

THE FUTURE OF LEGAL THEORY AND
THE LAW SCHOOL OF THE FUTURE



ACTA FALCONIS
XI

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THE LAW SCHOOL OF THE FUTURE

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The Future of Legal Theory and the Law School of the Future
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*“Change is the law of life. And those who look only to the
past or present are certain to miss the future.”*

John F. Kennedy



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I. INTRODUCTION

Conservatives as they supposedly are, lawyers are often viewed as more preoccupied with the past than with the future. Legal disputes, after all, are supposed to be resolved on the basis of rules that were enacted before the dispute arose. Legislation is supposed to be prospective but, for that very reason, lawyers first turn their attention to the commands issued by past legislators, courts and regulators when called on to figure out what laws apply to a specific set of facts. So looking ahead to try and imagine how legal education, legal scholarship and legal practice will look years from now is perhaps not the sort of exercise that comes naturally to the legally-trained mind. To be sure, prediction is an area where scepticism is often warranted. The art of forecasting is one that is notoriously treacherous. As all the proverbial Yogi Berras will not fail to remind us, “it’s tough to make predictions, especially about the future”. In that sense, lawyers may have legitimate reasons to steer away from the soothsayers and other fortune-tellers. Some bets, though, are safer than others. But not only that. The truth is we cannot avoid making predictions. Indeed, we are bound to make assumptions, however broad and tentative, over the shape of the world to come whenever we decide what our children should learn at school, what training future workers should receive or, more generally, how we should invest our scarce resources. In many cases, it is safe to bet that the future will largely look like the past and we may do better by sticking to these assumptions. But sometimes it is not. My bet in this essay is that change is on the cards. The European legal academy of the future will be

radically different from what it is today. Whether the current generation of law professors like it or not, the combination of market pressure, new technologies, globalisation and institutional incentives will make change inevitable.

These forces may push reform in different directions. It is very likely that the transformation of the European legal academy will result in a much higher degree of fragmentation and stratification. Law schools will experiment with different models and their success will depend on the response of students, employers and policy-makers. Some institutions will thrive. Others will struggle. Some may well disappear, at least as we know them now. Yet, through adaptation and by adjusting to their new environment, law schools can, at least in some measure, shape their own destiny.

The main goal of the present essay is to show how a new approach to legal research, Empirical Jurisprudence, can help us reimagine the law school of the future. The law school I imagine is one that retains its dual, hybrid nature as academic and vocational institution but which seeks to perform these two functions in a much more systematic and consistent manner. I shall contend that Empirical Jurisprudence can make an important contribution on both fronts. Empirical Jurisprudence is a multidisciplinary research programme that bears direct relevance to the sort of questions and challenges confronting lawyers and law students. As we shall see, Empirical Jurisprudence embraces two strands of research. One relates to the rhetorical dimension of lawyering and approaches law as a specialised form of political communication. The other focuses on law and legal rules as instruments of social

planning and aims to explain how legal rules emerge and how they then modulate social outcomes. These two perspectives are defined in broad terms. Both relate to rich scholarly traditions and present significant overlaps with extant research programmes such as Law & Economics or Empirical Legal Studies.

I must make clear that Empirical Jurisprudence does not claim to be the sole approach or research programme potentially capable of contributing to twenty-first century legal education. In the law school of the future as pictured in this essay I do see room for soft, interdisciplinary subjects such as Law & Literature (particularly in its incarnation as law *as* literature). As for doctrinal legal scholarship, it is true that Empirical Jurisprudence and the vision of legal education to which I relate it do imply a less prominent place for this form of scholarship in the future law school curriculum. Relative de-emphasis, however, does not entail outright disappearance. Far from predicting the death of doctrinal scholarship, the vision of the modernised legal academy I set out suggests that doctrinal scholarship fulfils a distinct, socially useful function which should remain a legitimate (albeit less dominant) part of a law school's output.

My argument proceeds in four steps. It starts out from the crisis experienced by the legal services industry in recent years. The evidence strongly suggests that lawyers and law firms have entered a less gilded age. Driven by globalisation, outsourcing, new technologies and fiercer competition, the crisis has resulted in slower revenue growth. Lower growth, in turn, has put downward pressure on wages and hires. Young law school graduates, as a consequence, must reckon with more uncertain job

prospects than their predecessors. The problem, I argue, is one that is not confined to the United States or to the Anglo-Saxon world. Law graduates in Europe, where lawyers also seem to be in oversupply, face a similar predicament. I then consider the implications of the job crisis for law schools and law departments. There, too, I compare the situation on both sides of the Atlantic. The legal education bubble in the US has spurred a continuous rise in tuition costs. With demand for their graduates in sharp decline, however, non-elite US law schools are stuck with an unsustainable business model. Because legal education, in most of Europe, is almost free and essentially paid for by the state, students have been slower to respond to market signals. For that reason, Europe has not seen the dramatic fall in law school enrolment observed in the US. Still, the European legal academy cannot afford to be complacent. Traditional institutions, I argue, face a choice between reform and slow decay (which may be accelerated by impatient policymakers, though). What shape the law school of the future should take and how Empirical Jurisprudence fits in this renewed vision of legal education is the focus of the subsequent section. I outline Empirical Jurisprudence as a research programme and situate it within legal theory and jurisprudence. I make a particular effort to relate Empirical Jurisprudence to the skills that law students need to hone and that lawyers of the future will be expected to possess. The last section goes on to discuss a variety of research methods and techniques on which empirical jurisprudential studies may rely and which future law students will need to get familiarised with. These include text-mining and formal modelling as well as the construction of large-

scale databases. I conclude by summarising the results of the analysis while making some suggestions for law schools that want to prepare for the future of legal education and research.

II. CLOUDS ON THE HORIZON: CRUNCH TIMES IN THE LEGAL SERVICES INDUSTRY

For law students looking ahead, at least looking beyond the bar exam, means looking at the job market. But, for those who do so in the current, post-crisis environment, the chance is they will see some grey clouds hanging over the horizon.

The legal services industry seems to have entered a less gilded age.¹ The story that has unfolded in the past few years has been one of languishing revenue, stagnant wages, increased competition, brutal layoffs and even outright bankruptcy.² The squeeze has not spared Big Law – as the top 100 US law firms are commonly referred to.³ Average per lawyer revenue – a key metric when it comes to measuring law firms’ performance – at Big Law firms has plateaued after three decades of uninterrupted growth.⁴

Nor have the Magic Circle firms of the City of London escaped the pain. The likes of Clifford Chance, Linklaters

¹ See “A Less Gilded Future”, *The Economist* (2011).

² William D. Henderson, “From Big Law to Lean Law”, 38, Supplement *Int. Rev. Law Econ.* 5 (2014).

³ Bernard A. Burk & David McGowan, “Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy”, 2011 *Columbia Bus. Law Rev.* 1, 27 (2011).

⁴ Henderson, *supra* note 2.

and Allen & Overy, too, have faced stagnant profits.⁵ Admittedly, predictions of the death of Big Law may have been exaggerated.⁶ But a particularly bleak metaphor reportedly circulating at large US law firms in recent years was the *Hunger Games* – a tournament in which the only prize is survival.⁷ No less gloomy are the scenarios that have kept industry commentators fretting about on the other side of the Atlantic. Among the most influential monographs on the future of the legal industry of late is a book by British author and industry consultant Richard Susskind bearing the ominous title *The Death of Lawyers?*⁸

That major Anglo-American law firms have suffered is especially telling because these firms dominate the global market for legal services. Large British and American firms are particularly dominant in the most lucrative segments of the legal market: large-scale financial and capital-market transactions, high-stakes litigation, antitrust and intellectual property.⁹ So if top-tiers global firms have hit on hard times, we may suspect that smaller, mid- and low-tier firms have fared even worse. There is little systematic data on the economic performances of the thousands of small and medium law firms in which the bulk of European

⁵ See <http://qz.com/232258/neverending-bank-scandals-are-great-news-for-londons-top-law-firms/>.

⁶ Larry E. Ribstein, “The Death of Big Law”, 2010 *Wis. Law Rev.* 749 (2010) (predicting the demise of the large law firm’s traditional business model).

⁷ Henderson, *supra* note 2.

⁸ Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (2010).

⁹ D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 *Indiana J. Glob. Leg. Stud.* 5, 9 (2007).

lawyers work. But the available evidence suggests that many of those firms have, indeed, faced difficult times.¹⁰

The crisis that has hit the legal profession may have many causes. But much indicates that the crisis is not merely cyclical, but structural. To be sure, the law firms' woes have been exacerbated by the economic downturn. Yet the problem is one that results from causes that are not only independent from but which also predate the recession. Analysts have blamed a string of factors, including globalisation, the effect of new technologies, more demanding clients and the demise of the billing hour model along with the accelerated commodification of legal services.¹¹ These forces have unleashed profound structural shifts, which even the return of steadier economic growth seems unlikely to reverse.

As is often the case when an industry goes through a structural crisis, the aggregate picture may mask important disparities and exceptions. Some law firms have certainly done better than others. Firms specialising in niche-markets – e.g. sovereign bond restructuring – may have even prospered.¹² Still, the impact of the crisis

¹⁰ See Klaus Werle and Eva Buchhorn, *Juristenschwemme Wohin nur Mit All Den Anwälten?*, *Spieg. Online* (2013) (documenting falling revenue and oversupply in the German legal market). See revenue figures for French legal sector www.insee.fr/fr/themes/detail.asp?ref_id=services-2010&page=donnees-detaillees/services-2010/act-juridique-compta.htm (accessed 6 July 2015).

¹¹ Henderson, *supra* note 2. Fiercer competition from new entrants in the legal market, such as accounting firms, may eat into the market share of established firms, mid-tier ones, see *Attack of the Bean-Counters*, *THE ECONOMIST* (2015).

¹² The top player in the sovereign bond restructuring business, the New York-based firm Cleary Gottlieb, has posted the highest growth

on the legal job market has been dramatic. Everywhere – from the United States¹³ to Germany¹⁴, the UK¹⁵, France¹⁶, Italy¹⁷, Israel¹⁸, Spain¹⁹, Australia²⁰ and Belgium²¹ – the talk is of saturated job markets and a surfeit of lawyers.²²

rate of all global firms in the past half-decade. See www.legalbusiness.co.uk/index.php/winners/708-law-firm-of-the-year-2013.

¹³ Natalie Kitroeff, *There Are Too Many Lawyers, Say Law Firms*, Bloomberg.com, www.bloomberg.com/news/articles/2015-05-13/there-are-too-many-lawyers-say-law-firms (last visited July 16, 2015); Bruce A. Green, “The Flood of US Lawyers: Natural Fluctuation or Professional Climate Change?”, *Int. J. Leg. Prof.* (2013).

¹⁴ Werle & Buchhorn, *supra* note 10.

¹⁵ Owen Bowcott & Legal Affairs Correspondent, *Law Graduates Hit by Stiff Competition, Legal Aid Cuts and Falling Crime*, The Guardian, www.theguardian.com/law/2014/jun/29/law-graduates-legal-aid-university-lawyers (last visited July 16, 2015).

