

Violence and the Truth[†]

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First, I would like to thank Dean Aman, Dean Robel, and the members of the law school committee who were involved in selecting me for this honor. I am deeply grateful for all of the support I have received from this great law school, and I rededicate myself today to the task of justifying the confidence all of you have so often placed in me.

I would like to thank my colleagues on the Indiana University law faculty for contributing so much over the past fifteen years to my development as a scholar and teacher. Simply put, there is no law school faculty anywhere in this country, or beyond, to which I would rather belong.

I would like to thank the many, many students whose insightful questions, comments, and criticisms over these fifteen years have helped to hone my mind and keep me on my toes. The learning environment at this law school is, I truly believe, second to none and our students play a major role in making it so.

I would like to thank my wife, Mary, as well as the rest of my family, for the unconditional love and support they have always given to me. Without them, I would not have been able to manage any of the accomplishments that have led to receiving this honor. In that sense, I share this honor completely with them.

I would like to thank the donors who made this professorship a reality. Without them, of course, this event would not be possible. I would like to give special thanks to the person who was, perhaps, the primary catalyst for the creation of this professorship: Robert Montgomery Knight.

Last, but certainly not least, I would like to thank Harry Pratter for allowing me, from this day forward, to use his name as part of my official title. No words are sufficient to express how meaningful it is, to me, to be named the inaugural Harry Pratter Professor of Law.

The 1996 Harry Pratter Lecture was delivered by one of Harry's former students, Professor George P. Smith of Catholic University.¹ Professor Smith described how he and his fellow Indiana University law students were the prime beneficiaries of Harry's lifelong pursuit of "knowledge for the sake of knowledge."²

But those of us who have been Harry's colleagues on this law faculty have also benefitted tremendously from Harry's intellectual curiosity. Although Wittgenstein may be his favorite subject, even on much more mundane topics Harry always manages to ask questions and make comments that provoke new and creative thought. And he always does it with a twinkle in his eyes that reflects the lively and youthful spirit of the man within. Thank you, Harry, for being such an inspiration to me throughout my career here at Indiana University.

The title of my lecture today is *Violence and the Truth*. This title is a variation on the title of an essay written in 1986 by the late Professor Robert Cover called *Violence and the Word*.³ In it, Cover made many observations about law, legal

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1. GEORGE P. SMITH, II, CHALLENGING FAMILY VALUES IN THE NEW SOCIETY 2-3 (1996).

2. *Id.* at 3.

3. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

interpretation, the nature of judging, torture, punishment, and death. But one particular passage from the article has always stayed with me. Commenting on the legal controversy surrounding the death penalty, Cover wrote:

Because in capital punishment the action or *deed* is extreme and irrevocable, there is pressure placed on the *word*—the interpretation that establishes the legal justification for the act. . . . Capital cases, thus, disclose far more of the structure of judicial interpretation than do other cases.⁴

In other words, when judges make legal rulings that uphold the imposition of a death sentence, their words—that is, the opinions they write to justify their rulings—are subject to greater scrutiny than in any other kind of case simply because the consequence is so violent. This is an extreme manifestation of the distinctiveness of legal interpretation. Unlike literary interpretation, or interpretation of texts of political philosophy, legal interpretation is defined by its capacity to produce action, including violence and even, in rare cases, death.

In his essay, Cover referred only to what judges do in death-penalty cases. But I have often thought about how the same words apply to what juries do in the same cases. Recent developments have brought this subject to the forefront.

We are witnessing today a true crisis of confidence in the death penalty in the United States. For the first time in more than twenty-five years, public support for the death penalty seems to be waning. The evidence of trouble is everywhere. The most prominent example is the moratorium on executions in Illinois declared by Republican Governor George Ryan,⁵ which followed a sensationalistic series of Chicago Tribune stories detailing cases of men who were erroneously convicted and sentenced to death in Illinois.⁶ These stories were largely prompted by earlier research by a Northwestern University journalism professor and his students.⁷ In New Hampshire, a state bill to repeal the death penalty was passed by the legislature but vetoed by the governor.⁸ In Nebraska, a legislatively enacted moratorium was also vetoed by that state's governor.⁹ In my own home state of Indiana, a comprehensive review of the death penalty was recently ordered by Governor Frank O'Bannon.¹⁰ And, at the federal level, bipartisan legislation, which has been working its way through Congress, would expand the rights of death-row inmates to challenge their

4. *Id.* at 1622-23.

5. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, § 1 (Evening Update ed.), at 1.

6. Special Report, *Failure of the Death Penalty in Illinois*, CHI. TRIB., at <http://www.chicago.tribune.com/news/metro/chicago/ws/0,1246,49183,00.html> (last visited June 12, 2001) [hereinafter Special Report].

7. Flynn McRoberts, *NU Professor Now a Media Superstar*, CHI. TRIB., Feb. 7, 1999, § 4, at 1.

8. John DiStaso, *Shaheen Vetoes Death Penalty in NH: Legislators React to Veto*, UNION LEADER (Manchester, N.H.), May 20, 2000, at A1, LEXIS, News Library, UNIONL File.

9. Robynn Tysver, *Moratorium Vetoed: Death Penalty Timeout Is Poor Policy*, *Johanns Says*, OMAHA WORLD-HERALD, May 26, 1999, at 1, LEXIS, News Library, OMWHLD File.

10. Diana Penner, *Governor Calls for Study of State's Death Penalty: O'Bannon Asks Legal Commission to Review Law's Fairness and Integrity*, INDIANAPOLIS STAR, Mar. 10, 2000, at A1.

convictions and sentences based on DNA evidence.¹¹

What's going on? If you happened to be out of the country for the past year and returned to find all of this activity, you might wonder what had prompted it. What earth-shaking event could have brought about this sudden crisis in confidence about the administration of capital punishment in America?

Your first, and most logical, guess would probably be that this crisis must have been precipitated by the one singular event that has always loomed, as a spectre, over the future of the death penalty: The execution of an innocent man. But your guess would be wrong. Despite the many resources that have been devoted to finding such an error, nothing has changed. We still have no proven instance, not one, of a mistaken execution during the modern era of American capital punishment.

If such an instance ever is proven, of course, it will likely mean the beginning of the end of the death penalty, at least in most states. Just such a case helped lead to the abolition of capital punishment in England about forty years ago.

For now though, we know of no such proven case here. So what's going on? It seems the attention of the nation has suddenly become focused on the *risk* of substantive error in death-penalty cases. When Pat Robertson calls for a national moratorium on executions,¹² when Senator Orrin Hatch cosponsors pro-death-row-inmate legislation,¹³ and when George Will writes columns critical of capital punishment,¹⁴ you know there is a perception problem with the death penalty. Even the broadest measures of public sentiment reflect a significant recent shift in attitudes about the death penalty—with public support dropping sharply.¹⁵ This represents a watershed event in the modern history of the death penalty in America, and it is an event that nobody anticipated would occur so suddenly, if at all. In particular, lawyers on both sides of the death-penalty divide have been stunned by these recent developments.

For the past twenty-five years, the legal battle over the death penalty in this country has been fought almost entirely on a battleground of procedure.¹⁶ Litigation in death-penalty cases has been focused almost exclusively on Eighth Amendment, "super due process" procedural issues.¹⁷ Even in those cases where there was concern about a possible substantive injustice, litigants and judges were forced to deal with these

11. Helen Dewar, *Support Grows for Execution Safeguards: Exonerations Spur Bills in Congress*, WASH. POST, June 16, 2000, at A1.

12. Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1.

13. See Dewar, *supra* note 11.

14. George F. Will, Editorial, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23.

15. See William Claiborne & Paul Duggan, *Spotlight on Death Penalty: Illinois Ban Ignites a National Debate*, WASH. POST, June 18, 2000, at A1 ("[A] Gallup poll in February found that 66 percent of Americans support capital punishment, still a solid majority, but down from 80 percent in 1994.").

16. Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771 (2000).

17. Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 818 (1993).

concerns indirectly, if at all.¹⁸ This has led to the explosive growth in procedural law in death-penalty cases, and, perhaps more importantly, to the concomitant virtual demise of substantive legal review of those same death-penalty cases.¹⁹ Today, as a matter of federal constitutional law, there is almost *no* substantive review after the trial of a death-penalty case.²⁰

This situation did not develop by accident. It was the direct byproduct of a deliberate strategy by those committed lawyers who have led the legal campaign against the death penalty. That strategy has been to promote procedural litigation in the hope that a never-ending sequence of new procedural rulings would interfere with the administration of capital punishment by blocking executions.

What is so fascinating about the events of the past year is that the worm has turned so quickly and unexpectedly. After twenty-five years during which the legal dialogue in death-penalty cases has been focused almost exclusively on procedural issues, suddenly our national dialogue has become obsessed with the substance of these same cases.

I believe that this sudden change occurred because of a basic difference between lawyers and people. In the court of public opinion, nobody much cares about "lawyers' issues" of procedure, such as the wording of jury instructions or verdict forms. Rather, in the court of public opinion, the public cares mostly about three things when it comes to the death penalty: (1) Did we get the right person? (2) Does he deserve to die for what he did? (3) How much will it cost us, as taxpayers, to implement the death penalty?

I'm not going to say much more about cost. I did predict, two years ago in an article for a Japanese law journal, that the continuing, enormously high cost of death-penalty litigation (a cost that I believe to be largely irreducible) was one force in society that could bring about the abolition of the death penalty.²¹ Just last year, for example, the Indiana legislature held hearings on an abolition bill for the first time in the modern era. The main reason the bill finally got a hearing probably was not increasing moral qualms over the death penalty, but increasing cost.²²

18. *Id.* at 819; see also Hoffmann, *supra* note 16, at 1771.

19. See Hoffmann, *supra* note 17, at 818; Hoffmann, *supra* note 16, at 1771.

20. See Hoffmann, *supra* note 17, at 817; Hoffmann, *supra* note 16, at 1771.

21. See Joseph L. Hoffmann, *The Death Penalty in America—Recent Developments in Law and Research* 1 n.3 (1999) (English version of manuscript published in Japanese with the *Journal of Proceedings of the Criminal Law Society of Japan*, on file with the *Indiana Law Journal*). It has been estimated that the costs associated with a death-penalty case range from three to six times the total costs of maintaining that same person for life in prison. See Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 356 n.106 (1996). For example, in California alone, a recent study concluded that taxpayers could save an estimated \$90 million per year by abolishing the death penalty. See Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack of Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 136 (1989) (citing Stephen Magagnini, *Closing Death Row Would Save State \$90 Million a Year*, SACRAMENTO BEE, Mar. 28, 1988, at 1).

22. See Heather Cocks, *Capital Cases Costly to Public*, S. BEND TRIB., Mar. 22, 1999, at A1, 1999 WL 14037265; Susan Dillman, *Bill Abolishing Death Penalty Likely to Fail*, S. BEND TRIB., Feb. 17, 1999, at D1, 1999 WL 5768415; Cary Solida, *Breaking the Bank over the Death Penalty: Small Counties Struggle to Finance Capital Punishment*, IND. LAW., Feb. 3,

What I did not foresee, when I wrote my article about cost, was the explosion, over the past two or three years, of concern about the substantive justice of the death penalty. This, even more than cost, now has the potential to bring down the death penalty.

It is said that those who do not learn from history are doomed to repeat it. The history of the death penalty in England now appears eerily similar to what we are presently experiencing in the United States. In England, the death penalty was abolished as the direct result of three notorious cases of substantive injustice.²³ The first was the Ruth Ellis case, in which a beautiful woman was hanged in 1955 for murder despite substantial public outcry seeking her pardon.²⁴ The second was the Bentley-Craig case. Bentley, a retarded nineteen-year-old, was executed in 1953 for a murder in which he was the minor participant.²⁵ The major participant, Craig, who had planned and instigated the crime, could not be executed because he was only sixteen.²⁶ The third was the Evans-Christie case. Timothy John Evans was convicted and hanged in 1950 for the murder of his wife and infant child, largely on the testimony of John Halliday Christie, his landlord, who lived in another apartment in the same building. Three years after Evans was hanged, however, Christie admitted killing not only Evans's wife, but also several other women, including Christie's own wife, all of whose bodies were found in the same building.²⁷

