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# Open Discussion: Capital Jury

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## OPEN DISCUSSION

BRADLEY

I was a prosecutor in Washington, D.C. for a number of years. A number of the speakers dumped on the “residual doubt” standard. My own experience is that it would make a difference in some cases.

Actually my only contribution to the death penalty literature was a very small comment proposing this standard. The most common case that I tried in Washington was an armed robbery of a High’s Store—a High’s Store is like a 7-Eleven—where the

robber would come in and there would be nobody else in the store except the clerk. The robber would take the money from the clerk and run out. A person who met the robber's description would be caught in the vicinity within an hour, brought back, identified by the clerk, later identified in a lineup by the clerk, and then identified at trial by the clerk. The robber might have some money that roughly corresponded to the amount that was taken from the High's Store, but that was about it.

As a prosecutor I felt obliged to try this case, assuming that the clerk was certain in his or her identification. But I recognize the difficulties with eyewitness identifications. I always got convictions in these cases on the "beyond a reasonable doubt" standard. I had residual doubt in these cases, and I think if the jurors had been asked, especially had they been told something about the unreliability of eyewitness identification, which they presumably would be at some point in this trial, the jurors might also have had residual doubts. If the clerk had been murdered, and there was another person in the store who was our sole eyewitness instead, I think that is a classic case where people are willing to find the defendant guilty beyond a reasonable doubt, but would say, nevertheless, "I have some residual doubt about this. I am not absolutely certain." So my own opinion, as a former prosecutor, is that this standard means something. I recognize, however, that it may be redundant in this particular proposal because of your additional requirement that there must be scientific evidence.

COLFAX

It seems like there are two problems that are competing here: the difficulty in coherently expressing remorse, and the problem of death qualifying a jury and the bias that falls out. Is there a consensus among the practitioners about which of these is a bigger problem? The Commission recommendation seems to focus on the problem of expressing remorse coherently. But I'm hearing, from at least Ms. Lyon, that maybe the other problem is bigger. So, do you think there is any consensus among practitioners?

LYON

We would all give whatever limb we dislike the most for good jury selection any day, and to not have to death qualify jurors on guilt-innocence. I think that the remorse issue is an issue that you can address appropriately if you have the ability to actually talk to your jurors and find out what matters to them.

Ms. King, one thing that you said about death qualifying should be explored in a more general way. But life qualifying requires specifics, when you are looking for Morgan excludables; under *Morgan v. Illinois* [504 U.S. 719 (1992)], anyone who would always impose a death penalty also can't sit. In order to find that out you have to ask really specific questions.

SUNDBY

Can I just add to that comment? Because one of the interesting things I've found in interviewing jurors is if you talk to death jurors, jurors who served on cases that came back death, they often will tell you that their number one reason for imposing the death sentence was lack of remorse. You know, "If he had shown one shred of remorse, I never could have given a death sentence." And I have no doubt that the defendant's perceived lack of remorse was part of the juror's emotional equation. Yet, what I found really interesting was that I would talk to jurors who were life jurors, those who served on juries that returned sentences of life, and when I asked them, "Did you think the defendant was remorseful?" the overwhelming percentage said, "Oh, no. I didn't think he even pretended to be sorry."

So it is not that the showing of remorse is a prerequisite to getting a life sentence. Actually what I've found is that the key factor was whether the jury thought the defendant was accepting responsibility on some level. Not that he was saying, "I'm sorry for what happened," but, rather, "I'm not trying to pull the wool over your eyes." If, on the other hand, a defendant claimed innocence at the guilt phase, and now at the penalty phase said, "Let me tell you how I ended up doing this terrible crime," the verdict almost uniformly was death. The jury's reaction was, "How dare you try to trick us at the guilt phase and now try to tell us your life circumstances at the penalty phase?"

I thought your comment, Professor Leipold, was very interesting. I have some sympathy too, because I'm a big believer that the more juries know and have to process, the better the decision. But I'm not sure . . . and I'd want to think about it more . . . but I'm not sure that this true bifurcated system as we're talking about it would necessarily keep the jury from having that information, because often the strategy at the guilt phase is simply to put the state to its test. Have you proven it beyond a reasonable doubt? Juries tend to not distinguish between that strategy and the defendant actually taking the stand and saying, "I didn't do it." They tend to react the same way—"Oh, you were trying to argue there was a reasonable doubt. How dare you do that and now at the penalty phase, you know, tell us the circumstances which brought you to this?" So I think remorse has to be understood in a very qualified way.

