As If: Why Legal Scholarship Needs Assumptions

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A common accusation against Law and Economics is that it is based on unrealistic and unreasonable assumptions, such as claiming that people behave rationally. This accusation may very well be true. But it should not stand in the way of progress in legal analysis. The reason is that when something is assumed about facts—for example, how people behave or, alternatively, about the best way to interpret a set of judgments—the test of this assumption is in whether the hypotheses built on it are supported or refuted by other facts. If an assumption does not lead to accurate predictions, it can easily be discarded. In contrast, conceptual analysis of law that tries to assess the nature of a legal norm or field, for example establishing whether investment treaty arbitration is a part of public international law or not, is not assuming anything about facts. Because the only substance that is played with is concepts, no facts can be brought to refute the argument, only competing narratives. The purpose of this Article is to explain why the process of making assumptions is necessary for legal scholarship and why it is impossible to understand the law without assumptions and it could be dangerous to try to do so.

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I. INTRODUCTION

As often happens, the law on a certain point is ambiguous and could be interpreted in several different ways. A Law and Economics scholar suggests interpreting the law in a way that leads to an efficient result.[1] "Why do you assume the law is efficient?" is the automatic reaction of her Critical Legal Studies (CLS) adversary. "That is a legitimate question," she should say. I assume the law is efficient because by explaining the law as if it leads to efficiency, I can make better sense of more doctrines and make good predictions about how judges will decide cases. Do you want to assume something else? What is your hypothesis?

This Article is not committed to the assumptions of Law and Economics (the field assumes a lot of different things anyway). The assumption that law leads to efficient solutions may be the wrong assumption, because better predictions may just as well be forthcoming under the assumption that the law is committed to some deontological moral principles or anything else for that matter. This Article is only committed to the necessity of making assumptions in legal scholarship. The gist of the argument is that only by making assumptions—thinking about the law *as if* it is designed to do something, even if there is no evidence anyone ever intended it to do so—can progress be made in the

[1] *See* Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 3–4 (1986) (referring to the "as if" type of argument used by Law and Economics scholars as a hypothesis and says that it should be supported by evidence of a dynamic that makes the hypothesis credible. But the "as if" assessment is not a hypothesis but an assumption. A hypothesis uses this assumption and is checked against reality to see if the hypothesis is correct or not, not whether the assumption is correct).

analysis of the law. This Article does not attempt to find the perfect assumptions to make sense of any legal regime, but it insists that making assumptions is necessary.

Part II starts by reviewing some assumptions that are regularly made in legal scholarship. It then explains the fallacy ingrained in trying to decipher the concepts that stand behind the law. The Article then makes three arguments for the inevitability of making assumptions.

First, openly making assumptions is the only way out of the intellectual trap of trying to find the essence of the law. Those who argue that the law has an essence are looking for conceptions that do not just help to make sense of the law: they are supposed to constitute the very being of the law. This is a fallacy that has normative implications because once a conception of the law is identified, legal solutions stem out of it without any concern for policy considerations. Part III explains why conceptual thinking in law is wrong, and why this means assumptions are necessary.

Second, making assumptions and openly declaring what they are is the only way to sustain scientific inquiry as a collaborative enterprise. Everyone has biases that affect their way of thinking and their view of the world. It is tempting to combat these biases by trying to reveal them and to present a relativistic account that is relevant only to people with the same set of biases. But the result of this exercise is to turn science into a cacophony of competing narratives without any prospect of gradually improving the accumulated knowledge within the field. The only way to make research useful for other people with different biases is by clearly stipulating what assumptions are made, what hypotheses are to be examined, and what conditions would falsify them. Part IV argues that making assumptions is required to make legal scholarship thrive as a field of research.

Third, making assumptions in legal research is an exercise in humility that is essential to any form of liberal rule. The liberal acknowledges that she does not know what the best legal solution is for everyone, all things considered. To guide policy, a liberal must assume some form of connection between the choices people make and what is good for them. Governments should assume people are rational, or at least boundedly rational, even if this assumption does not always hold true because such an assumption implies respect for people's choices. A regime that does away with assumptions aspires to know all the best solutions for all its citizens all the time. Such a utopian worldview is bound to deteriorate into tyranny. Part V suggests that lawyers who do not make assumptions can actually be dangerous to any form of liberalism.

The conclusion from this analysis is that nothing that can be said about the law is true forever and in every case. There are legal principles such as efficiency, consistency, and proportionality which explain many legal doctrines and can therefore serve as good assumptions to make sense of the law. To say the same thing differently, these principles are assumptions that can lead to the adoption of hypotheses that make good predictions about the content of legal doctrines. But in some unique situations, hypotheses that are based on these assumptions do not lead to good predictions—they do not make sense of certain doctrines. In these situations, the assumptions should simply be discarded for better ones; better not because they are truer but because hypotheses based on them lead to good predictions.

II. LEGAL ASSUMPTIONS

A. *The Proper Thinking About Doctrine*

In an essay about the methodology of economics, Milton Friedman develops a theoretical framework to demonstrate why assumptions should not be judged by how realistic they are. He gives a powerful example: imagine that you are trying to predict how much time it takes for a free-falling body thrown from a building to reach the ground. If you are throwing a metal ball, the assumption of no air resistance can lead to a good prediction. If you are throwing a feather, assuming no air resistance would lead to a plainly wrong prediction.[2]

In both cases, the hypothesis is the same: that a free-falling body covers a distance given by the formula $1/2gt^2$ where g is approximately 9.81 meters per squared second. The assumption is also exactly the same: no air resistance. And yet in one setting the assumption leads to good results, while in another setting it leads to false ones.[3] The moral of this demonstration is that assumptions should not strive to be realistic.

In fact, Friedman goes as far as saying that good assumptions are always untrue because the purpose of the assumption is to build a hypothesis that explains the most phenomena by the least factual detail. Irrelevant circumstances should not factor into the calculation, and assumptions about them can therefore be deliberately false,[4] just like assuming no air resistance when throwing a metal ball.

