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A Call for Developing a Field of Positive Legal Methodology

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SYMPOSIUM

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INTRODUCTION

This issue of *The University of Chicago Law Review* brings together leading scholars to discuss developing best practices for legal analysis. The goal of its organizers, however, is somewhat less modest: to encourage a movement that develops a positive legal methodology.

Years of reading legal scholarship have convinced us that scholars ought to devote more attention to positive methodology—figuring out how to tell what the law is—something that may seem like second nature to most lawyers, but that often relies on intuition and armchair persuasion.

To be sure, legal scholars have over time imported theory and methods from other fields—including economics, history, political science, psychology, sociology, biology, and anthropology—to make normative claims more rigorous. But most of that arbitrage is used to support or test policy implications of a law, not to determine what the law *is*. And in any event, we think law can and

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should contribute its own distinctive methodology, rather than being colonized by other disciplines. The movement we desire would meet this need by developing methods to determine what the law is and how best to apply (perhaps normatively motivated) methods of legal interpretation or analysis.

OUR ASPIRATION

The questions asked by courts and legal scholars are often divided into questions of fact and questions of law. Our focus is on questions of law. Even within questions of law there is another division: between the positive and the normative, between the law as it is and as it should be.[1] Our focus is on what the law is.

Many scholars prefer to emphasize normative claims, and we do not discount the value of that work. But even normative analysis often starts with or implicitly responds to positive claims. Arguments to change the law, or to resist a proposed change, may depend in part on what the law is. Arguments that a proposed change is dangerous or wise may depend in part on how much it resembles other legal rules we have had in the past. And, of course, those who want to know what the law requires *now* are asking questions about positive law.

Yet to answer this question, it is often necessary to adopt more controversial methodological views on what counts as law and how that material is to be interpreted. In other words, one must have a way of mapping facts about legal materials (for example, statutes and regulations, cases, legislative debates, histories of legal events, dictionaries, etc.) onto facts about what the *law* is. At this point, there is great temptation to return to or to allege a return to normative analysis. In debates over methods—for example, between strict textualism and multiple-source methods—it is often alleged that advocates support their preferred method because of the results the method reaches and not merely the route it takes to achieve those results, and the psychological literature on motivated reasoning suggests that some of those allegations are likely true.[2] These concerns are unlikely to go away.

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[1] See Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457, 457–58 (1897); William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 Harv L Rev 1079, 1093–97 (2017). See also generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593 (1958).

[2] See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla L Rev 1, 20 (2004) (questioning whether judges sometimes switch interpretive methods

But our goal is not to join the battle over which interpretive method is most desirable (at least, not here). *Instead, our proposal is to take interpretive method as given and ask, what are the best practices of applying it, and what results are returned by that application?* For example:

- If one thinks foreign law should inform interpretation of the US Constitution, what is the best method for identifying what foreign law is eligible for citation or reliance?

- If one accepts legislative history as a valid source for statutory interpretation, what is the best method to determine the relevant legislative history of a statute?

- If parol evidence can be used to interpret a contract, what sort of evidence can count as parol evidence and how does one weight the different sorts of evidence?

Of course, these questions do not fully escape normative issues. But as we move from interpretive method to application, the scope of normative disagreement declines and the relative importance of positive methodology rises.

What we hope to motivate is a movement to take up the question of best practices conditional on interpretive method—and to hold normative analysis constant. What does it mean to hold normative analysis constant? It means to pause when making arguments for one's normatively preferred version of the law and think about what factual claims have been made about the state of the law and how those factual claims about the legal world can be proven. It means to pause when arguing for or selecting a given mode of legal interpretation and think about how best to apply that method. Even when one is choosing methods of proof or best practices, there will be smaller normative questions, but one must try to be sensitive to and transparent about those in one's own work.

NEXT STEPS

This Symposium is a start. It showcases papers that try to develop and apply a methodology for positive analysis. Our paper,[3] along with the works of Professor Katerina Linos and Melissa Carlson[4] and of Professors Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler,[5] discusses empirical principles for canvassing cases and case studies. Judge Frank Easterbrook[6] and Professor Abbe Gluck[7] each demonstrate examples of the best practices for different theories of statutory interpretation. Professors Lawrence Solum[8] and Curtis Bradley[9] each put forward principles for the use of history in constitutional interpretation under a given methodology. Professors Fred Schauer and Barbara Spellman help us more rigorously understand analogical reasoning,[10] which is very common in law.

Meanwhile, Professor Richard Epstein[11] and Professors Tom Ginsburg and Nick Stephanopoulos[12] remind us of the importance of conceptual analysis in getting law right. And the works of Professor Richard Fallon[13] and of Professors Cass Sunstein and Adrian Vermeule[14] remind us that advances in interpretive methodology will always be important as well. Finally, Judge Richard

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[3]   See generally William Baude, Adam S. Chilton, and Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U Chi L Rev 37 (2017).

[4]   See generally Katerina Linos and Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U Chi L Rev 213 (2017).

[5]   See generally Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U Chi L Rev 7 (2017).

[6]   See generally Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U Chi L Rev 81 (2017).

[7]   See generally Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U Chi L Rev 177 (2017).

[8]   See generally Lawrence B. Solum, *Originalist Methodology*, 84 U Chi L Rev 269 (2017).

[9]   See generally Curtis A. Bradley, *Doing Gloss*, 84 U Chi L Rev 59 (2017).

[10]   See generally Frederick Schauer and Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U Chi L Rev 249 (2017).

[11]   See generally Richard A. Epstein, *Concepts before Percepts: The Central Place of Doctrine in Legal Scholarship*, 84 U Chi L Rev 99 (2017).

[12]   See generally Tom Ginsburg and Nicholas Stephanopoulos, *The Concepts of Law*, 84 U Chi L Rev 147 (2017).

[13]   See generally Richard H. Fallon Jr, *Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U Chi L Rev 123 (2017).

[14]   See generally Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U Chi L Rev 297 (2017).

Posner brings us insights about the judiciary, which has a crucial role in expounding the law.[15]

The next step is to support work that develops and executes positive legal methodologies, ranging from the empirical studies described by Bar-Gill, Ben-Shahar, and Marotta-Wurgler to the historical work described by Solum and Bradley. This means funding that work, using and applying it, citing it, and, ultimately, rewarding it in hiring and promotion decisions. We understand this is a bold request, as some of that work focuses on doctrine and top law schools often disdain work that they see as excessively "doctrinal" or "descriptive." But it is in the service of developing a legal methodology and, of course, valuable and reliable knowledge about the law.

In the long run, our hope is that developing best practices for legal analysis will translate into improved legal knowledge. For instance, if enough lawyers and scholars produced rigorous work along these lines, we would be able to set up a database modeled on the Cochrane Collaboration for medical systematic reviews or the Campbell Collaboration for public policy studies.[16] Such a website would enable people to quickly retrieve reliable and high-quality analysis on the state of the law, rather than forcing everybody to reexamine the primary sources or rely on their own intuitions. It would also begin a virtuous cycle by serving as a badge to distinguish rigorous doctrinal work. More generally, we hope to nudge the culture of the legal academy toward honoring the pursuit of legal truth.

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[15] See generally Richard A. Posner, *Legal Research and Practical Experience*, 84 U Chi L Rev 239 (2017).

[16] These databases are international research networks that produce systematic reviews of articles and other research publications. See *About Us* (Cochrane Collaboration), archived at http://perma.cc/6T3B-J53P; *About Us* (Campbell Collaboration), archived at http://perma.cc/E2LM-TNYN.