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Jeffery Fagan

Columbia Law School, jfagan@law.columbia.edu

James S. Liebman

Columbia Law School, jl Liebman@law.columbia.edu

Valerie West

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MISSTATEMENTS OF FACT IN ADAM VANGRACK'S STUDENT NOTE: A LETTER TO THE EDITORS OF THE WASHINGTON UNIVERSITY LAW QUARTERLY

JEFFREY FAGAN
JAMES S. LIEBMAN
VALERIE WEST

The *Quarterly's* Fall 2001 issue published a Note¹ reviewing our report, *A Broken System: Error Rates in Capital Cases, 1973-1995*.² That Note has three inaccuracies that are so clear and frequently repeated, and are the result of such clear cite-checking lapses, that remedial steps are required. These matters do not involve differences of opinion, judgment, or interpretation between us and the Note's author. Matters of that sort are appropriately addressed in a response. All instead are misstatements of fact that result from the *Quarterly's* failure to fulfil its basic obligation to check the accuracy of verifiable factual statements it publishes.³ By forgoing peer-review, law journals rest their integrity on the care with which they cite-check articles to avoid statements with no credible support or basis. In default of that obligation, corrective action is required.

1. *Inaccurate Statements That We Refused to Share Data*

The first matter has to do with our sharing of data underlying *A Broken System*. We published the study on June 12, 2000. On June 21, we asked the Columbia University's General Counsel to draft a data-sharing agreement through which we would make our data available on request under conditions that protected our and the University's proprietary interest in the data. Since that time, we have made the data available to all requesters who have signed the agreement, including university researchers and the press. We also have informed requesters of our intention to post our data in

1. Adam L. VanGrack, Note, *Serious Error With "Serious Error": Repairing A Broken System of Capital Punishment*, 79 WASH. U. L.Q. 973 (2001).

2. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000), at <http://www.law.columbia.edu/instructionalservices/liebman/>; http://papers.ssrn.com/so/3/papers.cfm?abstract_id=232712#Papers%20Download, reprinted in part in James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

3. The inaccuracies also could have been avoided if the *Quarterly* had informed us of the Note and offered us a chance to respond simultaneously with its publication. That step was not taken.

machine-readable form with the Inter-University Consortium for Political and Social Research (ICPSR) at the University of Michigan, a standard public repository for such data. We originally intended to post the data with ICPSR in the spring of 2001, just after the planned release of our second report, and for about two months in early 2001, we suspended data distribution under the Columbia University agreement in anticipation of making the data available through ICPSR. The second report took longer to complete than expected, however, prompting us to resume data sharing under the Columbia agreement in March 2001.⁴

On February 6, 2001, one of our co-authors, Professor James Liebman, received a letter from the author of your recently published Note, Adam VanGrack, asking for certain underlying data. The same day Professor Liebman wrote back to Mr. VanGrack, telling him of our intention within seven weeks—*i.e.*, “by the beginning of April 2001”—to release our second report and simultaneously deposit the data he was requesting with ICPSR. Professor Liebman’s letter, which is Appendix A to this letter, expressed our willingness to make all the requested data available to Mr. VanGrack “in full,” and our intention to do so by placing the data on the ICPSR site by early April. Recognizing that we might not meet our April target date, and that not all aspiring writers of law review notes carry through with their projects, Professor Liebman closed his letter with the sentence: “To be safe, please send me another inquiry toward the end of March.”

At no point did Professor Liebman’s letter state that our data were unavailable for peer review or confirmation; that our data were private or hidden; that we refused to share data with Mr. VanGrack or other researchers; that we had decided to withhold the study’s data from requesters; or that we personally refused to share data with Mr. VanGrack, inquiring academics, or the public. Instead, consistent with our intention at the time, we told Mr. VanGrack that the requested data would be available in full within seven weeks and that, to be sure, assuming he remained interested in the data, to contact us in five or six weeks to renew his request. Both before and after February 6, 2001, we in fact offered to, and did, share our underlying data using the Columbia University data-sharing agreement with inquiring academics and members of the press.

We never heard from Mr. VanGrack again. Nor did we hear from any *Washington University Law Quarterly* editor or cite-checker. Mr. VanGrack’s name next came to our attention on February 15, 2002, upon the

4. We issued our second report on February 11, 2002. See *infra* note 26. Our underlying data will be posted with ICPSR later this spring.

