

2015

A Personal Report on Methodological Developments in US Law

Stephen Utz
University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers



Part of the [Jurisprudence Commons](#)

Recommended Citation

Utz, Stephen, "A Personal Report on Methodological Developments in US Law" (2015). *Faculty Articles and Papers*. 487.

https://opencommons.uconn.edu/law_papers/487

CHAPITRE 9

A Personal Report on Methodological Developments in US Law

STEPHEN UTZ
Professor, School of Law, University of Connecticut

I. Introduction

A survey of contemporary legal research in the United States must to some extent be personal and impressionistic. No one can see the entire landscape or has the expertise to evaluate everything in it. The pitfall of myopia is heightened by the enormous variety of current methods and results, the need to mention and evaluate areas of specialty in which things are going well or poorly, and publication biases that should not influence content but inevitably do. The already huge variety of books, journals, and commercial guides to particular legal subjects has been overshadowed by an uncountable array of electronically circulated working papers, blogs, symposia, and conference proceedings. With that disclaimer, what follows is my own view of what legal scholarship in the USA is like at the present moment.

II. An anti-systematic background

At the outset, it is useful to note that, in comparison with the legal literature of countries with code-based law, those of the United States and other common law countries seem reluctant to address problems of legal methodology directly. Our default approach has

been to rely on the shared attitudes and techniques of exegesis we all learn in a relatively inarticulate fashion in the first year of law school. Generally, my legal compatriots are not particularly conscious that they might do more in this respect and that the failure to do so can harm otherwise expert reasoning about the law. Nevertheless, the USA has consistently produced a small but interesting literature on distinctive issues of legal interpretation. Recently, that literature has taken on a wider array of methodological puzzles and has begun to exercise a distinctive influence on the judiciary and the community of practicing lawyers as well as on academic lawyers who are not primarily methodologists.

A wider theoretical background in the USA partly accounts for the relatively little time devoted here to specific puzzles about legal reasoning. Influential shifts in American legal thought – big movements associated with prominent legal thinkers like the American Legal Realists or the inventors of Critical Legal Studies – have captured the high ground of public attention, leaving the task of surveying how law works in detail to languish. We seem instead to regard comprehensive effort to understand law in all its branches as tedious, the easy domain of retired judges and commercial digest authors.

Another influence that has diverted our attention from methodology is that of traditional legal pedagogy. The once-prevailing style of teaching law in the United States, the “case method,” shaped all thinking here about interpretation of the law for almost a century. Harvard Law School invented this method while inventing itself as the domestic standard of an academically ambitious professional school for lawyers, influenced to a great extent by German universities’ recognition of the “science” of law. Using case-intensive discussion of legal rules, the instructor could adopt a posture of agnosticism as to the reasoning and holdings of particular cases, leaving it to students to construct their own views on these matters. In this respect, the case method became emblematic of a kind of skepticism about the need for broad vision and generality. It left generations of American lawyers with the lesson that one could get along perfectly well without a self-conscious understanding of legal methodology.

More theoretically minded early law professors quickly lent their support to a debunking and castigation of “formalism,” which with hindsight we can recognize not to have been a genuinely shared view of earlier lawyers or lawyer academics, but an invented opponent of right thinking. H.L.A. Hart, writing roughly 60 years after

the first attacks on formalism, labeled the attackers “rule skeptics”¹. He treated them gently, in examining their arguments and the weaknesses of their conclusions, but the label was itself a sort of revelation : it pointed to the movement’s lack of constructive conclusions. Anti-formalism itself gave way to another, slightly less skeptical movement in law teaching, associated with the term “legal process”². But during and after the Viet Nam War, radical skepticism of the content of judicial decisions, focusing on American courts, arose. The Critical Legal Studies Movement and related movements that draw on some of the same hermeneutic criticism of the law revived the American Legal Realists’ broad-brush doubts about legal institutions³. Finally, over the last decade or so, a new generation of legal methodologists has emerged among US legal scholars. They have called stressed problems of legal reasoning, some of which the “Crits” also recognized, but have proposed less far-reaching diagnoses of the sources of these problems.