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[2] Milton Friedman, *The Methodology of Positive Economics*, *in* THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 145, 154 (Daniel M. Hausman ed., 3rd ed. 2007).

[3] *Id*.

[4] *Id*. at 153.

What is the connection between Friedman's theory on the methodology of economics and the law? Oliver Wendell Holmes's famous essay *The Path of the Law* actually describes the law in a way that is rather similar to Friedman's view of economics. According to Holmes, the law is only a set of predictions about what courts will do in fact—for example, what penalty they will impose in a criminal case. Many of the details in any legal case do not affect that prediction and can therefore be safely ignored. Holmes gives the example of the color of the hat worn by a party to a contract. The color of the hat is not a legally relevant fact and it can be omitted completely from legal texts.[5]

While the color of hats is simply not mentioned by lawyers, there are situations in which lawyers need to make an assumption that is factually false but can lead to good predictions of what judges will do in fact. One example is the doctrine of the reasonable person as applied in the so-called Hand Formula. The Hand Formula determines that a person has been negligent if she did not take a precaution that costs less than the damage she could have averted multiplied by the probability of its occurrence.[6] The law assumes that reasonable persons take more care in such cases even if almost everyone in that situation would have done the same thing. This assumption can lead to finding people negligent even if they did not behave any different than the social norm.[7]

The specific assumption here is that a reasonable person would be more careful, even though most real people would behave the same. But the larger and more interesting assumption in this situation is that the law as a whole complies with the dictates of efficiency. Efficiency determines the standard of care required, not the actual behavior of people in society. If you know what the efficient result is, you know how a judge would decide the case.

Another assumption made by lawyers is that the law is consistent. A legal doctrine is considered better by the mere fact that it promotes the predictability of the law. To serve that end, the doctrine itself has to be predictable. It has to match as much as possible the other relevant rules and judgments. The only problem is that sometimes legal doctrines do not fit together as neatly as this assumption seems to suggest. Consistency is a useful assumption most of the time because it can lead to good predictions of how judges usually behave. When better

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[5] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

[6] See Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 84 (2011).

[7] *See* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 NYU L. REV. 323, 326 (2012) (contrasting this normative definition of the reasonable person with a positive definition that looks at what most people would actually do in that situation).

predictions of judicial behavior can be made under the assumption of inconsistency, the assumption of consistency must simply be discarded.

The same goes for proportionality. Legal responses across many legal fields comply with the principle of proportionality.[8] If you want to settle an ambiguity in the laws of war, criminal law, or international sales law, assuming that the law is committed to proportionality would usually lead to good predictions of what judges will do. Proportionality can therefore usually serve as a good guide for scholars. But there are situations in which proportionality would not lead to good incentives, and legal doctrine has adapted to these situations by systematically digressing from proportionality in these cases.[9] Sometimes proportionality is not a good assumption because it does not lead to good predictions.

All these assumptions may seem like a useful way to predict what judges will do when faced with legal ambiguity. But H.L.A. Hart raised an important objection to Holmes's view of judging as predicting the actions of judges. Hart argued that judging cannot be based only on prediction because then it would force judges who are considering their own course of action in a case before them to base it on the prediction of what they would do *themselves*.[10]

The solution to this false paradox may not be that difficult. It was presented most clearly by the founder of Scandinavian Legal Realism, Alf Ross. Ross explained that the task of the legal scholar making sense of the law is not to put herself in the shoes of the judge.[11] The scholar does not share the normative commitments of the judge, but she is able to describe the judge's normative commitments. The scholar is able to build hypotheses about the judge's normative commitments and test her predictions using the judge's actual behavior.[12]

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[8] *See* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AMER. J. INT'L L. 715, 715–16 (2008).

[9] *See generally* Shai Dothan, *When Immediate Responses Fail,* 51 VAND. J. TRANSNAT'L L. 1075 (2018) (demonstrating how the laws of war, criminal law, and international sales law can usually be explained based on the assumption of commitment to proportional responses. But in cases of acute uncertainty, legal doctrines cannot be explained well based on the proportionality assumption, and a pattern of delayed and disproportional responses is mandated by the law. Insights from experimental game theory explain this shift.).

[10] *See* H.L.A. HART, THE CONCEPT OF LAW 102 (1961); Stephen R. Perry, *Holmes versus Hart: The Bad Man in Legal Theory, in* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 158, 188 (Steven J. Burton ed., 2000).

[11] *See* Jakob v. H. Holtermann, *A Straw Man Revisited: Resettling the Score between H.L.A. Hart and Scandinavian Legal Realism*, 57 SANTA CLARA L. REV. 1, 17–18 (2017)

[12] *See id.* at 19 (explaining that though it is impossible to know what judges actually believe, it is possible to construct hypotheses about the convictions of judges and test them against the judges' actual behavior); ALF ROSS, ON LAW AND JUSTICE 89 (2019).

Like any theory based on hypotheses, scholars need to make assumptions, and just like Friedman articulated clearly regarding economics, these assumptions may just as well be false yet lead to true predictions. For example, a legal scholar may argue that the main purpose of criminal law is to deter criminals. She can hypothesize that judges will assign penalties that comply with the Becker model, which stipulates that criminals will be deterred if the penalty they are expected to receive if caught, multiplied by the probability of getting caught, is higher than the benefit they derive from committing the crime.[13] The scholar assumes that judges assume people are making rational cost-benefit calculations. It may be untrue that people are rational, and it may also be untrue that judges use cost-benefit calculations when they assign penalties; still, the Becker model may serve as the best predictor of the magnitude of penalties. If using the rationality assumption succeeds in predicting the magnitude of penalties, it is useful, and the scholar can employ it. If it does not, it should be abandoned regardless of what either potential criminals or judges are actually thinking.

B. *The Error in Thinking About Law Through Concepts*

While this may sound obvious to some readers, the matter is confusing to many lawyers. Some lawyers devote considerable intellectual energy to trying to distill concepts that they believe lie at the core of the law.

