

# THE LEGAL ACADEMY AS DINNER PARTY: A (SHORT) MANIFESTO ON THE NECESSITY OF INTER-INTERDISCIPLINARY LEGAL SCHOLARSHIP

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*This Article explores the need for an increase in inter-interdisciplinary legal scholarship, suggesting that legal scholars from different traditions and backgrounds need to sit down at the same table and start talking to one another. The author presents an argument in favor of an integrated model of legal scholarship in which norms of intellectual modesty and cooperation fuel the development of interdisciplinary work. He develops a functional hierarchy which allows scholars to start with the first, threshold question, then work down to the operational details as they carefully consider our accumulated learning about why and how people actually act. After explaining the various functions in the hierarchy, he explains that the vision of the hierarchy creates a structure within which vigorous, highly interactive, and highly productive conversations can take place. Finally, the author concludes that the unifying theme of legal scholarship—multifaceted learning about social governance—offers legal academics a golden opportunity to break out of their silos and engage one another.*

“In the future, the knowledgeable lawyer will need to know, I believe, some economics, history, political science, empirical techniques, anthropology, sociology, basic science, and more.”<sup>1</sup>

The various branches or “silos”<sup>2</sup> of legal academic thought remain rather distressingly segregated and, in some cases, almost definitionally opposed to one another. As someone who remains wedded to the now-

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1. Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law As the Scientific Study of Social Governance*, 6 U. ST. THOMAS L.J. 302, 303 (2009).

2. See Eric Wolstenholme, *Using Generic System Archetypes to Support Thinking and Modeling*, 20 SYS. DYNAMICS REV. 341, 344 (2004) (defining the “silo” mentality as a boundary structure that inhibits process flow).

quaint “rational actor” approach to analyzing legal problems, some of my personal distress undoubtedly originates in the fact that the only observable unifying principle among other legal academic disciplines seems to be a desire to marginalize rational actor economics as a valid approach to analyzing legal problems.

That is not really what this Article is about, but I start there because I have learned a lot from this hostility, and it significantly informs my thesis. To be clear, I do not reject out-of-hand the critiques proffered by behavioralists and psychologists (“but people *aren’t* rational, and I can prove it with this pen and coffee cup”), empiricists (“but people *aren’t* rational, and I can prove it with this logit regression”), legal historians (“but people *aren’t* rational, and I can prove it with this monograph on the legal causes of the Great Depression”), or philosophers (“but people *aren’t* rational, and the important question is how one can even reasonably justify defending such an infantile, utilitarian-consequentialist conception of the good anyway”).

To the contrary, those critiques are enormously helpful in illuminating the strengths, weaknesses, and, more importantly, the *limits* of traditional law and economics scholarship. What really bothers me is the entrenched hostility between and among the disciples of various methodological traditions;<sup>3</sup> I find it both puzzling and pathetic. Why can’t the whole of legal scholarship be greater than the sum of its parts? In other words, why can’t the various approaches to legal scholarship at least genuinely interact, if not get along?

When the ideas expressed in this Article first started bouncing around in my head back in 2003,<sup>4</sup> I had not yet met Tom Ulen, nor was I aware that he was devoting significant mental energy to considering some of the same issues. I am glad that Tom finally put pen to paper not long ago;<sup>5</sup> whether the relative consonance of our views is further proof of his brilliance or evidence of my own lack of originality is the reader’s to decide.

Either way, a panel entitled “The Future of Law and Economics” allows me to offer this brief argument for an amicable and effective integration of the various serious methodological approaches to legal scholarship. The project may be quixotic; there are, after all, good reasons—economically rational reasons, no less—for the persistence of the silo mentality that pervades our lives’ work. But given Tom’s own recent attempt to bridge the gaps in the context of legal *education*,<sup>6</sup> perhaps it is a

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3. See Larry Solum, *Economists and Sociologists*, LEGAL THEORY BLOG (Aug. 9, 2006, 11:25 AM), [http://lsolum.typepad.com/legaltheory/2006/08/economists\\_and\\_.html](http://lsolum.typepad.com/legaltheory/2006/08/economists_and_.html).

4. For the blog post that got the ball rolling, see Brian Leiter, *Why Is There a Nobel Prize in Economics?*, LEITER REP.: PHIL. BLOG (Oct. 12, 2005, 11:08 AM) (originally posted on Oct. 1, 2003), [http://leiterrereports.typepad.com/blog/2005/10/why\\_is\\_there\\_a\\_.html](http://leiterrereports.typepad.com/blog/2005/10/why_is_there_a_.html).

