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Russell G. MURPHY[1]

Abstract

A majority of American states recognize the death penalty as a lawful and constitutional sentence for the most serious crimes committed by the most dangerous and blameworthy criminals. However, in recent years, numerous flaws in capital punishment systems have caused courts in the United States to reverse death sentences. Over one hundred death row inmates have been exonerated and released from prison. These same problems – racial bias, untrustworthy evidence, police and prosecutor misconduct, jury malfunctioning – have been joined with more philosophical notions of the limits of government and respect for human dignity to make capital punishment a human rights violation. One state Governor, Mitt Romney of the U.S. State of Massachusetts, proposed legislation that would have eliminated many of the shortcomings of death penalty practice by creating a "foolproof" capital system built on heavy reliance on scientific evidence to establish guilt. This article describes that law, examines political reactions to it, and explores the political implications of Governor Romney's efforts for his current campaign to become the 2012 Presidential nominee of the Republican Party of the United States.

Keywords:

criminal sentencing, death penalty, capital punishment, legislation, public policy, human rights.

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MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Preface

EXECUTION WATCH, FM KPTF, 90.1, Houston, Texas is a Public Radio show that only broadcasts when the State of Texas is executing one of its death row inmates. Hosted by a former prison inmate, EXECUTION WATCH promotes political accountability and responsible social change through legal and political commentary on each case, and provides live coverage at the execution site, Huntsville, Texas.

On February 15, 2011, the author of this article appeared on EXECUTION WATCH to comment on the execution of Michael Wayne Hall. Hall's case presented troubling issues of mental retardation and Texas standards and procedures for determining whether a defendant is mentally retardeditura At the time of his crime (participation in the kidnapping, torture and murder of a young girl), Hall's IQ was 67, he had trouble reading the hands of a clock and making monetary change, and exhibited marginal adaptive skills. The prosecution's expert characterized Hall as "borderline" mentally retarded, but evidence was admitted showing that Hall could function in society, including a TV interview with Fox News that was shown during the sentencing phase of the case.

The unique nature of EXECUTION WATCH is, of course, the fact that the show airs simultaneously with the beginning of the execution process. The EXECUTION WATCH discussion of Michael Hall's case began at 6.00 PM EST. When the author joined the discussion from his law school office in Boston, Massachusetts, the conversation turned to the status of Texas as the single greatest executing state, in comparison to abolitionist states in the Northeast like New York and Massachusetts. Participants were interested to hear that in relatively recent times a serious and sustained effort was made to restore capital punishment as a sentencing option in Massachusetts.

This is the story behind that effort in Massachusetts. It is now told, however, in the shadow of EXECUTION WATCH. Although the author did not know it at the time, it was disclosed the next day that Michael Wayne Hall's execution was started, by lethal injection, at almost the exact moment that the author began his commentary. Mr. Hall was dead by the time the show endeditura

Introduction

Capital Punishment is widely rejected as a criminal sentence under international law. The death penalty is prohibited by numerous international covenants, agreements or treaties. In major parts of the world, the execution of a criminal defendant is regarded as a human rights violation. This article examines the attempt by the Governor of one American state, Mitt Romney of

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Massachusetts, to create a "foolproof" death penalty law that would eliminate many of the shortcomings of U.S. death penalty practice that have led to its condemnation under international human rights principles.

Mitt Romney was elected the 70th Governor of Massachusetts in the Fall of 2002. He served one term, from January 2003 to January 2007. Mr. Romney was a candidate for the Republican nomination for President of the United States during the 2008 primary season. He ultimately lost the nomination to John McCain. It is widely understood at the beginning of 2011 that Mr. Romney is, once again, a candidate for President and a front-runner for the Republican nomination.[2]

Mr. Romney's record as Governor of Massachusetts will undoubtedly be carefully scrutinized during the campaigns that lie ahead. His spending cuts, increases in fees, and signing into law of universal health care coverage for all Massachusetts citizens, will be widely discussed.[3] However, it is unlikely that much attention will be given to the Governor's efforts to reinstate capital punishment in the Commonwealth of Massachusetts.

This article describes Governor Romney's plan to make the death penalty available as a sentencing option in the Massachusetts, a state that, historically, has been strongly opposed to it. It asks the question, was this plan about good public policy, or was it more about creating a "tough-on-crime" image that would counteract the impression that Mr. Romney's Republican credentials were suspect? Was it about politics or law?

Part I of the article describes the legal and political context in which the Romney death penalty proposals were made. Parts II and III explore the Governor's Council on Capital Punishment- its mandate, the recommendations of its final report in 2004, and legislative attempts to enact those recommendations into law. Part IV describes public, media, and academic

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[2] *See* Sasha Issenberg, *A 25-State Midterm Swing for Romney*, BOSTON GLOBE, Aug. 24, 2010 (describing trip as a prelude to a White House bid and one making Romney one of the country's most visible politicians). Romney was characterized as trying to "reposition himself within the (Republican) party, de-emphasizing social issues and focusing instead on foreign policy and economic affairs." *Id.*

[3] *See* Steve Le Blanc, *Romney Used Fee Hikes to Trim Budget*, WASH. POST, Aug. 28, 2007 (detailing budget cuts and fee hikes during Romney administration). Spending was cut by an estimated $1.6 billion including cuts in aid to cities and towns of $700 million and reductions in funding for higher education of $140 million. *Id.* Romney vetoed 250 items in the budget for his last term in office; all the vetoes were overridden by the legislature. *Id.* Governor Romney faced a $3 billion budget deficit when he came into office. *Id.* One response was to work with the legislature to raise fees and fines (33 new fees were proposed and 57 others increased) that ultimately produced $501 million in new revenue in the first year. *Id.*; Andrew Romano, *Mitt Romney on Romney Care*, NEWSWEEK, April 19, 2010 (describing Romney's universal health care plan, which relied on subsidies, exchanges, and mandates, as the model for President Barack Obama's national law).

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reactions to the proposals. Part V reexamines the proposed legislation in the light of current understandings about capital punishment. The article concludes with an invitation to voters to consider whether Governor Romney's campaign to reinstate the death penalty in Massachusetts should be weighed in his current effort to become the Republican nominee for President in 2012.

Part I. Legal and Political Context

Massachusetts's reputation as a progressive, liberal, state is well-known. However, these labels overlook the fact that, in recent years, Massachusetts's government has been divided between a conservative to moderate Republican Governor, a more liberal Democratic Legislature, and a very progressive Supreme Judicial Court (SJC). Mitt Romney's election as Governor in 2002 reflected a trend in voter preference for Republicans that started with the Fall election of 1990. Republicans held the Governor's office from January 1991(William Weld) through January 2007 (Mitt Romney) and the election of Democrat Deval Patrick. Governor Weld was succeeded by Republicans A. Paul Cellucci in 1999, Jane Swift in 2001, and Mitt Romney in 2003.

Mr. Romney's successful gubernatorial campaign stressed a number of "big" issues. What some might call "flexibility" on these issues (as, for example, declaring himself "pro-life" but supporting a right to abortion in cases of rape, incest, or where the life of the mother was threatened; or arguing for a right to "recognize the Creator" at public school events but stating later in his term that public schools should not "endorse specific religious beliefs or prayer in schools") raised doubts at various times about Romney's adherence to core Republican values.[4] Supporting capital punishment was a position that Romney could easily adopt and use to allay those doubts.[5]

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[4] Erin McPike, *Romney: Prayer in School Is A-OK, Sometimes*, The National Journal Magazine, December 14, 2007 *available at* http://hotlineoncall.nationaljournal.com/archives/2007/12/romney_prayer_i.php (detailing Romney's stance on school prayer). Erin McPike posted this article as a contributor for NBC/NJ.

