NOTES | Dr. Shepard
Legal and Historical Research

Cates

- Does law have any meaningful methodology to contribute to communications or other social science research? Yes, legal scholarship does, in fact, use a variety of methodologies.

- "Schools of Legal Analysis"
    - **Common and Civil Law Systems:** resolution of specific disputes create precedents to apply to future disputes
    - **Legal Formalism and Positivism:** intricacies of legal argument; law and legal rules as procedural and substantive
    - **Natural Law and Utilitarianism:** values and principles, desired outcomes
    - **Legal Realism:** looking outside the legal system to results, effects and context
    - **Economic Analysis of Law:** cost-benefit analysis
    - **Critical Legal Studies:** legal outcomes reflect bias, ideology, politics, wealth, power, status and extra legal factors
    - **Feminist Legal Studies:** inherent gender differences
    - **Critical Race Theory:** minority ethnic groups have distinct views, perceptions, experiences not fully recognized by mainstream
    - **Law and Society:** study the operation and impact of law from the perspective of other disciplines

- Four "analytical tools"—or are they methodologies?
    - **Precedent:** How well does a current or proposed application of the law comport with past decisions?
    - **Codified Rules:** constitutional, statutory and rule-based analyses: Did a court or other decision maker act as commanded by legislation or administrative rule?
    - **Policy Analysis:** focused on outcomes and asks whether the result of a particular legal decision or enactment is fair, efficient, or consistent with what the decision maker intended
    - **Procedural Analysis:** focuses on variety of questions involving the authority and competence of the decision maker, the process employed in arriving at the decision, and the impact that process has on the substantive outcome of a legal question or dispute

Nerone

- Journalism historians' work should be about the relationship between past journalism and present journalism
- Built-in identity crisis for media historians: part of a broader core of professional knowledge (law, ethics, history) or specialized field in history departments
- Methodological embrace of "History" – comes at the expense of its relationship to communication research or media studies
- Journalism and communication studies investigate a range of questions that can be answered through historical study: framing, agenda-setting, sourcing
- One rule of thumb for good journalism history: it changes a sentence in a journalism history textbook

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Chapter 2

Method in Our Madness: Legal Methodology in Communications Law Research

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As a law professor specializing in communications law, I often find myself as the external member of qualifying examination and dissertation committees for doctoral students in journalism and telecommunications. Having grown up in a field in which the JD, rather than the PhD, is the teaching degree, I have never fully understood all of the rites of this process. Without question, the most mysterious parts deal with methodology. I have read countless essays and participated in dozens of dissertation defenses that discuss, seemingly without end or purpose, independent and dependent variables, inductive and deductive reasoning, regression analysis, and standard deviations.

Occasionally, a colleague who works in the social sciences, but has training or an interest in law, will ask a candidate a question about "legal methodology." This is one of the moments I fear most—when I must exert the greatest energy to ensure that my face does not look as blank as the candidate's. Fortunately, with a little preparation, the occasionally sagacious nod, and vigilant silence, I usually can keep my fellow committee members—not to mention the candidate—from catching on to how completely lost I am.

This worked relatively well until the qualifying exam of Brooke Barnett, one of the editors of this volume. In her exam, she was asked—not by me, to be certain—how a scholar would approach a certain problem using legal methodology. Her written response—that there really was not any such thing as legal methodology—struck me as vaguely

sensible even if something of a slight to my academic discipline. My immediate concern, however, was that the issue might come up when the committee met with her to discuss her responses.

Sure enough it did. The faculty member who had posed the initial question—an obvious troublemaker—asked Brooke to comment on her dismissal of legal methodology. Whatever she said as I was busy trying to look thoughtful and nod sagaciously, its effect was to reiterate that law did not have many analytical tools to contribute to social science research.

"I am sure Professor Cate wouldn't agree," Brooke's inquisitor retorted, as he and the other committee members turned their eyes on me. My worst nightmares were realized as a blank look replaced my mask of wisdom. "I think she may have been a little harsh," I stammered, and then took the road of all professorial cowards and asked Brooke to expand on her answer.