As a renewed interest in constructive legal methodology has come to the fore, criticisms of “critical” theories of the law have arisen as well. Earlier skeptical accounts of how law works are being supplanted by more affirmative accounts. Some of the more recent work on legal methodology relies on specialized theories developed in linguistics and formal logic, as tools for understanding how statutes and rules derived from case law should be interpreted.

Judges and practicing lawyers have long complained that academic legal scholarship – especially, law review articles – have little relevance to their work. This may partly account for the emergence of a large number of sophisticated legal journals, the content and editorial procedures of which contrast sharply with those of law-school-based law reviews. Despite their practice orientation, these legal journals publish works of higher quality than was typical of similar practitioner-edited journals thirty years ago. They are, however, well attuned to judicial and practitioner interests.

1. H.L.A. HART, *The Concept of Law*, Oxford, Oxford University Press 1961 ; 2^d ed. 1997, ch.7.

2. H. M. HART JR. and A. M. SACKS, *The Legal Process : Basic Problems in the Making and Application of Law*, New York : Foundation Press, 1956 ; S. UTZ, Problems in American Legal Methodology, in *Rechtsgeschäft, Methodenlehre, und Darüber Hinaus : Liber Amicorum für Detlef Leenen*, Berlin, C.H. Beck, 2012.

3. D. KENNEDY, “Form & Substance in Private Law Adjudication”, 89 *Harv. L. Rev.* 1685, 1976.

Beneath the radar, however, it must be emphasized that legal academics now embrace a far less abstract approach to teaching their subject matter. There is currently a vogue for more experiential teaching – for the use of various forms of simulation exercises in what previously were strictly verbal investigations of legal content. Even philosophers of law are often prepared to take their students to courthouses for a glimpse of what practicing lawyers do well (or not).

III. A diversity of platforms

For many American lawyers, the term “law review” means a legal journal published by a law school, often without limitation to a specific area of the law. This kind of law review became prevalent during the early decades of the twentieth century, when the Harvard method to legal instruction, referred to above, was taking hold as the standard. At first, the faculty of law schools wrote most of the articles, selected the rest, and oversaw the work of student contributors, who wrote “notes” or short articles on new legal developments, mainly recent judicial decisions. All that changed during the 1930s, when one law faculty after another decided to leave the selection and editing of *all* law review articles to student editors. This notorious abandonment of responsibility by law professors has always been a target for criticism. In a 1936 law review article, Yale law professor Fred Rodell excoriated the quality of both the writing and the content of most law review articles⁴. Many have echoed him since. Most recently, Justice John Roberts, the Chief Justice of the Supreme Court, has said : “Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar”⁵. This and an array of similar judicial dismissals of the law review literature are collected in a recent New York Times article that may be of greater influence than the eminent judges it quotes. Adam Liptak concluded in this article that : “The general debate on how to improve law reviews is an old one, and there is little prospect of change. Law reviews

4. F. RODELL, “Goodbye to Law Reviews”, 23 *Virginia L. Rev.* 38-45, November 1936.

5. A. LIPTAK, *The Lackluster Reviews That Lawyers Love to Hate*, New York Times, October 21, 2013.

will continue to publish long, obscure and dated articles, and their readership and influence will continue to drop”⁶.

Not only are US law reviews reviled for their irrelevance, but it is also characteristic for them to publish only articles of much greater length than academic legal journals of other countries normally publish. Often, these long articles propose a framework for the core argument that is as complex and difficult to present as the primary argument. That is because the shared aspiration of so many such articles is to “break the mold”, to be a “game changer” in an area that may itself not be widely recognized to have a status quo against which the article’s novelty can be measured. This pretentiousness is no doubt a consequence, to some extent, of the role articles play in the “tenure process,” the crucial evaluation of junior faculty for permanent retention on a faculty.

IV. Absence of Treatises

The disappearance of scholarly treatises must surely strike most legal academics and practicing lawyers from other jurisdictions as among the most peculiar features of the US legal scene. It would have surprised many in this country only a few years ago to be told that treatises were about to disappear, like dinosaurs in an ancient ice age.