[5] *See* James Alan Fox, Op-Ed., *Baker's Half-baked and Pricey Support for Capital Punishment*, BOSTON GLOBE, July 20 2009 (noting support of capital punishment by current Republican candidate for Massachusetts Governor parallels Romney's stance). The Fall 2010 race for Governor in Massachusetts once again involved a Republican candidate supporting capital punishment as a campaign issue. "No new taxes, pledged gubernatorial hopeful Charlie Baker, a political position likely to resonate with countless Massachusetts voters mired in their own financial crises. In the next breath, the Republican candidate, regarded by many as a fiscal wizard, declared his support for capital punishment, a posture also guaranteed to appeal to those citizens who yearn for seeing the state's death penalty restored. Leaving aside the many compelling arguments against capital punishment, reinstating the supreme penalty would be rather difficult without raising taxes. At least in terms of murder prosecution, the Massachusetts justice system is hardly broken. But if Charlie Baker has his way, the state could go broke trying to fix it." *Id.*

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

However, one thing was relatively clear in the Fall of 2002 and the Spring of 2003. Massachusetts was, at least from the standpoint of the judiciary and the legislature, an anti-capital punishment state, and a state that had gone without the death penalty on the books for 18 years. During that long period there were occasional struggles over the idea of reinstating the death penalty. Proponents came close to passing capital punishment legislation in 1997 and 1999; in 2001 reinstatement bills were rejected by a large margin.[6] The electorate was generally split on the issue; for example, a 2003 survey revealed 53% support for the death penalty.[7]

Historically, these votes and accompanying public opinions were framed by a vote in 1982 approving a referendum to prevent the state constitution from being construed to bar the death penalty. That action resulted in the passing of reinstatement legislation and its subsequent invalidation by the Supreme Judicial Court.[8] Even though pro-death penalty Governors would be regularly elected, rulings by the state's highest court in 1980 and 1984 invalidated death penalty statutes and seemed to establish that Massachusetts would permanently remain among the minority of states rejecting capital punishment.[9]

Two pivotal cases, *District Attorney for Suffolk District v. Watson*[10] and *Commonwealth v. Colon-Cruz*[11], presented significant obstacles to the passage of a new Romney-sponsored capital punishment law for Massachusetts. In *Watson*, a majority of the Supreme Judicial Court ruled that the death penalty law in effect in 1980 was per se unconstitutional under Article 26 of the Massachusetts

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[6] The 1997 vote was 80 – 80 on a conference committee bill that had been approved by both the House and the Senate. This tie killed the bill. In 1999 the House voted down a reinstatement bill 73 – 80. By 2001 support had dropped to 60 in favor and 94 opposed.

[7] Pam Belluck, *Massachusetts Offers Plan for Death Penalty*, N.Y. TIMES, May 3, 2004. An April 2003 Boston Globe/WBZ TV poll indicated that 53% of the Massachusetts citizens surveyed supported capital punishment while 41% opposed it. *Id.* A similar poll in November of that year, by the University of Massachusetts, produced similar results: 54% in favor and 45% opposed. *Id.* The same poll reported that 62% of the respondents did not believe that Mr. Romney could establish a flawless death penalty system. *Id.* This compared with 1996 polling showing the greater level of support at 65% for and 26% against. *Id.* One must then add to this the passage of the referendum question prohibiting the Massachusetts constitution from being interpreted to ban the death penalty and the fact that Mr. Romney campaigned aggressively on restoring capital punishment and won. It is unclear in the Fall of 2010 whether this level of popular support for the death penalty still exists in Massachusetts. Since the defeat of the Romney reinstatement bill, no further polling has been done. The state thus continues to present a complicated political climate that appears to square off the people against the majority of the legislature and, clearly, the state's highest court.

[8] *See* M.G.L. ch. 265 §2 (as amended by St. 1982, ch. 554); M.G.L. ch. 279 §§4, 57, 71 (as amended by St. 1982, ch. 554) [hereinafter *Referendum Legislation*]; District Attorney for Suffolk District v. Watson, 381 Mass. 648 (1980); Commonwealth v. Colon-Cruz, 393 Mass. 150 (1984).

[9] *Watson*, 381 at 648; *Colon-Cruz*, 393 Mass. at 150.

[10] 381 Mass. at 648.

[11] 393 Mass. at 150.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Declaration of Rights, the state's cruel and unusual punishments clause[12], because capital punishment was impermissibly cruel in all cases ("unacceptably cruel under contemporary standards of decency…and…administered with unconstitutional arbitrariness and discrimination").[13] Two years later, Massachusetts voters approved a referendum amending Article 26 to provide that no provision of the Constitution "shall be construed as prohibiting the imposition of the punishment of death."[14] As a result, in December of 1982, the Massachusetts legislature passed Chapter 554 section 8 of the General Laws restoring the sentence of death for certain first degree murders.[15]

The *Colon-Cruz* decision confronted the state constitutionality of this new capital punishment statute.[16] It answered a certified question from a trial judge presiding over the death-eligible trial of a defendant accused of murdering a Massachusetts State Trooper.[17] The Court answered "no" to the question of whether the new capital punishment law was constitutional under the Declaration of Rights, but did so in less than absolute terms.[18] The Court majority explained that the new law "impermissibly burden(ed) a defendant's right against self-incrimination and right to jury trial in violation of Article 12 of the Declaration of Rights."[19] The Court's reasoning focused on provisions in the 1982 death penalty statute that permitted a death sentence only after a jury trial.[20] A defendant who entered a guilty plea in a case in which death was a possible sentence after trial could avoid the risk of being put to death.[21] The inevitable result was that defendants were discouraged from asserting their right

[12] Massachusetts Declaration of Rights Article XXVI. No magistrate of court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

[13] *Watson*, 381 Mass. at 648; *see* Mass. Const. pt. 1, art. 116 (amending Article 26) "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death." *Id.*

[14] Referendum Legislation*, supra* note 9.

[15] Id.

[16] *Colon-Cruz*, 393 Mass. at 152.

[17] *Id.*; *see* Mass. R. Crim. P. 34 (allowing trial judge to present question of law to Appeals Court). "If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court." *Id.*

[18] *Colon-Cruz*, 393 Mass. at 153.

[19] Id.

[20] *Id.* at 163.

[21] *Id.*

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

not to plead guilty and their right to demand a trial by jury.[22] The "Catch-22" thus created made the law unconstitutional because, in essence, it penalized a first degree murder defendant for asserting the constitutional rights of trial by jury and the privilege against self-incrimination by imposing a harsher sentence - death rather than life imprisonment - for the exercise of those rights.[23]

The SJC's decision left open the possibility that future legislatures could pass a constitutional death penalty statute.[24] It took the same approach to capital punishment as that taken by the United States Supreme Court under the Eighth Amendment's "cruel and unusual punishments" clause.[25] That is, today, as in the 1980s, the death penalty is a valid constitutional punishment (at both the state and federal level) so long as the United States Supreme Court's requirements for a lawful Eighth Amendment capital sentence are met.[26] Individual cases and individual defendants, under specific and distinct capital punishment laws, can raise the claim that a particular death sentence was imposed unconstitutionally. These attacks can target the procedures used to sentence the defendant or the precise terms of death penalty statutes relied on for that sentence. The key point is that after 1984 and the *Colon-Cruz* decision, the Massachusetts legislature never passed a death penalty law for the state (and still has not done so). There has thus been no need or opportunity for the SJC to spell out what a constitutional death penalty in Massachusetts would look like.

It thus seemed quite clear that Massachusetts would not become a death penalty state. That was until January, 2003, when Governor Romney, undeterred by past failures in the legislature, went to work on restoring capital punishment. Theoretically, Massachusetts could follow the majority of American states and enact death penalty legislation along the lines of statutes found constitutional by state and federal courts all over the United States. Governor Romney committed his administration to this goal, and more.

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[22] *Id.*

[23] *Id.* at 170.

[24] *Id.* at 159 (stating that invalidation of this statute does not prohibit death penalty altogether).

[25] *Id.* at 151 (noting Massachusetts Constitution does not per se prohibit death penalty); *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (analyzing Eighth Amendment as it relates to death penalty)

[26] *See Colon-Cruz*, 393 Mass. at 151-59; *see, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (holding Eighth Amendment prohibits death penalty sentence for rape of child where did not result in death of victim).

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Part II. The Governor‘s Council on Capital Punishment and its 2004 Report

Governor Romney's 2003 gambit was the creation of a special commission to examine Massachusetts' existing death penalty laws and practices and come up with recommendations for a "foolproof" capital punishment statute. The Governor 's Council on Capital Punishment (Council), established in September of 2003, was composed of four members from the field of forensic investigation, a judge, a law professor, a corporate executive, and four attorneys from the Criminal Justice Section of the Massachusetts Bar Association.[27] Interestingly, no criminal defense lawyer, and no constitutional law expert, was named to the Council.

The Council's general charge was to make recommendations on a new death penalty law for Massachusetts that would be as narrowly tailored, and as infallible ("foolproof"), as humanly possible. The Governor stressed two themes. "First, capital punishment should be limited to a narrowly defined subset of first-degree murders, so that only the worst of the worst murders, and murderers, will be eligible for the ultimate punishment. Second, the death penalty should be administered with a strong emphasis on the use of scientific evidence to help establish the defendant‘s guilt, which will ensure as much as humanly possible that no innocent person will ever wrongly be condemned to death."[28]

After seven meetings and extensive formal and informal communication among its members, the Council issued its final report and recommendations (Report) on May 3, 2004. The Report made ten recommendations, in the form of proposals, covering the following matters:

1) a narrowly defined list of death eligible murders.

2) appropriate controls over prosecutorial discretion in potentially capital cases.