¹⁶ *Trop d’avocats en France? La profession réfléchit à des solutions*, www.lexpress.fr/actualite/societe/trop-d-avocats-en-france-la-profession-reflechit-a-des-solutions_1305738.html (last visited July 17, 2015).

¹⁷ Amanda Carmignani & Silvia Giacomelli, *Too Many Lawyers?: Litigation in Italian Civil Courts* (2010).

¹⁸ Limor Zer-Gutman, “Effects of the Acceleration in the Number of Lawyers in Israel”, *Int. J. Leg. Prof.* (2013).

¹⁹ Laura Carballo Piñeiro, “Legal Education in Spain: Challenges and Risks in Devising Access to the Legal Professions”, *Int. J. Leg. Prof.* (2013).

²⁰ *Reality Check for Law Graduates*, www.lawyersweekly.com.au/news/15576-reality-check-for-law-graduates (last visited July 17, 2015); Margaret Thornton, “The New Knowledge Economy and the Transformation of the Law Discipline”, *Int. J. Leg. Prof.* (2013).

²¹ See *Te Veel Advocaten in België*, [Deredactie.be](http://deredactie.be/cm/vrtnieuws/binnenland/1.2319052), <http://deredactie.be/cm/vrtnieuws/binnenland/1.2319052> (last visited July 17, 2015); “*Veel Te Veel Advocaten in België*”, *Het Nieuwsblad*, www.nieuwsblad.be/cnt/dmf20150427_01650496 (last visited July 17, 2015).

²² Eyal Katvan et al., “Too Many Lawyers?”, 19 *INT. J. LEG. PROF.* 123 (2012); Herbert M. Kritzer, “It’s the Law Schools Stupid! Explaining the Continuing Increase in the Number of Lawyers”, *Int. J. Leg. Prof.* (2013).

The downturn saw Big Law and Magic Circle firms shed personnel in unprecedented numbers.²³ As employment in the legal sector shrank – in the US, legal sector employment numbers in 2014 were 45,000 jobs below pre-recession levels – many young law graduates faced either precariousness or outright joblessness.²⁴ What is more, those lucky enough to land a job and to keep it had to make do with a smaller pay check. Many large UK-headquartered law firms enforced pay freezes.²⁵ As the overall number of lawyers has grown exponentially across Europe, revenue per head has stagnated and even fallen in some countries. German lawyers, for example, have seen average revenue per lawyer drop from 116,116 euros in 1994 to 97,002 euros in 2011.²⁶

Nor does the future look much brighter than the recent past. In the US, post-recession employment in the legal sector has lagged behind the rest of the economy – confirming the belief that the crisis is structural and not merely cyclical.²⁷ According to projections by the US

²³ Steven J. Harper, “Big Law’s Troubling Trajectory”, *N. Y. Times* (2013); Noam Scheiber, “The Last Days of Big Law”, *THE NEW REPUBLIC* (July 21, 2013), www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries (last visited July 16, 2015); Burk & McGowan, *supra* note 3, at 29; Michael Peel & Sujata Das, “Leading Law Firms Cut Intakes”, *Financ. Times* (2009).

²⁴ Jacob Gershman, “Legal Services Sector Down 2,000 Jobs Since January”, *WSJ Blogs – Law Blog* (2014).

²⁵ See Michael Peel & Sujata Das, “Leading Law Firms Cut Intakes”, *Financ. Times* (2009).

²⁶ Werle & Buchhorn, *supra* note 10. See also the data collected by the Soldan Institute: www.soldaninstitut.de/fileadmin/user_upload/AnwBl_2013-12__Artikel_2_.pdf (last visited July 17, 2015).

²⁷ See figures from Federal Bureau of Labor Statistics Craig Stalzer, *Careers in Law Firms: Career Outlook: U.S.* Bureau of Labor Statistics,

Bureau of Labor Statistics, the legal services industry will create a little over 88,000 jobs over the period 2012–2022. Yet, at the current rate, US law schools churn out around 46,000 graduates every year. If anything, the gap between supply and demand is even larger in Europe. Spain along with the UK, Germany and many Latin American countries are home to very large law student populations.²⁸ French universities, meanwhile, host a staggering 200,000 law students!²⁹ More than the United States for a population six times smaller.

III. REPERCUSSIONS OF THE JOB CRISIS ON LAW SCHOOLS

Now, it is hard to imagine how the structural crisis that has hit the legal services sector could fail to impact legal education. A law degree used to be the guarantee of a middle-class job and, for the most ambitious and hard-working students, the promise of a lucrative career in corporate law. This expectation allowed US law schools to charge ever-larger tuition fees.³⁰ As fees rose faster than inflation, most students had to go deeply in debt to afford the high cost of a legal education. However, as the crisis

www.bls.gov/careeroutlook/2014/article/careers-in-law-firms.htm (last visited July 17, 2015).

²⁸ See figures in Kritzer, *supra* note 22, at 213.

²⁹ See: www.insee.fr/fr/themes/tableau.asp?ref_id=natnon07136 (last visited July 17, 2015). European law schools, though, tend to have significantly higher drop-out rates.

³⁰ Max Nisen, “US Students Are Fleeing Law Schools and Pouring into Engineering”, *Quartz*.

made it clear that the well-paid associate positions which had traditionally enabled law graduates to pay off their debts would never materialise, students have started fleeing the law schools. The last figures show enrolment at US law schools in free fall. Enrolment of first-year law students fell to 37,924 in 2014 from an all-time peak of 52,488 in 2010, amounting to a 28 per cent drop in just four years.³¹ The upshot is that first-year enrolment figures are back to what they were forty years ago, when the United States counted 53 fewer law schools!³²

Thus the reality is that the crisis in the legal services industry is now a crisis of the law school model, too. In the US, this has prompted a lot of soul-searching. Law professors, regulators, judges, politicians and practitioners alike have put forward proposals for reform, either to alter the curriculum or to bring education costs down.³³ Even

³¹ Mark Hansen, "As Law School Enrollment Drops, Experts Disagree on Whether the Bottom Is in Sight", *ABA Journal*, www.abajournal.com/magazine/article/as_law_school_enrollment_drops_experts_disagree_on_whether_the_bottom/ (last visited July 17, 2015).

³² Daniel Luzer, "Nobody Wants to Go to Law School Anymore", *Wash. Mon.* (2014).

³³ Brian Z. Tamanaha, *Failing Law Schools* (2012); Neil Joel Dilloff, "The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education" (Social Science Research Network, SSRN Scholarly Paper ID 1819485, 2011), available at <http://papers.ssrn.com/abstract=1819485>; Oliver R. Goodenough, "Developing an E-Curriculum: Reflections on the Future of Legal Education and on the Importance of Digital Expertise", 88 *Chic.-Kent Law Rev.* 845 (2012); Gene R. Nichol, "Rankings, Economic Challenge, and the Future of Legal Education", 61 *J. Leg. Educ.* 345 (2011); Kyle P. McEntee et al., "The Crisis in Legal Education: Dabbling in Disaster Planning", 46 *Univ. Mich. J. Law Reform* 225 (2012); Edward Rubin, "The Future and Legal Education: Are Law Schools Failing And, If So,

President Obama – himself a Harvard Law School graduate – has suggested reducing postgraduate legal education to two years instead of three.³⁴

Of course, Europe has not witnessed the astounding tuition fee bubble that has accompanied the rise in law school enrolment in the US from the 1980s until its 2010-peak. Law schools and law departments within European universities are mostly state-funded. Some countries have introduced student fees. Others have raised them, sometimes significantly, as did English universities after 2010. But in many places legal education – just as higher education in general – is virtually free. Moreover, even where students are expected to pay a fee, statutory caps have prevented the formation of tuition bubbles. The relatively low cost of a legal education, in turn, makes demand far less sensitive to changes in the legal job market. Smaller opportunity costs imply that students have less incentives to reconsider the life-long benefits associated with a law degree.

Does that mean that the European legal academy need not worry about the future? I do not believe so. Yet it is safe to predict that, for economic as well as for cultural and institutional reasons, change will be slower to come on this side of the Atlantic. First, as long as public money

How?”, 39 *Law Soc. Inq.* 499 (2014); Robert Rubinson, “The Holmes School of Law: A Proposal to Reform Legal Education Through Realism”, 35 *Boston Coll. J. Law Soc. Justice* 33 (2015); E. Thomas Sullivan, “Transformation of the Legal Profession and Legal Education”, *The*, 46 *Indiana Law Rev.* 145 (2013); Daniel Martin Katz, “MIT School of Law – A Perspective on Legal Education in the 21st Century”, 2014 *Univ. Ill. Law Rev.* 1431 (2014).

³⁴ Dylan Matthews, “Obama Thinks Law School Should Be Two Years. The British Think It Should Be One”, *Wash. Post* (2013).

keeps flowing law schools have little incentive to change. Even a sharp decline in first-year student enrolment would probably not cause much alarm. On the contrary, many professors, tired of teaching overcrowded amphitheatres, might welcome the prospect of a smaller student population. Second, life-tenure along with the quasi-absence of performance or student evaluation at many law-teaching institutions do little to encourage innovation. Sciences Po Paris Law School professors Christian Jamin and Mikhail Xifaras have argued that the bureaucratic setup of the French legal academy stifles initiative, even when it is designed to benefit students.³⁵ Finally, the culture that permeates large corners of the European legal academy seems itself allergic to change. German-born Michigan Law School professor Matthias Reimann, for one, maintains that the way the law is taught on the Continent has hardly changed at all since the beginning of the twenty-first century.³⁶ Moreover, many French and German legal academics are proud of their national scholarly tradition and seem to have little appetite for reform. Such was the hostility of the French academic establishment that Christian Jamin and Mikhail Xifaras from the newly-founded Sciences Po Law School in Paris

³⁵ Christophe Jamin and Mikhail Xifaras, “De la vocation des facultés de droit (françaises) de notre temps pour la science et l’enseignement”, Volume 72 *Rev. Interdiscip. Études Jurid.* 107 (2014).

³⁶ Mathias Reimann, “The American Advantage in Global Lawyering”, 78 *Rabels Z. Für Ausländisches Int. Priv.* 1 (2014). See also Geoffrey Samuel, “Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?”, 36 *J. Law Soc.* 431 (2009) (“The way law is taught in many law faculties in Europe is not so different from the way it was taught in medieval times and this goes for the way students are tested as well.”).

had to publish their blueprint for an overhaul of French legal education in a Belgian law review. This was after all major French law journals had refused to publish their manuscript.³⁷

These factors do not favour reform over the status quo. And yet change, in the long run, looks inevitable. Owing to their vocational character, law schools – just as business schools – cannot disregard what is happening on the job market entirely. Insofar as training future lawyers is seen as a primary function of a law school, lower demand for its graduates or the failure to deliver graduates with the right skillset for twenty-first century global lawyering may appear to undermine their *raison d'être*. The perception that law schools do not deliver or, at least, do not make optimal use of taxpayer money may prompt policy-makers to step in and force reform upon recalcitrant academics. As much as it has been the target of criticism in recent years,³⁸ US-style legal education – based on the Socratic method and a pragmatic, post-realist understanding of legal institutions – is viewed by some as a better preparation for the uncertain world of global lawyering than the more formalistic, black-letter-law approach to legal teaching prevalent in Europe.³⁹ The doctrinal approach traditionally privileged by the European legal

³⁷ Jamin & Xifaras, *supra* note 35.

