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INTRODUCTION

The new legal realist approach to international law does not address the conceptual question of what is law in the abstract, or what is the relation of law to morals, the conventional questions asked in analytic jurisprudence today. New legal realism rather builds from a jurisprudential tradition that asks how actors use and apply law in order to advance our understanding of three interrelated questions — how law obtains meaning, is practiced (the law-in-action), and changes over time. The new legal realist approach is thus both empirical and problem-centered in the Deweyan tradition of legal pragmatism. What is new from the old American legal realism in relation to international law is two-fold. First, the contemporary situation of economic and cultural globalization is quite different from when the old American legal realists wrote in the 1930s and focused only on U.S. domestic law at a time of domestic turmoil and relative retreat from transnational economic and cultural exchange. There have since been major developments in the social world that significantly broaden the areas for understanding international law from a socio-legal perspective, and in particular in relation to transnational problem-solving in which international law plays a role. Second, there have been major developments in empirical methods as applied to law, with growing interest among scholars regarding how international law conditionally operates in light of social, economic, and political developments.

The article is in six parts. Part 1 examines the jurisprudential roots of American legal realism and its relation to legal positivism and natural and interpretive law theory. Part 2 introduces two core attributes of American legal realism that a new legal realism develops — its focus on empirical questions regarding the law-in-action, and its attention to social problems in order to understand law in context from a pragmatist perspective. Part 3 addresses what is new in a new legal realism. Part 4 sets forth six important components for a new legal realist approach to international law in the current context. Part 5 provides a brief example of a legal realist approach in relation to formal positivist ones. Part 6 addresses the risks of a new legal realist approach and responds to them.

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1. NEW LEGAL REALISM'S HERITAGE AND ITS RELATION TO POSITIVISM AND NATURAL LAW AND INTERPRETIVE THEORY

Jurisprudence has largely turned to particular conceptual questions in the late twentieth and early twenty-first century, and primarily the questions of what is law and what is law's relation to morality. Such jurisprudence is wholly conceptual, asking what law is from a general, abstract, foundational, universal perspective, and how we determine its confines. From this perspective, scholars focus on such questions as the sources of international law, whether in the form of rules of recognition, *Grundnorms*, natural law, interpretive principles of justice, or otherwise.² These are fruitful questions from an internal perspective of those who make formal decisions in applying the law such as judges, and those who make formal arguments before them.³ But they are far from the only relevant jurisprudential questions.

A legal realist approach to law is different from positive and natural (or Dworkin's interpretive) law theory in that it focuses on the question of how law obtains meaning, operates, and changes in terms of *practice*, whether of courts, administrative bodies, or private parties in a broader *social context*. Although contemporary jurisprudence largely ignores these questions, that traditionally was not the case. As Brian Tamanaha shows, jurisprudence traditionally was viewed as having three pillars, that of moral theorizing of law (reflected in natural law and Dworkin's interpretive theory), analytic jurisprudence (reflected in positivism), and historical jurisprudence (assessing the relation of law and society).⁴ He traces this latter pillar back to Montesquieu's *The Spirit of the Laws*, which stresses the relation of law to political, social, and geographical context. As Isaiah Berlin eloquently wrote,

[Montesquieu's] whole aim is to show that laws are not born in the void, that they are not the result of positive commands either of God or priest or king; that they are, like everything else in society, the expression of the changing moral habits, beliefs, general attitudes of a particular society, at a particular time, on a particular portion of the earth's surface, played upon by the physical and spiritual influences to which their place and period expose human beings."⁵

² Cf. J. d'Aspremonte, *Formalism and International Law: A Theory of the Ascertainment of Sources of Legal Rules*; J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010).

³ Ronald Dworkin's normative, interpretive theory of law, for example, is entirely internal from the "participant's point of view," and in particular "from the judge's viewpoint." R. Dworkin, *Law's Empire* (1986), 14.

⁴ See e.g. J. Salmond, *Jurisprudence 7th ed.* (1924), 4 "Jurisprudence... is divisible into three branches, which may be distinguished as analytical, historical, and ethical," cited in B. Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256622.

⁵ Isaiah Berlin, Montesquieu, *Proceedings of the British Academy*, 41: 267, 289 (1955) (quoted in B. Tamanaha, *Third Pillar*, 8-9).

New legal realism addresses questions asked within this third pillar of jurisprudence — what Tamanaha calls social legal theory — contending that they are central for any jurisprudential understanding of law. Legal realists, as pragmatists, think in light of our social experiences in the world, and law and law's purposes are part of that experience. New legal realism is part of the broader study of law in social context.

Legal realism was famously and arguably unfairly reduced by H.L.A. Hart as a predictive theory that defines law in terms of predictions of judges' behavior.⁶ But as Brian Leiter argues, this is a misconstruing of legal realism's core claims since legal realists primarily were interested in developing descriptive theory of how law operates.⁷ Legal realists were (and always have been) varied in their orientation (as Llewellyn stated, they did not constitute a "school").⁸ Although many legal realists at times referred to law in terms of predictive theory,⁹ their broader focus (as that of new legal realists) was not to ask what law is in the abstract, but rather to assess how law works for purposes of practice and pragmatic decision-making, whether or not involving courts, and thus including administrative and social practice. To address how law works, one of course has to have a conception of what one is studying, and many legal realists could be viewed as assuming law in legal positivist terms as a pragmatic starting point for their analysis. But it is not the end point for those making such assumptions, and it is contested by others who contend that what the law is simply cannot be understood outside of the law's social context.¹⁰

Although legal realism is largely conceptualized today in American terms, legal realism had important roots in European jurisprudence in terms of a social understanding of law, and in particular that of the legal historicists, including Frederick von Savigny and Henry Maine, the legal pluralist Eugen Ehrlich, and the theorist of law as a struggle over interests, Rudolph von Jhering. These theorists differed in their conceptions of the role of culture, power, and the function of law, but what they have in common is that they each offered theoretical approaches as rivals to natural law and the formal aspects of legal positivism by addressing the relation of

⁶ H.L.A. Hart, *The Concept of Law* (2nd Edition 1994; [1961]), 65, 146-147. The traditional reference is a quote from Holmes referenced as the bad man theory of law — "But if we take the view of our friend the bad man we shall find that he does not care two straws for axioms or deductions, but he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law." O.W. Holmes, 'The Path of the Law', (1897) 10 *Harvard Law Review* 457, 460-61.

⁷ Leiter focuses on adjudication, although this is not the only interest of legal realists. Cf. B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (2007); J. Schlegel, *American Legal Realism & Empirical Social Science* (1995); and V. Nourse and G. Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?', (2009) 95 *Cornell Law Review*. 61.

⁸ K. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound', (1931) 44 *Harvard Law Review* 1222 (legal realism as a "movement in thought and work about law," and not a "school").

⁹ See e.g. F. S. Cohen, 'Transcendental Nonsense and the Functional Approach,' (1935) 35 *Columbia L Review*, 809 (referring to Holmes' predictive theory).

¹⁰ Those taking such a latter position epistemologically, and who aim to explain law in scientific terms, have links with Scandinavian legal realism and what Mikael Madsen and Jacob Holtermann call New European Legal Realism. See M. Madsen and J. Holtermann, this issue.

law to society.¹¹ Roscoe Pound, in developing a sociological jurisprudence, looked back to these forbearers, as did Karl Llewellyn, arguably the central figure in legal realism.¹² As Ehrlich, who Oliver Wendell Holmes, Pound, and Llewellyn each effusively praised,¹³ wrote in a manner reflective of a legal realist perspective, “[t]he problem is not simply to know what a rule means, but how it lives and works, how it adapts itself to different relations of life, how it is being circumvented and how it succeeds in frustrating circumvention.”¹⁴ Such an approach views law in much broader terms than the narrow judiocentric (judge-focused) perspective of much legal theory. I note the work of these forbearers because the social context today has changed, giving rise to greater relevance for international law as part of a broader phenomenon of transnational legal ordering.

