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# New Legal Realism: Unpacking a Proposed Definition

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*What is “new legal realism?” How, if at all, does it differ from work in law and society? Does it have much to do with concerns of law professors? Where does it stand in the law school work now and in the immediate future? What, if anything, do we gain by turning toward this approach to legal study?*

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## I. TRYING ON A DEFINITION FOR SIZE

Lynn LoPucki fashioned my favorite description of new legal realism. He tells us: “Born of the old Realism and nurtured in the law and society movement, the New Realism seeks to discover and teach *the meaning of law from its impact at the point of delivery*—not just in the courtroom, but in the hallway, the lawyer’s office, and occasionally even more distant realms.”<sup>1</sup> He continues: “At its narrowest, law

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1. Lynn M. LoPucki, *Bringing Realism to the Classroom—A Review of Warren and Westbrook’s The Law of Debtors and Creditors*, 1987 WIS. L. REV. 641 (emphasis added) (footnotes omitted). Lynn M. LoPucki & Walter O. Weyrauch offer a wonderful example of “the activities of lawyers,” in their *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1414–25 (2000). They offer the background of the litigation and appeals behind the published opinion in *Texaco v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987), arguing that “[e]ven if the ‘merits’ should ever reach a decisionmaker, it will be a decisionmaker

included the activities of lawyers. At its broadest, the study of law was no less than the study of society.”<sup>2</sup>

At the outset, I interpret this statement broadly. New legal realism must include situations where law is delivered neatly to the letter of the law. But LoPucki also includes situations where law has a varying impact at the point of delivery as well as those situations where law is supposed to have an impact but has little or none. Indeed, sometimes if we look at the point of delivery, we will find that law has an impact but not the one that was intended by the lawmaker. LoPucki points away from legislatures passing statutes and appellate courts issuing opinions. There is more to the story of law. He would have us look at what is going on in legislative and courthouse hallways and in lawyers’ offices. We should include in a realistic picture of law a well-connected lawyer sitting in the office of someone who holds public or private power. The role of the lawyer can create an opportunity to do many things other than advocating a position to a court by using legal concepts. It takes little thought to see that the meaning of law can be transformed by lawyers using contacts with the powerful.

We have to look beyond the activities of lawyers. The criminal law is delivered through an elaborate system involving police, prosecutors, defense lawyers, clerks of court, trial judges and, on occasion, appellate courts. State and federal administrative agencies also are involved in what delivery of law takes place. The impact of law is affected by such things as discretion, bargaining in the shadow of the law, and political influence.

Sometimes law can be delivered by public attitudes affected by statements about legal rules in a motion picture or television drama or even assertions by those chatting at a corner tavern or at a playground as they watch their children. Indeed, misstatements of the law by a talking head on television can affect the attitudes and behavior of viewers who accept what they hear either as the law or what ought to be the law. When we add the power of social media to our thought, we are a long way from classical legal education. But videos of the police in action can go viral on social media and provide demands for change. As LoPucki insists: “the study of law was no less than the study of society.”<sup>3</sup>

## II. WHAT DOES NEW LEGAL REALISM ADD TO WHAT IS ALREADY AT HAND?

Why do we need a new legal realism? We have what remains of classic legal realism in the law schools, and we have about a half-century of modern law and society studies. LoPucki tells us that the new legal realism was “nurtured in the law

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identified by the game, and the ‘merits’ will reach that decisionmaker in a form determined by the game.” LoPucki & Weyrach, *supra*, at 1412.

2. LoPucki, *supra* note 1, at 642.

3. *Id.*

and society movement.<sup>24</sup> This suggests that it is something more than, and sometimes something different from, what has occupied law and society studies. Elizabeth Mertz tells us that the goal of new legal realism is “to find successful ways to translate between law and social science.”<sup>25</sup> It is a project “which springs largely from the law and society tradition but which adds a focus on translating between the worlds (and words) of, on the one hand, sociolegal researchers and scholars concerned with the practice of law—and, on the other hand, legal professionals and more traditional legal scholars.”<sup>26</sup>

Some would limit finding any facts related to law to the practices of a particular social science or to particular methods of establishing patterns of facts and relationships.<sup>7</sup> If those who follow new legal realism, however, want to make common cause with “more traditional legal scholars,” we are going to have to take a very broad approach. The quantitative social sciences were not fashioned to study the law in action. Particular social science methods of reaching conclusions may make the risk of error less probable. Many of these methods, however, make demands that those studying the impact of law at the point of delivery often cannot meet. Sometimes what is necessary is impossible; sometimes it might be possible, but far too expensive in a world of limited research grants.

We have to ask how, and whether, social scientists can help legal scholars find out what they want to know without running the risk of making great mistakes.<sup>8</sup> Sometimes all the social scientist needs do is to hand the legal scholar an article or a chapter in a book, and the text will communicate accurately the ideas found there. Often, however, what appears in such places must be translated for those who have not mastered the language. Seldom can you just grab a “fact” from social science and “plug it in” to a law review article without running a real risk of error. For example, Professor Gregory Mitchell notes that scholars doing behavioral law and economics too often replace the assumption of rational human behavior frequently found in traditional law and economics work, with the opposite view. People are assumed never to be rational.<sup>9</sup> They have systematic biases and errors in judgment

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4. *Id.* at 641.

5. Elizabeth E. Mertz, *Introduction* to STEWART MACAULAY ET AL., *NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE* (Elizabeth E. Mertz et al. eds., 2016).

6. *Id.*

7. *See, e.g.*, Stewart Macaulay & Elizabeth Mertz, *New Legal Realism and the Empirical Turn in Law*, *in* *LAW AND SOCIAL THEORY* 195, 198–202 (Reza Banakar & Max Travers, eds., 2d ed. 2013).

