Working for the Weekend: A Response to Kessler & Pozen

A Response to Jeremy K. Kessler and David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U Chi L Rev 1819 (2016).

Charles Barzun†

Everyone's watching, to see what you will do.
Everyone's looking at you, oh
Everyone's wondering, will you come out tonight.
Everyone's trying to get it right, get it right.
Loverboy [1]

INTRODUCTION

In *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, Professors Jeremy Kessler and David Pozen argue that prescriptive legal theories tend to cannibalize themselves over time.[2] Drawing on four case studies (originalism, textualism, popular constitutionalism, and cost-benefit analysis), the authors show how these theories tend to gain popularity and momentum only at the cost of abandoning the theoretical and normative motivations that originally inspired them.[3] They thus offer the "life-cycle theory" as a theory of theories—a model that describes how this pattern of rise and decline occurs.[4]

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† Armistead M. Dobie Professor of Law, University of Virginia School of Law. I thank Professors Jeremy Kessler and David Pozen for helpful comments on an earlier draft of this Response. I have made substantial revisions as a result of them, though I suspect the authors will continue to think that I have misunderstood their central claims and motivations.

1 Loverboy, *Working for the Weekend* (Columbia, 1981), archived at http://perma.cc/29FX-786L.

2 See generally Jeremy K. Kessler and David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U Chi L Rev 1819 (2016).

3 See id at 1820–25.

4 See id at 1822–23.

The article is insightful, well argued, broad in scope, and stimulating to read. The authors' descriptive claims struck me as plausible and probably correct. This brief Response thus does not take issue—at least not directly—with their characterizations of the theories in question. It instead focuses on the last few pages of their article, in which the authors discuss what they take to be their study's methodological implications.[5] There they encourage two different lines of inquiry. The first is an empirical research program based on their life-cycle theory of which their article might count as one example.[6] The second is a normative or critical project that makes use of the results of the first line of research in order to criticize or engage with the kinds of public-law theories they examine.[7]

In some ways, my focus on these methodological suggestions is unfair to the authors because they are secondary to their main concern and are offered as nothing more than some concluding speculative thoughts. Nevertheless, I do so because these suggestions deal most directly with a question their study as a whole naturally invites: How, if at all, might the life-cycle theory be helpful to the lawyer, judge, or legal scholar?

I. THE LIFE-CYCLE THEORY

Let me first briefly summarize their argument. According to the authors, the life cycles of certain legal theories take a similar shape. The theories they have in mind are those that "seek to negotiate highly politicized legal conflicts through the introduction of decision-making frameworks that abstract away from the central values in contention."[8] The highest-profile examples are originalism and cost-benefit analysis (CBA), both of which purport to instruct judges or officials how to make decisions affecting public law or policy.[9] Theories like these are initially controversial because they seem to exclude certain kinds of considerations (for example, current societal norms in the case of originalism, dignitary or egalitarian values in the case of CBA). But that is precisely what makes them *attractive* to the theories' original adherents.

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5 See id at 1891–92.

6 Kessler and Pozen, 83 U Chi L Rev at 1891–92 (cited in note 2).

7 Id at 1892.

8 Id at 1822.

9 See id at 1844–47, 1859–68. The other theories the authors discuss are textualism and popular constitutionalism. See id at 1848–59.

Over time, however, as these theories gain traction, they become increasingly complicated and, more important, increasingly "compromised, by their own normative lights."[10] Originalists start saying that evolutionary change over time is consistent with originalism;[11] CBA supporters begin to incorporate considerations related to "human dignity, fairness, and distributive impacts" into their balancing of costs and benefits.[12] In this way, such theories "work themselves impure."[13]

The authors offer the life-cycle theory as a model that describes in abstract terms this process of impurification or "adulteration." At the first stage, the theory "introduces a decision procedure or criterion for judgment that seeks to resolve a highly politicized legal conflict in terms that are relatively alien to the main points of political contention."[14] At the second stage, critics attack the theory for "its failure to secure certain values that gave rise to the conflict in the first place."[15] The crucial stage is the third one, in which "the theory responds to these critiques by internalizing them—supplementing or modifying its approach so as to better serve the initially ignored values."[16] In so doing, the theories lose "normative and conceptual purity."[17] This process then repeats itself again and again until the theory either dies or "persists in substantially adulterated form."[18]

