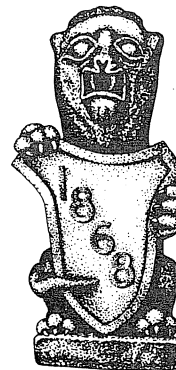


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# WISCONSIN LAW REVIEW

THE NEW VERSUS THE OLD LEGAL REALISM:  
"THINGS AIN'T WHAT THEY USED TO BE"

*Stewart Macaulay*



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THE NEW VERSUS THE OLD LEGAL REALISM:  
“THINGS AIN’T WHAT THEY USED TO BE”

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When we talk of a “New Legal Realism,” the obvious question is how it might differ from the well-known original movement. Can we say anything more than Karl Llewellyn did not have a website, but we do?<sup>1</sup> Today, we do not face the legal, political, or social world of the progressive reformers, academics who attacked legal formalism, or the few who tried to do empirical research about law in the late 1920s and early 1930s. After forty years of the Law and Society Association, we can hum Duke Ellington’s *Things Ain’t What They Used To Be*.<sup>2</sup> We do know much that scholars in the 1920s and 1930s knew, at best, only anecdotally. Nonetheless, if we review the histories of legal realism, we must realize that our great-grandfathers and grandfathers knew a lot more than we give them credit for.<sup>3</sup> At the outset, my mention of grandfathers and great-grandfathers should remind us that we must add gender<sup>4</sup> and race to the mix. The original realists who held positions of power were white

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1. See New Legal Realism Project, at <http://www.newlegalrealism.org> (last visited May 16, 2005).

2. Duke Ellington’s son Mercer Ellington composed the piece in 1941. However, Mercer said that his father would “[s]et problems for me, scratch out what he thought was in poor taste, and preset harmonies for me to write melodies against. . . . [W]hen the band played arrangements I had written under his supervision, like . . . ‘Things Ain’t What They Used to Be,’ . . . it was as instructive as it was gratifying.” MERCER ELLINGTON WITH STANLEY DANCE, *DUKE ELLINGTON IN PERSON: AN INTIMATE MEMOIR* 93 (1978).

3. In 1921, Roscoe Pound called for legal scholars to look to the findings of economics and sociology: “Before we can have sound theories here we need facts on which to build them. Even after we get sound theories, we shall need facts to enable us to apply them.” ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 213–14 (1921).

4. Professor John Henry Schlegel reported on the roles of Dorothy Swaine Thomas and Emma Corstvet in the Yale experiment with empirical research in the early 1930s. John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459, 521 (1979). Both were social scientists who served as associates on Professor Charles Clark’s projects. *Id.* Schlegel notes: “Clark had a bit of trouble securing faculty approval for the appointment because Thomas was female.” *Id.* at 521 n.306.

males, and we can wonder whether this affected what they looked for and what they saw.

I offer a very simplified history of legal realism. Next, I repeat the summary in my 1984 Mitchell Lecture at the State University of New York at Buffalo of what about twenty years of modern law and society research had uncovered, and I ask what we might add in light of the almost twenty years since I gave that talk. Then, at long last, I ask what a New Legal Realism growing out of this context might be like.

I begin my story with the progressive era and the Wisconsin Idea: the state was to be developed and social problems solved by using the skills and knowledge of the university faculty.<sup>5</sup> University of Wisconsin professors, such as economists Richard T. Ely and John R. Commons, advocated new social programs. They championed unemployment and workers' compensation laws as well as laws regulating the conditions of employment.<sup>6</sup> A great victory involved confronting child labor.<sup>7</sup> In 1909, the University of Wisconsin Law School's Dean Richards and Professors Walter Wheeler Cook and Underhill Moore helped Commons draft a bill proposing changes in the state arbitration act.<sup>8</sup> Charles McCarthy began the Wisconsin Legislative Reference Library.<sup>9</sup> He offered skilled people who could draft statutes, and this freed the legislature from depending on

5. See Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297, 299 (1997). Professor Morton Horwitz argued: "it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism." MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169 (1992). *But see* John Henry Schlegel, *A Tasty Tidbit*, 41 BUFF. L. REV. 1045 (1993) (criticizing Horwitz's views about the place of social science knowledge in the realist project). See generally Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 133-43 (2002) (outlining the rise of American Legal Realism and its Scandinavian counterpart).

6. See 4 JOHN D. BUENKER, *THE HISTORY OF WISCONSIN: THE PROGRESSIVE ERA, 1893-1914*, at 543-48 (1998).

7. As Gregory Alexander wrote,

The period between 1890 and 1913 was a time of tremendous economic, political, and social upheaval and conflict in the United States. . . . The increasing concentration of wealth and power widened the gap between the haves and have-nots and deepened feelings of resentment between opposite social-economic groups.

. . . .

. . . Progressives were reformers, not revolutionaries.

. . . .

. . . Progressive governance made no pretense of co-existing with the joint ideologies of laissez-faire and anti-paternalism. Its ideology was frankly paternalistic and interventionist, particularly on social issues.

Alexander, *supra* note 5, at 135-37.

8. Carrington & King, *supra* note 5, at 326.

9. See JOHN R. COMMONS, *MYSELF: THE AUTOBIOGRAPHY OF JOHN R. COMMONS* 107-111 (1963).

lobbyists for the text of bills. McCarthy created a library based on reports and clippings from newspapers about various social problems. If law was to be a tool in social engineering, facts and expert judgment had to replace doctrine and tradition.

The law school began to be influenced by the Wisconsin Idea. Carrington and King reported:

One effect of the Wisconsin idea was to bring the University's new young law teachers into contact not only with public affairs, but also with academic colleagues in other disciplines who possessed useful expertise. The law school established liaison with the political science department in 1907-08, a liaison designed with the purpose of "relating" legal instruction "to modern social and economic conditions." Similarly between 1904 and 1910, law faculty, [Dean] Gilmore in particular, collaborated with economics faculty such as John Commons and Richard Ely, in a large-scale endeavor to document the history of labor in America. . . . By 1915, law school bulletins actively advocated a mixture of law classes with history, economics, political science and philosophy classes.<sup>10</sup>

A few law professors at the University of Wisconsin, rather than honoring common law doctrine, studied the law in action. Professor Oliver Rundell studied delay in the criminal justice system as early as 1912.<sup>11</sup> Professor William Herbert Page, one of my predecessors as a Wisconsin contracts professor, came to Wisconsin from Ohio State in 1917. In 1914, he had presented a paper at the Association of American Law Schools meeting on "the living law" ideas of Eugen Ehrlich.<sup>12</sup> Ehrlich's living law was

10. Carrington & King, *supra*, note 5, at 324.

11. *Id.* at 329.

12. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936). Professor William Herbert Page's appreciation of Eugen Ehrlich's work was presented at the Association of American Law Schools' Annual Meeting in 1914. It is reprinted as William H. Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, in *READINGS IN JURISPRUDENCE* 825 (Jerome Hall ed., 1938).

Schlegel reported: "in the spring of 1914, [Professor Underhill Moore, then at the University of Wisconsin Law School] helped organize a 'legal and philosophical colloquium' [at the University of Wisconsin] whose participants included John Commons, Richard T. Ely and the prominent moral philosopher F.C. Sharp." John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195, 229 (1980). "Commons spoke on the 'Legal and Economic Theory of Value and Valuation,' Ely, on 'The Social Theory of Private Property,' and Sharp, on 'Principles of Judicial Legislation.'" *Id.* at 229 n.200. Schlegel also reported that Professor Underhill Moore moved to the University of Chicago Law School in 1914.

"in contrast to that which is in force merely in the courts and with the officials. The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law."<sup>13</sup>

Page, as far as I can tell, did little with these insights. Not too long after this, he turned to writing a multivolume treatise on contract doctrine.<sup>14</sup>

The initial wave of progressivism in Wisconsin came to an end in 1914, when the traditional Republicans defeated the Progressives.<sup>15</sup> The progressive cause and the University of Wisconsin's role in it suffered a great blow when America entered World War I against Germany.<sup>16</sup> U.S. Senator Robert LaFollette had fought to keep America out of that war,<sup>17</sup> and many in the University and the progressive movement had strong ties to German academic culture. The University came under great pressure to prove its loyalty to the American cause in the war.<sup>18</sup>

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*Id.* at 229. His salary at Chicago was \$5500. *Id.* at 229 n.205. Had he stayed at Wisconsin, he would have made \$4000. *Id.* It is comforting to know that some things remain constant in the world.

13. Page, *supra* note 12, at 825 (quoting Ehrlich's description of the living law).

14. See WILLIAM HERBERT PAGE, *THE LAW OF CONTRACTS* (2d ed. 1920).

15. See 4 BUENKER, *supra* note 6, at 657 ("In 1914, after fourteen victorious years, the progressive Republicans finally tasted defeat.").

16. See 5 PAUL W. GLAD, *THE HISTORY OF WISCONSIN: WAR, A NEW ERA, AND DEPRESSION, 1914-1940*, at 41-42 (1990).

17. *Id.* at 1-2 ("The most famous of Wisconsin's political leaders, Senator Robert M. LaFollette, risked his reputation and his influence, first in supporting the abortive effort to prevent American entry into the war, and then in aiding the successful effort to prevent ratification of the settlement drafted at the Peace Conference.").

18. See Cora Lee Nollendorfs, *The First World War and the Survival of German Studies: With a Tribute to Alexander R. Hohlfeld*, in *TEACHING GERMAN IN AMERICA: PROLEGOMENA TO A HISTORY* 176, 181-83 (David P. Benseler et al. eds., 1988). Cora Lee Nollendorfs noted that the University of Wisconsin was "under considerable pressure to prove that it was not a 'Germanized' institution as many were claiming . . ." *Id.* at 181. Moreover, "American academicians as a group and American institutions of higher learning as a whole were thought in some circles to be pro-German." *Id.* at 183. In this era, of course, many faculty members, particularly in the natural sciences, had advanced degrees from German universities. *Id.* Students at the university were not safe from such attacks, either. For example,

Princeton's Robert McNutt McElroy, a representative of the National Security League, drew attention to the University of Wisconsin when he published a capricious account of a campus loyalty meeting he addressed in April, 1918. That students had paraded through drizzling rain to get to the Stock Pavilion,

Much of the traditional story of legal realism focuses on the Columbia and Yale Law Schools during the late 1920s and the 1930s.<sup>19</sup> It is easier to describe what those who came to be known as realists were against rather than what they were for. The enemy was traditional legal scholarship that focused on the logic of doctrine. The enemy's home was the Harvard Law School, where the great authorities wrote multivolume treatises on the conventional areas of law. *Williston on Contracts*,<sup>20</sup> *Beale on Conflicts of Law*,<sup>21</sup> and *Scott on Trusts*<sup>22</sup> were prime examples of much of what the realist scholars attacked. Professor Lon Fuller, in an essay criticizing Professor Samuel Williston, commented:

Turning to Professor Williston's legal method, if we ask at what point he gives up the attempt to shape the law by direct reference to social interests, I think the answer will have to be, at the very outset. What may be called the bases of contract liability, notions like consideration, the necessity for offer and acceptance, and the like, are nowhere in his work critically examined in the light of the social interests they serve. These things are accepted on faith. This neglect to refer to underlying social desiderata cannot properly be called "logic." It is simply an acceptance of what is conceived to be received legal tradition.<sup>23</sup>

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that his audience was cold and uncomfortable, and that his address was overly long did not seem to McElroy sufficient reasons for restlessness. He called the students "a bunch of damned traitors!" and thereby initiated a noisy public debate over Badger patriotism.

5 GLAD, *supra* note 16, at 41.

19. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169-92 (1992).

20. SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920).

21. JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

22. AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* (3d ed. 1967).

23. Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 9 (1939). For another famous realist's critical treatment of Professor Samuel Williston's work, see Walter Wheeler Cook, *Williston on Contracts*, 33 ILL. L. REV. 497 (1939). I was surprised to find that Professor N.E.H. Hull noted that Williston "celebrated [Roscoe] Pound as the leader of the movement to teach social science in the law schools. Williston was proud that Pound had led the way in validating legislation like workman's compensation based on the findings of the social scientists." N.E.H. HULL, *ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* 167 (1997).

