Substantive Appellate Review in Capital Cases

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Panel Four—Post-Trial Review

Although error prevention is the highest priority of the Massachusetts Governor's Council Report, the Report also seeks to improve the post-trial error detection and error correction processes. This goal is the subject of recommendations nine and ten.

Participants: Michael J. Jenuwine (moderator), Stephen R. Creason, Joseph L. Hoffmann, Sam Kamin, William J. Meade, H. Geoffrey Moulton, Jr., Thomas F. Schornhorst

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SUBSTANTIVE APPELLATE REVIEW IN CAPITAL CASES

Joseph L. Hoffmann

I would like to focus my remarks on one of the two recommendations we are discussing today. I will not talk at length about recommendation number ten, which proposes the creation of a Death Penalty Review Commission, although I do believe that this is an important part of the overall plan to eliminate mistakes in the administration of the death penalty. Many prominent experts in the area of innocence and the death penalty, including the two co-founders of The Innocence Project, Barry Scheck and Peter Neufeld, have strongly advocated such an idea. Connecticut and North Carolina have recently created Innocence Commissions and more states are sure to follow. So I certainly hope that recommendation number ten will be seen generally as a good and not highly controversial idea.

What I would like to talk about briefly is recommendation number nine, which proposes that the Massachusetts Supreme Judicial Court (and the trial court as well, but I'll be talking mostly about the appellate court) should possess and should exercise broad, substantive review power over death sentences, so that the Court should reverse any death sentences on the merits and without regard to procedural defaults or barriers if it substantively disagrees with the jury's imposition of death.

This recommendation originated in some of the work that I did in Illinois in 2002 and 2003. At that time the Illinois Senate Judiciary Committee was studying the Illinois Governor's Commission Report and the eighty-five proposed reforms therein. One of those proposed reforms was that the Illinois Supreme Court should be required to engage in comparative proportionality review of every death case. For those who are unfamiliar with the term, comparative proportionality review means that the appellate court must compare the capital case before it with a universe of factually similar death-eligible cases. If the result reached in the instant case is disproportionate, based on the comparison with the results reached in the universe of similar cases, then the court must set aside the death sentence.

In August 2002, I testified before a panel of the Illinois Senate Judiciary Committee and expressed my view that comparative proportionality review was a fundamentally flawed concept. As I put it to the panel members: In the end what is the goal? What is the ultimate goal of comparative proportionality review? What do you hope to achieve at the end of the day? It seems to me that the goal must be to produce a legal taxonomy of death. In other words, to identify, through the inductive process of these explicit comparisons between cases, those possible combinations of factors that should lead to
a death sentence as well as those that should lead to a non-death sentence, i.e., to a life sentence.

But, as we heard yesterday, Justice Harlan wrote back in 1971 that this is a task beyond present human ability. And I believe that even today we cannot produce a formula that will tell us when the death penalty should be imposed and when it should not. We cannot do this today anymore than people could do it at the time that Justice Harlan wrote those words. Thus, I argued to the Senate Judiciary Committee Panel, it would be better to focus the appellate courts—to truly focus their attention—on the substantive merits of each individual death sentence, rather than engage in a process of explicit case comparisons that could lead only to a jurisprudential dead end.

I, therefore, ended up proposing an alternative idea: That the Illinois Supreme Court be required in every death penalty case to review the fundamental justice of the death sentence, on the merits and without regard to any procedural defaults or barriers, and also without regard to whether that unjust sentence resulted from any procedural error at the trial. This came to be known as the Fundamental Justice Amendment, or FJA, and after some political twists and turns, in November 2003 the FJA was overwhelmingly approved as a key part of the bipartisan death penalty reform bill in Illinois. It became the law in Illinois in January 2004.

Although it is far too early to be able to observe any effects in practice, the FJA provides the Illinois Supreme Court with a new and powerful way to ensure substantive accuracy and fairness in capital cases. And it has been so described by numerous observers—including the Chicago Tribune, which originally opposed the FJA—as one of the most important and potentially beneficial features of the 2003 reform legislation.

