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Ethics, Science, and the Law of Capital Punishment

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Frederick R. Bieber

I'd like to speak, for the moment, on behalf of our entire Council, especially those who couldn't be here today. We are all very grateful for the opportunity to have this open discussion with students and faculty members here who are concerned with this most important matter.

When I agreed to serve on this Council, I did so principally because, while I felt there may not be the political will in the Commonwealth of Massachusetts to enact legislation allowing a death sentence, we have a tremendous opportunity to influence the 38 other states, the military court system, and the federal government as they reexamine their existing death penalty statutes with an eye towards revising them, improving them, and making the important deliberations about fairness and justice and accuracy. I think all of us involved in the criminal justice system from any vantage point are keenly aware of them. So it was our personal goal to make recommendations that other states might benefit from as well.

As Professor Hoffmann mentioned this morning, we were specifically asked not to deliberate and opine on the many moral, social, and philosophical arguments about whether capital punishment should ever be carried out by the state or the Commonwealth of Massachusetts in this case. However we were most certainly familiar with, and mindful of, those arguments. In fact, I would argue that an awareness of those would be crucial to our work.

In thinking about whether I could separate whatever personal views I had on capital punishment from the specific charge at hand, I included in my own work and study a careful reading of some older law texts. In doing so I discovered the writings of Learned Hand, the late federal judge, who wrote in *The Spirit of Liberty*, (and I'll quote from Learned Hand) "Nothing is more commendable and more fair than that a man should weigh aside all else and seek truth. Not to preach what he might find, and surely not to try to make his views prevail, but to find satisfaction in the search itself." And accordingly, as I just said, we made no recommendation in our Report about whether capital punishment per se should be considered or enacted in our own Commonwealth of Massachusetts. It's my own personal belief that this type of decision belongs to the citizens of the Commonwealth and their duly elected representatives.

In our deliberations, and in preparing our Report, it might be useful for the audience to know that we relied not only on our own collective experience in the investigation and adjudication of homicides and other serious felonies, but also on the input and advice of others—which was similar to some of what we've heard this morning. The Council members were selected and invited to serve by the Governor's office with input from his legal team including Mr. Bill Meade and Mr. Peter Flaherty. Some of us

knew one another before we accepted this appointment and others did not, but together we had scores of years of experience either in the prosecution or defense of felony cases, in the investigation of serious crimes either at the crime scene itself, or at the autopsy bench, or in the laboratory analyzing, interpreting, and testifying about forensic evidence. We also solicited and had input from medical examiners, defense attorneys, legal scholars, and even private citizens. And we asked each of them who contacted us, to put their thoughts and comments formally in writing, and they became part of the official deliberations and minutes of our Council. We discussed every single suggestion and critique and felt really no restraint. I must say candidly, and to my delight, we felt no restraint from the Governor's office or any political body about where our deliberations would take us.

Throughout the Council's deliberations, specifically with regard to forensic evidence, we were all very much aware of the sad and sorry history of erroneous jury verdicts based either on limitations and possible inaccuracy both of fact testimony and of expert witness testimony. These cases have included false or coerced confessions, mistaken eyewitness identifications, and perjured testimony. These three categories accounted for the majority of false convictions for rape and murder tabulated by Professor Gross and his University of Michigan law students in their recent study, released in a prepublication version on April 19th of this year. Their report [*Exonerations in the United States 1989 through 2003*] is available online through the University of Michigan [<http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>]. In the Michigan study Professor Gross and his students reported on 328 documented formal exonerations in the United States since the first DNA-based exoneration occurred in our country in 1989. Results of post-conviction DNA testing were the basis for almost half of these exonerations. According to the data in their report, our own Commonwealth of Massachusetts appears to have the dubious distinction of being tied for fifth place, with fifteen exonerations since 1989 at the time of the report's publication in April. Altogether the 328 men in their report had spent 3,400 years in prison—that is about ten years each on average—for offenses that they presumably did not commit. One hundred and ninety-nine of these exonerations were for murder convictions. It was understandably disturbing to me to read their data tabulations. Seventy-three of these men (or 36% of the 199 murder exonerates) had actually been given a death sentence, and thankfully had not yet been executed.