The other key predecessor of American legal realism, from the perspective of the new legal realism, is the philosophical pragmatism of John Dewey, Charles Sanders Pierce, William James, and Herbert Mead, developed in the United States.¹⁵ The pragmatists were anti-foundationalist thinkers who stressed the importance of empirical work, combined with experimental practice aimed at problem-solving in particular social contexts. Law, from a pragmatist perspective, is a particular means for creating social order and social welfare. For pragmatists, concepts are important

¹¹ See e.g. F. von Savigny, *The Vocation of Our Age for Legislation and Jurisprudence* (1981) (stressing law as a product of changing social forces); H. Maine, *Ancient Law* (1861) (noting the mechanisms used to close the gap between changes in society and outdated law, including the use of legal fictions and equity); R. von Jhering, *The Struggle for Law* (1879) (critiquing Savigny’s focus on a “common consciousness” as opposed to struggles between competing individuals and classes giving rise to law as a form of organized force); and E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1937), 399 (“The reason why the law is in a perpetual state of flux is that men, whose relations the law is designed to regulate, are continually posing new problems for it to solve”). Scandinavian legal realism is a distinct approach to law, but not one that influenced American legal realists.

¹² J. E. Grisé et al., ‘Rudolf Von Jhering’s Influence on Karl Llewellyn’, (2012) 48 *Tulsa Law Review* 93; B. J. Brock, ‘Modern American Supreme Court Judicial Methodology and Its Origins: A Critical Analysis of the Legal Thought of Roscoe Pound’, (2011) 35 *Journal of the Legal Profession* 187, 206 (stating that Pound “heavily relied on von Jhering”); J. Tidmarsh, ‘Resolving Cases ‘on the Merits’’, (2010) 87 *Denver University Law Review* 407, 418 (“Roscoe Pound was deeply influenced by the work of the German legal philosopher Rudolf von Jhering”); K. Grechenig and M. Gelter, ‘The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism’, (2008) 31 *Hastings International and Comparative Law Review* 295, 314 (stating that the legal realists were “under the influence of the criticism of conceptual jurisprudence brought forth earlier by Jhering”); A. Simmonds, ‘Amah and Eved and the Origin of Legal Rights’, (2001) 46 *South Dakota Law Review* 516, 531, 606 (“Pound’s view was in the tradition of the University of Berlin school of Savigny and Jhering”).

¹³ Holmes and Pound declared Ehrlich’s work respectively “the best book on legal subjects by any living continental jurists” (Holmes), and “the best think that has been written lately” (Pound). Even though they arguably misconstrued Ehrlich, they used his work to develop their theories in their own contexts. See D. Nelken, ‘Law in action or living law? Back to the beginning in sociology of law’, (1984) 4 *Legal Studies* 157, 157–174; D. Nelken, ‘Erlich’s Legacies: Back to the Future in the Sociology of Law?’, in M. Hertogh (ed.), *Living Law: Reconsidering Eugen Ehrlich* (2009), 237 (Llewellyn stated that he was “somewhat crushed in spirit” given how much Ehrlich had done. Quoted in N. E. H. Hull, R. Pound and K. Llewellyn, *Searching for an American Jurisprudence* (1997), 108–110.

¹⁴ See E. Ehrlich, ‘Judicial Freedom of Decision: Its Principles and Objects’ in Various Authors, J. H. Drake et al. (eds.), *Science of Legal Method: Select Essays* (1969), 47, 78.

¹⁵ See discussion in Nourse and Shaffer, *Varieties*, *supra* note 7; W. de Been, *Legal Realism Regained: Saving Realism from Critical Acclaim* (2008).

for their use in social action, not for their representation of ‘truth.’ For a pragmatist, legal concepts must be contextualized in light of social conditions and practices. For example, legal realists broke down concepts in contract law in relation to types of contracts, such as railroad and shipping contracts compared to labor contracts and consumer contracts, and they assessed contract law doctrines in relation to business customary practice.¹⁶ Today, given the expansion of international law’s scope and its greater enmeshment with national law, new opportunities arise for transnational problem-oriented, pragmatist thinking about it.

Once legal realism is viewed in terms of building explanatory and pragmatist theory regarding the law in action, legal realism is not necessarily contrary to legal positivism. Legal realism does not necessarily reject legal positivism’s understanding of the formal sources of law,¹⁷ which is of importance for judges and lawyers making arguments before them, but it finds that such a focus is much too limited for understanding law in a world of varying factual contexts, including what lies behind the making of legal arguments and what influences legal development. A legal realist views law not as a thing, but rather as a process in which legal norms are defined through practice, through claims and counterclaims, resulting in the settlement and unsettlement of the meaning of legal norms in changing social contexts over time. For legal realists, law has a dynamic, reflexive character that helps us understand law and why the meaning of law changes in light of societal demands and structural contexts in which law, in turn, forms a part.

From an empirically grounded, pragmatist perspective, law simultaneously is driven by political and social forces and helps to shape them. Law thus represents both a reflection of such forces and a technology to tame and catalyze them for particular ends through human thought and action. As the legal pragmatist Thomas Grey writes, taking from Holmes, “all thought is at once ‘social’ and ‘on its way to action.’”¹⁸ Through this interaction of actors in particular social contexts enacting law, implementing law, and making and contesting claims and counterclaims regarding law, legal norms acquire meaning.

A legal realist can, as a result, conceivably be a positivist, an interpretivist, and legal realist all at once, depending on the question asked. That is, from an internal perspective of those making legal arguments before judges, some legal realists will accept Hart’s pedigree view on legal sources, while contending that those legal sources play only a partial role in determining how law acquires meaning and has effects. Similarly, some legal realists will contend that law’s authority depends in part on criteria of a normative nature, such as Lon Fuller’s conception of the rule of law

¹⁶ See e.g. K. Llewellyn, ‘Through Title to Contract and a Bit Beyond’, (1938) 15 *New York University Law Review*, 159.

¹⁷ The conventional positivist definition of “methodology of legal research” is the “ways to identify and locate primary and secondary sources.” See S. Rosenne, *Practice and Methods of International Law* (1984) (cited in S. R. Ratner and A. Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’, (1999) 93 *American Journal of International Law*, 291, 292).

¹⁸ T. Grey, ‘What Good is Legal Pragmatism?’, in M. Brent and W. Weaver (eds.), *Pragmatism in Law and Society* (1991), 9, 12.

involving such attributes as publicity, consistency, and clarity,¹⁹ or Dworkin's interpretive conception of law as integrity requiring judgment involving "convictions about fit" and "convictions about fairness and justice."²⁰ Yet a legal realist — *qua* legal realist — is ultimately interested in the law-in-action in dynamic relation to social context — that is, the law as practiced, sometimes involving judicial decisions, but most often not.

The legal realist — *qua* legal realist — does not engage in ideal normative theory, yet notes the importance of values in orienting social action. Legal realists may begin with different normative frameworks that inform our ends, but what they commonly contend is that those ends should be responsive to experience.²¹ As pragmatists, they maintain that thought is purposive and derives from experience (and is not a distinct *a priori* domain). Learning from the consequences of our interventions, we should be open to modifying our means and ends, which should be regarded as ends-in-view.

2. NEW LEGAL REALISM'S CORE ATTRIBUTES — EMPIRICISM AND PRAGMATISM — AND ITS DISTINCTION FROM FORMALISM AND CRITICAL LEGAL STUDIES

New legal realism — in my conception — has two core interacting dimensions from which a new legal realism builds, one focused on the empirical study of how law actually works in relation to social and political forces, and the other focused on law as a method of pragmatic problem-solving, however those problems may be conceived.²² The first dimension is empirical and backward-looking, the second pragmatic and forward-looking. The first studies how law operated in the past by using quantitative and qualitative methods, although potentially complemented by present-oriented, experimental ones. The second applies experiential knowledge from practice to engage new factual contexts and new perceptions of problems. In short, legal realists focus on two behavioral aspects of law — as empiricists, the world of facts — including material resources, social structures, and institutionalized practices — that explain how law operates; and as pragmatists, the context-shaping nature of law to address problems through reason. In this way, they aim to build explanatory theory of law as a form of reasoning in particular factual contexts for practical purposes — thus engaging simultaneously the normative and empirical grounded in human experience.

