

# VANGRACK'S EXPLANATIONS: TREATING THE TRUTH AS A MERE MATTER OF "FORM"

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We welcome criticism by responsible scholars and readers, and the chance to address it in journals that enforce appropriate standards of accuracy and integrity. We have done just that in exchanges in *Judicature* and the *Indiana Law Journal*.<sup>1</sup>

But the inaccuracies in Adam VanGrack's Note,<sup>2</sup> and new problems with his present explanation,<sup>3</sup> lead us to conclude that it is not useful to exchange views with him in the *Washington University Law Quarterly*. Beyond all is Mr VanGrack's dismissal of matters serious enough to trigger an extraordinary instruction to explain himself in print,<sup>4</sup> and to prompt him to rescind statements published only a few months ago,<sup>5</sup> as mere "semantic complaints."<sup>6</sup>

Although fruitless as dialectic with Mr. VanGrack, this reply does give us a chance to discuss our data-sharing arrangements.

## I. VANGRACK'S ADMITTED MISSTATEMENTS

The central premise of Adam VanGrack's student Note had been that "[t]he authors of the Liebman Study *refused* to share their data with *the author, inquiring academics, or the general public*"; that we "personally *denied* [VanGrack's] request to view the actual data from the study"; that our "*refusal* to release the data prevents others from using the data to confirm the results of the study"; that our "data is neither *available nor accessible*"; that we "prevented others in the legal and social scientific field from confirming

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1. See Valerie West, Jeffrey Fagan & James S. Liebman, *Look Who's Extrapolating: A Reply to Hoffmann*, 76 IND. L.J. 951 (2001); James S. Liebman, Jeffrey Fagan & Valerie West, *Death Matters: A Reply to Latzer and Cauthen*, JUDICATURE, Sept.-Oct. 2000, at 72; Jeffrey Fagan, James S. Liebman & Valerie West, *Death Is the Whole Ball Game*, JUDICATURE, Nov.-Dec. 2000, at 144 (continuing the exchange with Professors Latzer and Cauthen).

2. See *infra* note 7 and accompanying notes.

3. See *infra* notes 24-41 and accompanying text.

4. An electronic search of Westlaw's "JLR" file of approximately 150 law reviews and legal journals available on line has turned up no similar directive from law review editors to any author.

5. See passages cited *infra* notes 16-23.

6. Adam L. VanGrack, *Elevating Form over Substance: A Reply to Professors James Liebman, Jeffrey Fagan and Valerie West*, 80 WASH. U. L.Q. 427, 428 (2002) [hereinafter VanGrack Explanations].

their results [so] the study is *not replicable*,” and that we “assured the public that . . . serious trial reversals are included in [our] figures, . . . [but] due to the *lack of data availability* . . . readers . . . will *never* know.”<sup>7</sup>

As our letter to the editor excerpted above demonstrates, this premise was false as a matter of easily verifiable fact.<sup>8</sup> All our data are from judicial decisions available to all members of the public.<sup>9</sup> All our data compilations are fully replicable by anyone who consults those public records. Since July 2000, we have made our underlying data directly available to all inquiring academics and the general public under a data-sharing agreement prepared for that purpose by Columbia University’s General Counsel.<sup>10</sup> In February 2001, a year before Mr. VanGrack’s Note was published, we told him we would give him the requested data and asked him to contact us in six weeks.<sup>11</sup> He never did.<sup>12</sup>

When we called the inaccuracies in Adam VanGrack’s Note to the attention of the *Washington University Law Quarterly*, the editors found cause for concern and instructed Mr. VanGrack to explain himself.<sup>13</sup> A faculty advisor to the *Law Quarterly*<sup>14</sup> informed us that he was “disturbed by Adam’s use of the word ‘refusal’” and had advised Mr. VanGrack “to concede” that “he used the wrong language.”<sup>15</sup>

In his written explanation, Mr. VanGrack admits that the facts are different from those he reported in his Note. “[T]o my knowledge,” he now

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7. Adam L. VanGrack, Note, *Serious Error with “Serious Error”: Repairing a Broken System of Capital Punishment*, 79 WASH. U. L.Q. 973, 989 & n.123, 998 (2001) (emphasis added) [hereinafter VanGrack Note].

