

ELEVATING FORM OVER SUBSTANCE: A REPLY TO PROFESSORS JAMES LIEBMAN, JEFFREY FAGAN AND VALERIE WEST

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I. INTRODUCTION

My recent Note, *Serious Error with “Serious Error”: Repairing A Broken System of Capital Punishment*,¹ discussed problems that I found with the study released in June 2000 by Professors James Liebman, Jeffrey Fagan, and Valerie West entitled *A Broken System: Error Rates in Capital Cases*.² I am delighted to discuss a number of these concerns with the study’s authors in a public forum to elaborate on my previous comments and extinguish any misunderstandings they may have regarding my prior valid statements.

While certain differences of interpretation in terms of form versus substance exist between the authors of *A Broken System* and myself, my Note did *not* contain any misstatements, “inaccuracies,” or “statements with no credible support or basis.”³ Further, the fact that the *Washington University Law Quarterly* expressed “concern” over the authors’ letter to the journal’s Editor in Chief does *not* mean that the *Law Quarterly* or any person associated with the journal agrees with any of the authors’ assertions against my Note. Whether such assertions are valid or not, one would hope that an established journal would (1) express “concern” if certain peers claimed that the journal had published misstatements, and (2) address those claims directly and in a public forum. This Reply will address, in order, the three areas of the Note to which the authors of *A Broken System* refer in their Rejoinder. Part II will discuss the Note’s assertion that the lack of availability of the data from *A Broken System* is problematic. Part III will address

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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://justice.policy.net/jpreport/index.html> [hereinafter *A Broken System*] (labeled *Liebman Study* in VanGrack, *supra* note 1, reprinted 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) (abridged version of the original)) [hereinafter *Capital Attrition*].

3. Jeffrey Fagan, James S. Liebman, & Valerie West, *Misstatements of Fact in Adam VanGrack’s Student Note: A Letter to the Editors of the Washington University Law Quarterly*, 80 WASH. U. L.Q. 417, 417 (2002) [hereinafter *Rejoinder*].

possible replicability of the study. And Part IV will further elaborate on problems with *A Broken System's* state-by-state analysis, as well as my Note's references to Virginia. Finally, it is important to recognize that the authors' semantic complaints over my use of certain terms or words *do not* address the significant substantive problems of *A Broken System* as discussed in my Note.

II. WHERE'S THE DATA?

In form, to my knowledge, the authors of *A Broken System* have never told any requestor that they outright refuse to allow the requestor ever to review the study's data. However, in substance, the study's data has been and remains unavailable for peer-review because (1) their data was not publicly available at the time of my Note's completion (nine months after the study's publication), (2) their data is still not publicly available as of the writing of this Reply (one year and nine months after the study's publication), and (3) certain data requestors were granted only limited access rights to the data upon signing a legally binding Agreement⁴ with Columbia University. Nonetheless, out of all of the authors' suggestions for the data's release, only the authors' promised posting of the data on the Inter-University Consortium for Public and Social Research (ICPSR) Web site at the University of Michigan⁵ would allow *all* (and not a select few) potential peer-reviewers to access the data.

Regardless of the specific words used to describe the data release actions of the authors of *A Broken System*, the authors' actions have indicated a continual reluctance to publicly and universally release the study's data upon request. In support of the claim regarding the authors' "refusal" to release their data, my Note cited other peer-reviewers who noted the authors' restrictive actions.⁶ In fact, one peer-reviewer specifically used the word

4. See Letter from James S. Liebman, Jeffrey Fagan, & Valerie West, Professors, Columbia University Law School, to R. Clifton Merrell, Editor, Washington University Law Quarterly, attachment 1 (Feb. 25, 2002) (reprinted in Appendix A, *infra*, and on file with *Washington University Law Quarterly*) [hereinafter Agreement].

5. Inter-University Consortium for Political and Social Research, *at* <http://www.icpsr.umich.edu/index.html> (last visited Apr. 20, 2002) [hereinafter ICPSR Web site].