¹⁹ L. Fuller, *The Morality of Law* (1964). See also D. Dyzenhaus, 'Accountability and the Concept of (Global) Administrative Law', in (2009) *Acta Juridica* 3; B. Kingsbury, 'The Concept of 'Law' in Global Administrative Law', (2009) 20 *European Journal of International Law* 997, 23-57.

²⁰ R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1997), 410-411. Dworkin's theory of law, in my view, is primarily an adjudicative theory of the principled, integrative way that judges should reason, and, subject to empirical study, a claim regarding the way they actually do reason. *Id.*, at 411.

²¹ See J. Dewey, *Essays in Experimental Logic* (1916); Nourse and Shaffer, *Varieties*, *supra* note 7. For a more recent application in this vein, see A Sen, *The Idea of Justice* (2009).

²² See further elaboration in V. Nourse and G. Shaffer, 'Empiricism, Experimentalism, and Law: Toward a Dynamic New Legal Realism,' (Forthcoming 2014) 67 *Southern Methodist University Law Review* 101.

Epistemologically, these two components of legal realism are interdependent and infuse each other. The first empirical dimension cannot be completely dissociated from normative and conceptual frames, while the second pragmatic, conceptual dimension is infused with perceptions of facts. They are also necessary complements in a world characterized by dynamic change, since new empirical work and pragmatic practice are always needed to address new factual contexts and new questions. Empirics are needed to inform pragmatic decision-making, and the demands for such decision-making inform the empirical questions asked. The two components interact reciprocally to address law's dynamic character.

From a jurisprudential perspective, although the original legal realists were for the most part not philosophers engaged with epistemological questions, legal realism's approach to explanatory theory-building can be viewed as a form of philosophical pragmatism.²³ Given the place of James and Dewey in American thought at the time, legal realists were particularly shaped by a pragmatist outlook.²⁴ From a pragmatist perspective, we adopt concepts not because they are valid for all time and in all places, but because they are useful in helping us address particular problems, however these problems may be perceived.²⁵ We adopt them because we have no choice but to do so if we are to act in the world. We use them to adopt provisional understandings to inform our actions in attempting to shape the world in which we live. We revise such concepts when they are no longer helpful in light of our experience. Pragmatists are interested in legal concepts because these concepts play an important role in law's application — take, for example, such key concepts as “discrimination,” “equivalence,” and “necessity” in international economic law. But such application, in turn, should help us evaluate the orienting concepts. The reciprocal interaction of concepts and practice shape how lawyers, officials, citizens, and reformers engage in ever new decision-making in light of existing law. As Holmes cogently wrote, “the life of the law has not been logic; it has been experience.”²⁶

With its two-dimensional focus grounded in empirics and pragmatic decision-making, legal realism contrasts with attributes of both legal formalism and parts of critical legal studies. On the one hand, legal realists contend that legal meaning is not autonomous of legal practice, and legal outcomes are not determined by legal form. Judges do not respond simply to doctrine; they reply also to facts. And legal form does not automatically affect behavior, but only does so conditionally in light of context. Legal realism still takes legal form and legal doctrine seriously. But it does so as a contextualized, empirical question, and not as an assumption. A new legal realism also contrasts with contemporary variants of formalist thinking as reflected in non-

²³ de Been, *Legal Realism Regained*, *supra* note 15.

²⁴ See e.g. Cohen, *Transcendental Nonsense*, *supra* note 9, at 835 (“A definition of law is *useful* or *useless*. It is not *true* or *false*”); W. W. Cook, ‘Scientific Method and the Law’, (1927) 13 *American Bar Association Journal* 303, 306 (“Any grouping... appears as at most a working hypothesis, to be tested by its consequences, and subject to revision in the light of further experience”). Cf. Leiter, *Naturalizing*, *supra* note 7. (reconstructing legal realism from the perspective of philosophical naturalism).

²⁵ Pragmatists are not anti-scientific. See e.g. S. Haack, *Defending Science—within reason: Between Scientism and Skepticism* (2003).

²⁶ O. Holmes, *The Common Law* (1881), 1.

empirically grounded variants of law and economics. To the extent that law and economics prescriptions are based on rationalist assumptions that are not called into question through empirical study, then they are contrary to a legal realist approach. Behavioral economics grounded in empirical study is thus a component of the new legal realism.²⁷

New legal realism has an important critical dimension, but it also contrasts with at least parts of critical legal studies, which has been conflated with legal realism, obscuring the legal realist stance.²⁸ Legal realism is distinct from a critical legal studies that reduces law to ideology and views law as structurally indeterminate in principle. Critical legal studies is a rich and varied approach, and in international law, scholars such as David Kennedy and Martii Koskenniemi have insightfully opened new ways of understanding international law's structure and practice. Yet new legal realism differs in its attention to empirical study, in its pragmatic problem-solving focus, and in its enlisting of the potential of legal reasoning.²⁹ New legal realists stress the importance of empirically studying how law works before drawing conclusions regarding the relative roles of formal law, ideology, factual context, and other factors. New legal realists thus contrast with those critical legal scholars who do not engage with the empirical study of law for pragmatic decision-making. New legal realists also defend the normativity of law in shaping decision-making justified through reason giving, though on a conditional basis in light of empirics. They focus on empirics not out of any foundationalist sense of truth derived from social science, but because social science is helpful for understanding, developing, and applying law as a part of social action in particular social contexts.

3. WHAT'S NEW IN A NEW LEGAL REALISM APPROACH TO INTERNATIONAL LAW

What the new legal realism retains of its legal realist heritage is empiricism and pragmatism. What is new in a new legal realism is the factual context scholars confront and the development of new scholarly methods regarding the study of international law. The major development in scholarly methods for the study of international law is the turn to empirical work.³⁰ The major social development is

²⁷ See Nourse and Shaffer, *Varieties*, *supra* note 7; D. Farber, 'Toward a New Legal Realism', (2001) 68 *Chicago Law Review*, 279, 279-303; T. Broude, 'Behavioral International Law', (2015 forthcoming) 163 *Pennsylvania Law Review*.

²⁸ de Been, *Legal Realism Regained*, *supra* note 15. (arguing for a need to save legal realism from critical legal studies by focusing on legal realism's grounding in pragmatism).

²⁹ For examples of critical work that call for a critical empiricism, see e.g. D. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism,' 36 *Stanford Law Review* 575-622 (1984); D. Trubek and J. Esser, 'Critical Empiricism in American Legal Studies: Paradox, Program or Pandora's Box?', (1989) 14 *Law and Social Inquiry* 3; C. Harrington and B. Yngvesson, 'Interpretive Sociolegal Research', (1990) 15 *Law and Social Inquiry*. For examples of work tending to eschew empirical study, see e.g. M. Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', (2014) 26 *International Relations* 3; M. Kelman *Trashing*, *Stanford Law Review*, Vol. 36, No. 1/2, Critical Legal Studies Symposium (Jan., 1984), 293, 337-343.

³⁰ G. Shaffer and T. Ginsburg, 'The Empirical Trend in International Law', (2012), 106 *American Journal of International Law* 1.

economic and cultural globalization and greater transnational social connectedness, so that officials and stakeholders increasingly perceive social and legal problems as transnational in scope across substantive domains. This social development opens greater prospects for pragmatic engagement with international law, and accordingly, greater demand for its empirical study.