3) a system to ensure high-quality defense representation in potentially capital cases.

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[27] MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT, at 1 (2004) [hereinafter *Report*], *available at* http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf. The members of the Council were: Joseph L. Hoffman, Harry Pratter Professor of Law, Indiana University – Bloomington (Co-Chair and Reporter); Frederick R. Bieber, Associate Professor of Pathology, Harvard medical School (Co-Chair); Judge Robert Barton, Massachusetts Superior Court (Retired); Ralph Boyd, Jr., Executive Vice President and General Counsel, Federal Home Loan Mortgage Corporation; Plymouth County District Attorney Timoth J. Cruz; Donald R. Hayes Jr., MSFS, D-ABC, Director, Boston Police Department Crime Laboratory; Dr. Henry Lee, Chief Emeritus, Connecticut Department of Public Safety, Division of Scientific Services; Attorney Henry Moniz; Attorney Kathleen O'Toole; Carl M. Selavka, Ph.D., D-ABE, Director, Massachusetts State Police Crime Lab System; Michael J. Sullivan, United States Attorney, District of Massachusetts.

[28] Report, *supra* note 27, at 4 (detailing Romney's mandate to Council). .

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

4) new trial procedures to avoid the problems caused by the use of the same jury for both stages of a bifurcated capital trial.

5) special jury instructions concerning the use of human evidence to establish the defendant's guilt.

6) a requirement of scientific evidence to corroborate the defendant's guilt.

7) a heightened burden of proof to enhance the accuracy of jury decision-making.

8) independent scientific review of the collection, analysis, and presentation of scientific evidence.

9) broad authority for trial and appellate courts to set aside wrongful death sentences.

10) the creation of a death-penalty review commission to review claims of substantive error and study the causes of such error.[29]

These proposals require some explanation.[30]

The Council's recommended definition of death-eligible crimes was fairly standard. The Eighth Amendment cruel and unusual punishments clause, as interpreted by the United States Supreme Court, requires that any death penalty statute be consistent with contemporary evolving standards of decency, prevent arbitrary and capricious decision-making in the prosecutorial and jury trial processes, minimize prohibited forms of discrimination, and be limited in its application to only the worst of the worst criminals.[31] Any death sentence that is disproportionate to the crime committed or the culpability of the individual criminal being prosecuted is unconstitutional.[32] Thus, the Romney proposal covered only a very narrow range of the most heinous types of deliberate murders: political terrorism; murder committed to impede a criminal proceeding (to obstruct justice) in which the victim "played an official role within the criminal justice system" (e.g. a police officer, judge, prosecutor, witness or corrections officer); intentional torture killings; multiple victim cases; repeat killings by convicted first degree murderers; and murder by inmates serving life sentences for a prior killing.[33] These categories constituted the "aggravating circumstances" required by U.S. Supreme Court case law.

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[29] *Id.* at 5.

[30] See, generally, Russell G. Murphy, VOICES OF THE DEATH PENATLY DEBATE: A CITIZEN'S GUIDE TO CAPITAL PUNISHMENT (Vandeplas Publishing 2010) (setting forth detailed information on all major issues raised by capital punishment in the U.S. and internationally).

[31] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (applying evolving standards of decency analysis in deciding Eighth Amendment prohibits death penalty for minors).

[32] *See, e.g.*,*Kennedy*, 128 S. Ct. at 2649-2662 (outlining instances where death penalty sentence disproportionate to crime committed).

[33] Report, *supra* note 27, at 6 (listing narrowly defined list of death-eligible murders).

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Prosecutorial discretion was preserved in the Report but was subjected to two primary restraints.[34] Local prosecutors, through the District Attorneys Association, were urged to develop a uniform set of protocols defining the substantive factors that would govern the discretionary decision to bring a capital charge and the procedures to be followed in reaching that decision.[35] The Attorney General would then review any District Attorney's death penalty charging decision for consistency under protocol-based factors and processes.[36] The Report did not make specific recommendations on the content of these protocols.[37]

The inadequacies of defense counsel representation in capital cases was already legendary when the Council began its work.[38] Its Report dealt with this problem by requiring that defendants facing the death penalty be provided with two certified lawyers at state expense.[39] Indigent defendants who could afford only one defense lawyer would be assigned one additional certified counsel.[40] The recommendation specified the experience necessary to be certified, outlined capital-case training, and described types of exemplary performance that would qualify a defense lawyer for appointment in a capital case.[41]

The typical death penalty case is tried under a bifurcated trial format.[42] This means that there is a guilt or innocence phase (in which the jury decides whether the accused committed a death-eligible crime) and a separate sentencing phase (wherein the jury weighs aggravating and mitigating factors to determine whether the convicted murderer deserves the death penalty).[43] Standard practice in the United States is that the same jury is used in both phases of the trial.[44] This system has been severely criticized as creating significant prejudice against a defendant who has been convicted in the first phase [one in which the defense usually asserts that the accused didn't do it (was not responsible) or that the prosecution failed to meet its burden of proof] but must then argue for leniency

[34] *Id.* at 12-13 (recommending guidelines for proper use of prosecutorial discretion in capital cases).
[35] *Id.* at 13 (recommending the creation and adoption of state-wide factors).
[36] Id.
[37] *Id.*
[38] *Id.* at 13-17 (noting that past problems in capital cases often stem from inadequate defense counsel).
[39] *Id.* at 17
[40] *Id.* (arguing that requirement of two defense attorneys ensures performance of trial lawyers will be reviewed appropriately during post-trial proceedings).
[41] *Id.* (setting forth qualifications for capital-case qualified certification). The report calls for all capital-case lawyers to be certified and appear on a list established and maintained by the Committee for Public Counsel Services. *Id.* at 16. "To be "capital-case qualified," a defense lawyer must meet rigorous standards of experience (including capital-case experience), training (specific to capital cases), and exemplary performance." *Id.*
[42] Report, *supra* note 27, at 17-18 (explaining bifurcated trial system).
[43] Id.
[44] Id.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

in the second phase [by asserting that, now that the jury has found the defendant guilty, he is really not the "worst of the worst" based on the mitigating evidence presented in that phase, and, therefore, the defendant should not be sentenced to death].[45] It also sometimes happens in the second phase that the convicted murderer accepts guilt and claims to feel remorse for the killing.[46] A jury that has heard all the gory evidence about how the defendant committed capital murder may not be capable of fairly determining whether this murderer is entitled to mercy at the sentencing phase in the form of a penalty less than death.[47] To deal with this, the Report recommended that a convicted death penalty defendant be given the right to request the selection of a new jury for the sentencing stage of the case.[48] The exercise of this right would be predicated or conditioned on the defendant 's waiver of any challenges to trial evidence that would raise issues of "residual" or "lingering" doubt about guilt. To get a new sentencing jury, the defendant would not be allowed to raise such issues during the sentencing stage.[49] The Report described what the new jury would be told and how it would be instructed on the law.[50] It did not address the cost of this new system or its time-consuming character.[51]

A most intriguing aspect of the Romney approach involved Council recommendations (proposals Five and Six) dealing with scientific evidence. It is generally acknowledged that one of the most pervasive problems with death penalty prosecutions is the unreliability of certain types of human evidence.[52] These include eye-witness identifications, cross-racial identifications, defendant statements while in police custody that are not audio or video recorded, and testimony from informants or potential co-defendants.[53] Proposal (5) of the Report gave the defendant a right to request a specific jury instruction on the known limitations - the trustworthiness and reliability - of these forms of evidence.[54] Such instructions could be given at either the guilt/innocence stage or the sentencing phase of a trial, but could not be requested if the defendant

[45] *Id.* at 18
[46] Id.
[47] Id.
[48] *Id.* (noting new jury allows defendant to make meaningful strategic choices).
[49] *Id.* (indicating defendant may choose between denying guilt in second trial or accepting blame and showing remorse).
[50] Id.
[51] Id.
[52] See supra note 30, RUSSELL G. MURPHY, VOICES OF THE DEATH PENALTY DEBATE: A CITIZEN'S GUIDE TO CAPITAL PUNISHMENT (Vandeplas Publishing, 2010) [hereinafter *Voices*] (presenting major arguments for and against the death penalty) Voices details the death penalty debate through the testimony of the 147 witnesses who participated in the 2004 – 2005 hearings convened to determine whether the death penalty should be reinstated in New York. *Id.*
[53] Id.
[54] Report, *supra* note 27, at 19 (proposing jury instruction on limitations of human evidence introduced at trial).

