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FALSE POSITIVES AND FALSE NEGATIVES IN CAPITAL CASES

Erik Lillquist

The focus of this panel is on the capital jury, so I want to direct my comments in the limited time I have today to focus on the issue of accuracy in capital case decisionmaking. It borders on the trivial to observe that accuracy is an incredibly important value for any system of adjudication, but by no means the only one. As we are all well aware, concerns over the accuracy of determinations often give way in our system of criminal procedure to other values, such as privacy or dignity, to name just a couple.

Despite these other values, though, accuracy remains important. Therefore, I think it is worthwhile to spend some time considering the extent to which the three proposals being considered by this panel actually improve accuracy. As an aside, I'll note that there is at least one additional value that is often implicated along with accuracy that I'm not going to discuss here, and that is how the use of improved procedures in criminal cases may undermine the perceived legitimacy of outcomes. After all, as Professor Leipold was suggesting in one particular instance, if the proposals we have here are good for capital cases, then why not non-capital cases as well? One not entirely satisfactory answer is cost. But even acknowledging the problem of cost may still lead to increased questions about the legitimacy of outcomes in non-capital cases. And I think it is all too common in considering death penalty cases to forget that they are part of a larger system, and that changes in death penalty procedures may have inadvertent negative effects in other cases.

But that is not my main topic here today. Instead I want to discuss the concern that I believe has animated the considerations of the Governor's Council's Report and that is the problem of inaccurate death sentences or convictions in death penalty cases. Or, to put it more precisely, people who have been erroneously sentenced to death either because they do not deserve the death penalty or because they were not, in fact, guilty. I'll refer to these cases as false positives. They can be subdivided into two categories: those who are not actually guilty of the crime, and those who are guilty of the crime but nonetheless ought not to have been sentenced for death. These are two slightly different concerns.

However, often neglected is that there is a different type of accuracy of which we have to be aware. This is the problem of inaccurate failures to sentence to death. There has been some talk today about proportionality or fairness. But implicit in these ideas is the notion that there are those people who are inaccurately *not* sentenced to death. In other words, we can have people who, for whatever reason, should have been sentenced to death but were not. I will refer to these cases as false negatives. As with false positives, there are two types of false negative cases. The first category are cases in which the defendant is acquitted of the capital crime or perhaps of the crime altogether. The second category includes those cases where the defendant is convicted of the capital crime but the jury decides not to sentence the defendant to death.

Before going further in creating this taxonomy, I want to be clear that I am not expressing any personal opinion over whether or not there should be a death penalty. I am instead working on the assumption that society has decided to implement the death penalty, and the narrow question for us is how to do it. If someone is opposed to the death penalty, then the false negatives I am talking about here are absolutely no problem. But assuming that we are going to have a death penalty, in evaluating these

three proposals the question arises: what is their overall effect on accuracy, both false negatives and false positives? On this score I believe that the benefits of the three proposals are more tenuous than the Council has recognized.

Let me start with the seventh proposal, in which the Council recommends the use of a "no doubt" standard of proof in capital cases. For those of you who are interested in more detail, I have recently written an essay on this topic that is forthcoming in the *American Criminal Law Review*. Thus, I will keep my comments brief.

Among evidence scholars it is now well understood that standards of proof really do nothing to improve accuracy itself. I am aware that I am engaged in a bit of an oversimplification here, but standards of proof simply allocate errors among the parties. Thus, in civil cases, the preponderance of the evidence standard of proof is thought of as allocating the risk of errors equally between the plaintiff and the defendant. In criminal cases, the reasonable doubt standard is understood to shift that allocation of error, such that there are far more false negatives in the system than false positives. That is, there are far more inaccurate acquittals than inaccurate convictions.

But the reasonable doubt standard itself does not do anything, at least directly, to reduce the total number of errors that the system commits. (Indeed, to the extent that there is any effect on errors, just about everyone thinks that the reasonable doubt standard probably increases the overall number of false results for the system.) Thus, because standards of proof simply allocate errors, using a heightened standard of proof in capital cases—say the "no doubt" standard—will only reallocate errors between the government and the defense. It will not lead to a reduction in the total number of errors.

Before going any further, I want to be clear that I am assuming that the "no doubt" standard works in the way the Council hopes. As I have detailed elsewhere, I am dubious about that proposition. I am not sure that the instruction itself will have much impact on the decision that jurors make, but assuming that it does, the proposal still also poses some deeper epistemological questions for the legal system that Professor Leipold started to touch upon. For instance, proposing a "no doubt" standard assumes that that level of certainty is possible for human decisionmakers. The reasonable doubt standard itself emerged out of a history of epistemological thought that believed that humans were incapable of that sort of thinking. That gave rise to the notion of moral certainty and reasonable doubt. So, at that level, the proposal breaks rank with well over 200 years of epistemological thought.