In all three cases, the British government steadfastly refused to admit error. Indeed, in the Evans-Christie case, the government for many years continued to maintain Evans's guilt, even after convicting and executing Christie as a serial murderer.²⁸

Note that none of these cases had anything to do with the procedural law applicable to death-penalty cases. They were all about substance. The key questions in each were: Did we get the right person? And does he/she deserve to die? In the United States, lawyers can argue about "super due process," and can keep striving to find the perfect procedures to ensure perfect outcomes in death-penalty cases, but the court of public opinion will be roused into action only by substantive injustice—such as what happened in England during the abolition movement of the late 1950s and 1960s.

So what has provoked the American public into action? Why have we witnessed this recent crisis in confidence? It seems that the same folks who have always opposed the death penalty on moral and political grounds have persuaded the media

1999, at 1.

23. See JAMES B. CHRISTOPH, *CAPITAL PUNISHMENT AND BRITISH POLITICS* 97-107 (1962).

24. Terence Morris, *Is It Now Time to Rethink Our Law on Murder?: In 1955, Protests over the Hanging of Ruth Ellis Forced a Legal Revolution*, *DAILY MIRROR*, Apr. 28, 2000, at 6, LEXIS, News Library, MIRROR File.

25. Steve Doughty, *U-Turn on Payout over Bentley Hanging*, *DAILY MAIL* (London), May 13, 1999, at 5, LEXIS, News Library, MAIL File.

26. *Id.*

27. See Ken Armstrong & Maurice Possley, *Fatal Judgment: In England, a Search for Long-Buried Mistakes*, *CHI. TRIB.*, Dec. 31, 2000, §2, at 1; Colin Tapping, *An Honorable End to a Miserable Story*, *N. ECHO* (Darlington, U.K.), Sept. 13, 1999, at 8, LEXIS, News Library, NECHO File.

28. In 1966, Queen Elizabeth posthumously pardoned Evans, declaring him innocent. See Armstrong & Possley, *supra* note 27; Tapping, *supra* note 27.

(and a large segment of the public) into believing that cases of mistaken death sentencing are legion, and that (as a result) the risk of mistaken executions is real and substantial.

Although there are many pieces to the puzzle of American public opinion, it seems that three of those pieces are by far the most important in explaining the sudden shift in attitudes about the death penalty.

The seeds of this crisis were sown by the biggest criminal-law event of the 1990s—the trial of O.J. Simpson. The O.J. trial focused the public's attention, for months on end, on a particularly nasty and troubling criminal case. It was a case in which almost everything went wrong—the crime labs screwed up, a law enforcement official got caught lying, the lawyers turned the proceedings into a circus that had little to do with the facts, the trial judge lost control, and, in the end, the jury reached a verdict that most Americans found ludicrous. No matter how often, and how loudly, most legal experts tried to convince the public that the O.J. case was a bizarre aberration, that message got lost. Instead, the O.J. case served to teach Americans that the criminal justice system, including the police, prosecutors, defense lawyers, trial judges, and especially the jury, can't be trusted to produce a substantively correct outcome. Ever since O.J., the public has been primed to believe almost any kind of negative report about the criminal justice system.²⁹

This attitude is also consistent with the broad sweep of American history. One of the dominant themes of that history is Americans' distrust of government in all of its forms. The criminal justice system has managed to avoid the public's distrust for most of American history, but the O.J. case may have changed all that.

