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A PSYCHOLOGIST'S PERSPECTIVE ON CAPITAL JURIES

Steven J. Sherman

I'm the psychologist here. All the law that I know I learned from Professor Hoffmann and teaching a course with him on the law and psychology of culpability, blame, and punishment. And because he's so good, I have learned a lot. I do work in the area of judgment and decisionmaking: the kinds of decisions that jurors have to make. So I suppose that qualifies me to some extent.

I have a couple of narrow issues that I want to focus on, but before I begin the comments that I prepared, I want to take a minute to respond to some things that Professor Lillquist said about errors in judgment. As psychologists, we know there are two kinds of errors: misses and false alarms. I too think the Council erred in saying that this Report was geared to increasing accuracy. It's not. It's geared to changing the balance of errors. Is that worth it or not? I think the reason this all started was we want to change the balance of errors. People in Illinois were being executed and they were innocent. If you want to stop that you have to change the balance of errors. It would be lovely to say we are going to reduce the false positives without increasing the false negatives, but you aren't going to be able to do that very easily. So I think that the Council was aware that they were not necessarily increasing accuracy, but they were trying to prevent innocent people from being executed. And those two kinds of errors are not equal in my mind.

Now I want to address the issue of the choice of two separate juries versus staying with one jury. There are two real concerns that I have with this issue. The first is from the defendant's point of view. The very language allows the defendant a meaningful choice between two strategies, as if this is strategic, or about a game, rather than about capital crime and execution. Imagine that you're an innocent defendant who has just been found guilty at the innocence-guilt stage. Now you have a choice between two strategies. "A": I know I'm innocent. I can stay with this jury who has already made an

error in finding me guilty and try to keep convincing them that they should have some doubt; or, option "B": I can say I'm remorseful for a crime I didn't commit. This is untenable. How would you like to be an innocent defendant at that stage of the trial? I don't find it meaningful. I do find it strategic.

The second problem has to do with the question: Can the same jury really make a second decision with a higher level of proof after they've made a decision beyond a reasonable doubt? The jury knows that they have found the defendant guilty with a very high probability of guilt, whatever that is. Can they now set an even higher standard? As a psychologist with a lot of years of experience I have a simple answer: No. There are all kinds of mechanisms that come in; commitment, the arousal of cognitive dissonance, especially hypothesis confirmation biases. Once you believe that you have a viable hypothesis, you can't get out of it. The group that finds someone guilty is already entertaining a hypothesis of almost certain guilt. Can they move from that? I doubt it.

When I first read the Council's Report the one thing I found the biggest problem with was this kind of second jury decision, for the reasons that I've articulated. I suggest instead that the trial should start with twenty-four jurors, rather than twelve, who are qualified in whatever way you qualify them. The twenty-four jurors hear all the same evidence, and they don't know which later jury they will ultimately be on. They hear all the evidence. After all the evidence is in, you randomly take twelve of them and assign them to the simple guilt-innocence jury. The other twelve must decide either guilt and capital punishment or not. The second jury doesn't have to worry about guilty but no capital punishment. They're just deciding whether this defendant is guilty with capital punishment, and they don't know what the other jury will do.

Under this proposal, you would give instructions to each jury according to whatever you think the appropriate standard of proof. I don't necessarily believe that those are meaningful. But you may try the best you can to make one sound higher than the other. Then you let the two juries deliberate separately. Under this scenario, there is no jury that has made a prior decision that is now trying to make another decision on top of it. It also allows both juries to hear all the evidence, which I think is perfectly fair when you're trying to make these kinds of decisions. It also avoids the problem of the poor defendant facing the original dilemma I laid out at the beginning. You could get the outcome, which will probably not be a happy one, where the guilt plus capital punishment says execute him, and the other one says acquit him. I think you have to decide ahead of time if it's the guilt-innocence jury that has the say over the guilt. The second one would only have a say over the question of capital punishment.

Those are the thoughts of a social psychologist trying to conduct an experiment with randomization. But there is a real serious side to this theory. I do think that there are some good aspects to having two juries, but I also recognize that there are some serious problems. I think the Council can probably improve on this suggestion. I welcome comments and other suggestions. Thank you.
