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INTRODUCTION

TINKERING WITH THE MACHINERY OF DEATH – MENTAL CAPACITY, ABILITY, AND ELIGIBILITY FOR THE DEATH PENALTY

MICHAEL A. WOLFF*

Justice Blackmun, in the last death penalty case of his career, proclaimed that he would no longer “tinker with the machinery of death.”¹ To those of us who still tinker with the machinery of death, questions of mental capacity, culpability, and the character of the offender weigh heavily. As an appellate judge, tinkering means applying legal principles, not dealing with ultimate questions of morality, justice, and personal responsibility.

For most of the countries of the world, and a dozen states of our own country, the tinkering is an abstraction, for their laws do not include consideration of the death penalty. For the rest of us, the application of legal principles may be intellectually challenging. At the appellate level – nearly always one level removed from the question of whether an offender “should” be executed – the role seems rather dispassionate when compared with the role of prosecutors and jurors, who play an essential role in virtually every capital case.²

The trial courts, and in particular the citizens called to serve as jurors, are the crucial point in the process. Jurors do not write opinions; they rarely speak publicly. They are considered seriously, most often, by those who study how they may be manipulated in individual cases. Jurors are first selected only if their personal views do not preclude consideration of the death penalty. They are “death-qualified” jurors, and they are chosen to the exclusion of the substantial minority of citizens who could not in any circumstances consider capital punishment.

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1. *Callins v. Collins*, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting).

2. *See Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

Upon a finding of guilt in a capital murder case, these death-qualified jurors then must weigh the aggravating and mitigating factors of the crime, and the characteristics of the offender, to determine whether there are aggravating factors that make the offender eligible for the death penalty.³ Even if there are aggravating factors justifying the death penalty, the jury can still say “no.”⁴ This is the point in the process where moral values and personal ethics become central. Jurors consider these matters quite seriously. One could spend an entire career looking for death penalty jurors who have treated this duty cavalierly and you would probably find only a very few. Few if any jurors, I would venture to say, would describe their deliberations as “tinkering.” Only a career of judging could bring forth the word tinkering; jurors would probably more likely use a more substantial word like “weighing.”

My focus on the role of jurors, however brief for this introduction, is intended to set the stage and provide the backdrop for the legal and analytical questions addressed in these articles. Most deal with exclusion of categories of persons eligible for the death penalty. Why do we not execute the mentally ill, the retarded, the youthful offender? These cases carry a common notion that such offenders are not sufficiently culpable for law to authorize execution.

But why is that? Consider youthful age. In *Roper v. Simmons*, the prosecutor used offender Simmons’ youthful age to argue that it was an aggravating factor, not a mitigating factor.⁵ In effect, the prosecutor successfully argued to the jury that if Simmons was this violent and scary as a seventeen-year-old, consider what he would be like later in life.⁶ By the same principle, one could ask why we would exclude mentally ill persons. Some of them are genuinely scary and dangerous, and even the best of chemicals and consistency of treatment may not make them less so. And if I carry this argument one step further to the mentally retarded, in contemporary society I would run the risk of alienating most readers because, as the Supreme Court concluded in *Atkins v. Virginia*,⁷ there is a societal consensus that execution of the retarded is cruel and unusual.

3. MO. REV. STAT. § 565.032 (2000).

4. See *State v. Whitfield*, 107 S.W.3d 253, 258-60 (Mo. 2003) (en banc).

5. State ex rel. *Roper v. Simmons*, 112 S.W.3d 397, 416 (Mo. 2003) (en banc) (Wolff, J., concurring).

6. In preparing this essay, I found in the database of the *St. Louis Post-Dispatch*, an article about Simmons as a prisoner. In his late twenties, in prison, Simmons is reported to have become a Christian. If this characterization is accurate, it seemed to contradict the prosecutor’s prediction. In a religious sense, which the law does not consider, an execution may deprive the offender of the years needed to come to a point of redemption, if indeed that is what Simmons had achieved. Joan Little, *Teens Are Trying to Save Man Condemned to Die: He Was Convicted of Robbing, Brutally Murdering Woman*, ST. LOUIS POST-DISPATCH, Apr. 15, 2002, at A3.

7. *Atkins v. Virginia*, 536 U.S. 304 (2002).

So I return to a more interesting point, from an analytical perspective, that is, how do we determine as a legal matter whether somebody is eligible for the death penalty or whether the person is ineligible because of certain characteristics of his psyche, mental capacity, or youth?

With mental illness and lack of mental capacity, the questions involve defining the characteristics, and more importantly, determining in which cases they apply. When the law excludes execution of the mentally retarded, for instance, the more difficult question becomes whether a particular offender is mentally retarded so that he is ineligible for the death penalty.⁸

These questions of fact, more challenging than the issues of law involved, are left to juries. Actually these questions are addressed in the first instance by prosecutors who must decide whether or not to seek the death penalty. These prosecutorial decisions are influenced, in turn, by what prosecutors think that juries will do in individual cases. What are prosecutors and juries doing? Missouri statistics tell an interesting story. The number of death sentences has dropped in the past five years. In fiscal year 2001 through 2003, there were two per year, and none in the first half of fiscal year 2004.⁹ From fiscal years 1993 through 2005, 10.9 percent of first-degree murder convictions resulted in death sentences. From 2001 through 2004, however, the percentage was about half of that average. This drop started before the U.S. Supreme Court decisions in *Ring*, *Atkins*, and *Simmons*. The significant effect may have come from the widespread publicity about wrongful convictions.¹⁰

The consideration of the principles discussed in these articles focuses on the analytical concepts involved. This involves a close examination of legal principles, and the application of these legal principles to particular offenders. But it is important to consider, as we study these principles and their application, not just to consider the question: Who is he? But rather, who are we?

8. See *Goodwin v State*, No. SC86278, 2006 Mo. LEXIS 57 (Mo. May 2, 2006) (en banc).

9. MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING, DEATH PENALTY SENTENCING 66-69, 86-87 (2005), available at <http://www.mosac.mo.gov/Documents/final%20report21June%202005.pdf> (last visited June 15, 2006). "Death Penalty Sentencing" is an appendix to the Report of the Missouri Sentencing Advisory Commission. The state's fiscal year covers July 1 through June 30. Fiscal year 2001, for example, ended June 30, 2001. David Oldfield, director of research at the Missouri Department of Corrections, updates the Report's data, by calendar years, through 2005. There have been eleven death sentences in the circuit courts in the past five years, out of a total of 199 first-degree murder convictions in the same period, or about 5.5 percent. By contrast, the peak year was calendar year 1992, when death sentences were entered in 23.5 percent of first-degree murder convictions.

10. See RICHARD C. DIETER, DEATH PENALTY INFORMATION CTR., INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1150>.