Perhaps the most noted of the realists was Professor Karl Llewellyn.<sup>24</sup> His book *The Common Law Tradition* celebrates appellate judges who worked in what he called “the grand style.”<sup>25</sup> One of his achievements was the Uniform Commercial Code (U.C.C.), which, to a great extent, reflects a realist approach. For example, official comment 1 to section 1-102 of the U.C.C. tells judges to make policy decisions and offers an approach rather than a rule.<sup>26</sup> It says:

The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.<sup>27</sup>

This comment, probably written by Llewellyn, catches much of a realist approach to appellate judging. In short, a judge must exercise judgment to be a judge.

The great success of Old Legal Realism was in discrediting formal approaches and in justifying appellate judges taking action to carry out some substantive policy. Often the realists said little more than that the

24. A complete history would also focus on the work in conflict of laws by Professor Walter Wheeler Cook. My own introduction to full-blown realism came in Professor Moffat Hancock’s conflicts of law class at Stanford Law School in the early 1950s. Cook was Hancock’s hero. Then, when I was a member of the *Stanford Law Review*, we published Professor John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954), and I so enjoyed one of my favorite professors mocking the *Restatements* that I had been fighting to master in a fairly conventional legal education. After a year as Chief Judge William Denman’s law clerk, I became a Bigelow Teaching Fellow and Instructor at the University of Chicago Law School in 1956. There I got to watch Professor Karl Llewellyn in full flight. However, my mentor at Chicago was Professor Malcolm Sharp. I learned a great deal about contracts from the highly realist casebook that he wrote with Professor Fritz Kessler that I used when I began teaching the subject. See FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, *CONTRACTS: CASES AND MATERIALS* (1953). Once I became a law professor, one of my first articles focused on the contracts decisions of Justice Roger Traynor of the Supreme Court of California. See Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961). Justice Traynor was certainly one of the most realist of appellate judges ever to sit on the bench in this country. See generally *id.* To a great extent, in my generation of law teachers, legal realism was just assumed as the way to go.

25. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 5 (1960); see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT*, at viii (1973).

26. U.C.C. § 1-102 (2001).

27. *Id.* § 1-102 cmt. 1.

judge should balance the interests involved.<sup>28</sup> Some of the other realists, however, were highly skeptical about whether rules could even influence the decisions of judges.<sup>29</sup> Many realists said that legal doctrine, at best, rationalized decisions based on bias or, in Llewellyn’s terms, a judge’s “situation sense.”<sup>30</sup> A few realists demanded that we look at trial courts,<sup>31</sup> and a few did some empirical research on the flow of cases through the courts, the impact of laws, and even the law jobs of the Cheyenne.<sup>32</sup> However, the key focus of most of the original realists was appellate judging.<sup>33</sup> At many law schools and in many law reviews, legal realism became the conventional wisdom.<sup>34</sup>

28. Professors William W. Fisher, Morton J. Horwitz, and Thomas A. Reed asserted that

Legal Realism called into question three related ideals cherished by most Americans: the notion that, in the United States, the people (not unelected judges) select the rules by which they are governed; the conviction that the institution of judicial review reinforces rather than undermines representative democracy; and the faith that ours is a government of laws, not of men. The aspiration of most of the schools of American legal theory that have proliferated since World War II has been to meet these challenges.

AMERICAN LEGAL REALISM, at xiv–xv (William W. Fisher III et al. eds., 1993).

29. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE*, at viii (1949); ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK’S IMPACT ON AMERICAN LAW 60–65* (1985); Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 647–48 (1932). However, Professor Lawrence Friedman provided an important sociological qualification to the realist’s rule skepticism:

[T]here is a strong tendency within the legal system toward the framing of nondiscretionary rules at some level and that it is strongest where it is socially important to have mass, routine handling of transactions, which are channeled through some agency of the legal system, or where relative certainty of legal expectation is important. . . . [T]he legal system may have many more discretionary rules formally speaking than operationally speaking.

Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 794 (1967); see also ARTHUR L. STINCHCOMBE, *WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS* (2001).

30. See TWINING, *supra* note 25, at 225 (1973). As William Twining wrote: [a] judge in a commercial case who can see the facts in the way businessmen would see them, as well as from the lawyer’s point of view and from the point of view of the “mores” of the community as a whole, has grasped the “situation sense,” and if he has a better than average understanding of the situation and the problem it presents, he has “wisdom.”

*Id.*

31. See *supra* note 29.

32. See generally KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) (analyzing the legal practices of the Cheyenne and announcing their “juristic beauty”).

33. Schlegel noted that Professor Walton Hamilton, one of the realists at the Yale Law School, “actively opposed empirical research in law.” Schlegel, *supra* note 4, at 491 n.153. Most realists, other than Professor Jerome Frank, did focus on appellate judging. As always, Llewellyn offered a much more complicated story. Llewellyn applauded social science informing jurisprudence. He tried to do some of it himself. His major effort at

field research was his study of divorce after the breakup of his first marriage. It was a strange mixture of social science and Llewellyn's own intuitions. See generally K.N. Llewellyn, *Behind the Law of Divorce* (pts. I & II), 32 COLUM. L. REV. 1281 (1932), 33 COLUM. L. REV. 249 (1933). Twining stated: "The divorce study was Llewellyn's sole attempt to imitate the 'scientists' during the years of the Columbia experiment. For the rest of the period he remained comfortably indoors, to the relief and benefit of nearly everyone." TWINING, *supra* note 25, at 195. Llewellyn did collaborate with Professor E. Adamson Hoebel, an anthropologist, on the study that produced *The Cheyenne Way*, which was published in 1941. However, Llewellyn was in the field only for a brief time; Hoebel dealt with the informants. See John M. Conley & William M. O'Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179, 179 (2004). As Professors John Conley and William O'Barr recounted:

Later that summer, Llewellyn and his . . . wife, an economist, joined Hoebel in Montana for 10 days—the only days he ever spent among the Cheyenne. A photograph taken at the time shows Llewellyn and his wife seated in the back seat of an open convertible with elderly Indians being led up to him to be interviewed.

*Id.* at 186.

Llewellyn criticized Moore's attempts to study behavior in response to law and to become a true social scientist. Schlegel noted:

For those like Corbin and Llewellyn, satisfied because the law school world gave ample room for using their quite extraordinary talents to uncover substantial insights about doctrine and its use, Moore's work was simply unnecessary. A suggestion to go to Cincinnati to "observe the operations of bank tellers at close range" was pointless when a call to a friendly banker coupled with a bit of imagination would provide the same information.

JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 237 (1995) (footnote omitted). Llewellyn's reaction to large data sets is reminiscent of U.S. Supreme Court Justice Oliver Wendall Holmes's reaction to Justice Louis Brandeis:

Brandeis recalled having told Holmes "that if he really wants to 'improve his mind' (as he always speaks of it), the way to do it is not to read more philosophic books . . . but to get some sense of the world of fact. And he asked me to map out some reading—he became much interested—and I told him that I'd . . . get some books, that books could carry him only so far, and that then he should get some exhibits from life. I suggested the textile industry, and told him in vacation time he is near Lawrence and Lowell and he should go there and look about."

PHILLIPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 309–10 (1984). Justice Holmes's response was: "I have little doubt that it would be good for my immortal soul to plunge into them [facts] . . . but I shrink from the bore." *Id.* at 310. Likewise, Professor Grant Gilmore observed that he was "completely uninterested" in my empirical work because "when you have finished describing something, all you really have is a list. In itself the list is meaningless—a lot of trees waiting for someone to assemble them into a forest." Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545, 1546 n.8 (1989) (quoting Gilmore). I responded: "[o]ften empirical research into legal matters reveals that in the forests assembled by scholars, the trees have the blight or are creations of fantasy." *Id.*

Some of the realists saw law as merely rationalization or false consciousness. Not Llewellyn. Hull noted: "Llewellyn valued law, loved law, in a way that the data gatherers and behavioral observers among the realist corps did not." HULL, *supra* note 23, at 242. She also contrasts Pound's approach to studying the Chinese criminal justice system with Llewellyn's approach to the Cheyenne: "Pound drafted and wished to impose a

Western-style social science survey on provincial officials; Llewellyn listened to local "law-men" and tried to see the world through their eyes. Pound wanted to generalize through extensive comparison and categorization; Llewellyn wanted to particularize through the stories of individual cases." *Id.* at 313. For Llewellyn, one knew the world through what he called "feel." *Id.* at 296 & n.47. Feel "was a way of knowing about the world. Llewellyn had felt the rhythms of Cheyenne law and then saw how the Cheyenne felt their way through cases of trouble." *Id.* at 296 n.47. Hull wrote that Llewellyn was not interested in mere behavior—"that would be reductionist, and Llewellyn was not a simplifier. He loved complexity and reveled in it." *Id.* at 285. Hull criticized Llewellyn's approach:

Llewellyn had never dealt directly with reality. . . . Even when he spent his ten days on the Cheyenne reservation, he was a tourist in someone else's reality. The Cheyenne were not gifted, intuitive lawmakers. They were a people with a long tradition of negotiated settlements, gestures, scripted mini-dramas, and well-versed oral lore. Llewellyn's romantic inclinations and his breathless prose made them into something else.

*Id.* at 332.

Thus, I am left with a question. Suppose Llewellyn were, say, fifty-five years old and found himself at the fortieth anniversary meeting of the Law and Society Association in June of 2004 in Chicago. Would he have enjoyed himself? Would he have had a better time the previous January at the Association of American Law Schools meeting? Indeed, how would he respond to the variations of the now dominant law and economics paradigm? Professor Alan Schwartz has observed that Llewellyn did not have available the most modern techniques of law and economics. See Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 12, 18 (Jody S. Kraus & Steven D. Walt eds., 2000). Would he have embraced them, or would he have found them a form of reductionism just as objectionable as the masses of statistics gathered by the scientific realists? Hull pointed out that, to some extent, Llewellyn anticipated the concern with the costs of legal rules in an article published in 1925 in the *American Economic Review*. HULL, *supra* note 23, at 139–40 & 139 n.41; see also Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665 (1925).

Professor Carl Friedrich suggested that Llewellyn was primarily interested in predicting the behavior of judges and other legal officials. Carl J. Friedrich, *Remarks on Llewellyn's View of Law, Official Behavior, and Political Science*, 50 POL. SCI. Q. 419, 421 (1935). Friedrich thought that Llewellyn was not interested in explaining this behavior as a social scientist would. *Id.* at 423. Friedrich argued that, while Llewellyn established that judges in both the United States and Germany often do not follow precedent and offer misleading rationalizations for their decisions, he did not tell us why they do this. *Id.* at 428–29. Friedrich stated:

[T]he American judge is first and foremost the member of an ancient craft guild. In such free associations, make-believe is very essential for maintaining social coherence. While a bureaucratic hierarchy can count upon the individual official's desire to avoid arousing the displeasure of his superiors, within a free association convincing rationalization is essential and the rule of precedent is a mighty factor in making the rationalization convincing.

*Id.* at 429. He said that this is the kind of explanation that would not interest Llewellyn. See *id.* For Llewellyn, manipulations of precedent were just wrong behavior. See *id.* 34. As Friedman noted:

In an important sense, legal realism ended up defeating its enemy almost totally. If, today, you told a group of law professors (or lawyers for that matter) that you thought politics had an important influence on the legal system; that rules

Much of Llewellyn's career was spent at the Columbia Law School.<sup>35</sup> In the late 1920s, the Columbia faculty attempted to revise the curriculum and produce new teaching materials that focused on the functions served by law rather than traditional legal categories.<sup>36</sup> Largely, the attempt was to find information in the relevant social sciences and plug it into teaching materials that still focused on appellate judging.<sup>37</sup> Insofar as Columbia professors did any empirical research, it tended to be confined to asking someone who should know.<sup>38</sup> While Columbia faculty produced some brilliant casebooks,<sup>39</sup> these works did not provoke most legal educators to abandon the traditional categories, such as contracts and torts, and turn to functional arrangements of legal materials.<sup>40</sup> As the books went through

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were more malleable and less decisive than they appeared; that you believed law is not and can never be totally neutral, and other sentiments along these lines, they might very well yawn and agree. . . . What they *do* with this banality is another question.

LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 493 (2002).

35. Schlegel reminded us that when Moore arrived at Columbia in 1916, [w]hat Moore found was an intellectual community in its most extraordinary period of social scientific creativity: James Harvey Robinson and Charles Beard in history, Thorstein Veblen and William D. Mitchell in economics, Franz Boas in anthropology, E.L. Thorndike in educational psychology, William F. Ogburn in sociology and, of course, John Dewey.

Schlegel, *supra* note 12, at 236. Llewellyn was also very much part of this environment. Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 *BUFF. L. REV.* 359, 362 (2001). Allen Kamp noted:

Llewellyn's views and his original program for the Code grew out of the matrix of the collectivist mentality of the 1930s. . . . Llewellyn was once part of an academic avant-garde, a supporter of FDR in his court-packing plan, a folk dancer, a student of Boas' anthropology, part of a 1930s radical, collectivist milieu.

*Id.*

36. See Brainerd Currie, *The Materials of Law Study*, 3 *J. LEGAL EDUC.* 331 (1951); Brainerd Currie, *The Materials of Law Study*, 8 *J. LEGAL EDUC.* 1 (1955) [hereinafter Currie, *The Materials of Law Study*, 1955].

37. Currie, *The Materials of Law Study*, *supra* note 36, at 68-69, 74-75. ("The tendency to ask the wrong questions of other disciplines and to expect too much of the replies is persistent.")

38. *Id.* at 72 ("The materials sought by the Columbia faculty were relatively inaccessible, written in different technical languages, and in some instances nonexistent.")

39. See Robert Stevens, *Two Cheers for 1890: The American Law School*, in *V PERSPECTIVES IN AMERICAN HISTORY* 405, 483, 511 (1971).

40. Compare the comments of one of Harvard's most distinguished contracts teachers about Edwin Patterson's Columbia casebook on the subject

The volume [*Cases and Materials on Contracts II* (1935)] begins with several long opinions on the inferences with respect to sanity to be drawn from specific evidence, and ends with several extracts from psychiatrists. While these are no doubt instructive reading, one wonders how much is to be learned by a classroom discussion of them by teachers who are not psychiatrists and students

second and third editions, their authors tended to jettison more and more of the social science and the contextual materials.<sup>41</sup> Professor Christopher Tomlins reported:

Argument over the alternative directions for the [Columbia] Law School that the disciplinary turn and the functional curriculum implied—research institution or training school—came to a head in 1928 over the appointment of Young B. Smith as Dean. Antagonized by the appointment, the core group of realists (William O. Douglas, Hessel Yntema, Leon Marshall, Herman Oliphant, and Underhill Moore) resigned. The functional curriculum remained in place, but Smith ended the realist attempt to inform legal instruction with social research.<sup>42</sup>

The classic realists talked about doing empirical research, but relatively little was accomplished.<sup>43</sup> Professor John Henry Schlegel looked at the work of Professors Charles Clark, William O. Douglas, and Underhill Moore.<sup>44</sup> He concluded: "[a]s a coherent intellectual force in

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who have no means or intentions of becoming such. . . . Discussion might be centered on the really doctrinal decisions, leaving the others to be read.

George K. Gardner, *Cases and Materials on Contracts II*, 45 *YALE L.J.* 1153, 1154 (1936) (reviewing EDWIN W. PATTERSON, *CASES AND MATERIALS ON CONTRACTS II* (1935)).

41. See ALBERT C. JACOBS & JULIUS GOBEL, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* (3d ed. 1952); Currie, *The Materials of Law Study*, 1955, *supra* note 36, at 28-38 (addressing the changes in ALBERT C. JACOBS, *CASES AND MATERIALS ON DOMESTIC RELATIONS* (2d ed. 1939)); see also LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, at 87-97 (1986). For Laura Kalman's discussion of Albert Jacobs's casebook, see KALMAN, *supra*, at 88-90. ("The fate of the Jacobs's casebook indicated why law professors who espoused the integration of law with the social sciences in their scholarship so often balked at doing so in the classroom. Ignored by the law professors, the book was condemned as amateurish by social scientists.")

42. Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 *LAW & SOC'Y REV.* 911, 934 (2000).

43. Lawrence Friedman noted that the realists' critique attacked the conventional explanations of how judges decided cases; but they rarely broke out of the world the conceptualists occupied—the world of appellate decisions. With a few exceptions, they did not really investigate living law, the law in action. They did not even look at the work of the lower courts; and they had little or nothing to say about the way what judges did and decided reverberated in the outside world. In principle, they believed in the social-scientific study of law, and they paid lip-service to it; but in practice they did little or nothing about it.

Lawrence M. Friedman, *Karl Llewellyn and the Riddle of Judicial Decision-Making*, in *RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LEWELLYN UND SEINE BEDEUTUNG HEUTE* 135, 138 (Ulrich Drobnig & Manfred Rehbinder eds., 1994) (footnote omitted).

44. Schlegel, *supra* note 12, at 200.

American legal thought American Legal Realism simply ran itself into the sand."<sup>45</sup> He explained:

the Realists' social scientific research died out because of [(1)] the impermanence of the institutionalized circumstances in which it was undertaken, [(2)] the peculiarities of the personalities of the leaders of the undertaking, and [(3)] the difficulties in matching the impulse to do such research with the social science of the time.<sup>46</sup>

Schlegel showed us that these pioneers at Yale discovered that empirical research about law took time and was expensive. He looked at the Yale realists and said: "the one thing that really grand crew was not noted for was sustained commitment to anything."<sup>47</sup> The empirical realists attempted their work in the middle of a major depression when funds were scarce. Moreover, Yale was a private university that depended on rich donors. Many of them were not pleased with the politics of the researchers nor the questions their work raised about the ideology of the American legal system.<sup>48</sup> Nonetheless, Clark and his colleagues did discover the largely administrative nature of state court civil litigation and the role of plea-bargaining on the criminal side.<sup>49</sup> Of course, some of the empirical realists found the chance to go to Washington, D.C. to work for the New Deal to be far more attractive than remaining on the sidelines as a scholar. U.S. Supreme Court Justice William O. Douglas, for example, went from

a large empirical study of bankruptcy to serving as Chairman of the Securities and Exchange Commission before joining the Supreme Court.<sup>50</sup>

Schlegel reported that many law professors found the empirical work at Yale irrelevant or trivial. He described the reaction of progressive reformers, such as Professor (and later Supreme Court Justice) Felix Frankfurter, who "knew" that there was a problem of court congestion.<sup>51</sup> When Clark conducted an empirical study of the business of state courts that failed to support their preconceptions, these reformers ignored or attacked Clark's work.<sup>52</sup> Schlegel said that for these reformers: "[f]act gathering that did not advance an immediate reform objective was scholarship not worth publishing, just as fact gathering that did not fit their model of how the world was structured was an 'irrelevant jumble of figures.'"<sup>53</sup> Evasion and denial of the findings of empirical studies are still far too typical of law professors and Supreme Court justices.

After World War II, the University of Chicago Law School won major Ford Foundation grants.<sup>54</sup> Most of the money funded Professors Henry Kalven and Hans Zeisel's famed jury project,<sup>55</sup> but we should not forget Professor Soia Mentschikoff's arbitration project.<sup>56</sup> Both projects developed new methods for studying legal topics, and both published interesting findings. Neither, however, focused centrally on appellate cases in traditional fields.<sup>57</sup> As a result, any influence on conventional American legal scholarship was, at best, subtle and indirect.<sup>58</sup>

50. BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 88-91, 115-16, 124-35, 171-96 (2003).

51. Schlegel, *supra* note 4, at 513-19.

52. *Id.* at 513-14.

53. *Id.* at 519.

54. See SCHLEGEL, *AMERICAN LEGAL REALISM*, *supra* note 33, at 238-44.

55. See HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954); Dale W. Broeder, *The University of Chicago Project*, 38 NEB. L. REV. 744 (1959); see also Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323 (1991).

56. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961) [hereinafter Mentschikoff, *Commercial Arbitration*]; Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698 (1952) [hereinafter Mentschikoff, *The Significance of Arbitration*].

57. See Mentschikoff, *Commercial Arbitration*, *supra* note 56, at 848 (examining "the role of the adversary system as typified by commercial arbitration in dispute settlement in commercial matters"); Mentschikoff, *The Significance of Arbitration*, *supra* note 56, at 698 ("The thesis of this paper is that . . . we fail to perceive the importance and generative power of the arbitration process.")

58. This is not to say that, had the research been directly relevant to appellate decisions, American law professors would have paid attention to it. It is much easier to get your data by looking up at the ceiling tiles or asking what a rational actor would do and answering that question by introspection.

45. Schlegel, *supra* note 4, at 459 (footnote omitted). Schlegel credited Professor Duncan Kennedy with supplying the "felicitous image of the decline of Realism." *Id.* at 459 n.1; see also KALMAN, *supra* note 41, at 42-44; SCHLEGEL, *AMERICAN LEGAL REALISM*, *supra* note 33, at 1-2; Schlegel, *supra* note 12, at 195-323. Likewise, Kalman recounted the story of the Yale Law School's retreat from realism and law and society scholarship in the early 1970s. LAURA KALMAN, *The Dark Ages, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES* 154 (Anthony Kronman ed., 2004); see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

46. Schlegel, *supra* note 4, at 460.

47. Schlegel, *supra* note 12, at 315.

48. See KALMAN, *supra* note 41, at 122, 132-34, 136 (reporting that the *Chicago Tribune* once ran a cartoon showing a hammer and sickle flag flying above the Yale Law School).

49. See John H. Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, in JUDGE CHARLES EDWARD CLARK 81, 108 (Peninah Petruck ed., 1991) ("What is noteworthy about all this work was that it pointed to the marginality of law, and suggested that researchers had to look beyond the law and legal rules if they were fully to understand the phenomena they were concerned with.")



The jury project reminds us that research into the legal system in operation may be controversial and subject the investigators and their institutions to attack. After receiving permission from the judges and lawyers involved, the project recorded an actual jury deliberating about a real case.<sup>59</sup> The idea was to confirm some of the work that had been based on experimental juries and judges' opinions about jury performance.<sup>60</sup> Such "bugging a jury" provoked an outcry<sup>61</sup> and a federal statute<sup>62</sup> that rules out most of such research. Some with power in this society do not welcome research on the reality behind their ideological positions. Trial by jury is a powerful symbol of popular democratic control of our legal system. Some leaders of the bar may have worried that this kind of research might show jurors negatively. Moreover, the project invaded the privacy of an actual jury, and it might make other jurors worry about speaking their views because they would not know whether their words were being captured and might be turned against them. Finally, it allowed political figures to charge the University of Chicago Law School with the taint of communism. Kalven, one of the leaders of the project, was a noted civil libertarian who had battled invasions of free speech by the anticommunist crusades of the 1950s. The charge never was presented very clearly, but apparently those who attacked the project were asserting that professors at the University of Chicago were undermining a traditional and cherished American institution. I think it is safe to say that, in recent years, no one has attacked that law school on the ground of its communist tendencies.<sup>63</sup>

Also, in the early 1950s, the work of Professor Willard Hurst at the University of Wisconsin Law School began to appear.<sup>64</sup> Attempting to summarize Hurst's work in a paragraph or two is impossible. However, Hurst remade legal history into a true empirical enterprise. He looked at the role of law in the economic and social development of the State of

Wisconsin. Instead of focusing on the great appellate cases from the highest courts, Hurst looked at law from the bottom up.<sup>65</sup> He asked such things as: who turned to law, and what did it offer them? What did the pattern of ordinary cases reveal about the functions of law in the economic development of Wisconsin? Law to Hurst was much more than appellate cases or treatises about doctrine. Hurst insisted that we look at legislation and the operation of administrative agencies. He wrote one of the first, and still one of the best, studies of what lawyers did and how lawyer activity affected economic and social development.<sup>66</sup> He showed that ideas about a golden age of limited government were misleading. Americans always sought to use law in many ways to foster development by, in his phrase, "releasing energy."<sup>67</sup> That is, law created structures and institutions that enabled people to make money. However, Hurst did not romanticize the historical record. Far too often, instead of trying to solve problems, lawmakers simply drifted and evaded them. When they were forced to cope with problems that could not be ignored, they engaged in what he called "bastard pragmatism," finding short-run and cheap responses rather than real solutions to social problems. As I said, this is an inadequate picture of Hurst, but it makes at least some of the points relevant to a New Legal Realism.

