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Introduction: New Legal Realism at Ten Years and Beyond

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Introduction: New Legal Realism at Ten Years and Beyond

Keywords

New Legal Realism

Introduction: New Legal Realism at Ten Years and Beyond

Bryant Garth* and Elizabeth Mertz**

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I. CELEBRATING TEN YEARS OF NEW LEGAL REALISM

This symposium commemorates the tenth year that a body of research has formally flown under the banner of New Legal Realism (NLR).¹ We are very pleased

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** Research Faculty, American Bar Foundation; John and Rylla Bosshard Professor, University of Wisconsin Law School. Many thanks are owed to Frances Tung for her help in overseeing part of the original Tenth Anniversary NLR conference, as well as in putting together some aspects of this Symposium.

1. The Tenth Anniversary NLR Conference was held in 2014, exactly ten years after the inaugural U.S. NLR conference, held in 2004 at the University of Wisconsin Law School with support from the American Bar Foundation. Howard Erlanger et al., *Forward: Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 335–63 (2005).

As Stewart Macaulay notes in his article for this new symposium, there have been calls for a new Legal Realism for some time. He cites the early example of Lynn M. LoPucki, *Bringing Realism to the Classroom—A Review of Warren and Westbrook’s The Law of Debtors and Creditors*, 1987 WIS. L. REV. 641, 641 (1987) (describing NLR as “born of the old Realism and nurtured in the law and society movement”).

For other early examples calling for renewed attention to social science on the part of legal scholars see also BRIAN Z. TAMANAH, *REALISTIC SOCIO-LEGAL THEORY* (1997) (Tamanaha’s early formulation of a “realistic socio-legal theory”); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (stressing quantitative approaches); Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 LAW & SOC. INQUIRY 237, 237–39 (1998) (not limiting the kinds of methods to be used). All of these early calls for forms of new legal realism shared an emphasis on the integration of empirical social science research into legal scholarship. See generally Elizabeth Mertz, *Introduction – New Legal Realism: Law and Social Science in the New Millennium*, in *THE NEW LEGAL REALISM, VOL. I: TRANSLATING LAW-AND SOCIETY FOR TODAY’S LEGAL PRACTICE* 1-25, 4-11 (Elizabeth Mertz, Stewart Macaulay & Thomas W. Mitchell, eds., 2016); *New Legal Realism*, WIKIPEDIA, https://en.wikipedia.org/wiki/New_legal_realism (last visited Jan. 8, 2016). As we’ve noted, however, the first formal conference and

that the *UC Irvine Law Review* has elected to publish these articles and memorialize the 10th Anniversary NLR Conference that took place in Irvine in August 2014, with the support of the American Bar Foundation and the University of California, Irvine School of Law (UCI Law).² The four articles in this symposium and the concluding essay make important scholarly contributions and help in different ways to continue to define the NLR project while fostering its further development.³ As we will suggest in this Introduction, we believe there are good reasons to keep this project moving in the direction that these articles chart. We begin with a short introduction to the NLR project.

After ten years and quite a number of publications and scholarly presentations on the subject, NLR is gaining increasing acceptance as an important current strand of the renewed interest in empirical and social science work on law.⁴ This growing recognition has arguably eclipsed a few earlier arguments over how to delineate (or possibly police) who could be legitimate descendants of the original Legal Realism of the 1930s in the United States, and over the degree to which any current group could claim a Realist legacy.⁵ Of course, the question of what was legitimately part

ensuing published conference symposia in North America occurred in 2004. *See* Symposium, *New Legal Realism*, 2005 WIS. L. REV. 335 (2005); *see also* Symposium, *New Legal Realism*, 31 LAW & SOC. INQUIRY 795 (2006).

2. The authors wish to acknowledge the major support of the University of California, Irvine School of Law and the American Bar Foundation in funding the 10th Anniversary Conference, as well as the University of California, Irvine Law School for its gracious hosting of the event. The law student editors of the *UC Irvine Law Review* were in attendance at the conference, and their group has worked conscientiously and seamlessly at the task of coordinating this part of the publication effort from that conference, which will also include a Symposium in the peer-reviewed journal *Law & Social Inquiry*, as well as an edited volume focusing specifically on legal education. We appreciate their patient work and their vision.

3. From its inception, many involved in the NLR project have sought to develop its defining directions not only through programmatic statements but “in the doing” of the work. As Christopher Tomlins explains, these NLR scholars incorporate “pragmatist perspectives from multiple fields,” with the goal of “develop[ing] their new approach in large part through practicing it.” Christopher Tomlins, *In This Issue*, 31 LAW & SOC. INQUIRY 795, 795–96 (2006).