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

waived issues of residual or lingering doubt about this evidence by requesting a new sentencing jury.[55] The recommendation contained no guidance on how these limitations would be described or defined in the judge's instructions.[56]

Recommendation (6) imposed an unprecedented new requirement for Massachusetts capital cases. This proposal required that the jury at the sentencing phase must find, as a prerequisite to imposition of the death penalty, that there was at trial "conclusive scientific evidence, reaching a high level of scientific certainty, that connects the defendant to either the location of the crime scene, the murder weapon, or the victim's body", and that (this evidence) strongly corroborated the defendant's guilt of capital murder.[57] The physical or associative evidence sufficient to meet these standards was identified as including, but not limited to, "a full single-source DNA profile, photographs, video and audio tapes, fingerprints, and certain impression evidence (e.g., some footwear impressions, tire impressions, tool marks, firearms-related impressions, and other physical pattern matches)."[58] No current state or federal death penalty statute requires such a high level of scientific corroboration.

In keeping with these new demanding standards, Proposal (7) of the Report took the next step toward establishment of a foolproof death penalty by raising the standard of proof required in a Massachusetts capital case.[59] Under the new death penalty law, a heightened burden of proof to enhance the accuracy of jury decision-making would be part of the prosecution's responsibility.[60] At the sentencing stage of the capital trial, as a prerequisite to the imposition of the death penalty (unless the issue of residual or lingering doubt was waived), the jury would be required to find that there is "no doubt 'about the defendant's guilt" of capital murder. If any juror continued to have lingering or residual doubt about guilt, a death sentence could not be imposed, even though a unanimous jury previously convicted the accused on the first degree murder charge beyond a reasonable doubt.[61] The standard of proof at the guilt phase would continue to be beyond a reasonable doubt.[62] But the Council made it clear that a juror could be convinced of guilt but still harbor doubts about such guilt in relation to whether the defendant should suffer the ultimate penalty of death.[63] Thus, as to that sentence, the jurors would have to individually and collectively have no doubt at all about their guilty verdict.

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[55] *Id.*
[56] *Id.*
[57] Report, supra note 27, at 20 (arguing need for scientific evidence to corroborate guilt).
[58] *Id.*
[59] Report, supra note 27, at 22.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Returning again to the use of scientific evidence to corroborate guilt, the Report in Proposal (8) recommended that a system be put in place to provide independent scientific review (ISR) of the collection, analysis, and presentation of scientific evidence used to sentence a defendant to death.[64] This would include appointing an Independent Scientific Review Advisory Committee (ISRAC) to oversee standards for accreditation and certification of state crime labs, medical-examiner offices, and forensic-service providers; development of policies for certification of experts and the qualifications required for work in state offices; and, at the end of a capital trial resulting in a death sentence, the naming of an Independent Scientific Review Panel for that case to conduct a thorough review of the collection, handling, evaluation, analysis, preservation, and interpretation of, and testimony on all other matters relating to, physical or other associative evidence used in the case.[65] The panel would be required to submit a report (to the trial judge, trial lawyers on both sides, and the Supreme Judicial Court) on whether the physical and scientific evidence justified the capital sentence imposed.[66]

The last two Council recommendations dealt directly with the troubling national problem of wrongful convictions. Proposal (9) authorized broad trial and appellate court review of death sentence cases.[67] At the trial level, the presiding judge could eliminate a capital charge prior to trial if the aggravating circumstances relied on by the state were deemed to be legally insufficient.[68] After trial and sentencing, this authority expanded to allow the trial judge to set aside a capital verdict if it was found that the death sentence was "inappropriate on any basis in law or fact," including the trial judge's disagreement with the exercise of capital sentencing discretion by the jury.[69] Mandatory review by the SJC of death sentence cases was required.[70] The SJC should set aside a death sentence if "the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require."[71] Dealing with a matter of some controversy at the national level - procedural mistakes or defaults by the defendant and counsel resulting in procedural bars to substantive review of death sentences[72] - the court was instructed to exercise this authority without regard to any procedural default

[64] Report, *supra* note 27, at 23-25.
[65] *Id.* at 23.
[66] *Id.* at 24.
[67] Report, *supra* note 27, at 25-28.
[68] *Id.* at 26 (stating trial judges should be encouraged to reduce capital-murder charge if evidence legally insufficient to support death penalty).
[69] Id.
[70] Id.
[71] Id.
[72] Needs extensive cite to USSCt case law.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

rules or other procedural barriers to review, including the defendant's failure to raise an issue properly in prior proceedings. [73]

The Council's final recommendation took review of death penalty cases one step beyond formal appellate review. Proposal (10) urged the creation of a Death-Penalty Review Commission as an independent agency within the executive branch of state government.[74] The Commission would have the authority to investigate any claim of substantive error brought by any person subject to a death sentence, i.e., any claim that the person did not commit the capital murder for which the death sentence was imposed, that the person was legally ineligible for the death penalty, or that there were substantive errors that occurred at trial.[75] If the Commission concluded that any capital case might involve a substantive error, the Commission would be authorized to refer the case to the courts with a recommendation for further judicial review.[76]

Part III. Legislative Implementation

Approximately one year after the issuance of the Report, Governor Romney Romney unveiled the legislation that he hoped would enact the Report's recommendations into law. House Bill 3834 (Bill) was introduced on April 28, 2005, as "An Act Reinstating Capital Punishment in the Commonwealth."[77] The Governor described his Bill as representing a "first-in-the-nation approach to capital punishment that provided unmatched protections to the accused while at the same time offering an appropriate punishment for the most atrocious murders."[78] No mention was made of prior constitutional invalidation of Massachusetts death penalty laws or the potential obstacles to enactment presented by the *Watson* and *Colon-Cruz* SJC decisions. Neither the Governor's legislation nor his supporting commentary specifically addressed the issue of cost.[79]

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[73] *Id.* at 27.

[74] Report, *supra* note 27, at 28-29.

[75] *Id.* at 28 (noting that a Commission with such powers is common in countries such as England and Canada).

[76] *Id.* at 29.

[77] AN ACT REINSTATING CAPITAL PUNISHMENT IN THE COMMONWEALTH, H.R. 3834, 2005 Leg., 184th Sess. (Ma. 2005) [hereinafter *Bill*] The Act would have amended Chapter 279 of the General Laws (dealing generally with criminal sentences and including capital sentences) by adding a new Chapter 279A entitled CAPITAL MURDER AND PUNISHMENT. *Id.*

[78] Letter of the Governor to the Massachusetts Senate and House of Representatives (April 28, 2005) *available at* http://www.nodp.org/ma/death_penalty_4-28-5.pdf.

[79] *See* Bill, *supra* note 75. Other legislation was filed in 2005. *See* H.R. 884, 2005 Leg., 184th Sess. (Ma. 2005) (proposed by Rep. Bradley Jones, R. Middlesex, MA); S. 987, 2005 Leg., 184th Sess. (Ma. 2005) (proposed by Sen. Brian Lees R. West Springfield, MA); S. 988 2005 Leg., 184th Sess. (Ma. 2005) (also proposed by Sen. Lees).

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

The proposed legislation generally tracked the recommendations of the Report[80], as follows.

The categories of first degree murder carrying a potential death sentence excluded defendants under the age of 18 and those who were mentally retarded.[81] The statute required murder with "deliberately premeditated malice aforethought" AND any one of the several aggravating circumstances set forth in the Report.[82] This would include, for example, intentional killing of victims whom the defendant knew or believed to be a police officer, parole or probation officer, judge, juror, court official, prosecutor, criminal defense attorney, expert witness or employee of a correctional institution.[83]Interestingly, the proposed statute provided that the punishment for "capital murder shall be imprisonment for life without parole or the death penalty."[84] It also added extensive procedures to be followed on assertion of the affirmative defense of mental retardation including the examination of the defendant by a court-assigned psychiatrist or psychologist.[85] Provisions for the appointment of certified defense counsel included to a right to one appointed lawyer for all post-trial proceedings.[86] The Bill failed to fund certified experts or defense lawyers assigned to assist in the defense and allowed for waivers of certification requirements for appellate lawyers.[87] Also left out of the Bill was a provision that "defense lawyers in … capital cases, at every stage of the case, should receive adequate compensation, and should be provided with adequate funding for all reasonable expenses relating to the investigation, preparation, and handling of the case, including adequate funding to hire properly certified experts to assist in the defense."[88]

Unlike the recommendations of the Report that mandated instructions by the judge on certain types of evidence, the Governor's legislation gave discretion to trial judges (the judge "may" instruct) on whether and how to instruct juries on the known limitations of human evidence such as eye witness testimony and in-custody statements of the accused.[89] On the critical matter of corroborative scientific evidence at trial, the Bill required the jury to find that there was "conclusive scientific physical or other associative evidence reaching a high level of scientific certainty", but the Council's requirements that this evidence connect "the defendant to either the location of the crime scene, the

[80] *See generally* Report, *supra* note 27; Bill, *supra* note 75.
[81] Bill, *supra* note 75, §2, at 3; *supra* note 75, §3, at 5.
[82] *Id.* at §2, at 3.
[83] *Id.* at §2, at 4.
[84] *Id.* at §2, at 5.
[85] *Id.* at §3, at 5-6.
[86] *Id.* at §5, at 9-10.
[87] See id.
[88] *Compare* Report, *supra* note 27, at 16 *with* Bill, *supra* note 75 at §5, at 9-10.
[89] *Compare* Report, *supra* note 27, at 19-20 *with* Bill, *supra* note 75 at §8, at 13.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

murder weapon, or the victim's body," and "strongly" corroborate the defendant's guilt of capital murder were removed.[90] Two different burdens of proof were imposed on capital juries.[91] At the guilt or innocence phase, the standard was beyond a reasonable doubt.[92] On the other hand, the sentencing jury (whether the same jury or a new one requested by the convicted defendant) would have to find that there was no doubt about the defendant's guilt of capital murder.[93] This carried over proposals from the Council's Report.

