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UNINTENDED CONSEQUENCES OF THE SCIENTIFIC EVIDENCE REQUIREMENT

Jeffrey J. Pokorak

I'd like to start with the 1971 case of *McGautha v. California* [402 U.S. 183, 204 (1971)], in which Justice Harlan wrote:

To identify, before the fact, those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority appear to be tasks which are beyond present human ability.

I refer to this as "Harlan's problem of systemic imperfection." Now I have personally changed a lot since 1971, when I was twelve, but I do not think human ability or human nature really has changed that much since the time of the second Nixon administration.

From that conclusion by the Supreme Court, I think one can go in two basic directions. First, one could travel the cynical route that Justice Harlan takes, and ultimately conclude the legal system cannot perfectly regulate such decisionmaking processes in advance, so there is no reason to try. Or, in the shorter version: if mistakes are made, and innocent people are executed; well, that is just an acceptable cost of a death penalty system. The opposite path from the one taken by Harlan and the Supreme Court starts with the same premise that such decisions are, in fact, beyond the ability of people—prosecutors, judges and juries—to perfectly effectuate. However, the cautious or enlightened path from that reality would lead to the conclusion that in light of the inability to guarantee a correct result, our society and laws just should not tolerate any death penalty system.

I am discussing this fundamental divide by way of introduction. Thank you very much Professor Hoffmann and my thanks to Indiana University for giving us an opportunity to think about a third way of meeting Harlan's "problem of imperfection." The question posed at this symposium is whether one can build into a system that is necessarily imperfect some procedures which will create a scheme that is significantly less dangerously flawed and therefore leads to more perfect implementation and results?

In the discussion so far, we have focused primarily on lessons learned from post-conviction exonerations. Most scientific determinations of innocence, however, thankfully occur before trial. How does that happen? In the average case, the local police agency decides that they have sufficient evidence on some suspect, they run after and catch them, they put them in jail, they take some evidence from them and then send some evidence to the state crime lab or to the FBI for analysis. In DNA cases in which there is some evidence from the crime that can be tested, regardless of the police belief that they have caught the right person, a high percentage of those cases—once over 60%—are returned by the lab as exonerations. So, even in those cases where, according to the police, there is a huge amount of evidence suggesting the guilt of a suspect, they are more often than not wrong. I do not know what the current FBI exoneration rate is, but even if it has been halved to one-in-three exonerated by scientific testing, that still represents an amazingly high error rate for local law enforcement. And these mistakes are made during the investigative stage of a case before the adversarial system and the involvement of lawyers and experts for the defense. Additionally, I have never heard of any reason to believe that police and prosecution mistake rates are any less in the vast majority of cases that have no DNA evidence to test.

I have four overall points that I want to discuss which flow from this investigative error reality. First, Dean Lefstein pointed out that a great service of the Council's Report is that it openly acknowledges by its very creation to everyone throughout the country that all death penalty schemes currently employed in this country are no longer legitimate in the sense that none of them represent a credible way of determining who should live and who should die. That inescapable conclusion has been proven by the number of postconviction exonerations and the number of reversals because of substantive legal errors. There is a growing realization by everyone in the community, both pro-death penalty and anti-death penalty, that the old systems are too flawed to be sustained. And this view is gaining general public acceptance. Even the people who are very much in favor of death as punishment, including prosecutors and judges, now face much more skeptical juries than they did even ten years ago. That juror skepticism translates into very time consuming and costly prosecutions that end in life verdicts. That is not a good result for a prosecutor who has a competitive attitude or political interest about these things.

Then what is the point of this particular legislation? Is it, in fact, to find a hyperaggravated class of people who we will seek the death penalty against? Now, that is also, I believe, a very noble endeavor. In *McCleskey v. Kemp* [481 U.S. 279 (1987)], Justice Stevens writing in dissent noted that statistics indicate that in hyperaggravated crime cases (for example when several people are killed by one defendant) improper discretionary factors seem to drop out of the decisionmaking process. When such improper factors, like statistically significant race effects related to the race of victims and the race of defendants, are eliminated, we achieve a much more just result in sentencing. Therefore, hyperaggravating the predicate crime can go a long way toward a less flawed system. I am not convinced, however, that this Council's Report as currently constituted actually applies only to hyperaggravated crimes. I'll give two examples.