4. Discussions of the current resurgence of interest in social science within law now frequently list NLR as one of the major current schools of thought. This appears in arenas largely centered on social science as well as those centered on legal scholarship, which is in itself a promising sign. *See, e.g.*, the Institute for Advanced Study’s School of Social Science in Princeton announcement of its theme for 2016-2017 (Jan. 11, 2016), https://www.sss.ias.edu/law_and_social_sciences [<https://perma.cc/N3LR-3FFY>] (stating that recent decades have seen “the emergence of contemporary critical legal thought, the flourishing of the ‘Law and’ movements, the rise of New Legal Realism, Empirical Legal Studies, and Global Legal Pluralism”); the Association of American Law Schools’ Section on Law and Interpretation Annual Meeting Program 2016: “The Empirics of Legal Interpretation” (Jan. 11, 2016) https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=4c5fc744-71da-463d-a8b8-6f53f2e9aa3b [<https://perma.cc/BX6R-EFE2>] (stating that “[l]egal empiricism—whether under the rubric of empirical legal studies, new legal realism, or any number of other ‘brands’ of empirical study—is here to stay”); *see also* sources cited in Section II *infra*.

5. While Brian Leiter took a relatively extreme position on this issue, even claiming that the early Realists were not really interested in social science, his view has remained a minority position, contrasting with the views of major writers on the Realists such as Jack Schlegel, William Twining, Brian Tamanaha, and others. *See* Brian Leiter, *Legal Realisms, Old and New*, 47 VALPARAISO U.L. REV. 949,

of even the original Legal Realism is not settled.⁶ In any event, our concern is not with definitional issues or ownership. The New Legal Realists involved in our project are concerned with advancing a constructive relationship between law and the social sciences—building on, but moving beyond, the earlier Legal Realism, which had begun to develop that relationship purposively.⁷

NLR is not alone in making renewed calls for more social science research on law, for its emergence coincided with similar calls from those in the Empirical Legal Studies (ELS) movement and from law professors with roots in law and economics and behavioral law and economics, among others.⁸ In addition, there has been a subtle division even among those calling for a “new legal realism,” with a few of the writers in this area effectively limiting the field to large data-set, quantitative research.⁹ However, the broader span of writings claiming the aegis of “new legal realism” has cast a wider net, both in terms of methods and disciplines.¹⁰ It is our view that it is important for New Legal Realists to keep the doors open to multiple disciplines and methods, and furthermore to use our tools on ourselves as well. From the point of view of a thorough and searching social science analytic lens, the

949–63 (2013). *See, e.g.*, JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); WILLIAM TWINING, KARL LLEWELLYN & THE LEGAL REALIST MOVEMENT 185–96 (2d ed. 2012); TAMANAHA, *supra* note 1, at 8, 44–46, 53.

6. Among other issues, there is a debate about whether Roscoe Pound should be in or out despite the fact that he was explicitly written out by Karl Llewellyn. *See* N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism*, 1989 DUKE L.J. 1302 (1989).

See also Tamanaha’s detailed examination of the rather inchoate nature of the original Realist group as well as its definition of “realism” in Brian Z. Tamanaha, *Legal Realism in Context*, in *THE NEW LEGAL REALISM, VOL. I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE* 147–68 (Mertz et al., eds., 2016).

In recent publications dealing with NLR, William Twining, Brian Tamanaha, and Hanoch Dagan have separately made a similar argument that it matters more how this generation of Realists carries forward our understanding of “law in action” than how our work fits precisely with prior generations of Realist scholars. *See, e.g.*, HANOCH DAGAN, *RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY* (2013);

William Twining, *Legal R/realism and Jurisprudence: Ten Theses*, in *THE NEW LEGAL REALISM, VOL. I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE* 121–146 (Mertz et al., eds., 2016); Tamanaha, *supra*.

7. Symposium, *New Legal Realism*, 6 U.C. IRVINE L. REV. 121 (2016); *see also* Bryant Garth, *Introduction: Taking New Legal Realism to Transnational Issues and Institutions*, 31 L. & SOC. INQ. 939, 939–945 (2006); Heinz Klug & Sally Merry, *Introduction*, *THE NEW LEGAL REALISM, VOL. II: STUDYING LAW GLOBALLY*, 1–9 (Heinz Klug & Sally Merry, eds., 2016).

8. Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. ILL. L. REV. 1713 (2011); Christine Jolls, Cass Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555 (2010).

9. *See, e.g.*, Cross, *supra* note 1; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008).

10. Often referred to as a “big tent” approach, the more encompassing approach owes much to its roots in the Law and Society tradition. *See* Klug & Merry, *supra* note 7, at 8; Stewart Macaulay & Elizabeth Mertz, *New Legal Realism and the Empirical Turn in Law*, in *LAW AND SOCIAL THEORY* 195, 198–202 (Reza Banakar & Max Travers eds., 2d ed. 2013); Mertz, *supra* note 1, at 4–11.

privileging of quantitative and experimental work by some “empirical legal scholars” inside law schools is a socially constructed phenomenon to be explained.¹¹ It is certainly not about what kind of social science best accounts for social problems and solutions. The law-and-society community, to be sure, already embodies this catholic approach to social science methods, but we believe that the key to NLR is that it focuses explicitly on translation of social science theories—in addition to the methods and findings that address those theories—into mainstream law schools and legal scholarship. When attempting to adapt social science in legal settings, it is a mistake, in our view, to ignore the special worldview and methods of law as a discipline—and law schools as institutions—in their own right.