8. Those interested in doing or using empirical research on the operations of the legal system will benefit from reading *CONDUCTING LAW AND SOCIETY RESEARCH: REFLECTIONS ON METHODS AND PRACTICES* (Simon Halliday & Patrick Schmidt eds., 2009). The book presents interviews with twenty-six law and society scholars, and offers their reflections about coping with problems that they encountered in conducting the research that yielded some of the most important studies in the law and society field. The book ends with an article by Herbert Kritzer in which he draws conclusions from the collected interviews. *See* Herbert M. Kritzer, *Conclusion: “Research is a Messy Business”—An Archeology of the Craft of Sociolegal Research*, *in supra*, 264, 264–85.

9. *See* Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New*

regardless of their situations.<sup>10</sup> However, Professor Mitchell offers much evidence that situational variables can affect the degree to which human behavior is or is not rational.<sup>11</sup>

Professor Mertz studied what goes on in law school classrooms. She found that lawyers learn to have little humility about language or their ability to deal with the fields of others.<sup>12</sup> Law professors challenge students with ideas ranging from medicine to economics. Bright people can understand much, but there is always the risk of not seeing an idea in its larger context that may offer necessary qualifications. More traditional legal scholars may be willing to look at social science, but they must remember that it is not written for outsiders.

Legal scholars may well bring something from their culture to the social science approach to legal topics. Holding a Ph.D. does not free a scholar from the risk of reading, say, a statute literally without an appreciation of the context and traditions that give its terms meaning. Someone with a lot of social science education can still read the law just like first-year law students.

And lawyers often combine a confusing mixture of being ready to fight for principle and a real skill in finding an acceptable compromise that they can sell to opposing parties. They may offer language that is more suited to calm angry partisans than to convey unpleasant truths. Assuming that all lawyers are litigators or appellate specialists can lead social scientists to make serious mistakes in designing research. Finally, legal questions usually involve normative issues based in the culture in question, and law frequently reflects the conflicting norms within a society. Just getting the facts straight will not necessarily solve every problem.<sup>13</sup> Law professors deal with such matters as part of their stock in trade.

### III. ESCAPING APPELLATE CASES AND THE ANNOTATED CODE OR PUTTING THEM IN THEIR PLACE?

Why should we be interested in looking seriously at the meaning of law from its impact at the point of delivery? Often lawmakers claim to have designed rules, statutes, and administrative regulations as the means to produce consequences in

*Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1915 (2002).

10. Gregory Mitchell, *Tendencies Versus Boundaries: Levels of Generality in Behavioral Law and Economics*, 56 VAND. L. REV. 1781, 1784–97 (2003).

11. See Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 109–14 (2002).

12. See Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translation*, 34 J. MARSHALL L. REV. 91, 99 (2000). See generally ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

13. See, e.g., Justin Farrell, *Eco Conflicts*, FIN. TIMES, July 26, 2015, at 1 (“Environmental conflict is not ultimately about scientific true and false, but about moral right and wrong. It is not about the facts themselves, but what makes the facts meaningful. There are important moral and spiritual bases of conflict that observers and participants in the conflict have ignored, muted or simply misunderstood.”).

society.<sup>14</sup> Marc Galanter has sketched the tacit model of much, if not most, law review writing.<sup>15</sup> He finds that legal scholars tend to assume that if you read an appellate opinion or a statute, you will understand its likely consequences. If you assume that the behavior of legal actors generally conforms to rules, it follows that “[t]he authoritative normative learning generated at the higher reaches of the system provides a map for understanding [the entire legal system].”<sup>16</sup> Even legal scholars who have never read a page of the *Law and Society Review* know that this is not always true. Of course, few of us really think this; too often we just assume in what we publish that legal officials and the public will follow the law in the books. Sometimes rules of law do work in a large percentage of situations. Sometimes they do not. New legal realism recognizes this and demands that we put doctrine in its place.

Sometimes law affects behavior, and it may work in some situations even if not in others. Often, however, we find that legal systems operate with institutions, structures, and practices that affect the delivery of law. About fifty years of work in the modern law and society tradition has established a number of fundamentals about most legal systems. Two of the most important, and the most obvious as well, are (1) law is not free, and (2) people cope with law and often find ways to limit its burden on their endeavors.<sup>17</sup>

#### *A. Enforcing Every Legal Right Is Far Too Expensive*

Legal systems almost always face issues of limited resources.<sup>18</sup> Enforcing the law usually costs money to pay people such as police, judges and lawyers. Those charged with running the legal system must consider whether their appropriations will be affected by the wishes of those who count. Often legal actors on the ground will have to take steps to manage these kinds of considerations. For example, if we look at American criminal law, we find a great deal of discretion held by individual police officers and those who command police departments. Officials are expected to deal with what is important, and police officers cannot be positioned on every block at all times in the city they patrol. Prosecutors, too, have important choices

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14. See, e.g., James M. Galliher & John F. Galliher, *A “Commonsense” Theory of Deterrence and the “Ideology” of Science: The New York State Death Penalty Debate*, 92 J. CRIM. L. & CRIMINOLOGY 307 (2002). Legislators who supported the death penalty argued that common sense established that the death penalty deterred murder. See *id.* at 327. They rejected studies that questioned the deterrent power of the death penalty as mere liberal ideology. See *id.* at 311–12. Section 1-103 of the Uniform Commercial Code provides that the Code is to be “liberally construed and applied to promote its underlying purposes and policies.” U.C.C. § 1-103 (AM. LAW INST. & UNIF. LAW COMM’N 2012). It then lists three of these purposes. At least the second is aimed at affecting behavior: “to permit the *continued* expansion of commercial practices through custom, usage, and agreement of the parties . . .” *Id.*

15. Marc Galanter, *Notes on the Future of Social Research in Law*, in *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* 25, 25–27 (Stewart Macaulay et al. eds., 1995).

16. *Id.* at 27.

