

## Another Recount: Appeals in Capital Cases

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*Overall, between 1973 and 1995, less than one-third—32%—of all death sentences passing through the nation's state and federal judicial inspection system were cleared of serious error. Conversely, over two-thirds—68%—were thrown out because of serious error.*  
— James Liebman, Jeffrey Fagan and Valerie West

LAST SUMMER, EVERYONE with even a passing interest in the death penalty was shocked to read headlines announcing that two out of three death sentences did not survive the appellate process. Even the authoritative *New York Times* gave the finding front page coverage.<sup>1</sup> The source of the information was a study entitled “A Broken System: Error Rates in Capital Cases, 1973-1995,” published on the Internet by Columbia University professors James Liebman and Jeffrey Fagan and N.Y.U. doctoral candidate Valerie West.<sup>2</sup> The title hardly seemed an exaggeration; a judicial process with a two-thirds failure rate does seem “broken.”

Nevertheless, we were skeptical. For one thing (as we pointed out in our earlier article<sup>3</sup>), the study failed to differentiate between conviction and sentence-reversals. Our own research into 10 years of appeals in 26 states found that 61% of capital reversals overturned the death sentences while affirming the murder convictions (temporarily, as resentencing hearings were not included in the count).<sup>4</sup> Extrapolating from this (and relying on the 68% “error rate” published by Liebman et. al) we determined that the murder convictions originally imposed were upheld in 73% of all capital appeals.<sup>5</sup> Moreover, after all retrials/rehearings were complete, for every 100 death sentences imposed at trial, 44 death sentences survived the entire judicial gauntlet.<sup>6</sup> Nothing to boast about—especially given the number, duration and cost of all these appeals—but “broken?” We

thought it was at least as arguable that the trial courts did a modestly satisfactory job (they got the guilt question right 95% of the time<sup>7</sup>), but that, given the number of sentence reversals and the length of the process, the capital appeals system was in need of re-examination.

Then, in this Year of the Recount, we began to scrutinize the “Broken System’s” findings more closely. As a result, we now have come to the conclusion that the problems with the Liebman study go well beyond a failure to take account of sentence vs. conviction-reversals. We are now convinced that their 68% reversal rate along with many of the inferences that flow from it are misleading. We believe a more accurate capital reversal rate before retrials and rehearings is 52%, not 68%.

Moreover, after retrials and new sentencing hearings, 57% of the original death sentences (not 44%) still stand. In other words, assuming the Liebman investigators did not



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significantly undercount the number of death sentences that withstood judicial challenge, the effective reversal rate is closer to 43% than the widely publicized 68%.<sup>8</sup>

### A FLAWED ERROR RATE

The “Broken System” study examined capital postconviction decisions at three stages: direct appeal in the state courts, postconviction review, also in the state courts, and federal habeas corpus. The purpose of the study was to identify the extent to which courts, when reviewing capital cases, found serious error justifying a reversal of the conviction, the sentence, or both. The study concluded that the overall error rate was 68%.

However, the method used to reach the 68% figure was faulty. By calculating the error rate based on cases *actually reviewed* at each of the three stages rather than on all cases *available for review* at each stage, Liebman, Fagan and West significantly overstate the error rate.<sup>9</sup>

To illustrate, suppose 1000 cases “clear” state direct appeal and postconviction review, but only 100 are fully reviewed on federal habeas corpus, of which 75 are reversed. If one examines only the cases actually reviewed, the reversal rate at this stage is 75% (75 of 100). However, if one includes the cases that cleared the preceding stage but were not subsequently reviewed, the error rate is 7.5% (75 of 1000). The former method inflates the error rate by considering each segment of the review process in isolation, without regard to cases that had advanced through earlier stages of review.

### A SOUNDER APPROACH

We think it is preferable to consider the finding of error relative to all cases available for review at each of the three stages. With this approach the error rate is 52%, not 68%. We now go through the calculations.