For example, a book-length study argues based on a series of analogies and comparisons that investment treaty arbitration is a part of public law.[14] This argument is not susceptible to pragmatic analysis. It is not trying to predict anything concrete about human behavior, but rather to describe some mythical essence that is not conducive to scientific exploration.

This does not mean that applying public law doctrines to investment treaty arbitration would lead to bad results. In fact, another monograph makes the case that applying principles of public law to regulate investment treaty arbitration may lead to good outcomes. But this is an argument made based on functional reasons: arbitrators' interests bias them in favor of business and create a need for counterbalance in the form of public law principles.[15] *There* is an

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[13] *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 181–82 (1968); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 47–48 (2000).

[14] *See generally* ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW (2014).

[15] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152–53 (2007).

argument that can be tested empirically. Maybe it is true and maybe it is false, but it is susceptible to scientific inquiry.

Searching for concepts that are supposed to represent the essence of legal doctrine is wrong because it makes statements that cannot be established scientifically. The philosopher of science Alfred Jules Ayer argued in his famous book *Language, Truth and Logic* that the only statements that can be verified are either empirical hypotheses or logical tautologies.[16] Such propositions can be either true or false, and the scientific method may determine if they are true with different levels of certainty.[17] In contrast, metaphysical statements—statements about the essence of things—are simply nonsense, at least from the perspective of science, since their truth value cannot be established.[18] While Ayer's argument has been refuted on logical grounds as far as individual statements are concerned, it is useful for explaining entire scientific theories.[19]

Legal scholarship complies with the need to reject metaphysical statements. In fact, Felix Cohen also uses the word nonsense to describe the use of legal concepts to make claims that cannot be contested on either ethical or empirical grounds.[20] Law as a self-referential system of concepts is nonsense because it does not say anything that can be proven true or false.[21]

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16 ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 41 (1952).

17 *Id.* at 35.

18 *Id.* at 43.

19 Ayer and other followers of logical empiricism generally claimed that all meaningful statements have to be verifiable, but that claim was exposed to significant criticism. In response to this criticism, Rudolf Carnap was willing to withdraw to the narrower claim that it is only scientific statements that need to verifiable. By their nature, scientific statements are subject to disputes in the scientific community. The only way to settle such a dispute is by using logic and empirical evidence. *See Logical Empiricism* in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 4.1 (Edward N. Zalta ed., Fall 2017). For a very detailed and technical analysis of the failure of logical empiricism on analytical examination *see* 1 SCOTT SOAMES, PHILOSOPHICAL ANALYSIS IN THE TWENTIETH CENTURY: THE DAWN OF ANALYSIS 274–99 (2003). To salvage some of logical empiricism's insights regarding whole theories, Carl Hempel explained that theoretical claims are meaningful when they combine a set of observational statements and hypotheses that can be used to make testable predictions. Empirical content is not to be assessed in each individual statement but in the system as a whole, which is geared for empirical prediction. Similarly, Willard Van Orman Quine explained that meaning requires verification based on observational consequences, but these cannot be reduced to sentences and must be derived from entire theories. *See id.* at 296–97. Quine's explanation why sentences do not have individual meaning, only theories, is that the connection between every sentence and the evidence itself is mediated through other sentences in the theory. *See id.* at 383–84.

20 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935).

21 *Id.* at 821.

Cohen argues for understanding law based on the functional approach—law is a prediction of what courts will do.[22] When law is understood in this way, scholars can easily state that the law is such and such as an empirical matter because this is what judges actually do. They can proceed to criticize this judicial tendency on ethical grounds without falling into any logical contradiction.[23]

Even Cohen, writing in 1935, was not saying something completely original. At the beginning of his famous essay, he refers to the work of Von Jhering, who some fifty years earlier criticized the use of concepts in legal scholarship.[24] What Jhering expressed in German, Ross expressed in Danish, and Holmes and Cohen expressed in English is a true cross-cultural resistance to a particular kind of legal fiction—legal concepts that cannot be subjected to empirical inquiry.

Assumptions are also a form of fiction: they refer to things that do not exist, and the scholar should not even care about their truth value. But when you combine an assumption with a hypothesis and test this hypothesis against facts, you can verify if the hypothesis is true or false. This is why assumptions are necessary in every field of science.[25] Although easily confused, assumptions do not share the ills of conceptual thinking. The rest of this Article is dedicated to the argument that making assumptions in legal scholarship is the only cure to the relentless malaise of conceptual thinking.

III. THE ARGUMENT AGAINST ESSENTIALISM

In 1921, the Jewish philosopher Franz Rosenzweig wrote a short book called *The Little Book of Healthy and Sick Human Understanding* to make his complicated philosophical views more accessible. In this book, Rosenzweig decries the practice of philosophizing about the essence of things instead of using common sense to act in the real world.[26] Rosenzweig was not alone in perceiving the importance of focusing on

[22] *Id.* at 839.

[23] *See id*. at 839–42.

[24] Rudolf von Jhering, *In the Heaven of Legal Concepts: A Fantasy*, 58 TEMP. L.Q. 799, 802 (1985). Jhering mocked the use of legal concepts with a humorous text describing a Roman law scholar who dies and goes to the heaven of legal concepts. In this heaven, legal concepts exist in their pure form so that every legal question can be solved simply by analyzing the concepts and without any need for factual observation and practical considerations. The text was originally published in German in 1884.

[25] For an enormously comprehensive exploration of the use of assumptions in numerous fields of science, see H. VAIHINGER, THE PHILOSOPHY OF 'AS IF': A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND (C.K. Ogden trans., 2009) (1924).

[26] FRANZ ROSENZWEIG, DAS BÜCHLEIN VOM GESUNDEN UND KRANKEN MENCHENVERSTAND (1964).

the impact things have instead of on their essence. Writing in 1907, William James launched a whole field of philosophy known as *Pragmatism*. In a book that carries the same name, he explains that the focus of philosophy should not be on the essence of concepts but on their actual consequences, which he called their "cash-value."[27] What is true for philosophy is true for legal scholarship. This Part will demonstrate what healthy and pragmatic legal thinking should look like.