³⁸ The extent of the critique, though, demonstrates the intellectual vigour that characterises the American discussion. That critics of the status quo are less vocal in Europe, by contrast, may not be so much a sign of academic flourishing than an indication of intellectual sclerosis. Large sections of the legal academy may be indifferent to the issue or, even worse, wary of asserting views which the academic establishment might find unpalatable.

³⁹ Reimann, *supra* note 36.

academy has also been criticised for being neither practical nor truly theoretical.⁴⁰ Nor does openness to educational innovation and novel teaching methods emphasising learning by doing – such as law clinics – constitute a hallmark of the European legal academy. Traditional lecture-based teaching remains the norm, and, at many an institution, virtually the only game in town. Comparing educational practices across jurisdictions of the world, one scholar has described Western Europe, and France and Germany in particular, as the last holdout in the worldwide diffusion of clinical legal education.⁴¹

Dissatisfaction with the way the law is taught is all the more problematic as European law schools have struggled to establish research credentials in a context where research evaluation increasingly relies on measures imported from the hard sciences. Law scholars still largely publish in their native language in journals that do not meet the rigorous standards of anonymous peer-review applied in social-scientific disciplines. Much of the publication output of law faculties, including commentaries and treatises, do not fit well in the categories employed by research funding institutions to assess academic achievements and allocate research grants. Nor does the lack of methodological training help the cause of legal academics when it comes to securing research funding. Arguably, what differentiates scientific knowledge from other forms of knowledge is its having

⁴⁰ Jamin & Xifaras, *supra* note 35.

⁴¹ See Richard J. Wilson, “Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education”, 10 *Ger. Law J.* 823 (2009).

been gained by means of a procedure that rigorously observed the requirements of the scientific method. So insofar as it lacks a clearly identifiable methodology, doctrinal scholarship's claim to scientificity is always at risk of being dismissed as mere rhetoric.⁴²

Available figures do not exactly portray European law schools as research powerhouses. A report of the German Scientific Council points out that law departments in Germany significantly underperform other university departments in several respects, including internationalisation (number of professorships held by foreign scholars) and research funding received from third-party institutions (as measured by average awarded

⁴² The challenge confronting the European legal academy is neatly summed up by Christoph Engels and Wolfgang Schön in the German context:

“German legal scholars do not write in English. They do not publish discussion papers. They do not make their texts available online. Their law papers are not subject to peer review. They pay no heed to the impact factor. They do not finance their research from third-party funding. They do not have special research areas (*Sonderforschungsbereiche*). They are epistemologically naïve. They do not draft models. They do not use mathematics. They do not falsify hypotheses. They do not use statistics. They do not carry out interviews. They do not conduct experiments. There are exceptions to each of these statements. But this is a fair description of the large majority of German legal scholarship. In the concert of disciplines, legal studies increasingly seems to be singing out of unison. For the time being, however, the close contact of the discipline with those holding power in society has saved them. But the more distribution decisions are shifted to research organisations, the more the pressure is mounting.” (see statement on the webpage of the Max Planck Institute for Public Goods: www.coll.mpg.de/?q=node/1289 (accessed July 23, 2015)).

research funding per tenured professor).⁴³ In the Netherlands legal scholars have debated the need to articulate a methodology of legal research after evaluators underlined the baneful consequences that a failure to do so would have for the ability of the law departments of Dutch universities to attract funding.⁴⁴ Driven by the same desire to secure the future of legal research, the issue is now being discussed beyond national borders in Anglophone law reviews. In a noted contribution to the *European Law Journal*, Rob van Gestel and Hans Micklitz, in particular, have made the case for greater emphasis on methodology in legal scholarship and legal education.⁴⁵

Compared to other departments within academia that share the law schools' hybrid nature as academic institution and as professional school, law departments find themselves in a relatively weaker position. Medical schools are respected research institutions and nobody seriously challenges the scientific status of medical research. Business schools, meanwhile, have less robust research credentials. Yet they have adapted and internationalised much faster than law schools. Interestingly enough, leading business schools in France

⁴³ See 2012 report available at www.wissenschaftsrat.de/download/archiv/2558-12.pdf (accessed July 22, 2015).

⁴⁴ For an overview of the Dutch debate see Jan Vranken, "Exciting Times for Legal Scholarship", 2 *Law Method* 42 (2012); Jan Smits, *Omstreden rechtswetenschap: over aard, methode en organisatie van de juridische discipline* (1st ed. 2009). The 2009 report of the evaluation committee is available at www.vu.nl/nl/Images/Evaluatie%20onderzoek%20Rechten_tcm9-169244.pdf (accessed July 23, 2015).

⁴⁵ Rob van Gestel and Hans-Wolfgang Micklitz, "Why Methods Matter in European Legal Scholarship", 20 *Eur. Law J.* 292 (2014).

(HEC⁴⁶, ESSEC⁴⁷, ESCP⁴⁸), Denmark (CBS⁴⁹) and Spain (IE⁵⁰) now offer programmes in law next to their more traditional business and administration course offerings. Founded in 2009, Sciences Po Law School in Paris represents a similar attempt to build a new law school within an institution primarily known for its role in training French corporate and administrative elites.⁵¹ Not surprisingly, these new programmes give pride of place to interdisciplinary approaches as well as to hands-on, practice-oriented learning. They promote interactive teaching methods through simulations and masterclasses. They also focus on the acquisition of skills, including bargaining and negotiation, rather than on encyclopaedic knowledge of black-letter law.

Besides newcomers to legal education, market pressure and a shift to competitive research funding, technology represents another potential game changer. Online learning and Massive Open Online Courses (MOOCs) combined with the unbundling of traditional university services (like curriculum design, content generation,

⁴⁶ www.hec.edu/Faculty-Research/Tax-Law (accessed July 23, 2015).

⁴⁷ www.essec.edu/programs/advanced-masters-programs/advanced-masters-degree-in-international-business-law-and-management.html (accessed July 23, 2015).

⁴⁸ www.escpeurope.eu/escp-europe-programmes/masters-full-time/strategy-law-and-management-full-time-specialized-masters-postgraduate-degrees-escp-europe-business-school/ms-international-business-law-and-management/escp-europe-specialized-master-in-international-business-law-and-management-postgraduate-programmes-business-school/ (accessed July 23, 2015).

⁴⁹ www.cbs.dk/en/research/departments-and-centres/law-department/degree-programmes (accessed July 29, 2015).

⁵⁰ www.ie.edu/law-school/ (accessed July 23, 2015).

⁵¹ See Jamin & Xifaras, *supra* note 35.

student placement, assessment, etc.) promise to transform higher education as a whole.⁵² By allowing economies of scale, the rise of the virtual university may offer students more (e.g. a well-polished course by a star lecturer from a prestigious institution) at a fraction of the cost of a degree at a conventional, brick-and-mortar university.⁵³ Obviously, the most ambitious students will still want to enjoy the experience of studying in places like Harvard, Stanford or Oxford. But the digital revolution could pose a real existential threat for universities and law schools with less brand-recognition.

Decisiveness and timeliness in how institutions respond to these challenges will, together with inherited brand value, determine the fate of European law schools. In the United States, where the top ten schools and their graduates have largely escaped the crisis,⁵⁴ the contraction in the legal jobs market is accelerating the stratification of the law schools system. Adjusting to lower demand for legal education has already forced some schools to downsize and to shed staff. It is expected that some schools will close at some point in the near future and that others will merge to adapt to the new normal of less law students. Save perhaps in austerity-hit parts of the European Union's periphery, we should not expect something as brutal on this side of the Atlantic, at least in the short run. But the odds are that the European legal academy of the

⁵² Michael Barber et al., *An Avalanche Is Coming: Higher Education and the Revolution Ahead* (2013).

⁵³ "Creative Destruction", *The Economist* (2014).

⁵⁴ Jordan Weissmann, "The Jobs Crisis at Our Best Law Schools Is Much, Much Worse Than You Think", *The Atlantic* (2013).

future will look more fragmented, more stratified and more unequal than is now the case.

IV. EMPIRICAL JURISPRUDENCE AND THE FUTURE OF LEGAL EDUCATION

A. *The Law School of the Future: Academic or Professional?*

How should European law schools reinvent themselves to take up these challenges? Obviously, there is no single right answer to this question. Identifying the best strategy depends, in no small measure, on what one takes the goal and function of a law school to be. One may be of the view that the sole function of a law school is to train future practitioners – i.e. future attorneys and judges. In this view, the law school of the future should resemble a professional school, in which law students have become apprentices and are more or less exclusively taught by practitioners of the legal craft. In such a school, research would be, at best, a sideshow, when not completely absent. Arguably, such a law school would also cease to be part of academia.⁵⁵

⁵⁵ Some US states, including California, Virginia and Washington, already allow aspiring lawyers to sit the bar exam without a law degree after completion an apprenticeship programme. See Sean Patrick Farrell, “How to Learn the Law Without Law School”, *N. Y. Times* (2014). In England and Wales, many lawyers do not hold a law degree but took a one-year law conversion course after receiving a non-law degree. In many respects, the British system can thus be viewed as a close approximation of the professional model.

