SCHOOL OF LAW
UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2018-55

Legal Realism and International Law

Gregory Shaffer
gshaffer@law.uci.edu
University of California, Irvine ~ School of Law

Legal Realism and International Law

for Jeffrey L Dunoff and Mark A Pollack (eds), International Legal Theory: Foundations and Frontiers (Cambridge University Press, 2019, Forthcoming)

By Gregory Shaffer[1]

There are three pillars of jurisprudence: moral theorizing (reflected in natural law, but not exclusive to it); analytic theorizing (reflected in positivism); and socio-legal theorizing (reflected in legal realism).[2] Legal realism exemplifies this third approach to international law theory beyond natural law and positive law covered in chapters 1 and 2, and it provides a foundation for many theoretical approaches in the chapters that follow. For legal realists, jurisprudence should be conceived not just in terms of what law 'is' our 'ought' to be, but also in terms of how law obtains meaning, operates, and changes through practice.[3]

In the United States (U.S.) legal realism grew out of and continues to have parallels with European socio-legal thought (sometimes referred to as European legal realism), as well as socio-legal thought around the world.[4] It built from sociological jurisprudence that developed in Europe and the United States in the early twentieth century. Yet, in its formative years, it largely did not engage with international law since international law lacked salience in the U.S. academy before the U.S. rise to global power, the creation of the United Nations and the Bretton Woods institutions, and U.S. engagement with international law in the context of the Cold War.[5] Some American legal realists, indeed mainly as an aside, questioned the place of international law in light of interstate struggles for power,[6] as later reflected in the rise of international relations realism. American legal

---

[1] Gregory Shaffer is Chancellor's Professor of Law, University of California, Irvine School of Law.

[2] BRIAN TAMANAHA, A REALISTIC THEORY OF LAW 30 (2017) (calling this third pillar "social legal theory"). Cf. MAURICIO GARCÍA-VILLEGAS, THE POWERS OF LAW: A COMPARATIVE ANALYSIS OF SOCIOPOLITICAL LEGAL STUDIES (2018) (calling it sociopolitical legal studies).

[3] As William Twining writes, legal realism presents a "theoretical claim that challenges doctrine-centered legal theory: namely that empirical dimensions of law and justice are a necessary part of the enterprise of understanding law" and that legal theory is impoverished when it excludes them. William Twining, *Legal R/realism and Jurisprudence: Ten Theses*, *in* THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE 121 (Elizabeth Mertz, Stewart Macaulay, & Thomas W. Mitchell eds., 2016) [hereinafter Twining, *Legal R/realism*].

[4] For a comparison of socio-legal studies in the U.S., Europe and Latin America, see Mauricio Garcia Villegas, *Les Pouvoirs du Droit: analyse comparée d'études sociopolitiques du droit* (2015). For an application of Scandinavian legal realism and other European socio-legal thought to a new legal realist approach to international law that has parallels with the one in this chapter, see Jakob v. H. Holtermann & Mikael Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. INT'L. L. 211 (2015). On the influence of European thought on the American legal realists, see, for example, James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

[5] *See, e.g.*, LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960, 154, 181, 207, 217 (1986) [hereinafter Kalman, *Legal Realism*] (discussing the rise in international law courses at Harvard and Yale after World War II).

[6] *See, e.g.*, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 839 (1925) [hereinafter Cohen, *Transcendental Nonsense*] ("[A]t least to the extent that nations have not effectively surrendered

realism nonetheless exercised a profound influence on international law theory after World War II in the United States, including on international relations realism, the New Haven School of International Law, and many other approaches addressed in this book.[7]

With economic globalization and the expansion of international institutions after the collapse of the Soviet Union and the fall of the Berlin Wall, many areas of international law became of much greater salience. New international institutions, including international courts, proliferated, and international norm making—be it of a formally binding or informal soft-law nature—increasingly enmeshed with national law and practice across areas of social life, including almost all domains of human rights, regulatory, and business law. As a result, the social sciences became more interested in international law and institutions, spurring empirical study of these developments.

A new legal realism regarding international law rose in response. This new legal realism builds from the old in focusing on the interaction of internal 'legal' and external 'extra-legal' aspects in law's development and application.[8] The new legal realism thus attends closely to the role of actors, norms, and power in relation to legal processes. It builds, in particular, from developments in the empirical study of law. Over the past dozen years, over seven hundred articles have used the term "new legal realism,"[9] and a symposium issue and an edited volume on new legal realism and international law were respectively published in 2015 and 2016.[10]

The development of the new legal realism advances two dimensions for the study of international law. First, it stresses the importance of empiricism, thus providing a bridge to the social sciences. Second, it is grounded in philosophical pragmatism and, in this way, includes a conditional (constructivist) role for legal institutions, processes, norms, and practices in shaping social expectations and behavior. The new legal realism thus attends empirically and pragmatically to external political, economic, social, and cultural factors that shape law as a going institution,

---

their power through compacts establishing such rudimentary agencies of international government as the League of Nations or the Universal Postal Union, there is in fact a state of nature and a war of all against all."); BENJAMIN ALLEN COATS, LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY (2016) (citing Oliver Wendell Holmes in a letter, "International law, of course, has little to do in any sense, with the practice of the profession. I should almost as soon require chemistry.").

[7] Indeed, Harlan Cohen argues that we are all legal realists now. Harlan Cohen, *Are We (Americans) All Legal Realists Now?, in* CONCEPTS ON INTERNATIONAL LAW IN EUROPE AND THE UNITED STATES (Chiara Giorgetti & Guglielmo Verdirame, eds., forthcoming).

[8] *See* Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335 (2006) [hereinafter Erlanger, *New Legal Realism*]; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009) [hereinafter Nourse & Shaffer, *Varieties*].

[9] As of July 9, 2018, 736 documents were retrieved by the search "new legal realism" in Westlaw's Journals and Law Reviews (JLR) database. This number understates actual interest, as some authors simply refer to this scholarship as "legal realism," and Westlaw does not capture book chapters and non-legal publications.

