six kinds of murder:
 - a) political terrorism murder;
 - b) murder to obstruct justice;
 - c) intentional torture murder;
 - d) multiple murder in one episode;
 - e) multiple murder in more than one episode;
 - f) murder by one already serving life without parole for a previous murder.

Also, no person should be eligible for the death penalty unless the murder resulted from their own conduct, from the conduct of another person under their direction or control, or from a conspiracy to commit the murder—in other words, accomplice liability alone should never be enough to support a death sentence.⁴⁸

- (2) The discretionary decision to seek the death penalty in a particular case should be made pursuant to state-wide protocols, and each such decision should be reviewed for consistency with other death-eligible homicide cases by the state Attorney General.⁴⁹

- (3) Each defendant in a capital case should be represented by two well-funded defense attorneys, both of whom meet strict standards for experience, training, and performance established under the supervision of the state Supreme Court.⁵⁰

- (4) The defendant in a capital case should have the option, to be exercised either at the start of the proceedings or at the end of the

⁴⁶ MASSACHUSETTS GOVERNOR'S COUNCIL REPORT, *supra* note 13 (the Governor's Council included a U.S. Attorney, a State District Attorney, the heads of two government crime laboratories, and the Boston Chief of Police, among others).

⁴⁷ *Id.*

⁴⁸ *Id.* at 6-7.

⁴⁹ *Id.* at 12.

⁵⁰ *Id.* at 13-14.

guilt-innocence stage of the capital trial, to request a new jury for the purpose of hearing mitigating evidence and determining the defendant's ultimate sentence. If the defendant chooses this option, the new sentencing jury should be given only enough information about the defendant's crime to allow for the proper weighing of aggravating and mitigating circumstances, and should not be told whether the defendant contested guilt. If the defendant does not choose this option, but chooses instead to proceed with the original jury, the defendant should retain the right to raise "lingering" or "residual" doubt about guilt at the sentencing stage of the trial.⁵¹

(5) At both the guilt-innocence and sentencing stages of a capital trial, the jury should be instructed about the deficiencies, and potential inaccuracies, of various kinds of "human" evidence, such as eyewitness evidence (especially cross-racial identifications), statements made by the defendant while in police custody (especially if the interrogation was not contemporaneously video-taped or audio-taped), and statements made by co-defendants or police informants.⁵²

(6) At the sentencing stage of a capital trial, the jury should be required, as a prerequisite for imposing a death sentence, to find conclusive physical or other associative evidence, reaching a high level of scientific certainty, connecting the defendant to the crime and strongly corroborating the defendant's guilt.⁵³

(7) At the sentencing stage of a capital trial, the jury should be required, as a prerequisite for imposing a death sentence, and unless the defendant has waived the issue by requesting a new sentencing jury, to find that there is "no doubt" about the defendant's guilt. Jurors should be instructed that the "no doubt" standard means that if any juror continues to have "lingering" or "residual" doubt about guilt, even after finding the defendant guilty "beyond a reasonable doubt," then a death sentence cannot be imposed.⁵⁴

(8) A state-wide, well-funded system of Independent Scientific Review (ISR) should be created to help ensure the proper collection, handling, evaluation, analysis, preservation, and interpretation of all physical or other associative evidence in all death-eligible homicide cases. An Independent Scientific Review Advisory Committee should develop and implement policies for the accreditation and certification of all crime labs, medical-examiner offices, and forensic-science

⁵¹ *Id.* at 17-18. The defendant's opportunity to choose a second sentencing jury prior to the start of jury selection, and thereby avoid death-qualification of the first jury, is not mentioned specifically in the Report, but it is implicit, and it has been incorporated into the draft legislation based on the Report.

⁵² *Id.* at 19.

⁵³ *Id.* at 20.

⁵⁴ *Id.* at 22.

providers in all such cases. At the conclusion of any case in which a death sentence is imposed, the ISR Advisory Committee should appoint an ISR Panel, including experts in each forensic-science sub-discipline relevant to the particular case. The ISR Panel should review all of the scientific evidence in the case, and should issue a report to the trial judge, both attorneys, and the state Supreme Court.⁵⁵

(9) Both the trial court and the state Supreme Court should possess, and feel free to exercise, broad authority to overturn any death sentence that the court finds inappropriate on any basis in fact or law, including the court's substantive disagreement with the merits of the jury's imposition of the death sentence. The state Supreme Court's substantive review authority should be exercised without regard to any possible procedural default or other procedural barrier to relief.⁵⁶

(10) A new Death-Penalty Review Commission should be created to investigate any claim of substantive error in a particular capital case, and to recommend further judicial review if such an error may have occurred. The Commission also should investigate, and issue public reports, about the causes of substantive errors in capital cases generally.⁵⁷

The Massachusetts Governor's Council Report essentially seeks to outline a set of the "best practices" currently available for the administration of the death penalty. Some of the ideas in the Report have been proposed before, and a few are already in place in certain death-penalty jurisdictions.⁵⁸ Most of what is contained in the Report, however, breaks new ground. Taken as a whole, the Report is a major step in the direction of a "Model Death Penalty Code," against which all death-penalty jurisdictions can measure their existing capital punishment laws and practices.