5. See Ulen, *supra* note 1.

6. See *id.*

fitting tribute to our honoree that I offer a similar argument in favor of inter-interdisciplinary legal *scholarship*.

Each of the important methodological approaches to legal scholarship, including traditional doctrinal, philosophical, empirical, historical, economic, and psychological/behavioral analysis should play a major role in the legal academy's real work, what Tom appropriately calls the "study of social governance."<sup>7</sup> And it is not enough that many U.S. law schools can point to one or more representatives of these various scholarly traditions in their faculty directories.<sup>8</sup> To be sure, simply collecting a critical mass of intellectually diverse scholars under the same roof is quite an improvement over the doctrinalist monopoly of generations past. But we are unlikely to unlock the real benefits of this diversity unless and until legal scholars from different traditions and backgrounds sit down at the same table and actually start talking to one another.

This brief Article presents an argument in favor of an integrated model of legal scholarship in which norms of intellectual modesty and cooperation fuel the development of inter-interdisciplinary work. Properly conceived and executed, this model will bring the insights and learning of all of the social sciences to bear on the range of social governance problems that defines the scholarly study of law. Law and economics generally, and rational actor law and economics specifically, will remain critical to a successful enterprise, though their roles should be rather more modest than their most vocal proponents might prefer.

## I. THE INTER-INTERDISCIPLINARY DINNER TABLE

In his short article on interdisciplinary legal education, Tom devotes substantial attention to defending a broad definition of legal education as the "study of social governance."<sup>9</sup> It is sad but understandable that he found such a defense necessary; many voices over the past two decades have challenged the increasingly interdisciplinary direction of legal

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7. See, e.g., *id.* at 314. The list of disciplines is not intended to be exclusive; it is possible that other interdisciplinary approaches to law deserve a seat at the table as well. I consider those listed the most obvious choices for inclusion, but reasonable arguments exist for the inclusion of sociology, theology, and other disciplines as well. There are, in addition, a few border-definition issues. Political science, for example, is quite important, but it conceptually occupies a position substantially overlapping both the empirical and rational actor seats. It is less clear whether or where disciplines like literature or, more controversially, critical legal studies, belong. To justify their full inclusion, one would have to demonstrate (1) that they add something original and meaningful to the conversation, and (2) that they can in fact participate in a *conversation* rather than a nihilistic deconstruction. Though I am open to persuasion, I am not confident that "law and literature" has much to offer that is not duplicated in other disciplines with greater rigor and precision. And though critical legal studies brings a bit more to the table, its tendencies toward nihilistic excess suggest that its highest and best use may be as "gadfly" rather than "critical link in the chain." Even so, this may ultimately be a question of degree rather than kind.

8. See *id.* at 329 (illustrating that law and economics has shown the greatest rate of growth among law professors in the decade from 1992 to 2002, and the second largest increase was law and science).

9. See *id.* at 314-23.

scholarship (and especially of legal education), and those voices often call for a return to the purportedly narrower focus of preparing law students for law practice.<sup>10</sup>

Tom makes a persuasive case for the shortsightedness of this perspective,<sup>11</sup> and I will not recapitulate his arguments here. Instead, I endorse enthusiastically and even extend his definition: “the study of social governance” is the only coherent definition of scholarly law; moreover, it has ever been thus, even if the pieties of the times have occasionally masked this reality.

Moreover, if law is dynamic rather than static, the alleged dichotomy between the doctrinal and interdisciplinary models of law study actually presents a false choice. Once we introduce normative analysis, any attempt to study law as a static doctrinal phenomenon becomes irretrievably circular. To avoid this circularity, the normative study of law must obtain its content from outside; legal study is inherently normative, dynamic, and interdisciplinary, regardless of how critics choose to characterize the endeavor.

#### A. *Setting the Table*

Legal scholarship should be a highly interactive but quasi-hierarchical enterprise in which disciplinary *primacy* is contingent upon context-dependent threshold determinations of disciplinary *reliability*. Thus, the typical academic approach to any legal problem should take a rather predictable path through the various important disciplinary fields. But the approach I suggest is not rigidly hierarchical for at least two reasons. First, I envision constant feedback between and among the various disciplines; “primacy” does not and often cannot equal “autocracy” in this approach. It will almost always be the case that a “subordinate” discipline will nonetheless be able to contribute to the conversation, even if sometimes only as a “check,” “corrective,” or “devil’s advocate” to contextually “superior” disciplines.