To start with the contemporary social context, a legal realist approach is more relevant for understanding international law today than it was when the legal realists wrote in the 1930s and 1940s where American legal realist scholars viewed law in relation to social problems only within the United States.³¹ What is new are the rise of transnational social connectedness as a result of the intensity, extensity, and velocity of economic and cultural globalization,³² the types of problems increasingly conceived by stakeholders in transnational terms, the corresponding expansion of the substantive domains implicated by international hard and soft law, international law's increasing institutionalization, including through courts, and the decline of the monopoly of the nation state in international lawmaking. What is new is the scope and depth of transnational networks of government officials, business associations, civil society groups, and professionals such as lawyers. What is new is that what stakeholders previously perceived as problems to be addressed through national law are now viewed in transnational terms that cannot be addressed through national law alone, giving rise to increased international and transnational legal norm-making and flows of legal norms that permeate national legal systems.³³ As a result, in most substantive domains, it no longer makes sense to view law in purely national terms from a socio-legal perspective, and international law plays an increasingly important transnational role.

Until relatively recently, legal realism played less of a role in international legal theory because international law primarily involved relations among nation states, and international institutions such as courts had not developed to adapt, interpret, and apply it.³⁴ Legal realist theory focused on the relation of law to social order and social change, so that it had much less relevance to a world comparatively lacking in transnational social connectedness. Rather, for legal realists, building from historicist and sociological jurisprudence, "[t]he law embodies the story of a nation's

³¹ The legal realists also were not very interested in comparative law approaches either. See J.H. Merryman, 'Comparative Law Scholarship,' 21 *Hastings International and Comparative Law Review* 771, 781 (1998).

³² See e.g. D. Held, A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics, and Culture* (1999), 14-28; A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (1996); and R. Michaels, *Globalisation and Law: Law Beyond the State, in Law and Social Theory* (2nd ed.), eds. R. Banakar and M. Travers (2013), 287-304.

³³ The term transnational can be defined in different ways. Phillip Jessup defined transnational law as "all law which regulates actions or events that transcend national frontiers," which includes public and private international law but extends beyond them. P. Jessup, *Transnational Law* (1956), 2. Following, but also differentiating from, Jessup, I have defined transnational law more broadly as the construction and flow of legal norms implicating persons, entities, and/or institutions in more than one nation state. See G. Shaffer, *Transnational Legal Ordering and State Change* (2013).

³⁴ On the rise and proliferation of international courts, see K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014).

development,” to take from Holmes.³⁵ Law was central to the construction of the nation state, facilitating social integration, public order, and the resolution of conflict through the nation state’s monopolization of the legitimate use of force. As a result, the development of social theory of law, in the historicist and legal realist traditions, focused on national law and practice, and not on international law, which was viewed largely in terms of interstate relations regarding a narrow range of areas, such as war and peace.

In addition, the Cold War context placed severe limits on the efficacy of formal international law and international institutions. Legal realism became associated with a particular American approach — that of the policy jurisprudence of Myres McDougal and Harold Lasswell.³⁶ While this approach is an important precursor of a new legal realism in its call for social scientific study and its problem-centered orientation, it was critiqued for failing itself to engage with empirical study,³⁷ and for not being reflexive and in the process advancing the interests of a particular powerful actor, that of the United States (U.S.).³⁸ It thus lacked the neutrality of legal positivists, the moral valence of normative scholars, and the critique of American and European hegemony later reflected in critical legal studies. The Yale policy school of McDougal, Lasswell, and Michael Reisman is indeed an important predecessor for many scholars approaching international law in an empirical and pragmatist vein; but a new legal realism is distinct in its greater attention to and use of empirics, its consideration of law’s conditional normativity and thus its potential constitutive power, and the fact that the social context is no longer the Cold War with its balance of power focus, but rather the almost endless variety of international law across subject areas in a world

³⁵ Holmes, *The Path*, *supra* note 6, at 4.

³⁶ See H. D. Lasswell and M. S. McDougal, *Jurisprudence for a free society: studies in law, science and policy* (1992); M. Reisman, S. Wiessner, and A. Willard, ‘Commentary: The New Haven School: A Brief Introduction’, (2007) 32 *The Yale Journal of International Law*, 575.

³⁷ See, e.g., G. Dorsey, ‘Agora: McDougal-Lasswell Redux: The McDougal-Lasswell Proposal to Build a World Public Order’, (1988) 82 *The American Journal of International Law* 41, 49 (“Julius Stone pointed out that in none of these studies did McDougal and associates make the comprehensive empirical investigation that they specify for the scholars who are charged with building the world public order.” Citing J. Stone, *Visions of World Order* 29 (1984)); O. R. Young, ‘International Law and Social Science: The Contributions of Myres S. McDougal’, (1972) 66 *The American Journal of International Law* 60, 63 (“[I]t is hardly surprising that McDougal is a great advocate, at least at the verbal level, of expanding the use of findings from the social sciences in legal analysis. What is somewhat surprising, however, is that McDougal’s substantive contributions to the achievement of this objective are not particularly impressive and that the opportunities for introducing findings from the social sciences far outdistance their actual introduction in his own work.”).

³⁸ See, e.g., B. Leiter, *Legal Realism: A Companion to Philosophy of Law and Legal Theory*, D. Patterson and W. A. Edmundson (eds.), 50, 61 (“Scholars at Yale (notably Harold Lasswell and Myres McDougal) propounded a watered-down version of Realism under the slogan of ‘policy science.’.. ‘Policy science’ is now, happily, defunct, since it had far more to do with rationalizing American imperialism than it did with science”); M. E. O’Connell, *New International Legal Process*, (1999) 93 *The American Journal of International Law* 334, 350 (New Haven School’s “policies and norms are those of its creators and that they were too closely tied to the interest of the United States to be the norms of the international community.” Citing A. Carty, *The Decay of International Law?* (1986)).

characterized by economic and cultural globalization, accompanied by increased legalization and judicialization of politics.³⁹

International law today can be viewed as a part of the transnational legal ordering of social problems.⁴⁰ It serves both to facilitate and tame processes of economic and cultural globalization, interacting (as law always does) with a new social context — a transnational one. While the term “inter-national” still focuses on relations between nation states, international legal norms draw from national law and recursively permeate national law across substantive domains. International law, as a result, still reflects biases that empirical study should uncover as regards its production, its effects, and its reform.

In terms of methods for the study of international law, just fifteen years ago the *American Journal of International Law* published a special symposium on “methods” that viewed them only in terms of competing analytic frames, and not in terms of methods from a social science perspective.⁴¹ Major developments in the social sciences, and a changed orientation toward the study of international law in the legal academy and the social sciences in light of globalization, have opened new possibilities for the study of international law from a legal realist perspective. Social science disciplines have adopted new technologies and more sophisticated methodologies to engage in empirical work regarding law since the legal realists wrote in the 1930s. Scholars across disciplines have increasingly used these methodologies to assess international law, in particular, for the first time.⁴² We now have sophisticated quantitative techniques to assess the impact of human rights and economic law, and, more recently, experimental techniques to assess how legal decision-makers and the subjects of international law operate. Within the legal academy, there is a temperament in which a growing number of international law scholars increasingly take empirical questions seriously. Legal scholars now use quantitative, qualitative, and mixed empirical methods to study international law, often working with other social scientists. An increasing number have engaged in participant observation and systematic interviewing to uncover the mechanisms through which international law operates.

In complement, philosophers such as W.V. Quine, Hillary Putnam, Richard Rorty, and others, as the early pragmatists, have continued to raise challenges to

³⁹ This context, in theory, could of course change, but it remains the context in which law operates and develops today.

⁴⁰ See Shaffer, *Transnational*, *supra* note 33 ; T. Halliday and G. Shaffer, *Transnational Legal Orders* (forthcoming 2015).

⁴¹ See S. R. Ratner and A. Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’, (1999) 93 *American Journal of International Law* 291. They also cite Philip Allott for the proposition that “methods . . . refer to the structure of their argumentation, in particular its logical discourse.” *Id.*, at 292.