The life-cycle model itself only describes this process of adulteration, but the authors also attempt to explain it. What seems in need of explanation is why a theory like originalism or CBA becomes popular only after losing the very attribute—namely, its ability to resolve first-order political conflicts through a decision-making procedure—that had made the theory attractive to its original advocates.[19] The authors' answer comes in the form of what they call an "exogenous hypothesis" about why this phenomenon occurs.[20] According to this view, "highly adulterated legal theories persist to a large degree because of the work they do 'off the page'—serving interests and

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10 See Kessler and Pozen, 83 U Chi L Rev at 1821 (cited in note 2) (emphasis omitted).

11 Id at 1846 & n 79.

12 Id at 1867 (quotation marks omitted).

13 Id at 1821.

14 Kessler and Pozen, 83 U Chi L Rev at 1822 (cited in note 2).

15 Id.

16 Id (emphasis omitted).

17 Id at 1823.

18 Kessler and Pozen, 83 U Chi L Rev at 1823 (cited in note 2).

19 See id at 1884.

20 Id at 1891.

ideals that are exogenous to the theories' stated norms."[21] The use of CBA for governmental decision-making, for instance, increases the authority and prestige of economists.[22] Originalism does the same for lawyers and law professors, or at least those with a particular historical expertise.[23] The authors raise and discuss a few other hypotheses but conclude that the exogenous hypothesis "strikes us as the most useful starting point for further empirical work."[24]

The upshot of all of this is that the real work done by prescriptive legal theories may not be in advancing the normative goals that both motivated their original advocates and triggered the early rounds of criticism. Instead, their more lasting effects may lie in legal culture.[25] Such theories affect "not only which sorts of lawyers (and nonlawyers) are in or out, up or down, but also which styles of research, rhetoric, and justification have more or less currency."[26]

The authors conclude by suggesting two potential lines of work that legal scholars might profitably undertake.[27] The first is an empirical project that would investigate "the *indirect* and *unintended* effects of prescriptive legal theories," namely their consequences for "which sorts of lawyers (and nonlawyers) are in or out, up or down" and which styles of rhetoric in legal argumentation gain traction and which do not.[28] The goal of such a research program would be to better "understand[ ] why these theories succeed," and to "assess[ ] the costs of that success."[29] The authors see their own article as one, but only one, example of such a descriptive study.

The second proposal is normative and critical. The authors suggest in the conclusion that the next time a hot new public law theory comes along, public lawyers might consider using the results of the authors' study—or those of future empirical studies of the sort just mentioned—for the sake of employing "externalist approaches to legal argument."[30] That is, scholars and

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21 Id at 1885.

22 See Kessler and Pozen, 83 U Chi L Rev at 1885 (cited in note 2).

23 See id at 1885–86, 1891.

24 See id at 1891.

25 See id.

26 Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2).

27 I thank the authors for clarifying that these are, in fact, two distinct research proposals rather than one.

28 Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2).

29 Id.

30 Id at 1892.

lawyers should "focus not only on the merits of its initial decision-making framework but also on the social, political, and ideological effects that such a framework's adulterated descendants could foster, down the line."[31]

II. KESSLER AND POZEN'S RESEARCH PROPOSALS AND THE PUZZLED LAWYER

My interest lies with these last two proposals. In particular, my question is how each might be useful to a lawyer, judge, or legal scholar. To answer it, I will borrow and modify a heuristic that H.L.A. Hart once invoked. He suggested that asking how the "puzzled man" thought about law could tell us something important about the nature of law.[32] I want to instead ask: How might these two research projects be of service to the "puzzled lawyer" (whether practitioner, judge, or scholar)? That is, does it help someone contemplating whether to adopt, endorse, advocate for, ground a legal decision on, teach, or criticize some particular legal theory to learn about its social, political, and ideological effects? My answer is roughly, "it depends, but probably not." The rest of this Response attempts to explain what I mean.