A. *Healthy Legal Thinking*

A simple example of healthy legal thinking appears in Karl Llewellyn's classic guide to law students, *The Bramble Bush*.[28] Students are instructed to extract the rules on offer and acceptance sufficient to form a contract from actual cases. In one case, a person has made an offer and manages to deliver a revocation before his offer is accepted. The court ruled that in this case the meeting of minds necessary for a contract to materialize did not take place. In another case, a person makes an offer, and a letter of acceptance is sent to him before his revocation is received. The court decided that a contract was formed.[29] The two cases may appear contradictory, but it is easy to extract a general doctrine that agrees with both of them: even if the two sides are not simultaneously interested in the contract, the contract would stand if the person receiving the offer reasonably believes that the offer still stands when she accepts it.[30]

This legal reasoning is healthy because it is based on trying to make sense of the institution of contracts in the most effective way. To do that, the reasoning is based on assumptions and hypotheses, even if extracting them is not always easy. In the second case mentioned above, an assumption is made that a person stands by his offer until his letter of revocation is received, even if that happens not to be true. The reason is that based on this assumption, one can hypothesize that a contract is formed in such cases, which would explain in the best possible way judges' rulings in contract cases.

Llewellyn explained that the doctrinal rule should be pushed up to the point when it does not make sense anymore. If the person who accepted the offer reasonably believed no revocation was sent, but his clerk already received the revocation letter, maybe the rule should be

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[27] WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1st ed. 1907).

[28] K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951).

[29] *Id.* at 49–50.

[30] *Id.*

different.[31] Maybe a person should be assumed to know everything her clerk knows at the time when she attempts to accept an offer. The only question is what assumption would help to construct a hypothesis about the existence or nonexistence of the contract that would make sense of the most judgments.

In cases of doubt, one can turn to a higher level of assumptions, such as the assumption that the law strives for efficiency, to determine what should be assumed about the will of the parties. If the law is assumed to be efficient, maybe people should be assumed to stand by their offers until they formally deliver a revocation letter. The reason is that people making such offers are the ones that can most easily make sure their revocation letters are received in time. They are the so-called *least-cost avoider*.[32] The same line of reasoning may just as well dictate that people should be assumed to know all that is known to their clerks.

Healthy legal thinking complies with the Latin phrase *natura non facit saltus*: it makes no leaps but rather evolves steadily, always keeping in sight the logic of the precedents it chooses to follow. Legal thinking uses precedents because if cases involve similar policy considerations, a judge deciding the later case can rely on the prior judgment to make a satisfactory policy decision.[33] By making a decision with the same policy outcomes as past judgments, a judge or a scholar can follow the normative commitments of the community of judges. The key is not that the cases are similar in some abstract sense but that their similarity is relevant to their policy choices.

If the name of the person making the offer in the first Llewellyn scenario is Olixander, and that is exactly the name of the person making the offer in the second scenario, this bizarre coincidence has absolutely no legal significance. Neither would the fact that both individuals are avid water polo fans, or the fact that both have a parrot called Bobbie. Legal analysis that proceeds through assumptions and hypotheses abstracts away all the irrelevant information, leaving only factors with concrete policy implications. The examples just mentioned are clearly

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[31] *Id.* at 50.

[32] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1095–97 (1972) (explaining that the need to search for the least-cost avoider arises because the assumption of no transaction costs often must be discarded and replaced by assumptions that admit of certain transaction costs to predict the actual efficiency of human interaction. Under the assumption of no transaction costs, the market will always revert to the efficient solution.); Eric Rasmusen, *Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369, 406 (2004) (applying the least cost avoidance reasoning, which is regularly used in tort law, to solve agency problems in contract law).

[33] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 600 (1987).

absurd—no one would make the mistake of taking these irrelevant peculiarities into account. But serious scholars make the mistake of taking things into account that are just as irrelevant because they think they reveal the "essence" of the law.

B. *What Is Wrong with Conceptual Legal Thinking*

The opposite of healthy legal thinking is conceptual legal thinking. Conceptual analysis involves copying legal choices from one legal setting to another solely because of some abstract similarity between the two settings, and without taking into account the purpose of the copied legal choice. This way of reasoning is an invalid form of "reasoning by analogy" because it applies legal concepts in a way that is autonomous of their policy goals.

Reasoning by analogy that ignores policy considerations is intellectually flawed because the similarity between two legal cases is relevant only when it implies that the past case and the judgment advocated for have similar policy outcomes.[34] If scholars seek to predict judges' behavior through analogies, they should usually explain the policy considerations that justify the analogy. Alternatively, they can admit that only similarities affecting policy outcomes are relevant but claim convincingly that they can identify such similarities without observing directly the policy outcomes involved. Some scholars relegate the task of defining what similarities are relevant to the realm of legal expertise and intuition,[35] and others refer to elaborate techniques that can make this determination even without considering policy considerations directly.[36]

If a scholar instead tries to distill some concept that can carry over from one case to the other, she misunderstands the nature of legal analysis. Such concepts are fictions, but—unlike assumptions—they are not useful fictions that can lead to accurate hypotheses or be discarded.

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[34] *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 756–57 (1993); Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2006).

[35] *See* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 59–60 (2nd ed. 2016).

[36] *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 948–49, 962–63 (1996) (suggesting that it is possible to extract from specific doctrines a general rule that reflects the commitments of judges through an analytical technique known as *abduction*. Abduction can never prove conclusively that the rule reflects the commitments of judges, but it can serve as an educated guess.); Sunstein, *supra* note 34, at 751–54 (describing a technique known as *reflective equilibrium* that allows scholars to compare general rules and specific doctrines that they think reflect the commitments of judges. By modifying both types of sources simultaneously to better match each other, the process gets the scholar closer to understanding the commitments of judges.).

Because the concept is not systematically checked against the actual behavior of judges, it can easily lead to arbitrary results.