Quarterly's publication of his Note.

Through that Note, the editors of the *Quarterly* put their editorial and cite-checking imprimatur on the following statements of fact, of which claim to be based on a "Letter from James S. Liebman, Professor, Columbia School of Law, to Adam L. VanGrack, Student, Washington University School of Law (Feb. 6, 2001) (on file with [the Note's] author)":

"The authors of the *Liebman Study* refused to share their data with the author, inquiring academics, or the general public."⁵

"[T]he authors have personally denied a request to view the actual data from the study."⁶

"[T]he *Liebman Study* authors[] deci[ded] to withhold/delay the study's data upon request."⁷

"Professor Liebman and his colleagues' refusal to release the data prevents others from using such data to confirm the results of the study."⁸

"[T]he authors' data is neither available nor accessible."⁹

"[T]he authors of the *Liebman Study* prevented others in the legal and social scientific field from confirming their results."¹⁰

"Because members of the legal and social scientific community cannot replicate the *Liebman Study*, the public cannot fully accept the conclusions that the study draws from Professor Liebman and his colleagues' data and analysis."¹¹

"Although Professor Liebman and his colleagues have assured the public that only valid, serious trial reversals are included in their figures, without the authors' data decisions available, one cannot be confident in their decisions. Because law-based reversals were common during this volatile period, they almost certainly exist in their data; however, due to the lack of data availability . . . readers of the study will never know."¹²

Each of these statements is untrue as a matter of verifiable fact, and each is contradicted by Professor Liebman's February 6, 2001, letter in Appendix A. As a matter of easily verifiable fact, we have offered to share our data upon request with all inquiring academics and members of the public under the Columbia University data-sharing agreement, and we *have* shared the data with researchers and the media under the agreement. We did not refuse

5. VanGrack, *supra* note 1, at 989 n.123.

6. *Id.* at 989.

7. *Id.* at 989 n.118.

8. *Id.*

9. *Id.* at 989.

10. *Id.*

11. *Id.* at 991.

12. *Id.* at 998.

to share data with the Note's author. We did not "personally" deny his request to view data from our study. Professor Liebman's February 6 letter does not withhold or refuse to release any data. It instead says the requested data would be made available to Mr. VanGrack "in full" in seven weeks, and asks him, "to be safe" and assuming he still wanted the data, to contact us to confirm our plan to provide the data through the ICPSR. Had Mr. VanGrack contacted us as requested, he would have received the data-sharing agreement in keeping with our March 2001 decision to resume data sharing under the Columbia agreement rather than through the ICPSR. And if he had returned the agreement, he would have received the data as other requesters did at the time.

2. *Inaccurate Statements About Non-Replicability*

The *Quarterly* published numerous other misstatements revealing sloppy cite-checking and a failure even simply to read *A Broken System*. Two additional misstatements require corrective action. The first is the Note's repeated claim that, absent access to our data compilations, our study results cannot be replicated. Examples of this claim include:

"The authors of the *Liebman Study* prevented others in the legal and social scientific field from confirming their results. In social scientific terms, the study is not replicable. No one can repeat the results of the *Liebman Study*."¹³

"[T]he authors' data is neither available nor accessible."¹⁴

"Because members of the legal and social scientific community cannot replicate the *Liebman Study*, the public cannot fully accept the conclusions that the study draws from Professor Liebman and his colleagues' data and analysis."¹⁵

These statements are untrue. We in fact have shared our data. And, in any event, as *A Broken System* makes clear, *our results are entirely replicable from publically available and accessible records*. As is clearly stated on the fourth page of *A Broken System*, all of its capital-error findings are based entirely on information in formal judicial decisions of state and federal courts in the United States from 1973 to 1995.¹⁶ Most of those decisions are available in any university law library and on Lexis and Westlaw. All of those decisions are in official court records available to any member of the

13. *Id.* at 989.

14. *Id.*

15. *Id.* at 991. See also *id.* at 974, 988, 998.

