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# Changing the Role of Appellate Judges in Capital Cases

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## CHANGING THE ROLE OF APPELLATE JUDGES IN CAPITAL CASES

*Sam Kamin*

Instead of talking about the ways in which the judicial review recommended by this Report fits so nicely into what Massachusetts already allows judges to do, I want to talk about how different recommendation number nine is from the normal sorts of things we ask appellate judges to do in death penalty cases.

Normally the principal thing we ask judges to do in death penalty cases is to correct legal errors. If the defendant received ineffective assistance of counsel at the trial stage, if the trial judge inappropriately instructed the jury as to the relevant law, if the prosecutor engaged in the kinds of comments that Professor Schornhorst talked about, those are the things we expect appellate courts to ferret out. In short, we ask appellate judges to make sure that the proper procedures were followed. At a fundamental level this one of the most important things we ask of appellate courts to do: to correct procedural errors.

We also ask appellate judges, in at least some circumstances, to correct substantive errors. For example, we ask them to intervene if the evidence did not demonstrate that the defendant was guilty of the crime charged, if they find that no reasonable jury could find the defendant guilty beyond a reasonable doubt, or if the jury convicted the wrong person—and Professor Zimring mentioned this yesterday when he spoke of *Herrera v. Collins* [506 U.S. 390 (1993)]—there are at least some circumstances under which we expect appellate courts to intervene and prevent the execution of an innocent person, even if his trial was impeccable.

There are other ways in which we ask appellate courts to determine that a defendant is not eligible for the death penalty. For example, the trial judge could have

misinformed the jury about an insanity defense. Thus, it may be that a particular defendant, while he did the crime, cannot be held criminally liable for it. That is something we ask appellate judges to intervene and fix as well. We also ask judges to intervene if the defendant is not eligible for death because the aggravator that was alleged in a particular case was not sufficiently demonstrated by the evidence, or if the aggravator that was alleged in a defendant's case is constitutionally defective in one way or another so that this is not a defendant on whom the death penalty can legally be imposed.

And this statute asks judges to do all of those things. But it also asks judges to think in a very different way about whether the death penalty is appropriate in a particular case. In particular, it asks: Is this sentence appropriate to the defendant's culpability? And Professor Hoffmann showed us today that he really meant for this to be done solely with regard to a particular defendant. The task is not to examine a defendant in the context of other capital offenders, but to ask whether this is the appropriate punishment for this defendant.

What kind of review is this? Yesterday Professor Sundby referred to it as moral accuracy review. And I warned him that if he left early I was going to steal his idea and talk about it today. I don't see him in the room so I'm going to use it. Moral accuracy review; not: Is this the right person? Not: Were there legal errors? Not: Did the jury convict the wrong person? But: Is death the right sentence for this person? What kind of review is that? Well, I have no idea. It asks judges to do a task that we have in the past given exclusively or almost exclusively to juries; we generally ask only juries to express the public's will as to the appropriateness of a punishment for a particular defendant in a capital case.

Professor Hoffmann has told us today that he really meant for this not to be comparative proportionality review, that the thing he fears is the development of rules for this sort of review. He told us that he is a believer in what the Supreme Court said in 1971 in the *McGautha* [*v. California*, 402 U.S. 183 (1971)] case, namely that it is impossible to set forth express rules or criteria for determining who lives and who dies. The court said in that case that this is a task that is beyond human capacity. And ever since then the Court has been somewhat backtracking from that; deciding the next year in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)], that rules to guide discretion are necessary and deciding four years later that Georgia's rewritten capital statute adequately governed that discretion.

Since at least 1972, the Court has been attempting to balance these two ideas. On the one hand, the *Furman* and *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)] line of cases has trumpeted rules and the narrowing of discretion on the one hand. And on the other hand, the court has used cases like *Woodson* to mandate discretion, to emphasize the jury's capacity to consider anything that might spare the defendant's life, and to establish the right of the defendant to put into evidence any issue that he feels is mitigating of his guilt.

There has been in the Court's death penalty jurisprudence this enormous tension between rules and discretion. The discretion that the Supreme Court looked down upon in *Furman*, because it created the risk either of discrimination or of arbitrariness, has found its way back into death penalty law. The Court has said that so long as there are rules in place, the ultimate decision, the final decision, the decision whether an individual lives or dies, may be one that is done solely in the jury's discretion. That is, there must be room in a constitutional death penalty system for a jury to express its will independent of rules. Once the pool of the death eligible is sufficiently narrowed by

rule-based decisions, the jury may exercise its best judgments over who will live and who will die.

So while the Supreme Court has approved discretion, it has approved discretion only for juries. It has said that juries play this important role; juries express the public moral sense. This statute, in a very interesting way, in a way that I think has conflicting benefits and costs, also allows a judge to express that discretion; or at least to express it in one direction. That is, if a jury has decided to sentence an individual to death, a judge or a panel of judges may say that is not an appropriate sentence for this individual. For one reason or another, a judge or judges, in their wisdom, may decide that death is not appropriate.

Does this mean that moral accuracy review is a bad idea? Not necessarily. As someone who is deeply skeptical about the death penalty in the United States, it is difficult for me to disapprove of opportunities for mercy, of opportunities for a defendant not to receive the death penalty. And I think the Massachusetts recommendations provide just such opportunities. For me a good death penalty statute is one where the death penalty is difficult to impose and easy not to impose. That is, in a good death penalty regime, there are many hurdles that must be cleared, and at any point any one actor can say that death is not appropriate for this individual. This provision strikes me, therefore, as an important development and one more opportunity for mercy.

On the other hand, I read *Furman*. And I share with the three concurring justices in that case a view that there are deep problems with discretion. Discretion may not always be imposed fairly. Discretion permits personal biases to creep in. So, whether your concern is with arbitrariness, randomness, or discrimination, allowing a judge or judges to exercise discretion, perhaps without opinion, without expressing reasons, is deeply troubling. Yet, I share Professor Hoffmann's concerns that rules cannot be enough here; that we don't want moral accuracy review to become a checklist. For example, the United States Supreme Court, in the *State Farm [Mut. Auto. Ins. Co. v. Campbell]*, 538 U.S. 408 (2003), decision last term, held that when punitive damages exceed actual damages by a ratio of more than 10:1, that is presumptively inappropriate and unconstitutional. And I'm sure that the judges that had decided all those cases along the way to the result in *State Farm* must have looked at one another and said: "Really? That's what we were doing in each of those cases? We were creating a 10:1 ratio?"

So I share the concern that rules will appear miraculously and spontaneously from the process of doing moral accuracy review, and that what is meant to be open-ended review for fairness will become just another rule-bound procedure.