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New Legal Realism Goes to Law School: Integrating Social Science in Law and Legal Education

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**New Legal Realism Goes to Law School:
Integrating Social Science and Law through Legal Education**

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Abstract

Legal Realism was both a stunning success and a dismal failure; while it pierced the veil of legal formalism, it failed in its attempt to integrate law and social science. New Legal Realism seeks to address the failings of Legal Realism, by directing greater attention to the challenges of incorporating social scientific insights into legal discourse. In this chapter, I argue that to accomplish the integration of social science and law, legal education must be reoriented to further the goals of New Legal Realism. In particular, I consider how the formal curriculum, hidden curriculum, and law school pedagogy might be reformed to provide skills, knowledge, and values that are consistent with New Legal Realism's emphasis on empiricism, interdisciplinarity, and social contextualization. Using civil procedure as an example, I illustrate what a New Legal Realist approach to legal education might look like. Acknowledging the institutional and ideological barriers to this approach, I argue that the present moment offers a unique opportunity for New Legal Realism to succeed.

New Legal Realism Goes to Law School: Integrating Social Science and Law through Legal Education

Legal Realism was a multi-dimensional intellectual movement, encompassing a legal philosophy, a scholarly framework, and an approach to legal education, as well as ties to progressive social reforms. It was both wildly successful—in terms of the enduring appeal of many of its central tenets—and a tragic failure, if measured by the limited infiltration of those ideas into legal education, scholarship, and practice. As other scholars note, the movement “ran itself into the sand” (Schlegel 1979: 459) but also influenced “all major current schools of thought” (Singer 1988: 465). It “seemed revolutionary to those who lived through it,” but failed in its intellectual and pedagogical promise (Kalman 1986: 230). We are all realists now, yet many of the Realists’ most successful reforms “lacked staying power” (Tomlins 2000: 946).²

New Legal Realism seeks to carry the goals of the Realists into the twenty-first century, and into legal scholarship and practice. Although neither the current parameters nor the future trajectories of the New Legal Realist movement are settled (Suchman and Mertz 2010; Nourse and Shaffer 2009; Mertz 2016), several “basic tenets and orientations” connect the work of its adherents (Erlanger et al. 2005: 339). Among these is the desire to integrate law and social science to form a truly interdisciplinary approach to law, in which empirical scholarship enriches our understanding of both the law in action and the living law (Macaulay 2005).

As this book illustrates, advocates for New Legal Realism are cognizant of the obstacles to such cross-disciplinary discourse. In particular, New Legal Realist scholars seek to address the challenge of translating social science—with its embedded logics and predicates—into legal discourse (Mertz 2011; Erlanger et al. 2005). Such translation requires that empirical scholars convey

² While the Realists failed to secure many of the reforms to legal education they sought, the growth of clinical education can be attributed to their influence (Mertz 2016). Outside of legal education, the “political reformist side of Realism” was perhaps even more successful (Schlegel 1979: 570, Curtis 2015).

the relevance of their research to legal debates and that they present their work in a format that can be received by legal scholars—that they translate into “a dialect that the legal academy might actually be willing to hear.” (Suchman and Mertz 2010: 565). It also pushes social scientists to be mindful in communicating the embedded assumptions, methodological nuances, and inferential limitations of their work (Mertz 2011).

In this chapter, I argue that these efforts alone are unlikely to overcome the forces that stymied the original Realists and continue to challenge their modern successors. These include law’s continuing resistance to empiricism and unwillingness to engage across disciplinary boundaries, as well as the structural and institutional forces that perpetuate this methodological and disciplinary isolationism. While interdisciplinary scholars are increasingly common in the legal academe (Diamond and Mueller 2010) and law continues to be a focus of scholarship from other disciplines, studies “by trained social scientists continue to occupy a very marginal place in the thinking of legal experts.” (Mertz 2016: 2.) To overcome the obstacles that hinder cross-disciplinary engagement and successfully integrate law and social science, New Legal Realism must not only train empiricists to communicate with lawyers and legal scholars, but also succeed in building the bridge from the other side.

That is, New Legal Realists must convince legal scholars and practitioners of the value of interdisciplinarity and must ensure they are equipped with the skills and knowledge needed to engage with empirical data and analysis. To do so, I join other proponents in suggesting that New Legal Realism must return to one of the primary battlegrounds of the Legal Realists: law school.³ Only by reforming legal education, thus pursuing its agenda from the bottom up, will New Legal Realism have a chance of generating the paradigm shift necessary to integrate social science and law.