⁴² See G. Shaffer and T. Ginsburg, *Empirical Work in International Law: A Bibliographical Essay* (2009), 8-9 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444448 (providing data on publications on international law topics in flagship journals in international relations, law and society, and law and economics).

logical positivism.⁴³ Quine, for example, was skeptical of any conceptual or perceived “truth” that is independent from cultural context, while remaining a committed empiricist. As he wrote, “As an empiricist I continue to think of the conceptual scheme of science as a tool, ultimately, for predicting future experience in the light of past experience.... But in point of epistemological footing, the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conceptions only as cultural posits.”⁴⁴ Philosophical pragmatists call into question any theory of law based on concepts that are independent of the cultural context of a given time and place. Within law, critical legal studies scholars have advanced particular challenges to logical positivism, noting how even the questions asked can reflect a normative dimension reflecting bias. Surely conceptual analysis delivers important illuminations for those studying international law: again from a pragmatist perspective, concepts are essential for orienting thought and action. Yet one does not need to be a postmodernist to address the limits of conceptual thought. Legal realists contend that important research remains on which conceptual analysis cannot deliver.

For a philosophical pragmatist, concepts should be adopted for their usefulness for understanding and orienting social action, and should be revisable in light of experience. Empirical studies need concepts to study how law operates, but these concepts must be revisable. The resulting empirics inevitably will be partial as well, and thus should be in dialogue with each other to inform action. It is this pragmatist position that is the key predecessor of a new legal realism’s deployment of empirical methods.

The pragmatist orientation in new legal realism helps to clarify, and (for some) reconstruct, the old legal realist approach. To the extent one views old legal realism as a form of relativism and radical skepticism, this is not new legal realism’s claim. New legal realism rather makes claims of fallibilism and conditional theory for purposes of social action. For new legal realists, international law and its form of reason-giving can contribute to transnational problem-solving, but its contribution will vary in light of context calling for conditional theorizing. In certain situations, and especially those in which social order has broken down — such as war and peace, the most traditional domain of international law — law’s normativity may indeed be weak. The conditions for international law’s effectiveness should be empirically studied in order to inform pragmatic, purposive interventions.

⁴³ See e.g. R. Bernstein, *The Pragmatic Turn* (2010); D. Davidson, “Truth Rehabilitated” in *Truth, Language, and History* 3-18 (2005); H. Putnam, *Pragmatism* (1994); Quine, W.V., *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* (2d ed., rev., 1980); R. Rorty, *Philosophy and the Mirror of Nature* (1979); L. Wittgenstein, *Philosophical Investigations*.

⁴⁴ Quine, *Two Dogmas of Empiricism*, *supra* note 43, at 20 (2d ed., rev., 1980); *see also* W.V. Quine, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 69 (1969) (maintaining that our very thinking is constructed within a context from which it cannot be completely free).

4. SIX KEY ATTRIBUTES OF THE NEW LEGAL REALIST APPROACH TO INTERNATIONAL LAW

These changes in social context, conceptual thinking, and the appreciation of empirical study give rise to what can be viewed as the new legal realist approach to international law. In the spirit of Llewellyn's original defining of the old legal realism, we can distill key attributes of those working in the new legal realist vein in developing international law theory in terms of a movement and orientation and not of a particular school.⁴⁵ In my view, the following six attributes are central for developing the new legal realist understanding of international law within a third pillar of jurisprudence — that of social legal theory regarding how international law obtains meaning, is practiced, and develops over time.

(i) *How international law obtains meaning, operates, and changes are empirical questions.*

From a legal realist perspective, law cannot be adequately understood outside of empirical study. Kelsen and Hart incorporate the concept of effectiveness in their positivist definitions of law, acknowledging that there must be some minimum level of acceptance and effectiveness of legal rules for the rules to be considered law.⁴⁶ But a legal realist is not primarily interested in the concept of law itself, and thus in the either-or issue of some minimum level of effectiveness to constitute law conceptually; rather, the legal realist is interested in the shades of how law obtains meaning, has effects, and changes over time. Such shades can only be understood and theorized empirically in terms of conditional theory.

New legal realism neither is idealist regarding international law's role, nor does it assume the position of international relations structural realism that views law as epiphenomenal and reduces it to a function of state power.⁴⁷ Some areas of international law can be viewed as paper rules in that they exist only in form, but have no implications for practice or behavior. Other areas shape behavior, having both intended and unintended consequences. The empirical trend in international legal scholarship builds new conditional theory of international law's development, operation, and effects.⁴⁸ Such empirical study is also important normatively. Legal realists contend that any undertaking of law application and development to address social problems should be grounded in a study of factual context and potential consequences or the resulting intervention risks being counterproductive.

⁴⁵ Cf. K. Llewellyn, *Some Realism*, *supra* note 8. (not a "school").

⁴⁶ H. Kelsen, *Pure Theory of Law* (2nd ed., 1967), 87-88 ("A legal norm is valid even if it is not wholly effective—it suffices if it is effective 'by and large,' that is, if it is applied and obeyed to some degree"); H. L. A. Hart, *The Concept of Law* (1961) 235 ("The rules of the simple structure [international law] are, like the basic rule of the more advanced system, binding if they are accepted and function as such). Hart addressed validity at the system level for advanced legal systems, but noted that international law is analogous to the rules of a primitive society in which there is no rule of recognition.

⁴⁷ Cf. R. Steinberg, 'Wanted: dead or alive—realist approaches to international law,' in J. Dunoff and M. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* 153-154 (2012) (discussing different variants of IR realism and their claims).

⁴⁸ See Shaffer and Ginsburg, *The Empirical Trend*, *supra* note 30.

(ii) *How international law obtains meaning, operates, and changes should be pragmatic questions, best understood from a philosophical pragmatist position.*

New legal realists do not contend that law and legal texts are wholly indeterminate and that legal decisionmaking is to be focused only on policy consequences. Rather, to go back to Llewellyn and Dewey, legal realists address both the policy consequences of different interpretations of law, and build arguments based on precedent to provide for “stability and regularity” that enables actors to plan and foresee the legal consequences of their actions.⁴⁹ Law’s meaning involves choices because it cannot be understood outside of human agency, whether in terms of legal arguments that actors bring, or judges’ and other actors’ responses to those arguments. These arguments involve different interpretations applied to particular factual contexts. Judges build their justifications for decisions based on existing law that are defensible in light of those arguments, even while judges disagree regarding the appropriate interpretation of a given legal norm in such contexts. Law’s meaning will, as a result, vary in light of context.

New legal realists view law as a form of technology that can promote certainty and predictability, provide normative guidance, allocate institutional responsibility, enlist reasoning, and resolve disputes.⁵⁰ The term “technology” will trouble some, but it is an essential pragmatist point. By law as technology, I stress law’s relation to perceptions of problems that law can address. The term does not suggest that law lacks (potential) normativity, or that law does not involve a particular form of knowledge and reason-giving. Rather the term casts light on the fact that knowledge arises from engagement and interaction with the world (not as something transcending it) and that legal knowledge is developed and used, like a technology, to respond to and resolve problems encountered in the world. New legal realists, in other words, study how actors use law instrumentally to intervene in social contexts to change those contexts. They develop concepts and apply empirics to address the ever-new contexts that stakeholders face.

For a legal pragmatist, concepts and analytic priors need stability to coordinate research and action based on shared understandings. Yet these concepts ultimately must be revisable in light of experience. Change occurs too rapidly in the world to rely solely on analytic priors without an appreciation of new contexts, so that all empirical knowledge is contingent, not absolute. For pragmatists, “the only way to cope intelligently with such a changing world [is] through experimental knowledge that [is] constantly tested against projected results.”⁵¹ Within formal law itself, for example, experimental change is reflected in the development of legal doctrine over time.