[10] *See* Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189 (2015) (introducing symposium issue); Gregory Shaffer, *The New Legal Realism's Rejoinder*, 28 LEIDEN J. INT'L. L. 479 (2015) (responding to critiques by Jan Klabbers and Ino Augsburg in the subsequent issue); Heinz Klug, *Introduction*, *in* THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY 1 (Heinz Klug & Sally Engle Merry eds., 2016) (introducing an edited volume that addresses law and globalization, with a number of chapters focusing on international law in that context); Gregory Shaffer, *New Legal Realism and International Law*, *in* THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY 145 (Heinz Klug & Sally Engle Merry eds., 2016).

which distinguishes it from normative (naturalist) and doctrinal (positivist) approaches to international law. At the same time, its dual focus does not reduce the study and explanation of international law to extra-legal factors, such as state power.

The chapter is in five parts. Part 1 provides a brief background of the genesis and core attributes of legal realism, breaking down legal realism into three interrelated dimensions—behavioral, critical, and pragmatic—that explain law's development and practice. Part 2 presents how American legal realism migrated into and influenced international legal theory, starting with the realism of Hans Morgenthau and policy science of Myres McDougal, then turning to the development of transnational legal theory with Philip Jessup and the rise of global administrative law with the proliferation and deepening of international institutions. Part 3 presents the two principal dimensions of new legal realism—empiricism and pragmatism. The new legal realist approach builds from significant developments in the social sciences and opportunities and demands for transnational problem-solving in light of increased transnational social connectedness and international institutionalization. The section defines new legal realism positively in terms of the interaction of such internal legal and external extra-legal factors as reason and power, legal craft and empirics, and legal tradition and demand for change, and negatively in terms of its foils—on the one hand, a new formalism that relies on rationalist presuppositions and, on the other hand, a postmodernism that eschews social science and pragmatist engagement. Part 4 assesses the strengths and challenges of legal realism. Its strengths are the opening of the black box of international lawmaking and practice, which frequently reveals structural tilts in favor of powerful actors, combined with a pragmatic drive for international law adaptation and reform. Its challenges, to which this section responds, are the risks of scientism and losing sight of what makes law distinctive—namely doctrine and legal normativity. Part 5 addresses the critical place of legal realism for understanding and responding to the purported crises of international law today.

1. The Genesis and Core Attributes of Legal Realism

There are different readings and reconstructions of legal realist scholarship, which itself, as Karl Llewellyn insisted, represented more of a movement in law in the United States than a school.[11] Legal realists distrusted extant moral and analytic theory (chapters 1 and 2), and deductive logic more generally. Legal realism was a response to a legal formalism that failed to take account of changed social context, such as the industrial revolution and the rise of large corporations and unions. Legal realists stressed the importance of social context and consequences in law, so that concepts such as freedom of contract must be viewed in light of social conditions, including bargaining power.

Scholars have developed three primary (interrelated) depictions of legal realism that have exercised influence in the legal academy: legal realism as functionalism and behavioralism; legal

[11] Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233–34 (1931) [hereinafter Llewellyn, *Some Realism About Realism*].

realism as a critique of law as power; and legal realism as pragmatism that adopts a concept of law constituted by the interplay of internal and external factors.[12] The first arguably is the most common depiction of legal realism, the second is advanced by critical theorists, and the third provides, in particular, the analytic ground for the new legal realism. Each captures important, related dimensions of legal realism.

Arguably the dominant depiction of legal realism focuses on its functionalist and behaviorist dimensions. Behaviorally, the legal realists were interested in what courts and other legal actors actually do, in contrast to doctrinalists who focus on rules and concepts.[13] They were interested less in "paper rules" ("what the books say the law is"), than in "working rules" (the rules as they are practiced, and thus normalized through practice).[14] Functionally, they contended that legal decisions should take into account social context, social purposes, and the consequences of legal decisions, and thus they focused not just on doctrine, but on its interpretation in light of context and purpose.[15] In this vein, Karl Llewellyn wrote of "law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purposes, and for its effect, and to be judged in the light of both and of their relation to each other."[16]

Legal realists thus critiqued formalist doctrinal analysis, which views law as "an autonomous system of legal concepts, rules, and arguments" that is self-enclosed and thus independent of both the social sciences and humanities. Felix Cohen famously dubbed such formalist jurisprudence "a special branch of the science of transcendental nonsense."[17] The legal realists stressed that a reliance on texts alone is indeterminate for at least three reasons: legal texts are often ambiguous; multiple legal rules, doctrines, and exceptions are often available; and facts can be characterized in different ways in light of these competing rules, doctrines, and exceptions.[18]

To assess social context and institutional behavior, one needs empirical study, and so legal realists called for an integration of law and the social sciences.[19] On the basis of enhanced

---

[12] For a philosophical naturalist reconstruction of legal realism, see BRIAN LEITER, NATURALIZING JURISPRUDENCE (2007). For a critical theory reconstruction, see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1760-860 (1977) and Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) [hereinafter Singer, *Legal Realism Now*]. For a pragmatist reconstruction more in line with theorizing in this chapter, see WOUTER DE BEEN, LEGAL REALISM REGAINED: SAVING REALISM FROM CRITICAL ACCLAIM (2008) [hereinafter De Been, *Legal Realism Regained*].

[13] Llewellyn, *Some Realism About Realism*, *supra* note 11; Oliver Wendell Holmes, *The Path of The Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *The Path of the Law*] (establishing bad man theory of law); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 51 (1960) (studying law "as it works"); Cohen, *Transcendental Nonsense*, *supra* note 6, at 831 ("[B]ehavior of judges, sheriffs and litigants rather than conventional accounts of the principle.").

[14] Karl N. Llewellyn, *A Realistic Jurisprudence -- The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *A Realistic Jurisprudence*]. *See* discussion in Kalman, *Legal Realism*, *supra* note 5, at 234–35.