In 2000, the revelations involving the death penalty in Illinois sent a shockwave that continues to reverberate across the country (and around the world). The aforementioned Chicago Tribune series³⁰ made for compelling reading, and was almost impossible for any thinking person to ignore. Regardless of the level of hyperbole that may have existed in the series, everyone should be able to agree that the presence of innocent men on death row is a legitimate matter of serious public concern. In view of the massive publicity that was given to the Illinois situation, it may be that Governor Ryan did the best he could do by calling a temporary halt and ordering strong steps to restore public confidence in the system. At first glance, it appeared that his actions would ultimately succeed—especially when momentum began to build behind other efforts better to ensure, *beyond all doubt*, the substantive accuracy of death-penalty verdicts. In this sense, the aforementioned federal legislation to allow review of capital cases based on DNA evidence could be seen as another reassuring layer of protection for innocent defendants.

In June 2000, the third shoe dropped when Professor James Liebman of Columbia University Law School, and two research colleagues, Valerie West and Professor Jeffrey Fagan, released the first installment of a massive study, entitled *A Broken System: Error Rates in Capital Cases, 1993-1995*.³¹ This study purported to find a

29. See Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267 (1996).

30. Special Report, *supra* note 6.

31. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at <http://www.law.columbia.edu/instructionalservices/liebman/>

huge number of serious, substantive errors in death-penalty cases nationwide. Coming on the heels of the Illinois moratorium, the study hit the media channels—and the public—like a bombshell.

According to the official press release that accompanied the Liebman study,³² there are three key findings. First:

Nationally, during the 23-year study period, the overall rate of prejudicial error in the American capital punishment system was 68%. (In other words, courts found serious, reversible error in nearly 7 out of every 10 of the capital cases that were finally reviewed during this period.)³³

Also:

The study found that the errors that lead courts to overturn capital sentences are not mere technicalities. The three most common errors are: (1) egregiously incompetent defense lawyers (37%); (2) prosecutorial misconduct, often the suppression of evidence of innocence (19%); and (3) faulty instructions to jurors (20%). Combined, these three constitute 76% of all error in capital punishment proceedings.³⁴

Finally:

High error rates lead innocent persons to be sentenced to die. The study of post-reversal outcomes reveals that 82% of those whose capital judgments were overturned due to serious error were given a sentence less than death after the errors were cured on retrial. Seven percent were found to be not guilty of the capital crime.³⁵

In other words, according to the Liebman study, not only are mistakes rampant in death-penalty cases across America, but these mistakes are predominantly substantive mistakes—mistakes that lead directly to the conviction and sentencing of persons who are innocent or do not deserve to die. But there's something wrong with this statistical picture.

First, Liebman did not—and could not—base his statistics on a complete sample.³⁶ This is because during the study period many of the cases in his study had been reviewed only on direct appeal, but not on state postconviction or federal habeas review. Liebman, therefore, made an assumption that error rates on state postconviction and federal habeas review would remain constant over time, and he extrapolated those rates of error to calculate the overall percentages reported in the

liebman_final.pdf (June 2000) [hereinafter *A Broken System*], reprinted in part in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

32. Press Release, Columbia Law School, Landmark Study Finds Capital Punishment System "Fraught with Error" (June 12, 2000), http://www.law.columbia.edu/news/PressReleases/lieb_study.html.

33. *Id.*

34. *Id.*

35. *Id.*

36. See *A Broken System*, *supra* note 31, ch. IV; see also *id.* at 153 n.40.

study. This is not a safe assumption, especially in federal habeas, where reversal rates have been dropping as the U.S. Supreme Court's Eighth Amendment law has gradually begun to stabilize.³⁷ Thus, it is not necessarily a good idea to extrapolate from earlier federal habeas reversal rates. If you recalculate Liebman's data, without extrapolation, you find that the study identified 2370 actual reversals out of a total universe of 5760 capital cases—for an actual error rate of about 40%, not the 68% figure that the study reported.³⁸