6. VanGrack, *supra* note 1, at 989 n.118 (citing Ronald Eisenberg, Prosecutor *Comments On Latzer and Cauthen*, PROSECUTOR, Jan./Feb. 2001, at 16) (noting "Professor Liebman and his colleagues' 'refusal to share underlying data with researchers' and how such actions are 'particularly troubling in light of media representations of Liebman as a neutral professor heading a Columbia University study'") (emphasis added); *id.* (citing Barry Latzer & James N.G. Cauthen, *Another Recount: Appeals in Capital Cases*, PROSECUTOR, Jan./Feb. 2001, at 26 n.11) ("Upon our request, Prof. Liebman declined to release his data to us.") (emphasis added).

“refusal.”⁷ While I also used a letter that Professor Liebman sent to me in February 2001 to support this “refusal” proposition, the letter would probably have been better used to support the proposition that the study’s authors have continually delayed public release of the data and obfuscated its review.⁸ In the February Letter, Professor Liebman did not release the data, but rather stated that the study’s data will be publicly released in March 2001.⁹ Upon receiving this letter, in lieu of contacting the authors directly, I regularly searched for the promised second study (not released until one year after the February Letter)¹⁰ and continually checked the ICPSR Web site¹¹ for their data posting (not posted as of the writing of their Rejoinder).¹² My Note specifically referenced the letter’s suggested future posting and the fact that such posting had not occurred as of the Note’s writing.¹³

A full year after the February (2001) Letter, in a letter sent to the Editor in Chief of the *Washington University Law Quarterly* in February 2002, the study’s authors again promised that the study’s data would be released, this time by the end of March 2002.¹⁴ Further blurring the potential release of the data, in the amended letter to the Editor in Chief, published *supra*, the authors changed the “end of March” language to “this spring.”¹⁵ Other peer-reviewers have used “refusal” and “declined to release” to describe the actions of the authors of *A Broken System*.¹⁶ While the actions to which I have been a party to *may* not equal an outright refusal, they at least clearly show a pattern of unfulfilled promises and prevention of public access to the study’s data. Thankfully, and possibly as a result of this public colloquy, according to the authors’ response to this Reply, their data was finally sent to the National Institute of Justice for likely publication as of the end of April 2002.¹⁷

7. See Eisenberg, *supra* note 6, at 16.

8. See Letter from James S. Liebman, Professor, Columbia School of Law, to Adam L. VanGrack, Student, Washington University School of Law 1 (Feb. 6, 2001), *reprinted in part in Rejoinder, supra* note 3, at app. (on file with author) [hereinafter February Letter].

9. *Id.*

10. *Rejoinder, supra* note 3, at 423-24 & n.26.

11. See *supra* note 5.

12. *Rejoinder, supra* note 3, at 418 n.4.

13. VanGrack, *supra* note 1, at 989 n.118 (“While the letter indicates a future posting of the data, such action has not occurred.”).

14. Letter from James S. Liebman, Jeffrey Fagan, & Valerie West, Professors, Columbia University Law School, to R. Clifton Merrell, Editor, *Washington University Law Quarterly* 2 (Feb. 25, 2002) (“Our underlying data will be posted with ICPSR in machine-readable form by the end of March 2002.”).

15. Compare *supra* note 14 and accompanying text, with *Rejoinder, supra* note 3, at 418 n.4. (“Our underlying data will be posted this spring.”).