⁴⁹ See e.g. J. Dewey, ‘Logical Method and Law’, (1924) 10 *Cornell Law Quarterly* 17, 26; K. N. Llewellyn, *The Bramble Bush* (1930), 70-75; K. N. Llewellyn, ‘Major Steadying Factors in our Appellate Courts’, in *The Common Law Tradition: Deciding Appeals* (1960), 19.

⁵⁰ Cf. Cook, Scientific Method, *supra* note 24, at 308 (“human laws are devices, tools which society uses as one of its methods to regulate human conduct”).

⁵¹ See de Been, Legal Realism Regained, *supra* note 15, at 21. See also Lang, this issue.

New legal realist methodology thus needs to be able to give rise to *emergent analytics* that can call into question analytic priors brought to the research. By emergent analytics, I refer to analytics that emerge from empirical studies and experimentalist practice.⁵² From my new legal realist perspective, international law scholars need to leave their offices and engage with policymakers and other actors to call into question analytic priors and uncover the political and social contexts in which law develops and is applied. Empirical and experimental methods must be open to uncover biases within them that can give rise to new ways of seeing issues. In that way, scholars can more meaningfully contribute to our understanding of international law's role, operation, and adaptation in a changing world requiring ongoing human action.

To give an example from my own work, it is only when I went to Geneva and to developing country sites that I gained a greater appreciation of the construction of trade and environment issues before the World Trade Organization (WTO) from a developing country stakeholder perspective.⁵³ I went to Geneva with a conventional conception that the WTO was trade-biased and needed to 'balance' competing environmental norms and objectives. Yet my interviews turned into lectures from individuals from developing country governments and non-governmental organizations about how my questions reflected an American frame. I learned how the term 'environment' has vastly different meanings to stakeholders in developing countries where it is much more difficult to separate the concept from that of 'development' because people's livelihoods are more intimately connected on a day-to-day basis with the environment. I tested what I learned by reviewing the minutes of WTO trade and environment committee meetings, noting who spoke at such meetings on which issues, and showing how differently representatives from northern and southern countries understood trade-environment issues. In short, my assumptions and expectations were upset by the experience of weeks of interviewing and discussing the issues with people coming from a much broader range of experience and priorities than I could meet on Westlaw or at U.S. academic conferences. This type of empirical work, in particular, helps to include perspectives that otherwise might be unheard. It ultimately helps to inform how international trade and environmental law might be revised, as well as how the interpretation of open-ended provisions such as GATT Article XX's reference to "unjustifiable discrimination" might be approached.⁵⁴

⁵² Shaffer and Nourse, Empiricism, *supra* note 22.

⁵³ This research was published in G. Shaffer, 'The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of the Trade and Environment Matters', (2001) 25 *Harvard Environmental Law Review* 1, 1-93.

⁵⁴ For an example of how this work might inform interpretive choices, see G. Shaffer, Power, Governance, and the WTO: A Comparative Institutional Approach, in M. Barnett and B. Duvall, Power in Global Governance 130 (2005).

(iii) International law should be viewed in processual terms.

Law involves not only form (such as statutes, regulations, precedents, and contracts), but also practice.⁵⁵ Law thus should be viewed not in static terms (i.e. the law is “x”), but in dynamic processual ones, in which law’s operation and meaning are shaped by experience. For legal realists, international law’s meaning develops over time through lawmaking, interpretation, and practice involving institutional and social interaction. This interaction takes place at different levels of social ordering, and involves different legal forms, including not only hard law but also soft law that can be viewed as incipient law (to use Llewellyn’s term),⁵⁶ including law attempting to shape the meaning of existing hard law.⁵⁷ The interaction of institutions and actors advancing different hard and soft law norms shape law’s development and meaning over time, and thus what the relevant law is at a particular time.

Process theories of law are often attributed to the legal process school, which has been viewed as a critical response to legal realism.⁵⁸ Yet the legal process school grew out of legal realism’s critique of formalism, on the one hand, and its attention to factual context and institutional processes, on the other hand.⁵⁹ The study of the interaction of institutions and actors as part of a processual conception of how law obtains meaning, operates, and changes, is a central part of new legal realists’ empirical and pragmatic approach to international law. So long as legal processes are viewed not in ideal terms, but rather empirically and pragmatically in their imperfect and dynamic actuality, then the new legal realism draws upon those scholars who view law and legal processes in dynamic terms.⁶⁰

(iv) International law should be viewed in transnational terms in today’s context.

In today’s globalized world, international law is best viewed in transnational terms because one cannot understand international law empirically outside of the

⁵⁵ See J. Brunée and S. J. Toope, *Legitimacy and Legality in International Law* (2010) (applying a process-based approach building from Lon Fuller and his theories of social interaction which can also be viewed in social constructivist terms).

⁵⁶ K. Llewellyn, ‘The Normative, The Legal, and the Law-Jobs: The Problem of Juristic Method’, (1940) 49 *Yale Law Journal* 1355, at 1358-59 (referring to different forms of “incipient law” which was not yet “imperative.” As he writes, “the legal’ under immediate discussion is a very bare-bones kind of legal stuff; pre-law ways, if you will”).

⁵⁷ G. Shaffer and M. Pollack, ‘Hard vs. Soft Law in International Governance’, (2010) 94 *Minnesota Law Review* 706 ...

⁵⁸ See N. Duxbury, *Patterns of American Jurisprudence* (1997).

⁵⁹ J. W. Singer, *Legal Realism Now*, (1988) 76 *California Law Review* 465, 505-508. Hart and Sachs emphasized the role of institutions in the legal process, as opposed to a formalists’ focus on legal texts. See William N. Eskridge, Jr., and Phillip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lix-lxii (William N. Eskridge, Jr., and Phillip P. Frickey eds., 1994).

⁶⁰ See e.g. A. Chayes’ famous study of the Cuban missile crisis. A. Chayes, *Cuban Missile Crisis* (1974). See also Bodansky, this issue (applied to international environmental law). To adapt from Edward Rubin writing in a related theoretical frame, the new legal realism attends to “all the social forces, inequalities, and ideological [factors] that legal process theory ignored.” Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions* 109 HARV. L. REV. 1393, 1428.

interaction of international, transnational, and national institutions and actors, be they public or private.⁶¹ As the conception of problems becomes increasingly transnational in scope, international law becomes part of a transnational, interactive, recursive, dynamic process. The interaction of actors and institutions at different levels of social organization gives rise to the settlement and unsettlement of legal norms and the varying alignment of legal orders across national jurisdictions in light of different contexts.⁶² These processes can be studied across levels of social organization and across domains of law, from human rights to regulatory to business law. For example, international tax law, international bankruptcy law, international trade law, and international human rights law all involve the interaction of international law and national law over time. Such interaction gives rise to shifts in legal ordering instantiated in national law and practice in which international law plays a catalyzing, stabilizing, and destabilizing role. Tom Ginsburg, Zachary Elkins, and Beth Simmons, for example, have shown the relevance of the Universal Declaration of Human Rights, a soft law document, for national constitutions.⁶³ Sally Merry, an anthropologist, has similarly shown how international human rights law regarding gender is translated and vernacularized in local settings.⁶⁴ Similarly, Terrence Halliday, Susan Bloch-Lieb, Roderick Macdonald, Philip Genschel, and Thomas Rixen respectively assess the transnational settlement and unsettlement of tax, secured transactions, and corporate bankruptcy law in light of international institutions, treaties, and soft law instruments.⁶⁵ Interestingly, the work of Erlich on pluralist norms and local contexts in the Austro-Hungarian empire is relevant to understanding the varying transnational role of international law in national and sub-national contexts today since international law will interact with national and local law and customs in different ways that can be studied comparatively.⁶⁶

(v) *International law can exercise normative force, but in a conditional manner, demanding conditional theorizing.*

From a pragmatic perspective, law and law's normativity can play important roles in creating order and advancing norms of justice. Any theory of international law that reduces law to the outcome of politics fails to account for law's normativity in potentially shaping social relations. Thus, new legal realism should be distinguished from international relations (IR) realism, and in particular structural realism.