The underlying question—Does law have any meaningful methodology to contribute to communications or other social science research?—was left unanswered and surprisingly, given how much lawyers like to write about everything, appears largely unexamined. Methodology is just not a subject legal scholars tend to address explicitly, either in the classroom or in published research. Our failure to do so not only threatens to undermine the rigor and reliability of legal research, it also obscures the fact that legal scholarship does, in fact, use a variety of methodologies, which are indeed useful for communication researchers.

In the pages that follow, I describe, briefly and in broad terms, some of the major schools of legal thought, each of which involves different methodologies. In fact, it would be no exaggeration to say that one of the characteristics that most distinguishes each of these schools from the others is their different methodologies. I conclude by addressing four specific analytical tools that are crucial to legal scholarship and relevant to communication and other social science research.

SCHOOLS OF LEGAL ANALYSIS

Common and Civil Law Systems

Statutes and case law

The early Western legal systems, on which the U.S. legal system has drawn most heavily, are generally divided into those based on civil (also called Roman or code) law and those based on common (or case) law. Civil law, which the Romans spread throughout continental Europe, relied on extensive written codes—what today we would call statutes, rules, and regulations. In theory, albeit admittedly oversimplified, the answer to any legal problem was codified somewhere. The role of the civil law system, therefore, was primarily to ensure that the facts of any dispute or issue were correctly adduced and the right codified law applied.

Common law, by contrast, although not devoid of written laws, relied far more heavily on the resolution of specific disputes to create precedents that could then be applied to future legal disputes. Therefore, the common law system placed great emphasis on the adversarial role of attorneys to help hone factual and legal disputes and determine which of potentially many conflicting precedents applied to the case at issue. Whereas the raw material of the civil law system was complex codes, the raw material of the common law system was a constantly expanding array of precedents, each of which was highly fact-specific. These precedents might conflict among each other and from jurisdiction to jurisdiction, and they might even include divergent legal interpretations within a specific case. In House of Lords decisions, for example, each law lord might write his own opinion for why a case should be decided a certain way, none of which would be labeled as *majority* or *dissenting* opinions. Common law was uniquely English and exerted far greater influence on the early development of U.S. law; only the legal system of Louisiana, with its French origins, was explicitly based in civil law.

As can easily be imagined, the methodologies of these two systems—the ways in which they analyze and solve questions or disputes—are quite different. Although both systems require some way of determining facts that are in dispute, the civil law system relies heavily on judges to be fact-finders. Once the facts become clear, application of the law is really a matter of looking it up. In the common law system, by contrast, judges are more like referees or umpires between attorneys who fight not only about the facts, but also about which precedents should be applied and why. Categorization, as my colleague Professor Don Gjerdingen has noted, is therefore one of the key tools of the common lawyer.

In the United States, the two systems have blended significantly. Although scholars usually describe the U.S. legal system as being based in common law, most states have codified the widely accepted principles of common law precedents into statutes and regulations. By the start of World War II, the U.S. legal system, although often still referred to as a common law system, had evolved millions of statutes and regulations necessary, or at least more appropriate, for regulating an industrial economy.

Legal Formalism and Positivism

Moreover, both common and civil law systems contribute to the development of law as a set of fairly technical rules and procedures, and of lawyers as experts trained in the intricacies of legal argument and set apart

from the population at large. Sometimes characterized as legal formalism or positivism, this understanding sees law and legal rules—procedural and substantive—as important in their own right and requiring compliance without much regard for what their effect might be in practice. For example, a litigant might be barred from court because he failed to comply with a filing technicality or neglected to respond to a complaint in the precise time or manner required by court rules or precedent. Or a statute might be applied to an individual without regard for whether the result of its application appeared fair or just. One criticism leveled against the legal system is that its methodologies have become more important than its effect or outcome—that process trumps substance.

Natural Law and Utilitarianism

One of the earliest responses to this perception of law was reliance on some notion of natural law, which in turn often reflected theological principles. The founders relied heavily on such an approach in justifying rebellion against England. Recourse to natural law requires some shared understanding as to what values are natural and when they should be applied. Few truths are, in fact, self-evident, and both lawyers and legal scholars have found recourse to natural law methodologically problematic as a result.

Another early and often related response to legal formalism or positivism emphasized a more utilitarian approach to law. Thomas Jefferson, for example, wrote in 1810:

> A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. (Thomas Jefferson to John B. Colvin, Sept. 20, 1810; cited in Ford, 1904–1905, p. 146)

Utilitarianism, like reliance on natural law, raises all manner of methodological issues for both practitioners and scholars because it requires agreement on what desirable outcomes are and when formal law may be evaded to achieve those. As Jefferson noted: "The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives" (cited in Ford, 1904–1905, p. 146).