Perhaps unsurprisingly, the Massachusetts Governor's Council Report has been criticized by advocates on both sides of the American capital punishment divide. Supporters of capital punishment have attacked the Report because it would be likely to produce a death penalty that is very rarely applied, and whose implementation, in those rare cases where it is applied, would be very costly.⁵⁹ Opponents of capital punishment have attacked the Report because it does not, in their view, solve the myriad

⁵⁵ *Id.* at 23-24.

⁵⁶ *Id.* at 25-26.

⁵⁷ *Id.* at 28.

⁵⁸ See, e.g., Liebman, *supra* note 33, at 329 (lauding recent reform efforts to enhance quality of defense representation in New York and Indiana capital cases).

⁵⁹ See, e.g., Jonathan Saltzman, *DA's Rap Governor's Death Penalty Plan*, BOSTON GLOBE, May 4, 2004, at A1 (quoting prosecutors as opposed to proposal based on cost and use of higher burden of proof).

problems of capital punishment.⁶⁰ They worry that the Report might enable the reinstatement of the death penalty in Massachusetts. And they may well worry, in addition, that the Report may prolong the day when the death penalty is abolished in other states.

TWO KINDS OF DEATH PENALTY REFORMS: BALANCE-SHIFTING AND ACCURACY-ENHANCING REFORMS

Since its release, the Massachusetts Governor's Council Report has received significant public and media attention, primarily because of its unique reliance on a requirement of scientific evidence (Recommendation Six), and on the use at capital sentencing of a "no doubt" standard of proof (Recommendation Seven), to reduce the risk of erroneous imposition of a death sentence.⁶¹ These are probably the most provocative recommendations in the Report, and therefore the ones to which the media and politicians have gravitated.

These two prominent recommendations, however, actually may do less to enhance overall accuracy and fairness in capital sentencing than several other recommendations contained in the Report. This is because both the scientific evidence requirement and the "no doubt" standard of proof reduce the risk of erroneous death sentences by making it harder for the government to achieve death sentences at all. By reducing the total number of death sentences imposed, they necessarily reduce the number of erroneous death sentences. They shift, in other words, the balance of life and death sentences in the direction of life sentences.

Professor Erik Lillquist has cogently explained that such balance-shifting reforms reduce the risk of "false positives" (i.e., inaccurate or undeserved death sentences) by means of an explicit trade-off in which the risk of "false negatives" (i.e., cases in which a guilty and death-deserving defendant receives a life sentence) is correspondingly increased.⁶² For this reason, although such reforms might serve to reduce the total number of erroneous death sentences (and might therefore be viewed as desirable),

⁶⁰ See, e.g., Beth Daley, *Foolproof Forensics? Even Science May Not Make Verdicts Infallible*, BOSTON GLOBE, June 8, 2004, at E1; Michael Paulson & Ralph Ranalli, *O'Malley Hits Plan for Death Penalty*, BOSTON GLOBE, May 8, 2004, at A1.

⁶¹ See, e.g., Scott S. Greenberger, *Panel Offers Death Penalty Plan; State Would Use Standard of "No Doubt"*, BOSTON GLOBE, May 3, 2004, at A1; David Guarino, *Governor Begins Fight for "Fair" Death Penalty*, BOSTON HERALD, May 3, 2004, at 4 (explaining that Governor Romney "[a]im[s] to succeed with scientific reason where past governors relied on ultimately failing emotional pleas"); see also MASSACHUSETTS GOVERNOR'S COUNCIL REPORT, *supra* note 13, at 20-23.

⁶² Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. (forthcoming 2005) (manuscript at 20-21, on file with author).

they will not necessarily achieve, in an overall sense, greater accuracy or fairness in capital sentencing.⁶³

Indeed, as Lillquist notes, it seems likely that such reforms may actually *reduce* overall death-sentencing accuracy and fairness.⁶⁴ This is because the adjudication of criminal cases in America is already skewed substantially in favor of “false negatives.” We use a “beyond reasonable doubt” standard of proof at criminal trials because we generally believe that it is better to let ten guilty persons go free than to convict one innocent person. Given this existing gross imbalance, any further shifting of the balance in favor of the capital defendant inevitably will produce even more “false negatives” than it will eliminate “false positives.”