I have interviewed jurors from two cases where they believed the defendant was truly remorseful. In both cases, the jury returned very strong life verdicts. So if you could convince the jury that the defendant felt true remorse, I think it really is a strong life factor. But in most cases, it's just simply not an issue, in the sense that we usually think of remorse as the chest beating, "I'm sorry, how could I have ever done this?"

SHERMAN

I agree with Professor Sundby that Shakespeare would be the best to have as your lawyer. But what defendant is going to get off at the remorse stage from capital punishment? The sociopath—the sociopath can convince you of anything. People love sociopaths until they find out that they're sociopaths. They look you in the eye and—there they are. So, this whole remorse issue is a very hard one because you're allowing people to—in a sense—not be executed on the basis of how well they can either write plays or act. I don't know how much weight we want to put on that.

LYON

This is also very connected to racial biases and class biases too—as to whether someone is sincere or fake. There's that whole need, I think, to look at someone whom you convicted of committing some awful crime as somehow less than human. That's a lot easier for the majority to do towards a minority defendant. So you have that whole issue that gets wound up in there. Which means, again, you've got to have a chance to talk to these jurors to have any chance of getting at these feelings that all of us have. If there is an unbiased person here, please introduce yourself to me later. I'd love to meet you.

POKORAK

I'm a long-time capital postconviction attorney, and I was not convinced by the argument that because aggravators are in the first phase you have to death qualify jurors. The point of death qualification supposedly is that we don't want jurors at sentencing to make ill-judged, anti-law decisions because they want to skew the punishment. But if there is actually a bifurcated trial, then the first jury has no incentive to find anything but the facts on which the aggravation exists. So, in Texas, all the aggravators are in the first phase. And there is something called non-capital death. And those people are not death qualified.

So, by unpeeling it, I start to suspect that it's actually what we should say death qualification is, which is one of the finest tools of the prosecutor to identify those jurors who are least likely to question the state's evidence. And that's my experience. I wondered if anybody would like to talk about why you would say you must death qualify people.

LYON

One of the studies that undergirds the *Lockhart* [*v. McCree*, 476 U.S. 162 (1986)] decision really struck me. What they did is they had twelve juries who saw videotapes of the same trial. On half of the juries it was mixed. That is, people who would be excluded because they are opposed to the death penalty, and people who wouldn't be excluded. And half of the juries were only death-qualified jurors. And what was interesting to me was that the mixed jurors got the facts right more often. That's

because they are not politically homogeneous; they disagree with each other. And so somebody will point out this little thing or point out that little thing, and they come to a consensus that tends to be more accurate. That's another reason to not want death-qualified jurors. If what you want is greater accuracy as to whether the person did it and if they did, what they did, you know, then it would seem to me that there would be lots of good arguments for it.

Sometimes I get asked about the elected judiciary. Do you know what motion I file first in a death penalty case? Motion to continue this trial to an uneven numbered year. I do not want to have my case be any part of a reelection campaign.

A lot of the fighting over death qualification is related to the pink elephant in the room, which is that death qualification helps the prosecution win the case. It just does. They like it. I understand. I prefer winning, too. But that's not supposed to be their function.

#### LILLQUIST

I think that it's important to keep in mind that death qualification has two independently perverting effects on the process. One is to lower the standard of proof that's applied by the jury—death-qualified juries require far less certainty before convicting. That's one way in which they pervert the process. As I've already discussed, that reallocates accuracy, but it doesn't necessarily affect overall accuracy.

But Ms. Lyon is right to point out that death qualification also has the perverse effect of actually affecting the accuracy of the determinations that are made, because they are more homogeneous—less heterogeneous—decisionmaking bodies, and, therefore, do a poorer job of synthesizing the information that comes to them at the trial. Particularly, they tend to be more pro-authoritarian, and thus much more likely to believe evidence from the government and less likely to believe evidence from the defendant. And that skews outcomes in a bad way on the accuracy front.

I think it's important to keep in mind that the death qualification issue really is an important one. I think it's unfortunate that it was not addressed in the Massachusetts Report.

#### HOFFMANN

This is really fascinating, to watch the way the discussion flows, because to some extent it replicates a similar flow that occurred internally during the discussions that we had about these issues. Without commenting on what the right answer should be, because that is what you are all here for, I just want to summarize what seems to be a kind of a jigsaw puzzle, because all of the pieces kind of fit together.

