

# Afterword: Everything Old

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*“What do you replace it with?”*

Introduction .....	243
I. The “New” Look of Legal Realism.....	246
A. Connecting the New to the Old .....	246
II. “Doing” New Legal Realism Research.....	248
III. Including or Connecting with Presumably Compatible Movements .....	249
Conclusion.....	253

## INTRODUCTION

According to R. Michael Fischl, it was the question above—“what do you replace it with?”—that “killed” Critical Legal Studies (CLS), an intellectual movement that had its origins in the American Legal Realism movement of the 1930s.<sup>2</sup> The “deadly” question did not focus upon the law as politics or on the legal indeterminacy thesis connecting legal realism to CLS. Rather, the trouble with CLS was that it heavily relied upon deconstruction as a preferred method of critique. At least in Fischl’s estimation, CLS scholars spent too little time proposing alternatives to challenges they identified as stemming from the whims of judges overly influencing the law.<sup>3</sup> CLS serves as an important frame of

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1. R. Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 *LAW & SOC. INQ.* 779 (1992) (reviewing MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987)); see also Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 *HARV. L. REV.* 985 (1990) (specifically criticizing the CLS deconstruction of liberalism, despite the concept’s importance to the marginalized).

2. See ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* 79–208 (1986); Alan Hunt, *The Theory of Critical Legal Studies*, 6 *OXFORD J. LEGAL STUD.* 1, 5 (1986).

3. Fischl, *supra* note 1, at 78.

reference, because before New Legal Realism (NLR) emerged as a current offshoot of American Legal Realism, CLS and Critical Race Theory (CRT) were the prominent descendants of that movement.<sup>4</sup> As such, the histories of those movements may at least be somewhat instructive for assessing the trajectory and efficacy of New Legal Realism. While there has been no formal pronouncement regarding its demise, like CLS before it, CRT discontinued the practice of routinely meeting as a community of scholars.<sup>5</sup> CRT, however, expanded beyond Legal Realism and CLS, to focus on racial subordination and the structural dimensions of uneven relationships to power. Moreover, work identified as belonging to CRT continues to be produced and thrive internationally<sup>6</sup> and in other disciplines.<sup>7</sup> Whatever one thinks about the status of CLS or CRT, the commentaries on these projects engage histories spanning over thirty-five and twenty-five years, respectively. Just ten years into the development of NLR, there is no evidence that one should question its efficacy. Based on these previous movements, however, it is not too soon to ask whether the project appears to have a fatal discursive leaning like CLS, is morphing from its original Realist roots like CRT, or creating a new and different relationship to its generative movement.

As opposed to CRT, which stretched beyond CLS and its Realist origins by reframing discourses of rights and power, the innovation of NLR is more one of associations and methods. As two prominent law scholars have opined, NLR as a successor movement to Legal Realism is “an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.”<sup>8</sup> This definition, however, appears too narrow when one considers the description of the authors who wrote the *Foreword* to this collection, who claim the project is more broadly “concerned with advancing a constructive relationship between law and the social sciences.”<sup>9</sup> Even with this focus, there are questions to be explored as NLR is a developing and evolving enterprise. While arguments of the kind can,

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4. See OSAGIE OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 183–90 (2014); Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2054–67 (2016) [hereinafter, “*The More Things Change*”].

5. See Angela P. Harris, *Building Theory, Building Community*, 8 SOC. & LEGAL STUD. 313–14 (1999). On the broad differences between CLS and CRT and the conditions that facilitated a break between the two movements, see OBASOGIE, *supra* note 4; CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii–xix (Kimberlé W. Crenshaw et al., eds 1995); Kimberlé W. Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2010); Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1191–93 (2004); Barnes, “*The More Things Change*,” *supra* note 4.

6. See, e.g., MATHIAS MÖSCHEL, *LAW, LAWYERS AND RACE: CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE* 1, 1 (2014).

7. See Crenshaw, *supra* note 5, at 1256 (noting CRT has extended its presence into other disciplines, to include “education, psychology, cultural studies, political science, and even philosophy.”) (citation omitted).

8. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. OF CHI. L. REV. 831, 831 (2008).