Liebman and colleagues reported 4364 death cases reviewed on direct appeal in 28 states.<sup>10</sup> They then found that 1782 of these were overturned, for a reversal rate on direct appeal of 41% ( $1782/4364 = .408$ ). We do not dispute this figure, although we cannot independently vouch for it.<sup>11</sup>

The study then noted that 2582 cases had cleared direct appeal and were available for postconviction review. This was calculated by subtracting the direct appeal reversals from the total number reviewed:  $4364 - 1782 = 2582$ . Finding another 248 reversals on postconviction review, Liebman, et al. treated all of the cleared cases as if they had been subjected to postconviction review and calculated the reversal rate at 10% ( $248/2582 = .096$ ).<sup>12</sup>

The “Broken System” then determined the error rate for postconviction review by multiplying the reversal rate by the percentage of cleared cases. Since 41% of the cases

had been reversed on direct review, it follows that 59% cleared that stage. Thus, the error rate for postconviction review was  $.10 \times .59 = 5.9$ , which rounds to 6%.

Adding the percentage reversed on direct review, 41%, to the percentage overturned at the postconviction stage, 6%, the study computed the total state court error rate to be 47%. Again, we accept this figure because up to this stage, Liebman and colleagues assumed that the number of cases subjected to review was the same as the number of cases available for review.

Turning to the third stage—federal habeas corpus—the Liebman study reported 599 cases reviewed out of which 237 were reversed. However, at the habeas stage, the study calculated the reversal rate based on cases actually reviewed, not the total number of cases available for review. Had the available cases been included, the habeas reversal rate would have been 237 divided by the number of cases that had cleared the postconviction review stage, or 10% ( $237/2334 = .101 = 10\%$ ).<sup>13</sup> Instead, the rate was calculated as  $237/599 = .3956 = 40\%$ . This 40% figure represents the ratio of habeas reversals to habeas cases actually decided, excluding cases that cleared stage two but were not subjected to federal habeas corpus review.

Liebman and colleagues then multiplied their 40% habeas reversal rate by the percentage of cases clearing the first two stages, 53%, for a total habeas error rate of 21% ( $.40 \times .53 = .212 = 21\%$ ). Adding this 21% figure to the 47% state court error rate yields a total error rate for all three stages of 68%—the number that captured national headlines.

Had the “Broken System” study used what we believe to be the better approach, it would have produced the far less dramatic—but more accurate—total error rate of 52%. This is determined by multiplying the more accurate habeas reversal rate, 10%, by the percentage of cases clearing the first two stages, 53%:  $.10 \times .53 = 5.3\%$ , rounded to 5%. This is then added to the error rate for direct appeal and post conviction review to calculate the total error rate:  $47\% + 5\% = 52\%$ .

As a check, one could reach the total error rate by a much simpler, more direct route. Adding the 1782 cases reversed on direct appeal, the 248 reversed on postconviction review and the 237 reversed on federal habeas corpus review, for a total of 2267 reversals, and dividing by the total number of appeals, 4364, yields a total error rate of 52% ( $2267/4364 = 51.9\%$ ).

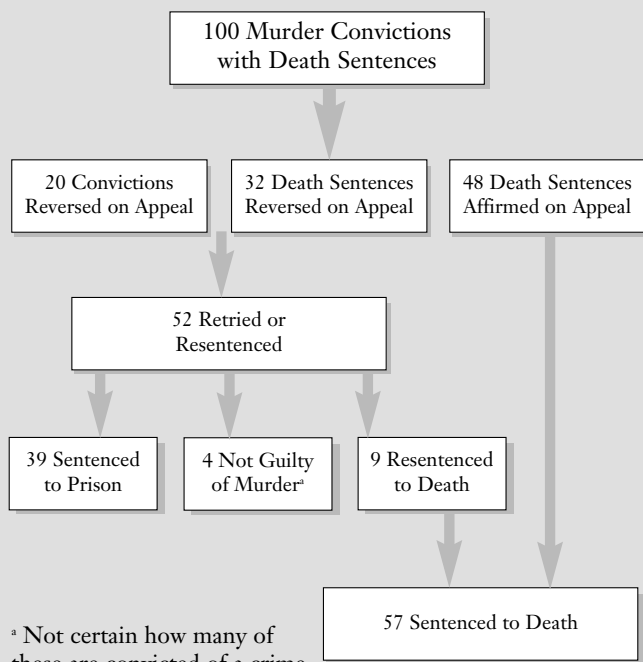
### RECALCULATIONS

Thus, the 68% error rate—the figure that shocked the nation—is misleading. It overstates the true reversal rate—52%—by a full 16%. In other words, the total capital reversal rate is closer to one out of two, not two out of three cases—a high, but substantially more acceptable ratio.