It may be helpful to first make clear the connection between the two proposals. Why would an inquiry into the sociological consequences of a theory, like that offered by the authors, be useful for those interested in criticizing it? One reason would be if those effects could themselves be usefully classified as either costs or benefits. The authors suggest this approach when they talk of the need to assess the "costs" of the theory.[33] Under this view, if we learn that certain lawyers have improved their position relative to others, or certain styles of argument have become more pervasive in legal practice, those facts might alone count as costs in themselves, to be measured by some independent evaluative standard. So we might weigh the costs and benefits of a prescriptive theory by looking to its sociological consequences just as we might weigh the costs and benefits of the

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[31] Id.

[32] See H.L.A. Hart, *The Concept of Law* 40 (Oxford 3rd ed 2012). The "puzzled man" was itself a modification of the more famous character, the "bad man." See also Oliver Wendell Holmes, *The Path of the Law*, 10 Harv L Rev 457, 459–61 (1897).

[33] See Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2) (observing that understanding the effects of theories "is integral to understanding why these theories succeed, and to assessing the costs of that success").

Affordable Care Act[34] by looking to its social and economic consequences.

But even putting aside the paradox seemingly involved in weighing the costs and benefits of cost-benefit analysis, this kind of argument would not be of much help to the puzzled lawyer. Or, more precisely, although the *empirical* work about the effects might be useful to her, the critical project would not seem to be doing much work. If the puzzled lawyer values certain kinds of lawyers and disciplinary methods, she may like that the theory helps advance those lawyers and those methods. If not, then she will not. But it is hard to see how deploying an "externalist approach[ ] to legal argument" against the theory would add much.[35] The empirical work would presumably suffice.

It thus seems more likely that the authors are using "costs" in a loose sense to refer to the effects themselves, not so much an evaluative assessment of those effects. A more plausible answer might then be that the sociological effects of a theory might aid the puzzled lawyer in evaluating a prescriptive legal theory because it provides her with evidence as to whether the theory's claims are *true*.[36] The argument here would be that what really accounts for the success of a given theory is not its conceptual coherence or its normative appeal (whether formal or substantive), but rather the beneficial consequences it produces for the lawyers and law professors who endorse it. The "*real* basis for the persistence of an adulterated prescriptive legal theory," the authors explain, "and the *real* stakes of that theory's persistence—will be only dimly illuminated by the theory itself."[37] Originalism, for instance, increases the authority, and improves the status, of lawyers, judges, and law professors, or a certain subset of those groups.[38] CBA does the same for economists.[39] These sociological effects give us reason to doubt the merits of the theory because they indicate that the theory's success is better explained by the way in which espousing its tenets has benefited its proponents than it is by the theory's intrinsic virtues.

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34 Pub L No 111-148, 124 Stat 119 (2010).

35 Kessler and Pozen, 83 U Chi L Rev at 1892 (cited in note 2).

36 A threshold objection to the point made in the text would be to deny that a prescriptive theory, insofar as it makes claims about values, could be true or false at all. But the authors do not appear to endorse such pervasive moral skepticism. They seem nostalgic, for instance, for a time when constitutional theorists more forthrightly engaged in an "open pursuit of justice." Id at 1828.

37 Id at 1824 (emphasis added).

38 Id.

39 Kessler and Pozen, 83 U Chi L Rev at 1885 (cited in note 2).

This would explain how the second project the authors envision—that of using "externalist approaches to legal argument" to critique prescriptive legal theories—could make use of the results of descriptive inquiries such as the one they have provided. Those arguments would look to the sociological effects of a theory in order tell a story about it—or give an explanation of its success—not in terms of the theory's own concepts and commitments, but rather in a way that undermines those concepts and commitments. It would be like pointing to the negative economic effects of environmental regulation on the oil industry as a way to undermine the industry's own scientific studies downplaying climate change.[40] Pointing to the interests that such studies may serve gives us reason to doubt their accuracy.[41] One could interpret certain forms of critical legal history as efforts along these lines.[42]