The 20th century saw the evolution of additional responses to legal formalism or positivism that offer more interesting (and, arguably, more useful) methodologies and are largely distinguished by their methodologies.

Legal Realism

The earliest of the modern responses—legal realism—tends to reject both formalism and natural law as the basis for legal decision making or scholarship. Instead legal realists see law as seldom being as precise or infallible as lawyers and judges might portray it; legal realists focus on factors such as judicial experience and bias, desirable public policy goals, and even social science research as better explanations of trial outcomes. Methodologically, legal realists abandon the concept that law is objective or neutral, or that codified law or common law precedents can be applied to achieve predictable, consistent results. For legal realists, analysis of the law requires looking outside of the legal system to results, effects, and context.

Like many of the 20th-century schools of legal thought, the primary contributions of legal realists might be characterized as *negative*: They criticize an established order and question the infallibility of laws, legal procedures, and legal decision makers. Legal realism thus helped lay the groundwork for many of the other schools of legal thought to follow. It also helped to legitimize critiques from broader perspectives than just analyzing how accurately facts are adduced and legal precedents applied.

Economic Analysis of Law

Law and economics—or the economic analysis of law—brings a more quantified or scientific approach to utilitarianism. This school of legal thought accepts as the goal of law *wealth maximization*. What constitutes wealth may be determined by allowing voters or litigants to actually value different outcomes (e.g., Would you pay more to have cleaner air or cheaper products?). Law and economics proponents then focus on the economic efficiency of various ways to achieve the desired end and to identify, avoid, or reduce transaction costs. Cost–benefit analysis is the key tool of law and economics proponents. Law and economics thus supplies a distinctive method both for determining the goal of a law or legal decision and for evaluating how that goal is achieved.

Although many adherents are careful to note that not all problems are capable of economic analysis and that economic analysis does not always consider all competing values (e.g., How do you value clean air for future

generations?), this school of analysis is often criticized for ignoring nonmonetary values (e.g., liberty or equality).

Critical Legal Studies

The critical legal studies movement emerged in the 1970s largely in response to law and economics, although the *crits*, as its proponents are called, also viewed the movement as building on the more radical aspects of legal realism. Critical legal studies focuses on the indeterminacy of law and legal process and argues that legal outcomes significantly or even predominantly reflect bias, ideology, politics, wealth, power, status, and other extralegal factors. Thus, law is often seen as a tool of legitimizing wealth and injustice and oppressing individuals, especially those who are less powerful or farthest removed from the social norm.

The methods of crit analysis, therefore, are far less quantitative than those of law and economics and far less concerned with legal precedent or procedure than any of the prior schools of legal analysis. After all, if the system is corrupt, applying its rules precisely and efficiently would only further the corruption. Instead crit methods are far more concerned with identifying bias, measuring impact on disenfranchised populations, and enhancing social justice.

Feminist Legal Studies

Over the past three decades, the critical legal studies movement has given birth to a number of related, but distinct, strands of legal analysis. One of the most distinctive is feminist legal studies. This label covers a wide array of thinking, but the common element they share is some focus on the questions of whether there are intrinsic differences between men and women and, if so, to what extent the legal system does or should reflect those differences.

For example, some feminist scholars argue that there are inherent differences between men and women—that women have distinct perspectives and approaches to problems that are often ignored by the legal system. As a result, these scholars urge reform of the legal system to accommodate women's ways of approaching problems and seeing the world and remove biases that favor male voices. Another strain of feminist legal thinking rejects the claim that there are inherent differences between men and women, and argues instead that the legal system, dominated by men, has created and perpetuated differences, allowing male-dominated society to subjugate women (e.g., by denying them the right to vote or failing to take domestic violence seriously).

Critical Race Theory

Another powerful offshoot of the crit movement is critical race theory. Professor Brian Bix describes critical race theory as presenting two strands of analysis. The first is that racism is pervasive in the legal system. The second is that people of minority ethnic groups have "distinctive views, perceptions, and experiences which are not properly recognized or fully discussed in mainstream of conventional discussions of the law" (Bix, 1999, p. 215).