Given these difficulties, balance-shifting reforms (such as changes in the burden of proof) are properly subject to the criticism—particularly in a society that still purports to believe in the justice and efficacy of capital punishment—that they may do more harm than good, in both the retributive and utilitarian senses.⁶⁵ Although such reforms occasionally will serve the salutary goal of preventing the execution of an innocent person, they will do so at the cost of sparing death-deserving murderers (a retributive injustice), who will then remain capable of committing future murders (a utilitarian loss).⁶⁶

Several other recommendations contained in the Report are quite different, however, because they do not involve balance-shifting, or a trade-off between “false positives” and “false negatives.”⁶⁷ Rather, if implemented, they will actually improve the quality of capital-case decision-making. Instead of simply moving all (or some subset of) close cases from one side of the adjudicatory ledger to the other, these reforms will enable the system to make better choices about how to resolve those close cases. By doing so, they can help to reduce the risk of *both* “false positives” and “false negatives,” thus enhancing overall accuracy and fairness in capital sentencing.

For this second, accuracy-enhancing kind of reform, the potential criticisms are also different. Such reforms—if they work—clearly have a positive effect on the criminal adjudicative process, in both retributive and utilitarian terms. The different questions that still need to be answered,

⁶³ *Id.* (manuscript at 23-24, on file with author).

⁶⁴ *Id.* (manuscript at 24-25, on file with author).

⁶⁵ *Id.* (manuscript at 26, on file with author).

⁶⁶ *Id.* (manuscript at 25, on file with author).

⁶⁷ See *infra* text accompanying notes 69-73 (discussing Recommendation Four); *infra* text accompanying notes 75-88 (discussing Recommendation Nine); *infra* text accompanying notes 100-01 (discussing Recommendations Two, Three, Eight, and Ten).

with respect to any such proposed reform, are: (1) will it work? (2) how much will it work? (3) will there be any collateral negative consequences? and (4) is it worth the additional cost?

One final difference between the two different kinds of reforms is that balance-shifting reforms are largely limited, in their potential application, to capital cases only. No reasonable person would advocate the adoption of a scientific evidence requirement, or a "no doubt" standard of proof, for the typical criminal case; it is only in the special context of capital cases that we are willing to contemplate tipping the balance of criminal adjudication even further in the direction of the defendant than it already is.

Accuracy-enhancing reforms, on the other hand, may have sound application to the criminal justice system generally. At least in theory, if a particular idea would make for better decision-making at capital trials, then arguably the same idea also should be applied to all other criminal trials. The issue basically comes down to costs and benefits: given the likely benefits, can we afford to extend the idea to every criminal case? If so, then the capital-case reform process can serve as a useful catalyst for broader systemic reform.⁶⁸

EXAMPLE ONE: LIMITING DEATH-QUALIFICATION

To illustrate these points, let me focus first on Recommendation Four, which gives the defendant the right to choose two separate juries for guilt and capital sentencing.⁶⁹ One clear implication of this recommendation is that the defendant can choose to avoid death-qualification of the jury that will decide his guilt or innocence, by declaring, before the proceedings even begin, that he will choose the two-jury option. At that point, there would be no legal justification for death-qualifying the first jury, since that first jury will never be asked to determine whether the defendant will be sentenced to life or death.⁷⁰

Professor Lillquist argues persuasively that eliminating death-qualification (or, in the case of the Massachusetts Report, allowing the defendant to opt out of it) is more likely to be effective in enhancing the overall accuracy and fairness of adjudication in capital cases than merely

⁶⁸ See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

⁶⁹ MASSACHUSETTS GOVERNOR'S COUNCIL REPORT, *supra* note 13, at 17.

⁷⁰ To be sure, there would still be the need to screen the first jury for potential "nullifiers"—that is, jurors who would be unable to consider fairly a verdict of "guilty" because of their desire to preclude even the risk of a death sentence. But such screening—which might be called "death-qualification-lite"—is a far cry from the much more extensive kind of death-qualification that occurs today, and that has been proven to skew the guilt-innocence determination.

raising the burden of proof.⁷¹ This is because eliminating death-qualification will produce a qualitatively different jury, one that is relatively more likely to be open-minded about the defendant's possible innocence and correspondingly less likely to accept blindly the prosecutor's version of the facts.⁷² Based on the available empirical evidence, such a jury is likely to evaluate the evidence at trial in an entirely different and better way than the average death-qualified jury.⁷³ This means that eliminating death-qualification—unlike raising the burden of proof⁷⁴—actually may tend to reduce “false positives” *without* necessarily increasing “false negatives.”