8. See 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 (2002).

9. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 24 (2002) (discussing *A Broken System* and another recent empirical study, and pointing out that their “creators obtained their data from public or other readily available sources: in the case of the Liebman team, from state and federal [case] reporters”).

10. See *supra* at 435-37 (reprinting our data-sharing agreement).

11. See *supra* at 425 (reprinting our Feb. 6, 2001 letter to Mr VanGrack).

12. See VanGrack Explanations, *supra* note 6, at 429.

13. See E-mail from R. Clifton Merrell, Editor-in-Chief, *Washington University Law Quarterly*, to James S. Liebman (Mar. 21, 2002, at 2:50 p.m. CST) (stating that our Feb. 25 letter listing the inaccuracies in Mr. VanGrack’s Note “raise[d] valid concerns,” that “further action on this topic is merited,” and that “[t]herefore, I have instructed Adam to write an explanatory statement, to be published in the *Law Quarterly*, to clarify the three issues you brought up”).

14. See Letter from James S. Liebman, Jeffrey Fagan & Valerie West to R. Clifton Merrell, Editor, Feb. 25, 2002, at 11 (containing “cc” to Dean Joel Seligman and to *Law Quarterly* faculty advisors Kathleen Clark and Theodore W. Ruger).

15. Telephone Conversation Between Professor Theodore Ruger, faculty advisor to the *Washington University Law Quarterly*, and Professor James S. Liebman, March 21, 2002, at 2:10 p.m. CST (notes on file with the *Washington University Law Quarterly*).

writes, “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.”<sup>16</sup> “[T]he actions to which I have been a party to may not equal an outright refusal.”<sup>17</sup> “The authors . . . have not outright denied . . . my access to their data.”<sup>18</sup> “[I]t is,” he acknowledges, “possible to obtain the data.”<sup>19</sup> “[P]eer-reviewers of *A Broken System* have an opportunity to replicate its results.”<sup>20</sup> The reason Mr. VanGrack did not receive our data or replicate our results is that he deliberately chose not to “contact[] the authors” after we asked him to do so.<sup>21</sup>

Mr. VanGrack also withdraws from his erroneous claim that we “ignore Virginia’s extremely low error rate *in all sections* of state-by-state error review” and “discard the use of Virginia in the study’s state-by-state analysis.”<sup>22</sup> VanGrack now concedes that “*A Broken System* did mention Virginia, did include Virginia’s statistics in their state-by-state charts, and did discuss Virginia’s [error-rate] figures.”<sup>23</sup>

## II. FURTHER PROBLEMS IN VANGRACK’S EXPLANATIONS

Although Mr. VanGrack withdraws from a number of erroneous statements in his Note, he then offers defenses and justifications that are themselves inaccurate. For example:

- Mr. VanGrack says our data were “not publicly available at the time of [his] Note’s completion” in 2001, and that our data-sharing agreement does not make data available to “all,” but only to “a select few[,] potential peer-reviewers.”<sup>24</sup> In fact, our data-sharing agreement makes data available to *all* members of the public and the academy. And since July 2000, we in fact have made data available under the agreement to

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16. VanGrack Explanations, *supra* note 6, at 428.

17. *Id.* at 429 (emphasis omitted).

18. The statement quoted in text is in the draft of Mr. VanGrack’s explanations that was forwarded to us for our response. See Adam L. VanGrack, *Elevating Form over Substance: A Reply to Professors James Liebman, Jeffrey Fagan and Valerie West*, at 2, attachment to E-mail from R. Clifton Merrell to James S. Liebman (Apr. 3, 2002, at 2:46 p.m. EST). The statement is not in VanGrack Explanations, *supra* note 6.

