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EMPIRICAL STUDIES CONTRIBUTE TO DEATH PENALTY DEBATE

By Professor Joan Howarth

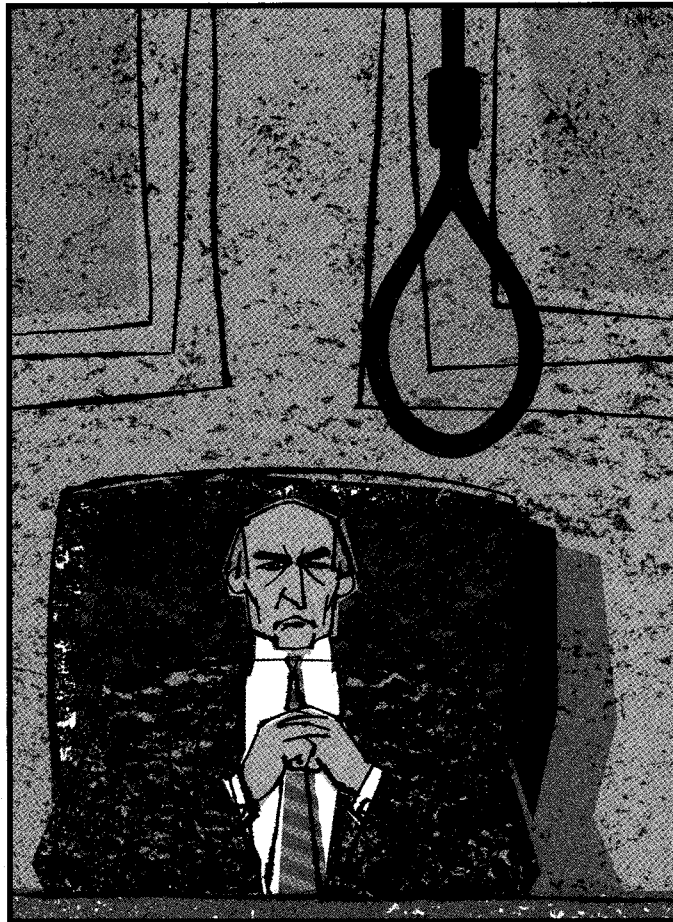
At a time of renewed scrutiny of capital punishment, Nevada lawyers may be interested in some of the recent legal scholarship on the death penalty based on social science data, rather than on legal philosophy or constitutional theory. Three projects are of particular interest: Professor James Liebman's work on errors in death penalty cases; the National Jury Project's data about how jurors decide capital cases; and David Baldus' recent study of peremptory challenges in capital cases.

Columbia law professor James Liebman's empirical studies on error rates in capital cases have captured national and international attention. Liebman's 2000 study, *A Broken System*,¹ reported that state or federal courts found serious errors that required reversal of 68 percent of all capital cases between 1973 and 1995. *A Broken System* also found an identical 68% error rate for Nevada.² The Liebman team's 2002 follow-up study, *A Broken System II*,³ identified several factors statistically associated with high rates of serious error in capital cases.

Liebman's use of actual reversals - whether by state appeal, state habeas petition, or federal habeas petition - as the measure of serious errors, is controversial with both supporters and critics of the death penalty. Some death penalty supporters understand reversals to mean that the system is working, not broken; Liebman, on the other hand, contends that the system is caving under its own weight, with high reversal rates proving the unreliability of death verdicts and causing terrible delay and additional costs. Many death penalty

critics are concerned with errors that have not led to reversals; Liebman concedes that reviewing courts do not catch all serious trial errors.

The main finding of *A Broken System, Part II*, is that nationally, "the



higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error."⁴ Liebman concluded "Heavy use of the death penalty causes delay, increases cost, and keeps the system from doing its job."⁵

Nevadans should be particularly interested in this conclusion. Liebman's study ranks Nevada 5th among all death penalty states in frequency of use of the death penalty.⁶

This nationally established association between heavy use of the death penalty and subsequent reversals is not perfect, of course. For example, under Liebman's figures, Clark County, Nevada stands out nationally as one of the heaviest users of the death penalty. Clark County is one of 15 counties in the country with at least fifty death verdicts in the 23-year study. Of those fifteen counties, Clark County ranks second in frequency of use of the death penalty, as measured by the percentage of homicides that result in death verdicts.⁷ Clark County's rate of 55 death verdicts per 1000 homicides is five times greater than the rate for either Dallas County, Texas, or Cook County (Chicago), Illinois, for example. Yet the error rate, or percentage of cases that have been reversed, for Clark County, is 64%, which is actually slightly below the national average (68%), and the reversal rate for Dallas (67%).