⁶¹ On the transnational, see *supra* note 33.

⁶² See Shaffer, *Transnational*, *supra* note 33 ; Halliday and Shaffer, *Transnational*, *supra* note 40. For earlier characterizations of these transnational processes that are less social scientific and empirical in their focus, see P. Jessup, *Transnational Law* (1956); and H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181.

⁶³ Z. Elkins, T. Ginsburg, and B. Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice', (2013) 51 *Harvard International Law Journal* 201.

⁶⁴ S. Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (2006).

⁶⁵ See their respective chapters in Halliday and Shaffer, *Transnational*, *supra* note 40.

⁶⁶ One does not need to take a conceptual position regarding whether non-state law constitutes law to see Erlich's relevance for assessing the interaction of international law with other forms of normative ordering in the broader transnational context. See Nelken, *Erlich's Legacies*, *supra* note 13. (2009) (noting different reconstructions and appropriations of Ehrlich in the current context).

International relations realism arose in the Cold War and was wary of any theorizing of law's normativity, and thus completely ignored *legal* realism. New legal realism differs from IR realism in the word legal, and the conditional importance given to the legal, as well as in its wariness of IR realism's anthropocentric image of nation-states and reductive view of state interests.⁶⁷ New legal realism, unlike IR realism, takes law and law's normativity seriously as an independent variable that can shape views of appropriate behavior, although it does so only conditionally. Any theory of legal ordering must not assume law's normative valence. It rather must investigate it empirically to assess the conditions under which international law matters and the various ways through which it matters.⁶⁸ New legal realists thus aim to build conditional theory that is focused on particular contexts involving different areas of international law, and problems posed within those areas.⁶⁹ It thus calls for the situation sense central to the pragmatic theorizing of Llewellyn and others in the legal realist tradition — that is, the need for contextual and not nomological thinking.

(vi) *International law should be reduced neither to universalist reason (of ideal liberal theory), nor to hegemony operating in the guise of law (from a critical or Marxist perspective). Rather, international law should be viewed in terms of power operating in tension with reason.*

International law is constituted by both power and reason.⁷⁰ We cannot understand international law outside of politics, especially in light of international law's distributive implications. Yet we also cannot reduce it to politics because actors use international law as a means for cooperation and problem solving in a world characterized by dynamic change. Any "pure theory of law" is thus fantastical from the perspective of legal practice because international law's meaning and operation reflect both international law's internal discourse (in which disputes are addressed within the normative constraints of law grounded in practical reason giving), and external factors (involving particular actors pursuing their conceptions of their interests who have particular extralegal and legal resources that they can use to shape international law in light of the distributional consequences at stake).⁷¹

Law should not be contrasted in any essentialist way from power, as in the tropes 'rules vs power', or 'right vs might'. But neither should law be reduced to an instrument of power, or a reflection of a particular ideology. Theorists who critique legal realism for reducing law to politics, such as Dworkin,⁷² thus misconstrue it, at

⁶⁷ Cf. J. Goldsmith and E. Posner, *The Limits of International Law* (2006); E. Posner, *The Perils of Global Legalism* (2009); Steinberg, *Wanted*, *supra* note 47.

⁶⁸ See also Madsen and Holtermann, this issue (on the conditional autonomy of law).

⁶⁹ For examples and further explication, see Shaffer and Ginsburg, *The Empirical Trend*, *supra* note 30. (appraising the empirical trend in international legal scholarship using multiple methods, as a means to build conditional theory); and Nourse and Shaffer, *Empiricism*, *supra* note 22.

⁷⁰ H. Dagan, 'The Realist Concept of Law', (2007) 57 *University of Toronto Law Journal* 607, 608. Nourse and Shaffer, *Varieties*, *supra* note, 7; Nourse and Shaffer, *Empiricism*, *supra* note 22.

⁷¹ On legal reason as a form of practical reason, see G. Postema, *Law's Autonomy and Public Practical Reason*, in *The Autonomy of Law: Essays on Legal Positivism* (ed. Robert P. George) (1996). On different variants of power, see Barnett and Duvall, *supra* note 55.

⁷² Dworkin, *Freedom's Law*, *supra* note 20, at 36 ("They said there is no such thing as law").

least from the new legal realist perspective. Yet scholars who reduce legal interpretation to a form of politics do not capture law's particular institutional form of reasoning that contributes to law's meaning.⁷³ From a new legal realist perspective, law is rather constituted by the tension between reason and power. Actors invest in law to advance their priorities and interests, and law channels that pursuit so that actors reason in the language of law within the institutions created through law. Going back to Jhering and Holmes, law's development involves struggles between competing parties over their conception of rights.⁷⁴ Going back to Llewellyn, these struggles, when appearing before courts and related institutional processes, are resolved through reasoned elaboration building from precedent.⁷⁵

Unlike some depictions of the old legal realists, new legal realism does not view law as wholly indeterminate and simply a reflection of power and ideology. It rather accounts for the potential normativity of law grounded in law's particular epistemologies, forms of reason-giving, and communicative practices, in tension with power. As international law expands in scope from such existential issues as war and peace, its normativity can be studied contextually and conditionally, as reflected in theories of transnational legal ordering regarding the settlement and unsettlement of norms' meaning.⁷⁶

5. AN EXAMPLE OF THE NEW LEGAL REALIST APPROACH

One can give many examples of the distinction of a new legal realist approach in relation to legal positivist reasoning.⁷⁷ Let us explore an example that both applies to the most traditional of legal issues, the interpretation of applicable law by a judge, while also extending the analysis to law's role outside of the adjudicative process. In WTO jurisprudence, there is a well-known debate between Professors Joel Trachtman and Joost Pauwelyn regarding the legal sources for WTO panels and the WTO Appellate Body, and, in particular, whether other public international law can be used as an independent defense in WTO jurisprudence. Professor Trachtman argues that only provisions of the WTO agreements can be raised in a defense to a WTO claim, pointing in particular to Articles 3.2 and 7.1 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Articles IX and X of the Agreement Establishing the WTO, for textual support.⁷⁸ Professor Pauwelyn, in

⁷³ Cf. Kelsen, *Pure Theory*, *supra* note 46, at 353 (interpretation as politics and outside of his pure theory of law).

⁷⁴ Jhering, *The Struggle for Law*, *supra* note 11.

⁷⁵ Llewellyn, *Bramble Bush*, *supra* note 49, at 70-75; Llewellyn, *Major Steadying Factors*, *supra* note, at 19.

⁷⁶ See Shaffer, *Transnational*, *supra* note 33; Halliday and Shaffer, *Transnational*, *supra* note 40. See also Madsen and Holtermann, this issue (on law's symbolic power).

⁷⁷ For other examples, see G. Shaffer, *New Legal Realism in International Law*, in *Studying Law Globally: New Legal Realist Perspectives Vol II*. Heinz Klug, Elizabeth Mertz and Sally Engle Merry, eds.. Cambridge: Cambridge Univ. Press.) (2015), as well as the other articles in this issue.

⁷⁸ J. Trachtman, 'The Jurisdiction of the WTO', (2004) *Proceedings of the 98th Annual Meeting of the American Society of International Law* 139

contrast, contends that WTO law is a part of public international law so that other international law applies unless a provision of the WTO agreements indicates that the parties to the WTO agreements have contracted out of other public international law. He points to support in Article 3.2 of the DSU that instructs panels to clarify WTO agreements in light of “customary rules of interpretation of public international law,” together with Article 31.3(c) of the Vienna Convention on the Law of Treaties.⁷⁹ A new legal realist does not deny that this debate is important for the formal reasoning of the WTO Appellate Body and that the answer to it affects the legal arguments that parties bring to WTO cases.