Are there additional costs incurred by allowing the defendant to choose two separate juries? Of course. Are those costs worth incurring? The Massachusetts Governor's Council concluded that, in the special context of capital cases (and especially if, as proposed by the Council, such cases will be extremely rare), they are.⁷⁵

EXAMPLE TWO: SUBSTANTIVE APPELLATE REVIEW

An even better example of an accuracy-enhancing recommendation is Recommendation Nine, which proposes that the Massachusetts Supreme Judicial Court (and the capital trial court as well) should possess, and should freely exercise, broad substantive review power over death sentences.⁷⁶ This would allow the Court to reverse any death sentence on the merits, and without regard to any procedural defaults or barriers, if the Court disagrees with the jury's imposition of the death sentence on any basis in fact or law.

This Recommendation originated in the reform work I previously did in Illinois. In 2002, the Illinois Senate Judiciary Committee was studying

⁷¹ Lillquist, *supra* note 62 (manuscript at 57-58, on file with author).

⁷² *Id.* (manuscript at 59, on file with author).

⁷³ See, e.g., the various empirical studies cited by the U.S. Supreme Court in *Lockhart v. McCree*, 476 U.S. 162 (1986) (upholding constitutionality of death-qualified jury in capital cases).

⁷⁴ This assumes that raising the burden of proof actually will have some effect on capital trial jurors. Professor Lillquist points out that this assumption is not necessarily true. Empirical research shows that jurors tend to be largely unaffected by the specific language of jury instructions on matters such as the burden of proof. Whatever effect such a change would have on jurors is likely, therefore, to be relatively small. *Id.* (manuscript at 49-50, on file with author). *But see* Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25 (1996).

⁷⁵ Note that this particular recommendation has no potential impact outside the scope of capital cases, except in those few jurisdictions where juries play a role in determining a non-capital defendant's sentence. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003).

⁷⁶ MASSACHUSETTS GOVERNOR'S COUNCIL REPORT, *supra* note 13, at 25-26.

the Report of Governor Ryan's Commission on Capital Punishment, and the eighty-five proposed reforms therein.⁷⁷ One of those proposed reforms was that the Illinois Supreme Court should be required to engage in comparative proportionality review of every death case.⁷⁸ Comparative proportionality review requires an appellate court to compare the particular capital case before it with a universe of factually similar death-eligible cases. If the result reached in the instant case is disproportionate, based on the results reached in the universe of similar cases, then the court must set aside the death sentence.

In August 2002, I testified before a panel of the Judiciary Committee, and expressed my view that comparative proportionality review is a fundamentally flawed concept.⁷⁹ As I put it to the panel members: In the end, what is the ultimate goal of comparative proportionality review? It seems that the goal must be to produce a legal taxonomy of death—in other words, to identify, through the inductive process of these explicit comparisons, the possible combinations of factors that should lead to a death sentence, as well as those that should lead to a life sentence. But, as Justice Harlan said back in 1971, this is a task “beyond present human ability.”⁸⁰ Nor can we produce a legal or linguistic formula for the imposition of the death penalty today any more than we could in Justice Harlan's time. Thus, I argued, it would be much better to focus the appellate courts on the substantive merits of each individual death sentence, rather than engage in a process of explicit case comparisons that can lead only to a jurisprudential dead end.⁸¹

I therefore proposed an alternative idea: That the Illinois Supreme Court be required, in every death penalty case, to review the “fundamental

⁷⁷ See FORMER GOVERNOR RYAN'S COMM'N ON CAPITAL PUNISHMENT, *supra* note 20.

⁷⁸ *Id.*

⁷⁹ See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only the “Appearance of Justice”?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 133 (1996) (noting that many state courts conducting proportionality review are “troubled about their responsibilities, suspicious of statistical evidence, and uneasy about the reliability of the factual record documenting disparities”). See generally Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1162 (2001) (describing comparative proportionality review as “constitutionally unwarranted, methodologically unsound, and theoretically incoherent”).

⁸⁰ *McGautha v. California*, 402 U.S. 183, 204 (1971).

