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Negative Effects of Capital Jury Selection

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THE NEGATIVE EFFECTS OF CAPITAL JURY SELECTION

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First, the burden of proof and $1.75 will get you on the bus. There is no such thing as a jury that presumes innocence. It is counterintuitive. It is not the way we think. Is there anyone in this room who thinks Kenneth Lay is innocent of anything? When you start out trying a death penalty case you have an awful crime that people are going to be upset about; and a jury that thinks: "where there's smoke there's fire." The police would not arrest someone who hadn't committed a crime. So increasing the burden of proof is a nice thing to be able to say and may help a juror who is trying to fend off the other jurors. But in real life it is not going to make any difference, in my opinion. My opinion is anecdotal perhaps, but it is informed by 132 murder trials that I've tried myself.

I also want to address the Report's failure to talk about not death qualifying jurors. The reason to have two juries would be to have a non-death qualified jury make a determination as to guilt or innocence. The only reason to have a death-qualified jury would be predicated on the theory that a juror who opposes the death penalty—who would never give the death penalty and thus could not apply the law. The only law such a juror couldn't apply is the law to impose the death penalty.

If you're going to have two juries, and if that's an option, then the option should encompass the defendant's right to choose not to have a death-qualified jury decide if he did it or not. Let me tell you why we don't want that: the most errors get made in the most serious cases. A jury is far more likely to try to presume innocence when faced with a burglary of an attached garage than if you're talking about a dead baby. People feel things about dead babies. I feel things about dead babies. Everyone does. And we can all intellectualize all we want do, but we vote with our hearts first and then our heads follow second.

Thus, you end up with a jury from which the prosecution has been able to excuse—for cause—the jurors most likely to seriously question the evidence. That's what concerns me about this recommendation. A lot of these recommendations are great. So when I pick out things to pick on, I'm simply picking on things, not saying that there aren't good things in here—there are. If the jury instruction idea would include that they should be written in English, preferably not by a committee of lawyers, that would be good to. You have to be from Illinois to understand this problem. Our no-death verdict is: "We, the jury, cannot unanimously find that there are no mitigating factors

sufficient to preclude the imposition of death." Only a committee of lawyers could write something that bad.

What happens is you have a jury from which everyone who opposes the death penalty is excused for cause, from which everyone who waivers on it (if it was Bin Laden, I could do it, but it would have to be that bad) gets excused peremptorily by the prosecution. It's been my experience that people who oppose the death penalty tend to be pretty honest about it, but people who support it tend to lie and will say upon rehabilitation, "oh, sure, I'll consider mitigation if the judge tells me to."

The death penalty is such a watershed political issue that it allows for the identification of jurors who are sympathetic to the prosecution point of view, the pro-authoritarian point of view. It removes people who have experiences in their lives that cause them to just say, "hold on a minute, let's compare these two police officers' testimony and see if there are contradictions." These people get exposed and they're removed. So you are most likely to have the most inaccurate false positives, to borrow my colleagues term here, in the most serious cases because everyone who is likely to question the facts has been removed for cause or peremptorily by the prosecution, who want, as Judge Murphy pointed out, to win.

Being a prosecutor has got to be the hardest thing in the world because you have two competing interests: doing justice and winning. In my experience, the ego thing takes over. I'm talking to a lot of lawyers and law students at this conference, right? We are all laid back and not control freaks. We don't care who wins as long as the game is played well? This is not human nature. Thus, I have real concerns about the recommendation that does not include not death qualifying the fact finding part. There are lots of different ways you could think about how to avoid this problem, like picking a larger jury and death qualifying later. I wish the Commission had thought about this problem.

I would also like to see a requirement of good jury selection. Jury selection is terribly idiosyncratic around the country. When I'm trying to explain to a client what jury selection is, they think you just go out and pick them. They don't know that it's a process of elimination that is carried out in an intimidating courtroom environment, with a seal, and a person in a robe, and a bailiff who is ordering people around while armed. It's set up to scare you to death. As a result, jurors look for the "correct" answer to the question—the civics answer. So, if a juror is asked by the judge if they will "hold it against the defendant if he doesn't testify if I tell you that the law is you can't hold it against him, will you follow the law?" The civics answer is: "No, I won't." But the real answer is: "Yes, I will." So, you need to be able to ask those questions and ferret out whether what you have is a challenge for cause or whether you need to exercise a peremptory on either side on many of these thorny issues that come up in criminal cases.

So I would have liked the Report to address the concept of individual-sequestered, attorney-conducted voir dire. My experience is that at the beginning of jury selection the attorneys and judge take their time and are careful; they give a lot more attention to procedural protections. But once the knife is bloodied it becomes easier to kill, and the dynamic changes.

As for the recommendations that require more skepticism when looking at evidence, I don't disagree with my colleague here on the panel. I don't think it is going to result in a lot of acquittals. First of all, you don't get a lot of acquittals anyway. You do lose cases, if you do defense work, because of presumption and because the police do catch the right guy some of the time. But it is worthwhile to give jurors tools to

counterbalance the intuitive belief that the prosecutor's pointing of a finger counts as evidence. Because jurors simply believe identification testimony, it is important to explain to them the ways in which to think about what could be wrong. Identification testimony has this aura of believability about it; and usually the witness believes it themselves, even if they're wrong. You don't often have people getting up and saying, "I don't like your shirt so I'm going to just point at you and say you committed the robbery." Normally, by the time they get to court, through the process of suggestion, reassurance, et cetera, even if they're wrong, they believe they're right.

Finally, I have to disagree with Professor Leipold about remorse. I know juries care about remorse. But what if you have someone who didn't do it? What are they supposed to do? Look sorry that they didn't do it? And how does one show remorse? Jury studies tell us that when a defendant cries he looks phony, and when he doesn't cry he looks cold. There is no good way for a defendant to behave that will communicate remorsefulness, even if they feel it, to juries. So, in the jury instruction recommendations I would have liked to have seen the issue of remorse addressed, in particular, telling the jury that remorse is not a reason either to kill or not kill, even though it does figure greatly for a lot of juries.

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