The professional school model certainly has merits. Of which bringing legal education closer to the practice of law comes across as the most evident one. Within the legal community, practitioners prone to deride law professors as mindless nincompoops out of touch with the legal real-world may find it especially appealing. However, even if we are ready to accept that scientific research is not for lawyers, the professional school model can only succeed in training able jurists if it is properly implemented. The challenge here should not be underestimated and it is easy to get the incentives wrong. Indeed, there is a sense in which the European legal academy in its current form already represents an approximation of the professional model. Again, this is a question for which we lack systematic information, but it may well be the case that a majority of those who teach law across law schools and law departments in Europe either practice law (as judge or as counsel) or have practiced law at some point in their career. In that sense, the typical law professor in Europe appears to be the practitioner part-time lecturer rather than the full-time academic.⁵⁶ Hence, it is by no means a self-evident proposition that increasing the share of practicing instructors will improve the quality of legal education. True, much of the knowledge and know-how that effective lawyering requires is highly context-dependent. Aside from intimate familiarity with the workings of legal institutions, effective litigation and effective dispute resolution require

⁵⁶ See the description of the European legal academy on website of the EUI Academic Career Observatory: www.eui.eu/ProgrammesAndFellowships/AcademicCareersObservatory/CareersbyDiscipline/Law.aspx (accessed July 30, 2015).

profound knowledge of the mindset, attitudes and interests that judges, parties and regulators bring to bear on their decisions. In that sense, law students certainly benefit from exposure to experienced practitioners. Possessing the skills, experience and know-how that are the preconditions to become a successful practitioner, however, does not automatically guarantee that one will be an effective teacher. Obviously, practicing a trade and explaining it in insightful manner are two different things. For that reason, excellence in one does not automatically translate into excellence in the other. Moreover, as all teachers know, good teaching – including the design and development of effective teaching materials (course-book, visuals, exercises...) – necessitates extensive preparation along with a good deal of creativity. Demanding as legal practice usually is, practitioners thus face a teaching/practice trade-off that is similar to the teaching/research trade-off faced by full-time academics. Yet, inasmuch as it makes training and teaching the institution's top priority, it appears crucial for the professional school model that instructors systematically favour teaching over legal practice. From an incentive standpoint, one difficulty is that practicing law is often far more remunerative than teaching it. Not only does the monetary gap render it difficult to attract the best and most dynamic practitioners, but students must compete with clients, associates and sometimes other law firm partners for the instructor's attention. What is more, even when a lectureship does not itself become a means to enhance the prestige of one's legal practice (subtext: look your lawyer is also a recognised academic!), it is not hard to imagine how practicing law can be experienced as more rewarding than grading exam papers or lecturing poorly-

motivated students. Deserted by colleagues prompt to leave the school's premises upon completing their teaching hours to return to their clients and memos, the professional school is unlikely to be an intellectually stimulating place where great minds seek to reinvent the law.⁵⁷ In fact, if one subscribes to the view that practitioners are better positioned to train aspiring lawyers, a radical – but perhaps more effective – solution might be to do away with the idea of a school altogether and go for an apprenticeship system. An apprenticeship system would, in principle, guarantee hands-on learning for aspirant lawyers. It would also provide established legal practitioners with a large supply of cheap labour, in whose training they would have an incentive to invest in order to increase productivity – thus removing the teaching/practice trade-off.

Diametrically opposed to the professional school model is the pure academic model. Instead of bringing law schools closer to legal practice, the idea is to bring the legal academy closer to the rest of academia. An extreme variant of this model would have law schools cast off their vocational tradition altogether and become research-oriented institutions, in which teaching focuses on the acquisition and application of the scientific method to the legal domain. Proposals such as the “MIT School of Law” go in that direction.⁵⁸ In less radical fashion, emphasising the humanities rather than computing skills and quantitative techniques, the vision at the heart of Sciences

⁵⁷ This description, however, may not be far from the everyday working experience of many a law professor at most European law schools, see Jamin & Xifaras, *supra* note 35.

⁵⁸ Katz, *supra* note 33.

Po Law School in France is also one that resolutely anchors legal education into academia.⁵⁹

B. Empirical Jurisprudence and the Hybrid Model

Between the two extremes of a purely professional school and that of an exclusively academic institution, the research programme I set out in this section assumes that the law school of the future will retain its hybrid nature as both vocational and academic organisation. Empirical Jurisprudence, however, seeks to take full advantage of this hybrid nature by creating greater synergies between the vocational and the academic function. In so doing, Empirical Jurisprudence promises to enhance European law schools' performances on the teaching as well as on the research front. How it purports to achieve this is the focus of the next two sections.

V. EMPIRICAL JURISPRUDENCE: LEGALLY RELEVANT, THEORETICALLY AMBITIOUS, METHODOLOGICALLY RIGOROUS EMPIRICAL RESEARCH

In brief, Empirical Jurisprudence seeks to leverage the full panoply of social-scientific research methods to answer questions that are relevant to judges, legal counsels, trial lawyers, litigants, compliance officers and legal reformers alike. What motivates the choice of the label "Empirical

⁵⁹ Jamin & Xifaras, *supra* note 35.

Jurisprudence” is the desire to move legal theory beyond classical jurisprudence and integrate theorising about law with methodologically rigorous empirical investigation. Classical jurisprudence – which I identify with the work of scholars such as H.L.A. Hart, Hans Kelsen, John Finnis, Robert Alexy, Joseph Raz and their disciples – has certainly made a great contribution to our understanding of law and legal systems. But it has remained stuck in old, now largely sterile, ontological disputes such as the separability of law and morality or the definition of the concept of law. Classical jurisprudence has produced a wealth of elegantly written monographs. But, while authors have been busy outshining each other’s prose, the discipline has hardly made any progress, let alone delivered any major findings or breakthroughs in the last 30 years. I believe that the principal cause of the discipline’s moribundity lies in the limitations of its methodological approach and the absence of connection with an empirical research programme. Classical jurisprudence was conceived and, at any rate, practiced as a sub-discipline of philosophy, rather than as a sub-discipline of a broader scientific inquiry into law and legal institutions. From analytic philosophy, jurisprudence borrowed its methodology. And so jurisprudence, as a discipline, became a combination of conceptual analysis (how legal concepts are defined and relate to one another) and philological study (what did H.L.A. Hart really say in Chapter VII of the *Concept of Law*? or what did Hans Kelsen really mean by “*Grundnorm*”?). The sort of arm-chair theorising that defined the discipline was entirely divorced from any empirical research programme. Nor did the legal philosophers really care to speak to other legal scholars or even to practitioners. Obsessed with questions

of interest only to members of the discipline, jurisprudence has become an insular and increasingly marginalised academic field.

In saying this I do not mean to suggest that classical jurisprudence has no valuable insights to offer or that no law student will benefit from reading Kelsen's *Pure Theory of Law* or Robert Alexy's *Theorie der Grundrechte*. Nor do I wish to imply that conceptual-analytical inquiries are pointless. Rather, I believe that the way forward for the discipline is to make conceptual analysis and theorising in general conversant with a fully-fledged empirical research programme. I also believe that such a research programme should be consonant with the vocational character of law schools and focus on questions that are of direct interest to members of the legal community at large.

This, in substance, is the idea that underpins Empirical Jurisprudence. As said in the introduction, Empirical Jurisprudence comprehends two strands of inquiry. The remainder of this section is devoted to their description.

A. *Law as the Art of Persuasion: Studying Legal Discourse as a Specialised Form of Political Communication*

1. Jurists as Advocacy Experts

The first strand of research focuses on law as the art of persuasion. Law in action is largely about argumentation and advocacy: judges, counsels and litigators deal in persuasion. For this category of practitioners, legal discourse is a form of rhetoric: it is a way of persuading

audiences to certain beliefs and actions. This also implies that persuasion and rhetoric are central to the law schools' vocational tradition: Law schools are supposed to train advocacy experts. That is, verbally agile people who excel at persuasion. Thinking and speaking like a lawyer is, in that sense, about "smarts on your feet", the ability to construct and deconstruct arguments on the spot and to deliver them with eloquence, as a counsel must often do in the courtroom. In that regard, lawyers have a lot in common with spin doctors, lobbyists, PR advisers and politicians. Like lobbyists, trial lawyers use argumentation to try and persuade a public decision-maker – in that case a judge – to make a decision favouring the interests of the individuals, groups or corporations they represent.⁶⁰

A similar analogy can be drawn between lobbying and doctrinal legal scholarship. Doctrinal legal scholarship ordinarily takes a perspective that is continuous with rather than detached from the discourse of legal practitioners. Being itself part of that discourse, it does not only observe but also takes side – just as judges and attorneys do – in normative disputes. The typical law review article seldom consists of a mere description of what the law is. Instead, it is usually infused with value judgments and penned with a view to advance a certain vision of how the law ought to develop. In fact, much of doctrinal legal scholarship can be understood as an attempt either to persuade the legal community to accept certain judicial policies or to persuade judges to change

⁶⁰ Economists have likened trial lawyers to enfranchised lobbyists, see Mathias Dewatripont & Jean Tirole, "Advocates", 107 *J. Polit. Econ.* 1 (1999).

theirs. In blending advocacy and research, description and prescription, doctrinal scholarship also bears some important resemblances with the working papers and reports published by policy institutes, think tanks and business associations. Consistent with this analogy, some social-scientific studies of the law professoriate in Europe have characterised it as operating as a “specialised lobby”.⁶¹

Judges, too, are, in their own way, advocates. As with politicians and public decision-makers in general, judges strive to present their decisions in the best light so as to avert criticism while maximising social acceptance. The art of writing effective party manifestos or government press releases and the art of penning persuasive judicial opinions thus share important similarities. To the extent that both are concerned with the optimal way to communicate a piece of information to a given audience, the task of a judicial opinion-writer is no very different from that of a PR consultant drafting a campaign manifesto.

2. The Specific Constraints of Legal Discourse

To be sure, legal argumentation is governed by distinct constraints. There are certain properties that an argument must possess in order to qualify as a legal argument in the first place. The effectiveness of a legal

⁶¹ See Arthur Deyvre, “Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations”, 61 *Am. J. Comp. Law* 729 (2013); Martin Shapiro and Alec Stone, “The New Constitutional Politics of Europe”, 26 *Comp. Polit. Stud.* 397 (1994).

argument often hinges on its being perceived to rest on “legal” as opposed to “political” foundations. This is the paradox of legal discourse. As Walter Mattli and Anne-Marie Slaughter put it in the context of European integration:

[Legal discourse] functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere. In specifying this dual relationship between law and politics, we also uncover a striking paradox. Law can only perform this dual political function to the extent it is accepted as law. A “legal” decision that is transparently “political”, in the sense that it departs too far from the methods and principles of the law, will invite direct political attack. It will thus fail as both mask and shield. Conversely, a court seeking to advance its own political agenda must accept the independent constraints of legal reasoning, even when such constraints require it to reach a result that is far narrower than the one it might deem politically optimal.⁶²

The particular constraints of legal reasoning, though, are themselves relative and turn out to be heavily context-dependent. Argument types regarded as unacceptable in one legal context may be routine in another. Some arguments – such as textualist arguments – may have more traction in some legal systems but less in others. Likewise, policy arguments once deemed unfit for lawyers may become commonplace. In the United States,

⁶² Anne-Marie Burley and Walter Mattli, “Europe Before the Court: A Political Theory of Legal Integration”, 47 *Int. Organ.* 41, 72 (1993).

the brief submitted by Louis D. Brandeis – attorney at the time but later appointed to the bench of the Supreme Court – in *Müller v. Oregon*⁶³ contributed to the popularisation of evidence-based policy arguments in the courtroom. By marshalling medical and social evidence to defend the constitutionality of a minimum wage law introduced by the Oregon legislature, the “Brandeis” brief made it acceptable for attorneys explicitly to consider the impact of legislation on society.⁶⁴

The constraints of legal reasoning are all the more relative as they are themselves partly endogenous to legal discourse. As the introduction of the Brandeis brief in the United States illustrates, legal actors may by their own action contribute to change the perception of what counts as appropriate legal reasoning. For that reason, the constraining force of legal reasoning is likely to vary not only across legal areas but also across space and time.

3. Legal Rhetoric as a Specialised Form of Political Communication

This warrants the conclusion that legal and political discourse do not form distinct genres but are more aptly thought of as cousins belonging to the same species. In constructing arguments, lawyers tend to rely on the same

⁶³ 208 U.S. 412 (1908).