⁸¹ My argument was based on the position articulated brilliantly by Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, where he explained that moral intuition is not necessarily inferior to legal reasoning—and indeed might even be superior in certain respects—as a tool for deciding who lives and who dies. See also Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000).

justice” of the death sentence, on the merits, and without regard to any procedural defaults or barriers. After the hearing, I was asked by both Democrats and Republicans on the Illinois Senate Judiciary Committee to draft a proposal for such substantive appellate review. The proposal eventually came to be called the “Fundamental Justice Amendment” (or FJA). After some political twists and turns, in November 2003, the FJA was overwhelmingly approved as a key part of the bi-partisan death penalty reform bill, and it became law in Illinois in January 2004.⁸²

Although it is far too early to be able to observe any potential effects in practice, the FJA clearly provides the Illinois Supreme Court with a powerful new tool to ensure substantive accuracy and fairness in capital cases.⁸³ The FJA has been cited by numerous observers, including the Chicago Tribune (which originally opposed it), as one of the most important and potentially beneficial features of the 2003 reform legislation.⁸⁴

⁸² The FJA, as enacted, provides:

The Illinois Supreme Court may overturn the death sentence, and order the imposition of imprisonment . . . if the court finds that the death sentence is fundamentally unjust as applied to the particular case. If the Illinois Supreme Court finds that the death sentence is fundamentally unjust as applied to the particular case, independent of any procedural grounds for relief, the Illinois Supreme Court shall issue a written opinion explaining this finding.

S.B. 472, 93d Gen. Assem., Reg. Sess. (Ill. 2003).

⁸³ Some experts claim that the Illinois Supreme Court already possessed most of the substantive review authority that was provided by the FJA, under the guise of reviewing death sentences for “excessiveness.” It is also important to note that Illinois law historically has provided to the appellate courts the power to reverse a conviction in any case where the evidence (or lack thereof) fails to leave the court with an “abiding conviction of guilt.” See Stephen L. Richards, *Reasonable Doubt Redux: The Return of Substantive Criminal Appellate Review in Illinois*, 34 J. MARSHALL L. REV. 495 (2001).

After surveying the history of both guilt-innocence and “excessiveness” review in Illinois capital cases, however, I believe that both grants of authority generally have been construed quite narrowly—in sharp contrast to the broad, open-ended authority contemplated by the FJA. In any event, the point is relatively moot. Even if it is true that the legal authority for substantive appellate review in capital cases already existed before the FJA, the Illinois Supreme Court clearly did not feel free to exercise such authority on a regular basis. The FJA—at a bare minimum—should serve as a clear and influential statement, by an overwhelming, bi-partisan majority of the Illinois Legislature, that such substantive review is both desirable and wholly consistent with legislative intent. The FJA thus should eliminate any concerns that the exercise of substantive appellate review authority by the Illinois Supreme Court is illegitimate, or contrary to the will of the people of Illinois, as expressed by the Illinois Legislature.

⁸⁴ See Editorial, *At Last, Death Penalty Reform*, CHI. TRIB., Nov. 20, 2003, at 30 (listing FJA first among important components of death penalty reform legislation); *Death Penalty Overhauled*, CHI. TRIB., Nov. 20, 2003, at 6 (also mentioning FJA first).

The Massachusetts Governor's Council eventually concurred in the view that the very concept of comparative proportionality review is inherently flawed, especially in the context of a proposed statute that would apply the death penalty to such a small number of potential capital cases. The Council simply did not believe that such explicit comparisons would help to achieve the goal of substantive justice. We therefore concluded that broad substantive review of particular capital cases by the state Supreme Court—on the merits and with no limits or procedural barriers—would be a better way to ensure just outcomes. We also agreed that, in any case where the state Supreme Court might feel a particular death sentence to be substantively inappropriate or unjust, it would be much better for the Court to feel free to declare its view honestly, rather than have to strain to find a procedural violation in order to justify overturning the death sentence.⁸⁵ Our goal was to produce nothing less than a wholesale role reversal for judges—so that they will feel responsible for ensuring, and will ensure, *both* the procedural *and* the substantive justice of every death sentence.

In Massachusetts, it was not necessary to propose the formal enactment of something like the FJA because the Massachusetts Supreme Judicial Court already possessed similar authority under existing state law.⁸⁶ All that was necessary was for the Governor's Council to highlight that existing authority, and to encourage the Massachusetts Supreme Judicial Court to exercise it freely. And that is exactly what the Council did, in Recommendation Ten.

The idea of substantive appellate review, in my opinion, is an idea whose time has come in America. In most other countries, substantive appellate review is viewed as an essential component of a fair criminal justice system.⁸⁷ Our modern focus in America on procedural justice has all too often left us unwilling or unable to recognize the simple reality that even perfect procedures cannot entirely guarantee perfect outcomes.⁸⁸

⁸⁵ See Symposium, *Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report*, __ IND. L.J. (forthcoming 2005) [hereinafter *Indiana Symposium*] (Panel 4 discussion).

⁸⁶ MASSACHUSETTS GOVERNOR'S COUNCIL REPORT, *supra* note 13, at 27 (noting that the authority was granted following the infamous Sacco and Vanzetti case.); see also *Indiana Symposium*, *supra* note 85 (introduction by Bill Meade).