19. VanGrack Explanations, *supra* note 6, at 431.

20. *Id.* at 432.

21. *Id.* at 429.

22. VanGrack Note, *supra* note 7, at 974 n.14, 987 n.104, 1006 & n.252 (emphasis added).

23. VanGrack Explanations, *supra* note 6, at 433.

24. *Id.* at 428.

*all* requesters who have signed it, including academics, students, and members of the press.<sup>25</sup>

- Mr. VanGrack says our data-sharing “Agreement would probably disable a peer-reviewer from using the data to disagree with the study’s conclusions.” His only support is a citation of our agreement itself, which is reprinted above.<sup>26</sup> As readers can see for themselves, that agreement provides no shred of support for this new assertion. Indeed, a comparison of our data-sharing agreement with the one required by the data consortium Mr. VanGrack acknowledges as the gold standard for data sharing<sup>27</sup> reveals that his complaints about our agreement apply in spades to that gold-standard agreement.<sup>28</sup>

25. Mr. VanGrack says the contract provides only “limited access rights.” We have no idea what he means by “limited access rights,” and he doesn’t say what he means. The agreement is reprinted above. *See supra* at 435-37.

26. *See supra*.

27. *See* VanGrack Explanations, *supra* note 6, at 428, 430 (discussing the Inter-university Consortium for Public and Social Research at the University of Michigan).

28. The following provisions, among others, of the Restricted Data Use Agreement of the Inter-university Consortium for Public and Social Research at the University of Michigan (ICPSR) are either similar to or go well beyond provisions of our agreement to which Mr. VanGrack objects:

#### Ownership of Data

11. Ownership of restricted data will be retained by ICPSR. Permission to use restricted data by the Investigator(s) and Receiving Organization may be revoked by ICPSR at any time, at their discretion. The Investigator(s) and Receiving Organization must return or destroy all originals and copies of the restricted data, on whatever media it may exist, within 5 days of written request to do so.

#### Access to the Restricted Data

12. Access to the restricted data will be limited solely to the individuals signing this agreement and the Supplemental Agreement With Research Staff, as detailed in the approved Data Protection Plan. The data may not be “loaned” or otherwise conveyed to anyone other than the signatories to this agreement.

13. Copies of the restricted data or any subsequent variables or data files derived from the restricted data will not be provided to any other individual or organization without the prior written consent of the ICPSR.

#### Use of the Restricted Data

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16. The restricted data will be used solely for the research project described in the Application for Restricted Data incorporated by reference into this document.

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#### Data Confidentiality Procedures

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21. The Receiving Organization will treat allegations, by ICPSR or other parties, of violations of this agreement as allegations of violations of its policies and procedures on scientific integrity and

- Mr. VanGrack claims that “peer-reviewers” have “noted the authors’ restrictive actions.”<sup>29</sup> But the two sources he cites are from a *non-peer-reviewed* trade magazine for prosecutors. One source is a staunch pro-death penalty prosecutor and advocate who is not a “peer reviewer,” has never asked for our data, and cites only the other source.<sup>30</sup> The other source

misconduct. If the allegations are confirmed, the Receiving Organization will treat the violations as it would violations of the explicit terms of its policies on scientific integrity and misconduct.

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#### Violation of This Agreement

28. If ICPSR determines that the Agreement may have been violated, ICPSR will inform the Restricted Data Investigator(s) of the allegations in writing and will provide them with an opportunity to respond in writing within 10 days. ICPSR may also, at that time, require immediate return or destruction of all copies of the restricted data in possession of the investigators. Failure to do so will be determined to be a material breach of this agreement and, among other legal remedies, may be subject to injunctive relief by a court of competent jurisdiction. If ICPSR deems the allegations unfounded or incorrect, the data may be returned to the Restricted Data Investigator under the terms of the original agreement. If ICPSR deems the allegations in any part to be correct, ICPSR will determine and apply the appropriate sanction(s).