First, narrowing the class of death-eligible defendants based on their purported motive is a poor way to define a hyperaggravated category of criminal behavior. It is very hard to accurately prove an individual actor's motive and it doesn't really do much to narrow the class of those eligible for death. You can put whatever the "crime du jour" is into the motivation slot—it could be 'drug king pin' (§ 1988 in the Omnibus Crime Act) or today's 'terrorism' (which is the choice of this particular proposal)—without really addressing an individual's actual death-worthiness. Indeed, from all current evidence from the flawed federal prosecutions, 'terrorism' as a motivation-based aggravator is likely to increase racial sentencing disparities rather than reduce them. Another example is the proposed torture aggravator. It will only take one prosecutor and one court in one case to figure out that almost every murder involves "torture." Rape, for example, is not an enumerated aggravator in the Council's proposal. How long will it be before every rape/murder case is treated as a "torture" case? Recall, we have no less authority than the international tribunals for Rwanda and the former Yugoslavia to cite for the proposition that rape is, in fact, a type of torture. This is an example of the phenomenon of aggravator creep, in which statutory categories which are designed and drafted to be narrow quickly become very broad in practice. I believe the Council tried to create a very narrow group of prerequisite crimes but failed to consider the very real expansion likely immediately after adoption of the plan. To be meaningful, a proper hyperaggravating factor ought to be fact and result based, as in "more than one person killed," or defendant fact and status based, as in someone who has already killed, received a life sentence, and then while in prison kills again. Only by drafting such spe-

cific hyperaggravators can the Council be assured that the defendants sentenced to death are truly the “worst of the worst.”

My second criticism with the Report’s proposal for narrowing is found in its requirement for proof of physical evidence linking crime and defendant. Who leaves physical evidence at a crime scene? Generally the most careless or the most passionate—by that, I mean people who are not criminal masterminds. Such people, who are sometimes referred to as ‘street criminals,’ are not the people who are necessarily the most deserving of the death penalty. Rather, the people who are the least effective at planning ahead, taking care during a murder, and cleaning up afterwards are the most likely to receive death. This is in spite of the fact that these acts are often thought of as the best indicia of malum in se mens rea or true evilness if you prefer. The Council’s proposals are likely to fall most often on people who commit crimes in a sloppy fashion leaving physical evidence behind.

I have been trying to figure out a way that it could happen, but I do not believe Timothy McVeigh would be eligible for the death penalty under this proposed statute. I do not recall any physical evidence that actually linked McVeigh to the crime itself as that type of evidence was blown up in the bombing. The only physical evidence that you might argue would be evidence is his signature from buying the fertilizer—but there was no scientific evidence that it was the same fertilizer that actually blew up at the scene. The same problem exists with a criminal mastermind or crime producer, like Osama bin Laden, as there is no physical link between him and his crimes. Crimes that seemingly require the most evil intelligence and intent could not be tried as capital offenses under the Council’s recommendation.

So, then, what does this proposal that may become a statute do? It does not really hyperaggravate the prerequisite crime. It does not necessarily identify the most deserving of death. Its design is limited, it seems, to increasing the certainty that those people who are put on death row are guilty of some crime involving a death. And those people will be the careless and the passionate who are often the poor, the drug-involved, and people with mental illness—not the clever planners or removed masterminds. For example, there is significant debate about whether there is any physical evidence to tie Scott Peterson to the crime at all. It may in his case come down to a hair strand that does not tell time. Those types of defendants would be excluded from capital prosecution under the Council’s plan.

Next, speaking as a death penalty defense lawyer, I anticipate a valid *Ring* and *Apprendi* challenge to the scheme. In *Apprendi v. New Jersey* [530 U.S. 466 (2000)], the United States Supreme Court held, roughly, that every fact that increases the range of punishment and available sentence must be found by a jury beyond a reasonable doubt. Now this was stated with a number of caveats, particularly for our purposes the Court’s clear statements that the *Apprendi* holding did not apply to death penalty schemes. But, just two terms later, the Court had to eat those words because the law is a strange and wonderful thing that sometimes creates its own inevitability. The constitutional logic of *Apprendi* could not be kept away from the Courts death penalty jurisprudence. Therefore, in *Ring v. Arizona* [536 U.S. 584 (2002)], the Court recognized that any fact that is a necessary precursor to the imposition of a sentence of death, rather than life, must be found by a jury beyond a reasonable doubt.