9. See Bryant Garth & Elizabeth Mertz, *Foreword. “New Legal Realism at Ten Years and Beyond*, 6 U.C. IRVINE L. REV. 121, 123 (2016).

at times, be specious, for some scholars, there is still somewhat of a fascination with what aspects of NLR are actually “new.” Though scholars have opined to the contrary,<sup>10</sup> it seems obvious that early Realists—who sought to identify the gap between statements of formal legal rules and the application of those rules in real life—would naturally have been quite open to social science data as a tool to assist them in their endeavors. One might wonder, however, whether NLR seeks only to make this connection explicit, or whether it is interested in a collaboration that will extend beyond the core themes of Legal Realism. On the one hand, then, there are questions as to precisely what distinguishes the “new” Legal Realism from the “old.” Equally important, questions arise as to whether NLR will require certain forms of theoretical and methodological coherence<sup>11</sup> or whether the project seeks to be a loose umbrella formation that welcomes myriad approaches to interrogating the vagaries of law.

Some of the questions posed above are engaged in the diverse collection of works amassed here. As such, Part I will assess this work and what it portends for the future of NLR. In so doing, the project’s content and context moving forward will be a primary focus. For content, for example, it will be interesting to observe whether NLR research will foreground a commitment to engage the issues of those at the bottom.<sup>12</sup> While NLR also gives primacy to “bottom-up” approaches,<sup>13</sup> this does not necessarily speak to what subjects and issues will be

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10. Brian Leiter was an early critic of the revitalization of Legal Realism. When the first collection of NLR scholarship was published in the *Wisconsin Law Review* in 2005, he wrote on his *Legal Theory* blog: “The actual Legal Realists, to be sure, paid homage to the social sciences, even adopting the rhetoric of the then-dominant behaviorism (e.g., talk about the ‘stimulus’ of the facts of the case), but their actual scholarly practice was almost entirely insulated from the social science of the day. . . .” *The So-Called “New Legal Realism,”* Brian Leiter’s Law School Reports, Jun. 21, 2006, [http://leiterlawschool.typepad.com/leiter/2006/06/the\\_socalled\\_ne.html](http://leiterlawschool.typepad.com/leiter/2006/06/the_socalled_ne.html) [https://perma.cc/XBL7-GCAB]. Others refute the Leiter description of the connection between Legal Realism and empirical methods: “Like the original Realists, who also sought to use social science in service of advancing legal knowledge, new legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.” (citation omitted). Howard Erlanger, et al., *Foreword: Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337; see also JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 2 (1995) (“The group of scholars that . . . brought the notion of science as an empirical inquiry if not into, then at least up against, law was the American Legal Realists.”).

11. Hunt, *supra* note 2, at 2 (noting that theoretical and methodological coherence are required to sustain a movement).

12. This type of research was central within CRT and has increasingly been of interest to sociolegal scholars. For a foundational articulation within CRT, see Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 398–99 (1987). In the presidential addresses of the last three presidents of the Law and Society Association, a similar call has been made. See Carroll Seron, *The Two Faces of Law and Inequality: From Critique to the Promise of Situated, Pragmatic Policy*, 50 LAW & SOC’Y REV. 9, 19 (2016) (in particular she spoke of scholars undertaking research focused on real world experiences of inequality, pointing to CHARLES EPP, ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) as representative work); Laura Gomez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC’Y REV. 221 (2012); Richard Lempert, *A Personal Odyssey Toward a Theme: Race and Equality in the United States: 1948–2009*, 44 LAW & SOC’Y REV. 431 (2010).

13. Garth and Mertz, *Foreword*, *supra* note 9, at 125.

researched.<sup>14</sup> Additionally, there may be issues related to methods. At least some believe NLR's turn toward empiricism should be about engaging quantitative research.<sup>15</sup> If this is not the case, which qualitative methods are suitable or preferred?

For context, there are at least two questions worthy of further exploration here. First, there is a question as to whether NLR will assess the operation of law in diverse domains.<sup>16</sup> Second, there is a question as to how much New Realists should and will look back as they look forward or how the influence of American Legal Realism will be expressed. Beyond NLR's internal operation, there is also the question of collaboration, which will be considered in Part III. Given NLR's focus on social science data, there will be opportunities to engage with other burgeoning scholarly movements that seek to test progressive theoretical positions through empirical methods. In particular, questions arise as to how NLR will engage with such projects as Critical Race Realism<sup>17</sup> or Empirical Methods and Critical Race Theory (e-CRT).<sup>18</sup> As these movements—through their connections to CRT—are offshoots of Legal Realism as well, one would imagine there are broad opportunities for engagement across the different fields of study. However, this remains to be seen, and a central question to consider is how do scholars whose work emanates from a common philosophy—but also has developed disparate traditions—find each other? I conclude by considering what lessons we have learned so far suggest about the future of NLR.

