

“TESTING” FULLER’S FORMS AND LIMITS: A BRIEF RESPONSE TO OLDFATHER, BOCKHORST, & DIMMER

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INTRODUCTION

In *Triangulating Judicial Responsiveness*, Chad Oldfather, Joseph Bockhorst, and Brian Dimmer give us a methodology by which we can empirically assess (among other things) the effects that argumentation has on judicial decision making.¹ Unlike the vast majority of empirical legal scholarship of judging, the authors do not use this methodology in their current study to compare “legalist” explanations of judging with “realist” explanations of judging.² Rather, the study operates almost entirely within the “legalist” frame. This is a welcome development for many reasons, one on which this Response focuses—the authors’ methodology illustrates a way of scientifically “testing” descriptive legal theory claims, and it suggests an empirical way out of some longstanding theoretical disputes.

I. LEGAL THEORY AND LEGAL SCHOLARSHIP

Because many legal theory claims are primarily philosophical, their acceptance or rejection generally depends on what Thomas Ulen calls an “appeal to hypothetical-deductive argument,” rather than empirical testing.³ As a result, we tend to evaluate an existing legal theory based on whether a more logically and/or morally persuasive legal theory

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1. Chad M. Oldfather, Joseph P. Bockhorst, & Brian P. Dimmer, *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189 (2012).

2. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (explaining the differences between “legalist” and “realist” theories of judicial decision making).

3. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 896 n.65, 912 (2002).

exists. The familiar statement of this process is the axiom, often stated in legal scholarly workshops,⁴ and in some scholarly articles, that “it takes a theory to beat a theory.”⁵

This axiom seems particularly appropriate to critiques of normative philosophical claims. But if a legal theory is instead an explanation of some feature of the observable world and an accompanying set of predictions about how that world operates, then it is certainly possible for such a theory to be incorrect (or incomplete) even if a rival theory has not yet risen up to take its place.⁶ For example, political scientists and legal realists in the legal academy have posited for decades that judging is influenced by non-legal factors such as politics and judicial ideology.⁷ This claim is, at bottom, a descriptive claim about the observable world, a claim which might be verified or questioned based on empirical research. Indeed, scores of empirical studies attempt to assess the influence of politics and other non-legal factors on the outcomes of cases.⁸

4. Larry Solum's *Legal Theory Lexicon* sets forth a useful summary of the axiom, its use, and the best responses to it, in the workshop context. See Lawrence Solum, *Legal Theory Lexicon: It Takes a Theory to Beat a Theory*, *LEGAL THEORY BLOG* (Oct. 21, 2012), <http://lsolum.typepad.com/legaltheory/2012/10/introduction-it-takes-a-theory-to-beat-a-theory-this-is-surely-one-of-the-top-ten-all-time-comments-uttered-by-law-professo.html>.

5. See, e.g., Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 *YALE L.J.* 1435, 1435 (1983) (using the axiom to question critics of his then-recent article); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CINN. L. REV.* 849, 855 (1989) (using a variant of the axiom—“You can’t beat somebody with nobody”—to question theoretical critiques of originalism). Perhaps the most thoughtful analysis of the axiom in the pages of a law review comes from Professor James Ryan, who uses the axiom as the foundation of a persuasive critique of two recent books on constitutional interpretation. See James E. Ryan, *Does it Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 *STAN. L. REV.* 1623 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Cass R. Sunstein, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)). The axiom has also been called into question in the literature as a form of “physics envy.” See Daniel Farber, *Toward a New Legal Realism*, 68 *U. CHI. L. REV.* 279, 295 (2001) (reviewing CASS R. SUNSTEIN, ED., *BEHAVIORAL LAW AND ECONOMICS* (2000) and questioning the claim of rational choice theorists that behavioralist critiques of the rational choice theory should be rejected because “it takes a theory to beat a theory, and . . . the behavioralists have only assembled a collection of empirical regularities without any unifying theory”). Taking these treatments together, one can surmise that the axiom is particularly appropriate to normative debates over how the constitution should be interpreted (because “no interpretive theory” is generally not an option in that context), but may not be appropriate to debates over descriptive theoretical claims that may be subjected to empirical testing.

6. See Ulen, *supra* note 3, at 911–12 (focusing on theories that include empirically verifiable predictions of the consequences of adopting legal rules).

7. See generally Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 *U. CHI. L. REV.* 831 (2008).

8. See Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 *ST. JOHN'S L. REV.* 231, 236 n.15 (2009).

Most such studies state descriptive conclusions regarding the significance of the influence of measured variables on decision making, along with general conclusions as to the importance of the findings for the rule of law.⁹ As Brian Tamanaha points out, though, in offering value judgments regarding the implications of non-legal factors' influencing judging, the existing studies of judicial decision making omit a necessary first step—they fail to define "rule of law baselines."¹⁰ That is, without an agreed starting point that reflects a consensus about the proper drivers of judicial decisions, it is impossible to know whether we should be concerned about a statistically significant finding that ideology, or politics, or some other legal factor influences decision making. Put another way, while the existing studies tell us lots about *statistical* significance, they tell us less about *practical* significance. Setting baselines bridges this gap.