The problem with this approach is that it is difficult to prove empirically the causal claim on which it depends. To see why, let us imagine that we want to follow the authors' lead and conduct an empirical inquiry into the effects of legal theories. We want to know whether we can understand better what *really explains* the endurance of our target prescriptive legal theory. Following the authors, our hypothesis is that these theories persist because they function to serve the interests of the lawyers, judges, and law professors who articulate, defend, and advance them.[43] We might test this hypothesis by ranking law schools, law reviews, and other legal institutions according to some measure of hierarchical status. We could then identify similarly situated legal professionals, some of whom adopt the theory and some of whom do not, and then compare how each group performs over some period of time according to these external indicators of pro-

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[40] See, for example, Suzanne Goldenberg, *Work of prominent climate change denier was funded by energy industry* (The Guardian, Feb 21, 2015), archived at http://perma.cc/SUT7-UFXA.

[41] This might be true even if the theory's proponents are not consciously pursuing these goals. See Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2) (emphasizing the need to look at the "*unintended* effects of prescriptive legal theories").

[42] See generally, for example, Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Oxford 1992); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 Yale L J 1017 (1981). I recognize that this interpretation of critical legal history is controversial, but I believe it is right. Still, I cannot defend that view here. I thank Professor Oren Bracha for pressing me on this point.

[43] See Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2) (describing the "exogenous hypothesis" as the claim that "highly adulterated legal theories persist because they serve interests and ideals that are not compassed by the theories themselves").

fessional status. If we see consistent correlations between theory adoption and status improvements, then that fact may count as empirical support for the hypothesis that these theories linger on because they serve as vessels of professional advancement.[44]

That seems plausible enough, but the difficulty that quickly arises is that this approach cannot rule out the most obvious competing hypothesis, which is that the theory's success is explained by reference to its intrinsic merits. After all, if the theory truly is conceptually coherent, normatively compelling, and practically useful, and if other lawyers, judges, and law professors recognize as much, then one would expect its proponents to achieve professional plaudits as a result.

The authors openly acknowledge the possibility—even plausibility—of such an explanation. Citing the work of Professor Imre Lakatos, a philosopher of science, they raise the possibility of an "internalist" explanation for a theory's endurance.[45] Under this view, even as the substantive implications of applying the theory become less clear, its "decisional formalism" (for example, the "centrality of the constitutional text" for originalists) endures as a "hard core" of the theory and continues to prove useful for legal decision-making.[46] The internalist hypothesis, then, amounts to the claim that these theories persist "because they really have succeeded on their own initial terms, pared down to those terms' most essential elements."[47]

The authors ultimately (if tentatively) reject the internalist hypothesis.[48] They do so on the ground that it fails to explain why, given the complexity which "adulterated" theories manifest in their later stages, a judge or law professor would sign on to such a program, especially since one need not do so in order to remain faithful to its now-banal prescriptions, such as to "pay careful attention to statutory text" in the case of CBA.[49] Presumably, it would always be easier (and hence cheaper) to follow

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44 Difficulties remain, however, including what it means to be "similarly situated" and to "adopt" a particular theory. Measures of hierarchical status will also be controversial.

45 Kessler and Pozen, 83 U Chi L Rev at 1888 n 285 (cited in note 2), citing generally Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in Imre Lakatos and Alan Musgrave, eds, *Criticism and the Growth of Knowledge* 91 (Cambridge 1970).

46 Kessler and Pozen, 83 U Chi L Rev at 1887–89 (cited in note 2).

47 Id at 1888.

48 See id at 1889 ("Nonetheless, we do not think this hypothesis offers an actual *alternative* to our own hypothesis.").

49 Id at 1889–90 (quotation marks omitted). The textualism example is theirs. See id at 1889. The CBA example is my own.

the procedure and avoid having to learn the complex theory. Thus, the exogenous hypothesis, which looks to the prestige and authority that such theories offer to those who embrace them, does a better job of explaining their persistence.[50]

But the internalist can explain such theory adoption. Those who adopt not only the theory's "minimal prescriptions" but also the theory itself, despite its high costs, do so because they judge it to be right. They think, for instance, that a judge's duty in a constitutional democracy is to stick closely to the constitutional or statutory text (originalism, textualism); or that sound public policy requires official decision-makers to weigh the societal costs and benefits of their decisions (CBA).