Second, the extraordinary complexity of the real world suggests that the functional hierarchy will itself differ substantially depending upon context. Though I do suggest a more or less universal, top-down frame-

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10. See, e.g., *id.* at 323–27; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–36 (1992) (discussing the disjunction between legal education and the practice of law); Gerry Rosenberg, *Street Signs and Two-Way Streets*, EMPIRICAL LEGAL STUD. (Oct. 5, 2006, 11:36 PM), [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/10/street\\_signs\\_an.html](http://www.elsblog.org/the_empirical_legal_studi/2006/10/street_signs_an.html) (explaining that he has met legal academics who believe they have met the criteria for a “complete legal academic” but their knowledge, while being “a mile wide,” is shallow in depth); Daniel Solove, *Larry Solum on Interdisciplinary Ignorance*, CONCURRING OPINIONS (Oct. 4, 2006, 9:38 AM), [http://www.concurringopinions.com/archives/2006/10/larry\\_solum\\_on.htm](http://www.concurringopinions.com/archives/2006/10/larry_solum_on.htm) (“At best, however, there are not enough hours in the day for law professors to gain cutting-edge expertise in such a wide array of fields. Law professors might be able to gain competence in other disciplines, but deep expertise is difficult in multiple disciplines . . . [W]e’ll probably have to settle for being generalists with only a very basic understanding of other fields.”).

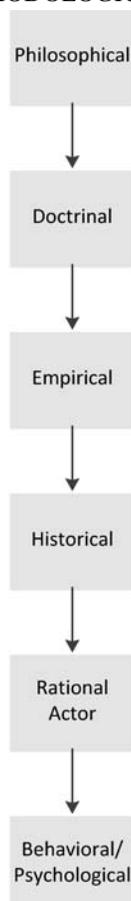
11. See Ulen, *supra* note 1, at 314–17.

work for legal scholarship, there are real-world problems to which, for example, empirical research can contribute little. As discussed in greater detail below, such problems might functionally and temporarily elevate rational actor or behavioral analysis to positions of greater importance, notwithstanding their nominal inferiority to empirical approaches in the general hierarchy.

### *B. Who Sits Where?*

With those preliminaries out of the way, it is time to fill in the seating chart. In general terms, I propose the following structure:

FIGURE 1: A METHODOLOGICAL SEATING CHART



Thus, when engaging with any particular legal problem, I recommend that we start with the philosophers and work our way down, stopping along the way as necessary to see what doctrinal, empirical, historical, rational actor, and behavioral/psychology scholars have to say about the matter.<sup>12</sup> Put another way, the legal academic enterprise starts and finishes with two “should” questions: (1) how should the world look?, and (2) how should we accomplish that vision? The hierarchy I propose allows us to start with the first, threshold question, then work down to the operational details as we carefully consider our accumulated learning about how people actually act and why.

Let me be clear: this hierarchical ordering should not be seen as an attempt to diminish the value or importance of *any* of these approaches to academic law. Each of these disciplines is an absolutely critical piece of the overall puzzle. Within the limits imposed by reasonable intellectual modesty, each discipline has something important to say about virtually every problem of social governance.<sup>13</sup> Moreover, the complexities of the real world dictate that no single discipline standing alone can offer practical and effective solutions to those problems.<sup>14</sup> Everyone must be sitting at the *same* table.

### C. *Why Do The Philosophers' Chairs Have Armrests?*

My hierarchy starts with philosophers because it is critical that we discuss and decide upon our conception of the good *ab initio*. It is equally important that we make that determination explicitly rather than implicitly.

Normative concerns undergird all legal scholarship. This is obviously true for all work containing an expressly prescriptive component. It is less obvious, but no less true, for every other piece of legal scholarship, including those that expressly disclaim any normative component whatsoever. Legal scholarship—even defined as the scientific study of social governance—differs from the hard sciences in at least one critical way:

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12. I am certain this hierarchy will make the philosophers on our faculty a bit happier, insofar as it has a law and economics scholar confirming for them a superiority they have long claimed for themselves. They should not get cocky, though; angels do not dance on the heads of pins in our physical world. The philosopher’s “ought” must ultimately be grounded in and modified by insights offered by other disciplines, else it risks becoming irrelevant to the study of social governance.