## I. THE “NEW” LOOK OF LEGAL REALISM

### A. *Connecting the New to the Old*

In this anniversary moment, two of the pieces in the collection pose questions as to the project's development and, to some extent, address the “content” questions raised above.<sup>19</sup> In different ways, both Macaulay and Bix explore definitions or boundaries for the NLR project, which may push

14. See generally *id.* at 3–4.

15. See *supra* note 8; see also Garth and Mertz, *supra* note 9 at 125–27.

16. See Victoria Nourse and Greg Shaffer, *Varieties of Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79–85 (2009).

17. See CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (Gregory Parks et al., eds., 2010); Gregory Parks, *Toward a Critical Race Realism*, 17 CORNELL J. L. & PUBLIC POL'Y 683, 713–40 (2008).

18. The e-CRT movement seeks to create a stronger connection between CRT and social science research. On its origins, see Osagie Obasogie, *Foreword; Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2010); Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443, 468–71 [hereinafter *Hybrid Methodology*]. Two collections of e-CRT writings have been produced. See *Symposium, Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2010); *Symposium, Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953 (2015).

19. See generally *supra* notes 8–15 and accompanying text.

supporters to more thoroughly consider how NLR is connected to and moves beyond American Legal Realism.

Macaulay seeks not only to explore a workable definition for NLR, but also to engage in a translation exercise. In analyzing NLR's orientation toward social science, Macaulay points out that empirical data does not necessarily seamlessly fit within the frameworks of legal domains.<sup>20</sup> Nor are legal scholars likely to know when a large-scale study or data set includes an important limit or mistake. As much, then, as social science studies offer promising tools to investigate legal claims, he points out the unique contributions of legal actors and insights from the law and society tradition. His point is that empiricists and those trained in law both bring skills and knowledge to the NLR project that should be mutually respected.<sup>21</sup> Returning to a classic Legal Realist commitment, he emphasizes the importance of NLR scholars continuing to do gap studies that measure the space between law "on the books" and "in action."<sup>22</sup> At bottom, he sees NLR as connected to traditional Realism both in its recognition of the types of problems that stem from legal doctrine and in how it identifies sites of study. As long as legal actors are cautious about accepting the validity of research data and NLR maintains a "big tent" approach, he seems hopeful of the possibilities that lie ahead for the collaborative enterprise.

Bix's contribution is perhaps the most fascinating. In one way, he draws historical linkages between approaches to judicial decision making amongst the "old" and "new" Realist traditions. He claims to be a supporter of the reinvigorated Realist project, while not necessarily accepting a complete commitment within NLR to empirical work.<sup>23</sup> He also raises the question of what it means to be a "new" Legal Realist. Is the methodological commitment the central driver of NLR or are "old" Realists included within the NLR tradition because of shared beliefs about the operation of law? He also suggests that NLR should imagine a role for Realists "old" or otherwise, who do not wish to employ empirical methods but may supply fruitful theory engagement to the project. In a way, his position mirrors Macaulay's claim about the utility of legal actors in the NLR project, in that he asserts: "My claim is that there is a need for a clearer articulation of what is meant by 'legal or doctrinal explanation,' and that this cannot be done through ever more sophisticated empirical investigations. This is an area where legal theory may be helpful."<sup>24</sup> Bix's questions and suggestions are interesting because they, in the very least, infer another important question: Who can and should police participation within the NLR project? The answer to this

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20. Stewart Macaulay, *New Legal Realism: Unpacking a Proposed Definition*, 5 U.C. IRVINE L. REV. 149 (2016).

21. I have made this point with regard to the relationship between critical and sociolegal scholars. Barnes, *Hybrid Methodology*, *supra* note 18, at 476.

22. Macaulay, *supra* note 20 at 161. Early realist Roscoe Pound is credited with popularizing this framing. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15–17 (1910).