³ Many others have also offered proposals regarding New Legal Realist interventions in legal education (e.g. Southworth, Garth, and Fiske 2016, Tejani 2016, Mertz 2007).

In this chapter, I describe how law school might be reoriented to valorize empiricism and interdisciplinarity. In particular, I argue for the inclusion of training in empirical methods in the law school curriculum, the adoption of evidence-based inclusive pedagogy, and the integration of social science insights into the explication of legal doctrine. Using civil procedure as an example, I illustrate what this New Legal Realist approach to legal education might look like.

While I propose a bottom-up reform, I also suggest that several top-down forces are poised to encourage the diffusion of these practices within legal education. Specifically, I foresee the increasing role of technology in law, current challenges facing legal education, and civil discourse regarding “fake news” as catalysts for the educational reorientation I propose. These dynamics offer reasons for optimism that the current moment offers New Legal Realists a unique opportunity to succeed beyond their antecedents.

The Elusive Integration of Law and Social Science

Conceptually, the Realists embraced empiricism and the potential of the social sciences that were emerging at the same time (e.g. Llewellyn 1931). They believed that empirical investigation could offer evidence to bolster the Realist critique of legal formalism, and illumine the extra-legal factors that influence judicial decisions (Cohen 1935). It could establish the realities of legal practice necessary for a functional approach to legal education (Fisher et al. 1993). Empirical analysis could also assess the efficacy of laws (Moore and Callahan 1943), assisting in the development of pragmatic legal policies. Yet, little empirical research was completed, innovative teaching materials were abandoned or coopted, and engagement with social science remained superficial (Tomlins 2000, Schlegel 1979).

Today, engagement between law and the social sciences remains uneven. In law schools, professors are increasingly likely to have graduate training in the social sciences (George and Yoon 2014). Empirical scholarship is more common (Diamond and Mueller 2010; Ellickson 2000;

Diamond 2019) and law and society, law and economics, and empirical legal studies have diversified the intellectual landscape (Heise 2002). Yet the majority of law students still spend their first year learning the same topics through the Socratic method using casebooks dominated by appellate opinions (ABA 2012). In legal practice, many lawyers lack basic data analysis skills, despite the potential disruption from emerging legal technologies that rely on big data, machine learning, and algorithmic prediction (Susskind 2017; Yoon 2016; McGinnis and Pearce 2014). Within the judiciary, the Federal Judicial Center (FJC) strives to educate judges to evaluate the scientific basis of expert testimony (FJC 2011), while the Chief Justice dismisses such evidence as “gobbledygook” (Gill v Whitford Oral Argument: 40).

Why is the integration of law and social science so elusive? Christopher Tomlins notes that the Realists failed to overcome law’s “institutional and ideological resilience” (2000: 940), pointing to the dual obstacles that also hinder the efforts of New Legal Realism. In the next section, I argue that to overcome these challenges and accomplish its goals, New Legal Realism must go to law school.

Legal Education: Contestation and Potential

The Legal Realists recognized the significance of law school—*qua* educational institution rather than simply the source of legal scholarship—as a place of contestation. Accordingly, they advocated reforms to the substance and manner of law teaching in support of their approach to law. These included efforts at curricular reform to better align legal education with their view of law as a social institution (Oliphant 1929). They also produced teaching materials organized by a functionalist approach to law (Currie 1951), and, they called for applied learning to supply students with an understanding of law in practice (Frank 1933).

While many of the reforms the Realists introduced were short-lived (Kalman 1986; Tomlins 2000), their focus on legal education reflects an ongoing truth: law school is a place of professional

socialization. This refers to the process through which students not only master specialized knowledge and skills, but also internalize the values of their chosen profession (Seron et al. 2016).

The transference of this knowledge occurs through several mechanisms. The curation of the formal curriculum indicates what is worth knowing, with the associated hierarchies in timing and staffing communicating additional insights about the relative import of different topics (Kennedy 1982). In addition, the requirements for succeeding in the formal curriculum, the so-called hidden curriculum (Jackson 1968), conveys to students the skills that are prioritized by the field. Relatedly, the choice of pedagogical approach itself conveys information to students about the values of the field (Mertz 2007, Guinier et al. 1997, Southworth, Garth, and Fisk 2016).