The term “legal treatise” is used by my countrymen to refer to more than one kind of compendious book with legal subject matter. The term covers generally any book that surveys an entire area of the law. Now that the law in all countries that have highly developed legal systems has attained a high degree of complexity, the subject matter of a treatise can be only a small part of what would once have been itself a relative specialized area of the law. For example, the law of products liability, once a small part of tort law in the common-law countries, is now so highly developed and elaborate that it no longer makes sense to treat it as a subtopic of the earlier field that spawned it.

US treatises, however, fall into three fundamental categories. The older category is that once dominated by academic writers and often dedicated to emerging or less obvious general areas of law. Among them were the classic treatises by Grant Gilmore and Charles Black

6. *Idem.*

on admiralty law and by Boris Bittker and James Eustace on corporate tax law⁷. Other treatises were and still are sponsored by commercial legal publishers and usually written by non-academic authors. The quality of this second category is mixed, although some are of excellent. The third category includes shorter treatises written primarily by academic authors and intended to serve as “hornbooks” or supplementary texts for specific law school courses ; these usually do not attempt to cover an entire legal area but only the selected portions of an area that can practicably be covered in a one- or two-semester law course. Examples include Joseph Singer’s treatise on property law⁸ and William Stoebuck and Dale Whitman on property law⁹. This last category are not works of serious scholarly ambition but are understood by their audience to be selective not only in their coverage of topics but also in their reporting of cases and statutes.

V. Conspicuous parts of US legal research

The reader may reasonably anticipate that a more detailed view of what goes on in a country’s legal literature should be organized into subject or topic areas. If divisions of that sort were clearly visible in the US literature, a survey could easily reflect them. In fact, both subject matter and research methods must be mentioned in order to give a useful overview here. The methodology of legal reasoning is not at issue. For example, the law-and-economics movement has only occasional and controversial relevance to court decisions and the interpretative work of jurists, although it looms large in law reviews. The same is true of the current vogue for empirical and especially statistical methods of legal argumentation in law reviews – this is not reflected in the work of judges or practitioners ; neither are gleanings from cognitive science or behavioral economics. Indeed, the most natural place to begin the present survey is with schemes of research that are *not* confined to one or a few subject areas.

7. G. GILMORE and C. BLACK, *The Law of Admiralty*, New York, Foundation Press, 1975 ; BORIS BITTKER and JAMES EUSTACE, *Federal Income Taxation of Corporations and Shareholder*, Boston, Warren, Gorham & Lamon, 2000, now listed as [“with the collaboration of Gersham Goldstein”].

8. J. SINGER, *Property*, Boston, Aspen, 3^d ed. 2009.

9. W. B. STOEBUCK and D. A. WHITMAN, *Law of Property*, New York, Foundation Press, 3^d ed. 2000.

Of these, until recently, the most prominent were law-and-economics and various types of “critical” legal theory. Exponents of both of these self-consciously systematic approaches held themselves out initially as inimical to each other – economic analysis was thought to dispel the apparent relevance of interest group politics on the law, while critical theory purported to expose the deeply rooted relevance precisely of class and group interests. The heyday of this opposition, however, has passed. Even the principal spokespersons of the now venerable Critical Legal Studies movement have begun to declare it irrelevant to current debates¹⁰. Other critical approaches have also begun to lose steam and to soften the defiant tone that was formerly characteristic of them¹¹. “L & E,” as the law and economics movement is known to legal academics, has not disappeared but has lost its oppositional character and become politically neutral : it has prominent proponents on both the right and the left¹².