II. A DEVELOPING TRADITION

So how has big-tent NLR developed over the past decade? Looking back to its early incarnation in 2003, the movement emphasized the need to provide a broad template for incorporating social science and law. In contrast with those who might want to limit the empirical resources upon which law draws to single social science disciplines and their associated methodologies, these NLR scholars envisioned integrating the full range of social science disciplines and methods within their project.¹² And in contrast with some who might want to limit empirical work within law to the study of appellate courts, NLR researchers pushed for a more thoroughgoing program of research on law, from everyday experiences of law’s effects on the ground on the one hand, through law as it is practiced by attorneys at large law firms or negotiated in international fora on the other hand.¹³ At the same time, these scholars also insisted that the discipline of law itself be taken seriously—including the “law in books” often (mistakenly) viewed as the polar opposite of the “law in action” discussed by realist scholars.¹⁴

11. Christine B. Harrington & Sally Engle Merry, *Empirical Legal Training in the U.S. Academy*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 1044, 1045 (Peter Cane & Herbert M. Kritzer eds., 2010).

12. Erlanger et al, *supra* note 1, at 336, 362–363 (describing NLR research using qualitative, quantitative, and experimental methods).

13. *Id.* at 346.

14. *Id.* at 337 (warning against social science approaches that ignore the “need to translate into the language of law”).

In fact, those who assume that the original Realists ignored “law in books” seriously misunderstand the actual views of many Realists regarding the role of doctrine. See generally BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010) (arguing that most realists espoused a “balanced realism” that acknowledged a rule-bound aspect of judging). For example, Karl Llewellyn, often identified as a core figure in the original Realist movement, was himself also instrumental in the redrafting of the Uniform Commercial Code (UCC) in the U.S., which is, of course, a quintessential example of “law in books.” To be sure, Llewellyn and his partner (in many ways!) Soia Mentschikoff attempted to bring the UCC closer to the “law in action” by drafting provisions that asked judges to look at the actual behaviors of parties to contracts. If they had had no faith in “law in books,” it is baffling why they would have devoted so much energy to writing and pushing for the enactment of a model law. See generally WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (2d ed. 1985).

The initial publications in this nascent field also stressed a number of other key aspects of big-tent NLR, including notably: (1) the use of “bottom-up” empirical perspectives and methods in addition to “top-down” in studying law;¹⁵ (2) the need for conscious attention to the process of interdisciplinary translation;¹⁶ (3) the importance of analyzing the politics and sociology of our own scholarly worlds, given that all scholarship is “situated knowledge”;¹⁷ (4) the centrality of globalization to understanding law in today’s world;¹⁸ (5) the potential in NLR to combine critique with “legal optimism” so as to build toward positive policy interventions in addition to warning about dangers in current legal arrangements;¹⁹ (6) the good “fit” between NLR approaches and pragmatist philosophy, especially that derived from the work of Dewey;²⁰ and (7) the crucial part that rethinking legal education has to play in formulating an NLR agenda that combines theory, empiricism, and practice for the next generation of lawyers.²¹

As we have noted, the initial NLR efforts came at a time of sharp division over methodologies within the group of scholars working to integrate social science into U.S. law schools.²² Some social scientists who had been involved in the Law and Society Association in the United States had decided to form the separate Society for Empirical Legal Studies. Although the leadership of this group eventually publicly embraced qualitative research as a valid form of empirical work (albeit not a core interest of theirs), a few adherents during its earlier days attempted to cordon off the ground of legitimate empirical work on law for quantitative research only.²³ One somewhat subtle indicator of this effort was the practice adopted by some of using the word “empirical” itself as a synonym for “quantitative” research—as if qualitative data and research were not also clearly “empirical” under any usual

15. The concept of “bottom-up” includes both *methods* that start from the ground level of law as it works in action—in actual social life—and also *perspectives on law* drawn from the study of non-elite members of a social hierarchy, in addition to the “top-down” perspectives of elites (which includes the social actors at the top of the hierarchy such as the legal professionals and politicians who formulate and carry out law).

16. Erlanger et al., *supra* note 1, at 341–42.

17. Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575, 590 (1988).

18. Erlanger et al., *supra* note 1, at 343–44.

19. *Id.* at 345.

20. See, e.g., JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION (1916); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 27 (1924).

21. MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 174 (1991); Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law,”* 2005 WIS. L. REV. 255 (2005). See generally Erlanger et al., *supra* note 1.

22. See *supra* Part I at 3–4.

23. See, e.g., Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L. J. 141, 141 (2006) (defining empirical legal scholarship narrowly as “a model-based approach coupled with a quantitative method”).

definition of the term.²⁴ The effects of this division are visible in NLR's own early focus on the importance of a big tent for empirical research on law, avoiding narrow definitions that might interfere with accessing the combined benefits of all of the social sciences for law professors, lawyers, and judges.