16. See *supra* note 6.

17. Jeffrey Fagan, James S. Liebman & Valerie West, *VanGrack’s Explanations: Treating the*

According to the authors' Rejoinder, the National Institute of Justice of the United States Department of Justice substantially funded their study.¹⁸ The Department of Justice states that the National Institute of Justice "is committed to ensuring the public availability of research data."¹⁹ Consequently, the National Institute of Justice *requires* all grant recipients to submit their data to the Institute and make their data publicly available through its data archive Web site "*prior to the conclusion of the project.*"²⁰ The National Institute of Justice uses the ICPSR data archive Internet Web site as its data depository. As I relayed in my Note, Professor Liebman indicated in his February Letter to me (*eight months after* the conclusion of the project) the possibility of future posting of the data on the ICPSR Web site.²¹ Nonetheless, despite that promise, as admitted in the authors' own Rejoinder (*one year and nine months after* the conclusion of the project), the data is still not available on the ICPSR Web site.²² Despite any prior arrangements or potential future studies, as *A Broken System* was publicly published as a full and complete study, its data should be publicly published as well. The authors are free to claim that their data has been publicly available; however, one of their sponsors, the National Institute of Justice, disagrees.²³

The authors further declare that "limited right"²⁴ access to their data has been available, sporadically, upon peer-reviewers signing a legally binding agreement with Columbia University.²⁵ Aside from this Agreement restricting peer-review to only those who sign the Agreement and aside from the National Institute of Justice requiring otherwise, this Agreement *does not equal* public access to their data. In fact, signing the Agreement would probably disable a peer-reviewer from using the data to disagree with the

Truth as a Matter of Mere "Form," 80 WASH. U. L.Q. 439, 444 (2002).

18. Liebman et al., *Rejoinder*, *supra* note 3, at 420 n.13.

19. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, GUIDELINES FOR SUBMITTING PROPOSALS FOR NATIONAL INSTITUTE OF JUSTICE-SPONSORED RESEARCH 7 (2001), *available at* <http://www.ncjrs.org/pdffiles/92737.pdf> [hereinafter NIJ, GUIDELINES].

20. *Id.* (emphasis added). In a further example, the National Science Foundation (NSF) requires that all grant recipients archive their data at a publicly available site no later than one year after their project is over. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 47 (quoting the National Science Foundation's grant letter, which requires that "[a]ll data sets produced with the assistance of this award shall be archived at a data library approved by the cognizant Program Officer, no later than one year after the expiration date of the grant"). While the authors were not supported by the NSF, this standard is still not met by the authors of *A Broken System*.

21. VanGrack, *supra* note 1, at 989 n.118.

22. *Rejoinder*, *supra* note 3, at 418 n.4 ("Our underlying data will be posted this spring.").

23. See NIJ, GUIDELINES, *supra* note 19, at 7.

24. Agreement, *supra* note 4, at [2].

25. *Rejoinder*, *supra* note 3, at [2-3].

study's conclusions.²⁶ If *A Broken System* has already been published in a public forum, then there should be no need for a peer-reviewer to sign a thirteen-point legally binding agreement in order to obtain the study's data. The Agreement states that "usual academic protocol is to retain such data until completing and publishing all analyses of it."²⁷ However, if a study has already been published stating significant conclusions based upon that data, social scientific protocol calls for public release of the data regardless of its future uses.²⁸ This empirical social scientific research norm is of particular concern if the data is still publicly unavailable almost two years after a study's publication. If a peer-reviewer signs the Agreement, among other things, the reviewer: must submit a statement of purpose to the authors and use the data only for that purpose, must notify the authors "of any errors or flaws of any kind whatsoever relating to [the study] at least twenty-one (21) days before any" type of public activity whatsoever, will have their rights to any future publications limited, and would be submitting to certain legal obligations.²⁹ Further, a signer's "limited right to use and analyze the Data under [the] Agreement may be immediately terminated by [the] University" for any breach of the Agreement.³⁰

While it is theoretically possible to obtain the data, this limited and restricted access to the data is neither the same as publicly available data nor the norm in social scientific research. In fact, the authors' requirements for access to their data is the social science equivalent of making the data unavailable for peer-review.³¹ The terms of the Agreement impair replication, restrict access, and delay access; such replication ability and access are all required for proper empirical social scientific research.³² The authors are free to claim that their Agreement is equal to having their data

26. Agreement, *supra* note 4, at [1-3].

27. *Id.* at 1.