⁸⁷ See, e.g., Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L L.J. 111 (2002).

⁸⁸ This mistake has been made repeatedly by the U.S. Supreme Court, in the context of the death penalty. See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); see also Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817 (1993); David Rossman, "Were There No Appeal": *The History of Review in American Criminal Courts*, 81 J. CRIM.

Sometimes, juries do make mistakes, even in a procedurally fair trial. One of the values of the innocence debate is that it has served to remind us of that essential truth. We should empower our appellate courts—not just in capital cases, although the momentum seems to be starting there—to protect defendants from such substantive mistakes.

Moreover, there is good reason, rooted in empirical research, to believe that conferring such substantive review power upon the appellate courts may produce better substantive decisions. As Professor Chad Oldfather has recently (and correctly) pointed out,⁸⁹ judges are not always inferior to juries in finding and evaluating facts. Sometimes juries are inappropriately swayed by live testimony whose reliability should properly be questioned—most notably, the testimony of eyewitnesses, government informants, and co-defendants. When such evidence is reduced to a cold, written record, and when it is reviewed by an appellate judge who is well-informed about the risks of unreliability of such evidence, such evidence perhaps can be better confined to its proper, supporting role in the guilt-innocence determination.⁹⁰

Would such a reform (or any other reform contained in the Massachusetts Report) violate the sacred and constitutional right to jury trial? This concern was expressed occasionally during the legislative debates over the Fundamental Justice Amendment in Illinois, and also

L. & CRIMINOLOGY 518 (1990); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

⁸⁹ Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2004).

⁹⁰ It is in this sense that I would characterize Recommendation Nine as an “accuracy-enhancing” reform—because it introduces into the case a new, and arguably sometimes better, substantive decision-maker. Of course, in practice, adding another decision-maker with the authority only to reverse (but never to impose) a death sentence inevitably will reduce the total number of death sentences, and thus might be seen as similar to the aforementioned “balance-shifting” reforms. But this effect does not flow inevitably or directly from Recommendation Nine’s recognition of an appropriate substantive role for judges. Indeed, there are many criminal justice systems around the world in which lay persons and judges are required to collaborate, and ultimately to reach consensus, about verdicts—and such systems arguably may produce better decisions (i.e., with fewer “false positives” and “false negatives”) than systems that rely on juries or judges alone.

Rather, this effect is a consequence of the distinct American legal rule that jury decisions in the defendant’s favor cannot be overturned. (Such a legal rule clearly applies to jury acquittals, and—at least arguably—also applies to jury decisions not to impose a death sentence, in light of *Ring v. Arizona*, 536 U.S. 584 (2002), which held that death sentences must be based on findings of fact made by a jury.) Because substantive judicial review can be one-sided only, the net effect of introducing it in capital cases will be to reduce the total number of death sentences. And the same can be said for Recommendation Ten, which authorizes a death penalty review commission to engage in additional post-trial substantive review.

during the deliberations of the Massachusetts Governor's Council, but it seems misguided. *None* of the proposed Massachusetts reforms in any way alter the fundamental requirement that a death sentence can be imposed only upon the unanimous agreement of the twelve members of the jury. The proposed reforms work *only* in one direction—i.e., they operate *only* to protect a defendant against a jury that imposes a death sentence that is wrongful or that might not be deserved. The reforms are no different, in this sense, from long-established and non-controversial procedures that permit trial courts (in at least some states) to set aside a jury's verdict as against the weight of the evidence, or that authorize both trial and appellate courts (in all states) to overturn a jury's verdict based on legal insufficiency of the evidence.

Moreover, the right to jury trial belongs, first and foremost, to the defendant. What defendant would ever be heard to complain because a trial or appellate judge overturned his death sentence, even if the action arguably violated his right to jury trial? There are a few old cases suggesting that the state has something like a corresponding "right" to jury trial, but such cases ought not be taken too seriously in this context.⁹¹ There can be no doubt that the historic origins of the right to jury trial lie in the protection of the individual against the state, and not in the protection of the state itself.⁹² Just as states are held to be free (despite the aforementioned old cases) to grant a criminal defendant an absolute right to waive jury trial, even over the objection of the prosecutor, so too should states be free to grant a capital defendant the opportunity to gain an extra layer of judicial protection against erroneous or biased jury decision-making in the particular case.

For similar reasons, none of the proposed Massachusetts reforms would appear to violate (at least not to an unreasonable degree) the notion of the jury as "conscience of the community." Again, notwithstanding the proposed reforms, no defendant ever can be sentenced to death without the unanimous agreement of the jury. As for the proposed pre-trial constraints on death-eligibility (Recommendation One) and prosecutorial discretion (Recommendation Two), such constraints have always existed—the proposed Massachusetts reforms would merely extend them. As for post-trial authorization of substantive judicial review (Recommendation Nine), it seems implausible to suggest that such review is impermissible, given the

⁹¹ See *Singer v. United States*, 380 U.S. 24 (1965); *Patton v. United States*, 281 U.S. 276 (1930).

