

# Questions of Life and Death—The Tsarnaev Case

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On Friday, May 15, after fourteen hours of deliberation, a Boston jury submitted a twenty-four page verdict that found that “death is the appropriate sentence for Dzhokhar Tsarnaev.” The verdict followed the trial that ended last month with Tsarnaev’s conviction on thirty charges related to the 2013 Boston Marathon bombings as well as the killing of an MIT police officer and the wounding of a Transit Police officer. At age twenty-one, Tsarnaev becomes the youngest person on federal death row, joining sixty-one others who await execution.

Now we wait to see whether Tsarnaev will, like convicted Oklahoma City bomber Timothy McVeigh, give up his appeal rights. That move, assuming the federal government can pull together the lethal injection drugs required to carry out an execution, would potentially shorten the time to execution to three or four years. Or Tsarnaev could pursue the full range of federal appeals, creating a delay of several years. In either case, there will be plenty of time to reconsider and debate some of the questions concerning the jury’s decision to choose “death” over “life without the opportunity for parole.”

First, why did Tsarnaev’s case go to trial—with death potentially on the line—when many other murderers have pleaded guilty in exchange for life in supermax prison? The answer is prosecutorial discretion. It’s up to a prosecutor to decide whether to put death on the table, and then to take it off again in exchange for a life plea. The individual prosecutor matters immensely: At the state level, for example, just a handful of state prosecutors are responsible for a high percentage of death verdicts in Florida, Louisiana, Arizona, Pennsylvania, Oklahoma, and North Carolina.

Naturally, a defendant has no right to choose a prosecutor or decide whether his case falls under state or federal jurisdiction. The jurisdiction for a case is based on where the crime was committed and the nature of the crime. Ordinarily, first-degree murder would be a state crime handled in state court. However, Tsarnaev was charged with counts including the use of a weapon of mass destruction resulting in death and the use of a firearm during a crime of violence resulting in death—in short, acts of terrorism which are federal crimes. By charging Tsarnaev in this way and trying him in a federal court, prosecutors circumvented the Massachusetts state ban on the death penalty. Jurisdiction, then, in addition to prosecutorial discretion, affects every level of the criminal justice system, but the impact is particularly strong in death cases and leads to disproportionate, and sometimes racially correlated, results.

To call Tsarnaev’s crime significant is an understatement. Tsarnaev was sentenced to death specifically for the bombs that resulted in the killing of Martin Richard, age eight, and Lingzi Lu, a twenty-three-year-old graduate student from China. He also received a life sentence for the bomb placed by his brother Tamerlan, which killed

Krystle Marie Campbell, age twenty-nine. Yet the reasons that the Boston prosecutors decided not to allow Tsarnaev to plead to life are known only to them.

By contrast, Ted Kaczynski, the “Unabomber,” ultimately killed a total of three people and injured twenty-three others through his nationwide bombing campaign that lasted from 1978–1995. Kaczynski escaped death by pleading guilty to all thirteen of the government’s bombing-related charges. Jared Lee Loughner, who in 2011 shot six people and injured thirteen, among them former US Representative Gabrielle Giffords, was also offered and accepted a guilty plea for life without parole. Known as the Olympic Park Bomber, Eric Rudolph wounded 111 people and killed one person with a forty-pound pipe bomb during the 1996 Atlanta Olympics. Rudolph also confessed to bombing two abortion clinics and a lesbian bar, acts that collectively injured several more people and killed a Birmingham police officer. He escaped death by pleading to four consecutive life terms.

We have no way of knowing whether or not Tsarnaev was given the opportunity to avoid a trial and plead to a life sentence, or if he would have taken that offer had it been made. It seems clear that there are inconsistencies when government determines when to seek death sentences.

Second, at the heart of the American criminal justice system is the right to be tried by a jury of peers from the community where the crime occurred (a right codified in the Sixth Amendment). The number of trials occurring in the federal and state systems has dropped off sharply over the last 30 years. This change correlates, at least in part, with the imposition of increasingly harsh criminal statutes that *require* a court to impose “mandatory minimum sentences” for certain conduct. When faced with the threat of these lengthy sentences, the efficiencies of taking a plea agreement have outweighed the uncertainties of a trial. Yet the right to have local people who were affected by the crime determine an appropriate resolution remains a bedrock principle. It is also what makes death cases so interesting. A jury in a case where death is an option must be “death-qualified,” meaning each juror has to be open to considering the death penalty. Anyone who opposes the death penalty is automatically excluded from service.

Polls show that 85 percent of Bostonians and 80 percent of Massachusetts residents opposed the death penalty for Tsarnaev. (Even the Richard family did not support the death penalty for the man who killed their son.) Only a quarter of Bostonians think the death penalty is ever appropriate. Yet it was from among this group that Tsarnaev’s jury was selected. Moreover, research suggests that death-qualified juries—which tend to have fewer black and female jurors—may be more likely to convict than the average population when reviewing the same evidence. The result of this system is a city that was horrified by the crime Tsarnaev committed and is now unsettled by the sentence.

Third, much post-verdict speculation has focused on Tsarnaev’s lack of remorse. Of course, we don’t know how the twelve jurors weighed their decision, but we do know that only two of the twelve jurors wrote on the special verdict form that they believed Tsarnaev showed remorse. It’s been reported that Tsarnaev showed no emotion either

during the trial or after the announcement of the verdict. And there is the infamous photo of Tsarnaev giving the middle finger to the jail security camera.

In the federal criminal system, sentencing guidelines effectively encourage defendants to “accept responsibility” for their crimes and plead guilty in return for measurable decreases to sentences. Depending on the severity of the offense and the offender’s criminal history, just pleading guilty (even without a plea agreement) may warrant a reduction of several years to the sentence.

But should remorse play a role in the decision between life and death? When the alternative to death is life without parole in a supermax prison, living in a twelve-foot-by-seven-foot cell with a single window four inches wide, two fifteen-minute phone calls to family a month, and an hour a day where a wire cage is affixed to the cell door so that the inmate can be “outside” for recreation—rehabilitation seems impossible. There is no hope of a life after this sentence. Evidence of remorse on Tsarnaev’s part would have had no bearing on the likelihood of his rehabilitation, although it could have humanized Tsarnaev and shed some light on how and why he committed such a heinous crime.

The Ted K Archive

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The Hedgehog Review Web Features. <<https://hedgehogreview.com/web-features/thr/posts/questions-of-life-and-death-the-tsarnaev-case>>

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