16. See, e.g., *A Broken System*, *supra* note 2, at 3 & n.26.

public. With or without our data compilations, any researcher can replicate our work by collecting the same court decisions we collected from publically “available [and] accessible” sources.¹⁷ Our data-sharing policy is of course designed to save researchers the trouble of replicating our work. But the Note’s repeated statement of fact that our findings are “not replicable” because our sources are “neither available nor accessible” is inaccurate.

3. *Inaccurate Statements About Discarding Virginia in All State-by-State Analyses*

The Note states that “Professor Liebman and his colleagues . . . disregarded certain states in state-by-state analysis.”¹⁸ It later becomes apparent that, by “certain states,” the Note means one state. The Note claims that: “despite its relevance as one of fifty states and the second highest death penalty state [sic] since 1973, [*A Broken System*’s] authors ignore Virginia’s extremely low error rate in all sections of state-by-state error review.”¹⁹ And the Note twice says flatly that the authors “discard[ed] the use of Virginia in the study’s state-by-state analysis because it does not support their theory.”²⁰

One would expect these unqualified, precise, and specific assertions of fact would be supported by citation of at least one state-by-state analysis in *A Broken System* from which Virginia or any other state was discarded. Yet, at each place where the Note makes the allegation, it drops an identical footnote citing three pages in *A Broken System*, which reads, “See Liebman Study, at 64, 68, 80.”²¹ And on each of the three cited pages, *A Broken System* does exactly what the Note unqualifiedly, precisely, and specifically claims we did not do. Each cited passage includes Virginia in a comparison of different states’ error rates at various stages of court review:

1. Page 64 of *A Broken System*, the first page the Note cites, discusses a 28-state comparison of state-court capital reversal rates in a bar graph designated Figure 6. In full, the passage states:

Virginia is a distinct anomaly. Its courts’ capital error—detection rate during the study period was less than a third the national average, and

17. For an example of a database collected over two to three months by researchers in order to replicate in part, and extend, our database of state capital decisions, see Barry Latzer & James N. G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE, 64, 66-67 (describing a database of 837 death penalty decisions collected during the summer of 2000).

18. See VanGrack, *supra* note 1, at 987 & n.104. See also *id.* at 974 & n.14.

19. *Id.* at 1006 & n.252 (emphasis added).

20. *Id.* at 974 n.14, 987 n.104.

21. *Id.* at 974 n.14, 987 n.104, 1006 n.252.

35% below the next nearest state, Missouri—which itself has an error-detection rate 31% below the next lowest state, after which the differences among states are small.

2. Page 68 of *A Broken System*, the next page the Note cites, discusses Figure 10, another 28-state comparison of state-versus-federal reversal rates. The entire passage about Virginia at this page reads:

We conclude our discussion of Figure 10 by again noting a discrepancy between Virginia and the other states. Unlike almost every other state (Missouri, again, and Texas are in an intermediate category) Virginia's state-review [indicator on the chart] and its federal-review [indicator] are *both* located at the very bottom of the chart. In this respect, the Virginia courts may be contrasted to those of the other states in the Fourth Circuit, which are discussed on pp. 51 and 65 above: unlike the courts of the neighboring states, there is no evidence that Virginia's courts have tried to compensate for very low error detection by the Fourth Circuit. Quite the contrary, Virginia courts have the lowest error-detection rates of the 28 study states. As a consequence of simultaneously low state and federal error detection, the rate of error detected in Virginia capital judgments is both extremely, and unusually, low.

3. Then at page 80, *A Broken System* states, in full:

As one would expect from our previous discussion, and as Figure 12 [a 26-state comparison of combined state and federal reversal rates], Virginia is a distinct outlier here, falling almost literally 'off the charts' on the low side of error detection. Virginia's overall rate of detected error is barely half that of the next closest state (Missouri, which itself is much lower than all the other states), and barely a quarter the national rate. In technical terms, Virginia's overall—error detection rate is nearly 3 standard deviations below the mean (2.88).

By stating that we “discard” and “ignore Virginia’s extremely low error rate in all sections of state-by-state error review,” the Note’s misstatements go well beyond a misrepresentation of the three cited pages. About half of *A Broken System*’s 126 pages are devoted to a series of state-by-state comparisons—38 in all in the text, with three more in Appendices A, C, and D. *Virginia is explicitly included in each of the 41 comparisons.*²² With all

22. See *A Broken System*, *supra* note 2, at 12-13 & fig. 1; 17; 51-112 & tbls. 4-10 and figs. 5-32; 116-19; app. A at A-1 to A-124; app. C at C-1 to C-49; app. D at D-1 to D-8. See also *id.* app. E, at E-

due respect, we simply cannot understand how an editor or cite checker who had read *A Broken System* could have approved repeated statements that Virginia was “discarded” from “all” sections of the Report’s state-by-state comparison, review, and analysis.