Still, the authors are skeptical. Although they acknowledge that adopting the minimum prescriptions of an adulterated theory could make a difference to how a judge decides a case, they doubt that applying such vague decision procedures yields determinate results in particular cases.[51] Given such indeterminacy, they speculate that "the appeal of such a maxim has less to do with its normative or practical payoffs than with its rhetorical power—its resonance with social expectations and self-conceptions about the lawyer's or judge's role."[52] In other words, because the adulterated theory no longer produces the "practical payoff[ ]" it promised (that is, a decision procedure capable of producing determinate legal outcomes), the "exogenous" hypothesis, framed in terms of the theory's "rhetorical power," seems more likely.[53]

The problem with this response is that it assumes that the theory's capacity for producing determinate results is what accounts for its appeal among those who adopt the theory. For if that is not the source of its appeal, then the fact that the (now-adulterated) decision procedure fails to yield determinate results would not necessarily count against the internalist hypothesis. Proponents of the theory might still be drawn to it—in spite of

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50 See Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2).

51 See id at 1889–90.

52 Id at 1890.

53 Id. Note what is and what is not at issue here. When explaining case outcomes, the indeterminacy of legal doctrines or decision procedures count in favor of alternative, "nonlegal" explanations of the decisions because the legal indeterminacy suggests that something else must be doing the causal work in producing the outcome. Here, though, the goal is not to explain case outcomes but to explain theory adoption. Thus, the question is why lawyers, judges, and scholars would adopt a theory in spite of its inability to generate determinate results. So it is the theoretical value of determinacy for legal professionals that is at issue, not whether the theory in fact yields determinate results. This distinction is important for understanding the point that follows in the text.

its inability to yield determinate results—on account of the other values it serves (that is, for other "internal" reasons). Even if not true of the original proponents of the theory, this may be true of more recent theory advocates.

Take originalism, for instance. On the authors' own telling, there were multiple normative commitments of early originalism, including (1) a "conservative frustration with the 'activist' constitutional rulings of the Warren and Burger Courts,"[54] (2) a desire to vindicate "democratic and rule of law" values,[55] and (3) an effort to restrain judicial discretion.[56] If it turns out that many of today's originalists recognize that Founding-era sources fail to produce determinate results in many contested cases but nevertheless remain committed to the method on the ground that it has a better claim to democratic legitimacy than any of its competitors, then that fact might count in favor of the "internalist" hypothesis.[57]

The authors seem to foresee an objection along these lines, and their response is to deny that the internalist hypothesis really amounts to an alternative hypothesis at all.[58] If originalism thrives because of the appeal of its minimal prescription that judges should keep the constitutional text central to their decision-making, then the internalist explanation "may just *be* explanation of that theory's persistence in terms of exogenous factors: the second-order benefits that accrue to those legal theorists and practitioners who commit to norms that are socially or professionally celebrated but legally indeterminate."[59] Under this view, the two explanations—one "internalist," the other "externalist"—are no longer competing *hypotheses* at all, but instead two different ways of looking at the same phenomenon.[60]

But now there is a problem. Recall that the question initially put forward was how empirical or descriptive projects like that of the authors could help the puzzled lawyer. The hope was

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54 Kessler and Pozen, 83 U Chi L Rev at 1844 (cited in note 2).

55 Id at 1845.

56 Id, quoting Keith E. Whittington, *The New Originalism*, 2 Georgetown J L & Pub Pol 599, 602 (2004).

57 In fact, I suspect that is true, as a descriptive matter.

58 Kessler and Pozen, 83 U Chi L Rev at 1889 (cited in note 2).

59 Id at 1890.

60 See id at 1840–41 (observing that due to "professional feedback effects," including the revisions to a theory "intended to make the initial idea not just more politically palatable but also more intellectually and institutionally sound," it may be that "[w]hat we are calling a process of impurification can thus be seen as a process of purification from another perspective: the very moves that undermine the theory's initial normative aspirations may be ones that make it conceptually richer and more refined").