As an example, consider a recent paper arguing that English tort law is committed to serving the function of vindication—affirming certain protected interests.[37] According to this paper, a concept can be distilled from the law and can lead to normative implications, such as recommending damages regardless of proving harm, at least if there are no countervailing policy considerations.[38]

It is perfectly possible that English tort law is explained well *as if* it follows the function of vindication. In that case, the judges' commitments can be predicted based on the *assumption* that vindication is their goal. If, based on this assumption, a hypothesis that damages are granted without proving harm is made and it is confirmed by observing judicial behavior, the assumption can be kept. But if such a hypothesis is refuted by observing real judgments, then the assumption should simply be rejected.

Scholars have zero commitment to the truth value of their assumptions. If the assumption does not lead to hypotheses that predict the normative commitments of judges, as evidenced by their actual behavior, it will be discarded. In contrast, thinking about the law through concepts implies a commitment to a certain view of the law, even if scholars sometimes qualify this commitment by indicating that the law has multiple functions and is different in some areas compared to others.[39]

Some supporters of conceptual legal thinking argue that it helps to organize the way scholars think about the law, as a form of "legal metaphysics."[40] If concepts are employed only for their aesthetic qualities, this way of thinking may not cause any harm. But it certainly would not do any good either. Indeed, the vibrant debate in philosophy on whether certain universal characteristics constitute the essence of law has no normative implications.[41] If a theorist presupposes that every legal system has certain properties, by her logic any social

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[37] *See* Jason N. E. Varuhas, *The Concept of 'Vindication' in the Law of Torts: Rights Interests and Damages*, 34 OXFORD J. LEG. STUD. 253, 256 (2014).

[38] *See id.* at 256.

[39] *See id*. at 260, 292–93 (arguing that some areas of the law serve the function of vindication less than others); *id*. at 275 (stating that certain areas of the law apply specific legal solutions that are different from the main doctrine).

[40] *See generally* Kenneth Einar Himma, *Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory*, 26 REVUS 65, 83, 91 (2015).

[41] *See generally* Brian Z. Tamanaha, *Necessary and Universal Truths About Law*?, 30 RATIO JURIS 3 (2017) (reviewing and criticizing the scholarship that argues there are certain things that constitute the essence of the law).

institution that does not have these properties would be nonlegal.[42] In contrast, when concepts are later used to make normative recommendations, as is done in invalid forms of reasoning by analogy, such use causes real damage to legal analysis.

Some scholars choose a different path: they clearly disavow any claim to describe the law and instead promote a project that is focused only on the question of what legal doctrines can be justified based on some coherent set of principles.[43] For them, a legal doctrine, even an established one, that does not comply with the required level of coherence is simply a legal mistake.[44] By preventing any possibility of refutation by doctrines that exist in the real world, this system of reasoning may conveniently achieve logical consistency. But at the same time, by committing to coherence at all costs, it forfeits both its ability to describe the normative commitments of real judges[45] and the possibility of defending policy choices based on any other grounds besides its own autonomous set of principles.[46] These are unacceptable concessions that have been rightly criticized throughout the modern era.

More than a century ago, Roscoe Pound criticized conceptual thinking in law, calling it by the derogatory name "mechanical jurisprudence."[47] Pound explained that creating concepts and using them to recommend normative solutions without accounting for their social implications is unjustified.[48] Similarly, a scholar who extracts concepts from judicial behavior and uses them to explain the normative commitments of judges in other areas without actually checking those judges' behavior is making unwarranted choices.

Conceptual legal analysis is like a sea monster that grows two new heads every time it is beheaded. It seems like the only way to avoid unhealthy conceptual thinking and to slay the sea monster is to offer a methodologically sound substitute for legal concepts. This substitute is a methodology that admits it works through assumptions that may be

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[42] *See id.* at 20; Joseph Raz, *Can There Be a Theory of Law*, *in* BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324, at \1 (Martin P. Golding & William A. Edmundson eds. 2005).

[43] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW XIX (2012).

[44] *Id*. at 13.

[45] *Id*. at 31–32 (A system that completely defies coherence would be unintelligible on this account) *See* Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEG. THEO. 457, 468–69 (2000) (describing the first concession)

[46] WEINRIB, *supra* note 43 at 17–18, 55; *See* Zipursky, *supra* note 45 at 469 (describing the second concession)

[47] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[48] *See id.* at 612.

untrue or inaccurate. By working through assumptions, scholars can avoid the confusion associated with commitment to concepts that supposedly reflect some essence of the law; scholars can choose instead to adopt assumptions only if they can lead to hypotheses that are confirmed by real judicial behavior.

If it is assumed that a person making an offer stands by it until her letter of revocation is received, this assumption does not stem from the concept or the "essence" of contract. The assumption is useful to form a hypothesis that judges would recognize a contract in these conditions. When conditions change, this hypothesis may be refuted—it will not represent judges' decisions. The scholar may have to adopt a different assumption; for example, that a revocation letter should be considered received when it is accepted by the clerk of the person receiving the offer. Assumptions are responsive to facts and can always be checked against them.

IV. THE ARGUMENT FOR SYSTEMIC ACCURACY

A. *Theoretical Background*

The CLS movement disputes the existence of two qualities that are often used to justify the law: formalism and objectivism. Formalism means the existence of legal doctrine that is distinct from ideological positions.[49] Objectivism is the view that legal analysis can proceed based on neutral constraints on human organization that are detached from the power struggles in society.[50]

CLS criticizes fields of legal scholarship that adhere, directly or indirectly, to the idea that law can be studied objectively. For example, CLS scholars criticize the Law and Economics movement because it tries to appear formalist and objective while adhering to a specific form of economic theory that is grounded in a particular history and serves certain interests.[51]

The gist of this Part is to explain why, even if scholars applying Law and Economics, or any other field of legal scholarship, are indeed biased, this poses no problem for the objectivity of legal science within these fields. The solution to scholars' biases is not to try to debias themselves by exposing their hidden ideological leanings, as CLS suggests.[52] The

[49] *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564 (1983).

[50] *Id.* at 565.

[51] *Id.* at 574–75.