[15] Cohen, *Transcendental Nonsense*, *supra* note 6, at 812 (calling for a jurisprudence that does not "forget the social forces which mold the law and the social ideals by which the law is to be judged").

[16] Llewellyn, *Some Realism About Realism*, *supra* note 11, at 150.

[17] Cohen, *Transcendental Nonsense*, *supra* note 6 (taking from the German legal thinker Von Jhering).

[18] *See, e.g.*, Llewellyn, *Some Realism About Realism*, *supra* note 11.

[19] JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (2011).

knowledge of social context and actual judicial behavior, the legal system could be reformed to advance social ends. Llewellyn thus called for "the *temporary* divorce of Is and Ought for purposes of study" because "no judgment of what Ought to be done in the future with respect to any part of law can be effectively made without knowing objectively, as far as possible, what that part of law is now doing."[20]

Critical legal theorists stressed a second, complementary dimension of legal realism that highlights the role of power in law and legal decisions. Legal realists attacked formalist doctrinalism not only because of its form of reasoning, but also because of how actors use law to legitimate and ensconce private power and the status quo.[21] For example, they provided a critique of the public/private distinction of law in that private law (such as contract) implicates public values (such as the rights of workers, consumers, and other citizens), and public law shapes the operation of private markets (including by recognizing and enforcing contracts) [22]—think today of controversies over the conception of international investment law as public or private. Similarly, they addressed the role of unequal bargaining power in assessing consent—think today of controversies regarding international economic law and its implications for inequality and the rise of neo-nationalism. Some went so far as to contend that law reflects and reproduces hierarchical relations of power, such that it cannot be used as an instrument for social change.

Third, and finally, legal realism has a pragmatist dimension in its conception of law as a going institution constituted by the interplay of internal and external factors. Hanoch Dagan constructs a legal realist concept of law in terms of the constitutive tensions between internal and external factors: namely those of reason and power, legal craft and empirics, and tradition and progress.[23] For Dagan, legal realists reject both "purist alternatives" of law as power and law as reason.[24] On the one hand, legal realists do not reject law's formal qualities as meaningless and they stress that reason-giving is fundamental to law as an institution. On the other hand, they recognize that it is dangerous to obscure law's coerciveness. Law's reason is put forward by real actors (in justification of the exercise of real power), and so law's reason must always be subject to skepticism and critique.[25] This fundamental tension is reflected in conceptions of international

[20] Llewellyn, *Some Realism About Realism*, *supra* note 11.
[21] Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. (1923) [hereinafter Hale, *Coercion and Distribution*].
[22] Singer, *Legal Realism Now*, *supra* note 12. See e.g., Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) ("[A] contract … between two or more individuals cannot be said to be generally devoid of all public interest…. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy").
[23] Hanoch Dagan, *The Realist Conception of Law*, 57 TORONTO L.J. 607 (2007) [hereinafter Dagan, *Realist Conception*].
[24] *Id*., at 637.
[25] K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1383 (1940) (actors struggle to capture the backing of power and law; but when they do, they simultaneously strive to persuade that the result will "serve the commonweal").

law as mediating the tensions between apology (to power) and utopia (of reason).[26] A realistic conception of law is not either/or, but both at once.

Similarly, both social science and legal craft are required for judgement and legal problem-solving. Because legal judgment has consequences, social science is critical for understanding social context and the consequences of decisions. Yet legal craft, technique, and ways of doing are not simply epiphenomenal, but critical for rule-of-law values that enable social planning, provide security, and shape social identity.[27] Similarly, law as a social practice reflects traditions, including precedent, which provide for stability and predictability. Yet, law is always in the process of becoming in light of changed social contexts and social understanding. In the words of Benjamin Cardozo, law is subject to an "endless process of testing and retesting."[28] This tension between tradition and progress is instantiated in the dual mandate of the International Law Commission to restate and progressively develop international law.[29]

As pragmatists, legal realists called for an ethics that attends to the consequences of legal decisions. A pragmatist ethics is based not solely on deduction (whether from natural law principles, ideal moral theory, formal rules, or rationalist assumptions), but on an appreciation of social context and consequences viewed empirically and in light of experience. They thus did not simply reject the value of doctrine and rules, as is sometimes argued. Rather, as John Dewey, the leading pragmatist philosopher at the time, wrote, judges should choose legal rules in light of their social consequences, on the one hand, and to enable individual and social planning in light of common understandings, on the other.[30] In the first instance, judges use a form of reasoning involving "search and inquiry" in light of purpose, experience, social contexts, and consequences. In the second, they elaborate principles as guidance for the future. These two forms of reasoning, Dewey argued, inform and constrain each other to achieve predictability, on the one hand, and promote social welfare, on the other.[31] In this way, legal realists hoped to make law less abstract and more in tune with social reality so that social actors could predict judicial decisions more accurately based on factual contexts, and social goals could be furthered.[32]

Legal realism, in sum, views law as a semi-autonomous field constituted by internal and external factors that shape law's meaning, practice, and consequences. Legal realism provides an avenue for the critique of power exercised through law, a bridge to the social sciences for understanding legal practice, and a ground for pragmatic endeavor to use law in a manner responsive to changing social contexts in light of experience.

---

[26] *Cf.* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).
[27] KARL N. LLEWELLYN, MY PHILOSOPHY OF LAW 1933, 1960 (1941).
[28] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 179 (1921).
[29] *See* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 166-76 (2008) (discussing the International Law Commission and its dual mission).
[30] John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 24–26 (1924).
[31] *Id.* at 27.
[32] *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 63 (1930).