Through these and other mechanisms, law schools shape students' professional identities (Bliss 2018; Yang Costello 2004; Ballakrishnen 2018). These internalized values shape behavior in ways that have widespread implications for the profession. As Duncan Kennedy writes, "Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world." (1982: 591). Professional socialization has been linked to patterns of advancement and attrition in professional fields (Seron et al. 2016), and may help to explain ongoing socio-demographic patterns in legal occupational attainment (Dinovitzer et al. 2004; Dinovitzer et al. 2009), as well as practice area preferences (Erlanger et al. 1996; *but see* Bliss 2018).

However, law schools influence legal professionals, and ultimately the law, in another way as well. In addition to the creation of human and social capital, law schools develop intellectual capital (Wilson and Hollis-Brusky 2018). That is, law schools generate—and transmit to students—ideas about what arguments and approaches to law are valid. The legitimacy of these positions varies over time, with some gaining credence while others are denigrated as off the wall (Balkin 2001).

Collectively, these patterns affect “law, legal culture and legal meaning more broadly” (Wilson and Hollis-Brusky 2018: 839). For this reason, efforts to promote ideological shifts in American law and legal culture have focused on legal education. This includes the rise of law and economics (Teles 2008), the conservative Christian movement (Wilson and Hollis-Brusky 2018), and the founding of the Federalist Society (Southworth 2008), as well as movements from the left like Critical Legal Studies and feminist jurisprudence (Menkel-Meadow 1988). Through these activities, groups recruit and train adherents who join supporting institutions and magnify the movements’ impacts as they obtain positions of influence (Southworth 2005). Thus, as in the era of the Legal Realists, law school remains a place in which approaches to legal scholarship and practice are legitimated, making law school a key battleground in efforts to define legal culture.

Law School’s Unempirical Exceptionalism

Unfortunately for New Legal Realism, the formal and hidden curricula of law school and the dominant pedagogical techniques therein do little to advance the goals of the movement. In fact, they likely do much the opposite. As discussed above, New Legal Realism seeks to break down law’s disciplinary and methodological isolationism, in hopes of achieving an interdisciplinary approach to law. Yet legal education, as currently constituted, reinforces law’s traditional approach, denigrating empiricism and sidelining the potential contributions of other disciplines.

The Formal Curriculum

The formal curriculum of law schools is largely a function of top-down mandates enforced through the accreditation process (Spencer 2012). As the federally-recognized regulatory body charged with overseeing the accreditation of law schools, the American Bar Association’s Section of Legal Education and Admissions to the Bar promulgates the *Standards and Rules of Procedure for the Approval of Law Schools*, which define the requirements of a “sound program of legal education.” (ABA 2016).

Fluency with empirical data and analysis is notably absent from these standards, and the formal curricula of most law schools reflect this (ABA 2012; Enos et al. 2017). In addition, while cross-disciplinary engagement might be incorporated within “competency in substantive and procedural law,” there is little reason to expect that it is. The result is that many law students leave law school without an understanding of empirical data or methods or substantial engagement with relevant research from another discipline.

Hidden Curriculum

What law students learn about how to succeed within the formal curriculum—the hidden curriculum—also conveys much about the priorities of the legal profession (Kennedy 1982; Bender 1992). Through classroom interactions, law students learn that claims about the law require citation to authority, while claims about the social world do not (Mertz 2007). By learning the law from appellate case opinions, law students intuit that only the facts presented by the appellate court are relevant (Menkel-Meadow 1988; Mertz 2000; Macaulay 2006). By introducing policy arguments without empirical assessment, students learn that the consequences of law are arguable.

Moreover, the hierarchies of law school conveyed through course structuring and professional esteem also communicate the values of the field (Kennedy 1982). While many law schools include introductory statistics among their elective offerings, few require them. ‘Law-and’ classes that explicitly incorporate the social sciences are optional, peripheral offerings. Thus, the “ordinary religion” of law school (Cramton 1978) does little to instill in future lawyers a respect for empiricism or the ability of other disciplines to contribute to our understanding of legal phenomena.

Pedagogy

Finally, the dominant pedagogies of law school also counter the goals of New Legal Realism. While legal pedagogy has evolved to include clinical courses, externships, and other forms of experiential learning, it remains striking for its continued reliance on the Socratic Method and singular

assessments, particularly in doctrinal courses (Sullivan et al. 2007, Spencer 2012). This pedagogical inertia not only directly affects student learning, but also may indirectly affect students' understanding of the role of empiricism and interdisciplinarity in law.