That is why I’m willing to take up this question that Dr. Selavka passed on: Can anyone explain how the reasonable doubt standard can apply to this Report’s language? The Report indicates that a capital jury “should be required to find that there is conclusive scientific evidence . . . , reaching a high level of scientific certainty, that connects

the defendant to either the location of the crime scene, the murder weapon, or the victim's body, and that strongly corroborates the defendant's guilt of capital murder." It seems that the *Ring* "beyond a reasonable doubt" problem with this proposal is the inevitable problem anyone encounters trying to find an adjective that exists beyond a reasonable doubt. The three critical adjectival or qualitative phrases in this jury instruction are "conclusive scientific evidence," "high level of scientific certainty," and "strong corroboration." Not only do these phrases invite *Ring* challenges, they also necessitate a wonderful lengthy and very expensive trial battle between prosecution and defense experts regarding how the jury should apply the "beyond a reasonable doubt" standard to less stringent scientific proof standards.

Responsible courts could work some of this out by requiring jury instructions that very narrowly tailor the adjectival phrase applications. However, we should be mindful that there are jurisdictions where these issues have not yet been resolved even after decades of application. In Texas, for example, one of the sentencing aggravators is whether there is a probability of the defendant's future dangerousness, the speculative existence of which the jury is to determine beyond a reasonable doubt. Go figure. I still haven't figured that one out. So I perceive an *Apprendi/Ring* problem in the proposal lurking in the space between reasonable doubt and the adjectives used to describe this sort of questionable quantitative evidence.

One great example of this proof space that I refer to is the application of fingerprint evidence. In the Kerry Max Cook case, a brutal rape-murder in the Dallas area, the conviction turned largely on one fingerprint. There was a fingerprint that belonged to Kerry Max Cook on the sliding glass door to the woman's house where the murder took place and where her body was found. The fingerprint expert—a local police officer—testified that not only was it Cook's fingerprint, but that the officer could tell within two hours when that fingerprint was put on the window. Of course, we all know that's bullshit. And yet the Court allowed the testimony.

Kerry Max Cook's case was reversed twice. He was found guilty and sentenced to death three times in that case until there was an investigation outside of the judicial process that proved Cook's innocence and pointed to the murderer. Not surprisingly, the likely killer had had an affair with the victim that ended in an unhappy break-up. The murderer, then, was the most likely suspect, not the rather mentally fragile person, Kerry Max Cook, who happened to be in the neighborhood of the crime at the time it happened. So the conclusive scientific fingerprint evidence in that case certainly connected the defendant to the location of the crime scene and the victim's body. Under the Council's recommended punishment proof standard, that would have been sufficient evidence for execution in Massachusetts. Whether such fingerprint evidence additionally "strongly corroborates" guilt is unclear and would depend on limiting standards created by a court after conviction and sentence of death. How an appellate court would handle such an issue, in the face of a jury determination that death was the appropriate sentence for a brutal crime and a brutal killer is an open question. I for one have seen bad facts make bad law too often to count on the courts to create standards to save the innocents like Kerry Cook.

My fourth point involves defending capital cases and the costs associated with zealous representation. The proposal does a great job of addressing a number of prosecutorial, judicial and jury issues such as the burdens of proof discussed above and certain aspects of case bifurcation. But I believe the proposal improperly ignores law enforcement discretion regarding the resources they will commit to any particular case, and the resulting decisions of what case will be pursued vigorously and what evidence will be

gathered or preserved. The failure of police to properly handle evidence can be the difference between conviction or acquittal. Think O.J. Simpson. Likewise, without law enforcement evidence standards, there is too much likelihood that murders in one locale will be handled very differently than murders in the neighboring town. And just subtle differences in evidence gathering will mean the difference between capital and non-capital prosecutions.

