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MORAL ACCURACY AND "WOBBLE" IN CAPITAL SENTENCING

Scott E. Sundby

It's been very interesting to read the Massachusetts Report and see the Council's thoughts about what a model death penalty would look like. One thing I particularly admire is the effect this Report will have beyond the capital sentencing context by raising the general question of factual accuracy in the criminal justice system. I grew up and participated in the criminal justice system pretty confident that decisions were being made accurately by juries in the vast bulk of cases. Lately though, the DNA exoneration cases have caused me to lose a lot of sleep. These are cases where off the cold record I absolutely would have been convinced the defendant was guilty, but now DNA testing is showing that the person was not. These cases really give me pause, and I think the criminal justice system over the next decade has a huge challenge in front of it to respond to and incorporate scientific testing as a way of making the system better in ways that we didn't even fully realize it needed to get better.

There is another type of accuracy, however, in addition to factual accuracy, which is incredibly important to talk about in the death penalty context. I will call it "moral accuracy." That is, we have been concentrating and focusing quite appropriately on the worst nightmare in a capital punishment system—the case in which the truly innocent person gets executed. But assuming we convict someone who is undeniably guilty, we then have another accuracy question which we have to confront. This question, which I'm calling the moral accuracy question, looks at the moral judgment of the jury and asks whether the jury's decision that a particular defendant deserves to live or die is accurate. And just to ask that question raises the problem, doesn't it? There is not a DNA test for moral judgment. We can't take a defendant, take a drop of their blood, and say, "Oh, yes, the jury got it right that you deserve to die," or "the jury got it wrong that you deserve to live."

In fact, as Professor Lillquist was talking earlier about the idea of false positives and false negatives, I found it a little incongruent to think about. Because how do we know in the first place that we have a false positive or a false negative with a death sentence—what is our baseline? It is almost impossible to define.

The way we have traditionally tried to define what is moral accuracy is through consistency: Can we be confident that a properly impaneled jury will always return a death sentence in certain types of cases and a life sentence in other types of cases? But as we all know, there are a number of wild card factors which can enter into the jury's decision.

The Massachusetts Report is clearly very cognizant of the need to try to minimize inconsistency. The Report, for example, does a very nice job of discussing how we need to try to limit discretion, and one way to do that is to try and limit the aggravating factors which will give rise to a capital conviction. The notion of true bifurcation—that is, the option of having a completely different jury once you've been convicted—clearly is also an effort to try and address whether we can get the sentencing jury to come up with a morally accurate decision. And certainly the competency standards for attorney representation address the concern with consistency as well.

But even with these reforms, I think it's important to acknowledge that inevitably there will be areas where, for lack of a better term, "wobble" will remain—that is, there will be wild-card factors affecting how the case is presented and how the jury decides the case that I'm not sure we can ever fully account for. One of the questions we'll

have to ask, therefore, is: Can we have a morally accurate decision with the wobble that is inherent to the system?

So where might we find this wobble? To answer that question, it is important to first recognize that in most capital cases, I believe, the difference in outcome primarily rests on the “case for life” rather than the “case for death.” What I mean is that by and large I have found juries to be angry and inclined toward death no matter the facts of the killing. I’ve interviewed jurors off of double torture-murder cases, and, as you would guess, their reaction to the murders was one of horror, revulsion, and anger. I also, however, have found jurors to be just as angry and just as repulsed in your ordinary felony-murder killing. In other words, coming out of the guilt phase even where you have a wide range of aggravating factors, juries, if they’ve found guilt, tend to be very angry and leaning toward death. Where the decision about death or life is really won or lost, then, is on the basis of mitigating factors and the case for life. That double torture-murder case I told you about? It came back life. On the other hand, regular felony murder cases have come back death. And the difference in outcome is explained by the strength of the case for life that was presented—where the defense tells the jury, “Listen, you’ve convicted the defendant of this terrible crime, but let me try to explain to you how he ended up doing this. Not that you will excuse what he did, but you can have some understanding of why he doesn’t deserve the ultimate punishment.”

Consequently, although the Report narrows down the crimes which give rise to death eligibility—and there is no doubt there will be fewer people eligible for the death penalty with these aggravating factors—it does not necessarily mean that juries will impose the death penalty more consistently on this smaller group of defendants and crimes. Rather, even under the cases identified by the model statute, the question of whether the defendant lives or dies still will largely be decided based on the nature and quality of the case for life presented to the jury. We must recognize, then, that narrowing the list of death-eligible crimes, while admirable, does not by itself cure the problem of inconsistency, because inconsistency might still arise through how the case for life is presented.

Professor Lefstein, I think, therefore, you were exactly right that every defendant is entitled to a mitigation specialist. The mitigation specialist is just as critical to the question of moral accuracy as the DNA specialist is to the question of factual accuracy. And you have to provide that type of assistance to the defense if you’re going to have any hope of minimizing wobble.