23. Brian Bix, *Doctrine, Data and High Theory*, 5 U.C. IRVINE L. REV. 137 (2016).

24. *Id.* at 145.

question may very well be that policing is unwelcomed. It is certainly reasonable to reach such a conclusion given the diverse pieces amassed in this collection and the broadly inclusive approach NLR scholars have espoused. The answer to such a question, nevertheless, will determine the reach and impact of NLR. If one need only believe in animating commitments of American Legal Realism to be a welcomed fellow traveler, then NLR researchers will likely be very open to collaborate with scholars from other movements descending from American Legal Realism, such as CLS, CRT, LatCrit, ClassCrits and other successor movements.<sup>25</sup> This potentiality is considered further in Part III.<sup>26</sup>

## II. “DOING” NEW LEGAL REALISM RESEARCH

The Tejani and Offit articles spend little time exploring the definitional contours or efficacy of NLR. Rather, these pieces seem to accept the historical origins and current goals of the project as given and attempt, instead, to introduce readers to work they surmise as belonging to the NLR project. In this way, these projects are representations of what it means to “do” NLR.

Tejani attempts to construct a Realist intervention into behavioral economics and tort theory by suggesting a reinterpretation of concepts of deterrence. Specifically, he points out that the “specter of process,” considered to be the deterrent effects that stem from fearing the burdens associated with litigation, may be as important in tort theory as the “specter of liability,” or the deterrent impact of legal liability.<sup>27</sup> In support of this claim, the article “examines the thinking behind optimal deterrence, including the larger law and economics preoccupation with defining social utility as ‘wealth maximization.’”<sup>28</sup> The goal was to prove that current thinking on liability rules overvalues the “behavioral influence of tort litigation.”<sup>29</sup>

Offit, by contrast, reports the findings of a study that may be precisely of the type NLR progenitors imagined. While it does not involve a quantitative or “big data” set, the research focuses on lawyers (U.S. Attorneys) and courts (the *voir dire* process).<sup>30</sup> It also involves a fairly robust investigation—an ethnographic study, comprised of 132 semi-structured interviews and the observance of thirty-eight jury selection proceedings.<sup>31</sup> Her primary argument is “that prosecutors draw on multiple interpretive resources as they seek to compose a jury based on the

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25. For a description of these other CLS successor movements, see Barnes, *supra* note 18, at 448–49, 449 nn.29, 31–33.

26. See *infra* notes 34–57 and accompanying text.

27. Riaz Tejani, *Efficiency Unbound: Processual Deterrence for a New Legal Realism*, 6 U.C. IRVINE L. REV. 207, 216 (2016).

28. *Id.* at 210.

29. *Id.* at 209.

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

31. *Id.* at 172.

attributes of jurors.”<sup>32</sup> Interpretive tools, in fact, help attorneys assign to jurors various attributes and identities.

These two pieces use myriad methods to demonstrate how understandings of the operation of legal rules and practices can be improved through empirical work. They do so by complicating understandings of legal theory and demystifying precisely how certain legal decisions are made. These pieces are helpful because they represent two of many possibilities for “doing” NLR work. These examples, however, do not outwardly take up a call to focus on those “at the bottom.”<sup>33</sup> What it would mean for NLR to foreground the concerns of marginalized communities within their projects is next considered.

### III. INCLUDING OR CONNECTING WITH PRESUMABLY COMPATIBLE MOVEMENTS

In the foreword to this collection, Garth and Mertz clarify that the NLR is not just interested in consulting experts to secure the benefits of greater empirical insights within law. Rather, the goal is the encouragement of collaborations between legal scholars and empirical researchers.<sup>34</sup> As NLR is not the only project interested in furthering such collaborations, there is a question as to whether scholars identifying as subscribing to NLR principles will begin to formally or informally align their research with other scholarly movements, thus pushing a stronger link between law and social sciences. In particular, nothing in this collection of writings speaks to whether NLR scholars will embrace periodic or systemic engagements with those working at the intersection of empirical methods and Critical Race Theory (e-CRT).<sup>35</sup>

The blueprint for e-CRT was laid in working group meetings hosted by scholars from the University of California, Hastings College of the Law in 2010 and 2011.<sup>36</sup> The substantive call for the collaboration was issued in the work of sociolegal scholars Osagie Obasogie<sup>37</sup> and Laura Gomez.<sup>38</sup> The resulting e-CRT

32. *Id.* at 173 (describing the tools as: “(1) probabilistic and evaluative analogies, (2) juror-types that prosecutors generate from the details of particular, criminal cases, and (3) social and local knowledge from prosecutors’ personal relationships and experience outside the courtroom.”).

33. *See supra* note 12.