Statistical methods, in the US as elsewhere, now enjoy great prestige in academic legal research agenda¹³. What is most notable about the US version of this phenomenon is the influence it has had on how criminal and administrative law is investigated (study of stops, Richard Parker). Criminal law, in particular, once attracted very little academic interest. In the US, criminal law is overwhelmingly the product of state legislatures, not of Congress. Local variations and the more modest level of expertise and skill exhibited by state legal codes have made it less interesting to researchers, not to mention the comparative rarity of problems of interpretation raised by criminal statutes. Statistical methods are also being applied here

10. D. KENNEDY, “Form & Substance in Private Law Adjudication”, 89 *Harv. L. Rev.* 1685, 1976 ; M. TUSHNET, “New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries”, 38 *Wake Forest Law Review* 813 (2003).

11. R. DELGADO, *Critical Race Theory: An Introduction*, NYU Press, 2^d edition 2012 ; P. WILLIAMS, *The Alchemy of Race and Rights*, Cambridge, Mass., Harvard U. Press, 1991.

12. L. KAPLOW, “Discounting Dollars, Discounting Lives : Intergenerational Distributive Justice and Efficiency”, 74 *University of Chicago Law Review* 79, 2007 ; S. M. SHAVELL, “Strict Liability versus Negligence”, 9 *Journal of Legal Studies* 1, 1980 ; P. SIEGELMAN and T. BAKER, “The Law & Economics of Liability Insurance”, in J. ARLEN (ed.), *Research Handbook in the Economics of Tort*, Cheltenham, UK, Edward Elgar, 2013 ; T. ULEN, “The Economics of Tort Defenses”, in J. ARLEN, (Ed.), *The Law and Economics of Tort Liability*, Cheltenham, UK, Edward Elgar, 2011 ; R. POSNER, “Statutory Interpretation – In the Classroom and in the Courtroom”, 50 *U. Chi. L. Rev.* 800, 1983.

13. See, e.g., H. E. JACKSON *et al.*, *Analytical Methods for Lawyers*, New York, Foundation Press, 2nd ed., 2011.

to employment law¹⁴, law reviews themselves,¹⁵ welfare law¹⁶, law practice and ethical issues¹⁷, banking and consumer credit law¹⁸. In the recent hiring season for new law professors, a disproportionate fraction of job candidates presented work that employed statistical methods.

But statistical reasoning is not suited to many complex policy issues. In the field of tax policy, for example, it is difficult to see how the necessary simplifications of null hypotheses and assumptions about the independence of variables can be adapted to questions about the economic distortions caused by highly flexible tax rules for changes in corporate form, for the amortization of investments in intangibles, and so forth. Early writers on political economy – Ricardo, Say, McCullough, Mill – devoted roughly one-third of the lengths of their ground-breaking books to income taxation, and this was no accident. The scope but also the uncertain empiricity of modern economics developed naturally only when the viewpoint of the public and not only that of autocratic sovereigns first became relevant to the problems of public finance.

Although modern economics is certainly not the only discipline that should or does influence tax policy today, it is still the most highly developed tool the area has at its disposal, and the peculiar resistance of economic theory to empirical testing has not been changed by the growth in number and inventiveness of empirical economics. In the US, the National Bureau of Economic Research is the most important umbrella group and promoter of macroeconomic research. It maintains a database of working papers and more formally published work and commissions experts to summarize the research projects and results of individual economists. While only a fraction of the NBER's work focuses on tax-related issues, it is a very large fraction. The data-driven portion of this fraction points out intriguing but usually inconclusive correlations between economic

14. S. S. PANDYA and P. SIEGELMAN, "Underclaiming and Overclaiming", 38 *Law and Social Inquiry* 836-862, 2013.

15. A. YAPHE, "Taking Note of Notes : Student Legal Scholarship in Theory and Practice", 62 *J. Leg. Ed.* 259, 2012.

16. K. S.GUSTAFSON, *Cheating Welfare : Public Assistance and the Criminalization of Poverty*, New York, NYU Press, 2012.

17. L. C. LEVIN, "Guardians at the Gates : The Backgrounds, Career Paths and Professional Development of Private U.S. Immigration Lawyers", 34 *Law & Social Inquiry* 399, 2009.