29. If ICPSR determines that any aspect of this agreement has been violated, ICPSR may invoke these sanctions as it deems appropriate:

Denial of all future access to restricted data files

Report of the violation to the researcher’s institution’s office responsible for scientific integrity and misconduct, with a request that the institution’s sanctions for misconduct be imposed

Report of the violation to appropriate federal and private agencies or foundations that fund scientific and public policy research, with a recommendation that all current research funds be terminated, that future funding be denied to the investigator(s) and to all other persons involved in the violation, and that access to other restricted data be denied in the future

Such other remedies that may be available to ICPSR under law or equity, including injunctive relief

I certify that all materials submitted with this application for this restricted data are truthful.

Furthermore, I acknowledge that I am legally bound by covenants and terms of this agreement, and that violation will constitute unethical professional practice and may subject me to the sanctions listed above.

Inter-university Consortium for Political and Social Research, Restricted Data Use Agreement, *at* <http://www.icpsr.umich.edu/ACCESS/restagree.html>, at 2-4.

29. *See* VanGrack Explanations, *supra* note 6, at 428-29 & n.7 (citing Ronald Eisenberg, *Comments on Latzer and Cauthen*, PROSECUTOR, Jan./Feb. 2001, at 16; Barry Latzer & James N.G. Cauthen, *Another Recount: Appeals in Capital Cases*, PROSECUTOR, Jan./Feb. 2001, at 25).

30. *See* Eisenberg, *supra* note 29. Mr. Eisenberg is a deputy Philadelphia District Attorney and vice president of an organization called the Association of Government Attorneys in Capital Litigation. *See id.*; Emilie Lounsbury, *Death-Sentence Rate in Phila. Among Highest*, PHIL. INQUIRER, Feb. 14, 2002 (describing Philadelphia, District Attorney Lynne M. Abraham as “having a reputation for aggressively seeking the death penalty” and describing Ronald Eisenberg as the head of the capital division in Abraham’s office). Mr. Eisenberg is a frequent spokesman on the pro-death-penalty side of partisan debates about capital punishment. *See, e.g.*, CNN Int’l: *Q&A Early Afternoon*, available at 2002 WL 5589635 (Apr. 29, 2002) (presenting on-line debate between Vanessa Potkin of the Innocence Project and Deputy Philadelphia District Attorney Ronald Eisenberg on the occasion of the DNA exoneration and release from prison of former Arizona death row inmate Ray Krone);

then repeats verbatim a statement about the availability of our data that the editor of a peer-reviewed journal had previously *removed* from a submission to that journal after being shown that the statement was untrue.<sup>31</sup>

Mr. VanGrack undertakes a long exegesis of National Institute of Justice (NIJ) regulations, claiming we violated them.<sup>32</sup> Characteristically, he never bothers to ask when our NIJ grant period ends—triggering the data-archiving obligation<sup>33</sup>—nor what our data-archiving agreement with NIJ provides. In fact, our grant period continued through December 31, 2001,<sup>34</sup> and pursuant to our agreement with NIJ,<sup>35</sup> we gave it our underlying data on April 26, 2002 for it to archive with the Inter-university Consortium for Public and Social Research at the University of Michigan.<sup>36</sup> Here again, when Mr.

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Christopher Lee, *Senate Panel Puts Death-Penalty System on Trial*, DALLAS MORNING NEWS, June 28, 2001, at 3A (describing competing testimony in the United States Senate by death penalty advocates, including Ronald Eisenberg, and death penalty opponents). As far as we know—and as far as anything we can find that has been published by or about Mr. Eisenberg—he has never studied the death penalty and has no academic or social scientific credentials as a peer reviewer of academic research.