2. Migration into and influence on international legal thought

Although the original legal realists did not address international law, their approach migrated into international legal thought, influencing many of the international law theories that arose after World War II. The behavioralist/functionalist vein of legal realism influenced both the realist theories of Morgenthau and the policy science of the New Haven School, as well as later rationalist, sociological, and process-based approaches.[33] The New Haven School of Myres McDougal and his followers formulated policy goals that the law should pragmatically pursue, while attending to the importance of context and process.[34] While Morgenthau cast a skeptical, realist eye on the New Haven School, he noted areas of international relations where law functionally could play a meaningful role—what Wolfgang Friedman would later call the "law of cooperation."[35] Similarly, the law-as-power dimension of legal realism influenced both the international relations realism of Morgenthau during the Cold War and critical and feminist theoretical approaches that gained prominence after it. Feminist theory, for example, frontally challenged the public/private dimension in international law.[36] Likewise, the pragmatist dimension of legal realism is foundational for the new legal realism (discussed in Part 3) as well as such theoretical approaches as transnational legal process, interpretivism, global administrative law, and global legal pluralism.

Because legal realist theory focuses on the relation of law to social order and social change, it had much less relevance in a world comparatively lacking in transnational social connectedness—as reflected, for example, in the relatively smaller number of international intergovernmental and non-governmental organizations. In the 1950s, Philip Jessup, however, noted the growing importance of what he called "transnational law" as a functionalist response to empirical developments, with public international law viewed as a subset of the broader category

---

[33] *See* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, AM. J. INT'L L. 260, 274 (1940) [hereinafter Morgenthau, *Positivism*] (noting debt to legal realists). The early work of Myres McDougal, defended legal realism in response to challenges from Lon Fuller. *See* Myres McDougal, *Fuller v. the American Legal Realists: An Intervention*, 50 YALE L.J 827, 834–35 (1941) ("[T]he American legal realism which Professor Fuller attacks is a bogus American legal realism…. The major tenet of the "functional approach," which they have so vigorously espoused, is that law is instrumental only, a means to an end, and is to be appraised only in the light of the ends it achieves."). *Cf.* Jakob V.H. Holtermann & Mikael Rask Madsen, *Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law*, 29 LEIDEN J. INT'L. L. 1001, 1017 (2016) (presenting their version of European Legal Realism as a form of philosophical naturalism in which empirical legal studies, in terms of "empirically observable practices," can replace doctrinal studies as an empirical science of law).

[34] Eugene V. Rostow, *Myres S. McDougal*, 84 YALE L.J. 704, 717 (1975) (McDougal and his partner Harold Lasswell aimed "to transform the sociological-functional jurisprudence of the Realist generation into a jurisprudence of values"); HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

[35] WOLFGANG FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964) (distinguishing it from the "law of coexistence" in which power plays a dominant role). *See* Morgenthau, *Positivism*, supra note 33, at 278–80 (distinguishing political law subservient to play of shifting interests and international law addressing stable interests where disputes might arise). *See also*, HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 211 (1948).

[36] Karen Engle, Dianne Otto, Vasuki Nesiah, *Feminist Approaches to International Law*, this volume.

of transnational law.[37] What stakeholders previously perceived as problems to be addressed through national law were increasingly viewed in transnational terms that could not be addressed through national law alone. This gave rise to increased international and other forms of transnational legal norm-making involving flows of norms that can permeate both international and national law. As a result, in most substantive domains, it no longer makes sense to view law in purely national terms from a socio-legal perspective, and international law plays an increased role as part of what can be viewed as transnational legal ordering.[38] Jessup pointed the way to how legal realism would become more relevant from a socio-legal perspective in a growing number of domains as international institutions, including courts, grew in importance for interpreting, developing, and applying law.

The original legal realists wrote at the time of the growth of the administrative state and administrative process engaged in pragmatic problem solving where empirical social science became relevant for administrative decision-making. International organizations and their interlocutors are the international analogues. By 2016, there were at least 7,757 intergovernmental organizations and 60,272 international non-governmental organizations developing, interpreting, and applying international hard and soft law implicating most domains of social life.[39] They work to establish norms, procedures, peer review mechanisms, and dispute settlement as part of complex processes of transnational legal ordering that implicate interstate relations as well as norms and practices within states.[40]

3. The New Legal Realism

The new legal realism builds from the old, reflecting developments in the social sciences and opportunities and demands for pragmatic decision-making. As the old, it is not a single school, and there is variation within it.[41] What new legal realists have in common is a call for questioning assumptions through engaging with empirics that is problem-centric and open to the emergence of

[37] PHILLIP JESSUP, TRANSNATIONAL LAW 2 (1956).

[38] *See* GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (2014) [hereinafter Shaffer, *Transnational Legal Ordering*]; Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Order*s (UC Irvine School of Law Research Paper No. 2017-02, 2017) [hereinafter Shaffer & Coye, *From International Law to Jessup's Transnational Law*]; *see also* Koh, Transnational Legal Process and the New Haven School, this volume).

[39] *UIA Yearbook of International Organizations 2015-2016*, UNION OF INT'L ASS'NS, http://www.uia.org/allpubs?combine=&field_pub_year_value=&items_per_page=20&page=8&order=field_uia_publication_nr_&sort=asc (last visited July 25, 2016) (reports data collected in 2014).

[40] *See* Lorenzo Casini, *Global Administrative Law*, this volume; JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 589-619 (2005); Shaffer, *Transnational Legal Ordering*, *supra* note 38.

[41] An important dimension of that variation is between those who focus more on empirical studies and those who combine it with a pragmatist view of social science. *See* Nourse & Shaffer, *Varieties*, *supra* note 8; Elizabeth Mertz & Mark Suchman, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555 (2010) [hereinafter Mertz & Suchman, *Toward a New Legal Empiricism*].

new analytics. Victoria Nourse and I have called the two central pillars of the new legal realism: empiricism and pragmatism.[42]

The new legal realism can be defined positively (in terms of what it is) and negatively (in terms of its foils). In positive terms, the new legal realism defines law in terms of external and internal factors dynamically in tension with each other—such as reason and power; legal craft and empirics; and legal tradition and the quest for progress.[43] Law cannot be viewed in terms of one or the other of these binaries, but rather as constituted by their interaction. The new legal realism thus contrasts with a number of other approaches. To start, it contrasts with naturalism and formalism because of their focus on self-enclosed moral and legal arguments and thus their relative disinterest in empirics and pragmatic decision-making. Similarly, and for the opposite reason, it contrasts with approaches that reduce law to external factors, ranging from international relations realism to other rationalist approaches in the social sciences and some currents of postmodernism.

