Evaluating Valuing Empiricism (at Law Schools)

Matthew Spitzer

I will respond to Lee Epstein and Gary King’s suggestions for improving empirical scholarship produced by law teachers and improving the empirical skills of law school graduates.¹ In brief, these are their suggestions.

• Offer courses in empirical research for law school students.
• Hire a “methodologist” onto the law school faculty.
• Support high-quality empirical research by law faculty through
  • supporting education in empirical methods by law faculty.
  • encouraging collaborations by law faculty with trained empiricists by “counting” the publications toward promotions, raises, and honors.
  • holding seminars on empirical methods.
• providing research assistants, seed money, and other resources for empirical work, including an in-house staff specialist in computer graphics and statistical software.
• Encourage employers to hire more graduates with empirical training.
• Turn law reviews into student-run but peer-reviewed publications.
• Support standards and methods for archiving data.²

I will start from the bottom and work my way up. (I am, after all, a dean.)

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1. I will not add to the debate about whether Epstein and King used the right methodology in testing their hypothesis that empirical scholarship in law is flawed. I will add, however, that if one pounds on anything hard enough it will break. To see this, consider the following thought experiment. Apply Epstein and King’s methodology to test all political science articles published in the past five years, but instead of Epstein and King the evaluator will be my late colleague Richard McKelvey. Richard was a brilliant political scientist on the Caltech faculty who taught econometrics to our graduate students and sometimes wrote articles on political methods. Richard had high standards, and if he were to evaluate all political science articles I suspect he would find the majority of them wanting in one respect or another. This would include some articles that he liked and thought made a valuable contribution to the field. Although such a finding might lead some others to conclude that political science was “broken,” it would in no way have led him (or me) to that conclusion.


1. Establish some protocols for archiving data underlying published results and making the data available to the public. This is a superb idea. It is the only way that published results can be checked. I will bring this suggestion to the American Law Deans Association for discussion.

2. Transform the law review into a student-run but peer-reviewed journal. This is an attractive idea on the surface, but one with no obvious path from the current situation into the suggested one. Epstein and King argue:

   Suppose that, of the top twenty-ranked law schools, ten adopt the model and ten do not. This would provide an opening for the ten adopters to advance their positions, for once it becomes common knowledge that their flagship journal is peer reviewed, deans elsewhere will have incentives to push their faculty to publish in them.

First, I don’t think that the analysis should start by supposing that ten schools adopt the model. We are in an equilibrium in which the core law reviews are student run and cross-disciplinary journals (e.g., *Journal of Law, Economics and Organization*) are peer reviewed. As a dean of one law school I first ask myself, “Can I gain something for my school by making the change in my school’s law review, assuming that no one else changes?” And, if the answer is yes, then I must ask, “Are the gains worth the costs?” If the answer to both questions is yes, I will proceed to make the change.

Are there benefits to converting to a student-run, peer-reviewed journal? That depends on whether such a journal could attract and publish better articles, enjoy an increase in prestige, and translate the increase in prestige into advantages for the rest of the institution. I am skeptical about such a journal’s ability to attract better articles, mainly because I would be loath to submit my own articles. One of the big attractions of publishing in peer-reviewed journals—at least those in which I have published—is the chance to work solely with professionals. A student-run journal, even if it has a peer-review stage and a board including some faculty, will lack this crucial benefit. In addition, the peer-review stage risks recreating the delays often experienced in more traditional peer-reviewed journals. On balance, my initial impulse would be to send my manuscripts to the traditional peer-reviewed journals or else go for the speed and multiple-submission advantages of the

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3. It is attractive for reasons that extend far beyond improving the quality of empirical work. Peer review can also help ensure that the theory—literary, game, philosophical, critical, psychological, and so forth—is done well.


5. It is possible that although it is not worth the cost to me alone to make the change at my school, it might be worth it if nine (or some other number of) other schools simultaneously made the change. But it is, in my opinion, highly unlikely to be worth my shouldering the organizational costs if the benefits are to be shared with many other schools.