Nonetheless, assuming that the proposal actually does work, the obvious benefit would be a reduction in the number of false positives. What the Council appears to have overlooked is that it will also increase the number of false negatives. That is, we ought to see more cases in which deserving defendants—assuming that there are people who deserve the death penalty—will be spared of that penalty. That is a cost to the system, and one that death penalty proponents may not be willing bear.

One obvious limitation to this observation is that using the "no doubt" standard at the sentencing stage, rather than at the guilt phase, is going to limit the type of false negatives we are going to achieve. That is, the no doubt standard will only shift individuals from sentences of death to sentences of life of imprisonment without the possibility of parole. The way the Council has put forward the proposal, we are not going to see these people actually acquitted of crimes, because the standard of proof will only be applied at the sentencing phase. It is worth noting, however, that the corresponding benefit of the standard will also be similarly limited. What we are gaining are not acquittals of the falsely convicted. They remain convicted, and face a

lifetime of imprisonment. We have simply removed the possibility that they will be sentenced to death. And for those who are presently sentenced to death, there really is, in practice, only the chance of a death sentence actually being carried out. The odds of actually being executed even after a death sentence are probably lower than 20%, with a lot of variability between jurisdictions.

I have no idea what the “correct” balance of false positives and false negatives are in this context (again, assuming that such a balance can exist). My point is only that it is not obvious to me that the reduction of false positives resulting from a no doubt standard is necessarily worth the cost in additional false negatives. After all, if we assume that we have a death penalty to serve some purpose, then undermining it by increasing the false negatives is not a good thing. Whether this instrumental bad thing is outweighed by the good of decreasing false positives, I cannot say. I just want to note that it is not clearly true. I suspect that the true proponents of the death penalty would be even more skeptical.

Having made that observation, I think the same logic applies to the Council’s fifth recommendation. Here the Council has suggested taking steps that are designed to limit the probative value of certain kinds of evidence to the jury. Most of the proposals do nothing to make the evidence itself more accurate. Undermining the probative value of evidence through the use of jury instructions strikes me as no different than altering the standard of proof. Instead of increasing the amount of proof required, the Council simply decreases the weight of the evidence itself. This ought to simply decrease the confidence the jury has in its conclusion. Thus, such instructions would pose exactly the same dilemma as a no doubt standard. Is it worth increasing the number of false negatives in order to lower the number of false positives?

What is of even more concern here is that the Council apparently intends to give such instructions at the guilt phase. In effect, the Council is increasing the standard of proof at the guilt phase. This ensures that with this proposal, unlike with the Council’s seventh proposal, there will be an increase the number of individuals who actually are erroneously acquitted. In other words, the Council here is directly trading a reduction in erroneous death sentences for an increase in erroneous acquittals. Even people who are not strong opponents of the death penalty might be concerned with this possibility.

Despite the gloominess of my analysis thus far, not all is lost. I do believe that there are two potential benefits to the Council’s fifth proposal. First, the effective increase in the standard of proof here will not apply to all cases, but only to those that rely on the types of evidence laid out in this recommendation: eyewitness testimony, cross-racial identifications, statements made by defendants while in custody, and statements made by codefendants or informers. Indeed, the more that the prosecution relies on such testimony rather than other types of evidence, such as the scientific evidence that is going to be discussed later today, the greater the increase in the standard of proof required of the government. We can assume, I think, that the relevant subset of cases to be affected—again those that disproportionately rely on things like eyewitness testimony—disproportionately contains innocent defendants, at least compared to those cases that do not rely on such evidence. If this is right, then we can justify a higher standard of proof in such cases in order to avoid excessive erroneous convictions in such cases. In other words, if we were more likely to find innocent defendants being wrongly tried where there is a lack of scientific evidence, these recommendations may be justifiable.

Second, the recommendation that the police should audio- and videotape defendant's statements should also lead to an increase in accuracy, because it will provide better, more reliable evidence. And better evidence should have the effect of decreasing both false positives and false negatives. There are, of course, other costs associated with such proposals but they are outside my scope today. But viewed simply as a matter of enhancing accuracy, this proposal strikes me as quite commendable.

I will conclude by simply noting that the fourth recommendation has a possibility of raising some of these other issues but others here on the panel are going to discuss it in more detail, so I will leave it to them. Thank you very much.