31. One of the “peer reviewers” Mr. VanGrack cites, Barry Latzer, claimed in a submission to *Judicature* in the Fall of 2000 that we had declined to supply him with data. The editor of that refereed journal immediately made the requisite inquiry to check the validity of that claim. We supplied *Judicature*’s editor with the appropriate documentation (an exchange of e-mails between us and Mr. Latzer in June 2000 in which no request for data was made), and the editor directed Latzer to remove the statement from his submission. See Attachments 4, 5, and 6 to our February 25, 2002 letter to the *Washington University Law Quarterly*, *supra* note 14 (providing copies of Latzer’s article in *The Prosecutor Magazine*, our mid-June 2000 exchange of e-mails with Latzer, and a letter from *Judicature*’s editor stating that he had required Latzer to remove the statement from his submission to *Judicature*). Unbeknownst to us as non-readers of *The Prosecutor Magazine*, Mr. Latzer proceeded to reprint, in that non-refereed publication, the exact statement *Judicature*’s editor had required him to remove from his submission to that refereed journal. It is regrettable that the student editors of the *Washington University Law Quarterly* did not follow steps similar to those taken by *Judicature*’s editor. Had they done so when Mr. VanGrack’s original Note was being cite checked, the Note’s inaccuracies could have been removed before it was published.

32. See VanGrack Explanations, *supra* note 6, at 430.

33. See *infra* notes 35, 38.

34. See U.S. Department of Justice, Office of Justice Programs, Grant Adjustment Notice on Grant 2000-IJ-CX-0035 (June 25, 2001) (on file with the *Washington University Law Quarterly*) (noting that grant period in question runs from Aug. 1, 2000 to Dec. 31, 2001).

35. See Special Conditions for State, Local Governments and Non-Profit Organizations, attached to United States Department of Justice, Office of Justice Programs, Award of Grant 2000-IJ-CX-0035, at 5 (Aug. 21, 2000) (on file with the *Washington University Law Quarterly*) (stating that “[t]o support NIJ in its mission to make available data and documentation from all NIJ-funded research, the recipient agrees to deliver to NIJ upon termination of the award period . . . a machine-readable-copy of each data set generated in conjunction with this project” (emphasis added)) [hereinafter Special Conditions].

36. See Letter from Jeffrey Fagan to Andrew Goldberg, National Institute of Justice, April 26, 2002 (on file with the *Washington University Law Quarterly*) (listing data being sent to NIJ for archiving purposes).

VanGrack states that “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*,” and when he asserts that “the National Institute of Justice[] disagrees” with our data archiving procedures,<sup>37</sup> he is wrong.<sup>38</sup>

Lastly, but not least irresponsibly, VanGrack says we “ne[v]er considered Virginia’s outlier status.”<sup>39</sup> In fact, *A Broken System* includes five separate discussions of Virginia’s “distinct outlier” status, concluding that the issue merited its own “further study.”<sup>40</sup> We issued that further study in February 2002, and it addresses the Virginia question in detail based on 19 new regression analyses.<sup>41</sup>

### III. OTHER ALLEGED AUTHORITY

Mr VanGrack predicated his Note on the absolutely inaccurate claim that our data were unavailable. His editors, had they been ordinarily diligent, would have discovered and rectified this misstatement before publication. They have now done so after the fact, and Mr. VanGrack has receded from his claim. In a final effort to defend himself, however, Mr. VanGrack invokes the authority of “social scientific research scholars” to suggest that others, entitled to more credence, have seconded his claim that we have

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37. VanGrack Explanations, *supra* note 6, at 430 (emphasis in original).

38. See United States Department of Justice, Office of Justice Projects, National Institute of Justice Data Resources Program, Depositing Data with the Data Resources Program of the National Institute of Justice: A Handbook, at 3 (Aug. 2000), <http://www.icpsr.umich.edu/NACJD/nijhandbook.pdf> (“The principal investigator[’s] . . . responsibilities with respect to depositing data with the DRP [are]: (1) Principal investigators submit the . . . materials [the underlying data in machine readable form] to their NIJ grant or contract monitor *at the conclusion* of their grant or contract period.” (emphasis added)); Special Conditions, *supra* note 35 (stating that NIJ and authors agree that underlying data are to be supplied “upon *termination* of the award period” (emphasis added)).