The methodologies of feminist legal and critical race scholars, like those of most crit scholars, involve the extensive application of disciplinary approaches and analytical tools external to the law and legal system. These schools of legal analysis are inevitably concerned with context as much or more than with the content of law and legal institutions. They are also more likely to be interested in the impact of the legal system in operation, the nature of the people acted on, and, significantly, the identity, demographics, and experiences of the observer or scholar.

Law and Society

Law and society builds on—and, to some extent, includes—many of the previous schools of legal thought to focus on how law and legal institutions operate in society. What is distinctive about this movement, and most relevant to this chapter, is that law and society is dominated by *nonlawyers*: anthropologists, economists, historians, political scientists, psychologists, sociologists, and others who study the operation and impact of law from the perspective of other disciplines. These scholars thus apply the tools of their disciplines to their analysis of broad questions about law in society. Those same tools and a broad interdisciplinary approach are often adopted by legal scholars active in the law and society movement. The reverse, however, has proved true as well: Legal methodologies are increasingly infiltrating the work of nonlawyer law and society scholars.

This brief and incomplete survey of some of the major schools of legal thought does not begin to do justice to the richness, diversity, or complexity of ways in which legal practitioners and scholars think about the law and analyze legal problems. However, it does suggest the range of legal approaches and tools available to both legal and social science scholars.

TOOLS OF LEGAL ANALYSIS

This final section highlights four of the most pervasive tools—four methodologies, if you will—that are clearly applicable to communications law and other social science research.

Precedent

One of the oldest and most widely used analytical tools in the common law is precedent: How well does a current or proposed application of the law comport with past decisions? This is one of the most basic tools used by judges, attorneys, and scholars every day, and it has the advantage of limiting the inquiry to a fixed body of law—no matter how large and complex that body may be.

Communications law research is often concerned with precedent: How did the Federal Communications Commission (FCC) apply its past decisions in similar areas? What is the new technology or media most like—how do we categorize it? This question has dominated the debate over the First Amendment status of cable and satellite TV for decades: Is cable more like over-the-air broadcasting, which gets limited First Amendment protection, or more like print, which gets full First Amendment protection?

Similarly, courts will often ask about FCC decisions: Did the Commission adequately follow its past precedent or justify departing from it? If the reviewing court concludes that the Commission ignored precedent or finds the justification for departing from it is inadequate, it will often reverse the Commission or remand the case for further consideration. As a result, precedent often acts to slow the pace at which communications law evolves and tends to keep both the practice and scholarship of communications law backward-looking.

Precedent is focused almost wholly *within* the legal system: It is concerned with the identity of the decision maker and the affected parties only to the extent necessary to determine whether they are bound by prior decisions (e.g., a lower court bound by the decision of an appellate court or a litigant bound by a decision in a prior case involving the same facts in a different jurisdiction). Precedent is rarely concerned with the identity of the observer at all and takes into account other contextual factors only as necessary to evaluate whether past precedent was applied correctly or how the current case might be applied as precedent in the future.

It is difficult to overstate the importance of precedent in communications law—not only because of its prevalence, but because precedent often plays a key role in applying other analytical tools—for example, in interpreting statutes or determining jurisdiction. Yet precedent is not the only tool used by communications law researchers.

Codified Rules

As the legal system has evolved in the United States, constitutional, statutory, and rule-based analyses have grown increasingly important: Did a court or other decision maker act as commanded by legislation or administrative rule? This type of analysis has proved especially vital in communications law, where the First Amendment to the Constitution has played a critical role and where Congress has passed a number of major statutes and the FCC has engaged in hundreds of rule-making proceedings in recent years.

Statutes and, to a lesser extent, rules are exceptionally important because they can overturn in an instant all but constitutional precedent. For example, the deregulatory approach that Congress adopted in the Telecommunications Act of 1996 led to the overturning of dozens of Commission rules governing broadcasting and telecommunications.[1]

Codified rules are thus far more likely than precedent to precipitate change. The two methods of analyzing communications law problems are otherwise quite similar: focused almost exclusively within the legal system and not particularly concerned with parties or outcomes. Moreover, precedent is used to interpret codified rules and to judge whether those rules were applied appropriately. This can be particularly vexing in situations where the codification took place years before substantial advances in the social or economic activity that is the subject of the rules. (For example, the Communications Act that created the FCC and governed the entire structure of communications industries in the United States into the 21st century was adopted in 1934 and was based largely on an earlier law enacted in 1927.) Nowhere is the difficulty inherent in interpreting aging codified law clearer than in courts' and agencies' interpretation of the Constitution—the United States' earliest and most authoritative source of codified law.