34. Garth & Mertz, *supra* note 13.

35. While both e-CRT and Critical Race Realism (CRR) propose collaborations between law and the social sciences, the primary points of difference are that CRR more explicitly references its origins in Legal Realism and has a more narrow focus on the connections between race, law and psychology. *See* sources cited *supra* note 17. Given e-CRT’s broader emphasis, it will be considered here.

36. *See* Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183 (2013); Barnes, *supra* note 18, at 447.

37. *See* sources cited *supra* note 36; *see also* Osagie K. Obasogie, *Race in Law and Society*, in RACE LAW AND SOCIETY 445 (Ian Haney-Lopez ed. 2006) (a study, following up on the earlier work of Laura Gómez, finding that race was a little studied topic in leading law and society journals).

38. Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004) [hereinafter *A Tale of Two Genres*] (discussing that sociolegal scholars rarely considered race in their research, and presenting data that leading sociolegal journals rarely published articles on race);

scholarship was supposed to acquire its theoretical orientation from CRT, but also “embrace[] the methodological contributions of social science research.”<sup>39</sup>

In some ways, NLR and e-CRT appear to be natural allies. First, both begin with theoretical commitments forged from the tradition of American Legal Realism. CRT, of course, famously split with CLS—the direct successor movement to Legal Realism—but that split was significantly related to the CLS critique of rights<sup>40</sup> and failure to fully account for the effects of racial subordination.<sup>41</sup> To the extent NLR is animated by concerns with judicial decision making and measuring the “on the books” versus “in action” gap in law’s operation, e-CRT devotees are unlikely to find this orientation a problem.

That NLR and e-CRT have a common source of philosophical underpinning, however, does not mean that interactions will be seamless. A number of potential pitfalls are apparent. First, as indicated above, CRT has been chiefly and deeply committed to articulating and seeking redress for issues of persons at the bottom.<sup>42</sup> NLR research has demonstrated a similar focus within some of its projects. For example, in the first collection of NLR articles, rich and probing work by scholars such as Thomas Mitchell, Devah Pager, and Guadalupe Luna clearly engaged subjects and subject matters for which interrogating societal vulnerability and legally-sanctioned inequality figured prominently within their analyses.<sup>43</sup> Additionally, nothing that has occurred within the last ten years suggests that current NLR scholars would find these projects or their commitments to be problematic in any way. As such, one would imagine that collaborations between NLR and e-CRT would naturally emerge, as some overlap exists, at times, in a common focus upon inequality and the subjects/populations studied. The concern is that at this point there is no way of knowing to what extent orientations that are foundational within e-CRT will continue to significantly animate future NLR projects. Mine is not a claim about the motivations of NLR researchers, moving forward, but that when measuring various forms of disadvantage is not consistently made a core and concrete tenet of a project, we are again likely to see the dearth of race-focused research Osagie

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Gómez, *supra* note 12 (encouraging a more meaningful and structured engagement between critical race and sociolegal work in her Law and Society Association Presidential Address).

39. Obasogie, *supra* note 36, at 185.

40. See Barnes, “*The More Things Change:*” *supra* note 4, at 2054–55; Crenshaw, *supra* note 5, at 1295; Obasogie, *supra* note 37, at 456.

41. See Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356–57 (1988).

42. See *supra* note 12.

43. See, e.g., Thomas Mitchell, 2005 WIS. L. REV. 557 (a quantitative and qualitative look into the systematic dispossession of land from among rural black landowners); Deva Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (presenting her research findings on the effects of incarceration in the labor market, which indicated that Blacks without convictions were less successful job seekers than Whites with them); Guadalupe Luna, *Legal Realism and the Treaty of Guadalupe Hidalgo: A Fractionalized Legal Template*, 2005 WIS. L. REV. 519 (suggesting how shifting legal interpretations of Mexican and Spanish law, thwarted property ownership claims of Chicanos in the U.S.).