II. SETTING BASELINES AND "TESTING" THEM

Baselines, it seems, will inevitably have their foundations in positive legal theory claims. For us to agree that a particular statement of the rule of law is indeed a baseline, we must be able to verify that the statement accurately describes an element of the rule of law. *Triangulating Judicial Responsiveness* illustrates one way in which such verification can proceed empirically. Lon Fuller's *The Forms and Limits of Adjudication* makes up a significant part of the theoretical grounding for the methodology the authors design.¹¹ Drawing from the "forms" section of Fuller's paper, the authors essentially take as a verifiable rule-of-law baseline that, for a decision making process to count as "adjudication," it must engage the parties through the "presentation of proofs and reasoned arguments."¹² They then construct measures of "judicial responsiveness," which employ content analysis to measure the judge's attention to the parties' arguments and the authorities on which the parties rely in making their arguments.¹³

The authors' analysis proceeds on the assumption that, where a judge is "strongly responsive," it is likely that the parties' right to participation through proofs and reasoned arguments has been

(collecting numerous law review articles presenting empirical findings on judicial decision making as of 2009).

9. See, e.g., Miles & Sunstein, *supra* note 7, at 844 (commenting on the rule-of-law implications of judicial politics scholarship).

10. See Brian Z. Tamanaha, *Devising Rule of Law Baselines: The Next Step in Quantitative Studies of Judging*, THE LEGAL WORKSHOP, DUKE LAW JOURNAL (March 25, 2010), <http://legalworkshop.org/>.

11. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

12. See Fuller, *supra* note 11, at 365.

13. Oldfather, Bockhorst, & Dimmer, *supra* note 1, at 1221–25.

fulfilled.¹⁴ The results of their study show that the authors' methodology is a good measure of judicial responsiveness, based on correlations between manually coded cases and cases coded based on automated content analysis, as designed by the authors.¹⁵ The authors go on to suggest that their methodology can be used to establish "baselines" of judicial responsiveness from which we might evaluate the "quality" of judicial decision making, and that is certainly true.¹⁶ But the really exciting potential uses for this methodology, in my view, will involve "testing" the underlying rule-of-law baselines on which it is founded. For example, if studies of judicial responsiveness show through content analysis that judges are, as a general matter, weakly responsive or even non-responsive, then such findings may call into question Fuller's descriptive legal theory claim itself.

Even accepting Fuller's primary descriptive claim about adjudication's "forms," we might draw from the "limits" portion of Fuller's article a set of testable predictions. Fuller's "limits" argument focuses on "polycentric" problems—problems that cannot be solved without affecting many related matters, most of which will not be known to the court.¹⁷ Fuller predicts that, where an arbiter is faced with a polycentric problem, the arbiter will take one of two actions. The arbiter may alter the process to fit the problem, for example by allowing non-parties to present arguments, or by guessing at facts on which the parties are unable to offer proofs.¹⁸ Or, the arbiter may alter the problem to fit the process, for example by converting political resource allocation claims into claims of right.¹⁹

Measuring correlations between the language of briefs and judicial orders may allow us to see whether judges are in fact altering processes to fit polycentric claims, or claims to fit the adjudicatory process. Taking Fuller's "forms" as a baseline, we might than draw empirical conclusions as to whether certain types of claims are suitable for adjudication, or are better suited for political decision making or private ordering, or whether concerns over the adjudication of political-sounding controversies are in fact not well-founded. Such studies might one day provide an empirical foundation for the political question doctrine, for example, or a foundation for its rejection.²⁰ Of particular interest to those of us who study institutional reform litigation, the

14. *Id.* at 1221.

15. *Id.* at 1236–37.

16. *Id.* at 1238.

17. See Fuller, *supra* note 11, at 394–95.

18. *Id.* at 401.

19. *Id.* at 401–03.

20. See generally Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (theorizing "there may be no doctrine requiring abstention from judicial review of 'political questions'").

authors' methodology perhaps presents us with a new way to evaluate our descriptive and consequential claims about this form of adjudication, moving beyond the current empirical studies, which focus heavily on the "success" or "failure" of such litigation in causing large-scale change,²¹ and toward more systematic examinations of the actual effects that such litigation has on the adjudicatory process.

CONCLUSION

Ultimately, numerous uses likely exist for the methodology developed in *Triangulating Judicial Responsiveness*, many of which the authors anticipate.²² My modest aim here has been to connect up the concepts of setting baselines for empirical evaluations with some more ambitious potential uses for this methodology, some of which will involve testing and potentially rejecting some of these very baselines themselves. Fuller provides a useful set of baselines with which to start, and *Trangulating Judicial Responsiveness* provides a promising way to test and evaluate these baselines.

21. See, e.g., MATTHEW E. K. HALL, THE NATURE OF SUPREME COURT POWER (2011) (finding, based on empirical analysis, that the Supreme Court can be an effective agent of large-scale social change where its rulings can be directly implemented by lower courts, or where the public will does not stand opposed to the Court's rulings); GERALD N. ROSENBERG, THE HOLLOW HOPE (2d ed. 2008) (questioning the enterprise of institutional reform litigation based on an empirical evaluation of its results).

22. See Oldfather, Bockhorst, & Dimmer, *supra* note 1, at 1238–41.