Hurst also worked hard to develop a new approach to legal scholarship.<sup>68</sup> He recruited and mentored many in both law and social

65. See JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915*, at xi (1964) ("'Great cases' and constitutional debate deserve their place in the telling of legal history. But most of life is not melodrama . . ."). For comments about Professor Willard Hurst, see, for example, Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 *LAW & HIST. REV.* 1, 16-19 (2000); Harry N. Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 *AM. HIST. REV.* 744, 756 (1970); Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 *YALE L.J.* 823 (1997).

66. Hurst said:

[I]n our years of national life, lawyers could show a record of social invention that was matched only by that of the more restless and vastly larger class of businessmen.

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Much, if not most, of lawyers' inventions consisted in making old institutions serve new needs. Obviously that did not derogate from the practical importance of their work; to the contrary, it placed it in the normal pattern of social change.

HURST, *supra* note 64, at 336-37.

67. See generally JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

68. See Bryant G. Garth, *James Willard Hurst as Entrepreneur for the Field of Law and Social Science*, 18 *LAW & HIST. REV.* 37, 58 (2000). Bryant Garth reported a debate in the early 1950s before a committee of the Rockefeller Foundation between Harvard Professor Lon Fuller and Hurst. *Id.* at 54-55. Fuller wanted to support thought

59. See *Recording of Jury Deliberations: Hearing S. Res. 58 Before the Subcomm. to Investigate on the Administration of the Internal Security Act and Other Internal Security Laws of the S. Comm. of the Judiciary*, 84th Cong. 3 (1955) [hereinafter *Hearing on S. Res. 58*] (testimony of Edward H. Levi, Dean, University of Chicago Law School); see also STAFF OF SENATE COMM. ON THE JUDICIARY, 84TH CONG., *REPORT ON RECORDING OF JURY DELIBERATIONS 1-5* (Comm. Print 1956).

60. STAFF OF SENATE COMM. ON THE JUDICIARY, *supra* note 59, at 1.

61. See *Hearing on S. Res. 58, supra* note 59, at 3; see also STAFF OF SENATE COMM. ON THE JUDICIARY, *supra* note 59, at 1-5.

62. 18 U.S.C. § 1508 (2000) (prohibiting recording of federal jury deliberations).

63. Compare Abner J. Mikva, *The Law School's Fair Image*, 70 *U. CHI. L. REV.* 259 (2003), with Malcolm P. Sharp, *The Conservative Fellow Traveler*, 30 *U. CHI. L. REV.* 704 (1963).

64. See, e.g., JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

science who later made real contributions to law and society scholarship.<sup>69</sup> Professor Frank Remington was a former student and great friend, and ran major projects in the criminal law in action.<sup>70</sup> Professor Harry V. Ball, then a young sociologist, came to Madison, Wisconsin, to work on one of Remington's projects.<sup>71</sup> Many played a role in the creation of the Law and Society Association in 1964, but Ball provided much of the energy and vision.<sup>72</sup> Without Ball, something such as the Law and Society Association would have come, if at all, later and perhaps in a different form.<sup>73</sup>

Tomlins told us:

Law and Society enjoyed its greatest success at Wisconsin. There, however, the field did not "return" to law: law had been its central focus from the start. Conceptually, law-centeredness manifested itself in Wisconsin's forthright definition of the field's purpose—to investigate and "explain" law as a subject by locating it contextually as the dependent variable in a context of social and economic phenomena. Institutionally, law-centeredness was expressed in the location of the explanatory project in the Law School, safely under the control

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about philosophy and law. *Id.* Hurst, arguing against such an approach, said: "I would like to see more people dealing with the more grubby fields of law. I would like to see people come to this field not for its own sake, but because they are exasperated with the tools that they have in, say, contracts." *Id.* at 55. Hurst won the argument and got the grant. To state the obvious, I owe a great deal to Hurst's mentoring when I was a beginning law teacher not long after this debate. I got to spend some of the money Hurst was granted by the Rockefeller Foundation. Indeed, I was "exasperated with the tools that . . . [I had] in [the grubby field of] contracts." *Id.* I also had a wife, the late Jacqueline Macaulay, who was well into her graduate studies in social psychology and who edited my papers. She got her Ph.D. in 1965 and then a law degree in 1983. She practiced law until her death in 2000. She was a tough editor who could catch me when I affronted the conventions of social science, turn my prose into English that communicated, and offer suggestions and insights. As I said in my tribute to her after her death: "Jackie deserves major credit for whatever success I've had."

69. *Id.* at 39–44.

70. *See id.* at 40.

71. *See id.*

72. *See id.*

73. For a detailed history of the creation and early days of the Law and Society Association, see Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409 (1998); Felice V. Levine, *Goose Bumps and "The Search for Signs of Intelligent Life"* in *Sociolegal Studies: After Twenty-Five Years*, 24 LAW & SOC'Y REV. 7 (1990); David M. Trubek & John Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3 (1989).

of lawyers. Both traits secured for Law and Society the "critical mass" at Wisconsin that it was unable to build elsewhere.

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... Law-centeredness guaranteed the necessary institutional security that permitted the field to develop, to attract local resources, to attain critical mass, and to achieve a transformative impact on legal scholarship. Necessarily, however, it also limited the extent of that transformation, and that limitation, too, was a condition of Law and Society's success.<sup>74</sup>

Undoubtedly, much of the effort at the University of Wisconsin Law School dealt with law as the dependent variable. However, most people there did not see this as the only subject for study, and many looked at something close to Ehrlich's living law, which moved attention away from such people as judges, police, administrators, and legislators. Professor Marc Galanter was long concerned with the processing of disputes outside of the formal legal system.<sup>75</sup> In 1986, I published an essay on "private government" that looked at what Professor Sally Falk Moore called semiautonomous social fields<sup>76</sup> and other formal and informal institutions that create norms and supply sanctions.<sup>77</sup> Hurst wrote a long and detailed comment about this manuscript.<sup>78</sup> He was highly interested and engaged the paper.<sup>79</sup> Not all of his comments were favorable.<sup>80</sup> Hurst was extraordinarily kind and always polite, but he did not pull punches when he disagreed with what we had written.<sup>81</sup> To support Tomlins to some degree, however, I will note that Hurst found my paper lacking sufficient attention to when people turned to state-supplied formal legal institutions rather than relying on private governments.<sup>82</sup> He wanted me to focus on when people

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74. Tomlins, *supra* note 42, at 958–59 (footnotes omitted).

75. *See, e.g.*, Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

76. SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978).

77. Stewart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* 445 (Leon Lipson & Stanton Wheeler eds., 1986).

78. *See* Stewart Macaulay, *Willard's Law School?*, 1997 WIS. L. REV. 1163, 1171–72 (quoting Letter from Willard Hurst to Stewart Macaulay 1, 4 (May 17, 2003) [hereinafter Letter from Willard Hurst]).

79. *See id.* at 1171 (quoting Letter from Willard Hurst, *supra* note 78, at 1, 4).

80. *See id.* (quoting Letter from Willard Hurst, *supra* note 78, at 1, 4).

81. *See id.* (quoting Letter from Willard Hurst, *supra* note 78, at 1, 4).

82. For example, here are three paragraphs from four single-spaced pages of comments he wrote in 1983 about my paper on private government:

saw a need to create law and legal institutions. This is law as the dependent variable. However, he only suggested adding an issue to a lengthy paper that focused on substitutes for formal public law.

Sometimes we will want to focus on law as the dependent variable; sometimes on the impact of law on society, often through indirect and subtle influences. As I said long ago in my Mitchell Lecture, "[w]hat is clear is that any theory that tells us to watch those with money, status and influence cannot be all wrong, and any theory that tells us that these factors are all there is to law cannot be all right."<sup>83</sup>

Professor Lawrence Friedman and I published collections of teaching materials on law and the behavioral sciences in 1969<sup>84</sup> and 1977.<sup>85</sup> We

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I'm glad to have the working paper on private government. It is a stimulating piece, and introduces me to some [jurisprudence] I'm not familiar with. It also stirs me to a few questions, which I submit in case you expect to consider any further tinkering with the manuscript. I don't try to set them down in neat order, figuring that if I made that a prerequisite to responding I'd likely not get around to it.

I finished the paper sensing some feeling of incompleteness about it, despite its breadth and detail. You make the case for the realities of private government, including both its reach and its wielding of forms of compulsion or discipline, and for the blurring of lines between "public" and "private." But it doesn't strike me that you squarely confront a question that all this inevitably poses: Can we derive from experience or logic or whatever some persuasive explanations or demarcations of why and where people turn to law and on the other hand to various kinds of private governance? At page 83 there is a rather tangential posing of the question, why and when do non-legal factors take over the human relations scene. But I'd think the question calls for more extended treatment, even if the upshot is going to have to be largely to confess ignorance. Legal institutions continue to be large, stubborn facts of our social experience, granted all the division of labor, competition, and blurring of lines that other kinds of social ordering introduce. Doesn't a satisfying explanation or analysis of private government derive its contours, inescapably, in large part from understanding where and how far law is used?

Finally, a minor point or irritant of style: "problematic" has become a buzzword in current learned journals, to an extent that grates on this ear at least. It turns up in this manuscript oftener than seems artistic. Webster offers some perfectly usable substitutes: questionable, unsettled, doubtful, unproved, equivocal.

*See id.* at 1171-72 (quoting Letter from Willard Hurst, *supra* note 78, at 1, 4).

83. Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 182 (1984).

84. LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1969).

85. LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (2d ed. 1977). In the most recent teaching materials, however, we faced a major problem of selecting from a large number of excellent articles and book chapters. *See* STEWART MACAULAY ET AL., *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* (1995). Political scientist and lawyer John Stookey joined us in fashioning

were hard pressed at the time of the first edition to find good articles and book chapters that made the points we wanted to make about where law comes from, the limits of effective legal action and the roles of the actors in the legal system. To some extent, this is a law-centered agenda, but in carrying it out, Friedman and I also looked at such things as complimentary and competing institutions and the broad idea of legal culture. There was a great development in the field during the time between the first and second editions.

In 1984, I gave the Mitchell Lecture at the State University of New York at Buffalo.<sup>86</sup> I asked what, if anything, twenty years of work in the Law and Society Association had accomplished. I offered seven propositions that Professor David Trubek called my "seven deadly sins."<sup>87</sup> Jackie Macaulay, when she was editing my manuscript, added a sentence that I kept. She wrote: "[t]his flood of social science and law has washed up a few shining nuggets."<sup>88</sup> I offer the main headings now as a quick way to review a large field. Of course, these are my seven, and I have no illusion that everyone would accept them without amendments or additions. Here they are:

1. Law is not free.
2. Law is delivered by actors with limited resources and interests of their own in settings where they have discretion.
3. Many of the functions usually thought of as legal are performed by alternative institutions, and there is a great deal of interpenetration between what we call public and private sectors.
4. People, acting alone and in groups, cope with law and cannot be expected to comply passively.
5. Lawyers play many roles other than adversary in a courtroom.
6. Our society deals with conflict in many ways, but avoidance and evasion are important ones.
7. While law matters in American society, its influence tends to be indirect, subtle and ambiguous.<sup>89</sup>

I invite you to revise, amend, or add what we have discovered during the twenty years since my Mitchell Lecture.<sup>90</sup> A few years after this

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the latest version of our materials. Without his ideas and energy, the revision would not have been accomplished. See the review of all three versions of our sociology of law materials in Jonathan Simon, *Law After Society*, 24 LAW & SOC. INQUIRY 143 (1999).

86. For an article based on this lecture, see Macaulay, *supra* note 83, at 152-56.

87. *Id.*

88. *Id.* at 152.