Policy Analysis

A third and increasingly prominent methodology used in communications law research is policy analysis. Policy analysis focuses on outcomes

[1]Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its broadcast ownership regulations every 2 years to "determine whether any of such rules are necessary in the public interest as a result of competition" and to "repeal or modify any regulation" that the FCC determines no longer serves the public interest. By the end of the Commission's third biennial review, completed in June 2003, it had eliminated the newspaper–TV cross-ownership ban, which had been in place since 1975 in markets with nine or more stations. The Commission raised the national limit on the percentage of TV viewers that any one person could own stations reaching from 35% to 45% (Congress later lowered it to 39%) and raised the limit on the number of stations that could be owned in any one market from one to three in the largest markets and to two in medium-sized markets. The Commission relaxed its rules limiting cross-ownership of TV and radio stations in the same market. The FCC modified the dual network rule, which prohibited common ownership of two or more TV networks, to permit the four largest networks—ABC, CBS, NBC, and Fox—to merge with smaller networks such as United Paramount or Warner Brothers. Some of the Commission's efforts have been stalled by the U.S. Court of Appeals for the Third Circuit (Franklin, Anderson, & Cate, 2004).

and asks whether the result of a particular legal decision or enactment is fair, efficient, or consistent with what the decision maker intended.

Many of the more recent schools of legal analysis argue that policy analysis is the key tool of legal decision makers and therefore should be an essential tool of legal scholars. In communications law, for example, some of the most significant Supreme Court cases appear capable of rational explanation only by focusing on their outcome, not their application of precedent or codified law. The landmark defamation case of *New York Times Company v. Sullivan* (1964) is an excellent example, making little sense in its application of either case law or statutes, but achieving the dramatic—and, many observers would argue, desirable—outcome of prohibiting southern states' high courts from stifling media coverage of the civil rights movement.

As this example suggests, the policy at issue may be unrelated to the four corners of an existing body of common or civil law; it may reflect social or political policy, the preferences of individual legal decision makers, or even explicit bias. As a result, focusing on policy objectives as a means of explaining or evaluating legal decision making is intrinsically responsive to the broader context of an issue: the impact on the parties involved, the implications for future generations, and the identity and experiences of the decision maker or observer. Policy analysis almost always refers to some broad principle or standard by which to evaluate outcomes, such as morality, justice, or social stability. This only heightens the need for the researcher to be aware of the range of contextual issues presented in a specific case or legislative enactment.

Policy or outcome analysis is perhaps the most common methodology used by nonlegal specialists engaged in legal research. Such scholars may be unaware of, or uninterested in, the minutiae of whether a court or administrative body correctly applied prior precedent, ignored key relevant precedent, or followed written statutes or rules. Instead their research focuses on the impact—both immediate and longer term—of whatever they are studying and the desirability of that effect.

For example, a social science researcher might ask whether TV coverage of a crime scene affects the likelihood of the defendant receiving a fair trial. All manner of traditional social science methodologies may be brought to the problem, especially if empirical research is involved, but at the end of the day the researcher will have to consider what makes a trial fair and whether exposure to pretrial publicity has a legally significant impact on the likelihood of achieving that goal.

One of the great challenges of policy-based research is the need to attempt to identify, articulate, and correct for researcher bias. This can be difficult to do. Yet this challenge should not obscure the desirability of policy-based research because such research may be perceived as being more interesting and, in the long run, more valuable because it attempts to answer important, relevant questions concerning the structure and governance of our society.

Procedural Analysis

Finally, a word should be said about procedure as a tool of legal analysis. Procedure may in fact be the most important tool for legal practitioners, although the one least used by scholars. Procedural analysis focuses on a variety of questions involving the authority and competence of the decision maker, the process employed in arriving at the decision, and the impact that process has on the substantive outcome of a legal question or dispute. Did the court have jurisdiction over the parties and the dispute? Did the administrative agency provide appropriate opportunities for the public to comment on a proposed rule? Was the burden of proof or standard for reaching a decision correctly identified? Were other important procedural rules followed?