A growing body of scholarship describes the Socratic Method's negative implications for student learning. It is criticized for its embedded logic of conflict (Spiegelman 1988), its removal of social context (Mertz 2007), and its disparate impact on women and students of color (Mertz 2007; Guinier et al. 1997). It is also ineffectual (Stuckey et al. 2007) and fails to incorporate what we know about cognition (Spencer 2012). Similarly, the use of single assessments is also contrary to what we know about best teaching practices (Sullivan et al. 2007, Spencer 2012).

The continued use of these methods despite awareness of their flaws represents a profound dismissal of empirical knowledge. It also communicates law's exceptionalism. Law school, it is said, must teach students 'to think like a lawyer.' To do so, it relies on the case method and Socratic questioning supposedly to 'sharpen the mind.' This, despite a long history of scholars debunking the myth of legal reasoning (Cohen 1935; Alexander and Sherwin 2008).⁴

In sum, law school teaches future lawyers and legal scholars that law stands apart as a discipline, that conclusions about the functioning of law in the world do not require recourse to empirical evidence, and that neither law-making nor legal practice require fluency in methods of empirical analysis. However, legal education does not *have* to be oriented toward these views. In the next section, I consider how we might reorient legal education to align with the goals of New Legal Realism.

Reorienting Legal Education

⁴ As Alexander (1998) writes, "[T]hinking like a lawyer boils down to moral reasoning, empirical reasoning, and deductive reasoning, and lawyers reason in these ways exactly as everyone else does. There is no additional form of reasoning, special to them . . ."

To support the movement's goal of "bring[ing] together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy" (Erlanger et al. 2005: 337), legal education must be reoriented. A New Legal Realist approach to education would: (i) instill in students an appreciation for the value of empirical research; (ii) provide them with a framework for understanding the relationship between law and social science; and (iii) equip them with the knowledge necessary to engage critically with empirical data and analysis. These goals have implications for the composition of the formal curriculum, pedagogical approaches, and both the choice of topics and materials in doctrinal courses.

Training in Empirical Research Methods

Since the time of the Realists, advocates for reform have recognized the significance of students' baseline knowledge for their ability to engage with law school materials (Oliphant 1932). New Legal Realism seeks to integrate empirical scholarship into these materials, in the hopes that legal practitioners and scholars will embrace an interdisciplinary approach. Yet law students come from varied academic backgrounds with differing levels of engagement with empirical scholarship (LSAC 2019). Moreover, there has traditionally been little suggestion that facility with empirical data and analysis is an important pre-law skill (ABA 2020). If law schools fail to provide students with a baseline competency in empirical research methods, they may be unable to engage appropriately with empirical materials.

For example, they may lack an appreciation for the importance and positive role of humility and caution in interpreting the results of empirical investigation (Epstein and King 2002). As Mertz (2011) highlights, the role of indeterminacy in the social sciences is often misunderstood in legal discourse, wrongly perceived as an indication of failure. Moreover, a lack of familiarity with empirical methods increases the likelihood that lawyers and legal scholars will make mistakes in

interpreting empirical results and may cause them to reject empirical evidence all together (Enos et al. 2017; Fenton 2011).

To avoid these pitfalls, a New Legal Realist approach to legal education requires the inclusion of training in empirical research methods within the formal law school curriculum. By this, I do not mean to suggest that all legal scholars and law students master multiple social science methodologies. Like Stewart Macaulay (2006: 117), “I am not foolish enough to advocate that all . . . become social scientists, expert in state of art methods and statistics.” However, I suggest that law students be equipped with a working knowledge of empirical methods sufficient to allow them to be educated consumers of empirical data and analysis.

What does it mean to be an educated consumer? It means, first, having an understanding of research design and its implications for interpretation and inference. Law students must be introduced to different sources of data and data collection methods as well as multiple modes of analysis to be able to understand empirical scholarship they encounter. Even more importantly, perhaps, law students must be educated to appreciate that each methodology is a component of a “cycle of critique” (Abbott 2004: 60).

