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A Brief Response to Liebman, Fagan, and West[†]

JOSEPH L. HOFFMANN*

Professor Liebman and his colleagues, Valerie West and Professor Jeffrey Fagan, have mounted a vigorous defense of their study. I agree with much of what they say.¹ But their response does not alter the facts, nor does it address the most important of my criticisms. I will make two brief responses.

First, with all due respect to Liebman, Fagan, and West (and setting aside dubious analogies to Ford Explorer assembly lines and Indiana Pacers free-throw shooting), the facts speak for themselves: Out of 5760 cases in the study, 2377² were reversed as of the study's completion date. That is an actual reversal rate of about 40%, not 68%.

Liebman et al. accuse me of “extrapolation in the purest sense” in highlighting the 40% figure, because many of the cases had not yet been reviewed at one or more of the direct appeal, state postconviction, or federal habeas stages.³ They argue that it is “absurd” to assume that all of those cases ultimately would survive such review.⁴ I agree.

But this pox should be upon both of our houses. Both the 68% figure in the Liebman study and the 40% figure cited in my lecture are based on “extrapolation in the purest sense.” Both figures rely—as they must—on guesses about the unknown (and unknowable): How many of the as-yet-unreviewed cases *would be reversed*, if they were completely reviewed?

To fill this gap, the Liebman study makes an assumption that reversal rates will remain as high in the future as they were in the past—despite what we know about the maturation of Eighth Amendment law and recent procedural reforms (especially in federal habeas) that have made such reversals much less likely. Even Liebman's own data show how “absurd” such an assumption is.⁵

In the end, the only thing we can say for sure is that the reversal rate, if *all* of the cases were reviewed at *all* stages, would be somewhere between 40% and 68%.⁶ I

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1. I also look forward to reading the second phase of the study, and to eating my words if the results therein prove that my current criticisms are mistaken.

2. There seems to be a slight discrepancy between the figures reported in the original study, which show 2370 reversals, and the figures cited in reply to my lecture, which show 2377 reversals. The 40% figure was based on the 2370 reversals in the original study.

3. Valerie West, Jeffrey Fagan & James S. Liebman, *Look Who's Extrapolating: A Reply to Hoffmann*, 76 IND. L.J. 951, 951 (2001) (emphasis omitted) [hereinafter *Look Who's Extrapolating*].

4. *Id.* at 953.

5. See Joseph L. Hoffmann, *Violence and the Truth*, 76 IND L.J. 939, 945 n.37 (2001). This, by the way, is also the reason why Liebman's analogies are so inapt. One can reasonably assume that assembly-line error rates and free-throw-shooting percentages remain relatively constant over time. But reversal rates in death-penalty cases do not remain constant, which means that the Liebman study essentially seeks to hit a constantly moving (and thereby unhittable) target.

6. There is no evidence to suggest that reversal rates are increasing over time, so the 68%

agree with Liebman that, even at 40%, the reversal rate would be “depressingly high.”⁷ But I disagree with his saying that the reversal rate is 68% when it is not.

Second, and more importantly, Liebman et al. do not address the criticism of their study that I believe to be the most damning. Statistical quibbles aside, there is a fundamental problem with characterizing all of the reversals in capital cases (whether the rate is 40% or 68%) as involving serious, substantive errors. The problem can be illustrated with a simple example.

Imagine that the U.S. Supreme Court is presented with a case, on certiorari from direct appeal, in which it is claimed that a particular jury instruction, given routinely in capital cases, is unconstitutional. Imagine further that the Court concludes that the challenged instruction might adversely affect the outcome, producing a death sentence where such a sentence might not be legally proper or deserved, in about one out of every ten cases. The Court thus declares the challenged instruction unconstitutional. Because it is virtually impossible to tell whether a particular death sentence was adversely affected by the challenged instruction, lower courts respond to the Court’s decision by reversing the death sentence in every case that included the challenged instruction.⁸

If a hundred death sentences get reversed in this manner, how many of those reversals represent examples of serious, substantive injustice? In the example, about ninety out of the hundred cases would have come out the same way even without the challenged instruction.⁹ Because reviewing courts cannot say with certainty which

figure should represent an upper bound.