39. See VanGrack Explanations, *supra* note 6, at 434.

40. See James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, <http://www.law.columbia.edu/instructionalservices/liebman/>; [http://papers.ssrn.com/paper.taf?abstract\\_id=232712](http://papers.ssrn.com/paper.taf?abstract_id=232712), at 17, 64, 75, 80, 117, *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).

41. 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*, <http://www.law.columbia.edu/brokensystem2/>, at 389-90 (explaining Virginia’s low capital reversal rates based in part on findings that “Virginia falls among the bottom five states in terms of [the] risk of serious capital error” posed by characteristics that regression analysis shows are related to capital error).

violated the norms of our academic community in regard to data-sharing and replicability.<sup>42</sup>

VanGrack's main sources for those norms are political scientists Lee Epstein and Gary King.<sup>43</sup> Recently, Professors Epstein and King published an article in the *Chicago Law Review* that meticulously analyzes the conduct and presentation of social scientific research in law schools.<sup>44</sup> The article criticizes literally dozens of law school authors and studies based, among many other things, on their data-sharing arrangements and the non-replicability of their work.<sup>45</sup>

Two passages in the text of Professor Epstein and King's article discuss our study as an example of "data-collection efforts" in law schools.<sup>46</sup> Yet,

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42. See VanGrack Explanations, *supra* note 6, at 430-32. Mr. VanGrack's major objection to our data-sharing agreement seems to be that we used an agreement of *any* sort. He doesn't realize that data-sharing agreements are the norm. Consider, for example, the Restricted Data Use Agreement that researchers must sign in order to receive data from the Inter-university Consortium for Public and Social Research, discussed *supra* note 28, which as Mr. VanGrack acknowledges sets the standard for data sharing. See VanGrack Explanations, *supra* note 6, at 428, 430. See also National Center for Health Statistics of the Centers for Disease Control and Prevention, Data Purchase and Use Agreement with The Trustees of Columbia University (June 5, 2001) (on file with the *Washington University Law Quarterly*) (conditioning authors' receipt of homicide and victimization data from the National Center for Health Statistics of the Centers for Disease Control and Prevention on Columbia University's agreement to multi-page set of "assurances" with respect to the use, presentation, and non-distribution of the data); State of New York, Division of Criminal Justice Services, Research Project Non-Disclosure Agreement #12-2000 with Columbia University School of Public Health (Dec. 4, 2000) (on file with the *Washington University Law Quarterly*) (conditioning researcher's receipt of data on agreement to numerous provisions governing use, presentation, and non-distribution of the data).

Nor does Mr. VanGrack understand the relationship between funding and data sharing. From 1991 to 1999, our sole funders were the Columbia Law School and Columbia University. Columbia University bylaws give it a proprietary interest in data its faculty generate using University's funds, and the University's General Counsel drafted our data-sharing agreement pursuant to that policy to protect its, as well as our, proprietary interest in a work product that took nearly a decade and cost many tens of thousands of dollars to generate. Then, in subsequent undertakings in connection with our NIJ grant, the University and the authors agreed to provide the databases underlying our two reports to NIJ for archiving with the ICPSR at the University of Michigan following the end of our grant period on December 31, 2001, and the issuance of our second report on February 11, 2002. See *supra* notes 32-38 and accompanying text.

43. See, e.g., VanGrack Note, *supra* note 7, at 978-81 & nn. 31, 32, 34-38, 42-46, 49; VanGrack Explanations, *supra* note 6, at 430-33 & nn. 20, 28, 31, 32, 35, 37, 45.

44. Epstein & King, *supra* note 9. The target of Epstein and King's most pointed criticism is student edited-law journals, which in Epstein & King's view are incapable of assuring the accuracy and reliability of the empirical articles and student work they publish. See *id.* at 48-49, 125-30.