13. See generally Peter Dizikes, *Our Two Cultures*, N.Y. TIMES, Mar. 22, 2009, at BR-23 (explaining C.P. Snow’s analysis that the gap between science and literature prevents the study of global issues); Kimberly M. Thompson & Radboud J. Duintjer Tebbens, *Using System Dynamics to Develop Policies That Matter: Global Management of Poliomyelitis and Beyond*, 24 SYS. DYNAMICS REV. 433, 443 (2008) (arguing that the scientific models need to be explained and defended to a wide audience range such as national and international policy makers, economists, financial donors, and system dynamicists).

14. See *Maslow’s Hammer/Maslow’s Maxim*, ABRAHAM MASLOW: FATHER MODERN MGMT., [http://www.abraham-maslow.com/m\\_motivation/Maslows\\_Hammer.asp](http://www.abraham-maslow.com/m_motivation/Maslows_Hammer.asp) (last visited June 29, 2011) (“If you only have a hammer, you tend to see every problem as a nail.”).

there is virtually no place in the legal academy for pure curiosity-driven “basic research.”

Within the legal academy, the purest formal model or the most sophisticated quantitative empirical analyses are necessarily informed by normative concerns, even if only at the “research agenda” level.<sup>15</sup> My colleague, David Hyman, may state, “I don’t do normative” as much as he likes, but his empirical research into tort reform or the duty to rescue is, at the very least, informed or prompted by the normative debates swirling around those issues. Once we introduce the ampersand, we have introduced the normative at some level; “law & blank” inherently involves questions of “should.”

And thus the philosophers get to go first. At this relatively late date,<sup>16</sup> legal academics have developed so many philosophical heuristics and so much apparent consensus that we often forget or decline to engage the first question—what should the world look like—directly. This is a mistake. Much legal philosophical space remains highly contested, and if nothing else, explicit declaration of our own philosophical preferences is critical to avoiding any number of elision and obfuscation problems. When we debate the appropriate nature of civil pleading rules, for example, it is fairly important that we decide ahead of time what procedural justice looks like. Should we strive for accuracy in results? Should we attempt to maximize litigating parties’ meaningful participation in the legal process?<sup>17</sup> These are philosophical questions.

At the same time, there are many things philosophy cannot do, or cannot do without help. Philosophy excels at developing abstract conceptions of the good; it is somewhat less accomplished at operationalizing those judgments in a complex and highly interdependent world. Even deep philosophical theories that purport to answer difficult ordinal judgment or cost-benefit questions are, at best, dependent upon other disciplines for critical input; the Kantian with complete faith in his or her philosophical judgment cannot confidently propose a resultant legal rule without seeking input from the social sciences on cause and effect.<sup>18</sup> At the very least, the philosopher needs to hear from the assembled dinner guests before making any pronouncements on the preferred rule. The

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15. This is largely true of the hard sciences as well; we tend to research phenomena that are important to us for some reason. But there is a big difference between “largely” and “entirely.” There is a market for the most basic of basic scientific research even if it has little or no impact on our daily lives. The same cannot be said for even scientific legal scholarship.

16. According to a former colleague, every date after around 400 BC is “late.” To hear him tell it, there has not been a truly original idea since Socrates.

17. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 259 (2004) (introducing the idea that “procedural fairness requires that those affected by a decision have the option to participate in the process by which the decision is made”).

18. At “worst,” deep philosophical theories actually collapse into exactly the sort of interdisciplinary interactions I prefer. When a systematic philosophy purports to offer the sorts of judgments necessary to a complete ordering of society, other disciplines must necessarily be doing a lot of the work, unless the philosophy in question cares not at all about consequences. And when philosophers say “consequences be damned,” I rarely believe them.

decision whether to adopt a first-best rule over a second-, third-, or twenty-fifth-best alternative must be informed by an interdisciplinary conception of the possible.

#### *D. Seating the Rest of the Guests*

Once we have ensconced philosophy at the head of our table, it falls to us to figure out where everyone else should sit. Two organizing concepts inform this decision: the realities of human nature and the reliability of the various disciplines in predicting outcomes in the real world. The structure I propose privileges doctrine and empirical research over other disciplines because, at their best, these approaches each represent a gold standard of sorts.

##### *1. Doctrinal Analysis*

“Doctrinalist” is almost a bad word at some U.S. law schools; it tends to connote an anachronistic approach to law inconsistent with the modern interdisciplinary focus. And yet I place doctrinal analysis near the top of my hierarchy because properly understood and limited, doctrinal analysis is among the very best tools we have for operationalizing our philosophical judgments about what law should be.