In the intervening years, this early division has loosened somewhat, leaving NLR scholars freer to move beyond debates over whether multiple methods should be available to empirical scholarship on law. Instead, now, work can focus on how and when to combine particular methods—and even more importantly, on the need for empirical research to be guided by theory. Scholars who use quantitative as well as qualitative methods have begun to press for more sophisticated engagement with the theoretical frames that provide crucial contexts for all social science methods.²⁵ Just as recent NLR scholarship is casting doubt on the utility of black-and-white separations between realist and formalist approaches to law, it is also questioning the validity of stark divisions between qualitative and quantitative approaches to studying law. Moving beyond these struggles over often inaccurate dichotomies has opened up a new space for more sophisticated, theory-informed, multiple-method research—and for scholarly understandings of law that benefit from this kind of research in formulating better legal analyses and pedagogies. A continuing theme in NLR is the idea that it is not necessary for law professors to themselves perform empirical research in order for them to become more sophisticated users of that research—just as empirical scholars often draw on research other than their own so that they can set the findings of individual studies within wider contexts. Another model has law professors teaming up with social scientists in research partnerships that draw fully on both sets of expertise. Two recent examples of these kinds of co-authorships (both involving UCI Law faculty) are (1) works by L. Song Richardson in partnership with Phillip Atiba Goff from the Psychology and Social Behavior Department of University of California, Los Angeles, on implicit racial bias, and (2) Benjamin Van Rooij working with Adam Fine from the Psychology Department of UCI, on rule orientation and behavior.²⁶

In the years since the opening NLR conference, there has also been a fascinating discussion of how to move an NLR scholarly agenda forward within the law schools. Although they are very much in keeping with many of the broad directions suggested by the big-tent scholars, these writings have moved our thinking into somewhat more specific channels—in ways that at times overlap with one another while, predictably, at other times taking somewhat disparate directions. Hanoch Dagan, Brian Tamanaha, Greg Shaffer and Victoria Nourse, William

24. “Based on testing or experience.” *Empirical*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008).

25. See, e.g., AMY R. POTEETE ET AL., WORKING TOGETHER: COLLECTIVE ACTION, THE COMMONS, AND MULTIPLE METHODS IN PRACTICE (1968).

26. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013); Adam Fine, Benjamin Van Rooij et al., *Rule Orientation and Behavior: Development and Validation of a Scale Measuring Individual Acceptance of Rule Violation*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846014 (2015).

Twining, Elizabeth Mertz, Michael McCann, and Stewart Macaulay have written a number of programmatic statements that have much in common but, understandably, tend to diverge slightly where they emphasize the virtues of the scholarly approaches that draw on their own training and expertise.²⁷ This demonstrates how big-tent NLR is creating new spaces for discussion among researchers whose expertise crosses boundaries that often prevent any productive scholarly conversation.

As noted, big-tent NLR has from its initial framing insisted that it is important to move to more international and global levels in theorizing and empirically studying law.²⁸ And as scholars from around the world engage with NLR, they are bringing fresh perspectives and creating new links among different national and regional perspectives on legal studies. Notably, legal scholars working outside of the Anglo-American legal tradition are often even more focused on formal analyses of law than are those within that tradition. Within continental Europe and the countries influenced deeply by colonial relationships with “Old Europe,” the leading figure in the legal academy has long been the grand professor who teaches and writes and literally pronounces on the authoritative interpretations of civil and criminal codes.²⁹ Legal scholarship that does not embrace legal formalism, and even more so that involves empirical research, has been against the grain, but recently there are strong efforts to build new traditions favoring interdisciplinary and empirical research.³⁰

Furthermore, even scholars advocating formalism are acknowledging the power of an NLR premised on combining “top-down” and “bottom-up” research on law, as well as on combining analysis of law in action with serious consideration of law in books. One such formalist scholar, Jean D’Aspremont, comments that the big-tent NLR scholars “seek to complement quantitative analyses by a use of qualitative methods,” leading them to “embrace a new interdisciplinary paradigm and create translations between law and social science which they want to be useful

27. See DAGAN, *supra* note 6; Stewart Macaulay, *A New Legal Realism: Elegant Models and the Messy Law in Action*, in THE NEW LEGAL REALISM, VOL. I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE 29–50 (Mertz et al., eds., 2016); Michael McCann, *Preface to The New Legal Realism, Vol. I & II*, in THE NEW LEGAL REALISM, VOL. I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE xiii–xxi (Mertz et al., eds., 2016); Elizabeth Mertz, *Introduction: New Legal Realism: Law and Social Science in the New Millennium*, in THE NEW LEGAL REALISM, VOL. I: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE 1–25 (Mertz et al., eds., 2016); TAMANAHA, *supra* note 1; TAMANAHA, *supra* note 14; TWINING, *supra* note 5; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009); Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 101 (2014); Tamanaha, *supra* note 6.

