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Death is the Whole Ball Game

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by Jeffrey Fagan, James S. Liebman, and Valerie West

In *Capital Appeals Revisited* and *The Meaning of Capital Appeals*, Barry Latzer and James N.G. Cauthen argue that a study of capital appeals should focus only on overturned findings of guilt, and complain that in *A Broken System*[1] we examine *all* overturned capital verdicts. But the question they want studied cannot provide an accurate evaluation of a system of capital *punishment*. By proposing to count only "conviction" error and not "sentence" error, Latzer and Cauthen ignore that if a death sentence is overturned, the case is no longer capital and the system of capital punishment has failed to achieve its central objective. Latzer and Cauthen's failure to recognize this point illustrates their basic misunderstanding of the legal process. That misunderstanding not only leads them to misinterpret our work and to advance misleading conclusions about the functionality of the death penalty in the U.S., but also invalidates the conceptual basis of their own study.

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Most crucially, Latzer and Cauthen fail to understand that the law treats a state's decision to take life as more serious than any other trial decision. They regard trial error that spells the difference between an individual's living and dying as unimportant and consign it to a lower status than, for example, error leading to convictions of one degree of homicide rather than another.

As a statement of Latzer and Cauthen's beliefs, this conclusion is merely idiosyncratic; most Americans disagree. But as a statement of the premises of our actual death penalty system—and, thus, of what to measure when assessing that system's effectiveness—their claim is dead wrong. A large body of law holds that "death is different," and that flaws in all other aspects of the criminal justice system *pale* in comparison to mistakes in meting out that punishment.[2] Death is not just the extra point after a touchdown. It's the whole ball game.

Latzer and Cauthen also misunderstand *how* the law aims to get capital sentences right. They assume the law requires only two findings for a death sentence—that the defendant is guilty of a "capital offense" (a decision they call "the conviction" and assume occurs entirely at the first phase of capital trials), and that the aggravating factors in the case outweigh the mitigating ones (a decision they call "the sentence" and assume is the only one made at the second phase). They then assert that the first of these decisions is important because it measures culpability, while the second decision is unimportant and beneath policy concern.

The law

The law states otherwise. Latzer and Cauthen ignore the fact that state and federal law generally requires states to prove *four* things before imposing a death sentence. The defendant must be guilty of (1) homicide (unjustified killing of another person), (2) additional acts making the killing murder of the *first degree* (e.g., a premeditated or deliberate killing), *and* (3) at least one statutory aggravating act that makes the murder capital. Only if these findings are made does the issue become the one Latzer and Cauthen say is unimportant: (4) whether aggravating factors outweigh mitigating ones. Latzer and Cauthen's *two* categories of error—"conviction" (first-phase) and "sentencing" (second-phase) error—thus are useless for studying a system that recognizes *four* types of error.[3]

Latzer and Cauthen also ignore the interdependence of the process for determining these four things. Some states allocate at least some aspects of finding (2) to the second trial phase. *All but a couple* states allocate finding (3) to the second stage.[4] So, when Latzer and Cauthen count only first-phase reversals as important, they miss many mistakes impugning findings that defendants

1. Liebman, Fagan, and West, *A Broken System: Error Rates in Capital Cases*, 1973-95, http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf, visited October 13, 2000.

2. *See, e.g., Woodson v. North Carolina*, 428 U.S. 253 (1976).

3. *See*, e.g., Tenn. Code Ann. § 39-13-201, 39-13-202, 39-13-204 (Supp. 1999).

4. For example, Florida and Texas assign premeditation and deliberation determinations, and all aggravating circumstance questions, to the second, so-called "sentencing" phase.

committed a high degree of murder that was capitally aggravated. These mistakes go directly to culpability, as Latzer and Cauthen themselves admit by counting them as "important" when they occur at the first phase. Latzer and Cauthen don't understand that many first-phase (so-called "conviction") and second-phase ("sentencing") errors are *the same, crucial, culpability-affecting errors.* Or, they artifactually depress their count of "important" error by omitting the large amount of it occurring at the second phase.

They also don't recognize that the fourth factor—whether aggravating factors are outweighed by mitigating ones—is no less determinative of culpability than findings (1) through (3). Latzer and Cauthen have no basis in law for treating serious mistakes that compromise the balancing of mitigating and aggravating factors as unimportant.