The Independent Scientific Review Advisory Committee (ISRAC), and Scientific Review Panels for cases in which a death sentence was imposed, were included in the legislation but not expressly funded.[94] The Council Report provision that "adequate funding should be available to support all ISRAC activities" and provide appropriate compensation for service on either the ISR Advisory Committee or on a case-specific ISR Panel of independent experts" was omitted.[95] On the other hand, the Death Penalty Review Commission referred to in the Report was provided for in significant detail including membership, responsibilities, and authority to hire staff and experts.[96] The mandated method for executions in the Commonwealth was lethal injection.[97]

On November 15, 2005, the Massachusetts House of Representatives rejected Governor Romney's proposed death penalty law by a vote of 53 in favor and 100 opposed.[98] This vote was fairly consistent with the historical record of legislative treatment of capital punishment proposals after the *Watson* and *Colon-Cruz* decisions in the early 1980s; in 1999 and 2001, the votes were, respectively, 73 in favor and 80 against, and, 60 for versus 94 against.[99] The closest Massachusetts came to legislative adoption of capital punishment occurred in 1997 when both the House and Senate passed reinstatement bills only to see a Conference Committee defeat the bill with a tie vote of 80 to 80.[100] During the time that Governor Romney was pushing his "foolproof" legislation, 2003 and 2004, four reinstatement bills failed to garner enough support to put

[90] *Compare* Report, *supra* note 27, at 20 *with* Bill, *supra* note 75, at §10, at 15.
[91] Bill, *supra* note 75, at 15-16
[92] Id.
[93] Id.
[94] *See* Bill, *supra* note 75, at §11, at 16-19.
[95] *Compare* Report, *supra* note 27, at 24 *with* Bill, *supra* note 75, at §11, at 16-19.
[96] Report, *supra* note 27, at 28-29.
[97] Bill, *supra* note 75, at §16, at 22.
[98] See Scott Helman, Death Penalty Bill Fails in the House Romney Initiative Roundly Defeated, BOSTON GLOBE, November 16, 2005.
[99] Brian MacQuarrie, *Mass. House Rejects Death Penalty Again*, BOSTON GLOBE, March 30, 1999; Erin C. McVeigh, *Death Penalty Bill Soundly Defeated*, BOSTON GLOBE, March 13, 2001.
[100] Adrian Walker & Doris Sue Wong, *No Death Penalty, By One Vote,* BOSTON GLOBE, November 7, 1997.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

them to a vote.[101] The final, and most recent, effort to collapse was in 2007, when death penalty proponents could generate only 46 votes for restoration against 110 "no" votes.[102] Divided government has thus meant total defeat for pro-death penalty advocates in Massachusetts.[103]

Part IV. Reactions.

The Chair of the Governor's Council was Professor Joseph L. Hoffmann of Indiana University-Bloomington. A self-described "agnostic" on the death penalty, Professor Hoffmann served as law clerk to the late Chief Justice of the United States Supreme Court, William Rehnquist. He was the author of the Illinois Fundamental Justice Act passed in 2004 to deal with problems in that state's death penalty law and practice that led Governor George Ryan to commute the sentences of all death row inmates to life without parole.[104] Professor Hoffman's 2005 article in the Journal of Criminal Law & Criminology, *Protecting the Innocent: The Massachusetts Governor 's Council Report*, is the most comprehensive description of Council's work, the thinking behind its recommendations, and the place of the Report in contemporary thinking about capital punishment.[105]

The entire body of academic commentary on the Romney death penalty law is embraced by this article by Professor Hoffmann and two other pieces. Professor Evan J. Mandery of John Jay College of Criminal Justice wrote a short article entitled *Massachusetts and the Changing Debate on The Death Penalty*.[106]

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[101] See Julie Mehegan, Debate Yields Little Support for Reinstating Death Penalty, SENTINEL AND ENTERPRISE, March 28, 2003.

[102] House Lawmakers Reject Death Penalty Bill, ASSOCIATED PRESS, November 7, 2007.

[103] See Death Penalty Bill Fails in the House Romney Initiative Roundly Defeated, supra note 96. This defeat did not seem to trouble Governor Romney. As reported in the Boston Globe, prior to the vote that killed his proposal, and aware that defeat was inevitable, Mr. Romney stated that while he still believed "that reinstating the death penalty is important . . . he does not consider it as critical as making strides in healthcare, education, job creation and auto insurance reform . . . (according to the Governor) '(t)he death penalty is not at the highest level . . . ."'of priorities going into the future. Id. The symbolic political statement had been made.

[104] See Fundamental Justice Act, S.B. 472, 93d Gen. Assem., Reg. Sess. (Ill. 2003).

[105] Joseph L. Hoffmann, Protecting the Innocent: The Massachusetts Governor 's Council Report, 95 J. OF CRIM. L. & CRIMINOLOGY 561 (2005).

[106] Evan J. Mandery, Massachusetts and the Changing Debate on The Death Penalty, 40 CRIM. L. BULL.1 (2004). Professor Mandery described the basic recommendations of the Massachusetts "commission" appointed by Governor Romney, praised Co-Chair Hoffmann as one of the "honest brokers" among scholars in the death penalty field, and described the proposals as "a serious, honest effort to eliminate error in capital sentencing and, arguably, considerably more than that." Id. Mandery suggested that the Massachusetts effort was a "special case" because "(n)o state has offered wholesale reform of the kind contemplated by the Massachusetts commission." Id. Because of this, the Council recommendations merited very serious consideration. Id.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Professors Jay D. Aronson of Carnegie Mellon University and Simon A. Cole of the University of California at Irvine took a highly critical look at the Council's reliance on science to protect against conviction of the innocent in *Science and the Death Penalty: DNA, Innocence, and the Debate Over Capital Punishment In The United States*.[107] While generally praising the Romney approach, particularly the reliance on scientific corroboration, none of these analyses contained a discussion of potential constitutional obstacles to the passage of a new capital punishment law in Massachusetts or an examination of the political dynamics underlying the Romney effort. These matters are taken up in Part V of this article.

Organizational reactions to the Council's Report and resulting legislative effort were very limiteditura Massachusetts Citizen's Against the Death Penalty (MCADP) issued a highly critical response.[108] It stated the obvious at the outset - science does not, and cannot, answer all the vexing questions about why society should be in the business of executing people.[109] As to categories of capital offenses, MCADP reminded readers that deciding on which killings are capital offenses is an overtly political process.[110] Though the legislation contained a short list of death eligible crimes, it did not, and could not, guard against the likelihood of adding other "crimes of the moment"[111] by future legislatures. For example, during the drafting of the Report and the resulting

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[107] Jay D. Aronson and Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate Over Capital Punishment In The United States*, 34 LAW & SOC. INQUIRY 603 (2009). These two professors noted that some commentators had characterized the Romney plan as "the guilty project" to contrast it with well-known innocence projects around the country. Their article pointed out that the "use of the rhetorical authority of science (relating primarily to the use of DNA testing) to advance abolitionist arguments … carries risks for the abolitionist. *Id.* The first is that DNA evidence is a double-edged sword: the epistemic certainty that defense advocates claim when using it to exonerate the wrongfully convicted can easily be turned against the abolitionist project by increasing the public's perception that those being executed on the basis of DNA evidence are, without a doubt, worthy of execution. *Id.* Second, such arguments perpetuate and strengthen the myth of epistemic certainty surrounding the technique." In other words, the success of the DNA argument for exoneration buttresses the case for the death penalty if it is the product of a scientifically "foolproof" system like that proposed for Massachusetts. *Id.* Underlying both of these arguments is the myth of epistemic certainty that critics regularly attack – science is not foolproof! *Id.* "(D)ata is available from which it is possible to generate estimates of the probability . . .(of matching DNA evidence of a suspect to a murder) . . . . However, even though the stated practice of forensic laboratories is based on settled understandings of DNA identification techniques, the actual production of DNA evidence is, like all other human activities (including basic scientific research), subject to error (e.g., sample contamination or mix-up), bias, unspoken practices and even corruption." *Id.*

[108] Massachusetts Citizens Against the Death Penalty, *Governor Romney's Imperfect 'Perfect' Death Penalty Bill* (2005) http://www.mcadp.org/Imperfect.htm; *see also* James P. Rooney, Massachusetts Citizens Against the Death Penalty, *Science and the Death Penalty* (2005) http:/www.mcadp.org/PoliticsNotScience.htm.