Now, in Massachusetts it was not necessary to propose something like the FJA, because the Massachusetts Supreme Judicial Court already possessed similar authority under existing state law. All that was necessary was for the Governor's Council to highlight that existing authority, and to encourage strongly the Massachusetts Supreme Judicial Court to feel free to exercise it. And that is what we did in recommendation number ten.

In my opinion, the idea of substantive appellate review is an idea whose time has come. In most other countries around the world substantive appellate review is viewed as an essential component of a fair criminal justice system. Our focus in modern America on procedural justice has all too often left us unwilling or unable to recognize the simple reality that even perfect trial procedures do not guarantee perfect outcomes. Sometimes juries do make mistakes, even in a procedurally fair trial. We should empower our appellate courts, not just in capital cases (although the momentum starts there), to protect defendants from such substantive mistakes. This does not interfere with the basic purpose of the defendant's right to a jury trial. It merely supplements it with an additional safeguard for the defendant's liberty.

Are there potential problems with substantive appellate review? Yes. Two come immediately to mind. First, appellate judges may not choose to exercise this power, especially if they fear the political consequences of reversing a death sentence. Second, juries eventually may become aware of this power, and this knowledge may diminish the jury's proper sense of moral responsibility for the capital sentencing decision that it must make at trial. These problems need to be addressed as the FJA and similar proposals gradually take effect. Nevertheless, in the end I believe that substantive appellate review will someday be seen as one of the significant advances in twenty-first century American criminal jurisprudence. Yes, it will require a role reorientation by appellate judges who have become accustomed to examining criminal cases through a
procedural lens only. But this shift in roles, I believe, can only work to the overall betterment of the criminal justice system. Thank you and I look forward to your comments.

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**THE HISTORY OF CAPITAL APPEALS IN MASSACHUSETTS**

_William J. Meade_

As you might guess, I’m not going to be critical of the Council’s Report. And without any planning or prior discussion with Professor Hoffmann, my remarks actually, I hope, should dovetail with what Professor Hoffmann just said. In recommendation number nine, the Council encouraged the use of this substantive appellate review power that you referred to. It’s actually a statutory power in Massachusetts. It’s in Chapter 278, Section 33E of our General Laws. And I just want to briefly explain what it is and where it comes from.

On a spring day in 1920, in a town just south of Boston—actually, not too far from where I was born—two payroll guards were walking through a street, in the town of Braintree, and they were robbed and killed by gunmen. Three weeks later Nicola Sacco and Bartolomeo Vanzetti were arrested. They were later indicted for first-degree murder and robbery. After a six-week, hard-fought trial they were convicted in July of 1921. Six years and several appeals later they were executed. After those executions in 1927 Massachusetts convened a judicial council to look into the problems that occurred in the Sacco and Vanzetti case. The main concern of the Council was not the fairness of the trial that Sacco and Vanzetti had, or even the political atmosphere under which they were tried. The main focus of the Council was that it took six years to execute them.

As a result of the Council’s Report, the Massachusetts Legislature enacted Section 33E. But that took twelve more years and several more councils before it became law. Prior to this 1939 enactment of 33E, our State Supreme Court, the Supreme Judicial Court of Massachusetts (“SJC”), was empowered to pass only on issues of law. And the power to order a new trial in a capital case was vested solely in a trial judge. On a review, an appellate court could only review abuses of discretion in that area. In Sacco and Vanzetti’s case, the appeal process, as I said, took many years and invoked multiple defense motions for new trials. And the SJC’s review was again, strictly confined to issues of law and whether the trial judge abused his discretion in denying a motion for new trial.

What 33E did was it changed that. And, for the first time in Massachusetts, capital cases were transferred in whole to the appellate court for review of matters of fact and law. 33E also gave the SJC, for the first time, the power to grant a new trial in a capital case. Now, as you know, we’re not a new state. In fact, our SJC is the longest continuing existing court in the Western Hemisphere. However, it wasn’t until 1939 that the SJC had this ability to order a new trial in a capital case.

Section 33E also (and this is a subtle component of proportionality the way the SJC views it; I don’t know if they’ve ever expressed it in this fashion) empowers the SJC to grant, to enter a verdict of a lesser degree of guilt. In 1939, we had a death penalty, so the SJC was empowered to lower the verdict to a non-capital crime or non-capital murder, or even lower it to second-degree murder, and even to manslaughter, if its