Compared to the old legal realism, the new legal realism benefits from significant developments in social science tools, training, and interdisciplinary relationships, as well as shifts in the culture of law schools. By calling for empiricism, it spreads its tent wide in terms of the range of empirical methods used and the role of scholars in using it.[44] Those working in a new legal realist vein often engage in fieldwork, and thus directly with legal practitioners to assess the law in action.

In parallel, transnational social connectedness and the proliferation of international organizations and non-governmental organizations catalyze demands for pragmatic decision making in which international law plays an increased role. Philosophical pragmatists—as in the work of William James and John Dewey—stress the importance of empirical work for the formation, application, and revision of concepts needed for problem-solving in particular social contexts in light of human needs.[45] For pragmatists, concepts are important not for their representation of immemorial "truth," but rather for their use in social action.[46] Today, with the expansion of international law's scope and its greater enmeshment with national law, new opportunities and demands arise for pragmatist, problem-oriented thinking.

Some have questioned whether these two aspects of legal realism—empiricism and pragmatism—can be reconciled because empiricism by its nature posits "truth."[47] That is the case

---

[42] Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 101 (2014) [hereinafter Nourse & Shaffer, *Empiricism*].

[43] Dagan, *Realist Conception*, *supra* note 23.

[44] *See* Mertz & Suchman, *Toward a New Legal Empiricism*, *supra* note 41; Twining, *supra* note 3. The importance of empiricism for legal realists goes back to Holmes' *The Path of the Law*, where he famously wrote that "the black-letter man may be the man of the present, but the man of the future is the man of statistics." Holmes, The *Path of the Law*, *supra* note 13, at…

[45] De Been, *Legal Realism Regained*, *supra* note 12; Nourse & Shaffer, *Empiricism*, *supra* note 42.

[46] *See, e.g.*, Cohen, *Transcendental Nonsense*, *supra* note 6, at 835 ("[A] definition of law is *useful* or *useless*. It is not *true* or *false*."). Thus, as regards legal categories, Walter Wheeler Cook stressed, "Any grouping… appears as at most a working hypothesis, to be tested by its consequences, and subject to revision in the light of further experience." W. W. Cook, *Scientific Method and the Law*, 13 AM. BAR ASSOC. J. 303, 306 (1927).

[47] Ino Augsberg, *Some Realism About New Legal Realism*, 28 LEIDEN J. INT'L. L. 456 (2015).

only if one views empiricism as a claim to foundational truth, as opposed to pragmatic and conditional truth-seeking, involving experimentation and judgment. As the economist Dani Rodrik writes, "diagnostics requires pragmatism and eclecticism, in the use of both theory and evidence. It has no room for dogmatism, imported blueprints, or empirical purism."[48] In this vein, empiricism and pragmatism complement and mutually constitute each other. Epistemologically, the empirical dimension cannot be completely dissociated from conceptual and normative frames. Similarly, the conceptual dimension is infused with perceptions of usefulness for assessing facts.[49] The two are complements since new empirical work and pragmatic practice are required to address new factual contexts and new questions. Empirics inform pragmatic decision-making; pragmatic demands for decision-making inform the empirical questions asked. Empiricism needs concepts, and concepts must be updated pragmatically in response to empirical changes in the world so as to pursue human goals.[50]

The new legal realism can also be viewed in terms of its foils. One foil has been the rise of a new formalism in legal scholarship that relies on rationalist presuppositions.[51] Law and economics becomes a target when it assumes away the complexity of the social world and uses models unreflexively for prescriptions. It risks becoming, to take from Roscoe Pound, a new form of "mechanical jurisprudence."[52] As Arthur Leff noted in reviewing Judge Posner's *Economic Analysis of Law*, "it must immediately be noted, and never forgotten, that [Judge Posner's] basic propositions are really not empirical propositions at all. They are all generated by 'reflection' on an 'assumption' about choice under scarcity and rational maximization. . . . Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in these terms there is no other way they can behave."[53] On the surface, law and economics appears to be the opposite of the old formalism because it is not focused on developing a science of legal doctrine, but at times it can parallel the old formalism in its form of reasoning and substantive prescriptions. This is not to argue against causal models and the use of assumptions for legal policy analysis (whether positive or normative), but rather that the assumptions need to be verified to see how well they reflect the empirical

[48] Dani Rodrik, *Diagnostics Before Prescription*, 24 J. ECON. PERSP. 33 (2010).
[49] Epistemologically, legal realists emphasize "the importance of experience in the formation of concepts and to the acquisition of knowledge." Twining, *Legal R/realism*, *supra* note 3, at 123. Llewellyn, for example, distrusted concepts when they "take on an appearance of solidity, reality, and inherent value which has no foundation in experience." Llewellyn, *A Realistic Jurisprudence*, *supra* note 14, at 453.
[50] *See* John Gerring, *Social Science Methodology: A Unified Framework* 107–40 (Cambridge 2nd ed. 2012) (on what makes a good concept in terms of its resonance, domain specificity, consistency, fecundity, differentiation, causal utility, and measurability).
[51] Twining, *Legal R/realism*, *supra* note 3, at 123 ("[T]he foil to empiricism is rationalism, which emphasizes instead the importance of thought and knowledge of material that is in some sense independent of experience"); Nourse & Shaffer, *Varieties*, *supra* note 8, at 105.
[52] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).
[53] Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 457 (1974) (emphasis omitted).

situation and need to be adjusted when they do not.[54] The new *legal* realism thus differs from aspects of the new realism of Jack Goldsmith and Eric Posner in *The Limits of International Law* when the latter builds from game theory more than empirics, as well as when it sees little to no role for legal reasoning, craft, and tradition.[55]