Let's start with Ms. Lyon's observation that you don't need to death qualify for what goes on at the guilt-innocence phase. That's correct. They could do the aggravators as well as the guilt-innocence determination without being death qualified. But, you're going to have to death qualify them eventually. You're going to have to have a death-qualified jury eventually for what happens at the sentencing stage. So then Ms. Lyon points out, quite correctly, that, for a variety of reasons, it seems remarkably unhelpful to have a huge jury and try to then death qualify the members of that jury to get down to the one you're going to need at sentencing. So we'll rule that out.

Now we go to the possibility of having two death-qualified juries; one death qualified, and one not. And we'll do that at the front end, so that we don't have to mess with it after the guilt-innocence determination. But at that point, one of the reasons to do that is so that both of the juries will be hearing the same recitation of the guilt-innocence case. What that means is that Professor Sundby's point, about how juries at sentencing find very troubling the fact that either the defendant affirmatively contested guilt, or alternatively that the lawyer put the government to their case, now both juries are going to see that and the defendant isn't going to be able to get out of that in any way, shape, or form, when it gets to sentencing.

LYON Well, Shakespeare can get you out of it. I promise you.

HOFFMANN I understand.

LYON I promise you. You can get out of it. That's the process.

HOFFMANN No, I understand. I'm not trying to say how this all developed. But it seems to me that virtually every comment fits together. It is precisely the kind of discussion about these issues that was generated internally as well.

LEIPOLD Can I just say a word about that, Joe?

HOFFMANN Absolutely.

LEIPOLD I began my comments by saying that the two-jury idea was justified in the Report by the idea of preserving the defendant's strategic choice, something which I don't think is worth doing. I phrased the point that way because that's what the Report said, but it wasn't obvious to me why you couldn't justify a seriatim two-jury system to avoid death qualifying the first jury. If you decide that it is interfering with the accuracy of the guilt-innocence stage to death qualify, then you can avoid doing so

with the separate trial jury. Then you get a second jury that you do death qualify. And so I wasn't opposed . . . .

HOFFMANN

In every case.

LEIPOLD

Right. Then you have your sentencing phase in the normal course. Now, there will still be difficulties of how much do you get to introduce at the sentencing phase. Perhaps there is a duplication of evidence problem, but I was just surprised that the two jury recommendation seemed to be justified on what I thought was a weaker ground rather than the accuracy ground of avoiding the death qualification of the trial jury.

KING

I just want to say one other thing. I'm not that troubled by the sentencing jury knowing whether or not the defendant pled guilty or went to trial. In fact, I'm not so sure that the sentencing jury, if there's a separate one, couldn't hear that the defendant admitted his guilt. Now, I know there is a lot of difference of opinion on that. Maybe sentencing should have nothing to do with the person's assertion of their right to a jury trial beyond a reasonable doubt. However, it's relevant to sentencing. I think pleading guilty is relevant. But, I'm in the minority.

BRADLEY

Does anybody plead guilty without getting the state to waive the death penalty?

LYON

Well, it was done once. He was executed in Illinois. Residual doubt plays in lots of different ways with juries. Sometimes it's whether you've got the right guy. Sometimes it has to do with, sort of, moral culpability or level of malevolence. All of that kind of calculus goes into how juries make decisions. Whereas judges and perhaps lawyers would say that pleading guilty is an expression of remorse, for juries, pleading guilty is a removal of all doubt and they can feel much more comfortable.

SUNDBY

Yes, and it's not necessarily a formal plea of guilt. You will often find what some lawyers will call "pleading my client guilty slowly." Which is that you present your guilt phase defense in a way that you are acknowledging: "Yes, this is the person, he did it. Now, let's try to find out what it is that happened." And in fact, if you followed the sniper trials in Virginia, the lawyer's strategy for the younger one, Malvo, very much followed a strategy of pleading him guilty slowly. They weren't going to try to deny he was involved with it. His lawyers were just stupendously good. Whereas, if you remember, the older one, Muhammad, he was denying guilt altogether. So there is a way of pleading guilty slowly without formally entering the guilty plea.

- KING                    But it doesn't say here whether you can waive these procedures. Can you waive the jury trial and guilt, or is society's interest in accuracy so strong that you're going to insist on this level of proof for every conviction?
- HOFFMANN            The standard of proof with respect to scientific evidence is non-waivable under the proposal so . . .
- KING                    It's in the sentencing phase.
- HOFFMANN            In the sentencing phase, right. But there is nothing that happens in the guilt phase that would be non-waivable. In other words, a defendant could, in fact, plead guilty, even if they didn't have a deal to avoid death. Although I've always thought that it was more or less *per se* ineffective assistance for a defense lawyer to do that.