[109] Id.

[110] Id.

[111] *See* Report, *supra* note 27, at 6-12.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

legislation, acts of terrorism were added as death eligible crimes.[112] MCADP argued that these crimes should be handled by the federal government.[113]

The Report's method of checking abuses in the exercise of prosecutorial discretion, review by the Massachusetts Attorney General, was seen as no check at all. MCADP cited review of federal death penalty prosecutions by the U.S. Attorney General to make the point.[114] Such review of capital prosecutions in Massachusetts produced the inconsistency of seeking the death penalty against Gary Sampson (use of federal carjacking statute to support federal death penalty charge for 2 murders committed in Massachusetts) and nurse Kristen Gilbert (multiple killings in a Massachusetts Veterans Administration hospital by mentally and emotionally troubled night nurse) but declining to seek such a sentence for gangster Steven Flemmi, who killed ten people over the course of ten years, including witnesses to his crimes, his girlfriend, and the daughter of another girlfriend.[115] As to jury discretion to sentence a defendant to death, it was noted that requiring scientific evidence of guilt in no way provides guidance on how a jury should ultimately decide whether a defendant should die.[116] There is no science that can assist jurors in making this fundamentally emotional decision. Lastly, getting back to politics, MCADP stated that "the Governor's council (Report) had nothing to do with science and everything to do with politics. Under the protective mantle of forensic technology the governor is merely following the dictates of his party. (U.S Attorney General) Ashcroft has declared war on the twelve non-death penalty states (including Massachusetts). Governor Romney is supplying the multiplier affect (in his Report and proposed legislation), announcing the Report and producing a scientific report in conjunction with Ashcroft's initiatives."[117] In other words, Romney's plan appeared to involve political credibility rather than necessary public policy.

The Criminal Justice Policy Coalition (a group dedicated to educating the public about criminal justice policies, proposals, and practices in the Commonwealth) commented that introducing the death penalty (bill) constituted a failure of government allegedly committed to rehabilitation.[118] It set the wrong moral standard for its citizens by affirming a role for vengeance.[119]

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[112] *See id.*; Bill, *supra* note 75, at §2, at 3-5.

[113] Governor Romney's Imperfect 'Perfect' Death Penalty Bill, supra note 106.

[114] Id.

[115] *See* Massachusetts Citizens Against the Death Penalty, *Gary Sampson: The Case Against Federalization* (2003)http://mcadp.org/sampson.html.

[116] Id.

[117] *See* Science and the Death Penalty, *supra* note 105.

[118] Press Release, Criminal Justice Policy Coalition, CJPC Statement Opposing the Death Penalty and Also Life Without Parole (2005), *available at* http://www.cjpc.org/i_death_penalty.htm; *see also* Press Release, Massachusetts Citizens Against the Death Penalty, *Massachusetts Citizens Against The Death Penalty Opposes Governor Mitt Romney's Effort to Reinstate the Death Penalty in the Commonwealth.* (April 28, 2005), *available at* http://www.nodp.org/ma/stacks/MCADP_042805.html (providing rare comment on cost of

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

The ACLU of Massachusetts pointed out that the Governor's Council did not include any members of the criminal defense Bar.[120] It challenged as "unworkable and dangerous" the so-called "'infallible' death penalty system proposed by (the Governor's) hand-picked panel" and noted that the panel failed to address adequately such issues as human error, racial discrimination, and the inherent limitations of science.[121] Ann Lambert, Legislative Counsel for the organization, pointed out that "past scientific breakthroughs, such as fingerprints and ballistics," that were thought to make criminal prosecutions more reliable ultimately turned out to be far less than foolproof.[122] Speaking directly of the very few cases that might present DNA proof of guilt, Ms. Lambert noted that the "so-called science of DNA remains riddled with human error, ranging from corrupt specimens to laboratory failures."[123] Like all critics of the proposals, the ACLU noted that Romney's elaborate death penalty system would be prohibitively expensive, apply to only a small percentage of murder cases, and have little actual effect in terms of the goals of death penalty sentencing.[124] Finally, and tellingly, Ms. Lambert echoed the theme of this article - "It (the plan) is clearly more of a political move than a serious criminal justice policy proposal. While many states and most countries are moving away from the death penalty, our Governor is attempting to reverse the progress we have made on this issue here in Massachusetts."[125]

The reaction in local and national news reports and editorials to the Governor's Council Report and subsequent legislation was nearly uniformly negative. The following are samples of the commentary.

In an article in the New York Times Magazine in December of 2004, Emily Bazelon quoted Professor Franklin Zimring of Berkeley School of Law as stating that the Romney approach might have been "the first effort to write a solely symbolic criminal statute . . . (that represents the beginning of) the postmodern era of death-penalty discourse."[126]

The day before the House defeated his legislation, Governor Romney, accepting the inevitable, was reported by the Boston Globe as stating that although he still believed that reinstating the death penalty was important, he did

capital punishment). The death penalty is "prohibitively expensive" and could cost more than "$5,000,000" per case. *Id.* "We conclude that the governor is play politics with human life." *Id.*

[119] Id.

[120] Press Release, American Civil Liberties Union, ACLU of Massachusetts Criticizes Romney's Proposed 'Human Error-free' Death Penalty (May 6, 2004) *available at* http://www.nodp.org/ma/stacks/aclu_050604.html.

[121] Id.

[122] Id.

[123] Id.

[124] Id.

[125] Id.

[126] Emily Bazelon, *The Foolproof Death Penalty*, N.Y. Times Magazine, December 12, 2004, *available at* http://www.nytimes.com/2004/12/12/magazine/12FOOLPROOF.html. ...

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

not consider it as critical as making strides in healthcare, education, job creation, and auto insurance reform.[127] After testifying on auto insurance before a legislative committee, the Governor told reporters "(t)he death penalty is not at the highest level" of policy priorities for his Administration.[128] At the very least, this prompt abandonment of something previously treated by the Governor as a matter of utmost importance raised questions about Mr. Romney's motivations.

The Worcester (Massachusetts) Telegram & Gazette editorialized in July of 2005 that "the most compelling reason why it (capital punishment) should not be reinstated is, simply, that punishing a killing with state-sanctioned killing is ethically and morally repugnant.[129] With its risk of irreparable harm, it also is dreadful public policy."[130] SouthCoastToday.com opined that "Governor Romney should be spending more time working with the state's cities to reduce drug and gang-related crime instead of spending far too much time pushing this (death penalty) measure, which does not address the real problems in our communities."[131] In The Republican, a July 2005 editorial noted "if lawmakers believe (that Romney's proposal would create a foolproof death penalty), we've got a tunnel in Boston we could sell them."[132] The Berkshire (Massachusetts) Eagle's view was that "the governor is bucking the tide with legislation he arrogantly believes is foolproof."[133] Also from the Eagle: "[T]he Governor, with his eye on 2008, is staging a little morality play for the GOP faithful in which the Republican, somehow elected Governor of the bluest state in the Union, tries to restore the death penalty to its flabby (criminal justice) system . . . (When the legislature votes his proposals down) Governor Romney can turn to the rest of the country and say 'Behold, they are so sunk in moral relativism, (that) they refuse to kill their heinous criminals!' And the choir says 'Hallelujah for the culture of life and maybe even nominates him for President. It's naked political pandering, dressed in a flimsy negligee of scientific legalism."[134]

The Boston Phoenix, in May 2005, commented that "Republican governors have been using capital punishment to score cheap political points for more than 14 years. (the Romney proposals can be seen as) an offensive but

