

Winter 2005

The Problem of Death Qualification

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Recommended Citation

King, Nancy J. (2005) "The Problem of Death Qualification," *Indiana Law Journal*: Vol. 80: Iss. 1, Article 15.
Available at: <http://www.repository.law.indiana.edu/ilj/vol80/iss1/15>

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THE PROBLEM OF DEATH QUALIFICATION

Nancy J. King

I want to emphasize three things. First, I think this proposal has wonderful possibilities for an impact in non-capital cases and also on investigation techniques. Someone pointed out earlier that the proposal did not set out regulations for changing investigation, confession, or eyewitness identification procedures. But it does through the back door—through deterrence. I think the more that police practices and prosecutorial charging decisions are deliberately designed to increase accuracy, the better off everyone is, including victims and the whole society.

Second, I'd like to talk about the dual jury/bifurcation issue because it seems to be something that we are all wrestling with here on this panel. Perhaps if we talked a little bit about it, we might actually come up with some way to respond to the concerns that were raised. I understand that the option presented in the proposal is designed to allow the defendant the choice at the sentencing stage of either raising the residual doubt or not. And I, like Ms. Lyon, read that and thought: this misses the point of bifurcation. I thought the point of bifurcation was to provide the defendant a guilt-innocence decision by a jury that had not been death qualified. I want to talk more about that because I think that there were some efforts here to address that.

First, you might increase the accuracy of the guilt-innocence phase decision, eliminating the bias that comes from death qualification, by death qualifying after a guilty verdict. But, I don't think you could death qualify the same jury that imposed guilt. I think that at that point the jury is too focused on whether this person deserves the death penalty as opposed to the death qualification that takes place before the trial

starts when it's really an abstract issue. You are talking about abstract principles before the trial: "Would you ever impose it? Would you never impose it?" I don't think that it would be a good idea to design a system where you have an extra large jury and then after guilt, you pick off those who may not be qualified to determine the sentence.

Dr. Sherman's proposal to have dual juries is extremely imaginative. The difficulty with it is the potential for inconsistencies. If one of the values that we are trying to promote is accuracy, while also maintaining the "appearance" of accuracy, I cannot think of anything that might undermine the appearance of accuracy more directly than to have two juries who have seen the exact same evidence come to different conclusions. I'm really struggling with that possible outcome.

Perhaps you could have a shadow jury: one death qualified, and one not. The death-qualified one only gets to do anything if the non-death qualified jury finds guilt. Then you avoid the problem of retrying the case.

The problem I see, particularly in conjunction with the Report's requirement of scientific evidence to corroborate guilt, is that at the sentencing phase you are inviting jurors to question whether guilt is proven by the standard that you have set out. Instead of avoiding the problem of residual doubt, perhaps there is a better way to manage the presentation of the information to the jury: two shadow juries, one death qualified, and one not. The defendant can't waive the shadow jury. It would be required in every case, so you don't have the strategy choice.

Finally, we have yet to talk about something that I think is pretty important to the administration of the death penalty: the election of the trial bench. I think it's insane—this is my own opinion—to have trial judges elected. We should appoint trial judges or adopt some sort of modified system of popular election. You might also think about the issue of whether a defendant can waive a jury. In most places, a defendant wouldn't waive a jury in favor of a judge because judges are elected and the incentives are fairly unidirectional.

In Arizona, judges are appointed in some cities and elected in others. When the Court in *Ring v. Arizona* [536 U.S. 584 (2002)], said the jury now has to find the aggravating features for the death penalty, all of a sudden, judges that had been doing death sentencing could not do it anymore and it went to the jury. Guess what? More death sentences in some jurisdictions in Arizona. Some people think that that has to do with the incentives on the trial judges and the difference between juries and judges in those different areas in Arizona. It's a big issue that underlies the administration of the death penalty, and that might be something we could talk about.