89. *Id.* at 152-55.

lecture, for example, I advocated study of the legal ideas held by ordinary people and elites that are offered by education, entertainment, and spectator sports.<sup>91</sup> This was not a new idea. In the early days of American sociology, Professors William Thomas and Dorothy Thomas observed that what people think is so, is in fact so for them.<sup>92</sup> Law can be part of a project to mislead people. I have cautioned, however, that Americans are seldom trapped in the rhetoric of law. Ordinary people in this country are

great jazz musicians, ready to improvise on legal tunes.<sup>93</sup> Moreover, many of our legal ideas come in matched contradictory sets so that almost every position can be challenged in totally predictable ways.<sup>94</sup> As Professor Marvin Harris asserted: “[n]o matter how deviant or unexpected the act, a psychologically intact human being can always appeal to some set of rules someone else will recognize as legitimate, although perhaps as misinterpreted or misapplied.”<sup>95</sup> I do not read Harris as saying that “anything goes.” There are some arguments that almost everyone will see as misinterpreted or misapplied—that is, off the wall. Nonetheless, if not anything goes, there is a lot that does.<sup>96</sup> There may also be a great deal of cynical awareness about the law in action. Many, if not most, Americans know that, it is one thing to have a right, but something very different to make it real.

Where do we go from here? What do I see as a New Legal Realism? It will involve the law in action, but we must use an expanded definition of that phrase. Professor David Nelkin untangles some confusion between Professor Roscoe Pound’s idea of “the law in action” and Ehrlich’s “living

90. Professor Frank Munger noted my seven propositions and added several that reflect the more current law and society culture. Frank Munger, *Mapping Law and Society*, in *CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH* 21, 42–55 (Austin Sarat et al. eds., 1998). He added the following: (1) recent law and society research has been more attentive to the perceptions and consciousness of actors; (2) the state is a contested and problematic category; (3) globalization is a process as well as a context—the changes in the nation state and global markets that in large part drive the process are a terrain of struggle for power; and (4) law practice is a domain of contest and cultural production. *See id.* at 42–52. He then offered a new perspective on legality from a law and society approach: (1) law is an element in the social construction of everyday life; (2) law is given content and meaning by actors with biography, in settings that have a history and thus a social organization of their own; (3) an issue of increasing importance in research is how the myth of neutral, autonomous law has been maintained; and (4) lawyers are producers of culture within the limits of their roles in political and economic institutions. *See id.* at 52–55. Munger concluded:

I would argue that the findings of “new” critical empiricism and our vision of the contemporary law and society field are remarkably consistent with the earlier empirical results summarized by Macaulay, but we no longer understand the earlier results in terms of the “gap” between liberal legal aspirations and achievement.

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New perspectives render Macaulay’s list of contingencies much less surprising. Research today is less a critique of official forms of legal authority than an exploration of all forms of power and their interaction in social life, ranging from formal discursive authority to embedded practical knowledge.

*Id.* at 55.

91. Compare Macaulay, *supra* note 33, at 1556 (“[L]awyers, trial judges, court commissioners, political candidates, office holders, clients, and even people standing at a working class bar are all jazz performers. They play variations on legal themes, and sometimes attempt to put new melodies to the chords.”), with Patricia Ewick & Austin Sarat, *Hidden in Plain View: Murray Edelman in the Law and Society Tradition*, 29 *LAW & SOC. INQUIRY* 439, 457–58 (2004) (“The public has ‘a small set of stock texts that everyone who grows up in a particular culture learns early: poverty as the fault of the poor or of social institutions; abortion as a form of freedom or a form of murder; and so on.’”) (citation omitted), and Austin Sarat & Jonathan Simon, *Beyond Legal Realism: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 32 (2001) (stating that cultural analysis calls us “to attend to the cultural, not for its recuperative or redemptive potential, but instead to expose the layers of power that the turn to culture in the political realm often seeks to mask”).

92. WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA* 572 (1928) (“If men define situations as real, they are real in their consequences.”).

93. Macaulay, *supra* note 33, at 1556; *see also* Mary Jo Hatch, *Exploring the Empty Spaces of Organizing: How Improvisational Jazz Helps Redefine Organization Structure*, 20 *ORGANIZATIONAL STUD.* 75, 75 (1999) (“This paper . . . begins with a description of some basic elements of jazz performance—soloing, comping, trading fours, listening and responding, groove and feel—and builds on these to redescribe organizational structure as ambiguous, emotional and temporal.”); Michael Humphreys et al., *Is Ethnography Jazz?*, 10 *ORGANIZATION* 5, 5 (2003) (“[E]thnographers are engaged in a dual quest for self-identity and empathy that is improvised in ways resembling the musical ‘conversation’ that occurs between performing jazz musicians.”); Susan S. Silbey & Patricia Ewick, *The Double Life of Reason and Law*, 57 *U. MIAMI L. REV.* 497, 511–12 (2003) (“Just as the jazz musician draws from her collection of favorite licks, people invent and construct legality by drawing from a repertoire or tool-kit of cultural signs and resources.”).

94. MARVIN HARRIS, *CULTURAL MATERIALISM: THE STRUGGLE FOR A SCIENCE OF CULTURE* 274, 274–75 (1980).

95. *Id.*

96. One of Jackie Macaulay’s cases is illustrative: a pro bono client was a member of a group that did not recognize the legitimacy of the governments of Wisconsin or the United States. She had gone through “a quiet title” action before her group’s “court,” and so she was sure that she no longer owed taxes to either government. She had a dispute with a deputy sheriff. She filled out a form that created a lien on the deputy’s house, signed it with her name, and put it in the pile of documents to be recorded at the county courthouse. Perhaps it was a long, hot day, and so the clerks did not notice who had signed the document. Whatever the explanation, they recorded it. The deputy discovered the lien when he wanted to sell his house. The woman tried to persuade Jackie to argue that the Constitution prohibits titles of nobility, that “judge” is such a title, and therefore anyone can do anything that a judge claims power to do. The woman insisted that the other members of her group knew that this was a valid argument. She fired Jackie when Jackie—acting as the lawyer—refused to present it. The woman would not have won on this ground, but there was enough to her argument that it served my wife as a good story for some time.

law."<sup>97</sup> "Law in action," for Pound, focuses on the gap between the law in the books and the actual practices of legal officials and the public in cases of disputes.<sup>98</sup> The "living law" refers mainly to the "norms recognised as obligatory by citizens in their capacity as members of associations."<sup>99</sup> Law in action pushes us toward studies of gaps between what we teach in law schools and what goes on in the world. Living law would take us toward the norms, sanction systems, and institutions that actually exist in various groups in society.

Nelkin points out that Ehrlich faced a problem in distinguishing living law from all other social norms, sanctions, and institutions.<sup>100</sup> We can speak, for example, of the law of Christmas or birthday gifts that defines who should give what to which relatives and friends, and sanctions a failure to give or reciprocate. However, many of us find the analogy strained and not too useful. Ehrlich limited his idea to those norms, sanctions, and institutions "which have a parallel form and content to the norms found in Roman and Western legal systems such as those associated with contract, property and inheritance rules."<sup>101</sup>

Nelkin argued that a failure to distinguish the two concepts could lead to distortions in our sociology of law work.<sup>102</sup> He stated:

A good example is provided by Macaulay's classic study of non-contractual relations between businessmen, work which has justly been paid the compliment of international replication. Macaulay's investigation was conceived very much in the Pound tradition of studies of legal effectiveness, even if its findings transcended this starting point. The question was whether contract law as taught in the universities was actually used or not, and how it might be changed so as to make it more useful to businessmen. Macaulay revealed that businessmen made only limited uses of contract law in planning their transactions, and were reluctant to rely on their contractual remedies. Business

97. David Nelken, *Law in Action or Living Law? Back to the Beginning Sociology of Law*, 4 LEGAL STUD. 157 (1984). Professor Marc Hertogh draws a distinction between an American view of a legal consciousness and a European one. Marc Hertogh, *A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich*, 31 J.L. & Soc'y 457 (2004). American law and society scholars focus more on Pound's concept of law in action. See *id.* at 465. The question is: how do people experience official law? *Id.* at 463. Europeans follow Ehrlich's view of a living law, the law that dominates life itself even though it has not been posited in legal propositions. See *id.* at 473. Hertogh saw the goal as integrating the two views. *Id.* at 480. I agree.

98. See Nelken, *supra* note 97, at 166-68.

99. *Id.* at 165.

100. *Id.* at 163.

101. See *id.*

102. *Id.* at 170-71.

relationships were governed more by the need to maintain a good reputation in the market, and stand behind a good product, than by rules of contract law. These findings were very similar to those Ehrlich had emphasized when illustrating the existence of living law amongst businessmen.

....

It is arguable that Macaulay's investigation would have been even more fruitful if it had started from this type of fascination with explaining the working norms of business life rather than the problem of how far contract "law in the books" misrepresents what actually occurs. In addition to showing how the exigencies of business life affect contract law, research using Ehrlich's ideas would seek to account for the origin and maintenance of the specific norms of business life including the neglected point which Ehrlich makes about the relevance of honour and business self-respect to the organisation of transactions.<sup>103</sup>

Nelkin argues that those who write about legal pluralism and "semi-autonomous social fields" take Ehrlich's ideas as an essential starting point.<sup>104</sup> Ehrlich's work pushes us to think about the limits of intervention by the formal legal system. However, such thought must be empirical and not just assertions about the glories of an impersonal market.<sup>105</sup>

Many of us who began work at the University of Wisconsin Law School in the late 1950s and early 1960s took the phrase "law in action" to include both the gaps between the law on the books and what happened in legal institutions, and, the way problems were avoided, suppressed, and dealt with apart from official public norms, sanctions, and institutions. We used the phrase "law in action" to describe our enterprise, but we also explicitly took Ehrlich into account. If anything, we were less aware of Pound than Ehrlich. As I have noted before, Page, one of my predecessors as a Wisconsin contracts teacher, read Ehrlich in German and published a comment about his work in 1914.<sup>106</sup> Professor Jacob Beuscher was

103. *Id.*

104. *Id.* at 171.

105. Compare *id.*, with Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995).

106. William Herbert Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, 4 N. KY. L. REV. 37 (1977).

Hurst's partner in the intellectual leadership of the school.<sup>107</sup> Beuscher constantly talked about Ehrlich's "living law," and he offered examples drawn from his own empirical research into agricultural and environmental social systems, which were only somewhat influenced by the law in the books and the actions of legal officials.<sup>108</sup> Nelkin notes that my 1963 study did "transcend" its starting point as a gap study.<sup>109</sup> I am sure that I was influenced by the appreciation of Ehrlich in our Wisconsin institutional culture. Also, I drew on parts of Professor Bronislaw Malinowski's *Crime and Custom in Savage Society*,<sup>110</sup> which pushed me to see the power of long-term continuing relationships.<sup>111</sup> I am sure that a full study of the norms and sanctions in business life would have been valuable; I am also sure that a thirty-year-old law professor with no formal training in any social science was not the one to carry it out.

We can say that "law in action," as it has developed in the law and society tradition, includes both Pound's and Ehrlich's ideas. Terms do take on meanings beyond their origins. Nonetheless, Nelkin's point is important. A New Legal Realism must go beyond mere gap research. Legal pluralism is an essential idea for one who would think about law seriously. The action may be taking place quite apart from cops, administrative agencies, and courts.<sup>112</sup> My late colleague Frank Remington was a master of the doctrine of criminal law—he was, after all, the primary drafter of the *Wisconsin Criminal Code*. However,

107. See generally FRAN THOMAS, *LAW IN ACTION: LEGAL FRONTIERS FOR NATURAL RESOURCES PLANNING; THE WORK OF PROFESSOR JACOB H. BEUSCHER, INCLUDING A BIBLIOGRAPHY OF HIS PUBLISHED WORK* (1972).

108. Professor Jacob Beuscher often told the story of a farmer assigning his right to future checks from a dairy cooperative. The Wisconsin courts had found this right too indefinite to be assigned. *O'Neil v. Wm. B. H. Kerr Co.*, 124 Wis. 234, 238, 102 N.W. 573, 574 (1905). One could not know in advance how much milk there would be or the price that it would command in the future. Nonetheless, Beuscher loved to tell us banks in the regions where dairy farms were most numerous regularly loaned money based on the security of an assignment of a right to a milk check. Is this the law in action or the living law? I think that it fits both ideas.

