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# THERE'S MADNESS IN THE METHOD: A COMMENTARY ON LAW, STATISTICS, AND THE NATURE OF LEGAL EDUCATION

STEVEN B. DOW\*

*Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind . . . .*

— Oliver Wendell Holmes Jr.<sup>1</sup>

## *Introduction*

Professional legal education is unique among all of the university graduate-level programs in the natural and social sciences in not requiring at least a basic level of competency in statistics and quantitative methods. As these other disciplines are becoming more quantitative, the dominant paradigm in legal education remains largely unchanged. To understand the reason for this puzzling situation and see its implications for law, we must start by looking at the history of legal education.

A little over a century ago, Oliver Wendell Holmes Jr., then a justice on the Supreme Judicial Court of Massachusetts, opined that the lawyer of the future would be skilled in “statistics and the master of economics.”<sup>2</sup> Holmes was commenting on the state of legal education, dominated at that time by Harvard Law School. Holmes’s remark was a not-so-thinly-veiled attack on the leading figure in legal education, Christopher Columbus Langdell, and the educational system he had established at Harvard.

Langdell, dean of the law school from 1870 to 1895,<sup>3</sup> was responsible for shaping legal education at Harvard. Not only was Harvard the first university-

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1. OLIVER WENDELL HOLMES JR., *COLLECTED LEGAL PAPERS* 230 (1921); *see also* ROSEMARY J. ERICKSON & RITA J. SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* 15 (1998).

2. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); *see also* WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 13 (1973) (discussing the skills which lawyers of the future will possess).

3. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 219 (1989).

affiliated law school,<sup>4</sup> but it was also the most influential law school, setting the trend for professional legal education throughout the United States.<sup>5</sup>

The nature of legal education at Langdell's Harvard is not merely a matter of historical interest; it is pertinent to this Commentary because not only did Harvard set the trend for legal education in the late nineteenth and early twentieth centuries, but the fundamentals of legal education have changed very little over the intervening century.<sup>6</sup> Therefore, understanding the history of legal education at Harvard is crucial to understanding the nature of contemporary legal education.

### *Langdell and the Origins of American Legal Education*

Before the rapid growth of American law schools during the second half of the nineteenth century, aspiring lawyers mainly were educated through an apprentice system.<sup>7</sup> Under this system, a practicing lawyer would accept a young man as an apprentice, who would then assist the lawyer and study the law for a fairly brief period before going out to practice law on his own.<sup>8</sup> The first law schools grew out of this arrangement. They were small, privately run businesses, not affiliated with universities.<sup>9</sup> On the eve of the Civil War, only twenty-one law schools existed in the United States.<sup>10</sup> By the time Langdell became dean of Harvard Law School in 1870, the number had grown to thirty-one.<sup>11</sup>

Langdell set out to radically change the nature of legal education. He was influenced by two things. The first was the growth and success of the natural sciences in the nineteenth century and their prestige both within and outside of universities.<sup>12</sup> He endeavored to emulate this success by establishing the study of law as a "science" in the hope of promoting the legitimacy of legal study in the eyes of the university community, which was suspicious of law

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4. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 322 (2d ed. 1985) [hereinafter *FRIEDMAN, HISTORY*]; LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 33 (2003) [hereinafter *FRIEDMAN, TWENTIETH CENTURY*].

5. *FRIEDMAN, HISTORY*, *supra* note 4, at 321-22; *HALL*, *supra* note 3, at 219; *TWINING*, *supra* note 2, at 10.

6. *FRIEDMAN, HISTORY*, *supra* note 4, at 322; *TWINING*, *supra* note 2, at 10; *see also* *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999); *infra* notes 67-72, 83-89 and accompanying text.

7. *FRIEDMAN, HISTORY*, *supra* note 4, at 318, 322, 606; *FRIEDMAN, TWENTIETH CENTURY*, *supra* note 4, at 33; *HALL*, *supra* note 3, at 218.

8. *HALL*, *supra* note 3, at 218.

9. *FRIEDMAN, HISTORY*, *supra* note 4, at 320.

10. *Id.* at 607.

11. *Id.* at 318-22, 607.

12. *HALL*, *supra* note 3, at 220.

schools' "trade school" origins.<sup>13</sup> The second influence was *legal formalism* — also referred to as *doctrinalism* — a common law theory that dominated the second half of the nineteenth century.<sup>14</sup> Under formalism, the common law consisted of a systematic, eternal array of broad principles and specific doctrines, all interconnected and logically consistent.<sup>15</sup> These doctrines were discovered — not made — by judges through the study of judicial decisions and a process of inductive reasoning. Joseph Vining described this view as "projecting an image of law as a set of rules outside, a grid that, could you only tap it with your fingernail, would give out a hard metallic ring."<sup>16</sup> These principles and doctrines could then be applied through a process of syllogistic reasoning to resolve current legal questions.<sup>17</sup> This view of law was manifested in the nature of legal education that Langdell developed and promoted at Harvard. His goal was to convert the study of these principles and doctrines into a science and establish it as the paradigm for training law students.<sup>18</sup>

Several features of Langdell's system are particularly relevant for understanding the notable absence of statistics and other aspects of quantitative methodology in legal education. First, Langdell's understanding of "science," at least in the context of the law, was very peculiar — perhaps even medieval — in its beliefs and practices. Langdell's science was devoid of experimentation.<sup>19</sup> Indeed, Langdell made no mention of it in his speeches or writings.<sup>20</sup> Instead, the locus of activity for this legal science was the law library. In a speech given at Harvard, he stated that

[w]e have also constantly inculcated the idea that the library is the proper workshop of [law] professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.<sup>21</sup>

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13. FRIEDMAN, *HISTORY*, *supra* note 4, at 613; FRIEDMAN, *TWENTIETH CENTURY*, *supra* note 4, at 36; GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977); HALL, *supra* note 3, at 220; NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW FROM POSNER TO POST-MODERNISM* 7 (1997); TWINING, *supra* note 2, at 12; David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 584 (1984).