The Report also doesn't flesh out, and I'm sure any resultant statute would have to, those procedures which focus on the defendant's individual characteristics which are required as a prerequisite to the constitutionality of any death penalty scheme. Particularly, the proposal largely ignores the constitutionally required consideration of mitigating factors and all evidence related to their application. What standard of proof will apply to mitigating factors? Mitigating evidence? Who bears the burden of proof on mitigating circumstances? All these details are amazingly critical to the legality of the scheme. Additionally, the failure to address the defense side of the constitutional equation hides the cost of the important and necessary near-unlimited access to expert witnesses that any capital defendant requires.

One could also improve this proposal by requiring the creation of a state-wide capital defender office or agency. Most capital defendants are indigent and will require public-financed appointed counsel. This fact is not well considered in the proposal and the current system of criminal defense in Massachusetts is unequipped to handle such complicated cases. The Massachusetts public counsel system is currently in chaos. As I speak here, judges have ordered pretrial defendants released and their cases dismissed because there are not enough public defenders and too few private lawyers willing to work for the meager rates that the state offers. One way of ensuring that at least capital defendants will have good defense counsel is to follow the example of New York, which created a statewide special defender unit that pools and applies its own resources and experience in every appropriate capital case. In other words, Massachusetts should commit to develop and appoint a stable group of the best and most expert capital defenders to every indigent capital defendant absent a conflict. Massachusetts is small enough that such a statewide defender could be easily created.

Rather than relying on certified local counsel, or others who would be willing to travel around the state for the fifty dollars an hour that Massachusetts may be willing to pay, I believe it would be far better to begin any system with dedicated attorneys, investigators, and mental health professionals who would be able to become aggressively involved in the case as soon as an arrest was made. Such a system would increase efficiency as the court would not have to waste time while a new attorney comes up to speed on the special legal framework governing capital cases. Further, such a specialized unit would be conversant with the critical forensic sciences upon which death will be predicated—for example in fingerprint evidence, or DNA analysis, or mitochondrial DNA technology. The office would be able to pool the resources and experience of the staff in order to deploy a defense team that would be willing, ready, and able to understand the nature of any new capital case. This would be a most efficient and cost-effective way to address an indigent defendant's representation needs. It is also the best way to guarantee that evidence is vigorously tested and that the statutory procedures designed to prevent innocents from being executed are carefully applied in every case.

I should add that from some prosecutors' standpoint such an independent defender unit is not necessarily a good thing. For example, in New York, the statewide capital defenders have been amazingly effective in avoiding sentences of death for their clients. This result was in many instances the product of the office successfully resolving

the case before trial. I hope everyone believes that is a desirable result—for defendants, courts, lawyers, and victims—in almost every situation. There will always be cases that must go to trial, but I think it generally better for the entire system if a conclusion can be reached early in the process.

Finally, we ought to remain humble and remember that some of these sciences have a lot of art involved in them—perhaps more art than science—that they may be on tomorrow’s junk heap of acceptability. Fiber analysis is an example that was mentioned earlier that would fall into this category. Similarly, bullet lead content analysis, bite mark analysis, and hair match testimony are all suspect. Just as a cautionary tale, do not forget that the insanity defense for Charles Guiteau, the man who assassinated President Garfield in 1882, was based on phrenology, the state-of-the-art science of the time that involved mapping bumps on the head. Even today, evidence of a smudged fingerprint with only three points of comparison instead of a full print, with 20 or more points, already takes a jury out of the world of science and well into the world of human error. We should keep in mind our society’s ability to develop new, and discard old, sciences and technologies.

The Council obviously tried to incorporate the scientific evidence restrictions that *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [509 U.S. 579 (1993)], suggests to courts. Unfortunately, in Massachusetts, three members of the Supreme Judicial Court are currently suggesting that *Daubert* should apply only to novel evidence, which would have the effect of grandfathering in all the junk science that has been presented to and accepted by courts up to this time. Thus, even what constitutes science is in dispute in the courts.

The Massachusetts Governor’s Council Report is important in its apparent repudiation of the way death is currently meted out in courts across the country. Additionally, the Counsel has worked hard to make less flawed a human and therefore necessarily imperfect system. In the final analysis, though, to rest the decision of who should live and who should die on such disputed standards, procedures, and even disputed science itself leaves the Massachusetts proposal on the cynical side of Harlan’s problem of systemic imperfection.