In law, a procedural violation is sometimes fatal to a decision. For example, decisions by courts that lack jurisdiction to hear the case are invalid and treated as if they never existed. Other procedural violations may not render the ultimate decision invalid, but may give rise to judicial or public challenges to decisions that shape the course and resolution of a case.

Procedural issues form the basis for many—perhaps most—challenges by lawyers to a law, regulation, or a judicial decision. This is especially true in communications law and other forms of administrative law, where agencies often fail to comply with one or more of the many rules contained in the Administrative Procedures Act, the main federal law governing how administrative agency authority is to be exercised. Even if that failure does not automatically render the agency's decision invalid, it may require that the agency reopen its proceedings or reconsider its decision, which gives attorneys a second chance to plead their case while delaying the effective date of an objectionable outcome. Delay is often sufficient, especially in cases involving the press or access to government documents because the need for, and sensitivity of, the information is likely to decrease with the passage of time.

To scholars of communications law, especially those not trained in the law, procedural analysis is often overlooked or dismissed, although procedure may have been dispositive in the outcome of the case. For example, pretrial motions—motions to dismiss a case before it gets to trial—are decided under standards that greatly favor the nonmoving party,

standards that are much harder to satisfy than those used at trial. So knowing whether an appeal is from a decision on such a motion or from a full trial on the merits is critical to evaluating its long-term significance.

Moreover, procedural issues have proved particularly significant in at least the constitutional dimensions of communications law because it is often these issues that the Supreme Court interprets as being most affected by First Amendment protections for speech and press. *New York Times Company v. Sullivan* (1964) not only established the now-famous "actual malice" standard for public plaintiffs to recover for defamation, it also required that actual malice be proved with "convincing clarity"—a procedural standard that makes actual malice virtually impossible to demonstrate. In *Philadelphia Newspapers, Inc. v. Hepps* (1986), the Supreme Court ruled that defamation plaintiffs must prove the falsity of allegedly defamatory speech (rather than defendants being required to prove truth), at least where the speech concerned matters of public concern and the defendant was the media. This shift in the burden of proof has made defamation cases involving expression on public issues virtually unwinnable because of the great difficulties inherent in proving falsity. These are only two of many examples where the high Court's tinkering with procedural requirements has had a dramatic and lasting effect on the outcome of cases.

One final example of the importance of procedural analysis is the impact of the procedural posture in determining outcomes in defamation cases. During the 1980s, plaintiffs brought about 1,000 defamation cases. Three fourths of these were terminated by decisions on motions in favor of the defendants. Of the 254 cases that actually made it to trial, however, plaintiffs won three fourths. Defendants appealed 147 of those decisions. The appellate courts ruled in favor of the defendants and reversed the lower court's decision in 53% of those cases and reduced damages in another 17% (Franklin, Anderson, & Cate, 2000).

Defamation scholars have long noted that only about 10% of defamation plaintiffs win their cases. What this new research taught us was much more informative than just that bare percentage: Few plaintiffs ever get to trial; if they do, they tend to win; but if the case is appealed, they tend to lose on appeal. The implications of this research are beyond the scope of this chapter, but notably this work has led to a number of proposals for reforming the defamation system.

Moreover, as this type of research amply demonstrates, procedural issues are not just a topic for communications law research, they are also a method for analyzing communications law problems. Procedural analysis helps make greater sense of existing case and statutory law, and it makes predictions about future decisions more precise.

CONCLUSION

Law is not as devoid of methodologies as generations of doctoral students and I may have surmised, although law's analytical tools may not be as clearly defined as in the social sciences. There are a variety of available explanations for this relative lack of definition, ranging from the fact that legal methodologies continue to emerge and evolve, to the fact that legal methodology is given little attention as such in most law schools. To be sure, we try to teach law students—especially in their first year—to "think like a lawyer," but we rarely are explicit about what this means or the methodological tools available to help lawyers think. Even when we teach those tools, we seldom conceive of them as methodologies. As a result, legal scholarship is more often recognized as borrowing methodologies from other disciplines—perhaps the most prominent example being in law and economics—than contributing to them. But this perception is incomplete and, increasingly, incorrect.

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