109. Nelkin, *supra* note 66, at 170.

110. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (Greenwood Press 1984) (1926).

111. Professor Bronislaw Malinowski, for example, said that sanctions are provided by "a definite social machinery of binding force, based . . . upon mutual dependence, and realized in the equivalent arrangement of reciprocal services, as well as in the combination of such claims into strands of multiple relationship." *Id.* at 55. Those who failed to keep economic obligations would soon find themselves "outside the social and economic order." *Id.* at 41. He also commented: "[w]henver the native can evade his obligations without the loss of prestige, or without the prospective loss of gain, he does so, exactly as a civilized business man would do." *Id.* at 30. Even in a long-term continuing relationship, obligations are not fixed once and for all but subject to redefinition in light of the social situation. See *id.* at 31.

112. See, e.g., Macaulay, *supra* note 77, at 445-518.

Remington always insisted that if you wanted to understand criminal law, you had to ride in the front seat of a squad car in an inner city on a hot summer night. Professor Elizabeth Mertz has suggested that it might also be a good idea to then join part of the crowd watching that squad car pass.

Both observations are apt, but even these suggestions would not be enough. If you really wanted to understand criminal law, you would need to consider Professor Herman Goldstein's point that the criminal law is but one resource sometimes used by the police in carrying out their basic duty of keeping the world looking safe enough for those who count.<sup>113</sup> You would want to consider what behavior by police earns them rewards and what behavior risks punishment. You would want to think about why the police patrol in some places and not others. You would want to consider what was involved in the decisions about how many police there are in a city and how they are equipped.

You would quickly turn from the city police to the institution of private police at athletic events, shopping centers, and large industrial plants, and in private-gated communities and condominiums. White-collar crimes are usually dealt with by what has been called "the second criminal justice system."<sup>114</sup> A large corporation does not have to worry about proof beyond a reasonable doubt or *Miranda* warnings. One suspected of, say, embezzlement from an employer might be just fired or moved to another job without the possibility of promotion. The threat of prosecution in the first criminal justice system may be used to gain some measure of restitution. The second system works without the burdens of constitutional rights and is under the control of large corporations rather than local or national politics. Moreover, a corporation can buy state of the art wiretapping or lie detector equipment that probably would be out of the reach of any police department budget.

But, there are other kinds of private police too—bad television calls them hit men. However, organized crime often operates a complex dispute avoidance and dispute resolution system that attempts to ward off the need for such drastic measures.<sup>115</sup> Indeed, Professor Donald Black says that much, if not most, murder in the United States is conduct that

113. See, e.g., HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990).

114. Mark Button, *Private Security and the Policing of Quasi-Public Space*, 31 INT'L J. SOC. LAW 227 (2003); Richard B. Cole, *The Second Criminal Justice System*, 43 S.A.M. ADVANCED MGMT. J. 17 (1978); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004); Ian Loader, *Consumer Culture and the Commodification of Policing and Security*, 33 SOCIOLOGY 373 (1999).

115. See Peter Reuter, *Social Control in Illegal Markets*, in 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 29 (Donald Black ed., 1984). Two of Peter Reuter's section headings are "The Mafia as a Dispute-Settlement System," *id.* at 40, and "The Mafia, Arbitration, and Extortion," *id.* at 49.

anthropologists would call "law" in primitive societies.<sup>116</sup> Someone has violated a norm, and we get self-help capital punishment. And so on. In a sense, the question is: "what do you mean by the bottom up—what is the bottom?" The hard part is deciding where to stop. The police are just part of social control, and social control is just about everything from concern about reputation, to not wanting to get someone mad, to life imprisonment.

If we have learned anything from this long academic history of realism, it is, I repeat, that we must also study law from the bottom up if we want to understand anything important about it.<sup>117</sup> Yet, we must be clear what we mean by bottom up. It is not enough to find a gap between the law on the books and the law in action, and then assume it should be closed. Probably none of us would be willing to bear the costs of 100% enforcement of all the laws all the time. On one hand, we rely on police and prosecutorial discretion to tailor the law to fit real situations not anticipated by the legislature. Sometimes enforcing the letter of the law just does not make sense. On the other hand, full enforcement would entail many costs. Americans have some expectations of privacy and civil liberties. Full enforcement probably would demand that we give up at least some measure of these American values. Just the burden of all the taxes needed to pay police, guards, and informers would dampen some of the enthusiasm of even those with only a minimal concern for civil liberties. Sometimes full enforcement would require that police or administrative agencies attempt to coerce a large group of citizens who felt strongly that the law was wrong. Whatever our normative judgment about a particular statute or decision, we must recognize that those who keep their jobs by running for office may hesitate to enforce unpopular laws. Indeed, attempted enforcement may do no more than fuel a popular movement against the law. In sum, finding a gap only opens a series of questions.

Moreover, there are other reasons to stress a broad view of the bottom-up approach. The legal academy tends to overlook important issues until they are captured in an appellate case that makes its way to the top of the legal system. Clearly, however, some important questions never make it to the courts or administrative agencies. The process by which a

116. Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34 (1983); Donald Black, *Crime as Social Control*, in 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 1, (Donald Black ed., 1984).

117. Schlegel objected to talking about top-down and bottom-up approaches. He stated that "[t]he problem of understanding law is better seen as that of constructing and understanding an unruly, multi-dimensional matrix, full of missing squares and partial columns." He continued, "Bottom up talk is as much a part of the problem as is top down. Situatedness is everywhere to be seen . . . Both suffer from the misunderstanding of taking part for the whole, and . . . [the] chosen part as well." I hope that my recognition of the virtues of classic legal thought and an expanded view of bottom up captures some of his point.

problem goes from people in the society to a lawyer, to filing a case, to motions, to a trial and to various appeals transforms both the facts and the problem.<sup>118</sup> Friedman stresses that a look at legal history also shows that legal problems tend to disappear from the courts in a relatively short time.<sup>119</sup> But, the legal academy continues teaching and writing about the classic cases long after they have lost much of their significance. If we are interested in the likely consequences of any rule, or system created by law, or if we are interested in living social problems, we must add a view of law in its full context.

At the New Legal Realism Symposium, Galanter observed that the old legal realists were optimistic and saw law as a "robust, expansive, problem-solving enterprise—by breaking the shackles of formalism, they would liberate it, unleash the power of law to solve problems—[it was] their own version of release of energy."<sup>120</sup> Few today sing this song. Professor Grant Gilmore said: "In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."<sup>121</sup> Adherents of Critical Legal Studies,<sup>122</sup> Law and Economics,<sup>123</sup> and Law and Society<sup>124</sup> all are skeptical about making

118. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-1981).

119. As Friedman and I wrote:

No contracts problem in a concrete sense—one that is frequently litigated and which deals with one specific type-situation—lasts more than two generations. . . . When problems reach the threshold of public or general business concern, they are solved or at least coped with by other means—by legislation, for example.

Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 812.

120. Friedman noted:

Part of Llewellyn's problem—if we can call it a problem—was that he was quite starry-eyed about the common-law, and the way it moved and worked; basically, he loved the common-law, and this intense love colors all of his work. Everything Llewellyn wrote, he wrote passionately; his style is curious, cryptic, stylized, and at times annoying; but it is full of zest, of boundless enthusiasm. He truly adored the law; and those that made it.

Friedman, *supra* note 43, at 139.

121. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

122. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 620-21 (1982) ("The liberal position is . . . that reform of exceptional cases and intelligent response to abuses are all that is needed to meet the just demands of the disadvantaged and thereby to relegitimate the overall system of distribution and the overall quality of life."). *Id.*

123. See, e.g., Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 370-71 (2004) (advocating that the number of enforceable contracts be cut back drastically and a system of clear formal default rules be adopted).

life better by creating legal rights. And yet, while law may not be a complete solution, sometimes law is one tool for bringing about some measure of social change. A New Legal Realism could tell us more about the costs and benefits of attempts to bring about change through law.<sup>125</sup>

The Old Legal Realism reflected a progressive politics.<sup>126</sup> The extent to which a new legal realism would do the same is an open question. Some of the work will be relatively neutral. It will probably focus on filling in the picture of functioning legal systems. Some will serve the task of training lawyers for their many social roles. However, sometimes a new legal realism will not be able to claim to be only a disinterested, neutral, nonpartisan pursuit of the facts. Sometimes looking at the law in action will carry a political message. Looking at law from the bottom up will often show that things are not as most people think they should be. Some studies may serve a muckraking function whether this is the intention of the researcher. Even the best studies may draw return fire.

Some people have an interest in holding to an ideological picture of the way things are, and they will not be pleased to have a scholar announce that the world runs differently. Since the early 1980s, for example, insurance companies, large corporations, and part of the medical profession have tried to convince Americans that we are in the midst of a

124. See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 13 (1974) (offering the classic statement of the "myth of rights"). But see Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 *LAW & SOC'Y REV.* 11, 27 (2005) (arguing that Professor Stuart Scheingold's position may place too much emphasis on how formal rights claims in court atomize grievances by narrowing disputes to legally relevant facts and individualized remedies, and that it overlooks how the informal processes of mobilizing rights can help build connections and common interests among grievants).

125. Compare this view with Friedman: "[F]resh law is a hybrid: half ratification, half real inducement to change. Formal legal change often comes at the middle point in a social process which requires a number of distinct steps . . . already taken, but it forces or hurries society along with regard to the steps not yet taken." Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 *ST. LOUIS U. L.J.* 351, 363 (1969). Of course, attempted legal change may provoke opponents to organize to fight the reform. The Supreme Court's decision in *Roe v. Wade* provided that states could not deny access to abortion during the first months of pregnancy. 410 U.S. 113, 164 (1973). Certainly, one consequence of the decision was to provoke the rise and power of the "Right to Life" movement.

126. In one of my favorite footnotes, Schlegel reported that Moore considered himself a socialist. Schlegel, *supra* note 12, at 243 n.285. However, Schlegel also noted "Moore was, first of all, a gentleman. The family was at least upper middle class and accordingly his tastes ran to expensive pipes, bone handle knives, and gray Packard roadsters." *Id.* at 242. Sadly, those identifying with New Legal Realism will be unable to drive gray Packard roadsters. My eccentricities are reflected in my fifteen-year-old red Saab convertible. While the extreme right probably would label me a socialist, socialists would not.

litigation explosion and that we would all benefit from "tort reform."<sup>127</sup> A number of scholars, including Galanter, have looked at the evidence and found it sadly wanting.<sup>128</sup> Those advocating "tort reform" have not been pleased.<sup>129</sup>

Moreover, a person's political stance and theoretical assumptions influence the questions she asks, and what she sees when she looks at the law in action. What is true for the upper and middle classes, for example, may hide the reality for those at the bottom of the social system. Tomlins reported that, from a critical left perspective, "systematic objective empiricism was impossible, merely a misleading positivism. The facts that empirical inquiry found were creatures of the observer's subjective position. Ideology and methodology were irremediably intertwined."<sup>130</sup> Furthermore, this left perspective insists that the work of reformist scholars reinforces the status quo. Trubek and John Esser reject what they call "universal scientism."<sup>131</sup> This approach assumes that "[m]ethods of empirical inquiry allow us to determine if the knowledge we hypothesize adequately describes the external world we can apprehend." While there is much truth in this challenge to empirical work in law, I think that it goes too far. A New Legal Realism will accept Professor Bill Whitford's gloss

127. See, e.g., Jon Robins, *Trial Lawyers Are Put on Trial*, *FIN. TIMES*, Feb. 3, 2005, at 12. ("People are in the habit of saying: 'I am going to get me a lawyer,' and just that threat—even the faintest possibility of a threat—changes behaviour . . .").

128. See, e.g., Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 *DEPAUL L. REV.* 647 (2000); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255 (2005); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 *ARIZ. L. REV.* 717 (1998); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *MD. L. REV.* 1093 (1996); see also Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 *LAW & CONTEMP. PROB.* 269 (1989); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 *TEX. L. REV.* 1781 (2002); Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 *EMORY L.J.* 1225 (2004); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 *NOTRE DAME L. REV.* 1497 (2003); Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 *STUD. L. POL. & SOC'Y* 95 (1991); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 *U. PA. L. REV.* 1147 (1992).

129. Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 *WIS. L. REV.* 1, 13-14 (describing the reaction of organizations seeking to limit punitive damages to a conference considering the evidence for the various assertions involved in the political campaign).

130. Tomlins, *supra* note 42, at 961.

131. David M. Trubek & John Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program or Pandora's Box?*, 14 *LAW & SOC. INQUIRY* 3, 11 (1989).



on Trubek and Esser's article.<sup>132</sup> Whitford argues that the goal is not to produce certain fixed truths about human society. Rather, we seek to understand the present and anticipate the future with a greater probability of accuracy, understanding that our knowledge can be only tentative.

First, let us look at some of the reasons for the critical left concerns about empirical research. Some social science approaches, for example, tend to be reductionist, seeking elegant models of behavior. Some approaches do put the rabbit into the magician's hat by the way they frame questions and what they ignore. There is no method that is sure to provide answers to questions that you do not ask.<sup>133</sup> Some writers relying on data go far beyond what they have proved when they discuss the implications of their research.<sup>134</sup>

132. See William C. Whitford, *Critical Empiricism*, 14 LAW & SOC. INQUIRY 61 (1989).

133. For example, Professors John Brigham and Christine B. Harrington argue that realism fails to account for the social terrain in the analysis of law. . . . In the high-court literature, the most startling characteristic of socio-legal research is that the politics taken up by social scientists is limited to the differences between (conservative-liberal) which pays little attention to the political implications of what is shared (a profession, a doctrinal tradition).

John Brigham & Christine B. Harrington, *Realism and Its Consequences: An Inquiry into Contemporary Sociological Research*, 17 INT'L J. SOC. L. 41, 50 (1989).

134. In an unpublished paper written in 1979 at the University of Wisconsin Institute for Research on Poverty ("IRP"), the late Dr. Jacqueline Macaulay dealt with "[s]ome [b]arriers to [d]rawing [p]olicy [c]onclusions from [s]ocial [s]cience [r]esearch." Jacqueline Macaulay, *Some Barriers to Drawing Conclusions from Social Science Research 1* (1979) (unpublished manuscript), available at [www.law.wisc.edu/facstaff/macaulay/papers/barriers.pdf](http://www.law.wisc.edu/facstaff/macaulay/papers/barriers.pdf). It is a development of her 1974 IRP Notes and Comments paper, *A Skeptic's Guide to the Literature on Poverty*. She used some of the ideas in her 1975 IRP Discussion Paper, *Is Welfare Bad for Children*. In her paper on barriers to drawing policy conclusions, Macaulay listed the: (1) problem of snapshot perspectives; (2) sample bias and the loss of qualifying tags in secondary reporting; (3) bias in the definition of the population from which a sample is drawn; (4) incomplete definition of the situation in which research is done; (5) the dataless cell (for instance, when one studies the poor and assumes that those who are not poor are different without any proof that this is so); (6) invalid inferences of causation; (7) bias in the outside world (that affects the social statistics that we gather); (8) similarities, differences, and what constitutes "significance"; (9) problems of inadequate theories, concepts and methods, such as (a) false dichotomies, (b) spurious symmetry, (c) dubious continua, (d) absent alternatives, (e) pejorative labels and deficit hypotheses, (f) noncorrespondence between theoretical and operational variables, and (g) too simple models and uncritical variables; and (10) problems created by the structure of academic disciplines and the road to academic success. *Id.* at 1-13. Put simply, for people not conversant with social science, this kind of scholarly research does not yield clearly defined "facts" that just sit there waiting for a legal scholar to pick them up and plug them into his or her analysis. Even social science research that seems to support our pet ideas must be read skeptically and carefully if we care about what is going on rather than just seeking rhetoric and authority to back our position.

Even if one accepts the procedures of any social science, studying anything related to law almost always requires compromises with textbook methods.<sup>135</sup> For example, it is hard to get a true random sample of those with legal authority. Most sets of data were compiled in ways that threaten their validity; our subjects are people engaged in some way with something we want to call law, but this means they often have reasons to shade the truth or lie. Moreover, the researcher is always a person formed by ideology, structures, and class. She frames the questions, records the answers, and interprets the findings. Who she is affects what she asks and what she sees.<sup>136</sup> Also, the world changes. Yesterday's magnificent study of practices related to law might be ancient history today because of shifts in the legal culture, or because new social institutions mean that the problem can never arise again in precisely the same way.<sup>137</sup>

Nonetheless, as Whitford warned, we should not throw out the baby with the bathwater. Reviewing these questions two decades ago, I concluded that when we look at Law and Society empirical research, echoing Gertrude Stein, we will find that there is some there there.<sup>138</sup> Law and Society empirical studies have at least made salient such things as that there is such a practice as plea-bargaining where defendants lack bargaining power. Police have discretion, and they are rewarded or punished for using it in various ways. Americans bargain in the shadow of the law, but shadows are usually distortions of the object between the sun and the ground. When I graduated from law school in 1955, these "facts" were not part of legal discourse. Moreover, there is no necessary reason

135. See Macaulay, *supra* note 83, at 156-63 ("All of the common approaches to the social study of law are flawed.").

136. The classic statement is from Karl Marx: "Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past." KARL MARX, EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 115 (1852). Professors Dave Trubek and John Esser state that the aspiration is to

develop a critical sociology of law that incorporates ideas of structure without abandoning the idea of agency; [one that] is able to identify patterns and regularities while holding onto the basic insight that social life is indeterminate and unstable; and [one that] insists that micro- and macro-level analyses must inform each other.

Trubek & Esser, *supra* note 131, at 35 n.69. They attribute this interpretation to Boaventura Santos in a personal communication.

137. Professor Robert Kagan suggests that the decline in debt collection cases coming before the courts over the past century can be explained in part by what he calls "systemic stabilization." Robert Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in Courts*, 18 LAW & SOC'Y REV. 323, 352-63 (1984). This involves "the development of large-scale economic and social institutions that ameliorate the conditions that cause individual conflicts or that provide collective administrative remedies (as contrasted to case-by-case legal remedies)." *Id.* at 352.

138. See Macaulay, *supra* note 83.

why empirical research must reinforce the status quo or serve as a tool of the haves. The trick is to get researchers to ask the right questions and to consider unorthodox interpretations of their data. Perhaps today, the hard part is to get such research funded or to have it count toward tenure in universities that are more and more pushed to please the powerful as the schools struggle for funds.

Accepting all the cautions, the goal must be to find the best evidence of what is going on in view of what is being studied. We cannot demand one "Truth" with a capital "T." Sometimes we can test hypotheses with hard data analyzed by state of the art statistics. When we can, we should. Often, however, given the nature of things legal, we are lucky to hear a story told by someone who should know.<sup>139</sup> We know that those in power may keep secrets, lie, or spin the truth to mislead. Our work will be scientific insofar as we know and disclose the limits of our data and fashion our claims accordingly. Often, the best we can offer is a provisional and qualified picture of the world as our best guess of what others would find if they looked at what we examined. Yet, this is an advance over supporting one's normative position by anecdotes, urban legends, or statements based on no more than what we want to believe, because too many law professors are expert in finding an example or two of something, and asserting that it is a typical or important enough phenomenon to worry about. Social science teaches that we can and should do better. Professor Peter Medawar reminds us that we need some defense against "the undisciplined exercise of the imaginative faculty to produce hypotheses held true because of their inspirational origin."<sup>140</sup>

Social scientists would not be surprised by the cautions that I have raised. Most of them are people who are very aware of threats to validity

139. See Shirley A. Dobbin et al., *Surveying Difficult Populations: Lessons Learned from a National Survey of State Trial Court Judges*, 22 JUST. SYS. J. 287, 288 (2001) ("[I]nterest in the topic of study is a good predictor of a decision to participate in the survey project, especially when surveying busy professionals with heavy time demands."); Brion Sever et al., *Successfully Acquiring Data from the Criminal Courts: Is It What You Know, Who You Know, or What You Don't Tell Them?*, 22 JUST. SYS. J. 315, 315 (2001) ("[S]trategies include using a contact within or close to the agency, as well as withholding the exact nature of the researcher's study."); see also Matt Bradshaw, *Contracts and Member Checks in Qualitative Research in Human Geography: Reason for Caution*, 33 AREA 202, 203 (2001) ("[T]here are differences in the power relations between a researcher and a low-income householder, as opposed to those between a researcher and a senior manager."); David Shulman, *Dirty Data and Investigative Methods: Some Lessons from Private Detective Work*, 23 J. CONTEMP. ETHNOGRAPHY 214, 250 (1994) ("Although fieldworkers must carefully avoid representing informants as the fieldworkers would like to have them be, they should also be cognizant of not just depicting subjects as subject wants.").

140. P.B. MEDAWAR, *PLUTO'S REPUBLIC* 61 (1982).

and the nature of evidence.<sup>141</sup> Furthermore, when we begin getting studies reaching similar results using different methods that have been done in different places, we can have more confidence that we are getting something close to a picture of the law in action. In taking this position, I am doing little more than accepting what Professors Walter Blum and Harry Kalven wrote almost fifty years ago.<sup>142</sup> Blum and Kalven brilliantly catalogued the many threats to the validity of the survey research in Professor Samuel Stouffer's work on American attitudes toward Communists.<sup>143</sup> In the end, however, they concluded that this research was highly valuable. In commenting on their article, Professor Paul Lazarsfeld said: "rather than trying in a utopian way to circumvent these limitations [of empirical social science], it is better to see all their logical implications and use them in the devising of new research instruments, as well as in the interpretation of research findings."<sup>144</sup>

New Legal Realism, I predict, will accept Professors Maureen Cain and Janet Fitch's observation: "[t]he 'facts' themselves speak with a political voice and kick with a political boot."<sup>145</sup> Cain and Fitch put the word "facts" in quotation marks to remind us that the political voice and political boot reflect what people who count in the society think is true. Sometimes, good empirical work can affect what such people accept as true, but we must acknowledge that people are well armed with defenses to ward off offensive or inconvenient knowledge. Nonetheless, accepting that people may reject good evidence of what they do not want to believe does not justify abandoning the effort to assemble the best evidence we can about what is going on. New Legal Realism will, I predict, insist that there are facts behind the clouds of interpretation that reflect all kinds of bias. As Cain and Fitch insist, facts can kick.

141. See, e.g., Juliet Corbin & Anselm Strauss, *Grounded Theory Research: Procedures, Canons and Evaluative Criteria*, 19 ZEITSCHRIFT FÜR SOZIOLOGIE 418 (1990) (explaining how the usual scientific canons can be reinterpreted for qualitative research).

142. Walter J. Blum & Harry Kalven, Jr., *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science—Observations on "Communism, Conformity and Civil Liberties"*, 24 U. CHI. L. REV. 1 (1956).

143. SAMUEL ANDREW STOFFER, *COMMUNISM, CONFORMITY AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND* (1955).

144. Paul F. Lazarsfeld, *Comment*, 24 U. CHI. L. REV. 65, 69 (1956).

145. Maureen Cain & Janet Fitch, *Towards a Rehabilitation of Data*, in PRACTICE AND PROGRESS: BRITISH SOCIOLOGY 1950-1980, at 105, 115 (Philip Abrams et al. eds., 1981). Professors Maureen Cain and Janet Fitch also say:

In constituting data by a variety of methods, one is not asking which is the true or best indicator of some absent essence but rather what these data, having been converted into evidence, have to say. What place can be made for them in the initial theory? How can it grow to take account of them? What refinements does this evidence necessitate and precipitate? These questions make a virtue of the qualitative differences between the items of evidence collected.

*Id.* at 112.

At the Symposium, Galanter pointed out that the Old Legal Realism was the party of ideas. At least, until the 1950s, those opposed to it stood on tradition. Today, however, a New Legal Realism can expect to be met by criticism based on social science or even studies that gather data designed to challenge the new legal realist efforts. As long as both sides play the science game honestly, this should all contribute to the good.<sup>146</sup>

We will not be surprised when a bottom-up empirical approach finds that a program enacted by liberals fails to achieve its announced goals of helping ordinary people. Certainly one strand of law and society work has questioned attacking social problems by creating individual rights without providing any real means of implementing them.<sup>147</sup> A New Legal Realism might well support some or many conclusions generally favored by conservatives. The old cliché is apt: it is an empirical question.