Northern Nevada makes its way onto the Liebman charts as well. Of the 244 counties across the country with at least five death verdicts in the study period, Carson City ranks 14th in frequency of use of the death penalty (again, the percentage of homicides that result in death verdicts), yet maintains a 67% reversal rate, just below that national average of 68%.⁸ One way to interpret these figures is that Clark and Carson City Counties did a better job than the rest of the country in producing error-free trials in high-percentage or high-volume death penalty systems. Another interpretation would suggest that the Nevada reversal rate is too low, at least when compared to other death penalty

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states, and that errors may be going unrecognized. Nationally, state courts reversed 47% of capital cases in the twenty-three year study; Nevada courts reversed 35%, putting us 21st out of the 28 study states.⁹ Nevertheless, federal courts reversed 50% of Nevada death verdicts, compared to a national composite average of 40%;¹⁰ the combination of low state court reversals and high federal court reversals brought Nevada's reversal rate to the national average of 68%.

Liebman's studies have not gone unchallenged. Nevada Attorney General Frankie Sue Del Pappa's office issued a statement, "Nevada's Death Penalty System is Working,"¹¹ disputing Liebman's figures for Nevada and elsewhere. This statement argues that the reversal rate by Nevada courts was actually only 19%, significantly lower than reported by Liebman. A serious academic critic of Liebman's findings is University of Indiana law professor Joseph L. Hoffmann, who also argues that Liebman's figure of 68% reversal rate is too high; by Hoffman's calculations, the national reversal rate probably should be adjusted downward to about 40%.¹² Although he is critical of important aspects of the Liebman studies, Professor Hoffmann concludes that the Liebman study should be taken seriously. "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."¹³

Liebman's study recommends that states work to reduce error in capital cases through a series of policy changes intended to limit the death penalty to the "worst of the worst." Those reforms include restricting capital charging to highly aggravated cases, requiring proof beyond any doubt that the defendant committed the capital crime, barring the death penalty for defendants with inherently extenuating conditions, such as for mentally retarded persons or

juveniles, and using comparative reviews to identify the "worst of the worst" in the state.¹⁴

Another significant body of empirical legal scholarship on the death penalty is based on data collected by the Capital Jury Project (CJP), a major study funded by the National Science Foundation on how capital jurors decide between life and death. Researchers interviewed a random selection of 1115 jurors in fourteen states. The jurors sat in 340 trials, half of which resulted in death, half in life. Each interview lasted three to four hours, with questions ranging from the conduct of the trial, the demeanor of the defendant, the actions of the victim's family, the instructions, deliberations, as well as demographic information, including race, sex, age, and religion, and juror attitudes about the death penalty. Of the many law review articles already published using CJP data,¹⁵ one of the most interesting, William J. Bowers' team's *Death Sentencing in Black and White*,¹⁶ focuses on the impact of the race of jurors in capital cases.

This Bowers study found that the racial and gender composition of capital juries was statistically relevant in cases of Black defendants charged with murder of a white victim. The presence of women, whether white or black, was largely unrelated to sentencing outcomes.¹⁷ However, the presence of five or more white male jurors dramatically increased the likelihood of a death sentence in these cases, while the presence of Black male jurors substantially reduced the likelihood of a death verdict.¹⁸ The researchers concluded that the "CJP data from capital jurors themselves unmistakably demonstrate the influence of race in capital sentencing."¹⁹

These results add significance to another important empirical study on race in capital cases, *The Use of Peremptory Challenges in Capital Murder Trials*,²⁰ recently published by a team led by prominent death penalty researcher Professor David Baldus. This study analyzed 317 capital murder cases tried

in Philadelphia between 1981 and 1997. The use of race-based peremptories by prosecutors has been prohibited since *Batson v. Kentucky*, 476 U.S. 79 (1986), which was extended to defense counsel in *Georgia v. McCollum*, 505 U.S. 42 (1992). Gender became a prohibited basis for use of peremptories with *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). In findings that should disappoint the Supreme Court, the Baldus team found that *Batson*, *McCollum*, and *J.E.B.* have had only a "marginal impact."²¹ Instead, the report concludes that "discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread"; that "prosecutors are considerably more successful than defense counsel in their attempts to control jury composition; and that this prosecutorial advantage 'enhances the probability of death for all defendants' and 'raises the level of racial discrimination in the application of the death penalty.'"²² This gap between lofty Supreme Court directives and real case data is disturbing, if not surprising to trial attorneys.