17. See Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TULANE L. REV. 1161, 1172–74 (2006).

18. See Marc Galanter, “. . . *A Settlement Judge, Not a Trial Judge:*” *Judicial Mediation in the United States*, 12 J.L. & SOC’Y 1, 8 (1985).

open to them. Do they pursue a case that will be costly to try and that is not of high priority in the community at the time? If they choose to do so, with what crimes do they charge the accused? Often the problem is how to deal with a mass of cases when the formal law, and our legitimating rhetoric, seem to call for each case to be treated individually through a complex and costly procedure. The American solution is plea-bargaining.<sup>19</sup> Police officers,<sup>20</sup> prosecutors, and defense lawyers<sup>21</sup> persuade those arrested that they will be better off accepting a lesser sentence that will follow from a guilty plea than risk the much greater sentence likely to follow from losing at trial. Clerks of court and trial judges reinforce the pressure to make a guilty plea rather than contest the issue and take up the time of an understaffed district attorney's office and the trial court system. Defendants who go to trial and are found guilty often are given longer sentences than defendants in similar situations who entered a guilty plea and did not waste the court's time.

Administrative agencies also pursue strategies to gain the greatest possible compliance by individuals and organizations that are regulated. Instead of imposing sanctions, agency officials can work to help the regulated comply.<sup>22</sup> They can also forget past violations as a reward for making present changes.<sup>23</sup> These officials also are likely to allocate their resources to what they see as the most important problems or those most likely to be supported by those who appropriate money to their agency. On the other hand, well-funded organizations can begin complicated litigation to delay the implementation of administrative regulation and to create the possibility of a settlement.<sup>24</sup> The fact that some well-known organizations can do this may affect the willingness of an administrative agency to take action—especially when the agency knows that it is only the first step in what promises to be an expensive legal war. Some regulated organizations can “capture” an agency. Their influence over elected officials may mean that the regulated can veto agency officials and staff who might seek forms of regulation that would burden those regulated. Moreover, elected officials may limit the appropriations for agency programs that burden important constituents.

If we look at the civil side of the American legal system in action, again we

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19. See Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 12 LAW & SOC'Y REV. 247 (1979).

20. Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259 (1996). Leo reports the tactics used to trick criminal suspects into confessing their guilt. See *id.* at 260–62.

21. See, e.g., Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967). Blumberg finds that criminal defense lawyers often play the role of “double agent,” both arguing for their client but also persuading their client to plead guilty. *Id.* at 28–31.

22. See, e.g., Stewart Macaulay, *Business Adaptation to Regulation: What Do We Know and What Do We Want to Know?*, 15 LAW & POL'Y 259, 261 (1993).

23. *Id.*

24. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 109–11 (2001).

find great concern about the mass processing of large numbers of disputes despite such things as contract, property, and tort law, which seem to focus on individual rights and on the precise facts in each case.<sup>25</sup> Trial judges, court commissioners, and clerks of court create pressure to settle cases rather than go to trial.<sup>26</sup> Plaintiffs' lawyers must worry about their clients' ability to pay for legal services, and many defense lawyers are skilled in tactics designed to increase costs and delay. Delay and cost barriers to using the legal system combine with uncertainties about the final outcome to deter parties from going ahead with litigation. Some sophisticated repeat player defendants are skilled in moving for summary judgment and then settling if they cannot get the case thrown out at this stage.<sup>27</sup> Indeed, the success of the incentives to settle rather than litigate is suggested by a large empirical literature about "the vanishing trial."<sup>28</sup>

Any new statutory right or judicially created cause of action must pass through the "law is not free"<sup>29</sup> barrier to have a chance of making much impact beyond serving those people ready, willing, and able to finance their use of the legal system. Rationing justice by cost barriers raises many normative problems. Everyone is said to have rights, but the claim is not as impressive if only the very rich can afford to implement them.

### B. People Cope by Sidestepping the Law

People are not puppets on the end of a string, dancing to the tune being played by legal authorities. Rather, people cope with laws to avoid or limit their impact on

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25. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 108–09 (1974).

26. See Galanter, *supra* note 18, at 6–8; Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

27. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 483–84 (2004).

28. See generally Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571 (2004); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627 (2004); Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637 (2004); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration and Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659 (2004); Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004); Galanter, *supra* note 27; Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735 (2004). But see John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know about Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 211 (2005) ("Before becoming horrified at the possible demise of the trial in general, we should have a clearer picture of the actual changes and their consequences. In the meantime, the insights of legal pluralism can help provide a balanced analysis by recognizing that such adjudication occurs before trial and outside the courts.").

29. Macaulay, *supra* note 17, at 1173.



what people want to do. Ordinary people, for example, can be paid for services in cash and, in many situations where they have not left a paper trail, they run little or no risk of being sanctioned for failure to pay income taxes on this money. When state highway patrols began checking the speed of cars on freeways with radar devices, at least some motorists responded not by slowing down generally but by buying radar detectors and slowing down only when there was a risk of being caught. Wealthy individuals and major corporations can hire professionals expert at avoiding or minimizing the impact of law. Law, business, and other disciplines in universities train large numbers of such people who work with what Doreen McBarnet calls “creative compliance.”<sup>30</sup> Apparently, computer professionals and engineers helped Volkswagen hide the fact that its diesel engines did not meet American standards for pollution control.<sup>31</sup>

Business interests have long lobbied state and federal legislatures for laws that they say will encourage the creation of jobs. On the state level, lengthy budget bills often contain unnoticed provisions that favor those who can make campaign contributions.<sup>32</sup> Sometimes business interests seek to minimize the appropriations to legal agencies that enforce the laws.<sup>33</sup> More recently, well-funded political action committees have worked to finance the election of state supreme court judges, who will decide cases “reasonably” from the PAC’s point of view.<sup>34</sup>

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30. See, e.g., Doreen McBarnet, *Law, Policy and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?*, 15 J.L. & SOC’Y 113 (1988); Doreen McBarnet, *Whiter Than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma*, 42 BRIT. J. OF SOC. 323 (1991) (focusing on the manipulation of the law by the powerful. She looks at a range of devices that arguable comply with the letter of the law, shade its requirements, or evade but make this hard to detect.); Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 MOD. L. REV. 848, 848 (1991) (discussing “creative compliance,” that is, “using the law to escape legal control without actually violating legal rules”).