A separate foil for new legal realists is postmodernism when postmodernists question the utility of a bridge between international law and the social sciences and distance themselves from reconstructive engagement in a pragmatist vein.[56] For postmodernists, "facts and interests" are viewed as "socially constructed," as if anything goes, or could go.[57] When analysis is not grounded in experience and practical reasoning, the result is a slipperiness, combined with arbitrariness, where positions are not pinned down so there is no accountability. Critique becomes an aesthetic in which the "real world" is left outside the analytic frame.[58]

The new legal realism, in contrast, stresses both the importance of empirical study and legal reasoning. On the one hand, it highlights the need to gather empirical data methodically to assess how law is operating before drawing conclusions and reaching decisions. On the other hand, it stresses the role of legal reasoning, legal craft, and legal traditions as important constraints on arbitrary power and important facilitators of social planning.[59] New legal realists focus on empirics and doctrine not out of any foundationalist sense of truth derived from either of them, but because they are helpful for understanding, developing, and applying law for purposes of individual and social planning. Conceptually, new legal realists view external and internal factors in productive tension, constituting law's practice, how law obtains meaning, and how it changes over time.

When done well, empirical work helps counter biases not only in conventional understandings of international law, but also in scholars themselves. As Elizabeth Mertz writes, "the power of social science methodology [is] to push us beyond our personal politics or situations, to enforce a form of humility in which we must listen to voices other than our own."[60] This reflexive checking of bias is particularly important given that much of international law has been written by and from the perspectives of the Global North, as emphasized by third world approaches

---

[54] *See* DANI RODRIK, ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE (2015) (chapter 3). Indeed, there has been an empirical turn in both economics and in law and economics. On the "empirical turn" in economics, *see id*, at 201-207.

[55] *Cf.* JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[56] *See, e.g.*, Martti M. Koskenniemi, Law, *Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L. REL. 3 (2014).

[57] *See, e.g.*, DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 112 (2017). For a critique of David Kennedy's approach, see, for example, Tom Ginsburg, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy*, 111 AM. J. INT'L. L. 1 (2017) (Kennedy's "iconoclastic project of blowing up global governance" with "critical detachment" and "without a program of action").

[58] For a Marxist, materialist critique of this approach, see BHUPINDER CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 310–11 (2nd ed. 2017) ("Kennedy tends to leave the "real world" entirely out of the frame…. His is more an aesthetic critique.").

[59] Dagan, *Realist Conception*, supra note 23.

[60] Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 483–84 (2005).

to international law.[61] This process of empirical investigation presses us to see freshly in terms of "emergent analytics"—analytics that the researchers have not themselves brought to the project on account of their analytic priors, but which emerge from the investigation.[62]

There has been a massive empirical turn in the study of international law to develop theory regarding the conditions under which international law is formed, operates, and has effects.[63] There are cross-cutting studies on the design and role of legal institutions (including tribunals) and legal instruments (such as hard and soft law, including the use of flexibility mechanisms), as well as the role of legal and extra-legal factors in decision-making.[64] Studies also have increasingly assessed the role of non-state actors in shaping international law, from business associations[65] to non-governmental groups,[66] legal professionals,[67] and international organizations.[68] Susan Block-Lieb and Terence Halliday, for example, illustrate how these processes work within UNCITRAL for the creation of global trade norms in terms of an "ecology" of global lawmaking.[69] These studies reflect and provide input for the new legal realism.

Alexandra Huneeus' work on the Inter-American Court of Human Rights provides an example of new legal realist insights that build from empirics and doctrine. International courts and institutions are structurally weak because they lack enforcement powers. International law's effectiveness thus relies on monitoring, deliberation, and stakeholder participation to enhance accountability and support domestic processes that embed normative change through practice. Huneeus shows how the Inter-American Court supervises transitional justice by engaging local courts, broader justice systems, and local civil society in experimental ways. The court not only orders state prosecutions of perpetrators of atrocities and payment of compensation to victims. It also uses "experimentalist methods of… engagement of victims and civil society in legal processes," combining "retributive measures with creative restorative measures."[70] The court

---

[61] James Gathii, *Third World Approaches to International Law*, this volume.

[62] Nourse & Shaffer, *Empiricism*, *supra* note 42.

[63] Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Law Scholarship*, 106 AM. J. INT'L L. 1 (2012) [hereinafter Shaffer & Ginsburg, *The Empirical Turn*].

[64] For studies of international judges, see, for example, Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005); and Eric Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008). For studies of international arbitrators, see YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); Sergio Puig, *Social Capital in the Arbitration Market*, 25 Eur. J. Int'l. 387 (2014); Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L. ECON. LAW. 301 (2017).

[65] *See* Melissa Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017).

[66] *See, e.g.*, PETER SPIRO, NEW GLOBAL POTENTATES: NONGOVERNMENTAL ORGANIZATIONS AND THE "UNREGULATED" MARKETPLACE (1996).

[67] On the importance of the configuration of what they term the "legal complex," see Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217 (2011).

[68] SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS (2017).

[69] *Id.*

[70] Alexandra Huneeus, *Pushing States to Prosecute Atrocity: The Inter-American Court and Positive Complementarity*, *in* THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY 228–29 (Heinz Klug & Engle Merry eds., 2016).

orders states to conduct rituals of remembrance, construct shrines, name streets and schools and thereby construct historical memory.[71] It then monitors and supervises compliance with its orders through dialogic processes. Although transitional justice is delicate, fraught with difficulties, so the court faces considerable challenges, the question is a comparative institutional one—the baseline should not be the ideal of perfect compliance, but what would occur "in the absence of the pressure and intervention from international bodies."[72] Huneeus's work shows how international and domestic legal processes work in tandem, involving dialogic mechanisms and learning from experience to coordinate actions to address international crimes.

