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Strategy and Remorse in Capital Trials

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I will focus not on the huge number of things that I find commendable and absolutely right about the Council's Report, but on the couple of things about which I still have questions. Let me very briefly say something about each of the three recommendations that our panel is assigned to discuss.

Recommendation four is that the defendant be allowed to have two different juries, one at the guilt stage and a different one at the sentencing stage. The goal is to avoid putting the defendant in a strategic bind: if he vigorously contests guilt at the trial, perhaps even by denying involvement in the crime, it then becomes practically impossible for him to credibly accept responsibility and show remorse at the penalty phase. Having a second jury hear only the penalty phase removes this dilemma, and allows the defendant to choose his strongest strategy at each stage of the proceedings.

I have strong doubts that this is a strategic option worth preserving. Defendants should not, of course, be penalized for using every legitimate means of contesting guilt. But it is quite different to say that we should allow defendants to conceal from the sentencing jury relevant information that might bear directly on punishment. The sentencing jury is wrestling not just with a legal question, but also with a factual one: Does the defendant in fact feel remorse, and does he in fact accept responsibility for his crime? These are highly important considerations for jurors, and to prevent them from seeing the defendant's demeanor and perhaps hearing his testimony at the guilt stage deprives them of potentially critical information. If the jury believes the defendant lied at trial, or improperly tried to blame the victim, or falsely tried to shift responsibility to a codefendant, this can and should affect the sentencing jury's judgment on the sincerity of the claimed remorse. Everyone is sorry after they are found guilty; observing the defendant before that point, therefore, can add significantly to the jurors' understanding of the person they will sentence.

Lawyers will recall that the Supreme Court has faced a related question in non-capital cases, namely, whether criminal defendants should be allowed to argue in the alternative: "I didn't intend to commit the crime, but if I did, then I was entrapped by the government." In *Mathews v. United States* [485 U.S. 58 (1988)], the Court said that there was no reason a criminal defendant should be prevented from arguing inconsistent positions, but it reached this conclusion in part because the jury would be able to watch the defendant take conflicting positions and draw the appropriate inferences. This is the missing step that makes me disfavor the recommendation.

One response to my concern may be that criminal defendants "accept responsibility" for their actions all the time when they plead guilty in return for sentencing concessions, and we rarely pause in those cases to ask if the defendant is really sorry

for the harm caused. But here I think death truly is different, because the capital sentencing decision is different from anything else that juries normally do. In trying to create a world of guided discretion for capital decisions, we should give juries every opportunity to sort defendants by levels of blameworthiness, and we can do that in part by giving the jury more rather than less information about the actual level of remorse.

Recommendation five involves special jury instructions for capital cases, in particular, eyewitness testimony. Here I applaud the Commission's recommendation, because this is a troublesome area and something clearly needs to be done. My only question is whether this recommendation can be restricted to capital cases. If these instructions really create a more accurate and fair trial, is there even a rational basis to deny the same instruction in a non-capital case? I doubt that there is, and while this is probably a desirable change in non-capital trials, it illustrates the difficulty of trying to sell some of these recommendations as being small changes to a limited number of cases.

Recommendation seven requires a heightened burden of proof at the sentencing stage, requiring the jury to find "no doubt" about the defendant's guilt before imposing the death penalty, having previously found at the trial stage that the defendant was guilty "beyond a reasonable doubt." This recommendation purports to give jurors an opportunity to give effect to any "residual doubt" that they have about whether the defendant committed the crime.

This recommendation is problematic on a number of levels. First, to the extent the jurors have genuine, non-trivial doubts about the defendant's guilt, they should have acquitted in the first instance. "Beyond a reasonable doubt" is notoriously hard to define, but it should at least mean that when a juror votes to convict, he or she is certain enough of guilt to make it morally appropriate to keep the defendant in prison for the rest of his life. Stated differently, if there is some lingering doubt—as long as it is reasonable and legitimate—the time to give voice to these misgivings is at trial.

Second, even assuming the appropriateness of asking a jury to apply a higher level of proof at sentencing, I question whether juries will be able draw a meaningful line between the two standards. People who practice criminal law know what a heroic assumption it is that jurors understand the instructions we give them now, especially (but not exclusively) as it relates to the burden of proof. To tell jurors that they now have to apply a differently-worded standard, one that is supposedly higher than reasonable doubt—which many jurors probably, and reasonably, assumed at the guilt stage was the highest standard available—is likely to be futile at best, and bewildering at worst.

As a result, I strongly suspect that a "no doubt" standard will not lead to more accurate or fair results, but instead will serve a different role. My concern is that the instruction will simply serve as a vehicle for jurors to express feelings that are unrelated to whether the defendant before them presents an appropriate case for the death penalty. Confusion about the hair-splitting differences in standards, feelings of anxiety about the enormity of the decision before them, and other "whimsical" concerns (to borrow language from the Court of Appeals for the Fifth Circuit) are likely to find an outlet in the "no doubt" instruction. If limiting the number of death sentences for its own sake is the goal, the proposed instruction will help. But if accuracy of outcomes and guiding juries in the exercise of their discretion is the goal, this instruction is a step in the wrong direction.