That is, all research designs require tradeoffs. For example, researchers prioritize internal validity at the expense of external validity, optimize either breadth or depth of data, and embrace longitudinal or cross-sectional designs (Tracy 2010, Lawless, Robbennolt, and Ulen 2016). These designs permit different types of analyses, support different forms of conclusions, and rest upon different disciplinary assumptions about the creation of knowledge (Abbott 2004). Educating law students to appreciate this will not resolve deep and fundamental methodological disputes (Suchman and Mertz 2010), but would equip them to place studies they encounter within a larger methodological context.

Appreciating this context could also address the need to train lawyers and legal professionals to value uncertainty in empirical results as it illustrates the role of triangulation in increasing reliability. That is, as students come to appreciate the inherent limitations of any one approach, they can begin to see the value of using multiple approaches to address multi-dimensional legal phenomena. Moreover, through this process law students may also come to grasp the utility of theory as a means of generating coherent bodies of scholarship, rather than a collection of one-off studies. Thus, while a course focused purely on empirical research design and methods might risk encouraging scientism (Nourse and Shaffer 2009), it might also help students intuit the value of theory.

Finally, New Legal Realist legal education must provide law students with a conceptual understanding of several topics that structure the way in which empiricists draw inferences from data (Epstein and King 2002). These include concepts that determine what conclusions are supported by the data, as well as those that explain why, even if that is done correctly, one might still be wrong. In the first camp, for example, in the quantitative tradition, are the concepts of causation and correlation (e.g. Ho and Rubin 2011). Related, of course, are ideas about alternate explanations, omitted variables, and potential confounding. Also important is a basic understanding of statistical significance, particularly in light of ongoing debates within the social sciences (Wasserstein and Lazar 2016; Benjamin et al. 2018). Measurement error and sampling bias are good candidates for inclusion in the second camp. In each case, the goal is not to enable law students to undertake their own analyses without further training, but to enhance their capacity to receive empirical social science insights.

Other proponents of New Legal Realism offer a different perspective, particularly when they place the burden of translation primarily on empiricists, rather than lawyers and legal scholars. However, it simply may not be possible to overcome the challenges of translation inherent in

realizing the New Legal Realist vision without providing lawyers and legal scholars with a baseline competency in empirical methods.

Evidence-Based, Inclusive Legal Pedagogy

In addition to their general failure to include social science in the content of what is taught, dominant law school pedagogies also undermine the values of New Legal Realism by discounting empirical evidence regarding effective teaching in favor of uniquely “legal” approaches. In contrast, a New Legal Realist approach to legal education must incorporate evidence-based best teaching practices and those that invite multiple perspectives. Doing so could not only enhance student learning outcomes, but also convey law’s affinity with other disciplines and the importance and validity of empirical analysis.

But what are these evidence-based approaches? Despite calls for greater attention to law school pedagogy, here is much about what goes on within the legal academe that remains unexamined (Mertz et al. 1998). Efforts to identify best practices are emerging,⁵ but lag behind empirical evidence on effective pedagogy in other disciplines. Reflecting the advanced state of research on effective pedagogy for teaching STEM subjects, for example, are self-assessment inventories of evidence-based best teaching practices, that award points for each evidence-based teaching practice a professor has incorporated into his or her course.

The Wieman and Gilbert (2014) inventory, for example, encourages professors to provide course information (e.g. list of competencies, affective goals) and supporting materials (e.g. discussion boards, lecture notes, relevant articles), to adopt in-class activities (e.g. question-asking, small group discussions, simulations) and assignments (with measures for, e.g., frequency,

⁵ For example, several institutions now sponsor centers that serve as clearinghouses for resources or offer training or consulting focused on enhancing legal teaching, including The Institute for Law Teaching and Learning, the Center for Excellence in Law Teaching at Albany Law School. In addition, the Association of American Law Schools has a Section on Empirical Study of Legal Education and the Legal Profession.

graded/ungraded, group/individual), and to provide frequent and effective feedback (e.g. use of midterms, opportunities to redo/correct, provision of grading rubrics). This illustrates not only the advanced level of empirical understanding of effective pedagogy for STEM, but also the striking divergence between traditional legal pedagogy and modern best practices in other disciplines. Might not these practices be equally effective in law teaching?