In addition, other statistics relevant to the capital adjudication process that were derived from the 68% figure

must now be recalculated.<sup>14</sup> For instance, we now conclude that after all state and federal appeals are completed, but prior to any retrials/rehearings, 32% (.61 X .52 = 31.72) of capital sentences (not including convictions) are overturned. Based on the same computation process, the number of conviction reversals drops to 20% (.39 X .52 = 20.28), which is very close to the number of conviction reversals estimated to occur in non-capital cases. Likewise, the number of death sentences upheld on appeal rises to 48% (100 - .52 = .48). Note, too, that the guilt of the murderer is reaffirmed or left standing in 80% of all capital appeals, not, as we earlier reckoned, 73%.<sup>15</sup> Finally, once retrials and resentencings are accounted for, we find that 96% of all murder convictions (in capital cases) and 57% of death sentences survive the entire adjudication process. Figure 1 illustrates all of this.

**FIGURE 1  
CAPITAL CASE OUTCOMES  
AFTER APPEAL,  
RECONVICTION AND RESENTENCE**



Notes: The figures showing outcomes after appeal are based on the corrected Liebman study (52% reversal rate after all stages of review) and our finding that 61% of reversals are of sentence only (.61 x 52 = 31.72). The retrial/resentence figures are based on the Liebman findings on case outcomes after reversal during postconviction review (see Liebman Study at App. C-4.) We have no reason to believe that the outcomes after reversal at other stages of review are any different than the outcomes after reversal on post-conviction review.

**DUBIOUS INFERENCES**

Not only is the 68% reversal rate unsound, but so are some of the inferences that Liebman and colleagues drew from this inflated rate. Most notably, they assert that their 68% error rate accurately measures the risk that the capital punishment system mistakenly executes those who are not deathworthy.<sup>16</sup> In essence, they are saying that if courts find error in 68% of the cases they review, then there is a 68% risk that those put to death are wrongfully executed.

They offer the following analogy: if Firestone plant safety inspections discover that 68% of the inspected tires are defective, there is a 68% likelihood that every tire produced at the plant is defective.<sup>17</sup> By this reasoning, if 99 out of 100 capital cases are reversed on appeal, there is a 99% likelihood that the one individual put to death was executed in error. But product safety inspection is not capital case review.

First, to generalize from capital cases reversed on appeal to all cases, the capital cases reversed must be substantially similar to those capital cases not reversed (i.e., similar facts, issues, defendants, etc.). Firestone is able to conclude that it is manufacturing defective tires after uncovering a 68% rejection rate on quality review because it is dealing with a uniform product produced under a single manufacturing process. In short, those tires inspected are representative of those tires not inspected. One certainly cannot make the same claim of uniformity with capital cases. Not surprisingly, Liebman and his colleagues provide no evidence in their report that the reversals are representative of all capital cases in which the defendant is sentenced to death.

Second, Liebman et. al necessarily assume that the cases in which the defendants are “wrongfully” executed were never subjected to appellate review. In the Firestone analogy, the company inspects a sample of tires during quality control to draw conclusions about tires *not* inspected. However, in our capital punishment system, *all* cases are inspected, not just a representative subset. The defendants executed are those whose cases were subjected to and survived “inspection” (appellate review).

In short, the appellate reversal rate tells us *nothing* about the likelihood of an erroneous execution.

**CONCLUSION**

Speaking of the 68% error rate, Liebman, Fagan and West suggest that “[a]ny system with this much error and expense would be halted immediately, examined, and either reformed or scrapped.” What, then, should be done about a system that makes considerably fewer errors? Is it reasonable to conclude that a process that reaffirms 96% of all murder convictions and 57% of all death sentences is “broken”?

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Any proper assessment of the capital adjudication process must be based on an accurate measure of the appellate reversal rate as well as a full account of the many idiosyncratic features of that process. “A Broken System” provides neither.