14. GILMORE, *supra* note 13, at 42-48.

15. *Id.* at 43, 62; HALL, *supra* note 3, at 220.

16. ROBERT POST, *LAW AND THE ORDER OF CULTURE* vii (1991).

17. EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 95 (Harvard Univ. Press 1976) (1974); MERCURO & MEDEMA, *supra* note 13, at 7-8.

18. MERCURO & MEDEMA, *supra* note 13, at 7.

19. FRIEDMAN, *HISTORY*, *supra* note 4, at 617.

20. TWINING, *supra* note 2, at 12.

21. *Id.*; GILMORE, *supra* note 13, at 47. This is the same position taken by the American

The subject of this “scientific” study was reported judicial decisions.<sup>22</sup> Over the course of several centuries, practicing lawyers and then governmental entities had developed a practice of collecting and publishing these decisions in bound volumes, which were eventually housed in law libraries. Although U.S. appellate court decisions were not systematically reported until the American Revolution,<sup>23</sup> a system of regular reporting on both the federal and state levels had developed by the beginning of the nineteenth century.<sup>24</sup> By 1847, all of the states existing at that time had reporting systems.<sup>25</sup>

The purpose of studying these decisions was not the study of judicial behavior in an empirical sense, but to discover the principles and doctrines of the common law.<sup>26</sup> In Langdell’s view, through the careful study of judicial decisions and after an appropriate amount of training, a law student could discover legal doctrines and their underlying principles. Langdell accomplished this training through the *casebook* method, which he established

Law Institute after World War II. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 212 (1995).

22. FRIEDMAN, *HISTORY*, *supra* note 4, at 613, 617; MERCURO & MEDEMA, *supra* note 13, at 7; TWINING, *supra* note 2, at 11.

23. FRIEDMAN, *HISTORY*, *supra* note 4, at 323.

24. *Id.* at 324.

25. *Id.* at 323; GILMORE, *supra* note 13, at 23.

26. TWINING, *supra* note 2, at 12; John Henry Schlegel, *Langdell’s Legacy, or the Case of the Empty Envelope*, 36 *STAN. L. REV.* 1517 (1984); Trubek, *supra* note 13, at 582.

In a controversial article published in 2003, Lee Epstein and Gary King argued that conventional legal scholarship is empirical in the sense that it purports to tell the reader something about the world. See Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 *U. CHI. L. REV.* 1 (2002). The problem with such scholarship, they contend, is that nearly all of it is “deeply flawed.” *Id.* at 6. For critiques of this characterization see, for example, Frank Cross et al., *Empirical Research and the Goals of Legal Scholarship: Above the Rules: A Response to Epstein and King*, 69 *U. CHI. L. REV.* 135 (2002); Jack Goldsmith & Adrian Vermeule, *Empirical Research and the Goals of Legal Scholarship: Empirical Methodology and Legal Scholarship*, 69 *U. CHI. L. REV.* 153 (2002); Richard L. Revesz, *Empirical Research and the Goals of Legal Scholarship: A Defense of Empirical Legal Scholarship*, 69 *U. CHI. L. REV.* 169 (2002). Epstein and King are probably correct with respect to contemporary legal scholarship; that is, with some notable exceptions, it is deeply flawed empirical scholarship. Schlegel describes contemporary legal analysis as “data-free social science.” SCHLEGEL, *supra* note 21, at 215. Even under Epstein and King’s broad view of “empirical,” there is considerable doubt that Langdell’s formalism was empirical. After all, Langdell was seeking something that transcended reality. To be sure, the judges’ articulation of these rules is a factual matter, but Langdell was not searching for the rules articulated by judges. If he were, he would not have ignored so many reported U.S. decisions. In this respect, Langdell’s formalism is similar to theology, which is the essence of Holmes’s remark that Langdell was “the greatest living legal theologian.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 424 n.2 (1990) (quoting 14 *AM. L. REV.* 233, 234 (1880)).

and systematized at Harvard to replace the lecture and textbook methods of instruction.<sup>27</sup>

Under the casebook system, the common law principles and doctrines were categorized into subjects such as contracts, property, and torts. Casebook authors arranged selected decisions on a particular subject in a casebook in chronological order so that students could learn the various principles and doctrines and how they had evolved. Notably, legal education continues to be structured around these same doctrinal subject categories, particularly in the first-year curriculum.<sup>28</sup>

Even on its own doctrinal terms, Langdell's system was problematic from an empirical standpoint. The selection of cases was not based on systematic, empirical observation of courts.<sup>29</sup> For example, in Langdell's casebook on contract law, over half of the cases were English.<sup>30</sup> Thus, American students studying contract law in U.S. law schools were studying primarily English law — a puzzling incongruity considering that most of these students would practice law in U.S. courts. Langdell's heavy use of English cases did not result from a dearth of American cases. The decisions of most American appellate judges had been reported since the early nineteenth century, leading to the conclusion that there were a sufficient number of American cases from which to choose.<sup>31</sup> Langdell, however, had his students predominately read English cases because the English judges did a better job of *getting it right*. The "it" was the common law of contracts — that elaborate system of doctrines and principles that Langdell was trying to impart to students. In Langdell's view, it was necessary for the students to learn this doctrinal system, not the doctrines and principles that American judges *actually* employed in their decision making. Insofar as American judges got these doctrines and principles wrong, they were to be ignored. Langdell made it

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27. FRIEDMAN, HISTORY, *supra* note 4, at 319, 612-13 (noting that Harvard used the "textbook" method, while all other law schools used the "lecture" method); FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 34; HALL, *supra* note 3, at 220; MERCURO & MEDEMA, *supra* note 13, at 7; Elizabeth Mensch, *The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 30 (David Kairys ed., 3d ed. 1998).

28. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 486; MERCURO & MEDEMA, *supra* note 13, at 9; Richard A. Posner, *Against the Law Reviews*, LEGAL AFF., Nov./Dec. 2004, at 57.