Obasogie and Laura Gomez observed within sociolegal journals.<sup>44</sup> At such time as the research does include a long-term focus on inequality, it will still be necessary to mind Professor Gomez's caution that the concept of race be embraced in all its complexity and not be treated as "an easily measurable independent variable."<sup>45</sup>

A second issue draws on Macaulay's thoughts on empirics potentially alienating lawyers and other legal actors.<sup>46</sup> Similar concerns exist for potential e-CRT/NLR collaborations. As I have written elsewhere in describing the nature of the relationship between critical and sociolegal scholars working on e-CRT projects, mutual respect will ultimately determine the efficacy of interdisciplinary collaborations.<sup>47</sup> Macaulay references both the unique contributions and limits arising from lawyers working with researchers. To this mix, one will need to add CRT theories and methods—such as narrative or storytelling<sup>48</sup>—which may present challenges to NLR scholars with no background in the relevant literatures.<sup>49</sup>

A larger issue may exist around the hardest fought battles over introducing empirical methods into CRT work, which have centered on the research component being regarded as incompatible<sup>50</sup> or accorded too much weight. As relying upon social science studies is the major point of emphasis within NLR, it is not clear how skepticism about methods or the validity of findings among critical scholars will play with social scientists.<sup>51</sup> Finally, the most difficult challenge for e-

44. See sources cited *supra* notes 37–38 and accompanying text.

45. Gomez, *A Tale of Two Genres*, *supra* note 38, at 455.

46. See McCaulay, *supra* note 20.

47. See Barnes, *Hybrid Methodology*, *supra* note 18, at 476.

48. On CRT's use of narrative, see OBASOGIE, *supra* note 5, at 197; RICHARD DELGADO AND JEAN STEFANCIC, *Legal Storytelling and Analysis*, in CRITICAL RACE THEORY AN INTRODUCTION 43–53 (2d ed. 2012); Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS. L. REV. 941, 951–58 (2006); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–15 (1989); Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 755–58 (2011); Rachel Moran, *The Elusive Nature for Discrimination*, 55 STAN. L. REV. 2365, 2378–81 (2003).

49. On the centrality of storytelling to CRT and the issue it raises for a wider collaboration with the social sciences, see Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 161–62 (2014). NLR Scholars, have embraced narrative scholarship and its articulation within CRT in some of their scholarship. See, e.g., John M. Conley, *Tales of Diversity: Lawyers' Narratives of Racial Equity in Private Firms*, 31 L. & SOCIAL INQUIRY 831 (2006) (qualitative research employing narratives that was first presented at the NLR conference at the University of Wisconsin in 2004); Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 438–39 (discussing the LL.M. thesis of Mario Barnes, *The Stories We Did Not Tell: Race, Family Silences and the Legal Recreation of Inequality*—a work employing CRT understandings of storytelling—as work that is also representative of NLR).

50. The potential incompatibility of empirical methods, more generally, and CRT is excellently detailed in a recent article. See Carbado & Roithmayr *supra* note 49, at 150, 155–60 (noting that CRT rejects the following positions that are central to social science methods: (1) the merits of objectivity and neutrality; (2) frameworks that instantiate disadvantage such as colorblindness and intent norms for discrimination; and (3) the understanding of racial bias as being created through individual behavioral rather than structural forms of disadvantage).

51. It should be noted that this concern is one that creates issues within e-CRT, not just across potential e-CRT/NLR collaborations.

CRT/NLR collaborations may be that both movements are quite young and still attempting to define the work that belongs to each enterprise. NLR and e-CRT have structured themselves around theoretical commitments and a belief in the value of interdisciplinary collaboration. Neither movement has, however, articulated terribly specific limits on representative work.<sup>52</sup> At this point, e-CRT is still conducting a yearly working group and has just published its third collection of representative scholarship within four years.<sup>53</sup> NLR appears to meet less often, but may have a greater sense of what it means to “do” NLR.<sup>54</sup> As two “big-tent” structures with porous boundaries and no policing or enforcement bodies or standards, the best way to further collaboration is to foster openness across e-CRT/NLR conferences and other intellectual gatherings.<sup>55</sup> In particular, it would be helpful to identify neutral institutional sites for more longstanding engagements. Organizations such as the American Bar Foundation (ABF) and Law and Society Association (LSA),<sup>56</sup> for example, are likely to welcome collaborations between and across e-CRT and NLR scholars.<sup>57</sup>

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52. See Barnes, *Hybrid Methodology*, *supra* note 18, at 447–48 (stressing the difficulty in understanding the hallmarks of work to be included within e-CRT); Garth & Mertz, *supra* note 13, at (explaining there have been sharp divisions over how to incorporate empirical methods into law, but that more recently debates have concerned “how and when to combine particular methods”).