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[127] Death Penalty Bill Fails in the House Romney Initiative Roundly Defeated, supra note 96.
[128] Id.
[129] Editorial, *'No-doubt' Doubts: Effort to Make Death Penalty Foolproof is Futile*, WORCESTER TELEGRAM & GAZETTE, July 15, 2005, *available at* http://www.nodp.org/ma/stacks/telegram_071505.html.
[130] Id.
[131] Editorial, *Romney's Folly*, SOUTH COAST TODAY, July 18, 2005, *available at* http://archive.southcoasttoday.com/daily/07-05/07-18-05/a09op285.htm.
[132] Editorial, *No Guarantees in Life – Or in the Death Penalty*, THE REPUBLICAN, July 17, 2005, *available at* http://www.nodp.org/ma/stacks/republican_071505.html.
[133] Editorial, *Don't Be Fooled by 'Foolproof' Law*, THE BERKSHIRE EAGLE, July 18, 2005, *available at* http://www.nodp.org/ma/stacks/eagle_071805.html.
[134] Editorial, *Mitt's Morality Play*, THE BERKSHIRE EAGLE, May 2, 2005, *available at* http://www.nodp.org/ma/stacks/eagle_050205.html.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

harmless publicity stunt aimed at boosting his nascent presidential campaign. But, (m)ake no mistake: with a death penalty bill in play on Beacon Hill, there is no guarantee that some horrific crime won't be committed that would suddenly create a firestorm of public support. The state does not kill people in Massachusetts. That's one of the things that makes this a special place to live. Mitt Romney and (his opponent for governor) Tom Reilly should set aside their shameful posturing and show some respect for the people who elected them."[135] /Commentary continued in the same vein. The Republican observed that "Romney is the latest of four Republican governors who have tried to reinstate the death penalty in Massachusetts; it's almost as if he were expected to give it his best shot. He's done that and we give him points for creativity. However, we hope he fails just as the others failed."[136] The ultimate fate of the Governor's bill was predictable from the strong opposition of the state's district attorneys. Once again, the Boston Phoenix weighed in by noting that "(S)everal district attorneys, including Suffolk County's Dan Conley, Middlesex County's Martha Coakley (now Massachusetts Attorney General), and Norfolk County's Bill Keating (now United States Congressman), have spoken out against renewing the death penalty saying they need more resources for fighting crime, not symbolism for Romney's national political resume."[137] Harvey Silverglate, well-known Boston criminal defense and civil rights lawyer, focused on the scientific reliability aspects of the proposal in another article in the Phoenix. "The proposal suffers from an obvious flaw. DNA can provide powerful evidence for exonerating a suspect...but it is considerably less reliable as surefire evidence of guilt. The council implicitly recognizes this when it notes that DNA must connect the defendant to either the location of the crime scene, the murder weapon, or the victim's body, 'in a way that strongly corroborates the defendant's guilt . . . .' The report gives an example of a situation where DNA evidence that links 'a person to a murder victim might (still) not establish guilt of a crime (e.g., semen of a husband and a lover both found in the body of a

[135] Editorial, Still Wrong: Mitt Romney's Embrace of Capital Punishment – And Tom Reilly's Craven Response – Show Why Progressives Must Remain Vigilant, BOSTON PHOENIX, May 6-12, 2005, available at http://www.bostonphoenix.com/boston/news_features/editorial/documents /04669656.asp

[136] Editorial, *It's Nearly Foolproof and it's Fatally Flawed*, THE REPUBLICAN, May 5, 2005, *available at* http://www.nodp.org/ma/stacks/republican_050504.html

[137] Editorial, *The Death Penalty Springs to Life*, BOSTON PHOENIX, May 7-13, 2004, *available at* http://www.bostonphoenix.com/boston/news_features/editorial/documents/03806053.asp; *see also* Jonathan Saltzman, *DAs Rap Governor's Death Penalty Plan*, BOSTON GLOBE, May 4, 2004. "Several district attorneys criticized Governor Mitt Romney's proposal to establish what he insisted would be a nearly foolproof death penalty system, with prosecutors saying yesterday that the troubled state medical examiner's office and State Police crime laboratory can barely carry out current responsibilities, let alone make sure that innocent people don't end up on death row." *Id.*

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

murder victim)"[138] Silverglate later pointed out that fingerprint evidence is notoriously unreliable and cited the Massachusetts case of exonerated prisoner Stephen Cowans (convicted of various assault with intent to kill and burglary charges) in which reexamined fingerprints showed, contrary to expert testimony at trial, that prints found at the crime scene did not belong to him.[139] (Cowans served over six years before being exonerated). The overriding point in this and similar editorials was that science can never be infallible when exercised by fallible human beings. "The problem of course (is) not the science. It (lies), rather, in the fact that human beings administer an otherwise perfect system."[140]

The political implications of Romney's efforts received regular comment. A Globe staff writer noted in April 2005 that the Romney measure could "bolster the Governor's standing among conservatives nationally as he tests the waters for a run for the White House in 2008."[141] Romney's political opponent at the time, Attorney General Tom Reilly, supported capital punishment but opposed the Romney bill because, according to the Globe's writer, the state's crime laboratory, medical examiner 's office, and municipal police departments were underfunded and thus incapable of providing the kind of airtight conditions the Bill envisioned.[142] Reilly's spokesman argued that the Governor should "focus on bringing jobs back to Massachusetts, reining in health care costs and improving our schools, not (pushing) a headline-grabbing bill that he knows has no chance of passing."[143] Another rival, now-Governor Deval Patrick, criticized the Bill and reportedly stated that "the death penalty can never be made foolproof, it is not a deterrent, and the huge costs incurred in capital proceedings divert resources away from actually fighting crime."[144] Patrick called the measure "shorthand politics."[145] Former Democratic Governor and Presidential candidate Michael S. Dukakis agreed because "the death penalty is a diversion from the real problems we face in the criminal justice system including Boston's shortage of police officers."[146] A Boston

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[138] Harvey A. Silverglate & Carl Takei, *Scientific Uncertainly: Romney's Death Penalty Plan Leaves Much Room For Doubt*, BOSTON PHOENIX, May 7-13, 2004, *available at* http://www.bostonphoenix.com/boston/news_features/other_stories/multi-page/documents/03806055.asp.

[139] Id.

[140] Id.

[141] Raphael Lewis, *Romney Files Death Penalty Bill: Measure Sets Out Tight Restrictions*, BOSTON GLOBE, April 29, 2005, *available at* http://www.boston.com/news/local/articles/2005/04/29/romney_files_death_penalty_bill/.

[142] Id.

[143] Adam Jadhav, *Romney Backs Capital Punishment Bill*, BOSTON GLOBE, July 15, 2005, *available at* http://www.boston.com/news/local/massachusetts/articles/2005/07/15/romney_backs_capital_punishment_bill/.

[144] *Id.*.

[145] *Id.*.

[146] *Id.*

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Herald editorial wondered why Romney would invite a fight over capital punishment and answered its own question by noting that "of course this has become an all-too-common pattern – he wants the issue more than he wants the legislation. The ground-breaking legislation would certainly be a Romney administration trophy. But the likelihood that the state would be firing up Ol' Sparky (the electric chair) in our lifetimes is remote at best (A) death penalty bill is likely to be dead on arrival on Beacon Hill."[147]

Not all politicians took a negative view. Philip Travis, a Democratic state representative from Rehoboth, Massachusetts, supported the Romney bill and said "it's not a gold standard; it's a platinum standard."[148] House Minority Leader Republican George N. Peterson Jr. of Grafton strongly rejected the argument that life in prison without parole was just as effective as the death penalty. "What is life worth when somebody takes it? I believe it's worth that individual 's (the killer's) life I do not think we pay justice to that life that was taken by allowing the individual (killer) to get up every day to see the sunrise, to see the sunset, even if it is in an 8-by-8 cell."[149] By contrast, the Senate President, Robert E. Travaglini, and the House Speaker, Salvatore f. DiMasi, vigorously opposed the Romney legislation.[150]

The political nature of Governor Romney's campaign to restore the death penalty in Massachusetts is underscored by two postscripts.

When it was clear that his legislation would fail, Governor Romney's facile response that "the death penalty is not at the highest level" in terms of his legislative priorities[151] exposed the cynical nature of his strategy. The political message had been delivered to those Republicans who most needed to hear it. The Governor could quickly move on to other items on his political agenda.