29. FRIEDMAN, HISTORY, *supra* note 4, at 617; TWINING, *supra* note 2, at 12.

30. FRIEDMAN, HISTORY, *supra* note 4, at 614, 618; GILMORE, *supra* note 13, at 57, 59; HALL, *supra* note 3, at 220. Friedman suggests that it was not unusual for courts and reporters to cite English cases before the Civil War, even though a system of reporting had been developing in the United States for half a century. FRIEDMAN, HISTORY, *supra* note 4, at 325-26; *see also supra* notes 23-25 and accompanying text. The few U.S. cases in Langdell's casebook were from the east and northeast. FRIEDMAN, HISTORY, *supra* note 4, at 614.

31. *See supra* notes 23-25 and accompanying text.

clear that the cases worth studying were “an exceedingly small proportion to all that have been reported.”<sup>32</sup> The rest, in his view, were “useless, and worse than useless.”<sup>33</sup> These “wrong” decisions were labeled as such because for Langdell, they “disturbed the conceptual order” of contract law,<sup>34</sup> those fundamental principles and specific doctrines that he had uncovered through his study of the cases.<sup>35</sup> Grant Gilmore captured this idea nicely when he wrote that for Langdell, “[t]he doctrine tests the cases, not the other way around.”<sup>36</sup>

The selectivity of Langdell’s view regarding which cases were worth reading is made even more apparent by considering another casebook he assembled on equity pleading.<sup>37</sup> Of all the cases he selected to include in the book, the most recent case was *fifty years old*.<sup>38</sup> These two casebook examples, along with Langdell’s own public statements, clearly illustrate that his science of law was *not* the study of what American judges were, in fact, doing in deciding the disputes brought before them. Moreover, Langdell’s method was not a study of the *behavior* of American judges or other actors in the U.S. legal system. It was not even a study of the legal doctrines American judges used in their decisions, except insofar as they “got it right.” It ignored, among other things, the great diversity that had developed among American courts, leading many to criticize Langdell’s system.

### *Langdell’s Critics*

What we see in the selection of cases is Langdell and the other casebook authors quietly, and perhaps unknowingly, shifting from a descriptive to normative undertaking. This approach was not without its critics, both inside and outside Harvard, who saw Langdell’s system as too theoretical.<sup>39</sup> For example, Holmes saw the pursuit of discovering enduring principles of law as misguided. In his famous speech, *The Path of the Law*,<sup>40</sup> he stated that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>41</sup> Holmes’s view and other early critical views,

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32. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (1871).

33. GILMORE, *supra* note 13, at 47; *see also* FRIEDMAN, HISTORY, *supra* note 4, at 614.

34. AMERICAN LEGAL REALISM xii, 4 (William W. Fisher et al. eds., 1993).

35. MERCURO & MEDEMA, *supra* note 13, at 8-9.

36. GILMORE, *supra* note 13, at 47.

37. *See* CHRISTOPHER C. LANGDELL, CASES IN EQUITY PLEADING (1878).

38. FRIEDMAN, HISTORY, *supra* note 4, at 614.

39. *Id.* at 617.

40. Holmes, *supra* note 2, at 457.

41. *Id.* at 461; *see also* AMERICAN LEGAL REALISM, *supra* note 34, at 4.

however, made little difference in the growing dominance of the Langdellian paradigm.

Langdell's approach to legal education is also notable for things it omitted. As William Twining pointed out, Langdell's view of legal education "consists solely of principles or doctrines and, in law school at least, law students should study nothing but law."<sup>42</sup> This meant that law students studied nothing but principles and doctrines of the common law. The common law was "self-contained" in the sense that it contained the answers for all legal questions, answers which could be uncovered through careful study.<sup>43</sup> This meant that in searching for the law there was no need to study anything outside of the cases, let alone outside of the law. Casebook authors omitted statutes, an obvious and important source of law.<sup>44</sup> In their 1993 book on legal realism, an approach to the study of law that briefly and unsuccessfully challenged doctrinalism during the 1920s and 1930s, William Fisher, Morton Horwitz, and Thomas Reed neatly condensed the essence of this formalistic conception of law:

Properly organized, law was like geometry. . . . Each doctrinal field revolved around a few fundamental axioms, derived primarily from empirical observation of how courts had in the past responded to particular sorts of problems. From those axioms, one could and should deduce — through uncontroversial, rationally compelling reasoning processes — a large number of specific rules or corollaries. The legal system of the United States, they acknowledged, did not yet fully conform to this ideal; much of the scholars' energies were devoted to identifying and urging the repudiation of rules or decisions that disturbed the conceptual order of their respective fields. But once purified of such anomalies and errors, the scholars contended, the law would be "complete" (capable of providing a single right answer to every dispute) and elegant.<sup>45</sup>

The search for principles and doctrines through the study of cases also meant that there was no attention to fact finding, a process in which courts were regularly engaged.<sup>46</sup> The facts of a case were set out by the judge in the

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42. TWINING, *supra* note 2, at 13.

43. This view has been recently defended by those in the "neotraditionalist" movement. MERCURO & MEDEMA, *supra* note 13, at 7-8; POSNER, *supra* note 26, at 423-53; Mensch, *supra* note 27, at 26, 30.

44. FRIEDMAN, HISTORY, *supra* note 4, at 322, 614, 617.

45. AMERICAN LEGAL REALISM, *supra* note 34, at xii.

46. GILMORE, *supra* note 13, at 60, 63.



written decision. Langdell's lack of attention to fact finding did not go unnoticed by his critics. John Chipman Gray argued that the study of a

substitute for the facts may be much better material for intellectual gymnastics than the facts themselves and may call forth more enthusiasm in the pupils, but a school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil.<sup>47</sup>

The lack of attention to the fact-finding process is still a characteristic of casebooks.