31. See, e.g., Jack Ewing, *Volkswagen Investigating if Emissions Deception Was More Extensive*, N.Y. TIMES, Oct. 23, 2015, at B3; Richard Milne, *Culture Clash Gives Clue to Origins of Volkswagen Emissions Scandal*, FIN. TIMES, Oct. 7, 2015, at 16; Richard Milne, *Volkswagen Has Suspended 10 Senior Executives in Emissions Probe*, FIN. TIMES, Oct. 22, 2015, at 14.

32. See, e.g., Steven Verburg, *Dane County May Mull Enbridge Oil Spill Options Left Open by GOP*, WIS. ST. J. (Aug. 17, 2015), [http://host.madison.com/wsj/news/local/environment/dane-county-may-mull-enbridge-oil-spill-options-left-open/article\\_625e487c-dca0-517b-bef8-d93860e70a49.html](http://host.madison.com/wsj/news/local/environment/dane-county-may-mull-enbridge-oil-spill-options-left-open/article_625e487c-dca0-517b-bef8-d93860e70a49.html) [<https://perma.cc/US6F-89UT>] (“Dane County leaders say they may consider ways to work around a law that was slipped into the state budget blocking a local requirement that the Enbridge Energy pipeline company purchase oil spill insurance.”).

33. See Ronnie Greene & Chris Hamby, *Residents of Polluted U.S. Communities Fear Planned Cuts in EPA Enforcement*, CTR. FOR PUB. INTEGRITY (Apr. 9, 2014, 6:00 AM), <http://www.publicintegrity.org/2014/04/09/14550/residents-polluted-us-communities-fear-planned-cuts-epa-enforcement> [<https://perma.cc/V6XC-UW8F>].

34. See Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at 1 (reporting that in a class action suit before the Supreme Court of Ohio in 2004, every justice in the 4 to 3 majority had taken money from affiliates of the companies being sued while every justice in the minority had taken money from the lawyers for the plaintiffs). In October 2015, the Brennan Center for Justice and the National Institute on Money in State Politics issued a report on spending on state supreme court races. See SCOTT GREYTAK ET AL., BRENNAN CTR., BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013-2014 (Laurie Kinney

Lawyers for companies that deal with consumers and employees have fashioned clauses, placed in standardized form contracts, to minimize the burden of individual rights and government regulation on their clients. The examples seem endless, but a few can help suggest the kinds of things that are done. Law professors often teach students about frequently used standard contract clauses that exemplify classic ways in which drafters “cope” within and around the limitations set by formal law, and the way that courts respond. For example, many contracts classes have long analyzed *Hadley v. Baxendale*.<sup>35</sup> This 1854 decision involved a contract between “well-known carriers” and a flour mill.<sup>36</sup> The carrier, Pickford & Co., was to take a broken mill shaft to the firm that had manufactured it for repair.<sup>37</sup> The shipment was delayed and the millers sued for the profits that they would have made had the repair been made and the part reinstalled on time.<sup>38</sup> The Court of Exchequer fashioned a rule that limited such a recovery to an amount “arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”<sup>39</sup> The carrier’s owner won the case;<sup>40</sup> these profits would not have been in the contemplation of both parties at the time they made the contract.

Those concerned with modern contract law will walk through a door into a very different world when they consider the terms and conditions on a modern Federal Express air bill. Within the large amount of gray fine print that Federal

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ed., 2015), [https://www.BrennanCenter.org/sites/default/files/publications/The\\_New\\_Politics\\_of\\_Judicial\\_Election\\_2013\\_2014.pdf](https://www.BrennanCenter.org/sites/default/files/publications/The_New_Politics_of_Judicial_Election_2013_2014.pdf) [https://perma.cc/VXA2-6FNE]. About fourth-fifths of American states elect judges. Wealthy national special interest groups bought television advertising. Many of the ads “either touted a candidate’s history of putting criminals behind bars or attacked them as soft on crime.” *Id.* at 3. There is a correlation between the amount spent and the probability of winning election. *Id.* at 7; see also Kate Giammarise, *Legislators Rethink How Pa. Judges Are Elected*, PITT. POST-GAZETTE, Nov. 9, 2015, at A1 (“The state Republican Party chairman, Rob Gleason, said he is an advocate of merit selection, though he said he has been for some time. ‘The person with the most money becomes elected a judge? That doesn’t make any sense,’ he said.”); Chris Potter, *Democrats Take Control: Wecht, Donohue Among Winners in a Sweep of 3 Open Seats*, PITT. POST-GAZETTE, Nov. 4, 2015, at A1 (“Although final spending numbers aren’t in, the three Democratic candidates spent more than \$3 for every dollar raised by the Republican slate, according to numbers provided . . . by the Brennan Center for Justice and Justice at Stake.”); Todd Spangler, *Michigan Judicial Races Most Expensive in Nation*, DET. FREE PRESS, (Oct. 30, 2015, 5:34 PM), <http://www.freep.com/story/news/local/michigan/2015/10/29/michigan-judicial-races-most-expensive-nation/74797942/> [https://perma.cc/M72G-6LYS] (“At nearly \$6 million, more was spent in Michigan on TV ads involving judicial races than in any other state . . .”). Cf. Editorial, *The Missouri Courts Plan Turns 75. It Needs Tweaking*, ST. LOUIS POST-DISPATCH, Oct. 22, 2015, at A16 (“Insiders know that while the Missouri Plan got politics out of judicial selection, it didn’t get politics all the way out. It still helps to have friends in high places, which raises a perception problem.”).

35. *Hadley v. Baxendale* (1854) 156 Eng.Rep. 145; 9 Ex. 341.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Express puts on the back of the document, there is a sentence stating that the company will not be liable for consequential damages “whether or not FedEx had knowledge that such damages might be incurred, including but not limited to loss of income or profits.”<sup>41</sup> Clearly, if we assume that courts will enforce this almost hidden clause, Federal Express has found a way to cope with the *Hadley* rule—they have avoided this part of the law of the British industrial revolution that remains in today’s common law.