Unfortunately, “doctrinalist” has, in part, earned its bad reputation, insofar as much doctrinal legal scholarship is guilty of either fatally circular or inappropriately implicit normative baselining.<sup>19</sup> And doctrinal pieces often make implicit empirical or theoretical assumptions as well, much to the detriment of their resulting conclusions. At the same time, doctrinal scholarship is enormously valuable when it provides a coherent, detailed, and nuanced picture of what the law *is* in any given area.

I do not here embrace a robust “efficiency of the common law” perspective. But there is substantial accumulated wisdom in the body of existing law on any given subject. My preferred approach looks first to what the law *is*—that is, the doctrinal status quo—for clues about what the law *should be*. Effective doctrinal scholarship does more than just collect and collate precedents. It also provides ground-level analysis of the pitfalls and problems associated with a particular approach. Thus, doctrinal scholarship can be used to almost empirical effect in our normative exercise; a subtle and complete analysis of existing law will often provide valuable clues to the questions of human behavior (both aggregate and strategic) with which the normative component of academic law must be concerned.

Given the inherent limitations of doctrinal scholarship, the inquiry cannot end there. But once we have a vision of the world as it should be,

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19. Something that can unfortunately be said about much interdisciplinary legal scholarship as well.

existing doctrine is a very good place to start in trying to figure out how to get there.

## 2. *Empirical Analysis*

Empirical analysis should be foundational to our normative approach to many legal problems.<sup>20</sup> Once we have settled on how we want the world to look, creative but careful empirical study will often be the best place to start in determining how to get there. Empirical study is superior to theoretical approaches to normative law precisely because it does not depend upon a theory. Rather, empirical study attempts to provide insight into the world as it actually exists, and it is thus unconstrained by the significant limitations inherent in *any* theory of human behavior.

Done properly, empirical analysis of legal problems can provide the most reliable basis for assessing the real-world effects of a particular legal regime. Empirical scholarship is no substitute for theory; in fact, good empirical scholarship will inevitably feed into theoretical scholarship as theorists attempt to explain empirical findings. Though empirical scholars might shudder at the analogy, there is a sense in which empiricists, with all their statistical sophistication, are nonetheless the alchemists of the legal academy. They study myriad human interactions with the law without any particular attempt to address the theoretical mechanics of those interactions, concerning themselves primarily with what works and what does not.

The theorist may look to empirical research and see an inelegant focus on the ends rather than the means. But in the inordinately complex real world, understanding the ends is at least as important as grand unified theories of everything. If empirical research provides reliable information as to the best way to approach a particular legal problem, no theory of human behavior—no matter how elegant or fully developed—should trump that research.

But empirical research is far from perfect.<sup>21</sup> Among other things, it is damnably difficult to study certain legal problems empirically. Direct data collection may prove impossible for many problems, and even the most talented empiricist may be unable to devise effective proxies for the effects to be studied. In addition, empirical study is only of analogical value with respect to many prospective inquiries; an empiricist may well

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20. See, e.g., Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777, 777–79 (2002) (illustrating the importance of using empirical methods to analyze policy decisions in the area of criminal justice).

21. See Stephen Bainbridge, *Why Legal Scholarship Should Reject Quants and Their Methods*, PROFESSORBAINBRIDGE.COM (Mar. 1, 2010, 8:43 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2010/03/why-legal-scholarship-should-reject-quants-and-their-methods.html> (“[Empirical results are] always going to be suspect—and incomplete—in my book.”). Cf. Josh Wright, *The First Thing We Do, Let’s Kill the Quants!*, TRUTH ON MKT. (Mar. 2, 2010, 7:38 PM), <http://truthonthemarket.com/2010/03/02/the-first-thing-we-do-lets-kill-the-quants/>.

be able to tell us how well something worked out *ex post*, but he or she stands at a bit of a disadvantage when attempting to predict the future by extension from a purportedly analogous area of law. For these reasons, the normative inquiry must frequently move beyond empirical study into the realm of the historical or theoretical.

### 3. *Historical*

Perhaps alone among the interdisciplinary approaches to law, historical scholarship can, under certain circumstances, exist for its own sake. That is, sometimes historians really are simply interested in understanding the past. But the primary inter-interdisciplinary value of historical scholarship lies in its ability to help us understand when and whether “past as prologue” is at play in the here and now. At some level, history is, like doctrinal analysis, empiricism by another name. As Tom himself is fond of putting it, historical analysis offers the opportunity to perform an “ocular regression” on rough data.