28. See Part II at 5–6, *supra*.

29. R. C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE 5–6 (2002).

30. See, e.g., Bryant G. Garth, *Brazil and the Field of Socio-Legal Studies: Globalization, the Hegemony of the US, the Place of Law, and Elite Reproduction*, 3 REVISTA DE ESTUDOS EMPÍRICOS EM DIREITO/BRAZILIAN JOURNAL OF EMPIRICAL LEGAL STUDIES 12 (2016).

to legal academics and lawyers.”³¹ D’Aspremont notes NLR’s promising synthesis of “self-reflective distance and the scepticism towards doctrinal dogmatism” while at the same time refusing to “back away from formal law-identification,” in the process perhaps taking some of the best aspects of both critical and doctrinal analyses:

The awareness of the role of the social scientist as a human being and political being when carrying out empirical research is a lesson they overtly take from critical thinking.³² . . . New Legal Realism should be seen as one of the few contemporary attempts to bridge diverging strands of the international legal scholarship . . .³³

For these reasons, D’Aspremont concludes that big-tent NLR is deserving of attention from international legal scholars.³⁴

NLR also covers a variety of research and approaches to international law and what can be termed legal globalization. The *Leiden Journal of International Law* in particular recently featured an article by Gregory Shaffer, entitled *The New Legal Realist Approach to International Law*,³⁵ with a number of responses by other scholars. Shaffer emphasized the need to study international law empirically, to highlight especially “transnational legal orders,”³⁶ and to combine different social science methods to provide pragmatic legal solutions to transnational problems.³⁷ Shaffer and collaborators have also pioneered with a set of studies of the way that the World Trade Organization (WTO), as a transnational legal order, has interacted with national legal settings to transform legal contexts in Brazil, China, and India.³⁸

One of the responses, by Jakob Holtermann and Mikael Rask Madsen, offers a helpful variant of the Shaffer approach, drawing more on European rather than U.S. traditions of legal realism.³⁹ The key difference, according to their analysis, is that the European approach is much less invested in the pragmatist project of aiding normative inquiry and legal reasoning—“doctrinal study of law as traditionally

31. JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 104 (2011).

32. We would simply note that the “critical thinking” here can derive from multiple sources and for many NLR scholars, social science theory is a key source.

33. D’ASPREMONT, *supra* note 31, at 105.

34. *Id.*

35. Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT’L L. 1–23 (2015).

36. See TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

37. See Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 232, 237 (2012).

38. Gregory Shaffer et al., *State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering*, 49 LAW & SOC. REV. 595 (2015); Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil’s Success*, 41 CORNELL INT’L L. J. 383 (2008); Gregory Shaffer & Henry Gao, *From Paternalism to Partnership: The Development of International Trade Law Capacity in China* (2015) (unpublished paper) (on file with Harvard GLEE Project).

39. 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, 212 (2015).

conceived.”⁴⁰ The emphasis promoted from the European side, drawing especially on the sociological tradition of Pierre Bourdieu, is not normative in the sense that U.S. legal realism tends to be, as “the European legal realists strictly maintain that an empirically respectable legal science should remain external.”⁴¹ The research associated with Dezalay and Garth, beginning with *Dealing in Virtue*,⁴² is squarely within this European approach. From the latter perspective, the concern is less with reforming the law or improving the work of transnational legal orders and more with seeing the way that the “rules of the game” operate in a transnational field—as well as with explaining how law came to provide (1) the ordering, (2) the hierarchies and power relationships embedded in that ordering, and (3) the governing law itself, including competing imperial approaches.⁴³

One theme, which complements Shaffer’s work on the WTO, is that when “peripheral” outsiders to the European and U.S. “core” learn to gain more success within the WTO or international commercial arbitration, they also become more likely to look to arbitrators, law firms, and scholars from that core when the stakes are high—just as the outposts of the British empire sought London barristers for the most important cases in Hong Kong or Singapore.⁴⁴ We note that to the extent scholars from outside the United States embrace the banner of NLR (or other scholarly approaches linked to the United States), we must be careful to avoid acting out and reproducing relationships of core and periphery.

The general point, however, is that these two (and other) interdisciplinary approaches can be complementary even while differing in their starting points and approaches. Indeed, the seeming antinomy between those who want to get on with reform, typically from the law, and those who seem always to favor more research and deeper understanding, is one of the tensions that NLR sees not as an antinomy but as material for creative dialogue and translation. In this respect, NLR encompasses and permits the opportunity for direct discussion of a tension that pervades much of the social science community.⁴⁵

There are other ways to blend approaches that shed similar light on international law and legal phenomenon. In international criminal law, for example, John Hagan’s *Justice in the Balkans*,⁴⁶ which examines the International Criminal Tribunal for the former Yugoslavia (ICTY), uses interviews and other methods in capturing the views of the interest groups, investigators, prosecutors, and witnesses

40. *Id.* at 214.

41. Holtermann & Madsen, *supra* note 39, at 220.

42. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

43. *Id.*

44. *Id.*

45. This echoes at a general level the tension between science and craft discussed by Hanoch Dagan as an important feature of New Legal Realism. *Supra* note 6, at 43-59.

46. *See generally* JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* (2003).

in order to show how humanitarian and international criminal law was constructed. A recent work on international commercial arbitration by Thomas Hale, while not explicitly a New Legal Realist, combines political science rational choice theory with detailed empirical research to examine the operation of contemporary international commercial arbitration.⁴⁷ Hale documents how power operates and the role of elite legal networks.