No one knows the extent to which any of these studies have contributed to the recent marked declines²³ in popular support for the death penalty. The execution of Karla Faye Tucker in Texas and revelations about innocent men on death row in Illinois that led to the moratorium imposed by Republican Governor George Ryan might be more responsible for shifting national attitudes. We do know, however, that, the recent numbers of executions and of death row inmates have declined nationally,²⁴ perhaps heralding a trend for future empirical study. ■

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ENDNOTES

¹ 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/>

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).

² *A Broken System*, Appendix E: Tables and Figures, Table 1: Overall Error Rates and Percent Death Sentences Carried Out, by State, 1973-1995.

³ James S. Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, & Alexander Kiss, *A Broken System, Part II: Why There is So Much Error in Capital Cases and What Can Be Done About It* (Feb. 11, 2002), at http://www.law.columbia.edu/broken_system2/ (visited May 31, 2002) [hereinafter *A Broken System II*].

⁴ *A Broken System II*, Executive Summary, p. 2.

⁵ *A Broken System II*, Executive Summary, p.3.

⁶ This is measured by rate of death verdict per 1000 homicides. *A Broken System II*, Table 18, Column A The Liebman study also found that political pressure on state judges was associated with death penalty errors. On that measure, namely election pressures on judges, Nevada ranked second from the top (along with several other states). *A Broken System II*, Table 18, Column E. Nevada did not have more than average rates of the other factors found by Liebman to be associated with high rates of serious error, including ineffective law enforcement, high Black population, and poorly funded court systems. *A Broken System II*, Table 18, Columns B, D, and F.

⁷ *A Broken System II*, Table 10B.

⁸ *A Broken System II*, Appendix B: County Tables, Table 11A: Death-Sentencing and overall Reversal Rates for All Counties With Five or More Death Verdicts, 1973-1995 (Ranked by Death-Sentencing Rates).

⁹ *A Broken System*, Table 30.

¹⁰ *A Broken System*, Table 30.

¹¹ State of Nevada, Office of the Attorney General, *Nevada's Death Penalty System is Working*, (Sept. 19, 2000), available at http://ag.state.nv.us/agpress/2000/00_0919a.pdf (visited May 31, 2002).

¹² Joseph L. Hoffmann, *The Harry Pratter Professorship Lecture: Violence and the Truth*, 76 IND. L. J. 939, 946 (2001).

¹³ *Id.*, at 949.

¹⁴ *A Broken System II*, § VIII (Policy Options).

¹⁵ See, e.g., Blume, John H., Stephen P. Garvey, & Sheri Lynn Johnson. *Future Dangerousness in Capital Cases: Always 'At Issue'*, 86 CORN. L. REV. 397 (2001); Eisenberg, Theodore, Stephen P. Garvey, & Martin T. Wells. *The Deadly Paradox of Capital Jurors*. 74 SOUTH. CAL. L. REV. 371

(2001); Eisenberg, Theodore, Stephen P. Garvey, & Martin T. Wells. *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*. 30 J. OF LEG.STUD. 277 (2001); Garvey, Stephen P., Sheri Lynn Johnson, & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORN. L. REV. 627 (2000); Bowers, William J., Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*. 83 CORN. L. REV. 1476 (1998); Bowers, William J., & Benjamin D. Steiner. *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998); Eisenberg, Theodore, Stephen P. Garvey, & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORN. L. REV. 1599 (1998); Eisenberg, Theodore, Stephen P. Garvey, & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996); Eisenberg, Theodore, & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital*

Cases, 79 CORN. L. REV. 1 (1993).

¹⁶ Bowers, William J., Benjamin D. Steiner, & Marla Sandy, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror Race and Jury Racial Composition*, 3 U. OF PENN. J.OF CONST. L. 171 (2001) [hereinafter Bowers].

¹⁷ Bowers, *supra*, at 195.

¹⁸ Bowers, *supra*, at 193-94.

¹⁹ Bowers, *supra*, at 259.

²⁰ Baldus, David C., George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) [hereinafter Baldus].

²¹ Baldus, *supra*, at 10.

²² Baldus, *supra*, at 10.

²³ See, e.g., *A Broken System II*, Introduction, n. 70-73 and accompanying text.

²⁴ Death Penalty Information Center, *The Death Penalty in 2001: Year End Report* (Dec. 2001), available at <http://www.DEATHPENALTYINFO.ORG/YEARENDREPORT2001.PDF>

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