The importance of the attorney also cannot be overemphasized. The objective criteria which are placed forward in the Report for appointment of counsel are clearly a great first step. And I do get the sense that the legal system, and even the Supreme Court, is starting to respond to the sleeping lawyer cases. What concerns me is that the Report doesn’t address, and realistically cannot address, what is a much deeper problem—that the competency of an attorney, a truly competent defense attorney in a capital case, is beyond anything that can be measured by paper credentials.

I have had the pleasure of working and dealing with a number of superb capital defense attorneys, and if I had to identify the characteristic which describes them best, it is that they are master storytellers. They understand the human psyche. They understand human nature. And they know how to take this mass of facts about the defendant’s life, which your mitigation specialist is going to find, and weave them together into a compelling story. I often tell people that if I were ever being prosecuted for a capital case and my life was on the line and I was given a choice between Blackstone, who knew the law in and out, and Shakespeare, who might not know a wit

of law but knows how to tell a story, I would choose Shakespeare every time. How do you capture in competency standards who is the Shakespeare and who is not? And to the extent that makes a difference, you're going to have wobble in the system.

It's like having the sheet music of a Mozart symphony. It's going to make a difference whether it's the Boston Philharmonic that is playing that sheet music or—and I was going to say the Indiana University Symphony and then realized that that might get me in trouble—the Illinois University Symphony playing that music. It still may be an excellent symphony but you are going to notice differences, and you are going to hear a different sound. It is not because the Illinois University Symphony is incompetent and the oboe players don't know how to read sheet music, it is just that there is often almost an intangible quality that distinguishes the best from those who are merely competent. How one accounts for the inconsistency that can result, I don't know. But I think it's important to recognize that wobble will be in the system no matter how we try to define lawyer competency.

The other area of wobble which I would like to discuss is the notion of jury composition and dynamic. I couldn't agree with you more, Ms. Lyon, as to the importance of jury selection. One of the most interesting things to me about interviewing jurors is how a jury will take on a personality itself. I've interviewed jurors off a number of cases, and I, of course, think about the jurors as individuals. But I also think of the entire jury as having a personality of its own—"Oh, the Jones jury, yeah, I remember that one"—as if the jury itself was a walking entity. And the reason that a jury takes on a personality is because of the interaction of the 12 individual jurors who are on it. And what we have to acknowledge if we're going to have a candid discussion about a morally accurate death penalty is that a lot is going to depend on who those twelve individual jurors are and how they interact.

There is a fascinating study out by William Bowers of Northeastern University, Marla Sandys, who is on the faculty in the Criminology School here at Indiana University, and Ben Steiner of Delaware [*Death Sentencing in Black and White*, 3 U. PA. J. CONST. L. 171 (2001)]. They found that the presence of a single black male on the jury has a significant impact on decreasing the likelihood that a death sentence will be returned. Interestingly, an African-American female does not have the same impact; it's the African American male that seems to really have an effect on the jury's verdict. So one way we can think about how a jury's dynamic might be altered is in terms of the race and gender of individual jurors.

But even beyond race and gender, one thing that has intrigued me is that there are different juror personality types. For example, there are what I think of as "hope jurors." Jurors who say, "You know, I could impose the death sentence, but I think there is still hope for the defendant." They have a strong belief in redemption which strongly influences their view as to whether or not to take someone's life. And a critical mass of hope jurors on a jury can have a tremendous impact on the personality that the jury assumes.

I also should note that I have become convinced that in most capital cases the penalty decision is delicately balanced. While there are some cases where perhaps you would always get a death penalty—the classic one that is always trotted out is Timothy McVeigh—I have found that the vast bulk of cases are balanced on an evidentiary fulcrum and could tip either way depending on how things develop. Consequently, who is on that jury when that first vote is taken at the sentencing stage has a tremendous impact. You throw a few more hope jurors on a jury that came out for death and I honestly believe that in many cases you could have ended up with life.

Likewise, there are jurors on the other end of the spectrum who I'll call fundamentalist jurors, not because they are religious fundamentalists, but because they have a fundamental belief that there is a right and a wrong, and, by Jove, if this person did something wrong, they deserve to die. These jurors often are incredibly powerful personalities on a jury. Throw one or two more fundamentalist jurors onto a jury that came back life and it could tip it the other way. In other words, we must acknowledge that who is on the jury is going to make a difference no matter what standard of proof we use, no matter how accurate the scientific evidence. Again, it's a question of wobble, if you will, that is inherent to giving a jury the moral choice between a life and death sentence.

I guess, therefore, what I ultimately want to raise, because I think this type of forum is invaluable, is this idea that the death penalty decision is inescapably a moral one. The Report undoubtedly is correct that if we are talking about a model death penalty we clearly have to acknowledge the factual accuracy question. I think the strides which are taken in the proposal to increase factual accuracy are essential. But I also think we have to talk about the moral accuracy question. We have to ask: how much wobble can we tolerate in terms of deciding whether to have a death penalty? I think some of the reforms I've heard discussed here would go a long ways to helping minimize that wobble. But you're always going to have the wobble. And the question we must not avoid is how much wobble can we tolerate and still have what we would consider a fair and accurate death penalty?