Though even the most rigorous historical research cannot produce the sort of apples-to-apples comparison quantitative empiricists prefer, understanding the history of law, its causes, and its effects can illuminate modern legal problems significantly. Deeper historical understandings of financial panics, for example, offer a lens through which to view modern regulatory efforts. Understanding the history of crime and punishment should inform our views of how to regulate criminal behavior in the future and can even help us understand whether a particular act should be criminalized in the first place.<sup>22</sup>

At its best, historical research offers advantages similar to empirical scholarship: it can help us understand how real people act in the real world. There is, again, an alchemical character to historical analysis, although historical alchemy looks a bit different than its empirical analogue. Historians are concerned with what actually happened. But they do tend to offer theories explaining human behavior as well, and given the open-system complexity inherent in the historical enterprise, the historian is more likely to ascribe causes to great men<sup>23</sup> or to the interaction of broad, sweeping trends than the typical empiricist would find attractive. In addition, historical research is, by its nature, context dependent and even slight variations in social, political, and economic conditions render suspect any attempt to analogize directly from a historical precedent to a contemporary legal problem.

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22. The history of Prohibition is instructive in this regard.

23. See THOMAS CARLYLE, *THE NORMAN AND CHARLOTTE STROUSE EDITION OF THE WRITINGS OF THOMAS CARLYLE: ON HEROES, HERO-WORSHIP AND THE HEROIC HISTORY* 26 (1993) (“[T]he [h]istory of the world is but the [b]iography of great men.”). *But cf.* HERBERT SPENCER, *THE STUDY OF SOCIOLOGY* 34–35 (1896) (“[T]he genesis of the great man depends on the long series of complex influences which has produced the race in which he appears . . .”).

At the end of the day, sometimes both formal and informal empirical approaches fall short. Then, we are left with (economic) theory.

#### 4. *Rational Actor*

Once we have concluded that resort to theory is necessary, it remains only to decide which theoretical approach to adopt. Given the state of contemporary learning, it remains appropriate to begin the theoretical project with a rational actor approach. Rational actor economics is an enormously powerful tool. And at its best, it is merely a tool, with no significant normative or ideological baggage impairing its efficiency. The premise is simple: in the aggregate, people act in ways that maximize their own utility. The non-normative prescriptive extension to this approach is similarly accessible: legal rules should be designed such that they align people's rational economic incentives with our externally determined normative preferences.

There are certain areas of the law for which rational actor approaches are particularly useful. The civil litigation system, for example, is uniquely well suited for rational actor modeling because the system is set up to encourage, in the aggregate, economically rational behavior.<sup>24</sup> And for most other areas of law, rational actor analysis offers a good starting point for designing a legal regime. That is not to say that people are always predictably economically rational, or, even if they are, that rational actor economics can tease out every relevant utility function such that rational actor analysis is utterly reliable. But, at the very least, there should be a rebuttable presumption that in the aggregate, people act to maximize personal utility.

Properly cabined, there is no place for hidden normative preferences in the rational actor analysis of my hierarchy. In fact, many critiques of rational actor economics focusing upon the normative excesses of rational actor scholarship make extremely good points, and the evolution of rational actor law and economics from modest positive modeling to highly normative enterprise was largely unfortunate.<sup>25</sup> That said, there is no reason to throw the baby out with the bathwater; rational actor economics offers an excellent theoretical beginning.<sup>26</sup>

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24. See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 118 (2009). There are, of course, people who litigate "on principle" or for other apparently irrational reasons. But the point of rational actor analysis is to adopt rules that best respond *in the aggregate* to legal problems. In the aggregate, there are reasons to believe that the civil litigation system is more reliably rational than other areas of the law.

25. This is not to say that utilitarianism is necessarily wrong. In fact, utilitarian approaches may in fact be the only coherent philosophical approaches to a number of legal problems. The point is, however, that whether to apply utilitarian reasoning *as to ends* is an inherently philosophical question that should be addressed explicitly, at the apex of the hierarchy. It should not be implicit in scholarship purporting to offer positive economic modeling.