Another problem with the self-contained, self-referential, and insular nature of law under Langdell's system was that there was no reason to look outside of the law in search for answers to legal questions.<sup>48</sup> Consequently, no attention was given to the array of social, economic, and political forces that interacted with law. In Lawrence Friedman's view, this made "Langdell's science of law . . . a geology without rocks, an astronomy without stars."<sup>49</sup> The lack of attention to the facts in a case meant a lack of attention to social facts. Accordingly, social data gathered through empirical means and the methods of analyzing it had no part in legal education. Simply put, the emerging social sciences — economics, psychology, political science, and sociology — had no part in the law student's curriculum.<sup>50</sup>

Skeptics criticized the insular nature of Langdell's system. Roscoe Pound, who held a doctorate in botany,<sup>51</sup> and who would serve as the dean of Harvard Law School in the early twentieth century,<sup>52</sup> was especially critical of Langdell's approach to education and his erroneous characterization of his method as "scientific." In Pound's "sociological jurisprudence," one of lawyers' important roles was gathering and presenting factual data on the "social and economic consequences" of legal decisions.<sup>53</sup> He was critical of

47. TWINING, *supra* note 2, at 20 (quoting Letter from John Chipman Gray, Professor, Harvard University, to Charles William Eliot, President, Harvard University (Jan. 8, 1883)).

48. MERCURO & MEDEMA, *supra* note 13, at 8.

49. FRIEDMAN, HISTORY, *supra* note 4, at 617.

50. *Id.* at 322, 617; MERCURO & MEDEMA, *supra* note 13, at 8.

51. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 54 (1995); FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 489; HALL, *supra* note 3, at 224.

52. Pound was dean from 1916 to 1936. DUXBURY, *supra* note 51, at 54, 62; FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 489-90; HALL, *supra* note 3, at 224.

53. DUXBURY, *supra* note 51, at 58; HALL, *supra* note 3, at 224; GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 26 (1995); TWINING, *supra* note 2, at 23; Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 831 (2002).

Langdell's system for failing to train law students to do this. Louis Brandeis was another important critic of Langdell's method. Before being appointed to the U.S. Supreme Court, Brandeis was influential in urging courts to consider a variety of "extralegal" material that included an array of data on workplace, psychological, economic, and medical conditions, a practice that was unknown before the twentieth century.<sup>54</sup> Not surprisingly, this data was absent from Langdell's method. Holmes and Benjamin Cardozo, both influential judges, also saw the importance of social and economic facts as well as social policy implications in legal decision making,<sup>55</sup> all of which were ignored by Langdell.

These critical voices failed to bring about change in Langdell's system. In fact, as dean, Langdell endeavored to purge Harvard's faculty of anyone who had any interest in these other disciplines and their analytical methods.<sup>56</sup> Langdell was also successful in perpetuating his system by hiring as law teachers mainly those who themselves were trained in the system.<sup>57</sup> Ephraim Gurney, dean of faculty at Harvard and one of Langdell's critics, remarked that Langdell's system was "breeding within itself."<sup>58</sup> Not only had Langdell removed faculty members who had any interest in fields outside of the law,<sup>59</sup> he also endeavored to purge anyone who had experience in law practice.<sup>60</sup> In his view, "scientists," not practitioners, were needed to teach the "science" of the law.<sup>61</sup> Consequently, legal education was largely cut off from the mainstream intellectual development of American universities, as well as the practice and administration of law.

Under Landgell's method, law students studied one doctrinal topic after another for the entire three years of school. They did not take any courses in natural sciences, social sciences, or research methods of those sciences, including statistics. Importantly, law school was an undergraduate program during much of this time period.<sup>62</sup> The schools did not require an undergraduate degree or even any undergraduate course work for admission.<sup>63</sup> The requirement of having a bachelor's degree before being admitted to law

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54. This practice became known as a "Brandeis brief." HALL, *supra* note 3, at 224; *see also* ERICKSON & SIMON, *supra* note 1, at 12-15.

55. HALL, *supra* note 3, at 223; MERCURO & MEDEMA, *supra* note 13, at 9.

56. FRIEDMAN, HISTORY, *supra* note 4, at 617; HALL, *supra* note 3, at 220.

57. GILMORE, *supra* note 13, at 57.

58. FRIEDMAN, HISTORY, *supra* note 4, at 615.

59. HALL, *supra* note 3, at 220.

60. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 34.

61. FRIEDMAN, HISTORY, *supra* note 4, at 615.

62. *Id.* at 608; FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 481.

63. FRIEDMAN, HISTORY, *supra* note 4, at 608; FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 481.

school started at Harvard in 1896,<sup>64</sup> but mainly did not come into effect until the 1950s and 1960s.<sup>65</sup> Consequently, law students did not receive college-level training in any natural or social sciences, or their research methods, before or during law school.

In light of what law students studied and how they studied it, they got along quite well without studying statistics or other quantitative methods. Students studied selected judicial decisions from a qualitative — but nonbehavioral — perspective. The “facts” of a case were posited by the judge who wrote the opinion, regardless of whether they corresponded with reality. Moreover, the disputes that parties typically brought before the courts were seen as involving the individual parties and little else. The larger social, economic, and political world was excluded from the instructional process.

Notwithstanding the unempirical nature of Langdell’s system, it was able to survive within the university system. Indeed, legal education gained intellectual legitimacy by affiliating with universities. Legal education remained very isolated, however, with respect to the universities in which the law schools existed, inasmuch as it developed in isolation from the natural and social sciences and other university disciplines.<sup>66</sup>

Despite its flaws and shortcomings, Langdell’s system was “firmly established” at Harvard by the middle of his tenure as dean of the law school.<sup>67</sup> More importantly, Langdell’s method spread to “[e]very major and most minor law schools . . . .”<sup>68</sup> These schools fashioned their courses and instructional method after Langdell’s model at Harvard.<sup>69</sup> In some cases, this was the result of Harvard-trained lawyers obtaining teaching positions at other law schools.<sup>70</sup> By 1920, Langdell’s system dominated legal education in the United States, establishing a high degree of uniformity in American legal education.<sup>71</sup> The rise and eventual hegemony of Langdellian orthodoxy in American law schools during the late nineteenth and early twentieth centuries is remarkable, perhaps even bizarre. It is truly difficult to comprehend how institutions that embraced an approach to legal education that was so profoundly flawed could establish themselves as an integral part of post-graduate education in American universities.<sup>72</sup>

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64. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 38.

65. *Id.* at 481.