[52] *Id.* at 578–80. *See* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R-C.L. L. REV. 301, 308–09 (1987)

solution is rather to sustain a scientific practice that allows for systematic testing of the ideas ingrained in legal scholarship.

The notion that objectivity in science cannot and should not stem from the scientists' individual efforts to debias themselves underlies Karl Popper's philosophy of science. Popper explained that a scientist can never be sure of the objectivity of her discovery. Inner conviction in the truthfulness of results is scientifically meaningless. The only scientific objectivity that should be aspired to is making statements that can be *intersubjectively tested.* This means that a scientist needs to assure that every experiment that leads to a scientific discovery can be reproduced.[53]

Legal science does not proceed based on experiments in the physical world, but it should be constrained by the same commitment to intersubjective testability. A statement about the law should be testable by anyone regardless of their gender, race, or social class. Because every scholar brings with her a package of ideological inclinations that cannot be fully debiased, the key to allowing testability of her ideas is in the methodology that she uses. Any attempt to get rid of individual biases will produce statements that are not truly objective and that cannot be systematically checked by other scholars.

In contrast, the scientific practice of making assumptions and being frank about them is the only way to ensure the testability of statements about the law. Once the assumptions are in place, every scholar can check whether the proposed hypotheses about the law are indeed confirmed by the facts. For example, if the assumption is that criminals behave rationally, every scholar can check if real criminal punishments concur with the Becker model.[54] If they do not, the assumption can be simply replaced by a more fitting one.

B. *International Law as a Case Study*

Legal doctrine is often the product of social struggles that belie any claim for objectivity. For example, scholars have argued that international law is not a universal and objective system of rules. Rather, international law is created by groups of lawyers with different nationalities, education, and political interests who pull legal doctrine in different directions.[55] Furthermore, some groups of lawyers pull

(criticizing CLS scholars' idealistic program to change the way lawyers think about the world, which they claim is imprisoned in an unjustified commitment to protect the status quo).

53 KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 22–26 (2002).

54 *See supra* note 13 and accompanying text.

55 ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 6 (2017).

stronger than others and bias international law in a direction preferable to them. For historical reasons, international law is largely tilted toward Western states' interests and legal choices.[56]

The exposure of the sociological pressure that made international law what it is today has great scientific merit. But it is an exercise in sociology, not in understanding legal doctrine. When a scholar seeks to understand legal doctrine, she must build a theory that in the most parsimonious way describes the normative commitments of judges. The historical reasons for the development of judicial behavior are irrelevant for this prediction. Being aware of these historical reasons may help a scholar guess how law is going to evolve or explain the motives of individual judges, but it does not help to understand what judges view as their commitment to the law.[57]

If a scholar makes a statement about the law, her statement has to be objective—not in the sense that it is necessarily true, but in the sense that it can be contested or checked on empirical grounds by any other legal scholar. If a scholar were to say, "I am American, and therefore I need to correct for my biases by viewing international law differently than my initial inclination," her observations about international law would not converse with the views of any other scholar. Because the American scholar can never be trusted to fully debias herself and adopt an objective view, her statements about the law are useless for the scientific community. Even if such statements are made with conviction, they are not scientific.

In contrast, the claim that international law is Eurocentric is susceptible to empirical investigation and can in principle be checked by any other scholar. Unless judges view it as normatively legitimate to openly serve Western interests, however, such a claim has to be investigated with nonlegal tools such as a sociological or historical inquiry. Such a claim may point out the reasons that historically caused the law to become what it is, but it does not point to the purpose that the legal system today tries to fulfill. It says nothing about the judges' commitments or what they would view as legitimate legal arguments.[58] Therefore, such a claim is scientific, but not legal.

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[56] *Id.* at 9.

[57] *See* Jakob v. H. Holtermann & Mikael Rask Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. INT'L. L. 211, 215–20 (2015) (explaining that while the legal scholar does not share the normative commitments of the judges, she offers a description of these normative commitments ("perceptions of axiological validity" to use the terminology of the paper)).

[58] *See id.*

The only way to make a claim that is both legal and scientific is to use the structure that is advocated in this Article, namely make assumptions and test hypotheses based on them. Take, for example, the claim that international law is committed to order more than it is committed to justice.[59] To test that claim, it is possible to assume that international law is committed to order and check if hypotheses formed under this assumption lead to accurate predictions of international judgments. If they do, one could argue that international law can be explained *as if* it is committed to order. If they do not, the assumption of commitment to order must be discarded.

For example, a scholar could assume that the legal doctrine on maritime delimitation is more committed to order than to justice and use it to construct a hypothesis on how the International Court of Justice (ICJ) would decide disputes. The hypothesis can either be refuted or confirmed based on the empirical investigation of ICJ judgments. Assuming commitment to order, the natural hypothesis is that the ICJ would draw maritime borders based on the equidistance line—which protects order and certainty. In fact, ICJ judgments on the subject fluctuated between applying the equidistance line and taking equity concerns into account.[60] Therefore, it is possible that an assumption that international law is committed to order would not lead to good hypotheses about ICJ practice in this specific area and would have to be replaced with an assumption of a commitment to justice.[61]

Because scientific claims are open for contestation by any scholar, the common view accepted by the scientific community emerges as a shared paradigm. Thomas Kuhn described the way paradigms in science change in his famous book *The Structure of Scientific*

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[59] *See* ANDERS HENRIKSEN, INTERNATIONAL LAW 17–18 (2nd ed., 2019).

[60] *See, e.g.*, North Sea Continental Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), 1969 I.C.J. 51–52 ¶ 89–91 (Feb. 20) (observing that according to the equidistance method, the Federal Republic of Germany would get a small continental shelf compared to the length of its coastline because of its concave shape. The court decided that the parties should take into account also the proportionate length of coastlines when they negotiate a solution to avoid an unjust result.); *see also* Tanaka Yoshifumi, *Reflections on the Concept of Proportionality in the Law of Maritime Delimitation,*16 INT'L J. MARINE & COASTAL L. 433, 434–43 (2001) (referring to more decisions by the ICJ and arbitral tribunals on division of continental shelves).