Second, what are the primary sources of error? Liebman suggests that two of the most common errors are ineffective assistance and prosecutorial misconduct, which account for, he says, more than half of the reversals. This is simply untrue. If you read the study carefully, you will notice that the data about the reasons for reversal come only from state postconviction review (i.e., state habeas) cases. This is highly problematic, for two reasons: (1) it's a very small sample (only 248 cases, out of the total of 2370 reversals)³⁹ and (2) it's a highly nonrepresentative, or biased, sample. State habeas is the only review stage in state court where legal issues that cannot be decided on the face of the trial record because they require additional factual development—such as, most prominently, ineffective assistance and prosecutorial misconduct—can be litigated in a meaningful way.⁴⁰ Indeed, in at least some states, a defendant is not even *permitted* to raise such issues on direct appeal. A defendant *must* wait for state habeas review to raise such issues, if he wants to raise such issues at all.⁴¹ In short, ineffective assistance and prosecutorial misconduct issues are much more likely to show up in state habeas review than elsewhere in the overall review process. One would expect to see these issues only rarely on direct appeal (if at all),⁴² and to see them primarily in state habeas. It is simply wrong, therefore, to assume that the presence of such issues in state habeas review is necessarily indicative of their presence elsewhere in the review process. That is why Liebman's conclusion about the most prevalent reasons for error is flawed. If one recalculates the study data to

37. See *id.* at app. E-5 tbl. 3 (showing reversal rates on habeas dropping from between 71% and 81% from 1980-82, to between 39% and 49% from 1985-88, and to between 24% and 36% from 1991-94).

38. See *id.* at app. A (reporting actual reversal figures).

39. *Id.*

40. See, e.g., Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 74 (2000) ("The next level of appeal is state habeas review, where the inmate raises claims based on facts outside the trial record, such as ineffective assistance of trial counsel.").

41. See *Woods v. State*, 701 N.E.2d 1208, 1215-16 (Ind. 1998) (mentioning "the view, followed in many state and federal courts, that ineffective assistance of trial counsel, irrespective of the nature of the contentions, can (or even must) be postponed until collateral review" (citing DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF (1996 & Supp. 1997) (state views) and *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (federal view))). The court in *Woods* held that, in Indiana, "[f]or the reasons outlined, a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim." *Id.* at 1219.

42. The only time ineffective assistance claims are likely to arise on direct appeal is if (1) the defendant has a new lawyer on appeal, and (2) the trial record is adequate, on its face, to support such a claim. The only time a *Brady* claim is likely to arise on direct appeal is if the undisclosed evidence—of which, by definition, the defense was unaware during the trial—is discovered before the time for filing the direct appeal has expired.

correct for this flaw, one finds that only 139 cases—or about 2.5% of the total in the study—are known to have been actually reversed for ineffective assistance or prosecutorial misconduct.⁴³

Third, are the defendants in the reversed cases innocent or undeserving of the death penalty? Again, there are serious problems with the study. Liebman says that, on retrial, 82% of these defendants received a sentence of less than death, and that 7% were found to be innocent. But these numbers are based on the same small and biased sample (i.e., state postconviction review cases) discussed above. As previously noted, ineffective assistance and prosecutorial misconduct issues are disproportionately prevalent in state postconviction review. Such errors, by their very nature, are more likely to lead to the conviction and sentencing of an innocent, or non-death-deserving defendant than are other, more “technical” kinds of legal errors. Thus, capital cases reversed on state postconviction review are likely to contain a disproportionate number of substantively flawed results. In other words, such reversals are more likely than the average reversal to involve an innocent or non-death-deserving defendant.

Moreover, within these numbers, Liebman included all cases where the defendant was allowed to plead guilty and receive a life sentence even though, in many such cases, the plea may have been based on factors totally unrelated to innocence or death-deservedness, such as the prosecutor’s desire to avoid putting the victim’s family through a retrial.⁴⁴ The reality is that, overall, Liebman identified only twenty-two cases nationwide—out of the original sample of 5760 death-penalty cases—in which a defendant was actually acquitted of the capital crime on retrial.⁴⁵

How many more cases involved a defendant who was guilty of the capital crime, but undeserving of the death penalty? It’s simply impossible to say, based on Liebman’s data—because there is no basis for concluding whether any particular reversal was based on an underlying substantive injustice or merely procedural errors that might, in a particular case, be unrelated to substantive injustice. Our legal system has spent the past twenty-five years creating an incredibly complex body of Eighth Amendment procedural law unique to capital cases. The existence of this precedent is directly responsible for most of the reversals identified by Liebman.⁴⁶ The core question, in a sense, is whether the reversals identified in the Liebman study stand as evidence that there are significant numbers of substantively flawed death sentences, or whether they stand as evidence that our system is simply overregulating (and overlitigating) the procedures that are used in capital cases. The data do not, and cannot, answer this question.