What ultimately interests a legal realist, as well as a practitioner, however, are two things. First, within the context of formal WTO dispute settlement, what matters is whether the WTO Appellate Body will take into account such other international law one way or another, formally or informally, and why they will do so. The answer depends not just on formal doctrinal interpretations, but also on social processes through which formal law gains meaning and is practiced. Sophisticated parties will aim to develop other international law to support their positions in relation to WTO law and they will refer to such other international law in WTO litigation. As the debate between Trachtman and Pauwelyn shows, because of the multiplicity of legal sources, different sources can support opposing arguments before a judge — a well-known legal realist point. What interests those affected by the dispute is how such other international legal norms, potentially reflecting broader changes in social norms, will shape the outcome of WTO judicial interpretation, which in turn can affect the crafting of policy options.

For example, many stakeholders and countries, and in particular the European Union (E.U.), worked to develop other international law through the negotiation of the Cartagena Protocol to the Convention on Biodiversity concerning the regulation of genetically modified seeds and crops. The E.U. then referred to this protocol, and the protocol’s incorporation of the precautionary principle, in the *EC-Biotech* case brought by the U.S. before the WTO. Although the panel did not formally accept the E.U.’s argument regarding the precautionary principle, the panel abstractly noted how other international law may affect the interpretation of WTO law and the E.U. obtained a relatively favorable legal outcome that I analyzed elsewhere from a legal realist perspective.⁸⁰ In other words, from the new legal realist perspective, WTO panels and the Appellate Body may often take into account other international law, which in turn can reflect other social developments, even though they do not formally state that such international law is part of WTO law or has shaped their interpretation of WTO law in a particular case. They may do so, for example, because their perceptions and interpretations are shaped socially, or so as to protect their decision from challenges to its legitimacy that could arise if the decision were to ignore such developments. Parties understand this legitimacy constraint, which is why they

⁷⁹ See J. Pauwelyn, ‘How to Win a WTO Dispute Based on Non-WTO Law’, (2003) 37 *Journal of World Trade* 997.

⁸⁰ See Shaffer and Pollack, *Hard vs. Soft Law*, *supra* note 57; G. Shaffer and M. Pollack, ‘A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the WTO Case’, 41 *NYU Journal of International Law and Politics* 1 (2008).

invest in developing and referencing such international law, even where it is of a rather “soft law” nature.⁸¹

Second, and critically, new legal realists stress that the implications of such other public international law, and more generally the relation of such law to political and social behavior, need to be assessed outside of the adjudicatory context.⁸² Most international disputes are settled and not fully litigated, just as is the case with domestic disputes. Other public international law is of interest to countries implicated by a WTO dispute, regardless of whether a WTO panel recognizes such other international law as a formal source of WTO law, because it affects the legitimacy of their position in their relations with other countries. Likewise, private stakeholders are interested in such other international law in light of its implications for advancing their priorities both in national and transnational debates. That is why stakeholders press countries to negotiate and sign such international agreements. Even if formally, the provisions of these agreements are of a rather “soft law” nature, the aim is to shape perceptions, expectations, and practice, and, in the process, potentially affect the development and understanding of the meaning of existing and future international law that may be of a “hard law” nature.⁸³ Law also can shape normative understandings so that disputes are avoided in the first place.⁸⁴ Parties invest in developing international law because of its normative potential for shaping social understandings and behavior.

6. THE RISKS OF A NEW LEGAL REALISM

New legal realism confronts the risks of legal formalism’s empirical blindness, and thus its potential irrelevance or counter-productivity. Yet new legal realism does not come without its own risks, and in particular those of scientism in which law and law’s normativity are reduced to explanatory factors used by other disciplines, and of relativism, in which law provides no compass for either providing order or pursuing justice. New legal realism takes a middle pragmatist path between the risks of reductivism of the social sciences and the risks of radical skepticism in critical legal studies.⁸⁵

The risk of scientism is a challenge for those engaging in quantitative legal studies, in particular, in which the variables chosen affect the findings. For example, if the variable chosen to explain law is a political one, and not a legal one, then the understanding of law can be reduced to such a factor, eliding any appreciation of law’s potential normativity. Law, in this sense, can be colonized by other disciplines who

⁸¹ Shaffer and Pollack, *Hard vs. Soft Law*, *supra* note 57.

⁸² See e.g. I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012) (giving a detailed example of the administrative context of the UNHCR).

⁸³ Shaffer and Pollack, *Hard vs. Soft Law*, *supra* note 57.

⁸⁴ See T. Tyler, *Why People Obey the Law* (2006); and Halliday and Shaffer, *Transnational*, *supra* note 40. (on the settlement of legal norms).

⁸⁵ See e.g. Robin West, *Normative...* (providing a normative critique from within critical legal studies of the turn away from normativity in critical legal scholarship).

see law only in the discipline's own terms,⁸⁶ such as purely a function of power in international relations realism. From a legal realist perspective, social science models are important for testing theory empirically across different contexts. Yet the methods must be open to emergent analytics that calls assumptions into question so that answers are not built into the assumptions in the model. Only then can they meaningfully inform pragmatic policymaking. All empirical methods are partial and subject to bias. They should be viewed as important for ongoing dialogue, not as trumps; they should be viewed as essential for pragmatic intervention, not as truth.

Second, legal realism risks relativism if it reduces law's importance to external factors, whether they are banal such as what a judge ate for breakfast or ideologically contentious such as the judge's political disposition. The risk of relativism was a central critique of the old legal realism in the context of World War II and the Holocaust.⁸⁷ The new legal realism, grounded in pragmatism, acknowledges that law can exercise normativity (shaping actors' views of what they 'ought' to do) and should not be reduced to politics or ideology. New legal realists are thus interested in the conditional role of law in context. They are non-foundationalist pragmatists who believed that law and legal meaning must develop to respond to ever-changing social contexts as a dynamic part of social action. For a new legal realist, the role of law's normativity and its grounding in practical reasoning thus becomes of critical, but also conditional, importance.

CONCLUSION

For the new legal realist, the enterprise of international law is constituted by the tension between power and practical legal reasoning. New legal realism is not blind to the operation of power, but it also views practical reasoning as central to international law. New legal realism contrasts with formalist approaches that treat law as if it were an autonomous discipline, while at the same time refusing to reduce international law to other disciplines' terms, such as material power and interest in international relations realism. New legal realism welcomes learning from the work of other disciplines. From the new legal realist vantage, only by understanding the context in which international law operates can practitioners adopt legal reasoning to address and respond to that context.

New legal realism provides a bridge between law, practice, and the social sciences.⁸⁸ It is the combination of legal realism's grounding of its analysis in empirical study, on the one hand, and its pragmatic, problem-centered focus engaged in practical reasoning, on the other hand, that makes it a critically needed approach in today's dynamically changing world. Legal realism is a vibrant tradition of jurisprudential thought regarding the relation of law to society, but one in which contemporary jurisprudence in the form of legal positivism, natural law theory, and Dworkin's interpretive theory have largely abandoned. The new legal realism is

⁸⁶ A. Huneus, this issue; H. Dagan, 'Lawmaking for Legal Realists', *Legisprudence* (Forthcoming 2014); Nourse and Shaffer, *Varieties*, *supra* note 7; Nourse and Shaffer, *Empiricism*, *supra* note 22.

⁸⁷ E. A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (1973), 82-85.

⁸⁸ See Huneus, this issue (regarding why social science needs law as much as law needs social science).

particularly relevant to the study of international law's transformed role in transnational and global context since national law can no longer be viewed in most substantive domains outside of such context.

This tradition of jurisprudence should not be lost. Rather, given the growth of transnational social connectedness and the increasing ways international law variably permeates and shapes national law and national legal institutions across subject areas, international law jurisprudence should include and engage with this tradition. Actors increasingly conceive of social problems that transcend the nation state in ways in which international law and international legal institutions play an important role. Scholars now apply empirical methods to understand how international law operates in these situations. This work is a critical component for understanding the meaning, operation, and development of international law from the pragmatic perspective of actors addressing the transnational challenges they face.