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States Seek Ways to Make Executions Error Free

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BODY:

GOV. MITT ROMNEY of Massachusetts does not just want a death penalty for his state. He wants an airtight, scientifically unassailable death penalty, one that is all that a death penalty can be.

Confident in the march of forensic science, Mr. Romney appointed a council last month to write a law that would restore capital punishment to his state -- one of 12 that have abandoned it -- while requiring physical evidence of guilt that would meet "the highest evidentiary standard" before a death sentence could be imposed.

That rule, in a law that would also limit capital punishment to the most egregious kinds of homicide, is intended to guarantee that Massachusetts never puts the wrong person to death.

The governor's effort is entirely beside the point for the minority of Americans who believe that capital punishment is either immoral or unconstitutional because it constitutes cruel and unusual punishment. But Mr. Romney, a Republican, is looking to the broad middle stripe of public opinion, the majority who would accept the death penalty if it could be purged of unfairness and uncertainty.

The last decade has been unsteady at best for death penalty advocates. Justice Harry A. Blackmun of the Supreme Court, who once supported capital punishment, announced in 1994, at the age of 85, that "I no longer shall tinker with the machinery of death."

Then came a wave of appellate decisions overturning convictions, more than 100 around the nation just on the strength of DNA testing. And with it came a growing unease in public opinion.

"Ten or 15 years ago, to be against the death penalty was to be politically marginal," said Austin Sarat, a professor of political science and law at Amherst College and the author of "When the State Kills" (Princeton University, 2001). "No longer. One can stand for the death penalty and say, 'I'm just against executing the innocent.' That's a simple and appealing proposition, and it's one Romney has come to."

Joseph L. Hoffman, the co-chairman of Governor Romney's council and a law professor at Indiana University, said no one had yet defined the governor's "highest evidentiary standard," but he said the council would write proposals to insure the independence and integrity of forensic testing.

Opponents of the death penalty say, as Justice Blackmun did, that even the most finely drawn legislation cannot insure that the death penalty is administered fairly. "There's an arbitrary quality that nobody's been able to uproot and eliminate," said Richard C. Dieter, the director of the Death Penalty Information Center in Washington. "Questions like whether you killed a black person or a white person, whether the police turned over all the evidence -- that's what determines whether you get the death penalty. What county you live in determines it."

In fact, the state you live in is the first determinant. Texas and Oklahoma account for more than half of the nation's 57 executions so far this year.

A requirement of incontrovertible physical evidence in itself creates distinctions that may be troubling. James S. Liebman, a Columbia University law professor who has directed a nationwide study of the death penalty, gives this example: "You might get a run-of-the-mill 7-Eleven robbery where somebody left his fingerprints on the cash register. Then you've got another case where it's a heinous torture-murder thing but the evidence could be a little unclear."

Under the system that Mr. Romney envisions, the first would be eligible for a death sentence and the second would not. "That's not what you want to do," Professor Liebman said.

Then, too, Professor Liebman asks, "Incontrovertible physical evidence of what?"

While DNA testing can prove the suspect's presence at the scene, it tells nothing about the factors critical to most capital cases: motive and intent, the presence of another suspect, the plausibility of a self-defense argument.

Professor Liebman's example is the driver of a getaway car who was, beyond any dispute, at the scene of a robbery-murder. "You'll have plenty of cases where nobody, nobody will say the person driving the car wasn't involved in the case," he said. "But did he have any idea that somebody was going to get killed?"

Professor Hoffmann -- who has invited Professor Liebman to address the Massachusetts council -- says physical evidence should not be a prescription for a death sentence but rather a limiting factor. "I'm just saying that before we as a society put somebody to death, we should be as sure as humanly possible," he said. And he noted that concern about accuracy in convictions is compelling many states to require DNA testing wherever possible and to set up DNA databases and make them available to defendants in all cases, capital or not.

Mr. Romney is hardly the first to try to save the death penalty by circumscribing it. After the Supreme Court temporarily halted executions in 1972, having struck down Georgia's death penalty law, 38 states rewrote their statutes to meet the court's requirements.

That broad effort to retain the death penalty, Professor Hoffman said, testifies to the fact that many people "think it's important for society to make a statement about the value of human life and the importance of certain crimes."

Over the last decade several states have undertaken arduous "proportionality reviews," the compilation of a kind of depravity index to guide appellate courts in making sure that capital punishment is reserved for certain kinds of crimes. New Jersey, which last executed someone in 1963 and has 14 people on death row, has spent years honing its review, generating voluminous studies of possible inequities.

In Illinois, where Gov. George Ryan imposed a moratorium on the death penalty in 2000 after 13 death row inmates were found to have been wrongfully convicted, a commission spent two years in research and debate, submitting a report with 85 recommendations. Some were adopted by the legislature, although a principal evidentiary requirement -- a forensic laboratory independent of all police agencies -- was not. The moratorium remains in place as the legislature continues to debate some of the remaining proposals.

For his part, Mr. Romney said he believed the problems were resolvable. "This," he said in appointing his council, "is a new kind of death penalty."

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GRAPHIC: Photo: The Massachusetts State Prison in Plymouth does not execute anyone. The state is seeking ways to restore the death penalty. (Photo by Stephen Tourlentes/Revolution, Ferndale, Mich.)

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