that it would do so by providing her with a better explanation for a given theory's success than its normative power or conceptual elegance.[61] By demonstrating that the real explanation for a theory's success lies in the "interests and ideals that are not compassed by the theories themselves," there would be reason to doubt the theory's intrinsic normative or conceptual appeal.[62]

Proving that hypothesis, however, would require showing that the theory's capacity to serve such interests actually does explain its success better than does the appeal of its substantive doctrines and commitments. Otherwise, there would be no reason to question the theory. Yet if the externalist and internalist explanations are just two different interpretations of the same phenomenon, then the puzzled lawyer will be no less puzzled than when she began: she now knows there are two perspectives from which she might view the theory in question—one "internal" to it and the other "external" to it. But she is not offered any criteria for choosing between the two.

III. THE PUZZLED LAWYER AND THE INTERNALIST/EXTERNALIST CRUTCH

So what has gone wrong? And what is the puzzled lawyer to do now? The answer to the first question is that the authors' claim has undergone a subtle transformation. Initially they purport to offer a hypothesis about the real "exogenous factors" driving the continued success of adulterated theories.[63] What accounts for such success, they suggest, is not the "normative or practical payoffs" promised in the theories themselves but instead the "interests and ideals" that the theories serve.[64] And in theory, the results of such descriptive, empirical studies could be of use to those commentators seeking to criticize public law theories because they undermine the stated claims and commitments of the proponents of such theories.[65] And for the same reason, the results could be of value to the puzzled lawyer trying to figure out what to make of these various legal theories.

But the claim then shifts slightly, likely because the authors recognize how difficult it would be to vindicate the external hypothesis empirically. Once they concede that even adulterated theories remain faithful to a minimally prescriptive core maxim

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61 See id at 1885.

62 Kessler and Pozen, 83 U Chi L Rev at 1891 (cited in note 2).

63 Id at 1890–91.

64 Id.

65 See notes 31–38 and accompanying text.

(for example, to recognize the "centrality of the constitutional text" in the case of originalism), it will be almost impossible to disprove the "internalist hypothesis" that lawyers, judges, and scholars are drawn to the theory because of their genuine commitment to the maxim's value rather than because of its "resonance with social expectations and self-conceptions about the lawyer's or judge's role."[66] The reason is that the kind of rule-of-law concerns that might counsel in favor of the maxim also jibe with the professional expectations as to the judge's proper role. The authors' solution is to conflate the two hypotheses: to be drawn to such core maxims just *is* to follow norms that are "professionally celebrated but legally indeterminate."[67]

But now the puzzled lawyer is in a sticky wicket. For she is now presented not with two rival hypotheses, one of which may be vindicated by empirical inquiry, but rather with two different ways of looking at the same legal theory. Under one ("internalist") view, there are many versions of the theory in question, some of which may be superior to others along certain normative dimensions (rationality, democratic legitimacy, etc.), and some which may produce more legally determinate outcomes than others (itself another normative dimension), but all of which share a commitment to a foundational norm or idea. For example, all versions agree that the constitutional text should be privileged in constitutional adjudication (originalism) or that governmental decision-makers that should calculate trade-offs when allocating governmental resources (CBA).

Under the other ("externalist") view, the diversity of views that travel under the name of the theory itself—including ones that run contrary to the commitments of the theory's original proponents—is itself evidence of the theory's vacuity. The chief virtue of such "minimal prescriptions" is that they enable the lawyers, judges, and law professors who embrace them to validate and reinforce the judicial self-image as a neutral, constrained decisionmaker.[68] But the minimal prescriptions are nothing more than that—hollow rhetoric, voiced (whether consciously or not) for the sake of maintaining or improving one's professional status.

So how should the puzzled lawyer now think of such theories and their minimal prescriptions? One tempting response is to say that the answer depends on her position relative to legal

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66 Kessler and Pozen, 83 U Chi L Rev at 1890 (cited in note 2).