66. FRIEDMAN, HISTORY, *supra* note 4, at 609.

67. TWINING, *supra* note 2, at 13.

68. FRIEDMAN, HISTORY, *supra* note 4, at 617.

69. *Id.* at 322, 616.

70. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 34-35.

71. *Id.* at 34; HALL, *supra* note 3, at 220.

72. The focus of this commentary has been on legal education, but it should be added that scholarship within the legal academy suffered from the same problems. Friedman observes that

*Law and Statistics in American Courts*

Although legal education was moving away from mainstream intellectual development in America and becoming more isolated from the universities in which it was situated, we should consider the extent to which empirical data and methods of analysis played a role in the activities of courts. While American courts were never entirely separated from making public policy, before the twentieth century the amount of empirical data inside of courts was quite small.<sup>73</sup> Starting in the second half of the nineteenth century, U.S. courts frequently found themselves involved in overt public policy making, largely as the result of legal challenges to governmental regulation of the economy.<sup>74</sup> Such cases inevitably involved disputes over social and economic facts, which entailed the need for empirical data and the means to interpret it. Rosemary Erickson and Rita Simon identified *Muller v. Oregon*,<sup>75</sup> decided in 1908, as the beginning of the use of social science data by judges in resolving legal disputes.<sup>76</sup> Judges used such data only sporadically over the next sixty years, notably in cases such as *Brown v. Board of Education*,<sup>77</sup> until becoming more routine, at least in certain areas of law.<sup>78</sup> Nearly thirty years ago, Judge Braxton Craven suggested that providing courts with empirical data “is now standard operating procedure [for lawyers] in equal employment, ecology, and major school desegregation cases.”<sup>79</sup> In the same year, Judge John Wisdom expressed a similar view on the developing relationship between law and social science:

What seemed at first to be antagonism between social science and law has now developed into a love match. What began in the field of education spread to many other fields. In case after case the Fifth Circuit, among other courts, has relied on studies developed by social scientists and other scientists to show pollution, unlawful

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“[l]egal scholarship had, since Langdell, tended to be self-centered, solipsistic, unmindful and unaware of scholarship outside the discipline.” FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 496. On the question of whether legal scholarship has significantly changed more recently, see *infra* notes 90-97 and accompanying text.

73. ERICKSON & SIMON, *supra* note 1, at 12-15.

74. See, e.g., FRIEDMAN, HISTORY, *supra* note 4, at 439-66; HALL, *supra* note 3, at chs. 5-6, 10, 12.

75. 208 U.S. 412 (1908).

76. ERICKSON & SIMON, *supra* note 1, at 14-15.

77. 347 U.S. 483 (1954).

78. ERICKSON & SIMON, *supra* note 1, at 12-18.

79. J. Braxton Craven, Jr., *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROBS. 150, 151 (1975).

exclusion of blacks from the jury system, employment discrimination, arbitrary or discriminatory use of the death penalty, discrimination against women, the need for reapportionment, and the cure for malapportionment of various public bodies.<sup>80</sup>

Despite the U.S. Supreme Court's selective hostility to the use of social science data,<sup>81</sup> the need for and reliance on social science data has dramatically increased since the 1970s.<sup>82</sup>

While the courts were slow to respond to the challenges created by these cases, the legal education system totally failed to respond. Law students failed to obtain the skills they would need as lawyers and judges to deal with the factual and policy questions that increasingly confronted courts. Under Langdell's casebook system, law students were assumed to have acquired the skills they would need for law practice. Ironically, as legal education ossified into Langdellian formalism and turned away from social, political, and economic perspectives, reform in the opposite direction was most needed. At a time when law schools needed to train lawyers to integrate the various social sciences to practice law effectively, these schools were purging their curricula and faculties of any trace of these outside influences.

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80. John Minor Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 LAW & CONTEMP. PROBS. 134, 142-43 (1975).

81. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); ERICKSON & SIMON, *supra* note 1, at 17; Donald N. Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCHOLOGIST 52 (1987).

82. ERICKSON & SIMON, *supra* note 1, at 1-2; see LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* (1992); MELVIN D. KRAFT, *USING EXPERTS IN CIVIL CASES* (1982); GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991); FAUST E. ROSSI, *EXPERT WITNESS* (1991); Patrick A. Driessen, *The Wedding of Social Science and the Courts: Is the Marriage Working?*, 64 SOC. SCI. Q. 476 (1983); see also Nancy E. Adler et al., *Psychological Factors in Abortion*, 47 AM. PSYCHOLOGIST 1194 (1992); Bersoff, *supra* note 81, at 52; David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989); Constance R. Lindman, *Sources of Judicial Distrust of Social Science Evidence: A Comparison of Social Science and Jurisprudence*, 64 IND. L.J. 755 (1989); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986). J. Alexander Tanford's assessment of the trend is less sanguine. See J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137 (1990).

*Legal Realism and Its Legacy*

In the early part of the twentieth century, a varied group of law school faculty known as the *legal realists* challenged the Langdellian model.<sup>83</sup> Legal realists tended to have a more activist orientation, and they sought to reform legal education by transforming it from its medieval mentality into modern intellectual life.<sup>84</sup> They also attempted to make legal education more relevant to the needs of lawyers and judges by introducing social sciences into the curriculum and connecting the law with the real world by having students study what judges actually do.<sup>85</sup> The policy implications found in the connections between law, economics, and society especially interested the realists.<sup>86</sup> After the height of legal realism in the 1930s, the movement faltered and eventually faded from the law school establishment.<sup>87</sup> There is some question about how much of an impact the realists had on legal education, but one thing is certain. Within a few decades, the Langdellian system had reestablished itself in American law schools, at least with respect to its fundamentals.<sup>88</sup> Accordingly, legal education retains many of the same flaws it had in its original form.