Sometimes contracts professors tell students that the rules we are teaching them are “default rules.” They are what the law imposes if the parties do not bother to agree to something different. However, there are standard clauses that are very common which are found on business documents or are part of what large law firms usually provide in certain types of transactions. At some point, teaching the default rules becomes misleading because some of them seldom, if ever, go into effect. Rather, the problems lawyers face involve interpreting the customary terms printed in the documents used in conducting business. Transaction-planning lawyers have coped and worked around traditional contracts and sales law by using form contract terms. What they have done with these terms is at least as important as any default rules. Some of these common provisions will be interpreted in appellate cases, although there may be a substantial delay before this happens. Contracts scholars must discover other frequently used provisions, however, using empirical research—sometimes, they can be found neatly packaged in a continuing legal education program, but often the only way to discover and understand them is by interviewing lawyers.<sup>42</sup>

Lauren Edelman and her colleagues have published a series of studies about how employment lawyers and human resources professionals helped businesses cope with anti-discrimination regulations and with court decisions that imposed limitations on employers’ power to hire and fire.<sup>43</sup> These professionally fashioned

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41. FedEx Express New Package U.S. Airbill (revision date Jan. 2012) (on file with author). This disclaimer of consequential damages is set out in STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 113–14 (4th ed. 2016).

42. Claire Hill has written several articles about contract drafting by lawyers. See, e.g., Claire A. Hill, *Why Contracts Are Written in “Legalese,”* 77 CHI.-KENT. L. REV. 59 (2001); Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 CHI.-KENT. L. REV. 889 (2004). Contracts often have many ambiguities. But the lawyers know that if they try to negotiate to clear up matters, they might have been forced to accept a clear rejection of their position or they might have been forced to give the other side something in exchange for a precise term benefiting their client. It is far easier to state matters with terms such as “material,” “reasonable,” or “best efforts” than to fashion a precise definition. Hill argues that uncertainty increases the costs of litigation, and this creates a bond against precipitous recourse to the courts. Law students need to understand that contract drafting involves a very human process, and law professors writing about contract interpretation also need to remember this. The intention of the parties may be to leave matters to negotiation if an unlikely event ever comes up.

43. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990) [hereinafter,

procedures were not unduly burdensome to business but at the same time had sufficient apparent fairness that they could be sold to courts as reasonable interpretations of the legal standards.<sup>44</sup> As courts in many states have become more pro-business, it has become more and more difficult for an employee to establish a case under the documents and procedures related to employment in most large organizations.<sup>45</sup>

Lawyers often use arbitration as a ploy in both consumer and employment situations. Form contracts or employment manuals state that consumers and employees cannot go to court. Rather, they must try their disputes before an arbitrator selected by the seller or employer. Moreover, many of these clauses prohibit class actions.<sup>46</sup> While it is possible that some arbitration arrangements in these contexts are a significant improvement to taking cases to an overburdened court system,<sup>47</sup> at least some of these arrangements are highly questionable. For example, Gateway computers were once very popular and Gateway, Inc. originally sold most of its products by telephone or internet orders. When the computer arrived, an owner's manual was in the shipping container along with the components. The terms and conditions of sale appeared in the manual and they included an arbitration clause.<sup>48</sup> It called for arbitration of any dispute about Gateway products to be held before the International Chamber of Commerce (ICC) in Chicago.<sup>49</sup> However, all correspondence was to be sent to ICC headquarters in France.<sup>50</sup> The ICC's terms were incorporated by reference and not set out in the Gateway manual. Those rules called for a party seeking arbitration of a claim of less than \$50,000 to pay \$4,000 (this was more than the price of most Gateway products at the time) in advance, with \$2,000 not refundable even if the customer won the case.<sup>51</sup> Consumers would also have to pay their own travel costs to get to and stay

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Edelman, *Legal Environments*].

44. See Edelman, *Legal Environments*, *supra* note 43, at 1543.

45. See, e.g., Lawrence C. Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993 (1989). We discuss exceptions to an employer's power to dismiss employees at will without showing cause in MACAULAY ET AL., *supra* note 41, at 425–63. We contrast the striking differences in the approach of the courts in several states.

46. *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998). There has been much written critical of arbitration. For example, the New York Times ran a three-part investigative report, which described how corporate lawyers had fashioned a one-sided system to offset various consumer and employee rights and ward off the threat of class actions. It further offered many examples of unfair outcomes and corporate influence and control over the decisions reached by arbitrators. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1; Jessica Silver-Greenberg & Michael Corkery, *A "Privatization of the Justice System,"* N.Y. TIMES, Nov. 2, 2015, at A1; Michael Corkery & Jessica Silver-Greenberg, *When Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1.

47. See U.S. DEP'T OF LAB., THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 49–51 (1994).

48. See *Gateway 2000*, 676 N.Y.S.2d at 571.

49. *Id.* at 570.

50. *Id.* at 571.

51. *Id.*

in Chicago.<sup>52</sup> Additionally, a “loser pays” rule applied to legal fees, so that a customer who lost would be liable for Gateway’s legal fees.<sup>53</sup> A New York court ruled the clause unenforceable because it was “unconscionable.”<sup>54</sup> Undoubtedly, this is an extreme and atypical example. However, Gateway was willing to use this arbitration clause. Apparently, it did not fear that potential customers would discover that in substance, it was the claim of a right to sell computers with all faults and without warranty while not meeting the standards of the Uniform Commercial Code. Gateway did not fear using such clause would undercut whatever reputation for trouble-free performance its computers possessed.

