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Response to Professors Kamin and Pokorak

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I am extremely grateful to Professors Kamin and Pokorak, as well as to several other participants in the Indiana Conference—most notably Nancy King, Andrew Leipold, Geoff Moulton, and Scott Sundby—for suggesting that the well-documented problems of death qualification might meaningfully be addressed by allowing capital defendants to make the election of separate guilt and sentencing juries before the capital trial begins. This seems, upon reflection, to be a natural corollary to the proposal contained in the Massachusetts Governor's Council Report, in recommendation four, to grant capital defendants such an option at the conclusion of the guilt phase of the trial. If the defendant is to be granted such an option at that point, there seems to be no good reason not to allow him to exercise the same option at an earlier point. And if the defendant does elect, pretrial, to use two separate juries for guilt and sentencing, then death qualification of the first jury is not only unnecessary, it is entirely unjustified.

After consulting with several other members of the Massachusetts Governor's Council, I have forwarded the proposal of Professors Kamin and Pokorak to the Office of the Governor, with the suggestion that it should be incorporated into any legislation that might be drafted on the basis of the Governor's Council Report. Although such legislation has not been introduced or made public as of the time this issue of the *Indiana Law Journal* went to press, I believe that the proposal contained in this article is, in fact, very likely to become a part of any such legislation. Again, I thank Professors Kamin and Pokorak, and the other aforementioned participants in the Indiana Conference, for making such a helpful and important suggestion. I believe that it will only further enhance the fairness and accuracy of any death penalty system that ultimately may be based on the Massachusetts Governor's Council Report.