18. P. MCCOY, "A Behavioral Analysis of Predatory Lending", 38 *Akron L. Rev.* 725, 2005.

phenomena and tax rates, adjustments to tax bases, and tax design generally. In comparison with these studies, bolder model-building projects, of which the most prominent by far is optimal tax theory, have a greater influence on policy debates, precisely because they speak in more general terms and offer hypotheses about broad tax design choices¹⁹. On the whole, broad theoretical work is of greater relevance than small-scale empirical studies to scholarly discussions of tax policy. To the extent that US legislators in Congress or at the state level pay any attention to fact or theory, they are also more likely to respond to broad design advice than to incremental and tentative findings, even though only the latter are directly based on empirical data. Accordingly, US tax law journals are still dominated by narrow discussions of existing law and theoretical discussions without evidence-based foundations.

One notable development in US academic research is a new interest in statutory interpretation. It must first be said that any activity at all in this area is a significant change from what has been a longer period of stagnation. At infrequent intervals, great names in American law, like Justice Oliver Wendell Holmes, Jr., John Chipman Gray, Justice Benjamin Cardozo, Edward Levy, and Lon Fuller, have published brief discussions of the major problems raised by precedent and the common law. On the whole, their contributions have been elementary or even superficial, offering not much more than a restatement of the obvious puzzle : whatever claims of fidelity to precedent judges may make, is there any reality to the supposed continuity of judge-made law that is not itself subject to articulate, independent standards ? Most lawyers in this country are satisfied with Ronald Dworkin's account of the continuity as comparable to that of a game in which the players each write a chapter of a novel, without first agreeing on its plot, able only to see the previous chapters²⁰. The weakness of this account lies in the fact that the players of such a game, and common-law judges, can of course do whatever they please, as long as they maintain some sort of continuity : each player may otherwise feel bound by a different standard or even consider herself bound by no standard at all. In brief, the existing

19. S. UTZ, *Tax Policy : An Introduction and Survey of the Principal Debates*, Minneapolis, Minnesota, West Publishing Co. 1993, ch. 13.

20. R. DWORKIN, *Law's Empire*, Cambridge, Massachusetts : Harvard U. Press, 1986.

literature on legal methodology in this country has itself been exhibited a relatively superficial continuity.

Some recent writers, however, devote their attention exclusively to statutory interpretation, sidestepping the broader discussion of the common-law method and instead taking its basic features for granted²¹. Notably, Professor William Eskridge of Yale Law School argued for “dynamic statutory interpretation,” making somewhat more precise a theme that is not new to the legal academy but had not previously been singled out for close examination²². It is that statutory interpretation should be governed above all by the purpose of the statute in question, in an appropriately wide sense of the word “purpose,” which may vary with context. A court’s reading of a statute that sets forth the rights of landlords and tenants should be sensitive to whether the legislature wanted to preserve the quality of the rental housing stock or to safeguard the parties’ intentions. Separately, Scott Brewster and Ernest Weinrib, both at Harvard Law School, have engaged in an elaborate debate about the analogical reasoning in the common law²³. Brewster, trained in philosophy, proposed that what is often described as analogical reasoning from precedent is better understood as “abduction” from specific fact patterns to be brought under a single rule. Weinrib argued that there are other varieties of analogical reasoning to be found in familiar parts of the common law. Neither, however, addresses the elastic scope of the term “analogy,” or considers its possible over-use by the few legal methodologists in the older US legal literature²⁴.

Approaching the problem of method from a different angle, legal scholars have recently highlighted problems raised by the lawyerly tradition, perhaps in all common-law jurisdictions but at least in the US, of *misreading* referentially opaque language in statutes and other legal materials. Philosophers and linguists, since the late 19th century, have noted and attempted to explain more fully how words function when they follow certain types of verbs, especially those

21. J. SCOTT, “Codified Canons and the Common Law of Interpretation”, 98 *Geo. L. J.* 331, 2010.

22. W. ESKRIDGE, *A Republic of Statutes : The New American Constitution*, Yale University Press, 2010.

23. S. BREWSTER, “Exemplary Reasoning : Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy”, 109 *Harv. L. Rev.* 923, 1996 ; L. L. WEINREB, *Legal Reason : The Use of Analogy in Legal Argument*, Cambridge, England, Cambridge U.P., 2005.