Answering that question will require law schools to adopt measures of teaching effectiveness beyond student evaluations, which offer limited insights and are biased (e.g. Rivera and Tilcsik 2019). For example, the use of pre- and post-tests to assess student mastery of course material, monitored experimentation with teaching materials and methods, and pre-post surveys to track student interest in and perceptions of course topics are more rigorous approaches (Wieman and Gilbert 2014). By implementing deeper methods of teaching evaluation, we could identify those approaches that are most effective generally, and with regard to fostering substantive approaches and understandings that are consistent with New Legal Realism.

In addition to adopting evidence-based pedagogy, inclusive pedagogical approaches that invite student engagement also support New Legal Realism's goals of incorporating bottom-up perspectives. Together, these pedagogical approaches could contribute to a law school culture that values empiricism, recognizes the universality of learning across disciplines, and invites multiple perspectives; that is, a culture that is conducive to New Legal Realism.

Integrating Social Science Insights and Legal Doctrine

Finally, implementing a New Legal Realist approach to legal education would mean integrating social science insights and legal doctrine. This includes linking doctrinal legal education to the realities of legal practice, incorporating bottom-up perspectives on law and legal institutions, de-centering law and increasing attention to the social contexts within which law operates. Making these moves

would have implications for the topics covered within doctrinal courses (what we teach) as well as the materials used and substance conveyed (what we teach about the things we teach).

Aligning course content with the empirical realities of legal practice could realize the Realists' goal of functionalist legal education. This approach inherently valorizes empiricism, because the choice of course topics relies on empirical understandings of legal practice. It also reveals the endogenous relationship between empirical investigation and our understanding of law; the production of data is a political act that both reflects and informs our evaluation of what is worth knowing.

Incorporating social science materials into doctrinal courses can also help in presenting bottom-up perspectives and the social context of legal decisions and rules. This is particularly true given that the social sciences seek to explain outcomes other than law (Priest 1983). This approach builds upon the recommendation that students obtain training in empirical methods; exposure to these methods enhances the feasibility of incorporating social science research into doctrinal legal classes by providing students with the skills and knowledge to engage with social science research without resort to first principles. Moreover, covering these topics using inclusive pedagogies, with materials that incorporate multiple perspectives and situate law within larger systems of power, integrates the values and knowledge of New Legal Realism.

New Legal Realist Legal Education: A Civil Procedure Illustration

In this section, I consider what this New Legal Realist pedagogical approach might look like in the context of a doctrinal course. Using an introductory 1L Civil Procedure course as the subject, I

consider how the course could be reoriented in terms of the topics covered, materials used, and activities undertaken.⁶

Topics Covered

In support of a New Legal Realist agenda, the topics covered in this doctrinal course would reflect a functionalist approach to legal education, incorporate bottom-up perspectives, and place civil procedures within a larger social context. It would draw on social science approaches and insights to do so. In addition, as will become clear below, it would spotlight the enormous gaps in our empirical understanding of the civil litigation process, hopefully giving rise to a positive reinforcing cycle between empirical investigation and scholarship and teaching.

Given the wide number of topics that professors might cover and emphasize in civil procedure courses, there is an inevitable tension between expanding coverage and limited credit hours (Tidmarsh and Katz 2013). Adopting a functionalist approach means covering those topics that future lawyers are most likely to face in a practice focused on civil litigation. This course would aim to educate students about those tasks relating to civil litigation that are most salient in practice, in the substantive areas of law where they most often arise, in the jurisdictions where lawyers appear most frequently.

Yet, as a foundational matter in teaching civil procedure, one is faced with the striking truth that most civil procedure courses focus on the rules that govern civil litigation in the federal courts, the Federal Rules of Civil Procedure (FRCP). This is despite the fact that federal courts handle only a fraction of civil cases in this country. For example, in 2016 (the most recent year for which data are available) there were 15.3 million civil cases filed in state courts (National Center for State Courts

⁶ Civil procedure also presents the potential for many innovative approaches beyond those described here, including connections with clinical education, research or writing courses, capstone experiences, etc.

2016) in comparison to only 274,552 civil filings in the same year in federal district courts (U.S. Courts 2017).

In defense of this approach, civil procedure professors often note that most states model their rules of civil procedure on the FRCP (Tidmarsh and Katz 2013), glossing over inconvenient factual challenges to this statement (Subrin 1989). Professors might also point to a pedagogical benefit of having a single source of rules for students to master that nevertheless represents a larger body of legal authority. And, of course, many of the constitutional dimensions of civil procedure apply to both federal and state courts. Yet many other courses in law school address the challenge of jurisdictional variation explicitly, with discussion and debate arising out of the various approaches taken to addressing the same issue. Ignoring this variation discounts the importance of grounding legal education in empirical reality.