In addition to its receptiveness to scholarship from around the world, from multiple social science perspectives, and from a combination of doctrinal and law in action perspectives, another benefit of the New Legal Realist frame is that it invites a conversation between empirical research on law and legal theory or jurisprudence. This is a continued gift from the original Realists, whose work has received attention from legal academics who identify as scholars of jurisprudence: these legal theorists otherwise rarely concern themselves with knowledge of the law in action (or with any of the vibrant streams of research on law with realist roots). The article in this symposium by Brian Bix, discussed below, is a perfect example of this opportunity for more fruitful and better-informed conversation between legal philosophy and empirical research. This is also a continuation of the discussion begun at the first European conference on NLR, where scholars from these and other diverse approaches to the study of law were brought together to bridge divisions in a way that is rarely seen in the legal academy.⁴⁸

Also, since the initial U.S. New Legal Realism Conference, scholars involved in these efforts have worked together to form related networks. Under the aegis of the U.S. Law & Society Association, they developed a Collaborative Research Network on Realist and Empirical Methods, which has regularly sponsored panels on empirical research methods and on translations between law and social science.⁴⁹ At the Association of American Law Schools, researchers involved in both NLR and ELS have contributed to ongoing sessions designed to provide training and help in understanding empirical methods for law professors.⁵⁰ A number of

47. THOMAS HALE, *BETWEEN INTERESTS AND LAW: THE POLITICS OF TRANSNATIONAL COMMERCIAL DISPUTES* (2015).

48. See *New Frontiers of Legal Realism: American, Scandinavian, European, Global*, UNIV. COPENHAGEN, [http://jura.ku.dk/ansatte/forskningsomraadet/?pure=da%2Factivities%2Fnew-frontiers-of-legal-realism-american-scandinavian-european-global\(a2065411-a3a1-42be-86e7-7882222ef776\).html](http://jura.ku.dk/ansatte/forskningsomraadet/?pure=da%2Factivities%2Fnew-frontiers-of-legal-realism-american-scandinavian-european-global(a2065411-a3a1-42be-86e7-7882222ef776).html) [<https://perma.cc/KXN8-QC2P>] (last visited Mar. 5, 2016).

49. See *What Is CRN 28?*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events/CRN.html> [<https://perma.cc/3JKG-D4EB>] (last visited Mar. 1, 2016).

50. See *Empirical Training Workshops*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events/EmpiricalTrainingWorkshops.html> [<https://perma.cc/Y5NY-UV3K>] (last visited Mar. 5, 2016) (a pilot program in 2013 with NLR scholars leading the qualitative program and ELS scholar Ted Eisenberg leading the quantitative program); *2015: Third Annual Qualitative and Mixed-Methods Workshop at AALS*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events/AALS2015.html> [<https://perma.cc/7VDX-Z5N6>] (last visited Feb. 18, 2016) (successive programs in 2014, with some variation in the degree to which methods were taught separately or as part of a combined “mixed methods” curriculum); *2014: Second Annual Qualitative AND Mixed-Methods Workshop at AALS*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events/AALS2014.html> [<https://perma.cc/CLK4-TW7C>] (last visited Feb. 18, 2016) (successive program in 2015); *AALS Index*, NEW LEGAL

conferences have explored the intersection of empirical work, law, and theory in particular domains—with examples ranging from poverty to women’s rights, and from global law to the impact of “indicators.”⁵¹ In August 2014, as we have noted, a group of NLR scholars met in Irvine, California to assess the trajectory of the past decade and explore new directions that an upcoming generation in NLR is poised to explore.⁵²

III. CURRENT REALIST DIRECTIONS: THE SYMPOSIUM ARTICLES

It bears noting that of the four article contributions in this issue, two quite explicitly link the current work to the history of Legal Realism. In fact, Stewart Macaulay, who was one of the key individuals in what could be called Willard Hurst’s Wisconsin in the 1960s and 1970s, is very much a direct descendant of the original realist approach.⁵³ Hurst came out of Legal Realism, built his own historical approach—making law the “dependent variable”—out of Realist approaches, and helped make Wisconsin a remarkable and unique interdisciplinary community that still continues to be strong in this approach.⁵⁴ Riaz Tejani is a scholar from a different generation, but he also strongly anchors his current research in the concerns of the Realists.

Stewart Macaulay’s article provides a superb statement of the openness of the NLR. He points out that it is necessary to build on the Realism of the 1930s to resist the pull of legal formalist attitudes, even if many acknowledge the limits of those formalist attitudes.⁵⁵ He further emphasizes that communication and mutual respect between law and social science is an essential part of a constructive dialogue.⁵⁶ The dialogue takes us to a level that has sometimes been difficult for law professors who may echo subconsciously or consciously the statement associated with Legal

REALISM, <http://www.newlegalrealism.org/index.html> [<https://perma.cc/7UR4-8YWW>] (last visited Mar. 5, 2016); *AALS 2016*, NEW LEGAL REALISM, https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=TrkDetails&trk_key=ae0d67ed-52c8-475e-b912-8336d9053a55 [<https://perma.cc/YHF8-JP95>] (last visited Feb. 18, 2016) (successive program in 2016).