[61] *See* Malcolm D. Evans, *The Law and the Sea, in* INTERNATIONAL LAW 676–80 (Malcom D. Evans eds., 4th ed., 2014) (following the equidistance line can lead countries with a concave coastline caught between two other states to get a very small continental shelf compared to the length of their coastline. Considerations of equity can mitigate against that, but note that this is a very limited view on equity. International courts do not consider economic factors and distributive justice when they determine maritime disputes. Therefore, even if there have been digressions from the order dictated by the equidistance line, they did not go all the way to sustain an ideal of justice.).

Revolutions.[62] His analysis is relevant also for changes in legal paradigms. Legal scholars can use the paradigmatic view of the legal community as an assumption and build their hypotheses of what is the law on a specific issue based on that paradigmatic view. When the assumption leads to inaccurate predictions vis-à-vis a specific doctrine, it can be discarded regarding the analysis of that doctrine and possibly kept regarding others. If a critical mass of doctrines cannot be explained based on the assumptions shared by a certain paradigm, a paradigm shift can occur.

For example, when Wolfgang Friedmann described international law as shifting from the "law of coexistence," concerned with regulating conflicts between competing states, to the "law of cooperation," concerned with sustaining collaboration and forming effective institutions, he was describing a classical paradigm shift.[63] One could take the claim that the world today is described by the law of cooperation as an assumption and use it to build a hypothesis about the amount of deference, or margin of appreciation, the European Court of Human Rights (ECHR) shows to member states of the Council of Europe. Scholars have indeed argued that the margin of appreciation granted to states takes into account many elements of governance and not just the sovereignty of the states involved.[64] The practice of the ECHR is therefore explained well under the assumption that international law is a law of cooperation.

Not all paradigms have to be phrased at such a high level of generality. One could, for example, argue that the law on belligerent occupation shifted from a focus on the rights of the sovereign state whose territory is occupied to a focus on the rights of protected persons

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[62] *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

[63] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1966)

[64] *See* Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. INT'L L. POL. 843, 849 (1999) (arguing that the ECHR should show less deference in case states do not represent the people affected by their actions); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 27–31 (2012) (arguing that the ECHR does in fact show different levels of deference to states based on their ability to properly represent the relevant interests); Shai Dothan, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, 42 FORDHAM INT'L L.J. 765, 793 (2019) (arguing that the ECHR is justified in showing less deference to states when they fail to properly represent the people affected by their actions based on the assumption that the ultimate source of authority for international courts is individuals and not sovereign states); ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME?: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 210–13 (2014) (arguing that human beings are indeed the source of authority behind international courts); *see also* Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 514 (2009) (arguing that humanity is in fact the underlying reason to respect state sovereignty).

living under occupation.[65] The assumption that the rights of protected persons matter more than issues of sovereignty can lead to hypotheses about concrete legal questions. A possible hypothesis suggests that courts would allow the occupying power to use natural resources in the occupied area if it appears to serve the needs of the local population under occupation. Despite the significant potential for abuse of such a doctrine by occupying powers, this hypothesis does have some support from judgments, suggesting that the novel paradigm is indeed a useful assumption.[66]

The laws regulating the use of force (*jus ad bellum*) can serve as another example. These laws can usually be explained well based on the assumption of proportionality: every armed attack can be answered only by using proportional force. However, when a country is exposed to a series of armed attacks, the "pin-prick doctrine" allows it to respond with one major strike that is equivalent to the aggregated force of all the small attacks against it. In some situations, therefore, international law doctrines can be better explained by an assumption that delayed and disproportionate retaliation is allowed.[67]

As these examples demonstrate, the method of legal analysis advocated here has a key advantage over any scholar's attempt to debias herself and provide what seems to her to be an objective view of the law. The advantage of this method is that any scholar, regardless of his or her individual biases, can engage in the same empirical investigation. Any scholar can analyze the same legal materials based on assumptions shared by the legal community and use them to test hypotheses to

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[65] *See* Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L. REV. 19, 28 (2003) (explaining that the Fourth Geneva Convention from 1949 changed the focus of the law of occupation from the rights of the ousted government—protected by the Hague Regulations of 1899 and 1907—to the rights of the population under occupation).

[66] *See* HCJ 2164/09 Yesh Din v. IDF Commander in the West Bank (2011) ¶¶ 8, 13 to the opinion of President Dorit Beinisch (The judgment rejected an application against the operation of Israeli-owned quarries in the occupied West Bank. Though its reasoning is very controversial, the judgment focuses on the rights of the protected local population and not on sovereign claims to the territory to reach the conclusion that in light of the length of the occupation and the potential damage that closing the quarries would cause to the local economy, the application should be rejected.).

[67] *See* Dothan, *supra* note 9 at 1090–91 (explaining that the rules on proportional countermeasures are often useful for securing cooperation, according to the findings of experimental game theory. In situations of uncertainty about the actions of adversaries, however, delayed and disproportional reactions are actually better at leading to cooperation, according to game theorists. Because both doctrines seem to match the recommendations of game theory in the circumstances in which they are adopted, the laws of war can be explained *as if* they strive to minimize conflicts and reach efficient results. Efficiency is just an assumption made at a higher level of generality and not part of the nature of the law.).

explain the law on a certain issue. When assumptions fail to lead to good hypotheses, they can be discarded and replaced by others.

V. THE ARGUMENT FOR LIBERTY

The two preceding arguments for maintaining the use of assumptions in legal scholarships were arguments about scientific accuracy. They have to do with maintaining a clear vision of the law that can avoid unjustified, irrational, or arbitrary legal choices. But there is another argument for using assumptions that stems from the likely normative implications of doing away with them. This Part is dedicated to explaining why assumptions are necessary to sustain any form of liberal thinking.

A. *The Importance of Free Choice*

Before dealing with the issue of assumptions, the merit of free choice must be clarified. In *On Liberty*, John Stuart Mill defines the strongest argument against public interference with people's private behavior as the realization that this intervention is likely to cause more harm than good.[68] State intervention is likely to be harmful because mechanisms for collective decision-making are imperfect, but also because people usually know better what is good for themselves.