24. UTZ, 2012, pp. 300-307.

that express the content of mental states or rely on such content for their truth value. “I’m looking for a dog” is ambiguous because the speaker may be looking either for a particular dog or for any dog at all. Medieval logicians had already labeled this feature of descriptive language by calling the first sort of meaning *de dicto* and the second *de re*²⁵. Many languages, like French, set apart some or all linguistic contexts in which words are used *de dicto* and not *de re* by the use of the subjunctive mode of the verb within these contexts. For example, “Je veux que tu me rendes mon pull” means that I want you to return the sweater I consider mine, even if there is no such thing²⁶.

One of the foremost exponents of current American methodological research, who uses linguistic and logical research tools, is Professor Jill Anderson. She has pointed out a pattern of word-by-word interpretation by courts that overlooks aspects of the meaning of sentences that would be obvious to nontechnical speakers of English²⁷. For example, she analyzes the repeated judicial misinterpretation of the Americans With Disabilities Act, which prohibits discrimination against the disabled. The act defines disability as the impediment of “one or more life functions” of the individual. Courts have definition to imply that they cannot find a defendant’s conduct to be discriminatory on the basis of disability, unless the plaintiff can prove that the defendant discriminated with respect to a particular life function of the plaintiff that is impaired. Thus, a defendant’s admitted discrimination against an individual on the grounds that she “was disabled” would not be actionable. It cannot be said of such misinterpretation that it is even excessively literal, since no ordinary user of English would interpret the statute in this way. Similarly, Professor Anderson has criticized the Supreme Court’s interpretation of the word “any” in *Coraco Pharmaceutical Labs v. Novo Nordisk*,²⁸ on the grounds that the Court mistook the limiting function of that word by mistakenly treating it as having the same meaning as the definite article, when the word can in fact mean some one thing among many of a certain kind. The fallacy in the Court’s reasoning

25. P. GEACH, *Reference and Generality: An Examination of Some Medieval and Modern Theories*, Cornell Univ. Press 1962.

26. J.-P. SARTRE, *L’Être et le Néant. Essai d’ontologie phénoménologique*, Paris, Éditions Gallimard, 1943.

27. J. ANDERSON, “Just Semantics : The Lost Readings of the Americans with Disabilities Act”, *117 Yale L.J.* 992, 2008, p. 210.

28. 132 S. Ct. 1670, 566 US – (S. Ct. April 17, 2012).

is that highlighted in Sartre's observation concerning *de dicto* and *de re* utterances, discussed in the previous paragraph.

VI. Conclusion

Despite the absence of a broad tradition of methodological study among US legal scholars, the modest literature by my compatriots on distinctive issues of legal interpretation has grown markedly in quantity and quality over the last two decades. Contributors to this literature have identified previously unnoticed methodological puzzles, and their proposed analyses of these puzzles have begun to exercise a notable influence on judges, practicing lawyers, and the scholarly world. The prominence of American Legal Realism, the pedagogical Legal Process Movement, and the more recent Critical Legal Studies Movement formerly distracted attention from narrowly framed questions of legal interpretation, coordination, and renovation. This may have contributed to the fall in prestige of legal treatises and law reviews concerned with incremental changes in the law, the sort of legal development that is of greatest concern to the bench and the bar. Prompted by idiosyncracies of statutory interpretation, however, a new generation of methodologists have found these narrow questions interesting and have begun to propose analytical responses to them that may change the course of judicial interpretation in particular cases, while also alerting practicing lawyers and scholars that some of their most deeply rooted instincts, carefully cultivated in traditional law-school instruction, are due for re-examination and, in some instances, correction. The methodological toolbox of these new scholars includes empirical methods, especially, those borrowed from the social sciences, as well as economic, linguistic, and logical modes of analysis. As a consequence of this turn of events, it may be hoped that courts and law schools alike will focus more consciously on core questions of interpretation and of the systemic coherence of US law.