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### ENDNOTES

<sup>1</sup> Fox Butterfield, “Death Sentences Being Overturned In Two of Three Appeals,” *N.Y. Times*, June 12, 2000, at A1.

<sup>2</sup> Although it was not originally published there, we recommend that readers access the “Broken System” at the website of John Jay College of Criminal Justice, [www.lib.jjay.cuny.edu/inetlink.html](http://www.lib.jjay.cuny.edu/inetlink.html), where one may also read our earlier critique of the Liebman study, “Capital Appeals Revisited,” 84 *Judicature* 64 (2000).

<sup>3</sup> Latzer & Cauthen, “Capital Appeals Revisited,” 84 *Judicature* 64 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> This was calculated as follows. We multiplied Liebman’s 68% overall reversal rate by the 61% sentence-reversal rate that we had uncovered:  $.68 \times .61 = .4148$ , rounded to .41. This represents the proportion of capital appeals resulting in a sentence only reversal. We then added this figure to the proportion of cases in which both the death sentence and the conviction were upheld:  $.32 + .41 = .73$ .

<sup>6</sup> Once again, we relied on data generated by Liebman and associates. We now believe, as we explain below, that this 44% figure significantly undercounts reality.

<sup>7</sup> Relying yet again on “Broken System” data, we calculated that after all retrials/rehearings, 5% of the underlying murder convictions were toppled. We note that Liebman does not say whether these defendants were convicted of lesser criminal homicides or other serious crimes associated with the fatal incident.

<sup>8</sup> At least one state official found that the Liebman study made significant errors in counting and analyzing its death penalty cases. See State of Nevada, Office of the Attorney General, “Nevada’s Death Penalty System Is Working” <<http://ag.state.nv.us/agpress/>

2000/00\_0919a.pdf> (overall error rate for Nevada is 19%, not 38% as Liebman study concluded). By “effective reversal rate,” we mean judicial reversals of death sentences after all retrials/rehearings have been taken into account.

<sup>9</sup> The study also counted 4578 direct appeals in 34 states, but as the postconviction review and habeas corpus decisions reported were for 28 states we make no further reference to the 34-state results. Also, the reversal rate on direct appeal is the same in both the 34 and 28 state samples.

<sup>10</sup> At the first two stages, direct appeal and postconviction review, there is no overstatement because the study authors assumed (reasonably) that all cases available for review were actually reviewed. At the third stage, habeas corpus, they dropped this assumption and calculated the error rate based solely on the cases actually reviewed.

<sup>11</sup> Upon our request, Prof. Liebman declined to release his data to us. We therefore could not examine the cases or verify the decisions reported in the “Broken System.”

<sup>12</sup> Liebman and colleagues believe that 10% is an underestimate, due to the difficulty of collecting postconviction judgments.

<sup>13</sup> The number of cases clearing postconviction review is computed by subtracting the reversals at the postconviction review stage from the cases that had cleared direct appeals:  $2582 - 248 = 2334$ . Professors Liebman and Fagan and Ms. West will undoubtedly point out that due to incomplete data on postconviction review we can’t be certain that 2334 is the correct number of cases available for habeas review. This is true, but 2334 is certainly closer to reality than 599. We do not think it is credible that 1983 cases were reversed at the postconviction stage, which would be necessary if 599 cases were cleared for habeas review ( $2582 - 599 = 1983$ ).

<sup>14</sup> See Latzer & Cauthen, “Capital Appeals Revisited,” 84 *Judicature* 64 (2000), where we relied on the 68% rate.

<sup>15</sup>  $100 - .20$  (the conviction-reversal rate) =  $.80$ .

<sup>16</sup> “[T]he decades of high reversal rates we documented nationally and in most capital states provide strong evidence that American death verdicts—decisions that men and women have committed sufficiently culpable acts that they legally may, and should, be executed—are generally unreliable. There is, in sum, a *high risk that many capital verdicts are unreliable*.” Liebman, Fagan & West, “Death Matters; A Reply to Latzer and Cauthen,” 84 *Judicature* 72, 76 (2000) (emphasis in original).

<sup>17</sup> Fagan, Liebman & West, “Death Is the Whole Ball Game,” 84 *Judicature* 1, 3 (2000).