28. See, e.g., GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 7-9, 25-27, 51-57 (1994); NIJ, GUIDELINES *supra* note 19, at 7; ROYCE SINGLETON, JR. ET AL., APPROACHES TO SOCIAL RESEARCH 56-57, 339-74 (1988); Epstein & King, *supra* note 20, at 38-48.

29. Agreement, *supra* note 4, at 1-3.

30. *Id.* at 2 (emphasis added).

31. Epstein & King, *supra* note 20, at 39 (noting that a study is not replicable nor are its procedures properly available when "another researcher could not reproduce them without talking with the authors"—here, another researcher must sign a legally binding and limited agreement with the authors to obtain any data).

32. See, e.g., HUBERT M. BLALOCK, JR. & ANN B. BLALOCK, METHODOLOGY IN SOCIAL RESEARCH 13-17, 171-78 (1968); KING ET AL., *supra* note 28, at 7-9, 25-27, 51-57, 150-53; SINGLETON ET AL., *supra* note 28, at 56-57, 90-101, 177, 339-74; Epstein & King, *supra* note 20, at 38-48.

publicly available; however, social scientific research doctrine disagrees.³³ Consequently, because they have yet to place their data in a public location and because the authors' Agreement's requirements do not equal public access, the data from *A Broken System* is still as unavailable for peer-review today as it was when my Note was written.

III. POSSIBLE REPLICATION?

In form, certain peer-reviewers of *A Broken System* have an opportunity to replicate its results. However, this replication can only occur if (1) the peer-reviewer has access to all the data that the study's authors used, (2) the peer-reviewer is aware of how the study's authors labeled the data, and (3) the study's variables are clearly defined.³⁴ As such, in substance, only a limited number of approved authors who have obtained undisclosed information from *A Broken System*'s authors have replication ability.

Two prominent social scientific scholars recently noted, in regards to legal empirical research, that “[g]ood empirical work adheres to the replication standard: another researcher should be able to understand, evaluate, build on, and reproduce the research *without any additional information from the author*.”³⁵ Replication is not, as the authors' claim, having a peer-reviewer conduct a different study with different data and parameters because they were unable to retrieve the original study's information.³⁶ And these two social scientific scholars' noncritique of *A Broken System* does not support the authors' actions, especially considering the article's theme is public availability of data and support.³⁷ Peer-reviewers are unable to replicate the study's results because the authors of *A Broken System*'s did not present their data in a publicly available format;³⁸ did not provide information on how they labeled their data, specifically the individual cases;³⁹ and did not clearly define the study's variables,

33. See *supra* note 32 and accompanying discussion.

34. See *infra* note 35 and accompanying discussion.

35. Epstein & King, *supra* note 20, at 38. These requirements of replication are common among scholarly evaluation of empirical social scientific research. See, e.g., BLALOCK & BLALOCK, *supra* note 32, at 13-17, 172-78; KING ET AL., *supra* note 28, at 8, 25-27, 51, 151; SINGLETON ET AL., *supra* note 28, at 56-57, 117-23, 177, 339-74.

36. *Rejoinder*, *supra* note 3, at 421 & n.17.

37. Compare Epstein & King, *supra* note 20, with [cite to new Liebman article noting Epstein & King's support].

38. See *supra* Part II.

39. See VanGrack, *supra* note 1, at 991-96.

specifically the “serious error” variable.⁴⁰ Consequently, in terms of proper empirical social scientific research, *A Broken System* is not replicable.

IV. THE STATE OF AFFAIRS

In form, *A Broken System* did mention Virginia, did include Virginia’s statistics in their state-by-state charts, and did discuss Virginia’s figures. However, in substance, *A Broken System* did not explain Virginia’s status as an outlier, labeled Virginia “a anomaly,” and dismissed its non-positively-conforming figures.⁴¹ Substantively, in terms of proper social scientific statistical research, the authors of *A Broken System* ignored Virginia.