51. See, e.g., *Previous New Legal Realism Events 2004-10*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events/EventsPrevious2004-10.html> [<https://perma.cc/9K4V-4GPQ>] (last visited Mar. 2, 2016); *Previous New Legal Realism Events 2011-13*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events/EventsPrevious2011-13.html> [<https://perma.cc/DB6R-MEMQ>] (last visited Mar. 2, 2016); *New Legal Realism News and Events*, NEW LEGAL REALISM, <http://www.newlegalrealism.org/events.html> [<https://perma.cc/24ZL-GZ39>] (last visited Mar. 1, 2016).

52. See sources cited *supra* note 49; see also *Program to NEW LEGAL REALISM 10TH ANNIVERSARY CONFERENCE: FUTURE DIRECTIONS FOR LEGAL EMPIRICISM (2014)*, <http://www.law.uci.edu/events/legal-history/NLR-Conference-Program-2014.pdf>.

53. Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC. REV. 409 (1998).

54. *Id.* at 439.

55. Stewart Macaulay, *New Legal Realism: Unpacking a Proposed Definition*, 6 U.C. IRVINE L. REV. 149 (2016).

56. *Id.*

Realists that lawyers should be “on top” and social scientists “on tap.”⁵⁷ As Macaulay recognizes, mutual respect is not simply deploying “social science methods” to test law professors’ legal theories.⁵⁸ Hiring a social scientist to say whether mediation is more efficient than arbitration, for example, would not be as effective as a joint project that took into account evolving social contexts and the many variables at play beyond the abstract categories of mediation and arbitration. Indeed, as Macaulay explains, sometimes citizens are regulated indirectly through public attitudes and understandings of law that have little to do with what lawyers understand to be relevant; thus, lawyers would need to listen to social scientists before framing a research question if they wanted to understand, for example, what might be keeping people from even trying to access legal rights at all.⁵⁹ At the same time, he also warns that social scientists are at risk of misreading and misunderstanding the language of legal statutes and other technical aspects of law, if they are not sufficiently respectful of this very different approach.⁶⁰ He concludes with a plea for careful interdisciplinary translations, and for a better dialogue between law and the social sciences.⁶¹

Riaz Tejani draws on his anthropological and legal training to see what the deterrence notion from tort law means in our “one percent society.”⁶² He suggests there are huge social inequalities that an NLR approach should consider when developing legal and social scientific analyses. As part of this project, as noted above, he details how his approach links to the older Realist concern with actual behavior and with the perceptions that lead to behavioral responses. The huge costs of litigation bring their own form of deterrence, he argues. He makes sense of the phrase “lawyering up” and how, in today’s world, that brings the “specter of process” which may deter access to justice both on the plaintiff side and on the defense side (for ordinary businesses confronted with claims or liabilities).⁶³ Tejani’s article actually performs the translation envisioned by NLR: he begins with the language and conceptual framework of tort doctrine, lays bare some of the hidden assumptions embedded in it, draws on Realist and empirical perspectives to demonstrate that those assumptions fail to capture law on the ground, and then proposes a way to take account of what is actually happening in legal process within the framework of formal law. To that end, he suggests that legal scholars and lawyers take account of “processual deterrence,” which considers the degree to which legal process actually deters people not only because of high costs and other difficulties, but also through the popular understandings of law (not always accurate) that deter

57. Bryant G. Garth, *James Willard Hurst as Entrepreneur for the Field of Law and Social Science*, 18 LAW & HISTORY REV. 37 (2000).

58. *Id.* at 41.

59. Macaulay, *supra* note 55, at 154.

60. *Id.* at 151.

61. *Id.* at 167.

62. Riaz Tejani, *Efficiency Unbound: Processual Deterrence for a New Legal Realism*, 6 U.C. IRVINE L. REV. 207, 220 (2016).

63. *Id.* at 221.

people from even thinking about trying to access law.⁶⁴ In this regard, Tejani is incorporating what we know from qualitative and interpretive studies of “legal consciousness” as well as what we know from qualitative and quantitative research on actual legal process.⁶⁵ His article exemplifies the NLR idea that better understandings of how law works in practice can emerge from informed use of the available empirical research (viewed through the lens of social science norms) and informed translation of law (viewed through the lens of legal expertise in doctrine and law practice).