Over a half century after Langdell, Judge Richard Posner observed that

law professors . . . with only a few exceptions, believed that the only thing law students needed to study was authoritative legal texts . . . because the only essential preparation for a legal scholar, beyond what he could be expected to bring to his work from his college education and his general reading, was knowledge of what was in those texts . . . . The only change from Langdell's day . . . was that law was increasingly recognized to be a purposive instrument of social control, so that one had to know something

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83. See generally AMERICAN LEGAL REALISM, *supra* note 34; see also FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 490-93; MERCURO & MEDEMA, *supra* note 13, at 10; Heise, *supra* note 53, at 822; Mensch, *supra* note 27, at 32.

84. See sources cited *supra* note 83.

85. *Id.*

86. CLAYTON & GILLMAN, *supra* note 6, at 16; MERCURO & MEDEMA, *supra* note 13, at 11; Mensch, *supra* note 27, at 32-33; Craig A. Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 357-59 (1995); Trubek, *supra* note 13, at 584. A few engaged in empirical research. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 490; Heise, *supra* note 53, at 831; Trubek, *supra* note 13, at 583-84.

87. Clayton and Gillman discuss why the realist orientation had little impact on professional legal education. CLAYTON & GILLMAN, *supra* note 6, at 17-20.

88. MERCURO & MEDEMA, *supra* note 13, at 12; SCHLEGEL, *supra* note 21, at 243, 250-51; Heise, *supra* note 53, at 822-24; Mensch, *supra* note 27, at 34-35.

about society to be able to understand, criticize, and improve law. But that “something” was what any intelligent person with a good general education and common sense knew or could pick up from the legal texts themselves . . . .<sup>89</sup>

Clearly very little had changed in that half century, and the problems with Langdell’s system survive today in American legal education.

### *Legal Education Today*

A number of scholars have suggested that important changes are currently underway in the study of law. It has been, as one scholar remarked, turning “outward.”<sup>90</sup> These scholars have noted a recent breakdown of the idea of law as an autonomous discipline and, at the same time, the rise in a variety of “law & \_\_\_\_” movements within law schools.<sup>91</sup> Collectively, these movements view the traditional perspective on law as deficient — Posner describes it as “bankrupt”<sup>92</sup> — and are attempting to integrate into the study of law various disciplines from both the humanities and the social sciences.<sup>93</sup> Perhaps the most influential of these movements is the law and economics movement.<sup>94</sup> While no law and statistics movement currently exists, the use of statistics has become part of the integration of various social science disciplines, such as economics, into the study of law.

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89. POSNER, *supra* note 26, at 425; Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987) [hereinafter Posner, *Decline*].

90. MERCURO & MEDEMA, *supra* note 13, at 13; Martha Minow, *Law Turning Outward*, 73 TELOS 100 (1987). Posner marks the 1960s as the beginning of this movement. POSNER, *supra* note 26, at 432.

91. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 488; MERCURO & MEDEMA, *supra* note 13, at 11, 13; POSNER, *supra* note 26, at 58; Mensch, *supra* note 27, at 45; Posner, *Decline*, *supra* note 89.

92. POSNER, *supra* note 26, at 433.

93. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 496; POSNER, *supra* note 26, at 432. For example, the movements are attempting to integrate literary theory, feminist theory, political science, sociology, economics, and anthropology. Although these movements collectively are attempting such an integration, individually this is not always the case. Critical Legal Studies, which is most hostile to traditional legal education and scholarship, gives very little attention to research (whether reading it or doing it) that would be considered *empirical* by most social scientists. Trubek, *supra* note 13, at 618-19.

94. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 495-96; MERCURO & MEDEMA, *supra* note 13, at 12-13; POSNER, *supra* note 26, at 58; Mensch, *supra* note 27, at 47. While law and economics may be the most influential, there is no consensus on which of the alternative disciplinary approaches is the most suitable or useful for the study of law. MERCURO & MEDEMA, *supra* note 13, at 5. Those within the neotraditional movement find that none are suitable. POSNER, *supra* note 26, at 423-53.

### *The Old Order Hangs On*

These interdisciplinary movements in law sound very exciting; however, all of these activities within the movements largely are confined to the scholarly activities of a fairly small minority of faculty in the upper tiers of law schools. These movements have brought about little, if any, changes in the scholarly activities of other law faculty,<sup>95</sup> and, more importantly, these movements have brought about remarkably little change in the instructional model, even in upper-tier law schools.<sup>96</sup> Notably, the fundamentals of the traditional instructional model continue to dominate legal education today.<sup>97</sup>

The format of casebooks has changed very little over the last century, and the casebook method still dominates legal education.<sup>98</sup> Students continue

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95. POSNER, *supra* note 26, at 57. Friedman describes contemporary legal scholarship as “antediluvian as ever,” but acknowledges exceptions. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 493. He adds elsewhere that twentieth-century legal scholarship has remained doctrinal. *Id.* at 487; *see also* SCHLEGEL, *supra* note 21, at 253-57; Tracey E. George, *Developing A Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1654 n.65 (1998); Heise, *supra* note 53, at 824, 828 (acknowledging that scholarship from law faculty is still overwhelmingly doctrinal, but expressing optimism about the future of empirical research among law school faculty); Nard, *supra* note 86, at 349 (noting the “lack of empirical legal scholarship” among law faculty). Exceptions to an otherwise negative assessment also are acknowledged by Nard. Nard, *supra* note 86, at 361. It should be added, however, that there are far more law faculty calling for empirical research than actually doing it, or teaching it. Heise, *supra* note 53, at 821. Admittedly, there is some evidence that legal scholarship has changed. *See generally* DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* (1997); MINDA, *supra* note 53; *see also, e.g.*, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554 (1986); Peter Schanck, *Understanding Postmodern Thought*, 65 S. CAL. L. REV. 2505 (1992). This development has not been without its critics. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). At the same time, this trend is largely limited to the journals of the upper-tier law schools, which are publishing an increasing amount of empirical research. Heise, *supra* note 53, at 825. The increase in the number of law faculty with a J.D. and a Ph.D. is another sign of change. *Id.* at 825, 828.

96. CLAYTON & GILLMAN, *supra* note 6, at 17; FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 489, 504; HALL, *supra* note 3, at 220; Heise, *supra* note 53, at 822.