53. See Barnes, *Hybrid Methodology*, *supra* note 18, at 446–48. The last two e-CRT working groups met in Wisconsin in October 2015 and at Yale Law School in November of 2016. For the 2015 conference, see Critical Race Theory and Empirical Methods, UNIVERSITY OF WISCONSIN LAW SCHOOL, INSTITUTE FOR LEGAL STUDIES, Oct. 9–10, 2015, <http://law.wisc.edu/ils/2015lawreviewsymposium/index.html>. For the 2016 conference, which was joined with a public conference discussing the legacy of *Washington v. Davis*, 426 U.S. 229 (1976), see Forty Years After *Washington v. Davis*: Legal and Empirical Implications, YALE LAW SCHOOL, Nov. 18–19, 2016, [http://www.law.uci.edu/faculty/full-time/barnes/Washington-v-Davis-Poster\\_Yale\\_e-CRT.pdf](http://www.law.uci.edu/faculty/full-time/barnes/Washington-v-Davis-Poster_Yale_e-CRT.pdf).

54. Garth & Mertz, *supra* note 13, at 131–34 (describing seven tenets observable in the published NLR work).

55. This should be achievable, as e-CRT, is after all, a hybrid formation at the intersection of multiple disciplines, see Barnes, *Hybrid Methodology*, *supra* note 18, and NLR previously engaged in joint meetings in 2007 and 2008 with another CLS splinter movement—Feminist Legal Theory. See *The New Legal Realism Project*, U. WIS. L. SCHOOL, <https://law.wisc.edu/ils/newlegal.html> (last visited pMar. 30, 2017).

56. This role for LSA was proposed previously by scholars seeking an opportunity for CRT scholars to engage with law and economics scholars. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003). Both the ABF and LSA welcome collaborations between legal and sociolegal scholars. In fact, LSA already has formed a Collaborative Research Network (CRN) for each enterprise. CRN 12—Critical Race and the Law—is the home for many e-CRT scholars and scholarship. The same is also true of CRN 28—Realist and Empirical Methods—and NLR. See Garth & Mertz, *supra* note 13, at 122.

57. Just prior to the publication of this volume, it was announced that the Northwestern Pritzker School of Law, the school that houses the American Bar Foundation, will host the 2017 e-CRT working group.

## CONCLUSION

This Afterword began with a question related to the so-called demise of CLS, one of the significant scholarly movements to emanate from American Legal Realism. While it is likely erroneous to suggest that the theories and knowledge production tied to CLS ever perished, the movement itself did stall. To the extent it was the project's penchant for deconstruction that facilitated its "death," CLS might have also represented a cautionary tale for CRT and other successor movements. While CRT too engaged in deconstruction and abandoned its yearly workshops, it also engaged in positive theory building, sustained the production of a diverse range of scholarship, and was celebrated by a large number of involved scholars at a twenty-year anniversary conference in 2009.<sup>58</sup> CRT has also, itself, produced successor movements such as LatCrit and e-CRT. Through its meetings and publications over the last ten years, NLR too has existed as an ongoing concern. The fear, then, is not really that these movements will cease to exist in the near term. The goal moving forward, however, should be to define the conditions under which they shall continue to flourish.

For NLR, the work in foundation building seems largely complete. NLR has a well-established philosophy and a set of tenets that help to mark the project's commitments for interested participants. Yes, there are still internal questions—some of which are engaged in work published here.<sup>59</sup> The larger challenges with which I am concerned do not relate to drawing lines between precisely what is "new" and "old" in NLR, or otherwise policing additional internal issues. Rather, my concerns regarding what NLR can and will become center on to commitments animating its research and its openness to collaborations with other scholarly movements. Here, I have suggested a sustained focus on the plight of those at the bottom within the research and working more intentionally with movements of similar or common origin, such as e-CRT. While neither of these circumstances will arise without deliberate actions on the part of NLR scholars, the potential benefits could be great for the legal subjects whose issues will be explored and the scholars involved. Such collaborations will also produce challenges. There is no reason to believe, however, that they will be insurmountable. As the authors of the *Foreword* to the first collection of NLR scholarship opined, such interdisciplinary collaborations can succeed, but must be mindful of meaningful differences across "epistemology, methods, operating assumptions, and overall goals" that may exist.<sup>60</sup>

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58. See Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497, 1497–98 (2009); Crenshaw, *supra* note 5, at 1311.

59. As discussed above, there are still questions over how legal actors will engage empirical work, whether there was a role for those not embracing empiricism, and what types of methods will be employed. See *supra* notes 44–52 and accompanying text.

60. See Erlanger et al., *supra* note 10, at 336.