Specifically, as I explained in my Note, and was not addressed in the authors’ Rejoinder, their state-by-state comparisons are flawed by differential meanings of their “error” variables.⁴² A state with low “serious error” rates either has (1) judges who are resistant to change lower court capital decisions or (2) a low number of decisions that merited a remand.⁴³ One cannot separate these two meanings within the variable. Virginia is the most significant proof of this problem.⁴⁴ The authors did note Virginia’s figures. However, the authors neglected to address Virginia’s problematic statistics and overlooked it for statistical purposes.⁴⁵

Further, I did *not* solely mention Virginia as the only telltale troubling state, but rather expressed concern that their variable is unable to compare any state with another state.⁴⁶ In my Note, considering that the authors praise states with low error rates in each comparative chart in *A Broken System*,⁴⁷ I noticed the following:

For error rates in direct appeals (the only error chart with significant state comparisons including all states), the *bottom three, lowest-*

40. *See id.*

41. VanGrack, *supra* note 1, at 1006-10 (all explained in detail).

42. *See id.*

43. To highlight the study’s variable problem exemplified by Virginia, I described in my Note the following hypothetical:

If hypothetical state *E*, whose trial courts have many capital errors, has a staunch, pro-capital punishment, non-reversing appellate court system, then that *E* will have a low “serious error value.” Despite the fact that *E*’s court system is fraught with capital trial level error, Professor Liebman and his colleagues would incorrectly conclude that *E*’s capital trial level error is low due to *E*’s low “serious error rate” value.

VanGrack, *supra* note 1, at 1008.

44. As I described clearly in my Note, Virginia has one of the lowest, praised “serious error” rates in the study, *id.* at 1008 n.270, yet it is the second highest capital killer, *id.* at 1008 n.272.

45. *See* KING ET AL., *supra* note 35, at 94, 96-97.

46. *See supra* note 43.

47. *See, e.g., A Broken System*, *supra* note 2, at 59-60, 68, 75.

ranked, error states have the 2nd, 5th, and 1st highest rates of per capita executions respectively. For error rates in all state courts (data not available for all states), the *bottom three lowest-ranked* error states have the 2nd, 5th, and 28th highest rates of per capita executions rates respectively. For error rates in habeas corpus cases (some states with less than three cases), *the bottom three lowest-ranked* error states have the 1st, 2nd, and 6th highest rates of per capita executions rates respectively. For overall error rates (data not available for all states), the bottom three lowest-ranked error states have the 2nd, 5th, and 3rd highest per capita execution rates respectively.

One might explain the above pattern by the fact that the states with the greater execution rates have appellate justices that are more prone to approve of executions and not be against capital punishment. Such patterns might also occur due to public opinion, institutional factors, or state biographical information. Professor Liebman and his colleagues addressed none of these possibilities.⁴⁸

Consequently, while the authors did mention Virginia in their study, they (in social scientific research terms) neither considered Virginia's outlier status nor addressed the situational problem regarding all states in their state-by-state analysis.

V. CONCLUSION

I hope that this Reply has clarified any misunderstandings that Professors James Liebman, Jeffrey Fagan, and Valerie West had with my Note. The Note's assertions stand alone; however, I welcome the opportunity, as here, to expand on any issue found within. To determine whether *A Broken System's* evidence validly supports its conclusions, members of the legal and scientific community need (and have needed) access to the study's data without having to sign a legal agreement that violates empirical scientific norms. Consequently, in the public's interest, I am delighted to see that the authors' of *A Broken System* have apparently finally begun to publicly release their data.

48. VanGrack, *supra* note 1, at 1009 n.276 (emphasis added) (citations omitted).

APPENDIX A

[Date]

[address]

Dear _____:

Thank you for your interest in obtaining data underlying “A Broken System: Error Rates in Capital Cases, 1973-1995” (“Data”). The Data to be provided are defined in attachment A hereto. The usual academic protocol is to retain such data until completing and publishing all analyses of it. Departing from usual academic protocol and in the interests of ensuring that the information in “A Broken System” is as accurate as possible, we agree to share the Data with you, as set out below, before we complete and publish all our analyses. Once those analyses have been completed, the data will be posted in the National Archive of Criminal Justice Data, at the Inter-University Consortium for Political and Social Research (ICPSR) and the University of Michigan.