The same threshold

Latzer and Cauthen do assert that death makes *one* kind of legal difference. They say: "[I]n death cases, errors ordinarily considered harmless are treated more seriously because the defendant's life is on the line. This lowered threshold for capital trial reversals is a virtual mandate of the Supreme Court. . . . [T]he ground rules of review are different and the scrutiny more intensive." But this is wrong. Prisoners on death row have repeatedly asked the Supreme Court to mandate a lower threshold for reversals and to undertake a different, more intensive level of scrutiny for the vast majority of claims that are raised, and that lead to reversals, in capital cases. And the Supreme Court has repeatedly declined, applying the *same* standard for deciding whether any error is "harmless," the *same* threshold for reversal, and the *same* scrutiny, in capital as in noncapital cases.[5] Latzer and Cauthen have not, and cannot, identify any different legal threshold or scrutiny that accounts for high reversal rates.

Moreover, the reversals we counted are hardly for technicalities, and certainly meet this difficult threshold for reversal. At the state post-conviction stage, where data are available, 75 percent of the post-reversal retrials replaced a death sentence with a lesser sentence once the error was cured; 7 percent more ended in *acquittals.* Far from being unimportant, therefore, curing capital sentencing error as we define it very often reveals that the defendant is not capitally culpable, and sometimes reveals that he is not guilty at all.

Two crucial points

Latzer and Cauthen use a biased search technique designed to find *all* errors affecting death "sentences" and "penalties," but to *underestimate* (because they didn't even search for) errors affecting capital *convictions.* We showed that their method in fact undercounts so-called "conviction reversals" by quickly identifying 40 cases their search method misses, and finding that 83 percent of those missed cases were *conviction* reversals. In reply, they obfuscate two crucial points.

First, they claim that the 40 cases we identified are small in number compared to the 837 cases they sampled. But in *A Broken System* we studied more than 2,100 state court reversals. Latzer and Cauthen "sampled" only 837 reversals. The question, then, is whether their facially skewed sampling technique—which searched a computerized data base for "death *penalty*" and "death *sentence*" reversals but did not search it for "*conviction*" or "*first-degree*" or "*aggravating factor*" reversals—produced a skewed comparison of the number of each kind of reversal. The 40 cases we found in a quick search for the hundreds they omitted show they missed four conviction reversals for every one *sentencing* reversal. Latzer and Cauthen's defense to biasing their sample thus cannot be that 40 is less than 837, but could only be an argument they don't make: that the 4-to-1 skew revealed by our 40 cases is unrepresentative of the skew in the many other cases they omitted.

Second, Latzer and Cauthen say that some of the 40 cases we identified were "mere" intermediate court reversals, which they didn't bother to count. This admits *another* legal mistake. They think state intermediate court decisions never reflect the state courts' final judgment about the validity of death verdicts. In fact, the law of three high capital-sentencing states gives *intermediate* courts the duty to make final rulings on the validity of some or all capital verdicts (as occurred in all the intermediate court decisions in the 40 we found). Thus, in addition to systematically under-sampling "conviction" reversals, Latzer and Cauthen arbitrarily omitted large chunks of final state court cases from the universe they sampled.

Latzer and Cauthen's most flagrant error is one of logic. They say a 68 percent rate of death sentence reversals has "nothing to do with" the reliability of the verdicts by which "persons [are] selected for execution," because those whose sentences are reversed don't get executed. Suppose we learn that 68 percent of Ford Explorers fail the manufacturer's safety inspections and have to be scrapped or retooled, as do 68 percent of Firestone tires, 68 percent of Value Jet aircraft, and 68 percent of Swift Packing Co.'s hamburgers checked for *E.coli.* Latzer and Cauthen say regulators would be crazy to raise an alarm, or to scrutinize or shut down the relevant plants until finding out why they produce more duds than safe products, and whether their inspectors can catch all the death traps before any reach the public. If that's what Latzer and Cauthen think, they are free to drive to the airport in a Ford Explorer with Firestone tires, take a Value Jet flight, and eat a hamburger on board. Forgive the rest of us, however, for exercising more prudence when life is at stake.

5. *See, e.g., Calderon v. Coleman,* 525 U.S. 141 (1998) (harmless error); *Kyles v. Whitley,* 514 U.S. 419 (1995) (prosecutorial misconduct); *Boyde v. California,* 494 U.S. 370 (1990) (misinstruction); *Strickland v. Washington,* 466 U.S. 668 (1984) (incompetent counsel).