45. *Id.* at 130-31, 38-45.

46. See *id.* at 20-22.



despite having carefully reviewed our study and the availability of our data,<sup>47</sup> and despite their expansive criticism of numerous other law school studies and authors,<sup>48</sup> Professors Epstein and King offer no criticism of any aspect of our conclusions or methods, including our data-sharing arrangements and the replicability of our findings. They simply say that “the creators obtained their data from public or other readily available sources: in the case of the Liebman team, from state and federal [case] reporters”<sup>49</sup>; that “[i]f the Liebman team makes its database publicly available, even though it was originally designed . . . for their research, scholars . . . will take advantage of the Liebman team’s labors”; and that “[s]een in this way . . . , the Liebman team and many other data-collection efforts are important contributions to the scholarly community in their own right. We should fully recognize them as such.”<sup>50</sup>

If our data sharing, replicability, and other methods are as inconsistent with the Epstein-King standards<sup>51</sup> as Mr. VanGrack claims—albeit for reasons that shift radically from his original Note to his recent explanations and are inaccurate in both cases<sup>52</sup>—it is hard to understand why Professors Epstein and King said nothing about the problem in their comprehensive critique of empirical work in the legal academy. This is particularly so given how freely they criticize the work of other legal researchers in what has been called “an unremitting and excessive attack on the current state of empirical

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47. In November 2000, in preparation for his article with Professor Epstein, Professor King e-mailed us about our data-sharing arrangement. E-mail from Professor Gary King to Professor James S. Liebman (Nov. 11, 2000, at 1:46 p.m. EST). We informed Professor King of our plans to archive our databases upon finishing our second study, described the data-sharing agreement we were using in the meantime, sent him a copy of the agreement, and noted how researchers could obtain all the information in our study from public sources. See E-mail from Professor James S. Liebman to Professor Gary King (Nov. 14, 2000, at 3:37 p.m. EST); E-mail from Professor James S. Liebman to Professor Gary King (Nov. 15, 2000, at 6:14 p.m. EST). Professor King expressed no objection. See E-mail from Professor Gary King to Professor James S. Liebman (Nov. 17, 2000, at 3:52 p.m. EST) (concluding the e-mail exchange with the statement, “sounds good; I’m just not use[d] to this level of legal formality. But no problem. Thanks for arranging it.”).

48. See, e.g., Epstein & King, *supra* note 9, at 17-19, 28-29, 30-31, 40-49.

49. See *id.* at 24.

50. See *id.*

51. On whether the Epstein-King standards should be accepted as gospel, as Mr. VanGrack does, see Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 154 (2002):

[W]e . . . question the privileged status of Epstein and King’s rules of inference even within [their own field of] political science, much less in other domains. Epstein and King give the impression that their article extends uncontroversial methods from political science to law. In fact, as we show in Part II, Epstein and King’s prescriptions are contested even in their own discipline. There simply are not “Rules of Inference” in the sense of universally agreed-upon methods of empirical analysis.

52. See *supra* notes 7, 24-38 and accompanying text.

legal research methodology,”<sup>53</sup> and given Epstein and King’s familiarity with our study, its replicability, and our data-sharing arrangements.<sup>54</sup>

#### IV. CONCLUSION

We look forward to future exchanges with critics on our methods and findings. We have concluded, however, that additional exchange with Mr. VanGrack is not useful, given his stated belief that inaccurate reporting of the basic facts is a mere matter of “form,” not “substance.”<sup>55</sup>

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53. Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135, 135-36, 151 (2002). *See also id.* at 151 (claiming that Professors Epstein and King were “overcome by zeal in the intensity of their criticism of the current state of legal research”); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 188-89 (2002) (stating that Epstein and King’s article contains “unwarranted criticisms and exaggerations”).

54. *See supra* notes 46-50 and accompanying text.

55. *See* VanGrack Explanations, *supra* note 6, at 428.