97. HALL, *supra* note 3, at 220; *see also infra* notes 98, 110, 113 and accompanying text.

98. Heise, *supra* note 53, at 822. To be sure, casebooks contain a larger variety of materials than in the past. Their titles or subtitles typically contain the phrase “Cases and Materials.” Friedman opines that “[g]enerally speaking, the casebooks of the 1990s included a lot more than cases. Typically, they bristled with notes and questions; they sometimes included excerpts from law review articles and, occasionally, historical, philosophical, economic, or sociological



primarily to study judicial opinions. Judicial opinions, however, can be studied for reasons other than learning legal doctrine. Indeed, feminist and other critical scholars study them in search for ideology.<sup>99</sup> Moreover, law and literature scholars study judicial opinions as literary texts,<sup>100</sup> while at least some political scientists study judicial opinions as behavior.<sup>101</sup> For the most part, however, law students study them to learn legal rules and doctrine.<sup>102</sup> Certainly these are not the transcendent rules that were sought by students under Langdell's formalism. With legal positivism dominating the law schools for most of the last century,<sup>103</sup> it is difficult to imagine that anyone still believes in transcendent rules. Instead, the object of study is a body of rules and principles fashioned by the courts and other authoritative sources such as legislatures. No longer used as normative standards, the transcendent rules have been replaced by various ethical doctrines and by an instrumental view of law linked with an array of economic, social, and political policy analysis.<sup>104</sup>

The fundamental problem is that an instrumental view of law linked with economic, social, and political policy requires an understanding of the economy, society, and the political system. In short, it requires an understanding of *facts about the world*. But, these systems and the policy

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material." FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 489. Polinsky emphasizes how common it is for casebooks to contain material on an economic analysis of the book's topic, stating that there are too many of them to survey. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 148 (2d ed. 1989). At the same time, however, Friedman is discouraged:

Still, to be honest, the bulk of the material in almost all casebooks remained highly traditional; and the students probably do little more than skim the "other stuff."

Why pay much attention to it, if it isn't really "law"? Why read it if there is no chance it will be on the exam?

FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 489.

99. Trubek, *supra* note 13, at 619. Trubek acknowledges that scholars engaged in critical studies typically have limited their study to the study of "ideology in doctrine." *Id.*

100. See, e.g., INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988).

101. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

102. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 486; SCHLEGEL, *supra* note 21, at 253-57.

103. Legal positivism is a theory that views law as rules posited by some authoritative source, such as a court or legislature. MINDA, *supra* note 53, at 51; JEFFREY G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 19 (rev. ed. 1990).

104. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 256; Mensch, *supra* note 27, at 35, 45; J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971). The instrumental view of law sees it as a means of carrying out social policy and achieving other goals.

issues they entail are not yet studied in any *systematic* way by most law students. Law faculty members typically have no formal graduate-level training in any social science discipline,<sup>105</sup> and law students are still not required to take courses in social sciences or their analytical methods. While a few law schools offer a course in statistics or social science methods, no law school *requires* a course in these subjects, not even at the introductory level.<sup>106</sup> Consequently, law students who have skills in these areas acquired them before entering law school and, therefore, with rare exceptions, these skills are at the undergraduate level. Since the 1960s, all states require an undergraduate degree before beginning law study,<sup>107</sup> but there is no prescribed set of skills or knowledge for beginning law students. As a result, possession of skills in statistics is at best randomly scattered among the law student body. The requirement of having an undergraduate degree before beginning law school has made legal education a graduate level program from a formal standpoint, but there has been little change in the nature of legal education from its late nineteenth-century origins.<sup>108</sup>

Looking back over the twentieth century, Holmes's prediction that lawyers of the future will be skilled in "statistics and the master of economics" was largely wrong.<sup>109</sup> The need for such knowledge and skills certainly exists now; it probably existed in Langdell's time, but the efforts to educate law students in these disciplines remain unchanged from when Holmes wrote those words over a century ago. Other observers have reached similar conclusions. Cornell Clayton and Howard Gillman suggest that

precedent, *stare decisis*, and formalism continue to be the way most law students experience law and the way judges describe what they do in written opinions. With the exception of the occasional course in jurisprudence and the occasional statement of "judicial candor," the law school curriculum and judicial opinions

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105. Heise, *supra* note 53, at 828.

106. Nard, *supra* note 86, at 365.

107. See *supra* notes 64-65 and accompanying text.

108. Martha Minow's observation of the law "turning outward" is surely a commentary on legal scholarship, not legal education. Minow, *supra* note 90, at 100.

109. Michael Heise characterizes Holmes's prediction as being "correct." Heise, *supra* note 53, at 820. Perhaps Heise's error is because of his misunderstanding of Holmes's prediction. Contrary to Heise characterizing the prediction as one "about the future influence of the 'man of statistics' on the law," Holmes predicted that future lawyers *would be* skilled in statistics, as well as masters of economics. Heise correctly saw that the use of statistics has influenced the law's development, at least to some extent, but was absolutely wrong in suggesting that lawyers as a group are skilled in statistics.

continue to rely on a fairly traditional “legal model” to explain the craft of law.<sup>110</sup>

Clayton and Gillman acknowledge the “law & \_\_\_” movements, but they add that there is “still little evidence that . . . [these new movements] have significantly altered law school curricula or judicial opinion writing.”<sup>111</sup> In their view these various movements

have all remained remarkably compartmentalized within the legal academy, confined largely to discussions of jurisprudential theory. They are curiously detached from the processes of professionalization and practice of the legal craft. Judges rarely rely upon these theories in their written opinions, and legal training continues to use rather traditional methods of case study and doctrinal analysis to teach students how to lawyer.<sup>112</sup>

Friedman concludes his recent assessment of twentieth-century legal research, legal education, and legal culture by observing that the core of the “old scholarly order” is still intact. In his view, “Students still feel, as John Schlegel put it, ‘that law is about rules.’”<sup>113</sup>

### *Statistics for Lawyers*

One solution that might be considered is a book such as *Statistics for Lawyers* by Michael O. Finkelstein and Bruce Levin,<sup>114</sup> one of a large number of \_\_\_ *for Lawyers* books that can be found on law library shelves. Unfortunately, given the high level of statistics in this book and the low level of statistical knowledge on the part of lawyers and law students, it would not be useful or understandable for most attorneys.<sup>115</sup> But, even if a book like Finkelstein and Levin’s *Statistics for Lawyers* could succeed in teaching statistical methods to lawyers, it would be of little value in ameliorating the more fundamental shortcoming in legal education. The more serious problem for most lawyers is not that they know almost nothing about statistics, but rather that statistics and empirical data are not even “on the radar screen.” In

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110. CLAYTON & GILLMAN, *supra* note 6, at 17.