7. It is my impression that delays are usually caused by manuscripts’ lying unread on reviewers’ desks. The existence of students on editorial boards and on the staff will do nothing to solve this problem.
fully student-run law reviews. Others, I suspect, would make similar choices. So I suspect that the change to a student-run, peer-reviewed journal would founder because of a lack of good submissions.

If I am wrong, such a journal could gain a reputation for high quality. This, alone, would provide some benefit to the law school that publishes the journal. Could a dean leverage the journal into other benefits for the school? Perhaps the school could get better students by highlighting the journal to applicants, but I doubt the effect would be large. It would be a difficult thing to explain to applicants, and rational students would see that only a small fraction of the student body can work on the journal. Similarly, the dean could try to use the journal to attract faculty to the school. For a few people the appeal of being on the journal board might be strong.

There would be significant costs in making such a transition. The most obvious is the time and effort involved in any significant institutional innovation. Less obvious are the possible political costs. The law reviews are regarded as belonging to the students. A dean who tried to persuade the existing editorial board to agree to such a transformation would risk being perceived as unfriendly to student rights. There are enough flash points with students without trying to transform the law review. I would need to be convinced that the benefits from making the transformation were larger and more certain before I would risk the costs.8

3. Get employers to value empirical skills. Epstein and King suggest that law schools persuade employers to hire graduates who have empirical skills. This, with all due respect, is silly. It presumes that law schools have influence over employers’ value sets. We have no such influence. In addition, employers already want graduates who can help them with any sort of technical skill. This includes econometrics and statistics, engineering, and many fields of basic science. Such graduates already get the best jobs. Law schools have no additional role to play here.

I will spend little time discussing the next three, primarily because U.S.C. already does most of them.

4. Support high-quality empirical research by faculty. Most of these suggestions are reasonable, but several (such as hiring an in-house expert in computer graphics and statistical software) cost a lot. U.S.C., like many other law schools, already does most of this. In particular, I think U.S.C. has resolved the coauthoring issue. We give the standard advice to junior scholars to avoid publishing only with the same coauthor, but we go a bit farther. We advise an untenured scholar to try to publish one or two solo-written articles, in addition to the coauthored articles, to make it easier to measure our faculty member’s contributions to the coauthored pieces.

8. I would be delighted to watch another dean try this experiment while I evaluate the results from afar.
I want to say a word about “punishing” faculty for publishing coauthored work. U.S.C. does no such thing. I am a good example. I have been on the faculty since 1981 and have been rewarded in every imaginable way: I was granted tenure, given a chaired professorship, given good raises, given the directorship of two interdisciplinary centers, and rewarded with the deanship. Calm down. I admit that some might quibble with the dean’s position being a reward rather than a punishment, but I like the job. The point is that when I was given tenure I already had published five coauthored articles, and only two solo pieces. At present I have written twenty coauthored articles and have written twelve articles by myself. I have also written one book by myself and one with a coauthor. U.S.C. always supported me in every way.

5. **Hire a methodologist.** We did so years ago, both by hiring faculty with law degrees in addition to Ph.D.s in fields that incorporate empirical methodology into the training, and by hiring faculty with only Ph.D.s in the other fields. At the moment our “methodologist” is Linda Cohen, although she would call herself an applied economist. And we have eleven others on our faculty with Ph.D.s in empirically oriented allied disciplines, including Tom Lyon (psychology) and Eric Talley (economics), who team-teach the empirical methods course to our students.

6. **Offer an empirical methods course.** As I mentioned in the paragraph above, we already do this. ’Nuff said.

In sum, the only thing I am going to rush out and do differently is data archiving. It is a great suggestion. At U.S.C. the rest of the suggestions have already been implemented or are impractical, for either monetary or political reasons.

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9. Epstein & King, *supra* note 2, at 120.