Still more disturbing is the Note’s and its cite-checkers’ failure to cite *A Broken System*’s introductory and concluding discussions of Virginia, which give our overall judgment about that state’s capital error rates. Far from “ignoring,” “disregarding” or “discarding” Virginia, both passages identify the state as one of the most interesting subjects of inquiry based on our results, and each passage committed the authors to further study of the state. Near the beginning of *A Broken System*, in the context of our first state-by-state comparison, we say this about Virginia:

Figure 1 . . . above, illustrates another finding of interest that recurs throughout this Report: The pattern of capital outcomes for the State of Virginia is highly anomalous, given the State’s high execution rate (nearly *double* that of the next nearest state, and 5 *times* the national average) and its low rate of capital reversals (nearly *half* that of the next nearest state, and less than *one-fourth* the national average). The discrepancy between Virginia and other capital-sentencing states on this and other measures presents an important question for further study: Are Virginia capital judgments in fact half as prone to serious error as the next nearest state and 4 times better than the national average? Or, on the other hand, are its courts more tolerant of serious error? We will address this issue below and in a subsequent report.²³

At the very end of *A Broken System*, we again raise the question “whether Virginia capital judgments are substantially less error prone than all others in the nation or, on the other hand, whether laxer error detection takes place there.”²⁴ After devoting a page to discussing our tentative thoughts on the matter based on our preliminary findings, and anticipating our second report, which would be devoted entirely to explaining why different states have different capital error rates, we simply concluded that “[t]hese questions [about Virginia] bear further study.”²⁵

We issued our second report on February 11, 2002, following 18 months of additional data collection and presenting the results of 19 separate regression analyses of the question of why error rates are lower in some

2; E-5 to E-20, E-23.

23. *A Broken System*, *supra* note 2, at 17.

24. *Id.* at 117-18.

25. *Id.* at 118.

states and counties and higher in others.²⁶ That report devotes an entire section to the question of Virginia's unusually low capital-error rates, and praises Virginia for implementing three important strategies (low death-sentencing rates, appointment as opposed to election of state judges and a high rate of apprehending and incarcerating serious criminals) that our regression analyses reveal are strongly associated with low rates of reversible capital error.²⁷

* * * * *

Corrective action in regard to these three inaccuracies is required, in view of the inaccuracies' central role in the Note, their repetition, and their clear violation of minimal cite-checking standards.

Sincerely,

James S. Liebman
Jeffrey Fagan
Valerie West

26. James S. Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Alexander Kiss & Garth Davies, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, at <http://www.law.columbia.edu/brokensystem2/> (Feb. 11, 2002).

27. See *id.* at 389-90 (noting, in section entitled "Virginia," that "Virginia falls among the *bottom* five states in terms of its risk of serious capital error" based on several characteristics of states that our regression analyses associate with levels of risk of serious capital error, including that "Virginia's death-sentencing rate . . . [is] the sixth lowest in the nation" and that "Virginia also ranks low in terms of the political pressure put on state judges through the electoral process" and in term of the state's "relatively strong record of apprehending and punishing serious criminal[s]," all of which help explain why Virginia death verdicts are less error-prone than those of other states).

APPENDIX A

COLUMBIA UNIVERSITY
in the City of New York
Law School

February 6, 2001
Adam L. VanGrack
Washington University *Law Quarterly*
Washington University School of Law
Box 1120
One Brookings Drive
St. Louis, MO 63105

Dear Mr. VanGrack:

Thank you for your January 15 inquiry about data underlying *A Broken System*, which just arrived today.

We are currently preparing a second report drawing upon the same data and, simultaneously, preparing that data for posting in full on the University of Michigan repository for social scientific data. We should be finished with these efforts by the beginning of April.

To be safe, please send me another inquiry towards the end of March.

Sincerely,

/s/

James S. Liebman