7. Look *Who’s Extrapolating*, *supra* note 3, at 953.

8. This is a routine situation. In the context of discretionary capital sentencing, harmless-error rules are defined very narrowly, often providing little opportunity for a reviewing court to avoid reversing a death sentence once a constitutional violation has been identified. See *Barclay v. Florida*, 463 U.S. 939, 958 (1983) (plurality opinion) (defining “harmless error” in capital sentencing as limited to those situations where the error “could not possibly affect the balance”); *Zant v. Stephens*, 462 U.S. 862 (1983).

The example given in the text is loosely based on the real case of *Mills v. Maryland*, 486 U.S. 367 (1988), in which the U.S. Supreme Court invalidated the jury instructions and verdict forms that were routinely used with respect to mitigating circumstances in Maryland capital cases, based on the existence of a “substantial risk” that the jury in particular cases might have been thereby misled. *Id.* at 381; see also *McKoy v. North Carolina*, 494 U.S. 433 (1990) (applying *Mills* to invalidate similar procedures routinely used in North Carolina capital cases). After *Mills* and *McKoy*, virtually all Maryland and North Carolina death sentences had to be reversed, see *infra* note 9, even though, by the Court’s own analysis, most of the cases involved defendants who were both guilty of the capital crime and deserving of a death sentence under the law.

9. Professors Liebman et al. note that six out of eight Maryland defendants (75%) whose death sentences were reversed on state habeas because of *Mills* actually received life upon retrial. See *Look Who’s Extrapolating*, *supra* note 3, at 955 n.21 Good data is better than speculation and the point is well taken—especially since it confirms, rather than rebuts, my claim that not all reversals involve “serious, substantive injustice.” But questions remain: At the time the *Mills* case was decided, it was estimated that almost one hundred Maryland and North Carolina death-row inmates would require resentencing as a result of that decision. See Vivian Berger, *Victories for Capital Defendants*, NAT’L L.J., Aug. 22, 1988, LEXIS, News Library, NTLAWJ, at *3 (stating that “almost 100” in Maryland and North Carolina will likely

particular cases would have come out the same way, it is right for them to reverse all hundred of the death sentences. But only about ten of the reversals involve serious, substantive injustice, in the sense that the defendant should not have been sentenced to death in the first place. In the other ninety cases, defendants who were both guilty of the capital crime and deserving of death under the law receive a windfall benefit. Yet, according to the Liebman study, *all hundred of the reversals* count as examples of serious, substantive injustice.

This is the biggest deficiency in the Liebman study. It does not, and cannot, tell us how many of the reversals that occur in capital cases involve defendants who are (or even might be) either innocent of the capital crime or undeserving of a death sentence. For all we know, very few of the capital cases that get reversed involve such innocent or non-death-deserving defendants. For all we know, most of the reversals identified in the Liebman study involve, instead, the kind of procedural error that warrants reversal *despite* the guilt and death-deservedness of the particular defendant involved.¹⁰ Because the Liebman study does not, and cannot, help us to resolve this fundamental problem, its findings—important as they are to the ongoing debate over capital punishment—must be taken with the proverbial grain of salt.

be affected by *Mills*); *Response Sought on Death Penalty*, N.Y. TIMES, Mar. 7, 1990, at 22 (stating that “about 70” in North Carolina were affected by *McKoy*, which applied *Mills* to the North Carolina statute). What happened to the ninety or so defendants whose ultimate outcomes are not documented in the Liebman study? How many of those ninety obtained resentencing hearings, and how many were then resentenced to death? We do not know, and until we do, it seems rash, if not foolhardy, to base any judgments on a sample of only eight cases. Even with respect to the six Maryland defendants who were resentenced to life, were those life sentences really caused by a difference in jury instructions, or simply by submitting the cases to different juries? More data, which may be provided in future phases of the Liebman study, will be needed to answer such questions.

10. I leave it to others to decide whether or not such procedural errors should be called “technicalities.”