In an ironic twist, a judge whom Romney had named to the bench, Superior Court Judge Kathe M. Tuttman, ordered prisoner Daniel Tavares Jr. released, in November of 2007, without setting bail at $50,000 as requested by the prosecution.[152] Tavares had a long record of violent crime, including homicide, and was on parole when he was rearrested on charges of assaulting prison guards.[153] While out on release, Tavares allegedly murdered a newlywed couple in the state of Washington.[154] Tavares was reported by the Boston

147 Editorial, *Narrow Death Bill Won't Be A Deterrent*, BOSTON HERALD, May 4, 2004, *available at* http://www.nodp.org/ma/stacks/herald_050404.html.
148 Romney Backs Capital Punishment Bill, supra note 141.
149 Death Penalty Bill Fails in the House Romney Initiative Roundly Defeated, supra note 96.
150 Romney Files Death Penalty Bill: Measure Sets Out Tight Restrictions, supra note 139.
151 Death Penalty Bill Fails in the House Romney Initiative Roundly Defeated, supra note 96.
152 Major Garrett, *Romney Condemns Release of Man Who Threatened to Kill Him, But Will Not Apologize For Judge's Decision*, FOX NEWS, November 23, 2007, http://www.foxnews.com/printer_friendly_story/0,3566,312572,00.html.
153 Id.
154 Id.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Herald to have threatened to kill Romney and other Massachusetts public officials in 2006.[155] When asked to apologize for the actions of his judicial nominee, Romney refused, argued that this convicted killer should never have been released, and asserted that Massachusetts should have reinstated the death penalty to avoid such cases.[156] The father of the murdered bride demanded accountability form Romney because "he was the Governor - he picked this judge he should be answering for what happened." [157]

Part V. Looking Back on the Romney Proposals.

Viewed from what we now know about the substance, policy, and practice of capital punishment in the United States, some general observations can be made about the 2004 and 2005 efforts of Governor Mitt Romney to restore the death penalty to Massachusetts law.

First, the Bill rejected by the legislature, and the Report on which it was based, represented an ambitious attempt to deal with some of the major problems with capital prosecutions in this country.[158] Examples of serious attempts at reform included:

(1) Death eligible crimes were limited to most of the well-recognized categories of the worst killers committing the worst murders. The Eighth Amendment requires that death penalty laws be narrowly tailored and precise. It can always be debated whether a particular type of murder or murderer is so heinous that only the ultimate sanction of death will achieve the goals of the criminal law. However, Governor Romney's approach respected the requirements of proportionality in exemplary fashion.[159]

(2) Abuses of prosecutorial discretion in the form of racial prejudice or inconsistent charging patterns were addressed by the requirements of uniform protocols for capital cases and Attorney General review of prosecutorial discretion.[160] However, the lack of concrete guidance on the substance of these checks raised issues of workability.

(3) Flaws in trial and review processes were remediated in several ways: a system for the appointment of highly qualified defense lawyers was implemented, the defendant was offered the choice of a new and separate sentencing jury, special instructions on the reliability of human evidence were made available to trial judges, post-conviction review of physical and associative

[155] Id.
[156] Id.
[157] Id.
[158] *See generally* Voices, *supra* note 28 (summarizing and analyzing major issues surrounding capital punishment).
[159] *Id.* at ch. 2, pp. 7-8.
[160] *Id.* at ch. 4, pp. 128-36, ch. 5, pp. 153-71Supra note 80 Chapter Four at128 – 136 and Chapter Five at 153 – 171.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

evidence by an Independent Scientific Review Advisory Committee and mandatory appellate review of capital convictions were established, and an additional layer of review was imposed in the form of a Death-Penalty Review Commission. These were significant improvements over existing practices around the country.[161]

(4) Protections against the conviction and execution of the innocent were created through the requirement of scientific evidence corroborating a defendant's guilt, a heightened burden of proof ("no doubt" concerning guilt before a death sentence could be imposed), and the provision of broad powers at the trial and appeals levels to set aside wrongful convictions. It should be noted that these new protections, while reducing well-known threats to valid convictions and sentences, imposed burdens on the prosecution that could deter seeking the death penalty in the first place.[162]

Second, even though these highly demanding and very specific requirements met many of the criticisms of current capital punishment practice, their overall effect was to make it practically impossible to sentence a murderer to death or carry out a death sentence. It is very likely that the layers of processes and standards imposed by the Bill would have deterred prosecutors from bringing death penalty cases, lead juries to reject death sentences, or cause the types of lengthy delays (an average of 12 years or more) in executions that have been condemned as "the death row phenomenon." The question to be asked about the Romney approach today is - what good would it be to have the death penalty available as a sentencing option when the actual operation of the system created by the bill was so cumbersome that it probably would never be sought?[163]

Third, the utter silence about cost in the Report, the bill, or the Governor's supporting commentary, should have doomed the legislation from the outset. As noted in the previous section of this article, the public response to the Romney proposals - by prosecutors, organizations, and the press - immediately identified cost as a powerful obstacle to passage of the Bill. Yet, at no point did the supporters of capital punishment make a serious effort to explain how this elaborate and multi-tiered system would be paid for. In our current difficult economic times, one of the strongest arguments against capital punishment is the financial burden it places on state, county, and municipal budgets.[164] With increasing budgetary pressures in Massachusetts, it is hard to imagine that the death penalty would be such a high priority as to justify the expenditures required to make Romney's system work.

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[161] *Id.* ch. 4.

[162] *Id.* at ch. 6.

[163] *Narrow Death Bill Won't Be A Deterrent*, *supra* note 145. The Boston Herald editorialized that the Romney proposals were "so hideously cumbersome and so narrowly focused that we wonder why the governor would even bother to fight this fight." *Id.*

[164] *See, e.g.*, Voices, *supra* note 28, at ch. 4, pp. 109-28.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

Fourth, the Bill's overwhelming emphasis on science as the ultimate check on wrongful convictions raised unavoidable questions about the limits of scientific evidence. Many critics pointed out that such evidence is only as good as the people and processes used to collect and analyze it. Especially telling were criticisms directed toward documented operational problems found at state laboratories, medical examiner offices, and handling and storage facilities.[165] In addition, by requiring some form of scientific corroboration of guilt prior to imposing a death sentence, the legislation automatically exempted from capital punishment many cases involving the worst of the worst crimes and criminals by precluding capital punishment in the absence of such corroboration. Lastly, it was noted that scientific evidence is far less effective in proving guilt than it is in establishing innocence. For example, the presence of a defendant's DNA on a victim or at a crime scene might just as easily lead to a false conviction as to a supportable finding of guilt. Such would be the case of semen found in a victim's body from both the victim's husband and her illicit lover. That evidence would not provide conclusive corroboration of guilt for either potential defendant.

Finally, the complete failure of any proponent of the legislation to consider its possible constitutional defects made the entire process cynical and counterproductive. After the *Watson* and *Colon-Cruz* decisions by Massachusetts highest court, counsel for any capital defendant would be expected to make targeted state and federal constitutional challenges to the substance and procedures of any death penalty law passed by the legislature.[166] One example of such a constitutional flaw in Romney's legislation involved the Bill's requirement that a defendant waive any objections to trial evidence alleged to give rise to "residual" or "lingering" doubts about guilt in order to get a new jury at the death penalty sentencing phase of a case.[167] To ramrod through a potentially coercive law without even evaluating or discussing possible constitutional issues was at least irresponsible.

Conclusion.

Support for capital punishment has been a longstanding component of the Republican Party platform. Governor Mitt Romney's early-term embrace of a plan to reintroduce the death penalty in Massachusetts was neither novel nor surprising. However, as the campaign for the 2012 Presidential nomination approaches, voters should be aware of the lengths to which Mr. Romney was

[165] *See supra* Part IV (discussing reactions and criticism of the Governor's proposals) Part IV also notes the illusion of "epistemological certainty" about reliance on science to achieve a perfect death penalty system. *Id.*

[166] *Watson,* 381 at 648; *Colon-Cruz,* 393 Mass. at 150.

[167] *See supra* Parts II and III.

MURPHY, R., G., (2011) INTERNATIONAL HUMAN RIGHTS, A "FOOLPROOF" DEATH PENALTY ACT, AND THE POLITICS OF CAPITAL PUNISHMENT, Jurnalul de Studii Juridice, Anul VI, Nr. 1-2, Iunie, pp: 13-42

willing to go in using Massachusetts political and legislative processes to achieve his personal political goals. This article offered at least two interpretations of his campaign. One, it is possible that Governor Romney believed then, and now, that capital punishment is a necessary sentencing option for prosecutors in this state and that the time and money spent on trying to return the death penalty to Massachusetts law was worth his failed effort. Or, two, given the nature of the legislation resulting from the Council's recommendations, and the great political and legal obstacles to its enactment that existed, Mr. Romney's actions were a cynical ploy designed solely to enhance his political standing with the conservative wing of the Republican party. Ultimately, interested and concerned Americans should decide for themselves whether Governor Romney's 2003 - 2005 campaign to give Massachusetts a death penalty was mainly about good public policy or was simply an exercise of raw political ambition. Their answers could influence the results of elections in 2012.

On an international level, even if Governor Romney had succeeded in enacting into law the many real reforms found in the Council Report and its subsequent legislative proposals, not even a "foolproof", error-free, capital punishment statute could remove the fundamental fact that international law will continue to treat governmental execution of its citizens as a human rights violation.

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