⁶⁴ How decisive the famous brief was in spurring the use of policy analysis by litigants, however, is disputed see Ellie Margolis, “Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs”, 34 *Univ. San Franc. Law Rev.* 197 (1999); Noga Morag-Levine, “Facts, Formalism, and the Brandeis Brief: The Origins of a Myth”, 2013 *Univ. Ill. Law Rev.* 59 (2013).

story-telling techniques and rhetorical stratagems familiar to PR gurus and spin-doctors. Just like effective political spin, effective legal rhetoric is about more than just collecting and compiling facts or lining up authorities. It is about doing it in a way that tells a compelling story. To borrow an example from the British writer EM Forster, the sentence “The king died and the queen died” is a statement of facts; but “The king died and the queen died of grief” is already a story. Owing to some peculiar quirks of our brain – its in-built tendency to search for causal relationships among events⁶⁵ – we are more likely to remember the latter as a single piece of information rather than two. And, for the same reason, we are more likely to imprint it into our brain. Experimental psychology and neuroscience research suggest that the human mind has a hard-wired predilection for well-constructed narratives.⁶⁶ Human beings, in other words, find a good story pattern hard to resist. From marketing to political propaganda, research has demonstrated that stories represent a potent tool to shape beliefs, change minds and influence behaviour.⁶⁷ Law is no different. When arguing a case, a good lawyer will recognise that there are various ways in which the facts and legal authorities (legislative provisions, precedents, established doctrines, interpretive canons...) can be reconstructed. She will then seek the reconstruction – the story – that best serve her client’s

⁶⁵ See Daniel Kahneman, *Thinking, Fast and Slow* 74 (2011).

⁶⁶ See Jonathan Gottschall, *The Storytelling Animal: How Stories Make Us Human* (2012).

⁶⁷ Jeremy Hsu, “The Secrets of Storytelling”, 19 *Sci. Am. Mind* 46 (2008).

interests. Hence the best litigators are those who have the ability and creativity to line up facts and authorities and make them tell a compelling story where no other lawyer could come up with one. In similar fashion, verbally agile judicial opinion-writers will find creative ways to interpret the law, enabling the court to push the law in the judge's desired direction while deflecting accusations of activism.

Cherry-picking, bifurcation and straw-man arguments are rhetorical techniques commonly employed by jurists that are also part of the lobbyist and PR consultant's stock in trade. A party manifesto typically emphasises the party's achievements while overlooking its failures. Party strategists carefully cherry-pick the items that will cast their organisation in the best possible light.⁶⁸ So too do government press releases. Ditto for lobbyists. A nuclear energy lobbying group, for instance, will stress the advantages of nuclear energy such as low-carbon emission and affordability and play down its perceived problems (radioactive waste, Fukushima, Chernobyl...). No less adept at cherry-picking are lawyers. In fact, cherry-picking may be said to inhere in lawyering. Consider that in a trial no counsel will be expected to weigh the evidence both *for* and *contra* her client, as doing so would lead to her immediate disbarment. Far from a flaw in one's argumentation, cherry-picking – that is, picking only the evidence and materials that support one's case – is the governing norm in the courtroom. Cherry-picking, however, is not confined to the memos and oral pleadings

⁶⁸ Ian Budge, "Validating Party Policy Placements", 31 *Br. J. Polit. Sci.* 179 (2001).

of trial lawyers. When lining up the authorities to support their verdicts, judges usually emphasise the legal materials that favour the outcome they have reached and, more often than not, ignore countervailing precedents or alternative, but equally plausible constructions of the legal materials.⁶⁹ Cherry-picking is similarly prevalent in (doctrinal) legal scholarship. Indeed, law professors seldom make explicit the criteria by which they identify the precedents they choose to comment (“sample representativeness”, just as “research design”, is a foreign concept in doctrinal legal scholarship). Nor do they explain the method by which they construe legal materials and why they privilege one particular approach to interpretation over other alternatives.

The false dilemma, usually combined with a straw man argument, constitutes another rhetorical figure that is probably as popular among lawyers as it is among politicians and other professional advocates. Politicians seeking re-election tend to frame the choice facing voters as one between a reasonable option (re-electing them) and an unreasonable one (electing the opposition).⁷⁰ In the

⁶⁹ Pamela C. Corley et al., “The Supreme Court and Opinion Content: The Use of the Federalist Papers”, 58 *Polit. Res. Q.* 329 (2005) (documenting patterns of selective citations to the Federalist Papers by US Supreme Court justices).

⁷⁰ PM David Cameron’s appeal to British voters in the 2015 general election represents as good an example as it gets of the combined use of the false dilemma and straw man argument in a political message:

In five days’ time – when all is said and done – it boils down to one thing: Ed Miliband or I will walk into No10. If you really believe it’s worth taking a major risk, if you really believe more borrowing and more taxes are needed, if you really believe the struggle we’ve been through has been pointless, if you believe the SNP won’t hold Britain

same manner, in legal discourse, a particular interpretation of a given clause is not usually presented as one of several plausible readings of the clause, but as the single correct reading. A counsel will be loathe to admit that the interpretation of the law she advocates is one among other equally plausible ones, which only have against them that they happen to disfavour her client. Instead, she will be adamant that a correct examination of the law inevitably leads to her interpretation. Meanwhile, the counsel representing the opposite party to the legal dispute will make exactly the same claim about his preferred interpretation. Judicial opinions exhibit the same tendency to present the outcome of adjudication as following inevitably from the application of legal rules to the facts of the case.⁷¹ Legal discourse in general, whether in judicial opinions or on the pages of law reviews, is replete with expressions that seem designed to delegitimise those defending alternative views. For example, judges and law scholars in Europe prefer to speak of judicial “dialogue” rather than of judicial “negotiation” or judicial “bargaining” to refer to interactions between domestic courts and supranational ones.⁷² Because it would seem that only a crypto-fascist could oppose the idea of

to ransom – then vote for Ed Miliband. But if you believe we’ve set Britain on the path to economic recovery, and want a stable Government that offers security for your family – then vote Conservative locally.

See <https://www.facebook.com/DavidCameronOfficial/posts/978223018868683> (accessed August 26, 2015).

⁷¹ Erwin Chemerinsky, “The Rhetoric of Constitutional Law”, 100 *Mich. Law Rev.* 2008 (2002).

⁷² See e.g. Anthony Arnull, “Judicial Dialogue in the European Union”, *Philos. Found. Eur. Union Law* 109 (Julie Dickson & Pavlos Eleftheriadis,

dialogue, whoever ventures to criticise the “dialogue” theories of inter-judicial relations looks immediately suspect. The same goes for the no less popular catchphrase “constitutional pluralism” which is supposed to capture the ethos of judicial decision-making in the multi-level EU legal order.⁷³ Another illustration is the “living constitution”, which loosely stands for constitutional doctrines privileging the views of progressive judges over the original meaning of the constitutional charter. Whatever merits these doctrines may have, use of the adjective “living” suggests that it must be preferred over its implied alternative, the “dead constitution”, which only the constitutional Necrophile could possibly favour.⁷⁴ These examples of legal rhetoric parallel the use of positive and negative frames by social movements and interest groups. In the United States, proponents of abortion introduce themselves as “pro-choice”, which implies that the only alternative is “anti-choice”. Their opponents, however, do not make the mistake of framing their position as “anti-choice”. Instead, they present it as “pro-life”, thereby implying that pro-abortion militants are in fact anti-life. So each side uses a positive frame to describe itself and suggests a negative one for the other.⁷⁵

2012); *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Filippo Fontanelli et al., 2010).

⁷³ See *Constitutional Pluralism in the European Union and beyond* (Matej Avbelj & Jan Komárek, 2012); Neil Walker, “The Idea of Constitutional Pluralism”, 65 *Mod. Law Rev.* 317 (2002).

⁷⁴ William H. Rehnquist, “The Notion of a Living Constitution”, 54 *Tex. Law Rev.* 693 (1975).

⁷⁵ Ronald Dworkin, *Taking Rights Seriously* (1978).

We could easily multiply the parallels between legal discourse and other forms of political advocacy. My broader point, though, is that we should think of legal discourse as a specialised form of political communication and study it as such.

4. The Rhetorical Tradition in Philosophy and Jurisprudence

The study of legal discourse as rhetoric can claim a long tradition in legal philosophy. A tradition that goes back to the Sophists – the lawyers, spin-doctors and educators of the Antique – and runs through the work of Aristotle, Cicero and Chaim Perelman. The Sophists were known for teaching oratory and for the great importance they attached to the spoken word. They played an important role in Athenian democracy, advising members of the aristocratic class on argumentation strategies while defending citizens in court. As with modern-day lawyers, the Sophists were famous for their ability to craft clever arguments and counter-arguments – an aptitude that Aristophanes parodied in his contemporary play *The Clouds*.

Plato, however, took a dim view of rhetoric and sought to distinguish philosophy from sophistry. He had harsh words for the Sophists, which his work depicts as mercenaries charging fees for their expertise in the use of deceitful demagoguery.⁷⁶ More pragmatic, Aristotle saw rhetoric as an inevitable part of social life and human

⁷⁶ Plato's depiction of the Sophists bears a striking resemblance to (the no more charitable) portrayals of the legal profession by later writers, such as Jonathan Swift in *Gulliver's Travels*:

communication, as even men pursuing noble ends, such as truth and justice, could not escape the need to persuade their fellow citizens. To the subject he contributed his magisterial treatise *The Art of Rhetoric*. Aristotle's extended treatise has proved a major influence on most subsequent writings about persuasion through to modern days. Interestingly, the *Art of Rhetoric* examines the use of rhetoric both in political assembly (deliberative rhetoric) and in the courtroom (forensic rhetoric).

Expanding on Aristotle, Cicero authored several works on rhetoric and was himself an accomplished orator who set the standard for Latin eloquence. Embodying the power of persuasive speech in both law and politics, he was a successful lawyer but also a key figure in Roman politics. Closer to us, authors like Chaim Perelman⁷⁷ and Stephen Toulmin⁷⁸ revived the study of rhetoric, which had been neglected by Enlightenment thinkers, by focusing on the use of arguments in the judicial context.

There is a sense in which even the work of a legal philosopher like Ronald Dworkin can also be viewed as partaking in this tradition. True, Dworkin did not cast his work as an exercise in rhetoric, nor as a theory of how lawyers achieve persuasion. Yet, like a modern Cicero, he was an exceptionally compelling speaker who also received praise for his slick, fluent prose – which, among other things, earned him to become a regular contributor

I said, “there was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid”.

⁷⁷ Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1969).