Anna Offit also draws on anthropology in her fresh and insightful tour de force study of voir dire. She analyzes just how Assistant U.S. Attorneys (AUSAs) use voir dire in cases going to jury trials. Her work, based on 121 semi-structured interviews and in-depth examinations of thirty-eight jury selections, tells us “how uncertainty informs technique.”⁶⁶ Her theoretical approach comes from anthropology and provides a frame that allows her to analyze the ways AUSAs determine which jurors are the “outliers” or “crazies” whom the attorneys will challenge in a process analogized by respondents to “a blind date” or “job interview.”⁶⁷ The different approaches to this daunting task are explained in Offit’s article, which includes an insightful description of some of the stereotypes used to disqualify potential jurors. She also further demonstrates how the professional identity shared by the AUSAs is expressed in their approach to voir dire. These federal prosecutors generally believe that they have such strong cases that only outliers and crazies need to be kept off the jury. The article concludes by making the case for in-depth qualitative empirical research as a key way to bridge gaps in understanding how the process of voir dire really works. Here, translation of relevant social science helps bridge the gap between theory and practice, demonstrating that even as attorneys use categories that verge on stereotypes in selecting jurors, these lawyers continue to redefine and negotiate those stereotypes in the face of the undeniable complexity of potential jurors as individual people “on the ground.”⁶⁸

The strength of Brian Bix’s article is that it is an example of someone trained in philosophy and law, and understandably not predisposed to take up empirical research, yet who draws systematically on both legal theories and empirical studies of “judging.”⁶⁹ The article is open and respectful of empirical research and reads that research critically and insightfully. Bix dives into the empirical findings and hypotheses to offer issues and clarifications that can shape and help interpret new

64. *Id.* at 238.

65. This combination of perspectives is available in large part through research done by Law and Society scholars who have worked together for decades to understand law in action through a broad combination of disciplinary perspectives and methods.

66. Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169 (2016).

67. *Id.* at 183.

68. *Id.* at 188.

69. Brian Bix, *Doctrine, Data, and High Theory*, 6 U.C. IRVINE L. REV. 137, 139 (2016).

debates and empirical research. For example, he suggests that we need tools to refine the prevailing “attitudinal” approach, which essentially focuses on ideology as the key to judicial decisions.⁷⁰ That approach does not distinguish whether attitudes are brought to the judging explicitly or are brought by judges who think they are just following law. Bix also notes ongoing research that has demonstrated how judges often start deliberations with their own initial hunches, which may or may not then play formative roles in ultimate outcomes. Change happens during judges’ deliberations, and doctrinal reasoning can switch when something that is “beyond the pale” evolves a few years later into settled legal doctrine.⁷¹ Bix makes a strong case for the utility of nonempirical legal theorists in helping refine empirical studies by explaining perspectives from “inside” the legal culture; in this sense, he is arguing for careful attention to the interpretive norms and practices of judging—particularly when it comes to how judges parse the legal texts through and in which they make their decisions.⁷² This approach is consistent with the spirit of NLR and indeed suggests the way that contemporary scholars in the philosophy of biology or the philosophy of physics dive into the empirical science rather than starting with grand philosophical themes. It also fits well with the way scholars of Science Studies focus on the actual practices of the scientists they study.

Throughout these symposium articles, we find a fruitful elaboration of a New Legal Realist approach that brings together the best insights of law, empirical research, and disciplinary scholarship. These scholars take doctrine seriously but also move beyond the surface of law in books to investigate law in action—and then move back again to retranslate what they find into language that might speak to scholars in law as well as in social science.

CONCLUSION: MOVING FORWARD

The importance of NLR stems in part from the fact that lawyers have historically served as brokers between different sectors of society, such as the Church and the State, the Crown and the Aristocracy, the establishment and emerging social groups, and, more recently, different scholarly approaches and disciplines. NLR seeks to clarify that relationship, which is an academic project of considerable importance, and to make it more effective, which is in part a consequence of the academic project. Law professors who read some social science or attend a two-week course as preparation, conduct some empirical research, and then make legal and policy arguments may have their arguments quickly dismissed on the basis of methodological weaknesses, or may provide bad recipes for normative interventions in legal debates. Neither outcome is desirable. The quality and academic prestige of the social sciences is such that, today, the social scientists

70. *Id.* at 142.

71. *Id.* at 141.

72. *Id.* at 145.

need legal translators and the lawyer or legal scholar needs social science translators. NLR takes this process of mutual respect and translation as its *raison d'être*.

However successful that project, the very competitive academic field will remain characterized by (1) shifting hierarchies among disciplines—with sociology ascendant in the 1950s, for example, and economics ascendant in the 1980s; (2) true believers unwilling or unable to see the virtues of different academic approaches; and (3) academic entrepreneurs leading a charge for the one true path to mix social science and law. Yet it is vital to see beyond this quasi-religious strife to see what can emerge from ecumenical scholarship. Instead, we can hope that future discussions will follow the lead established by Mario Barnes in his Afterword, where he makes constructive suggestions as to how different, but closely related current scholarly endeavors might come together. His insightful commentary asks how NLR might learn from critically informed empirical research on race that is currently emerging from the burgeoning empirical Critical Race Theory (eCRT) scholarly movement.⁷³

The work that NLR has done over the past decade has helped to find a place for that big-tent scholarly approach. The examples from this symposium and other publications mentioned within this introduction demonstrate the richness of this approach and point the way for future work in the area. Rather than narrowing the scope of inquiry, NLR pushes previous limits, to allow ever more fruitful and skilled communication among scholars who have expertise to share regarding law and how it works.

73. Mario Barnes, *Afterword: Everything Old*, 6 U.C. IRVINE L. REV. 241