I would be delighted and surprised if a New Legal Realism at least brought the picture of functioning legal systems, inherent in my seven shining nuggets, into legal scholarship and teaching.<sup>148</sup> Of course, one can analyze legal rules in terms of their consistency with some normative system. Often this is useful work. However, very often the discussion shifts to evaluating a rule in terms of its likely consequences. Almost always, this is an unexamined and difficult empirical question. A rule of, say, contract law can celebrate the goal of efficiency. Whether it produces a truly efficient result is always an open question until one looks at the law in action and the living law.

Suppose that legal scholars were to move from an almost purely doctrinal approach to one that incorporated at least some of the findings of Law and Society. A recent article by Professor Wolf Heydebrand offers one suggestion about where this might take us. Heydebrand argues that we have moved more and more away from Weber's formal and substantive rationality<sup>149</sup> to something Heydebrand calls "negotiated process

146. *But see* Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences*, 2002 WIS. L. REV. 1 (stating that what passes for social science becomes a tool in political battles as a way of legitimating what is sought by the powerful).

147. *See, e.g.*, GERALD ROSENBERG, *THE HOLLOW HOPE* (1991); STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974).

148. Compare this view with Malcolm M. Feeley, *Three Voices of Socio-Legal Studies*, 35 ISR. L. REV. 175, 203 (2001) ("Legal scholars write for judges in the common law countries and law commissions elsewhere, and social scientists—like scholars more generally—tend to write for each other."). However, Professor Gregory Scott Crespi has suggested that courts do not draw on contracts scholarship. *See, e.g.*, Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105 (2004). More and more, it tends to be written for other scholars who play one of the games included within the academic contracts world. *Id.*

149. *See* Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality: Or, Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, in MAX WEBER'S ECONOMY AND SOCIETY 322 (Charles Camic et

rationality."<sup>150</sup> This is a mode of governance based on the "logic of informal, negotiated processes within social and sociolegal networks."<sup>151</sup> These networks are not accountable to elected or appointed officials.<sup>152</sup> Process rationality tolerates diversity and indeterminacy, and it does not yield transparent, highly predictable law.<sup>153</sup> We lose constitutional safeguards, and we lose both substantive and procedural rights.<sup>154</sup> Moreover, some individuals and interests will be able to play the game of informal, negotiated processes better than others.<sup>155</sup> Rather than imposing some restraint on power, this form of governance often amplifies the benefits of holding power. It is highly attractive to the interests of corporate and transnational governance.<sup>156</sup> Professor Jane Larson warns us: "Viewed from the perspectives of legality and equality, the subject of informality is a minefield. Even so, lawyers and legal scholars must take the lead in formulating policy responses to informality."<sup>157</sup>

A New Legal Realism could challenge the adequacy of studying the legal system when that concept is defined formally and narrowly. Reality is messy. Sharp lines cannot be drawn between the formal and the informal or between the public and the private.<sup>158</sup> For example, today all

al. eds., 2005); Wolf Heydebrand, *Process Rationality as Legal Governance*, 18 INT'L SOC. 325 (2003).

150. Heydebrand, *supra* note 149, at 327.

151. *Id.* at 326.

152. *See id.* at 326.

153. *See id.* at 329.

154. *See id.* at 334, 336.

155. *See id.* at 326.

156. Compare this view with Stewart Macaulay, *Business Adaptation to Regulation: What Do We Know and What Do We Need to Know?*, 15 LAW & POL. 259, 268 (1993).

What should we say about a society where legislatures, agencies, and the top command of the Air Force make policy decisions, while officials at the local level fashion compromises that reflect their wise or biased view of competing values? What should we say when these decisions about how far we should apply the law are significantly influenced if not controlled by corporate lawyers?

*Id.*; *see also* Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986) (dealing most critically with the situation that Professor Wolf Heydebrand calls "process rationality"). Professor Owen Fiss likewise argues: "settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised." Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

157. Larson, *supra* note 105, at 181.

158. *See, e.g.*, John Griffiths, *The Social Working of Legal Rules*, 48 J. LEGAL PLURALISM 1, 4 (2003) ("[T]he connection between a legislative text and actual behavior is not at all obvious."); Stewart Macaulay, *Crime and Custom in Business Society*, 22 J.L. & SOC'Y 248, 253 (1995) ("[T]hat corporate police are not public legal officers makes a difference. We may risk obscuring this if we fail to distinguish public from private, formal from informal.").

kinds of commercial disputes go to arbitration rather than to the civil justice system in the public courthouses.<sup>159</sup> However, one major source of arbitrators and mediators is retired judges who once worked in the public courts. Professor Stacy Burns studied mediation by acting and former judges.<sup>160</sup> They tend to evaluate each side's legal arguments and what would likely happen in litigation.<sup>161</sup> Their experience and the legal culture that they bring with them may limit how far judges would go beyond legal or factual issues to encompass business, relational, or personal issues.<sup>162</sup> Are these former judges and their mediation efforts part of the legal system? Can you study modern commercial law and ignore them? Some trial judges bring great pressure on the parties to settle rather than try cases.<sup>163</sup> They even do such things as bringing the parties before them without their lawyers.<sup>164</sup> Indeed, this is more likely to happen in litigation involving major corporations with large stakes. Can we study law and ignore the settling judge? Some commentators argue that lower court judges who have ambitions for the upper appellate bench trim their decisions so that they remain acceptable to those who determine such appointments.<sup>165</sup> Can

159. See Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 932 (2002) (arguing that the emergence of alternate dispute resolution in lieu of increased litigation has "created a low-end justice for the rank and file"); Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 778 ("Many, and probably most, parties to contracts disputes do not litigate or even threaten to do so."). Business elites can use arbitrators and mediators "whose background and the selection process ensured they would be able to understand and handle large business disputes." Garth, *supra*, at 949. However, at the same time, today we have tilted toward a kind of justice that "includes a pecking order that dictates the kinds of cases allowed into the courts." *Id.* at 952. Bryant Garth said that we have "created a low-end justice for the rank and file. . . . [We] push ordinary litigants into settlement-oriented ADR processes dominated by quick-and-dirty arbitration and by mediation conducted by private individuals accountable neither through review processes or appeal." *Id.* at 932.

160. Stacy Burns, "Think Your Blackest Thoughts and Darken Them:" *Judicial Mediation of Large Money Damage Disputes*, 24 HUM. STUD. 227 (2001).

161. See *id.* at 241-42.

162. See *id.*

163. See Marc Galanter, ". . . A Settlement Judge, Not a Trial Judge:" *Judicial Mediation in the United States*, 12 J.L. & Soc'y 1, 7 (1985) (noting that trial judges increasingly accept promoting settlement as part of their task and exchange information about how to get parties to settle).

164. See Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 73-77 (2003).

165. See Barbara M. Yarnold, *Do Courts Respond to the Political Clout of Groups or to Their Superior Litigation Resources/"Repeat Player" Status?*, 18 JUST. SYS. J. 29 (1995) ("[C]ourt outcomes in abortion cases were linked to political factors, with civil liberties groups and Planned Parenthood affiliates obtaining preferential decisions from the federal courts."). Compare Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 427 (1992) (arguing that "constituency influence in

we study law and ignore this? In sum, ideas of public and private, formal and informal, and the like, break down when we look at law from the lawyer's office or the executive suite. Much of the lawmaking and dispute resolution in any society is carried out by private governments influenced directly or indirectly by public ones.

Furthermore, once we see the need to study law in an international context, things really get messy.<sup>166</sup> It becomes obvious that we cannot limit ourselves to governments as actors and our ideas of what is legal action must expand. As I pointed out in an article on private government,

In the late 1960s, when official United States policy imposed a boycott on Cuba, the Ford Foundation sent a number of Third World scholars and government officials to visit Havana. The foundation could do "privately" what the United States government did not wish to do publicly . . . .

. . . . .

. . . Private governments such as corporations, churches, and labor unions can pursue their own foreign policies, in concert with or in opposition to official policy . . . . Nations may form alliances with large multinational corporations or such corporations may seek to overthrow governments. Churches may battle nations about human rights, seeking to affect what is

state supreme courts is enhanced by competitive electoral conditions and experience with electoral politics"), with Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004) ("The political party of the appointing president is a fairly good predictor of how individual [appellate court] judges will vote.").

166. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS* 4 (2002) ("[T]he 'failure' of law and development is now generally conceded."); GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant G. Garth eds., 2002) ("We are convinced that it is necessary to go well beyond legal institutions and reforms to understand the position of law and how it is changing. We need to build tools for research that will place legal reform and legal reformers in their broader social context."); Alberto Martinelli, *Markets, Governments, Communities and Global Governance*, 18 INT'L SOC. 291, 291 (2003) (examining "the contradictory character of the social world in the 21st century as a single system and fragmented world, and identifying global integration and global governance of key problematic questions"); Robert Hunter Wade, *US Hegemony and the World Bank: The Fight Over People and Ideas*, 9 REV. INT'L POL. ECON. 201, 201 (2002) (drawing "broader conclusions about how hegemony actually works, about the extent of World Bank autonomy, and about the debate on development agendas").

called world public opinion. Labor unions may boycott goods from certain nations.<sup>167</sup>

All kinds of people and organizations create norms and can impose sanctions. Sometimes they mimic legal action; sometimes they do not. There is a great deal of bargaining in the shadow of this kind of law. Lawyers scramble to speak with authority, often with about as much substance as the Wizard of Oz possessed. But, the lesson of modern international governance is that we should learn to see the same kinds of things on the local level.

One goal of a New Legal Realism is to get this bottom-up perspective into the law schools. The temptation is to abandon this project as hopeless. Yet, law schools have influence not only on training students, but also on legal reform and public perceptions of our legal systems. Most of us who have taught law for some time find elections involve voting for one of our former students rather than another who is his or her opponent. Moreover, we find even more of our former students when we walk through the state capitol and encounter all of those who serve on legislative staffs. We risk being marginalized if we ignore the legal academy. History also teaches that, if we affront conventional law professors and the legal profession, these are powerful enemies who can retaliate.

Even after a career spent on the margins, I still have some hope.<sup>168</sup> We can point to law professors at many law schools, some with social science degrees, who do empirical research. Many more people are entering law teaching who have both a Ph.D. in a social science and a law degree. Such people can read data in a table and are not terrified by a statistic. There are law professor members of the Law and Society Association, and they do not all work at Wisconsin, Buffalo, Denver, the Jurisprudence and Social Policy Program at Berkeley, or the American Bar Foundation. There are even some terrific empirical scholars at both Harvard and Yale. Our contracts casebook, *Contracts: Law in Action*<sup>169</sup>

167. Macaulay, *supra* note 77, at 452.

168. We can find examples of work that expands the paradigm of scholarship in law reviews in ways that I would call New Legal Realism. *See, e.g.*, William A. Klein & Mitu Gulati, *Economic Organization in the Construction Industry: A Case Study of Collaborative Production Under High Uncertainty*, 1 BERKELEY BUS. L.J. 137 (2004); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

169. *CONTRACTS: LAW IN ACTION* (Stewart Macaulay et al., 2d ed. 2003). "Et al." conceals the fact that the editors are myself and Professors John Kidwell and William Whitford. *Id.* Professor Marc Galanter joined us for the first, but not the second, edition. *CONTRACTS: LAW IN ACTION* (Stewart Macaulay et al. eds., 1995). The project that produced the book was such a partnership that I have always regretted the citation form that reduces real contributors to "et al." The editors' favorite title of a review of the book is William J. Woodward, Jr., *Contracts for Grown-ups*, 47 J. LEGAL EDUC. 139 (1997). *But*

reflects what I think of as some of the New Legal Realism. Much to my surprise, about twenty schools use the book. The times may be changing so that there is more interest in how law works rather than an exclusive focus on appellate cases and elegant theories. Indeed, I can hear Johnny Hodges's alto sax blowing: *Things Ain't What They Used To Be*.

*see* Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55 (2004) (criticizing how modern law schools teach the subject of contracts).