111. *Id.* at 39 n.1; *see also* FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 489; Nard, *supra* note 86, at 362.

112. CLAYTON & GILLMAN, *supra* note 6, at 18 (internal citation omitted).

113. FRIEDMAN, TWENTIETH CENTURY, *supra* note 4, at 504 (quoting SCHLEGEL, *supra* note 21, at 256). Law schools’ embrace of the old order is not because of an absence of specific reform proposals. *See, e.g.*, Nard, *supra* note 86, at 365-68.

114. MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS (2d ed. 2001).

115. *See* Steven B. Dow & Christina DeJong, 48 J. FORENSIC SCI. 698 (2002) (reviewing *Statistics for Lawyers*).

an interesting study published in *The Law and Society Review*, J. Alexander Tanford shows that the problem is more profound than a basic lack of skills in statistics.<sup>116</sup> Tanford explores whether and in what way the substantial literature on the problems jurors have understanding and remembering jury instructions, most of which is published in psychology journals, is used by various authoritative actors in the legal system.<sup>117</sup> After reviewing a number of reform efforts by appellate courts, special commissions, and legislatures,<sup>118</sup> Tanford concludes that the appellate courts were least likely even to consider this literature.<sup>119</sup> When they did consider it, appellate judges were most likely to make a policy change in the direction *opposite* from that suggested by the literature.<sup>120</sup> In other words, judges were least likely to give any attention to the literature, and when they did, they were unable to grasp its import. On the other hand, legislators were most likely to reform rules relating to jury instructions in the way suggested by the literature,<sup>121</sup> even though lawyers constituted part of the legislatures. Tanford suggests that the explanation is found in legal culture.<sup>122</sup> Lawyers as judges do not value empirical studies or see a need for such studies in the legal decision-making process.<sup>123</sup>

This problem will not be remedied simply by teaching lawyers, or law students, statistical methods. Rather, a *new empirical orientation*, along with statistical methods, would have to be integrated throughout the law school curriculum. This change will require nothing short of a paradigm shift, something that has not happened in American legal education for over a century.

### *Conclusion: A New Direction?*

Even with the changes brought about by the law and economics movement within American law schools, it remains to be seen whether these current reform movements will have any lasting impact on American legal education. There is uncertainty over whether the outcome of these movements will be any different from the earlier ones, particularly legal realism. Over the course of the last century, doctrinalism has proven itself to be quite resilient — some

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116. J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC. REV. 155 (1991).

117. *Id.*

118. *Id.* at 158-64.

119. *Id.* at 167.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

say “impervious” — within U.S. law schools.<sup>124</sup> Still, there are some signs that the current reform movement within American law schools may in the long run succeed in bringing about significant change. The courts are now much more receptive to, if not insistent on, social science data than they were forty years ago.<sup>125</sup> This puts pressure on lawyers — and aspiring lawyers — as advocates to obtain the necessary empirical and quantitative skills to provide this data.

Additionally, an increasing number of law faculty are calling for more empirical research from their colleagues.<sup>126</sup> A smaller, but growing number of law faculty are actually producing such research, however flawed.<sup>127</sup> The task of integrating social science perspectives with the traditional doctrinal perspective will be difficult, but not insurmountable. Except for the most narrow-minded behaviorists,<sup>128</sup> social scientists who study law have been moving in exactly this sort of interdisciplinary direction for quite some time.<sup>129</sup> The unique challenge for law faculty is to develop an instructional paradigm for students who will be *primarily consumers rather than producers of empirical research* and, at the same time, accommodate the need for professionally mandated competencies in such things as doctrinal analysis, client counseling, and advocacy.<sup>130</sup> In this regard, the most suitable instructional model may not be a social science Ph.D. program because the graduate students in such programs typically are learning to do the same kind of scholarly activity as the faculty members. In this sense the mission of a law

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124. CLAYTON & GILLMAN, *supra* note 6, at 17. The hostility of law school faculty to the “law and society” movement, which has lessened slightly over the last few years as more law faculty have joined the movement, provides additional evidence that reform is quite problematic. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Nard, *supra* note 86, at 359-60, 364-65.

125. *See supra* notes 53-54, 77-82 and accompanying text.

126. *See supra* notes 90-97 and accompanying text.

127. *See supra* notes 26, 90-97 and accompanying text.

128. *See, e.g.*, SEGAL & SPAETH, *supra* note 101.

129. This movement is exemplified by Marc Galanter’s seminal article, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974), as well as by the recent “new institutionalist” approaches to the study of judicial decision making, *see, e.g.*, CLAYTON & GILLMAN, *supra* note 6.

130. *See generally* SCHLEGEL, *supra* note 21, at ch. 5. Clayton and Gillman suggest that law schools’ “core function” of training legal practitioners is the reason that the schools resisted the more empirical and eclectic study of law that was flourishing in social science (especially political science) departments following World War II. CLAYTON & GILLMAN, *supra* note 6, at 17, 19. The realist critique had so little influence on legal education because of the perception that it was at odds with what judges and lawyers were doing. Now that judges have a much stronger orientation toward social science data and methods, professional legal training is compatible with — in fact, requires — a similar shift in orientation.

school is very different from that of a Ph.D. program. Instead, the most suitable instructional model may be master's level programs in subjects such as public administration and business administration, where students are trained to be primarily consumers rather than producers of empirical research. Law school faculty who advocate integrating social science research and data into legal education should look to these programs for guidance in fashioning a new instructional paradigm.