26. I tentatively associate New Institutional Economics (NIE) with the rational actor tradition; I recognize that this is a contestable proposition, but the general approach of NIE is to work within the neoclassical framework. Its emphasis on social norms and informal rules may arise out of the same

### 5. *Behavioral/Psychological*

Much of the sniping among legal academics over the last decade has been between traditional law and economics scholars and the upstart behavioralists.<sup>27</sup> Oversimplified a bit, the behavioralist approach is psychological in nature, and its primary accomplishment to date is to demonstrate that, in certain circumstances, people demonstrate predictable biases inconsistent with rational actor theory.<sup>28</sup>

Behavioral and psychological scholarship has much to add to our dinner conversation. If nothing else, it is enormously valuable every time a behavioralist pops a rational actor theorist's overinflated theoretical balloon by reminding him or her that people do not always act in their own economic best interests, even in the aggregate. And behavioral research may ultimately prove extremely helpful in designing legal regimes that account for and respond to predictable biases in an effort to maximize the "good," however we choose to define that term philosophically.

And yet behavioralists occupy the bottom rung of my hierarchy for at least two reasons. First, like rational actor analysis, behavioral analysis is a deeply theoretical approach. Just as people may not behave precisely as predicted by remarkably thoughtful, complex, and elegant supply and demand curves, they may also choose not to act in the real world in ways consistent with a behavioralist's carefully constructed experiments. Apples-to-apples problems, experimental design/proxy problems, and a raft of other complexities, at the very least, should subordinate behavioral analysis to formal and informal empirical approaches to law.<sup>29</sup> More controversially, I would currently subordinate behavioral analysis to rational actor analysis because it has yet to demonstrate that it offers a superior baseline foundation for the design of legal regimes.

Behavioral/social psychology approaches to law are at this point largely oppositional in character.<sup>30</sup> That is, they tend to assume a rational actor baseline and take potshots from the margins. Behavioral research

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types of intuitions that inform behavioral approaches, but NIE largely remains grounded in a "rationality, properly understood" framework.

27. See Josh Wright, *A "Plain Vanilla" Proposal for Behavioral Law and Economics*, TRUTH ON MKT. (July 16, 2010, 8:53 AM), <http://truthonthemarket.com/2010/07/16/a-plain-vanilla-proposal-for-behavioral-law-and-economics/> [hereinafter Wright, *A "Plain Vanilla" Proposal*]; Josh Wright, *Shouldn't I Just Be Happy My Name Is Spelled Correctly?*, TRUTH ON MKT. (Sept. 7, 2009, 9:10 PM), [http://truthonthemarket.com/2009/09/07/shouldnt\\_i\\_just\\_be\\_happy\\_my\\_name\\_is\\_spelled\\_correctly/](http://truthonthemarket.com/2009/09/07/shouldnt_i_just_be_happy_my_name_is_spelled_correctly/) ("[B]ehavioral law and economics literature has . . . overstated its case in terms of its predictive power relative to vanilla neoclassical economics.").

28. See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-89 (1998) (explaining the task of behavioral law and economics and how it differs from standard law and economics).

29. See George Loewenstein & Peter Ubel, Op-Ed., *Economics Behaving Badly*, N.Y. TIMES, July 15, 2010, (late edition), at A31 (explaining that the field of behavioral economics has its limits and that policy makers are using behavioral economics "to avoid painful but more effective solutions rooted in traditional economics").

30. See Wright, *A "Plain Vanilla" Proposal*, *supra* note 27 (illustrating opposition to behavioral approaches regarding antitrust, regulatory interventions in credit markets, and consumer contracting).

is extraordinarily important stuff, and my hierarchy should not be read as an indictment of the discipline. There is ample empirical evidence that people sometimes act against interest, and theories that explain these anomalies are critical to the legal academic project.

At the same time, however, I have not, as yet, seen evidence sufficient to flip the theoretical presumption in favor of behaviorist approaches. Perhaps that day is coming. But there is simply too much evidence that people tend toward economic rationality to accept the premise that psychology is better suited to take the lead in writing the law's rough draft, however willing I am to admit that we need to employ behaviorists as editors.