Having pointed out some of the problems with the Liebman study, I will now proceed to discuss that study in its broader context. First, none of my criticisms of the study should be interpreted as a general defense of the system by which we currently administer the death penalty in this country. Although the Liebman study greatly overstates the statistical case about substantive injustice in death-penalty cases, that

43. See *A Broken System*, *supra* note 31, at app. G (illustrating actual figures for state postconviction cases).

44. See *id.* at 154 n.45.

45. See *id.*

46. See Hoffmann, *supra* note 16, at 1782 n.58; see also Hoffmann, *supra* note 17, at 825.

does not mean that the system is operating as it should. As Liebman and others have noted, the current system remains plagued by examples of overzealous police and prosecutors, inadequate defense lawyers, and strained resources.⁴⁷ Even if these problems lead to substantively unjust outcomes in only a small handful of capital cases, that is still too many.

We know that substantively unjust outcomes do occur. Perhaps the clearest recent example is the case of Anthony Porter in Illinois. Porter was convicted and sentenced to death in 1983 for a double-murder. Porter's defense lawyers did a poor job of defending him at trial. Many years later, it was learned that Porter's jury was tainted. One of the jurors was an acquaintance of the mother of one of the victims, and in fact had attended the victim's funeral.⁴⁸ Even Porter's prosecutors now concede that he was completely innocent of the crime.⁴⁹ Whether or not capital punishment in this country is broken in general, Anthony Porter's case stands as stark evidence that substantive mistakes do occur, and that it is often difficult and time consuming to find and correct them.

If there are even twenty-two cases like Anthony Porter's, in which an innocent defendant was sentenced to die, that is a serious problem. There are certainly many more cases in which the defendant was guilty, but was given an undeserved death sentence—even if Liebman's study cannot tell us exactly how many.

In this sense, the Liebman study has been a good thing for the system, provoking a long-overdue shift in emphasis from procedure to substance. While we may never truly know the extent of substantive injustice in capital cases, we can see the impact that the Liebman study has had—including the executive and legislative responses that were mentioned earlier. If the legal system does not respond in what the public views as an appropriate manner, then the future of the death penalty is in serious jeopardy.

To make the point more clearly: Even if abolitionists do not find the "Holy Grail" of an innocent person who has been executed, they will prevail, in at least some states, if (1) the American public comes to believe (as they may now do, by virtue of the Liebman study) that substantive error occurs widely in capital cases and (2) the American public further believes that the government does not care, or even worse, is trying to hide the nature and extent of the problem.

It should be obvious, of course, that the same kind of problems exist in noncapital cases. The difference is that the public is less concerned about wrongful imprisonment than it is about wrongful execution. For this reason, the public does not focus so much, or so often, on substantive problems in noncapital cases.

The same point that Professor Cover made about judging in capital cases, and about the procedural rulings made by judges, thus turns out to be even more true about the substantive decisions of guilt and appropriate sentence in such cases. After all, the legal justification for a death sentence begins with the defendant's conviction. If the

47. See Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

48. See Ken Armstrong & Steve Mills, Special Report, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, § 1, at 17.

49. *Id.*

conviction is substantively tainted, nothing else matters, not even perfect legal procedures. In capital cases, the extreme violence of the outcome places extreme pressure on all of the constituent legal decisions—including the substantive legal decisions that, in our system, are usually made by juries.

The recent emphasis on substantive injustice in capital cases is thus both inevitable and desirable. We should not need federal legislation to allow death-row inmates to have access to DNA evidence that might prove their innocence. We should support such legislation, regardless of our opinions about the death penalty. Paradoxically, it turns out that the future of the death penalty may depend on the willingness of prosecutors to admit the possibility—indeed, the certainty—of substantive error, and on their willingness to join with defense attorneys in searching for, and correcting, such error.