As can be seen from Huneeus' work, an advantage of the new legal realism is that it views international law as part of larger legal, social, and political processes. In doing so, it decenters international law, just as the old legal realism decentered law, while still taking law seriously. As a result, the new legal realism gives rise to conditional theorizing that helps predict variation regarding law's place.[73] The concept of conditional theory casts attention on the contingent reach of any realistic theory of law's development, practice, and consequences in light of the different and always changing contexts in which law operates. The theory is contingent on context and attendant to new problems that arise in a dynamic world.

Theories of transnational legal ordering and transnational legal orders illustrate the new legal realist approach.[74] Under this analytic framework, scholars assess how actors struggle over the conceptualization of problems and develop and apply legal norms in response to these conceptualizations. International law forms part of a recursive process in which actors and institutions interact at different levels of social organization, propagating, resisting, and adapting norms over time, shaping their meaning and practice and giving rise to the settlement and unsettlement of the norms. International law, as a result, is frequently enmeshed with domestic law. For example, both intellectual property and indigenous rights law involve the interaction of national, international, and non-state norm-making that shapes legal practices transnationally.[75] Indeed, an important implication of the new legal realism is that, in many domains it breaks down the standard dichotomy that separates law into two categories: domestic law and international law.

4. Strengths and Challenges of the New Legal Realism in International Law

A. Strengths. The new legal realism's strength is that it enhances understanding about how international law obtains meaning, operates, and changes as a going institution in response to social context. It thus provides a better grounding for law's application in pragmatic decision-making and social action. It builds a bridge to social science. It grounds analysis in legal practice. It casts

[71] *Id*.
[72] *Id*. at 236.
[73] *See* Shaffer & Ginsburg, *The Empirical Turn*, *supra* note 63.
[74] *See* SHAFFER, TRANSNATIONAL LEGAL ORDERING, *supra* note 38; TERENCE C. HALLIDAY & GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERS (2015).
[75] Shaffer & Coye, *From International Law to Jessup's Transnational Law*, *supra* note 38 (using these two areas as examples).

attention on the prospects for legal change. Empirical understanding is critical for uncovering international law's structural biases and thus to hold legal decision-making accountable. And it provides a grounding for international law reform so as to enhance law's effectiveness in light of the ends-in-view.

Legal realism has both a deconstructive (empirical) and a constructive (pragmatist and problem-solving) dimension. Deconstructively, it opens the black box of international lawmaking and practice, revealing the processes through which international legal norms are developed, applied, and have effects. In the process, it uncovers structural tilts in international law on account of power asymmetries between states and among constituencies operating through and apart from them, such as capital and business. Law constitutes not just a form of reasoning, but also a form of power, both directly when it is enforced, and more diffusely when it normalizes perceptions of the way things are and should be. For legal realists, normative and positivist international law scholarship tend to elide how powerful actors not only shape norms in international law, but also harness them (however neutral they may seem) for their own ends. While greater legalization can reduce concerns over the wielding of political power, it raises new ones over the distribution of legal capacity to use the law. Empirical studies in international trade law, for example, illustrate the role of not only economic power but also legal capacity.[76] For legal realists, it is dangerous both to obscure law's power and coerciveness and to view law as indistinct from power.

In parallel, legal realism has a constructive, pragmatic dimension regarding how law can be adapted and reformed in light of new challenges. International courts, for example, can respond to challenges, such as from civil society groups, to accommodate new demands through contextualizing doctrine. Rob Howse, for example, shows how the WTO Appellate Body responded to contestation over the trade-environment linkage by developing a jurisprudence that is more accommodating to environmental and animal welfare concerns.[77] Over time, less powerful actors can learn to organize and use law more effectively, as many countries have done in the WTO legal system.[78] For legal realists, legal norms matter. Because they are constituted by reason as well as power, they can provide effective tools for resolving common challenges (climate change being the largest confronting the world today), and, in the process, also protect the interests of less powerful actors. There is much tragedy in international relations,[79] but for legal realists, law also offers hope.

B. Challenges and Responses. The main challenge to legal realism is the risk of subsuming law within other disciplines and thus losing touch with what makes law distinctive, including its

[76] Gregory Shaffer, Marc Busch & Eric Reinhardt, *Does Legal Capacity Matter: A Survey of WTO Members*, 8 WORLD TRADE REV. 559 (2010).
[77] Robert Howse, *World Trade Organization Twenty Years On*, 27 EUR. J. INT'L. L. 9 (2016).
[78] *See* GREGORY SHAFFER & RICARDO MELENDEZ-ORTIZ, DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE (2010).
[79] *Cf.* HANS MORGENTHAU, SCIENTIFIC MAN VS. POWER POLITICS (1946) (on the limits of reason and the tragedy of international politics).

normativity. A frequent challenge to legal realism is the risk of reductionism and scientism.[80] By calling something "science," one asserts an authority while potentially obscuring assumptions on which findings depend. Such a science risks hiding normative claims implicit in the categories used. It moreover can leave little room for the distinctively legal in legal institutions, legal professions, legal consciousness, and legal modes of discourse involving craft and tradition. In the process, legal analysis can become an apology for power, which was a frequent critique of the policy science of the Yale school. Legal realism, however, stresses the importance of bridge building, not surrender.[81] It embraces multi-disciplinarity and, in doing so, opens research agendas, including joint ones with those from other disciplines, that are reflexive about their theoretical assumptions. In this way, it helps address the translation between law and social science.[82]

International law includes legal doctrine and so a related challenge is whether legal realism deprives law "of the very features that make it a distinctive enterprise."[83] A first—important—response is—in part—to concede the charge, while insisting that doctrine and the activity of international courts form only a small part of international law's practice that shapes the law's meaning and so it is a mistake to narrow the study of law to only doctrine and courts.[84] A second response, however, is that legal realists take doctrine seriously while taking equally seriously external factors that inform law's practice, such as power, empirical context, and forward-looking goals.[85] Legal realists provide important insights for doctrinal analysis by focusing on the institutional and factual contexts in and with which legal reasoning engages,[86] such that the answer to doctrinal questions is intricately linked to sociological ones.[87] Third, empirical analysis is important in litigation itself, which involves the assessment of empirical data in light of formal legal categories. For example, panels in litigation before the World Trade Organization, assess economic data, but that data alone is not determinative because it is viewed through legal

---

[80] *See, e.g.*, Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L. L. 7 (2009); Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L. REL. 3 (2012); Jan Klabbers, *The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity*, 1 J. INT'L. L. & INT'L REL. 35, n.1 (2004–2005); Jan Klabbers, *The Bridge Crack'd: A Critical Look at Interdisciplinary Relations*, 23 INT'L. REL. 119 (2009); ANDREA BIANCHI, INTERNATIONAL LAW THEORIES 126–31 (2017).