⁹² See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); Nancy J. King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41 (1999).

situation prior to *Apprendi v. New Jersey*⁹³ and *Ring v. Arizona*,⁹⁴ in which some trial judges (e.g., in Arizona) could sentence to death without any jury participation at all, and in which other trial judges (e.g., in Florida, Alabama, and Indiana) could override a jury's life recommendation and impose the death penalty. Nothing in *Ring* or *Apprendi* suggests that there is any problem with substantive appellate review in capital cases, so long as the jury has already made all of the findings of fact necessary to the imposition of a death sentence.

Are there any other potential problems with substantive appellate review? Yes. Two such problems come to mind. First, the idea simply may not work, because appellate judges may not choose to exercise their new powers, especially if they fear the political consequences of reversing a death sentence. If substantive appellate review is to be effective, then it *must* be a power with whose exercise the Court feels comfortable. That is one reason why it would probably be a good idea for the state Supreme Court to issue unsigned (per curiam) opinions, in cases where a majority of the Court concludes that the substantive review power should be exercised.

Second, if there is any collateral problem with the idea of substantive appellate review, it is that such reforms run the risk of undermining the sense of jury responsibility for the capital sentencing decision that *McGautha v. California*⁹⁵ and *Caldwell v. Mississippi*⁹⁶ both seemed to contemplate, and that *Apprendi* and *Ring* both seemed to bolster.

There are two ways in which such an adverse impact on the jury's sense of responsibility might occur under the Massachusetts Report. First, the new pre-trial constraints on death-eligibility and prosecutorial discretion exacerbate a situation that already exists—namely, the fact that juries in capital cases may already perceive their role in the capital sentencing process as substantially constrained by legal rules. The entire so-called “guided discretion” approach to death sentencing, which was enshrined in the Constitution by the *Furman*⁹⁷ and *Gregg*⁹⁸ decisions in the 1970's, poses the same risk, because such an approach seems to suggest to the jury (or at least to some jurors) that the death-sentencing decision is somehow dictated by “the law,” rather than resting squarely in the (discretionary) hands of the jury. Jurors who tend to be uncomfortable making such a momentous decision (i.e., most jurors) may consciously or subconsciously

⁹³ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁹⁴ *Ring*, 536 U.S. 584.

⁹⁵ *McGautha v. California*, 402 U.S. 183 (1971).

⁹⁶ *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

⁹⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁹⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976).

hide behind the judge's "guided discretion" instructions, interpreting those instructions as providing a legal formula for who should or should not receive a death sentence.⁹⁹

Second, if juries eventually become aware of this new power in the appellate courts, this knowledge may diminish the jury's proper sense of moral responsibility for the capital sentencing decision that it makes at the trial. The post-trial authorization of substantive appellate review may effectively re-create the same kind of "shared responsibility" that previously existed in the now-defunct and largely disgraced hybrid capital-punishment systems. The distinction is that this new form of "shared responsibility" is shared across the divide between trial and appeal, rather than within two stages of the trial itself. But this may be a distinction without a difference, if jurors ever become aware that the appellate courts will be looking over their shoulders in a substantive sense.

What can be done about this neo-*Caldwell* issue? The answers are not immediately obvious. One response is to downplay the significance of the problem, based on the fact that capital jurors are one-shot actors who are unlikely to know or to understand the intricacies of appellate review. According to this view, the only thing necessary to prevent a serious problem would be to avoid telling the jurors about the appellate process, so that they would believe that their verdict is final.

On the other hand, capital jurors may not be as naïve as all that. Given the high-profile nature of most death-eligible crimes (especially under a narrow statute like the one proposed in Massachusetts), many prospective capital jurors may have read about a prior capital case, and may be aware of the substantive review powers of the appellate courts. And all it takes is one such juror to taint the next jury with knowledge of the "shared responsibility" for capital sentencing.

If this is so, then the solution to the problem may lie in a carefully crafted special instruction for capital juries, stressing the importance of their role even in a process that involves other actors. It is not advisable, of course, to lie to jurors about their role. But it may be possible, and desirable, to emphasize the truth that jurors remain—even under the proposed Massachusetts reforms—the "first among equals." In other words, capital jurors may need to be told that they are still the central actors in a drama that concededly involves other decision-makers as well, and that without their unanimous consent, no defendant can ever be put to death. Such an instruction may make it possible to ensure that the promise of

⁹⁹ Joseph L. Hoffmann, *Where's the Buck? Juror Misperceptions of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995).