Our Council members also recognized that other erroneous convictions have resulted in the past from missing evidence, poor crime scene processing, from flawed or outdated scientific methods, or from inept or biased interpretation of results when presented before the finder of fact. Surely such processes that allow so many errors shouldn't be allowed to continue unchanged especially in capital cases.

There are many reasons to seek infallibility in the adjudication of serious crimes. Two stand out to me. The first is the basic issue of justice for victims, society, and defendants. Second, if mistaken convictions do occur because of the problems I've just eluded to, the true perpetrators not only escape justice, but they are also then potentially free to offend again and again.

The above issues relating to fallibility were clearly in mind when the members of the Council turned to the scientific and forensic issues. We recommended what we consider to be an important new array of legal safeguards and reviews for defendants charged with capital crimes and we made other recommendations specifically regarding the review of physical evidence that is proper in such cases.

Among the changes that have been summarized briefly already, we recommend special instructions to the jury regarding eyewitness testimony and the absolute requirement of finding some associative physical evidence that conclusively links a defendant to the crime, even before considering capital punishment as an option. We also recommend new policies for crime-lab certification and accreditation. We also recommend a thorough review of the forensic evidence by a select panel of independent experts, who would be appointed if a guilty verdict were rendered. This recommendation is made with the hope that problems with evidence would then be identified and reported prior to the final sentencing, when guilty verdicts are rendered in capital cases. We believe that this should greatly reduce the chance of a false conviction and/or a capital sentence in the very narrow set of cases that were outlined by Professor Hoffmann and others this morning.

The quality of evidence collection and analysis, whether it's human evidence, eyewitness evidence, or from laboratory analysis, has really improved dramatically in the past fifteen years. There are now expert technical working groups that continue to revise and improve almost all of the practices in use now. For example, videotaping all interviews and recorded statements by suspects and those detained under arrest; the screening of sequential images rather than group photo arrays for eyewitness identifications; improved protocols for the analysis and interpretation of complex DNA mixtures; added requirements for storage and analysis of trace evidence that can be gone back to in time; and the added requirements for development of important quality assurance standards, lab accreditation, and outside audits for laboratories receiving federal funds.

If you will again allow me to play first year law student, I found the writings of the late Justice Learned Hand very interesting in this regard. In one of his earlier essays he spoke about the dynamic tension, as he called it, between ethics, science, and the law and described these as being like three horses drawing the chariot of a civilized society, in which ethics and law move together rather well, but science kept racing ahead or stopping abruptly causing a very rocky ride. He further described the most essential feature of the law as its desire for justice. In a perfect world I suppose that this could mean that a crime committed today would receive the same social sanction as the same crime committed 500 years ago. Perhaps for this reason the law is intrinsically conservative and it may have a hard time dealing with the concept of evolving scientific or forensic technology; the law may want—or desire—bright lines, clear precedents, and permanent distinctions.

It's worth pointing out, from my own perspective as a geneticist, that people have actually been put to death on the basis of a three-locus RFLP-typing result, which by itself would very possibly be considered inadequate for a conviction today. Whether there are likely to be continued developments in technology is certainly not a question. There certainly will be continued motion in this rocky ride that Justice Learned Hand described regarding this three-horse chariot. The significance of forensic evidence, when performed properly and interpreted reasonably is beyond dispute.

To end my formal comments, I'd like to turn away briefly from the review of potentially capital cases to those that are not, because I think one could ask the rhetorical question, "Why shouldn't many of the Council's recommendations apply whether or not it is a capital case?" Indeed, I hope that our society would be asking those questions. It is my own belief that the way in which the scientific evidence and medical evidence is collected, stored, analyzed, processed, interpreted, and presented in court needs to continue to change and improve not just in these capital cases but in all crimi-

nal cases. Hopefully our Report and our Lieutenant Governor's recent Crime Commission Report will help show the way to go in that direction.