⁷⁸ Stephen Edelston Toulmin, *The Uses of Argument* (1958).

to the *New York Review of Books*. Though the merits of his work is a matter of dispute among analytical philosophers,⁷⁹ Dworkin certainly figures among the great rhetoricians of the law. His jurisprudence is best understood as a masterful exercise in defence of the US Supreme Court's civil rights revolution. Dworkin insisted on "taking rights seriously"⁸⁰ in a period that saw a major expansion in the federal judiciary's influence over policymaking. At the same time though, he denied that judges had discretion, arguing, instead, that there is a "single right answer" to every legal question, including in hard cases.⁸¹ He invoked "principles" and rejected any sharp distinction between law and morality. He described the Supreme Court as a "forum of principle"⁸² while comparing judicial opinion writing to the composition of a chain novel.⁸³ Dworkin's themes and catchphrases bear a remarkable affinity to the characterisation of legal discourse as story-telling (the chain-novel metaphor) in which lawyers make emotional appeals to moral values (principles, rights and the inseparability of law and morality) while denying the under-determinacy of law (the single right answer thesis). No less remarkable from a rhetorical viewpoint is that Dworkin defended his views against the critique coming

⁷⁹ See e.g. criticism of British philosopher Simon Blackburn in "Comment: Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It", 9 *Brown Electron. Artic. Rev. Serv.* Ed. Jamie Dreier David Estlund Accessed (2003).

⁸⁰ Dworkin, *Taking Rights Seriously*, *supra* note 76.

⁸¹ *Id.* at 279; Ronald Dworkin, "No Right Answer", 53 *N. Y. Univ. Law Rev.* 1 (1978).

⁸² Ronald Dworkin, "The Forum of Principle", 56 *NYUL Rev* 469 (1981).

⁸³ Ronald Dworkin, *Law's Empire* 228 (1986).

from legal theorists by resorting to classical rhetorical tricks. He carefully cherry-picked the cases he used to attack legal positivism (*Riggs v. Palmer* and *Henningsen v Bloomfield Motors*)⁸⁴ and characterised the issue at hand in such a way that it forced the reader to choose between a caricature of the positivist position and his own neo-natural law jurisprudence⁸⁵ – a classical combination of straw man fallacy and false dichotomy. He also made the work of critics seeking to nail down his arguments difficult by ingeniously hiding them behind a smoke-screen of definitions and distinctions.⁸⁶ In addition to his knack for titles (“*Law’s Empire*”, “*Life’s Dominion*”), Dworkin was particularly adept at wielding positive and negative frames. His theory of law was of “law as integrity”⁸⁷ (try to persuade anyone that he should disagree!). He appealed to “principles” where his opponents had only “rules” and “pedigree”.⁸⁸ And he ridiculed metaethics by calling it “Archimedean”.⁸⁹ In sum, the work of Ronald Dworkin – who, not unlike Cicero, became a prominent public

⁸⁴ See Ronald Dworkin, “The Model of Rules”, 35 *Univ. Chic. Law Rev.* 14 (1967). Using real cases rather than imaginary ones, as philosophers and legal theorists typically do, is itself a clever rhetorical stratagem. Because real-world cases do not possess the abstract purity of thought experiments, it is difficult to engage the argument they are meant to support without taking issue with the specific manner in which it reconstructs the associated facts and legal materials.

⁸⁵ See again *id.*

⁸⁶ See e.g. *Id.* (Taking the reader through multiple distinctions, variants, definitions and reconstructions of concepts and theoretical doctrines such as rule, policy, principle, discretion, positivism.).

⁸⁷ Dworkin, *Law’s Empire*, *supra* note 84, at 94.

⁸⁸ See Dworkin, “The Model of Rules”, *supra* note 85.

⁸⁹ Dworkin, “Objectivity and Truth: You’d Better Believe It”, 25 *Philos. Public Aff.* 87 (1996).

intellectual after a successful stint in legal practice – offers a great illustration of the power of legal rhetoric. Analysing the rhetorical features that made Dworkin’s writings popular in and outside the legal academy can thus represent an important source of insights for the empirical study of legal discourse.

5. Rhetoric and Legal Education

To a certain degree, advocacy training is already part of legal education. This is most readily apparent in moot court contests, which are taken very seriously at some European law faculties. Yet the fact that persuasion is so central to the practice of law militates for an even greater emphasis on the evaluation, acquisition and perfection of rhetorical skills in the law school curriculum. An interesting avenue to promote the place of rhetoric in legal education has been pioneered by the Law & Literature movement in the United States, which has stressed the affinity between legal and literary writing. Conceptualising legal discourse itself as a literary genre, Law & Literature scholars have encouraged students of the law to use the methods of literary criticism and analysis to evaluate the equality as well as the rhetorical effectiveness of legal writing.⁹⁰

In its incarnation as *Law as Literature*, the Law & Literature movement reminds us that effective advocacy in law, too, is a form of story-telling. That law students may benefit from the comparative study of legal and literary works is also hard to deny; and there might well be

⁹⁰ James Boyd White, *The Legal Imagination* (1985).

a place for the sort of exercises and classroom assignments promoted by Law & Literature scholars in the law school of the future. Now, “Law as the Art of Persuasion”, to put a name on this first strand of research within the Empirical Jurisprudence research programme, does not purport to displace nor to dispute the educational value of initiatives inspired by exponents of the Law & Literature approach. It does claim, though, that the systematic empirical study of the rhetorical strategies deployed by real-world practitioners may make an important contribution to legal education by aiding law students to identify the discursive strategies that successfully achieve persuasion. It also claims that such an inquiry will be more insightful and enriching to law students if it is informed by psychology, brain science and systematic discourse analysis, as is twenty-first century political communication.

What about doctrinal legal scholarship? Inasmuch as it is continuous with, rather than detached from, the discourse of legal actors, doctrinal scholarship fundamentally differs from the approach to legal research advanced by Empirical Jurisprudence, which purports to investigate legal rhetoric but without being itself rhetorical.⁹¹ Empirical Jurisprudence, however, need not

⁹¹ The difference lies in the distinct perspectives that govern advocacy and scientific inquiry. As Lee Epstein and Gary King observe, legal scholarship tends to follow the rhetorical logic of legal discourse rather than the methodology of scientific inquiry:

“One source of the problem almost certainly lies in the training law professors receive, and their general resulting approach to scholarship. While [scientists] are taught to subject their favored hypothesis to every conceivable test and data source, seeking out all possible evidence against their theory, attorneys are taught to amass all the evidence for their hypotheses and distract attention from anything

entail the death of doctrinal scholarship. It is true that if law schools are serious about training advocacy experts, rather than militants of the law, they will have to make sure that law students learn to discern the rhetoric behind doctrinal constructions. This can only be achieved if the study of doctrinal discourse is integrated within a broader, contextualised account of legal practices. Hence, as more interdisciplinary approaches receive greater emphasis, the place of pure doctrinal teaching looks indeed set to decline. With regard to research funding, it is also true that, for the reasons detailed above, the shift to competitive research funding does not favour doctrinal scholarship in the long run. Funding institutions such as the European Research Council (ERC) already privilege interdisciplinary, frontier research. For that reason, a law school whose professors only produce doctrinal work is doomed to attract less research funding. This said, however, the research programme I have just outlined does itself suggest that doctrinal studies do serve a significant practical function that new approaches to legal research will not make redundant. Indeed, litigants need doctrinal arguments to articulate their claims, as do judges to justify their findings. For these practitioners, doctrinal legal scholarship thus constitutes an important supply of arguments in the form of ready-made rationalisations of the legal materials. Because the demand for doctrinal argumentation will not go away – at least as

that might be seen as contradictory information. An attorney who treats a client like a hypothesis would be disbarred; a [scientist] who advocates a hypothesis like a client would be ignored”; Lee Epstein and Gary King, “The Rules of Inference”, 69 *Univ. Chic. Law Rev.* 1 (2002).

long as law and courts exist – I believe that the legal academy of the future will and should continue to produce doctrinal work. Furthermore, just as political communication research may help party strategists and interest groups craft more effective campaign messages, rigorous empirical research on legal discourse may generate insights on which doctrinal legal scholars may in turn rely to develop more powerful legal rhetoric.

B. The Law as Product of Human Decision Making and as Instrument of Social Planning

Law in practice, however, is not solely about persuasion. Indeed, practicing law further involves figuring out how legal rules emerge and how they affect social behaviour while navigating rapidly changing and increasingly complex rule systems.

1. The Need to Understand the Social Impact of Legal Rules: Law as Instrument of Social Engineering

Legal rules serve as instrument of social planning. As such, they are designed to channel social behaviour in a certain way and those who enact them do so with a view to engineering certain social outcomes. Consequently, legislators and legal reformers need to identify the preferences, incentives and constraints that will determine how human agents respond to the rules they have designed. Equally, before thinking about the best way to package their decisions, judges – particularly those sitting at the top of the judicial pecking order –

must consider the effect their rulings might have on the behaviour of litigants and other public and private decision-makers. The necessity to fathom the behavioural response that legal rules are likely to elicit is fundamental to other key areas of legal practice, including new domains such as corporate compliance. For many law graduates in the United States but also in Europe, compliance is becoming an attractive career alternative to joining a law firm.⁹² Yet the job of a compliance officer goes far beyond simply reminding corporate decision-makers what laws and regulations require. Instead, the officer needs an in-depth knowledge of the company's business and organisation in order to locate and monitor those points in the structure that are most likely to lead to risks.⁹³

2. Law as Outcome: Predicting Lawmakers' Behaviour

As much as instrument of social control, legal rules are the product of human decision making. Lawyers are frequently called on to predict and anticipate the law public decision-makers – including judges, arbitrators and industry regulators – will produce. To advise her client on the best course of conduct, a lawyer must assess the probability that the conduct will trigger litigation and the odds of prevailing in case her client is actually taken to court. While clients want effective dispute resolution, they often prefer effective dispute avoidance. “[C]lients prefer to have

⁹² *The Morning Risk Report: Compliance Jobs Draw Law-School Grads* (2014).

⁹³ Ray Worthy Campbell, *The End of Law Schools*, 49 (2014).

a fence at the top of a cliff, rather than an ambulance at the bottom.”⁹⁴

3. Managing Legal Complexity: Navigating the Growth, Entanglement and Changeability of Legal Regulations

Another challenge confronting practitioners – especially those working for multi-national corporations and global law firms – arises from the need to oversee deals, transactions and operations straddling multiple jurisdictions while keeping pace with the growth, changeability and increasing entanglement of legal rules. Not only have legislation, case law and regulation grown in quantity and complexity. But as an ever larger number of states has joined an ever larger number of international legal regimes, supranational law – especially in Europe – has become more and more integrated with domestic law. Adding to the uncertainty generated by the interplay among multiple legal systems is the emergence of private regulations of global corporate conduct.⁹⁵

4. Law as Social Science

The kind of expertise that legal engineering, legal forecasting and legal compliance require relies less on eloquence and the art of persuasion and is more akin to risk analysis. Here lawyering is not about constructing persuasive doctrinal narratives but about getting the facts

⁹⁴ Susskind, *supra* note 8, at 224.

⁹⁵ David Vogel, “The Private Regulation of Global Corporate Conduct: Achievements and Limitations”, 49 *Bus. Soc.* 68 (2010).

and the law as they are or are likely to be. This form of legal expertise also bears a closer and more direct affinity to the social science perspective.