Thus, a New Legal Realist approach to civil procedure, while anchored by the FRCP, could incorporate greater consideration of the divergence and congruence between federal and state practices, as well as across subdivisions within each of these systems. This might include greater consideration of local rules (Macfarlane 2015), for example, or litigant choice between the state and federal system (Flango 1995). It might even trigger questions about local legal culture, at varying levels of 'local' (Nelken 2004). Given the link between Legal Realism and the creation of the FRCP (Marcus 2010), this expansion beyond the FRCP might be characterized as a New Legal Realist take on old questions.

Within this jurisdictional structure, a second question is how to allocate course time among many potential dimensions of the civil litigation process. A functionalist approach suggests allocating time in proportion to the salience of topics in practice. One way of measuring salience would be to determine the relative frequency with which different events occur within the litigation process. We know that trials are vanishing as other forms of pre-trial terminations become more prevalent

(Galanter 2004). However, existing data regarding these non-trial terminations in federal court is limited (Clermont 2009) and contested (Hadfield 2004), and we know even less about what occurs in state courts (Yeazell 2014).

Alternatively, we might measure salience by lawyer effort. That is, we could concentrate on teaching students the skills and substantive legal knowledge necessary for them to undertake the tasks undertaken most often by practicing lawyers, or those that occupy the greatest proportion of lawyers' time. The rarity of civil trials indicates that lawyers spend the bulk of their time on achieving early resolutions to problems, or, if they advance, on discovery and motion practice. However, empirical evidence on the particulars is lacking. Survey results indicate that litigators devote the greatest proportion of time to the discovery and trial stages *of cases that go to trial* (Hannaford-Agor and Waters 2013), but we know little about their overall labor with regard to the civil litigation process.⁷ Thus, existing empirical evidence suggest that a functionalist course on civil procedure would focus more on discovery and motion practice. However, the most significant contribution of attempts to generate a functionalist approach to civil procedure may well be the impetus to generate a better empirical understanding of civil litigation.

A final pair of considerations in selecting course topics are the desire to contextualize civil litigation and incorporate bottom-up perspectives. These considerations push to broaden the scope of civil procedure courses. In particular, they suggest, first, that civil litigation be situated within a more expansive ecology of dispute processing mechanisms. Debates about the extent to which ADR, mediation, and arbitration should be incorporated into civil procedure teaching are nothing new (Tidmarsh and Katz 2013). However, doctrinal developments (Subrin 2013) and patterns of

⁷⁷ We are constrained by our limited empirical knowledge as concerns about attorney-client privilege hinder survey methods and industry reports, although they may benefit from access to data (Dattu and Currell 2017), are limited in their scope and can lack transparency (Hannaford-Agor and Waters 2013).

dispute resolution indicate that the issue is only gaining in importance. In addition, a New Legal Realist orientation would place civil litigation as a relatively rare occurrence that rest atop a series of socio-legal processes through which legal disputes emerge (e.g. Felstiner et al. 1980-1981). And, it would explicitly consider how social realities shape the experience of litigants within procedures governed by “neutral” rules.

Content, Materials, and Activities

Adopting an interdisciplinary approach to civil procedure that valorizes empirical inquiry and diverse perspectives has implications for the content, materials, and activities used to analyze course topics. Here, I offer several ideas—which remain untested hypotheses subject to future investigation (Epstein and King 2002)—for a New Legal Realist civil procedure course.

Course materials could help to provide social context for common law and statutory/rule provisions. Reading more deeply about the circumstances, motivations, and consequences of cases covered can illustrate how extra-legal factors shape—and are shaped by—social context (Macaulay 2006).⁸ In addition, explicit consideration of the unrepresentative nature of cases that reach the Supreme Court—and even many appellate courts—can draw attention to the distinction between everyday reality and course content. Incorporating legal materials beyond appellate opinions also helps to illustrate these points. Court observations—particularly at the state court level and on motion calls (as opposed to rare trials)—might also help to give students a more realistic sense of civil procedure in action. Interviews with practitioners or clients, perhaps organized through law school clinics, can also connect principles and rules covered in class with reality.