The argument that every adult *always* knows better than society what is good for her own well-being may be refuted on empirical grounds. People are often irrational because they have limited cognitive abilities and limited willpower. People are also not entirely self-seeking and may choose to sacrifice their own welfare for the benefit of others.[69] Liberalism does not need to be committed to the strong thesis that people make perfect choices. In fact, it may even concede that given people's imperfections and the fact that default choices are not neutral, the choices available to people should be deliberately engineered to guide them toward making better decisions.[70]

Nevertheless, liberalism does need to sustain a commitment to the following weak thesis: there is some form of connection between how people behave and what is good for them. If people are making predictable mistakes, the menu of choices offered to them can be changed to avoid these mistakes. But if there is absolutely no

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[68] JOHN STUART MILL, ON LIBERTY 150–51 (1859).

[69] *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–79 (1998).

[70] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 4–8 (2008).

connection between the actions people take and their own well-being, there is no utilitarian reason to let them choose at all.

There may be other moral reasons not to force people to change their behavior against their will. But the utilitarian reason is a much stronger bulwark against tyrants' claims of greater efficiency. It is difficult to appreciate why it is so important to let people go about their own business without realizing that the utility of free choice multiplies itself infinitely when large groups of people are considered. Constructing an elaborate choice metric to help one individual make a decision instead of deciding for her may look wasteful. But when millions of people have to make many daily decisions simultaneously, limiting governmental regulation helps reveal boundless information about what forms of behavior and which transactions are beneficial for every member of the group. By choosing, people disclose their preferences. Even when people are nudged in a certain direction, the act of choosing between options reveals information that sustains a healthy market.

Adam Smith famously called this phenomenon "the invisible hand,"[71] and Friedrich Hayek elaborated on the way countless decentralized decisions of self-seeking individuals outperform any regulator. If people buy what they need when they need it, this leads to levels of efficiency that are impossible for any central planner.[72] Hayek also warned that even established democracies can easily slide on the slippery slope that leads from well-intentioned governmental regulation to the enslavement of society by dictators.[73] To prevent the deterioration of liberal society, a certain humility of lawyers is essential.

B. *The Humility of Making Assumptions*

Making assumptions is an exercise in humility because it means being willing to concede that certain relevant facts are unknown. If lawyers assume that people who sign a contract wish to be bound by its provisions, they are proceeding on an assumption that may be untrue. Some people may not be aware of the content of the document they are signing at all, for example. But for the law, there is a certain predictable trajectory that goes from human actions to legal consequences. This trajectory cannot be broken by a claim that other solutions would better serve people's welfare.

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[71] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book IV Chapter II Par. 9 (1776, MetaLibri 2007).

[72] *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519, 524 (1945).

[73] *See generally* F.A. HAYEK, THE ROAD TO SERFDOM (1944).

The advantage of making assumptions lies in the fact that the gaps in the government's knowledge are filled in a predictable way. The government does not need to know everything. It makes no claim that the actions people take are the best for them, all things considered. Instead, it produces legal implications that usually concur with the possibility that people do what is good for themselves. In some cases, the law produces legal implications that concur with the view that people diverge from what is good for them in predictable and coherent ways. Either way, the choices people make are meaningful because they are a factor in the complex equation that determines the legal rule.

Many of the examples mentioned in this Article, such as the assumption that the law strives for efficiency, may seem distant from the assumption that people do what suits them best. Nevertheless, these are just cases in which the link between people's actions and their legal implications is more complicated. Indeed, the trajectory that goes from peoples' actions to the ultimate legal result may be quite long. One could claim, for example, that to interpret tort law as if it were efficient the rules on negligence should be set at a level that leads to optimal incentives, given a set of assumptions about the rationality of relevant actors. This does not mean that people will always follow their rational incentives, but it does mean that there is no need to inquire into people's actual preferences and to decide for people what serves their own interest. In contrast, there is a need to observe what people do and apply a legal solution based on their actions.

When the government does away with assumptions, it must try to find out what is going on in people's minds, and it may determine that what goes on there is biased in ways that are not predictable. If people are treated as if they suffer from false consciousness that eliminates the link between their actions and their personal advantage, that is the end of liberalism and the end of freedom. Freedom cannot survive when the government claims to know better than individuals what is good for them and allows itself to ignore any connection between people's actions and their true interests.

VI. CONCLUSION

The purpose of this Article is to demonstrate that making assumptions is a vital tool of legal scholarship. Legal scholars, as opposed to judges, are not committed to following the normative strictures of the law. They have a different task: to describe the normative commitments held by judges.[74] The only way to do that

[74] *See supra* note 12 and accompanying text.

properly is by making assumptions, constructing hypotheses based on them, and then testing these hypotheses against facts.

Proper legal scholarship can be conducted by scholars with a variety of methodological outlooks. But it is Law and Economics that is most frequently criticized for making assumptions that are false or simplistic. The critics do not lie: Law and Economics is really based on assumptions and is more forthcoming and honest about it than other methodologies. And it is also true that many of the assumptions made by Law and Economics scholars are simply untrue. Yet this Article argues that Law and Economics scholars who make these assumptions are doing exactly what they are supposed to do. They are following the proper intellectual process that can lead to progress in legal scholarship.

The reader may ask herself: what are the normative implications of this argument about how law should be understood? The answer is that every statement legal scholars make about existing law should follow the method of making assumptions. Other ways of reasoning fall prey to unhealthy essentialism that leads to arbitrary decisions, forfeit the ability to communicate their conclusions effectively with other scholars, and endanger the most basic liberal principles. This means that statements about the law that strive to have justifiable normative implications have to be based on assumptions. Every time a scholar interprets an ambiguous legal doctrine, she should do so through assumptions and hypotheses. Instead of saying what should be the specific recommendations of legal scholarship, this Article explains the methodology that must be followed to describe the current state of the law, a prerequisite for making any viable normative recommendation.