It is to this form of legal expertise that the second strand of research comprising the Empirical Jurisprudence project relates and purports to contribute. As with the first direction of research, this perspective can point to illustrious – albeit not nearly as old – precursors. In his oft-cited 1897 *Harvard Law Review* article “The Path of the Law”, Oliver Wendell Holmes urged legal scholars to look at the law from the vantage point of the bad man who seeks to avoid its disagreeable consequences. This led him to advocate an empirical, social-scientific approach to the study of adjudication:

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

The “business like” understanding of law propounded by Holmes found an echo in the legal realist movement that swept US law schools in the 1920s and 1930s. In the same pragmatic spirit, American legal realists – who for the

most part were or had been practitioners – advocated an empirical approach to judicial decision making, hoping that it would help lawyers better predict case outcomes.⁹⁶

What is more, this approach to legal research overlaps, to a much greater extent than Law as the Art of Persuasion, with vibrant on-going research programmes. This goes for Law & Economics, which applies the theoretical and methodological apparatus of economics to the study of legal questions. There is also a vast political science literature on judicial behaviour, which, although initially focused on US courts, is now increasingly turning its attention to European courts.⁹⁷ These literatures ask questions – whether about the motives driving judicial behaviour or the efficiency of legal rules – that are of direct interest to those practicing law or aspiring to practice it.

5. Legal Education and the Social Context of Rules and Rule-Making

Owing to the unchallenged dominance of doctrinal scholarship in both research and teaching, European law schools do relatively little to inculcate in their students the skills and attitudes necessary to excel whether at legal engineering, legal forecasting or legal compliance. Law students typically study legal rules as if they existed in a vacuum and are hardly, if at all, exposed to truly

⁹⁶ Brian Leiter, “Rethinking Legal Realism: Toward a Naturalized Jurisprudence”, 76 *Tex. Law Rev.* 267 (1997).

⁹⁷ See Arthur Dyevre, “Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour”, 2 *Eur. Polit. Sci. Rev.* 297 (2010); Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013).

interdisciplinary approaches. Surely, many law schools allow students to take a minor in another discipline or even to opt for a double-degree. Yet the perspective of the other discipline – whether economics, business or political science – is rarely brought to bear on the exposition or contextualisation of legal doctrines. Meanwhile, Law & Economics may have become mainstream in US legal education but it is far from having achieved the same status in Europe.

There is no doubt that many in today's European legal academy are sceptical that empirical and, generally, social-scientific studies can make any sorts of contribution to either legal practice or to legal education. Why should law professors believe that social scientists who have never practiced law could have anything interesting or useful to say about the subject? While the same scepticism long prevailed in the United States, recent developments have demonstrated that lawyers may have a few things to learn from social scientists. In 2002, for example, a tournament was organised in which two teams, one consisting of two political scientists with a statistical algorithm, the other a panel of 83 law professors, had to forecast the outcome of all cases on the docket of the US Supreme Court in the forthcoming term. At the end of the term, the political scientists had accurately forecast 75 per cent of the case outcomes, compared to a mere 59.1 per cent for the law professors – despite the fact that the latter were leading authorities in the areas of law covered by the cases.⁹⁸ That

⁹⁸ Theodore W. Ruger et al., "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking", 104 *Columbia Law Rev.* 1150 (2004).

social scientists can outperform expert law professors at a task deemed central to legal practice, such as predicting judicial outcomes, suggests that the sceptics are wrong and that the successful law school of the future is likely to see a much more interdisciplinary curriculum.

VI. NEW TOOLS FOR LEGAL RESEARCH: NUMBER-CRUNCHING LAWYERS

The two lines of research outlined in the previous sections invite us to consider theoretical insights from a wide range of disciplines, including political communication, cognitive psychology, economics, sociology and political science. But to take full advantage of the insights gained from these disciplines, tomorrow's law students will have to familiarise themselves with techniques and methodologies that most in today's European legal academy have only vaguely heard of. While it is not uncommon to hear students cite a revulsion for mathematics as one of the chief reasons that motivated their choice to study law, the odds are that in the law school of the future number-crunching will feature much more prominently both in research and in teaching. The quantitative turn, that US law schools have begun to embrace, was already anticipated by Oliver Wendell Holmes in the "Path of the Law":

For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

We have now reached the stage where the man of statistics and the master of economics are ready to compete with the blackletter man. Even in areas where one would expect legal scholars to have the upper hand, such as law and development, economists can already claim to have more influence on policy debates than lawyers.⁹⁹ Unless they update their aging toolkit, European legal scholars risk becoming irrelevant in political and social debates. Here is not the place to go through a comprehensive survey of the many empirical techniques that researchers may draw on to further our understanding of legal discourse and legal institutions. So I will only highlight three: large-scale data collection, game-theoretic modelling and text mining.

A. *The Law in Numbers: Collecting, Coding and Aggregating Legal Information*

The construction of large databases involving the extensive collection and painstaking coding of legal information is perhaps what one most naturally associates with the adjective “empirical” in “Empirical Jurisprudence”. The last fifteen years have seen great progress on that score with the completion of large databases on courts, constitutions and bills of rights. Zachary Elkins, Tom Ginsburg and James Melton, for example, have amassed information on all

⁹⁹ See Stephan Haggard and Lydia Tiede, “The Rule of Law and Economic Growth: Where Are We?”, 39 *World Dev.* 673 (2011); Daniel M. Klerman et al., “Legal Origin or Colonial History?”, 3 *J. Leg. Anal.* 379 (2011); Thorsten Beck et al., “Law and Finance: Why Does Legal Origin Matter?”, 31 *J. Comp. Econ.* 653 (2003).

constitutional events that occurred in the world since 1789. The size, coverage and precision (with nearly 300 indicators for each constitutional event) of the Comparative Constitution Database mean that it represents a real game changer for a field like comparative law hitherto dominated by blackletter scholarship. Researchers have already used the data to test a flurry of hypotheses, from the factors that determine the longevity of constitutions¹⁰⁰ to the conditions that lead to the adoption of constitutional review.¹⁰¹

Meanwhile, researchers have been busy coding decisions of the European Court of Justice¹⁰² and the German Federal Constitutional Court.¹⁰³ Scholars have also sought to gather systematic data on patterns of argumentation and interpretive methods in landmark constitutional cases for courts in Europe and elsewhere in the world.¹⁰⁴ More research in that vein will certainly come. That said, there are alternative techniques to costly and time-consuming coding of legal information that hold great promise for students of legal institutions. One alternative is represented by expert surveys. As alluded to above, much of legal knowledge is scattered across many individuals, locked as it is in the brains of practitioners of the craft who have amassed it through years of legal practice. Expert surveys are one way of unlocking

¹⁰⁰ Zachary Elkins et al., *The Endurance of National Constitutions* (2009).

¹⁰¹ Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?", *J. Law Econ. Organ.* (2013).

¹⁰² Alec Stone Sweet and Thomas Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community", *92 Am. Polit. Sci. Rev.* 63 (1998).

¹⁰³ See www.christoph-hoennige.de/?page_id=46#project_verfassungsgericht.

¹⁰⁴ See www.conreasonproject.com/.

this intimate, practical knowledge of the law. Well designed, a survey may enable scholars to aggregate and harness this expert knowledge for the purpose of identifying general, as well as more specific, trends in the development of the law. Another method, crowdsourcing, builds on the wisdom of the crowd, using networks of (typically online) volunteers to source relevant legal information. An illustration of the application of crowdsourcing to the law is the FantasySCOTUS website where law enthusiasts can make predictions over the outcome of any given US Supreme Court case and win prizes.¹⁰⁵ Aside from aiding to identify good individual forecasters,¹⁰⁶ crowdsourcing allows the construction of aggregate legal indicators that have the potential to outperform the predictions of individual forecasters.¹⁰⁷

B. Formal Modelling

Understanding how law works as instrument of social planning is principally about understanding interactions among legal rules and people: how rules of procedure

¹⁰⁵ See <https://fantasyscotus.lexpredict.com/>.

¹⁰⁶ Intriguingly, the best forecasters of judicial outcomes are not always jurists, see Oliver Roeder, "Why The Best Supreme Court Predictor In The World Is Some Random Guy In Queens", *FiveThirtyEight* (2015).

¹⁰⁷ Indeed, to the extent that the errors made by individual forecasters average out, the resulting average prediction will be more accurate than each individual forecast. This property was recognised over a century ago by one of the fathers of modern statistical theory, Francis Galton, see Francis Galton, "Vox Populi (the Wisdom of Crowds)", 75 *Nature* 450 (1907).

influence the strategy of litigants in legal disputes, how tort regimes shape the conduct of pedestrians and car drivers, how judges interact with legislators under the rules laid down in the constitutional charter, how opinion assignment rules affect bargaining among judges on the same panel, how docket rules modulate relations among judges at different echelons of the judicial hierarchy... Because game theory aims to explain how interacting agents choose from the options made available to them (notably by law) when the choice an agent makes affects the others and vice-versa, game-theoretic modelling provides a powerful tool to analyse the effect of legal rules on social behaviour. Even a very simple model can help sharpen our understanding of an otherwise elusive legal problem. Varying the parameter values of the model may generate new hypotheses and facilitate the exploration and discussion of counterfactual scenarios.

There have been numerous applications of game theory to law and courts in the United States.¹⁰⁸ Recent research is also beginning to shift attention towards courts in other countries as well as international legal regimes.¹⁰⁹ One model I have developed investigates the strategic interplay

¹⁰⁸ Charles M. Cameron and Lewis A. Kornhauser, *Bargaining on Appellate Courts* (2013); Jeffrey Lax, "Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four", 15 *J. Theor. Polit.* 61 (2003); William N. Jr Eskridge, "Reneging on History – Playing the Court/Congress/President Civil Rights Game", 79 *Calif. Law Rev.* 613 (1991); Daniel Orr, "The Superiority of Comparative Negligence: Another Vote", 20 *J. Leg. Stud.* 119 (1991); Tai-Yeong Chung, "Efficiency of Comparative Negligence: A Game Theoretic Analysis", 22 *J. Leg. Stud.* 395 (1993).

¹⁰⁹ C.J. Carrubba, "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems", 71 *J. Polit.*

between international and domestic judges, seeking to identify the conditions under which domestic courts may want to defy the authority of international judicial bodies.¹¹⁰ The model has a domestic and an international court competing over competences. Both courts generally want to either expand or, at least, maintain their powers. However, as the two courts clash, a constitutional crisis results, which may, in turn, damage the courts' institutional standing depending on the fragility of the international court's authority and the reaction of domestic legislators. Variations in the costs associated with constitutional crisis and the value attached to the jurisdictional issue at hand lead to different equilibria, reflecting varying degrees of legal integration. Among other things, the model suggests that the pressure executive and legislative commitment to EU membership put on domestic judges is an important factor in explaining the greater level of inter-court cooperation in the EU when compared to other international legal regimes. Moreover, an extension of the model, in which courts lack complete information over each other's preferences and domestic judges also have the ability to issue non-compliance threats, casts a wider light on concepts such as judicial dialogue and constitutional pluralism that have featured prominently in the EU law literature.

Assuredly, the assumption of rationality underpinning classical game theory (along with most of microeconomics) has its limitations, as has been well demonstrated by the

55 (2009); Arthur Dyevre, *Domestic Judicial Defiance in the European Union: A Political Economic Approach* (forthcoming).