Policy discussions offer another way to integrate social science perspectives and empirical analysis. Rather than allowing policy debates to remain abstract and arguable from a normative

⁸ For example, *Civil Procedure Stories*, edited by Kevin Clermont, is a helpful resource for this type of material, as the book chapters place several leading civil procedure cases in context.

perspective, recourse to empirical investigation offers an alternative approach. The emerging debate about the effect of evolving pleading standards, for example, offer an opportunity to both review existing empirical evidence (e.g. Hubbard 2017, Michalski and Wood 2017, Klerman 2015) and to challenge students to design future research projects that could assess the impacts of legal change. Other similar topics that benefit from the incorporation of empirical scholarship include the effects of removal and transfer motions (Clermont and Eisenberg 2002, Clermont 2009) and the effect of legal representation on civil case outcomes (e.g. Sandefur 2015; Shanahan, Carpenter, and Mark 2016, Quintanilla, Allen, and Hirt 2017)

Finally, activities and assignments might also be used to incorporate student perspectives. Short reflection papers or small group discussions might draw out responses from students who otherwise are unlikely to participate. Giving students some control over the content of assignments may not only enhance learning, but also offer diverse perspectives. In addition, drawing on relevant personal, professional, or disciplinary experiences among students could broaden conversations.

An Opportune Moment for New Legal Realism

Reorienting legal education could do much to advance the goals of New Legal Realism. Yet New Legal Realism arose out recognition of the major obstacles to an interdisciplinary approach to law, and many of the institutional impediments that limited the Realists' impact remain in place today. Is there any hope of achieving educational reform? In this section, I offer several reasons for optimism that now is a propitious moment for enhancing law's engagement with empiricism through legal education.

A first reason for hope is the increasingly salient role of technology in legal practice. Current and emerging technologies ranging from e-discovery to algorithmic prediction are shaping the practice of law (Susskind 2017; Yoon 2016; McGinnis and Pearce 2014). Understanding these

technologies, and interpreting the results they produce, requires probabilistic thinking and an appreciation for the relationship between underlying data quality and the accuracy of results. As comfort with empirical data, analysis, and inferences becomes increasingly essential to the practice of law, demand in the job market may incentivize students to obtain these skills (Epstein and King 2002). It could also spur top-down educational reforms (ABA 2012: Figure 90) consistent with the goals of New Legal Realism.

Of course, there is a risk that reforms could value empiricism, but otherwise diverge from the goals of New Legal Realism. Methodological training divorced from social theory and motivated solely by powerful interests within the bar could undermine many of the goals of New Legal Realism. For example, greater facility with empirical data and analysis may allow lawyers and legal scholars to engage with legal technology without causing them to consider the disparate impact of such technologies in practice.

There are other reasons for optimism, however. The perceived crisis in legal education (Campus 2012; *but see* Garth 2013) might help to overcome the inertia that protects the status quo in legal education. To protect their privileged status, law schools may be willing to adopt reforms that address current criticisms, such as the need to train practice-ready lawyers. To the extent this moves legal education closer to the realities of legal practice, it may encourage interest in understanding what those empirical realities are. New Legal Realist scholars are well positioned to generate this knowledge.

In addition, civic debates about the role of truth and knowledge in the era of “fake news” may stimulate a deeper interest among students and scholars in modes of generating knowledge. It may also increase law students’ desire for authority to support claims about social facts that have historically been unquestioned within the law school classroom (Mertz 2007), while at the same time

helping them to understand the ways in which knowledge is socially constructed. In this way, the zeitgeist may bolster efforts, paradoxically, to reorient legal education toward empiricism.

Conclusion

In this article, I argue for a reorientation of legal education to further the goals of New Legal Realism. I suggest that a New Legal Realist law school is one in which students are provided with a baseline education in empirical data and methods and develop a belief that such knowledge is essential for success in law. It is one in which the pedagogy employed is based on evidence-based best practices for student learning and invites student engagement. Within it, the content, materials, and activities offer students a more holistic view of law—how it is carried out and experienced as social context shapes its inputs and outputs—by incorporating social science insights.

The goal of this reorientation is not simply to develop an audience for New Legal Realist scholarship. Rather, the hope is that it will influence law students in their careers, whether as academics, practitioners, judges, or legislators. As Stewart Macaulay writes, the hope is that by exposing students to a New Legal Realist perspective, “the facts will speak to them differently” (2006: 1175). Perhaps by reorienting legal education, the Legal Realists’ goals might ultimately be achieved.

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