## II. THE DINNER CONVERSATION

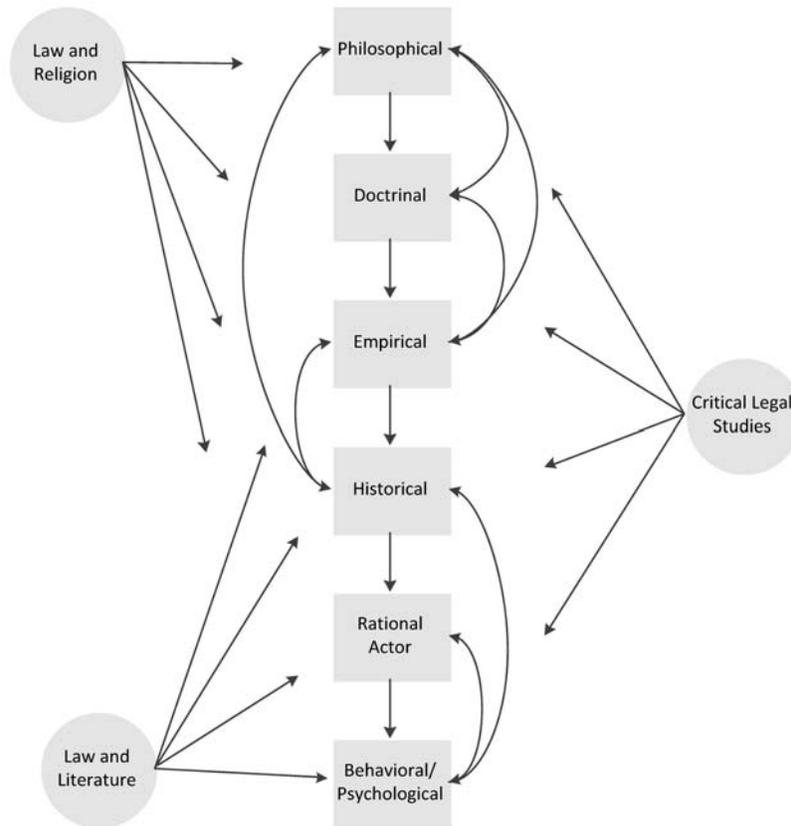
The hierarchy proposed above is only a small portion of the project I envision. It is important to think in loosely hierarchical terms, but, perhaps somewhat paradoxically, I hope that the net effect of this hierarchical approach will be to break down the walls that separate legal academic disciplines. In my vision, the hierarchy functions more like Robert's Rules of Order,<sup>31</sup> creating a structure within which vigorous, highly interactive, and highly productive conversations can take place. The hierarchy's primary function is thus to clarify and classify legal academic thought in ways that help us all to see where we fit in, and when we have bitten off more than we can chew.

The goal of the entire project is to stimulate good dinner conversation. But if the hierarchical structure depicted in Figure 1 accurately portrays inter-interdisciplinary relationships within the legal academy, it is unlikely that anyone will still be talking after the appetizers are served. A more complete picture of the relationships and interactions I envision would include myriad miniature feedback loops and information flows in all directions:

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31. HENRY M. ROBERT, ROBERT'S RULES OF ORDER: NEWLY REVISED (Sarah Corbin Robert et al. eds., 10th ed. 2000).

FIGURE 2



Note: Artist's rendering of the idea that everyone should be talking and listening to everyone else.

In this conception of the academic dinner party, we expect and affirmatively encourage each discipline to engage in conversation with the other disciplines, with the ultimate goal of helping each to refine its own analysis. The historian may acknowledge that there is little historical precedent on which to build a regulatory response but can nonetheless remind the rational actor modeler that his or her preferred approach was tried and failed in another area of the law. The rational actor modeler may, in turn, acknowledge the primacy of empirical research as to a particular problem but can still challenge the empiricist to refine his or her analysis because a particular finding seems so at odds with the results a rational actor model would predict. And the interactions go on.

Finally, every participant can and should interact with the philosophers. First, though terminological sophistication may vary, philosophers have no monopoly on philosophical judgments; a patient philosopher can

learn a lot from even an untutored interlocutor. Second, as discussed above, inter-interdisciplinary inputs are ultimately necessary when it comes time to operationalize philosophical judgments in the form of law. Even a fully determined set of philosophical judgments requires predictive information before it can be put into practice; if we are trying to decide whether to privilege a judgment that people should not kill over a judgment that people should keep their promises, it will be necessary to gain as complete an understanding as possible of the net real-world effects of that decision and its opposite, regardless of the philosophical approach we adopt.

### III. CONCLUSION

The purpose of this Article is, ultimately, to start a conversation about conversations. For reasons that are all too understandable, the legal academy trends toward the silo mentality. But this should not be so. The unifying theme of legal scholarship—multifaceted learning about social governance—offers legal academics a golden opportunity to break out of their silos and engage one another.

The details of the hierarchy I propose are certainly open to debate. I may have seated the wrong folks at the table. I may have wrongly elevated one discipline above another. But I am confident of two things. First, the legal academy as a whole needs to think more and harder about the entirety of the legal academic enterprise. Second, the results of that thinking will be a vision of a legal academy deeply engaged in a truly cooperative endeavor, where the whole becomes greater than the sum of its parts.