¹¹⁰ Arthur Oyevre, *Domestic Judicial Defence in the European Union: A Geostrategic Map of the EU Judiciary* (2014), available at <http://papers.ssrn.com/abstract=2455301>.

literature on cognitive psychology.¹¹¹ Yet a new field of research is emerging – behavioural game theory – which seeks to overcome these limitations by revisiting the basic principles of game theory in light of behavioural experiments.¹¹² To the extent that game-theoretic analyses incorporate such advances they hold great promise for the study of law.

C. *Automated Content Analysis: Text as Data*

Finally, a third family of techniques that will surely become mainstream in future legal education and research comes by the name of Automated Content Analysis (ACA). In short, ACA methods are statistical algorithms that treat texts as if they were quantitative data. Three factors make ACA especially attractive for lawyers and legal researchers. First, texts constitute a pervasive feature of law. Legal rules and doctrines are commonly expressed in the written word and lawyers spend much of their time poring over texts, summing up the positions of various scholars on a particular issue or charting the evolution of a court’s case law. Second, thanks to the digital revolution, many of these texts are now available online at a few clicks. Third, ACA methods represent an alternative to manual

¹¹¹ Richard H. Thaler, “From Homo Economicus to Homo Sapiens”, 14 *J. Econ. Perspect.* 133 (2000); Daniel Kahneman et al., “Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias”, 5 *J. Econ. Perspect.* 193 (1991); A. Tversky and Dh. Kahneman, “The Framing of Decisions and the Psychology of Choice”, 211 *Science* 453 (1981); Kahneman, *supra* note 66.

¹¹² Colin Camerer, *Behavioral Game Theory: Experiments in Strategic Interaction* (2003).

coding and classifying, which the sheer volume of texts available makes prohibitively expensive.

I will not review the various techniques popularised by the text-as-data movement.¹¹³ But I will illustrate the power of ACA by showing what a technique called “text-scaling” can achieve. Computerised text-scaling exploits the rhetorical nature of legal language.¹¹⁴ The fact that lawyers – including judges – tend to emphasise different words when they articulate divergent positions on the same issue. To assess the performances of text-scaling algorithms, it has been applied to a well-documented body of case law, the decisions of the German Federal Constitutional Court on European integration. Shown in Figure 1 are the 16 opinions issued by the German Court in the 1967–2012 period and their respective length.

Here we can be confident that European integration and the relationship between EU law and German law is the main issue in the opinions and, on that assumption, we can turn the opinions into numbers (or, more accurately, into sequences of word counts). Text-scaling algorithms then look for differences in word usage and, on that basis, estimates the decision’s underlying position on the dimension of interest, here European integration. Figure 2 depicts the results (with vertical bars representing 95 per cent confidence interval).

¹¹³ For an accessible survey see Justin Grimmer and Brandon M. Stewart, “Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts”, 21 *Polit. Anal.* 267 (2013).

¹¹⁴ Arthur Dyevre, “The Promise and Pitfalls of Automated Text-Scaling Techniques for the Analysis of Judicial Opinions” (Social Science Research Network, SSRN Scholarly Paper ID 2626370, April 10, 2015), available at <http://papers.ssrn.com/abstract=2626370>.

Figure 1. German Federal Constitutional Court, Opinions on European Integration, 1967–2012

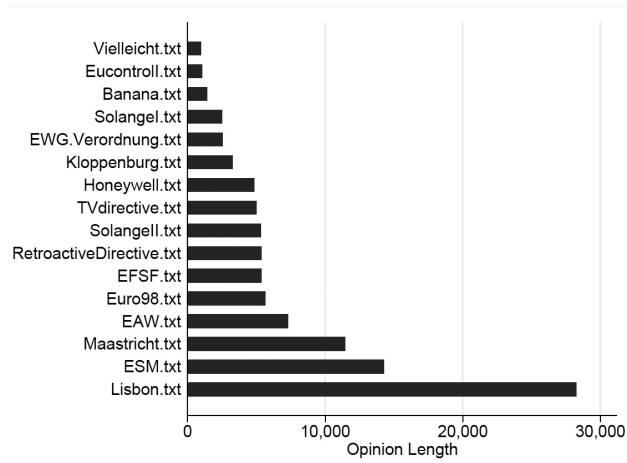
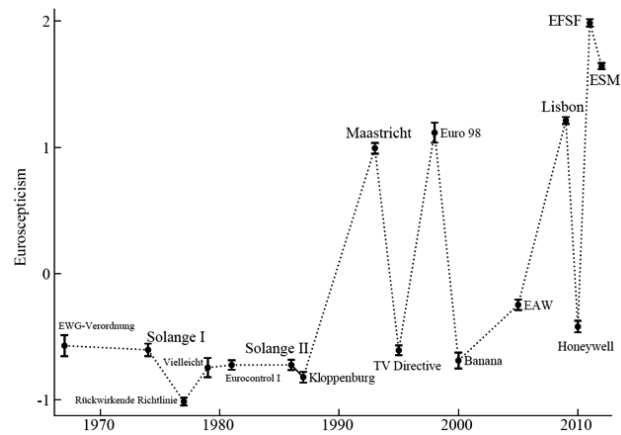


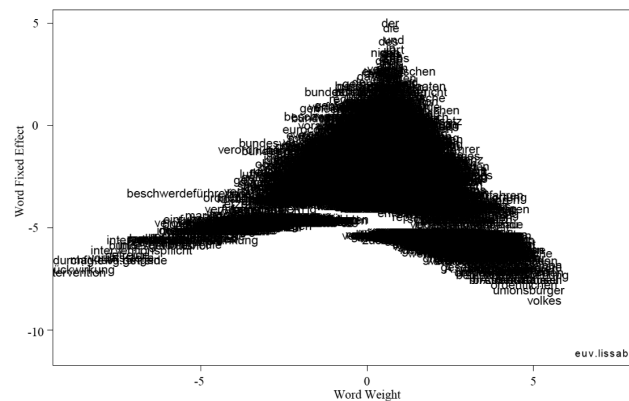
Figure 2. Text-Scaling (Wordfish) of German Federal Court Opinions on European Integration



These positional estimates can be compared to doctrinal accounts in textbooks and law review articles. For this body of case law, at least, they turn out to be remarkably consistent with what legal scholars report on the decisions.¹¹⁵ All this without actually reading the texts!

But there is more. This technique permits us to see the words that drive the estimation. This Eiffel-tower shaped word cloud in Figure 3 represents the 11,000 lexemes appearing in the 16 opinions.

Figure 3. Word Weight and Word Fixed Effect, German Constitutional Court Opinions on European Integration



At the top of the Eiffel tower are the words that appear in the same proportion across all texts. One can spot “der, die, das” – the most common words in the German language. Then on the lower-right corner are the words

¹¹⁵ *Id.*

with significant (positive) weight. These are the words that drive the decision in a Eurosceptic direction. These are words such as “*Volk*” (people), “*Herrschaft*” (governance), “*Souveränität*” (sovereignty) etc. On the opposite side, with large negative weight, are the EU-friendly words, which include “*Getreide*” (cereals), “*Vorratstelle*” (warehouse), “*Marktstörung*” (market distortions). These words compose two distinct frames: a constitutional statehood frame, and a common market frame. Besides potentially augmenting and amplifying the number of texts a single lawyer can analyse, ACA techniques like text-scaling thus provide a fascinating window into judicial rhetoric. This suggests that ACA methods can potentially contribute to the two lines of inquiry making up the Empirical Jurisprudence research programme.

This is but a glimpse of the many possibilities that advances in data analytics, natural language processing and computer-based knowledge-management technologies hold for the future of legal scholarship and legal practice.¹¹⁶

¹¹⁶ Among the new techniques that may have the most disruptive effect on the way both lawyers and non-lawyers manage legal knowledge are open-domain Q&A – pioneered by IBM supercomputer Watson, of Jeopardy fame – and Natural Language Generating (NLG). Applications of open-domain Q&A to law and compliance are already under development, see www.rossintelligence.com/ (accessed 20 October 2015) and www.cio.com.au/slideshow/577060/pictures-how-ibm-watson-apps-changing-7-industries/?image=3 (accessed 20 October 2015).

VII. CONCLUSION: RECONCILING ACADEMIA AND THE PROFESSION

Law schools face a double challenge. On the one hand, there is growing dissatisfaction with the way the law is taught. Assessing the state of legal education in the United States – although his current affiliation is with the Peking University Transnational School of Law – Ray Campbell is unequivocal in his rebuke of the standard curriculum.

Law school as most of us know it is doomed. Law school today – which is but a gloss on Langdell’s Harvard – attempts to prepare students to practice general law in an 1870s world. Students learn a bit about criminal law, a smattering of contracts, a little about torts, a smidgeon of property law, some of the essentials about how cases are moved through a court system. When they emerge, they typically can read and analyse cases, and are told they have learned to “think like a lawyer.” In a way, they have. But, at least in the typical required curriculum, they haven’t been taught how to negotiate, they haven’t been taught how to build teams or work within organizations, and they haven’t been taught how to work with clients. They don’t learn project management techniques and wouldn’t know how to discuss modern information management technologies. It would be considered *déclassé* at most schools to suggest that they should learn how to market themselves, either within the organizations they will join or to the general public. They haven’t been shown how to build a balanced life in the law, one where they can achieve professional excellence and yet have a satisfying personal life. In short, they haven’t been

taught how to “think like a lawyer” in many of the core areas that define successful lawyers today, and will increasingly define them tomorrow.¹¹⁷

Even so, and despite the fact that US law schools are far more interdisciplinary than their European counterparts, it is in their inability to adapt to the multi-disciplinary and multi-dimensional reality of the legal services industry that Campbell sees the ultimate failure of law schools:

But that’s not why law schools are doomed. Law schools are doomed for a more fundamental reason: law schools train only lawyers. Like a zombie, law schools stagger forward reliant on a vision from a past life, ignoring today’s diverse world of legal services and the pervasive changes wrought by the rise of the administrative state. To live, legal education needs to be connected to law as it is experienced today. New institutions should be designed based not on what best serves law students or legal educators, but on what best serves the needs of today’s society.¹¹⁸

As seen in the present essay, this line of criticism has found some echo in some – albeit for now still somewhat isolated – corners of the European legal academy. Even though European legal educators have little incentive to embrace change, the odds are criticism will grow more frequent and more strident as law schools are perceived to fail their vocational mission.

¹¹⁷ Campbell, *supra* note 94.

¹¹⁸ *Id.*

The other challenge is research. To the extent that doctrinal scholarship continues to be their sole research output, European law schools will struggle to establish research credentials and risk gradual marginalisation within academia, to the point that their very place of the legal discipline within academia may one day be called into question.

In the present essay, I have made the case for Empirical Jurisprudence and argued that European law schools should embrace its research programme in order to address these two challenges. Law schools need not shed their hybrid identity as both vocational and academic institution. But they need to fulfil these two missions better. This is the promise of Empirical Jurisprudence.