McGautha and *Caldwell* is fulfilled. As the FJA and similar proposals gradually take effect, such problems will need to be addressed.

Despite these obstacles, however, in the end, I am confident that substantive appellate review someday will be seen as one of the significant advances in early 21st Century American criminal justice. Yes, it will require a serious role re-orientation by appellate judges, who have become accustomed to examining criminal cases through a procedural lens only. But this shift in roles can only work to the betterment of the criminal justice system.

OTHER EXAMPLES IN THE MASSACHUSETTS REPORT

Other examples of accuracy-enhancing recommendations in the Massachusetts Report include: involving the state attorney general in prosecutorial decisions to seek the death penalty (Recommendation Two); improving the quality of defense representation at all stages of a capital case (Recommendation Three); instituting a process of independent scientific review (ISR) of all forensic evidence in a capital case (Recommendation Eight); and creating a new death-penalty review commission (Recommendation Ten). Each of these recommendations offers a meaningful way to improve the quality of decision-making in capital cases.

In the case of Recommendations Two and Ten, the improvement will come from the participation of a decision-maker who is structurally less likely to be susceptible to the kinds of political pressures that have often led local prosecutors to seek the death penalty in questionable cases,¹⁰⁰ and that have also been experienced by the state-court judges who review such cases. The state attorney general and the new death-penalty review commission¹⁰¹ are relatively more immune to such political pressures, and their involvement can make for a better decision. In the case of Recommendation Eight, the ISR process will bring greater scientific expertise to the crucial task of ensuring that forensic evidence is properly collected, handled, analyzed, presented, and preserved.

In the case of Recommendation Three, on the other hand, the overall effect on substantive results seems likely to be mixed. The proposed enhancements to capital defense representation seem likely to lead to more

¹⁰⁰ F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link*, 62 IND. L.J. 295 (1987).

¹⁰¹ The Honourable Mr. Justice Peter H. Howden, *Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process*, 21 WINDSOR Y.B. ACCESS TO JUST. 569 (2002); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98 (2002).

extensive discovery of potentially exonerating or mitigating evidence, as well as to more vigorous testing of the prosecutor's case at trial, both of which should enhance the quality of decision-making at the trial. On the other hand, some of the advantages of having better, more experienced capital defense lawyers stem from the superior powers of persuasion such lawyers often will bring to the case, notwithstanding the relative strength or weakness of the prosecutor's evidence. In this way, Recommendation Three may serve merely to shift the risk of errors from death sentences to life sentences, thereby helping guilty or death-deserving defendants avoid the death penalty—much like the Report's proposals for a scientific evidence requirement or a heightened standard of proof.

CONCLUSION

At the end of the day, I return to a fundamental issue: Should the now well-documented problems of inaccuracy and substantive injustice in capital sentencing be viewed as arguments for reform or for abolition? It seems patently obvious that they are strong arguments for both positions—depending entirely on one's personal point of view about (1) which goal is more desirable, and (2) which goal is more achievable. Most of the participants in this symposium, for example, choose to view these problems as arguments for abolition. In my academic work, however, as well as in my work for the Massachusetts Governor's Council, I have consistently chosen to view these problems as arguments for real reform.

Certainly there is room for both perspectives, and I suspect that in the end, even those who favor abolition will find it in their best interests to argue in some contexts (and in some places) for real reform, and in other contexts for abolition. In Texas, for example, abolition is not on the horizon; in fact, it may not even be in the same galaxy. Thus, reform would seem to be the best that the abolition community can hope for in Texas.

Whatever happens in Massachusetts, the Massachusetts Governor's Council Report seeks to make a strong statement about where we are—and even more so about where we are going—in terms of the death penalty in America. Professor Frank Zimring recently has referred to the Report and its recommendations as the leading example of a “post-modern,” “symbolic” death penalty.¹⁰² Professor Zimring also has characterized the Massachusetts Report as the “missing link” that will serve as the necessary intermediate step between broad public support for the death penalty and its ultimate abolition.¹⁰³ Perhaps that is an accurate characterization.

¹⁰² Bazelon, *supra* note 14, at 73.

¹⁰³ Indiana Symposium, *supra* note 85 (plenary address).

But whether or not it is so, I cling to the hope that, among those Americans who continue to support the death penalty, the vast majority would want the death penalty to be rarely applied, and only to cases in which both the defendant's guilt and the deservedness of the ultimate punishment are virtually certain. If I am right, then the Massachusetts Report's vision of a more accurate and fair capital punishment system is one with which most Americans probably are more than willing to live, at least for the time being.