The automobile insurance industry has spawned at least two institutions that serve to mass process claims while minimizing the costs to the insurers.<sup>55</sup> Insurance firms have adjusters rather than lawyers process claims in all but exceptional cases. Adjusters attempt to get to victims of accidents before they seek legal advice. Often these potential plaintiffs in litigation will be satisfied with a fairly quick payment of what they may see as a substantial sum but which does not reflect the amounts that insurers end up paying in big litigated cases.<sup>56</sup> In the 1990s, many insurance companies began using elaborate computer programs to determine the amounts that they would offer people who made claims against them.<sup>57</sup> The programs are designed to value the kinds of injuries typically found as the result of an accident.<sup>58</sup> Plaintiffs’ lawyers argue that the amounts that these programs produce do not reflect the large jury awards that their clients could potentially win in litigation and are therefore unfair to those making claims.<sup>59</sup>

More recently, some plaintiffs’ lawyers have created organizations that Professor Engstrom calls “settlement mills.”<sup>60</sup> These firms advertise extensively on television, and they hire nonlawyers to gather information and deal with claims. These nonlawyer employees can estimate how much insurance companies will offer to settle claims. They receive offers from insurance adjusters and persuade their clients to accept those offers. These firms do not use lawyers who know what juries award in personal injury litigation. Accident victims with smaller claims get a recovery fairly quickly with minimum transaction costs. Employees of the

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52. *Id.*

53. *Id.*

54. *Id.* at 575.

55. See, e.g., H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 24–27 (2d ed. 1980); Dawn R. Bonnett, *The Use of Colossus® to Measure the General Damages of a Personal Injury Claim Demonstrates Good Faith Claims Handling*, 53 CLEV. ST. L. REV. 107, 110 (2005).

56. See ROSS, *supra* note 55, at 20–21.

57. See Bonnett, *supra* note 55, at 110.

58. *Id.*

59. See Jerry Guidera, “Colossus” at the Accident Scene—Insurers Use a Software Program to Pay Out Claims for Injuries, but Lawsuits Claim It’s Misused, WALL STREET J., Jan. 2, 2003, at C1.

60. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 807 (2011) [hereinafter, Engstrom, *Sunlight*]; Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1486 (2009).

settlement mills help sell these awards to the clients. Those with major claims, however, do not get the large awards that an expert personal injury lawyer might produce after a slow and complicated litigation process. Such cases take a long time. They are an investment on the part of the plaintiffs' lawyer. The law firm that files a claim seeking a large recovery runs a major risk that it will invest a great deal in the case but receive little or nothing for its work if it loses or gains only a small judgment.<sup>61</sup>

Again, put very simply, if we are interested in the consequences of legal rules, we have to look at the law in action. If it costs too much to sue, win, and defend the judgment on appeal, this will deter most who have a possible cause of action. If allocating scarce enforcement resources costs too much, those in charge of administrative agencies and the police will try to avoid doing more than is absolutely necessary. If some legal demand interferes with what individuals or businesses want to do, they will try to cope. They may contract around the offending legal norm. They may create internal structures that at least look good. And they may attempt to change the law, or those who enforce it, or both. In most instances, these activities will change the likely impact of the law from what classic legal scholars might imagine (or deduce from their model).<sup>62</sup> For legal scholars to engage realistically with the world outside the law school's doors, they will have to engage in some form of empirical research—perhaps beginning by little more than just reading the empirical work found in many law reviews today.

*C. What Is the Function of the Gap Between the  
Law on the Books and the Law in Action?*

Largely to this point I have explained the gap between the law on the books and the law in action—the classic “gap problem” that occupied law and society scholars at least through the 1980s.<sup>63</sup> Some new realists want to go beyond this. They insist that we should ask why there are such gaps?<sup>64</sup> What functions do these gaps serve?<sup>65</sup> And, most importantly, who benefits from the gaps?<sup>66</sup> Indeed, some might want to ask who benefits from traditional legal education and its focus on doctrinal systems fashioned by people removed from practice. For example, David Trubek argues that the behavioral system related to processing particular types of disputes—including the relevant doctrine—“not only transforms the various individual conflicts: in so doing it ‘transforms,’ so to speak, a raw conflict of interest

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61. Daniel Fisher, *Study of “Settlement Mills” Shows Insurers Like Them*, FORBES (Dec. 3, 2010, 7:39 AM), <http://www.forbes.com/sites/danielfisher/2010/12/03/study-of-settlement-mills-shows-insurers-like-them/>; see STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS’ LAWYERS, AND ACCESS TO JUSTICE (2015).

62. See Engstrom, *Sunlight*, *supra* note 60, at 821 n.91.

63. See, e.g., Richard Abel, *Redirecting Social Studies of Law*, 14 LAW & SOC’Y REV. 805, 809 (1980).

64. See *id.* at 810.

65. See *id.* at 817–22.

66. See *id.* at 828.

into a social process with limited possibilities. The disputes that do emerge are those in which basic economic relationships are not challenged: all other possibilities are filtered out.”<sup>67</sup>

And I have suggested:

The classical model of contract . . . appeals to many legal professionals [and law students] because it seems to offer those without political or economic power the possibility of overturning the structures of the powerful in the society. Judges are supposed to respond to reasoned argument, and if their decisions importantly affect behavior, then a single skilled advocate or author of a law review article, armed only with reason, could right wrongs by persuading judges. Not only would the powerless win, but the legal professional who championed their cause would need to do only honorable and enjoyable things in order to help them. The champion works through appeals to reason and intelligence, and talks of economic and social norms, the “findings of science,” efficiency, or some other highly valued body of thought. Problems of politics, interest, power, and dominance need not be faced because they do not appear to be relevant in the world of doctrine, where it is assumed that right ideas will be crystallized into rules that are self-enforcing. . . .

. . . But many of those who examine the legal process in operation today find it difficult to retain their faith that the key to the good society resides in appellate judges, administrative agencies exercising discretion, pluralism, the morality of adjudication, or economic theory. Instead of justice, the empiricists describe a system of bargaining where “the haves come out ahead.”<sup>68</sup>

It is possible, of course, that some more traditional legal scholars may not want to give up the dream of winning the great case before the Supreme Court of the United States or writing the law review article that is read by many and which provokes major social change. A new legal realism does not say that it cannot happen; it does insist that there is a lot more going on.

#### IV. IS THERE METHOD IN OUR MADNESS?

As I mentioned at the outset, Elizabeth Mertz tells us that the goal of new legal realism is “to find successful ways to translate between law and social science.”<sup>69</sup> If our goal is to make common cause with, as she puts it, “more

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67. David Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727, 743 (1981).

68. Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 521–22 (1977) (citing Galanter, *supra* note 25, at 124–25) (internal citations omitted).

69. Mertz, *supra* note 5, at 3.

traditional legal scholars,”<sup>70</sup> we are going to have to take a very broad approach. There are many difficulties in turning to the impact of law at the point of delivery. If we follow LoPucki and want to study what goes on in the hallways of courthouses or in lawyers’ offices, we face problems of confidentiality. Much that lawyers do is secret for both very good and very bad reasons. Lawsuit settlements are typically made confidential by a clause in the contract that records the deal. Many kinds of contracts are kept secret unless a regulator demands that they be published. Lawyers want to please clients, and the safe course always is to refuse to talk to a researcher. Many lawyers would consider it even more dangerous to allow a researcher to watch or participate in backstage activity. A new legal realist scholar cannot expect that many lawyers will let her watch such things as their conferences with their clients or their negotiations with lawyers for the opposing parties.

One way to find out what is going on as lawyers do such things as planning transactions or crafting litigation strategy is to find an insider willing to be interviewed. This person will filter what she or he reports so that secrecy remains. However, interview studies raise all kinds of problems. When the experts talk about practice, are they telling you what actually happens, or are they saying what makes them and their friends look good? Are they trying to entertain you with a colorful example that delights because it is unusual and unexpected? Are they repeating accepted folklore of the practicing bar that everyone thinks is true, but that is actually not an accurate representation of reality? And does the expert really know what is going on beyond her or his little corner of the world?<sup>71</sup>

Often it is not easy to find lawyers or clients who have faced the particular type of problem that we want to study. This leads to the “snowball sample.” For example, I interview Lawyer A, and Lawyer A then sends me to lawyers B, C and E, with a suggestion that I avoid Lawyer D. Lawyer A identifies the others and uses her influence to persuade the others to cooperate and talk to me. Unless the researcher is adept and alert, important perspectives can be left out using this method. Nonetheless, when only a few people are well informed about a problem, snowball sampling may be the best way to find some of them.

All of the problems that I have mentioned would undercut many conventional social science approaches to study. In many of these situations, it would be difficult to find random samples of people with similar relevant experiences. For example, how do you find people who thought about going to a lawyer and asserting a claim, but then decided not to do this because of the possibility of retaliation against their family members or themselves? It is not impossible, but it is not easy. Many possible subjects for the study would likely refuse to cooperate unless the researcher could find some way to interest them in the outcome of the study. There is a real risk that

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70. *Id.*

71. See, e.g., Stewart Macaulay, *Notes on the Margins of Lawyering, in Three and a Half Minutes*, 40 HOFSTRA L. REV. 25, 34–38 (2011); Stewart Macaulay, *Bill Whitford: A New Legal Realist Seeking to Understand Law Outside the Law School’s Doors*, 87 TEMPLE L. REV. 725 (2015).



the percentage of those surveyed that actually respond and participate might be low. Many would not participate unless promised confidentiality. Perhaps those willing to risk participation are different in important ways from those who refuse; again, the researcher must be alert to this possibility and do everything she or he can to compensate for it. With so many compromises needed to gain access, another researcher would have great difficulty replicating such a study to check its validity. However, those interested in new legal realism are interested in what can be done to improve the reliability of work without setting requirements that defeat the whole enterprise. We may have to accept methods that some social scientists would question. We cannot abandon the effort to improve the reliability of what we do. Moreover, we can caution others, and ourselves, to remember the limits of our studies.

At the other extreme, legally trained scholars may not recognize threats to validity of social science studies exhibiting large tables of numbers followed by pages of statistics. Most simply, the authors of such studies may have failed to ask a question which, when answered, would have seriously undercut their results. Or the study may be wonderfully designed and carried out at the time it is done, but things may have changed so that the conclusions no longer reflect today's situation. For example, the law that caused most of the results of the study may have been repealed. Or public attitudes may have changed. Furthermore, all too often when we approach data related to law, we must worry about how accurately it was coded. There are many ways to "fudge" the data to make legal officials look good, or at least not as bad as they really are. Police departments, for example, have been known to ignore data or misclassify it to produce wanted results.<sup>72</sup> Sometimes, too, the authors of studies that use big data sets find relationships among variables based on statistical approaches,<sup>73</sup> but they seek to explain these relationships based on speculation or the application of theories that may or may not be valid in the particular setting. If clearly labeled, this may fashion a creative argument as an explanation. One should not take the point as having been proved by a scientific method.<sup>74</sup> At the very least, an active new legal realism should help legal scholars

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72. See, e.g., Carl Bialik, *Fuzzy Facts Can Make Crime Rankings Suspect*, WALL ST. J., Jan. 28, 2012, at A2 ("Homicide is . . . 'well-measured' . . . That is not to say that there aren't a variety of ways for fudging the measurement."); Jim Dwyer, *An Officer Had Backup: Secret Tapes*, N.Y. TIMES, Mar. 14, 2012, at A22 ("He also documented cases in which armed robberies were classified as 'lost property' cases."); Ben Poston, *Flynn: Department Misreported More than 5,300 Violent Assaults*, MILWAUKEE J. SENTINEL (June 21, 2012), <http://www.jsonline.com/news/milwaukee/flynn-department-misreported-more-than-5300-violent-assaults-8j5rtnh-159925645.html> [<https://perma.cc/H6QE-GYL6>] ("An internal department audit shows that 20% of aggravated assaults were underreported [by the Milwaukee Police Department] as lesser offenses that didn't get counted in the city's violent crime rate during that time.")

73. John Kay, *Economists Should Keep to the Facts, Not Feelings*, FIN. TIMES, Oct. 7, 2015, (Comment), at 9.

74. "The American economist Paul Romer has recently written of 'mathiness,' by analogy with 'truthiness,' a term coined by American talk show host Stephen Colbert. Truthiness presents narratives which are not actually true, but consistent with the world view of the person who spins the story. . . . Mathiness is a similar use of algebraic symbols and quantitative data to give an appearance of scientific

who lack training in the social sciences handle with care studies based on large tables of numbers, as well as small-scale qualitative empirical research.