The provision of the Data by Columbia University (“University”) is subject to your agreement to the terms and conditions set forth below (“Agreement”):

1. You should submit to the University a statement of purpose for which you will use the Data, and nature and scope of the analysis you plan to conduct.

2a. You will notify the University in writing of any errors or flaws of any kind whatsoever relating to the Data or compilation thereof, or any new or additional information relevant to “A Broken System”, at least twenty-one (21) days before any publication, announcement, public statement, release or other public disclosure, public or otherwise (including any article, opinion, newsletter, letter, Lecture, program, conference presentation, panel discussion, editorial or interview of any kind), concerning the Data or “A Broken System”.

2b. Any publication based on Data will include the following acknowledgement:

The data for this report were compiled by James S. Liebman, Jeffrey Fagan and Valerie West, and were originally published in “A Broken System: Error Rates in Capital Cases, 1973-1995,” on June 12, 2000, and were licensed for secondary analysis by Columbia University. The views and opinions expressed herein are those of the authors, and do

not reflect the positions of Professors Liebman, Fagan or West or Columbia University.

3. You will not provide or make available the underlying Data or any portion thereof to any third party.

4. You agree that the University is and will remain the owner of the Data.

5. Except as provided in paragraph 2b hereof, you will not use the name, insignia or symbols of the University, its faculties or departments, or any variation or combination thereof, or the name of any trustee, faculty member, other employee or student of University for any purposes whatsoever without the prior written consent of University.

6. Any Datum supplied under this Agreement is provided on as "as is" basis. University makes no warranties, express or implied of any kind, and hereby expressly disclaims any warranties, representations or guarantees of any kind, as to Data, including warranties of merchantability, title or fitness for a particular purpose, result or use, and any warranties of freedom of infringement of any patents, copyrights, trade secrets or other proprietary rights.

7. You may use and analyze the Data only as described in your statement sent to the University in paragraph 1 hereof. No other use or purpose is permitted without the express written consent of the University.

8. Except as expressly set forth herein, no right or license concerning the Data or any other property is granted to you by the University or its faculty under this Agreement.

9. You agree to waive all claims against the University, its trustees, officers, employees and agents, and to indemnify, defend and hold harmless the University from and against any and all actions, suits, claims, demands, prosecutions, liabilities, costs and expenses (including attorneys' fees) based on or arising out of your use of and activities with respect to the Data.

10. The limited right to use and analyze the Data under this Agreement may be immediately terminated by University for your breach of any of the terms and conditions of this Agreement. If so terminated, you agree to and shall (a) destroy all Data and copies thereof and certify that you have done so, and (b) and (b) [sic] immediately terminate and desist from any dissemination, of any sort described in paragraph 2(a) above, of findings on conclusions based or claimed to be based on the data. [sic]

11. This Agreement and the obligations and rights hereunder may not be assigned without the prior written consent of the University. Any attempt to do so without consent shall be void.

12. This Agreement constitutes the entire agreement between you and the University concerning the subject matter hereof and supersedes any and all

previous agreements, written or oral. This Agreement may be amended only by a written instrument duly executed by you and the University.

13. This Agreement shall be governed by New York law applicable to agreements made and to be fully performed in New York, without reference to the conflict of laws principles of any jurisdiction.

If the foregoing terms and conditions are acceptable to you, please indicate your agreement by signing below and returning this letter to me. I will return a fully executed copy to you for your files.

Within ten (10) days of receiving this Agreement signed by you and the statement under paragraph 1 hereof, we will provide the Data to you.

Very truly yours,

AGREED TO:

Name: _____

Institution: _____

Date: _____

