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William J. Meade

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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

examination of the record indicated that justice so required. That's all the statute said, it empowered an appellate court to go beyond mere legal error and to actually weigh the evidence that the jury heard that had been presented on the record. The court would then simply decide whether or not that verdict was consonant with justice. If the court determined that it was not, it could lower the verdict.

And I say that, there is a component in 33E review that relates to proportionality because if you read the decisions in which the court has exercised that power, and the arguments that are often made in this context, what the court does is it actually compares the case before it with others where a verdict was reduced. The SJC does this now, even though we don't have a death penalty. The court essentially asks whether this first-degree murder conviction is in the same ballpark as others. Or, is this case off the mark? The SJC will exercise that reduction power. They do it sparingly, and probably in sixty-five years they've only done it thirty or so times.

So the other aspect of 33E is one that Professor Hoffmann mentioned. That is, regardless of any procedural defaults, errors can be reviewed to see whether or not a miscarriage of justice occurred. Even perhaps more remarkable, the court can raise errors or claims and review things *sua sponte*, things that no one had raised. This is exactly the kind of substantive review that I think was important to the Council's recommendations. Fortunately, it's a mechanism already in place. It's similar to what Professor Hoffmann referred to as the fundamental justice amendment. I think that this type of review coupled with the other layers of review is one of the things that make the Council's Report a modern blueprint for what could hopefully be a model death penalty in Massachusetts and in other jurisdictions.

I wanted to mention one thing based on what Professor Hoffmann had said that I thought was interesting. I thought about this when you questioned whether or not jurors would become aware of substantive review and whether it would have an effect on their decision. I don't know whether that would actually happen. It hasn't happened to my knowledge in Massachusetts. We've had 33E review for about 65 years, and that issue hasn't come up. That is, to my knowledge, that jurors would feel that their role is diminished in any way by the substantive appellate review that is done by the SJC. Thank you.