67 Id.

68 Id at 1890.

practice as a whole. A lawyer or judge within legal practice might justifiably view them in an "internal" or normative sense, whereas the sociologist might justifiably view them from the outside, as doctrines or purposes recognized by the group in question—in this case, lawyers, judges, and law professors. If that is right, then I have answered my own question by stipulation, insofar as I have posited that our puzzled lawyer is a lawyer. If she is a lawyer, then she likely will (and probably should) adopt the internal account. But a puzzled sociologist or political scientist likely would (and probably should) adopt the "external" account.[69]

But this answer is unsatisfying because I had reason to ask about a puzzled lawyer. Recall that the authors themselves suggest that looking to the sociological consequences of prescriptive law theories could be instructive for "how we should evaluate and engage the legal theories around us" and useful for "commentators" on public law theories.[70] That is the second of their two methodological proposals. Since lawyers, judges, and legal scholars tend to be the ones who evaluate, engage, and comment upon the prescriptive legal theories in question, it is reasonable to assume they would be the consumers of the life-cycle theory (as are economists in the case of CBA). So it seems fair to ask what the puzzled lawyer ought to do when faced with dueling perspectives on originalism, CBA, or any other theory she seeks to understand for the purpose of action.

Perhaps a better route, then, would be for her to devote more thought to what she makes of those banal, minimal prescriptions in their own right. When assessing originalism, for instance, she might ask such questions as whether a judge should in fact begin with the constitutional text when deciding constitutional cases. If so, why? Is it because of the text's claim to democratic legitimacy? How strong can such a claim really be given that only a small number of white males ratified it and did so over two hundred years ago? Regardless, how much guidance does the text actually provide? Is talk of the document's "original meaning" just rhetoric designed to mask the discretion that

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69 But see David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan L Rev 575, 587 (1984) (drawing a distinction between "doctrinal" and "empirical" legal studies and suggesting that the contrast is "similar to that between theology and the sociology of religion. Theologians develop ideas about the world and humanity from within an authoritative tradition. Sociologists of religion look at theological production from the outside, attempt to account for it, and try to trace its impact on society").

70 Kessler and Pozen, 83 U Chi L Rev at 1892 (cited in note 2).

judges actually possess? Should we then not at least be honest about what courts are doing? Or might it be that there is genuine value in maintaining the appearance that judges are principled adjudicators, even when that is not true?[71] In any case, if the constitutional text does not form the center of the inquiry, which legal sources ought to? Cases? Do they have any greater a claim to democratic legitimacy? Some other moral or intellectual virtue?

These sorts of questions, of course, are the stuff of constitutional theoretical debate. They are questions about which sources, methods, and values matter for adjudication and legal decision-making more generally. No doubt one could generate analogous questions to ask of CBA, textualism, or popular constitutionalism.

Perhaps something like them is what the authors have in mind when they encourage commentators to focus, the next time a new public law theory comes along, on the "ways in which the theory's advancement may reshape legal culture."[72] If so, I applaud their efforts. We should remain alert to the way in which new methods for analyzing law may challenge or alter the kinds of sources, methods, and values on which lawyers and courts typically rely. And we should remain sensitive to the ways in which the framing of particular questions exclude certain kinds of arguments, while privileging others.

But I do not see what is gained by calling such questions "externalist" or "internalist" ones. As the authors' article itself nicely demonstrates, legal theories change over time and take on different meanings and commitments. Invoking the distinction when discussing some particular theory thus risks begging the central questions at issue because what seems "internal" to a theory to one person may well strike another as "external."[73]

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71 See Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz L Rev 1107, 1139–51 (1995) (arguing that the Supreme Court properly takes into account its own reputation for being principled on the ground that doing so may be necessary to ensure that it can enforce its judgments generally and thus legitimately).

72 Kessler and Pozen, 83 U Chi L Rev at 1892 (cited in note 2).

73 For example, at one point the authors note that some originalists think other originalists are not really originalists, with the result that when the authors see one (adulterated) theory of originalism, others see multiple originalist theories, with some being more deserving of the name than others. See id at 1835 n 37. To this objection the authors respond that they are content with the accuracy of their own account because "[t]he best a descriptive (meta-)theory such as ours can do is to acknowledge and assess this disagreement from an external perspective." Id. The response makes it sound as if the authors do not take any substantive stand on what originalism as a theory of constitutional interpretation really is. But they do (and must) offer a substantive account of

The authors are hardly the first to succumb to the temptation of conceptualizing methodological debates in law around a dichotomy between internal and external points of view.[74] The distinction tempts the legal metatheorist because it promises to yield insights free of controversial moral or metaphysical commitments. Maybe that is why the distinction is now endemic to legal theory. But in my view, the distinction is an intellectual crutch that ought to be kicked away for good. It no longer serves any useful purpose, and it blocks clear and creative ways of thinking about law.