Social scientists from a variety of fields have a great deal of experience coping with these, and many other, threats to the validity of various ways of studying the world outside the doors of offices in universities. However, legal scholars often want to study the impact of law at the point of delivery in a setting that presents its own special problems. The goal of a new legal realistic approach would be to have people with much of the relevant and different forms of knowledge work out best approaches to such studies. The demands of legal settings might offer only the option of using the “best” research method in the sense of it being the “least bad.” Perhaps the best option open to a scholar is to use findings very cautiously with full warning to readers about threats to validity. At least, this approach alerts readers to think about why the reported results might not be accurate or might depend on a particular context. Sometimes the only alternative would be to not study the problem. In many cases, this would be the worst solution. Uninformed speculation about the consequences of law can be wildly wrong.<sup>75</sup>

I have been describing part of a “big tent” approach to a new legal realism. Multiple methods would be welcomed and encouraged, as would “triangulating” among studies using different methods to study similar issues. Discussion among scholars from various backgrounds might fashion creative solutions that could at least limit the dangers of various approaches.

#### V. CAN WE SAY “THE TIMES ARE A-CHANGIN’”?<sup>76</sup>

In the past, the more traditional legal scholars have resisted the impulse to look at law outside of the law school’s doors. Professor Schlegel commented about those professors who did not embrace original, pre-World War II legal realism’s call to turn to empirical study:

Science was too threatening. It suggested that the words of law might not be too important, that the special preserve of the law professor might not be too special and that, since law was not just rules, the rule of law might not be just a matter of following rules either. That threat was simply too much for the professional identity of the law professor; it could only be attacked mercilessly or distanced with derisive laughter.<sup>77</sup>

Grant Gilmore published *The Death of Contract* in 1974.<sup>78</sup> He was very critical

content to ideological preconceptions.” *Id.*

75. See, e.g., Rachel Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 677–79 (1988).

76. See BOB DYLAN, *The Times They Are a Changin’*, on ‘THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964).

77. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 255 (1995).

78. GRANT GILMORE, *THE DEATH OF CONTRACT* (1st ed. 1974).

of what he called sociological approaches. He said that those who questioned the traditional subjects of contract law as the object of study would “observe the current scene and write down a description of what they see.”<sup>79</sup> He said that he found himself “completely uninterested” in such work.<sup>80</sup> He explained:

[W]hen 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 . . . . We are not scientists—not even social scientists—nor were we meant to be. Let us not be overly depressed at that not altogether depressing thought.<sup>81</sup>

The version of new legal realism that many of us advocate accepts that legal rules can be very important.<sup>82</sup> For example, you may have an unusually compelling case likely to yield a large sum in damages. However, if you let the statute of limitations run, you are unlikely to see a penny of those damages. Rules often influence how discretion is used. Sometimes they are critically important to how legal systems operate, but sometimes they are no more than part of the story when we get to the places where law is delivered. And we do not have a well-developed knowledge about what makes the difference. New legal realism does not attempt to deny a role to more traditional legal scholars. But which rules are enforced to the letter is an empirical question.

Gilmore sees law and society work as lacking theory. The scholar finds “a lot of trees waiting for someone to assemble them into a forest . . . .”<sup>83</sup> However, new legal realism does not advocate observing random facts about what is going on in the places where law is delivered. Legal theories fashioned by famous scholars holding named chairs at elite law schools rest on factual assumptions about the legal system and the greater society. Law and society work often points out that “a lot of trees” in the scholar’s forest do not exist or are very rare and not as large as assumed. For example, there is a lot of writing about *the rule of law*. Does it exist in the United States? How does one square the assumptions in writing about the rule of law with such things as plea-bargaining in American criminal processing, the huge growth in prison populations, or the vanishing trial in civil cases?<sup>84</sup> Moreover, the empirical researcher’s “list” may suggest something to a theorist trying to capture knowledge about whether and to what extent law matters in a particular society. When you discover a group of unusual trees, you may be moved to say something about what

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79. *Id.* at 3.

80. *Id.*

81. *Id.* at 3–4.

82. See Mertz, *supra* note 5, at 8.

83. GILMORE, *supra* note 78, at 3.

84. Cf. Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J.L. & SOC’Y 411, 437 (2007) (“There is little point in promoting an ideal of state justice that does not work in the better resourced context of the developed world where ‘rule of law’ norms have (arguably) had much longer to become embedded in the political and social fabric.”).

kind of forest they represent. At the least, looking at places where the law is delivered should be useful to all but those who like the fantasy of the rule of law or who want to support an ideology that rationalizes the position of those who are favored in a society.

We have come a long way since the time that Schlegel was describing or even since the 1970s when Gilmore wrote. Law faculties are hiring more people with both a Ph.D. in a social science and a law degree.<sup>85</sup> Empirical work appears more frequently in law reviews.<sup>86</sup> Many law schools have major clinical programs where students actually see where law is delivered.<sup>87</sup> Some clinical instructors have found social scientist partners to help them analyze aspects of law in action that they encounter that bother them in light of the ideals of our legal system. Once we accept that what goes on “back stage”—in lawyers’ offices and in the halls of courts and legislatures—is an important part of the subject matter of legal study, many social scientists and many law professors find that the other field has something important to add to the conversation. That is, each should find this, if both realize the need for translation and the importance of listening to what the other is saying.

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85. See, e.g., *Aspiring Law Professors: The PhD*, THE FACULTY LOUNGE (Sept. 6, 2010), [www.thefacultylounge.org/2010/09/aspiring-law-professors-the-phd.html](http://www.thefacultylounge.org/2010/09/aspiring-law-professors-the-phd.html) [https://perma.cc/B25Z-4JZ6].

86. See Daniel Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1195 (2013).

87. See Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL’Y 85, 86 (2013).