CONCLUSION

Is there a better alternative? I am not sure, but if so, I think it begins with the recognition that two things are simultaneously true: (1) all human endeavors to organize immediate human experience into systems or patterns of thought are imperfect and so contain anomalies and contradictions, and (2) we cannot live or think other than by relentlessly engaging in such organizing and generalizing endeavors, sometimes consciously and often not.[75] Accepting (1) means that we should not be surprised by

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what originalism is. What unites originalists, in their view, is their commitment to "the decisional centrality of the constitutional text." Id at 1834. That sounds like a plausible view, but the point is that it is a substantive, interpretive claim about what the object of their analysis is, which makes them vulnerable to the charge that they have misunderstood that object. I take this to be Professor Lawrence Solum's point when he wrote, in response to an earlier draft of Kessler and Pozen's article,

> If you want to write about originalism as a constitutional theory, then you need to . . . dig into the actual theories advanced by originalists. This is hard work. It means that you actually have to read and analyze the theoretical literature, reconstruct the theoretical positions, and then consider the evolution of ideas and the shape of current theoretical landscape.

See Lawrence Solum, *Kessler & Pozen on the Development of Normative Legal Theories (with Commentary on the History of Originalist Theory)*, Legal Theory Blog (Mar 30, 2016), archived at http://perma.cc/8FF2-XB25. The problem with the internal/external distinction, in my view, is that it seduces the metatheorist into thinking that she can study a theory or practice without doing the "hard work" of trying to understand the purposes, doctrines, and concepts that constitute it. That is true even if—*especially* if—one's ultimate conclusion is to reject its central purposes as misguided, its doctrines as causally inert, or its concepts as incoherent.

74 See generally Charles Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 Va L Rev 1203 (2015) (surveying and criticizing the use of this distinction in legal scholarship).

75 Even framing the issue in this way is controversial insofar as it suggests that there is such a thing as pure, unconceptualized "experience" that we then organize by imposing concepts on it. Some philosophers have denied the intelligibility of such a view. See generally, for example, Donald Davidson, *On the Very Idea of a Conceptual Scheme*, 47 Proceedings and Addresses of the Am Phil Assn 11 (1973) ("I want to urge that this second dualism of scheme and content, of organizing system and something waiting to be

the authors' observations about legal theories because, as their own illuminating discussion shows, the adulteration process they identify is pervasive in intellectual life.[76] Accepting (2) means that there is no escaping the difficulties recognized by (1). So the authors are right that no decision procedure can free judges from the need to make controversial evaluative judgments when deciding cases. But nor can any "perspective" be reached that will free legal theorists (or metatheorists) from the need to make controversial conceptual, causal, or evaluative judgments when analyzing theories for the sake of practical decision-making of any sort.[77] If there is no exit from this predicament, then the best the metatheorist can hope for is that she becomes marginally more aware of the "interests and ideals" driving her own judgments and perhaps someday even learns to distinguish between the two. In the meantime, all she can do is keep on trying to get it right, get it right. [78]

organized, cannot be made intelligible and defensible."); Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Harvard 4th ed 1997). But if true, this fact just reinforces the main point, which is that all our cognitive judgments are in some ways contestable and controversial.

[76] Kessler and Pozen, 83 U Chi L Rev at 1868–80 (cited in note 2) (identifying a similar pattern in the life cycles of legal doctrines, political parties, and scientific theories).

[77] See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 Phil & Pub Affairs 87, 88–89 (1996) (arguing, in the context of debates about the nature of morality, that "Archimedean" theories, which "purport to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it," are misconceived).

[78] Loverboy, *Working for the Weekend* (cited in note 1).