[81] Alexandra Huneeus, *Human Rights Between Jurisprudence and Social Science*, 28 LEIDEN J. INT'L L. 255 (2015); Erlanger, *New Legal Realism*, *supra* note 8.

[82] *See* Elizabeth Mertz, *Introduction*, *in* THE ROLE OF SOCIAL SCIENCE IN LAW xiii–xxx (Elizabeth Mertz ed., 2008); Elizabeth Mertz, *Translating Science into Family Law: An Overview*, 56 DEPAUL L. REV. 799, 801 (2007) ("[A]n adequate translation of social science to law must look at the intervening steps just as systematically and carefully as it looks at the initial findings.").

[83] Daniel Bodansky, *Legal Realism and its Discontents*, 28 LEIDEN J. INT'L L. 267 (2015).

[84] *See* Twining, *Legal R/realism*, *supra* note 3. *See, e.g.*, SALLY MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING (2016) (on social indicators as a form of soft law).

[85] Dagan, *Realist Conception*, *supra* note 23.

[86] *See, e.g.*, BRIAN LEITER, NATURALIZING JURISPRUDENCE 21 (2017) ("[J]udges respond primarily to the stimulus of facts.").

[87] Frederick Schauer, *Institutions and the Concept of Law: A Reply to Ronald Dworkin (with some help from Neil MacCormick*, *in* LAW AS INSTITUTIONAL NORMATIVE ORDER, 35 (Maksyilian del Mar and Zenon Bankowski eds., 2009).

categories.[88] Those legal categories, in turn, are not static, but amenable to change in light of practice and experience.

Legal realism also has been critiqued for its failure to provide a normative theory of values. As the legal realist Felix Cohen wrote, "we never shall thoroughly understand the facts as they are, and we are not likely to make much progress towards such understanding unless we at the same time bring into play a critical theory of values."[89] Legal realists are wary of ideal normative theory, but still stress the importance of values in orienting decision-making. Indeed, concern about "law as a viable social institution that can be an instrument of justice" drove the legal realists.[90] They recognize that human values tend to be "pluralistic and multiple, dynamic and changing,"[91]—a characteristic especially pertinent in the international context.[92] Since claims will always be contentious, legal realists stress the importance of participation in social decision-making by affected stakeholders.[93] Yet, not all values will do, particularly those not focused on human needs.[94]

Legal realists may apply different normative frameworks that inform ends, but what they commonly contend is that those ends should be responsive to experience.[95] As pragmatists, they maintain that thought is purposive and derived from experience. Learning from the consequences of our interventions, one should be open to modifying means, as well as ends, which should be regarded as "ends-in-view."[96] Normative-oriented international law theories—such as those of international constitutionalism, global administrative law, and global legal pluralism—can thus complement legal realism, but only to the extent that they retain a pragmatist orientation that builds from experience and focuses on consequences.

5. New Legal Realism and the Purported Crises of International Law

The dramatic shift in global economic power from the United States and Europe toward China, rising inequality within states, and mass political and economic migration have made for a potent, combustible mix. Among the fallouts has been a rise in neo-nationalist political movements and a backlash against international law and institutions. A question emerges whether the 1990s and 2000s represented a heyday for international law and institutions that are now in secular

---

[88] *See* Andrew Lang, *New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science*, 28 LEIDEN J. INT'L L. 231 (2015).
[89] Cohen, *Transcendental Nonsense*, *supra* note 6, at 848–49; Felix Cohen, *Modern Ethics and the Law*, 4 BROOKLYN L. REV. 33, 45 (1934).
[90] HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 61 (2013).
[91] Hessel Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154, 1169 (1941).
[92] See Nico Krisch, *Global Legal Pluralism*, this volume.
[93] Nourse & Shaffer, *Varieties*, *surpa* note 8, at 123–27.
[94] *See* Hessel Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 955 (1931) ("[I]deals of justice not related to human needs are not true ideals."); Nourse & Shaffer, *Varieties*, *supra* note 8, at 135 (citing Sen's conception of liberty in AMARTYA SEN, THE IDEA OF JUSTICE (2009) and Petit's non-domination theory in PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997)).
[95] *See* J. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC (1916); *see also* Nourse & Shaffer, *Varieties*, *supra* note 8.
[96] *See, e.g.*, John Dewey, *Valuation and Experimental Knowledge*, 31 PHIL. REV. 325 (1922); John Dewey, *Theory of Valuation*, 6 PHIL SCI. 490 (1940).

decline, or whether transnational social connectedness and interdependence will catalyze ongoing global and transnational governance through law.

Legal realism's grounding in empiricism and pragmatism is critical for understanding and responding to these developments. From a legal realist perspective, a crisis in international law occurs when international law becomes decoupled from its social and political context and either ceases to have its intended effects or has effects that spur significant state and civil society resistance and rejection. Legal realism provides the grounding for understanding and responding to crises because its theoretical framework is based on the interaction of internal and external factors that shape law's meaning, practice, and change. Legal realism stresses how international legal ordering is not inexorable, but conditional. Norms settle and unsettle, often encountering resistance. Such resistance arises because of the stakes implicated by international law and its institutionalization. International law norms, which vary in their hard and soft law nature, do not simply complement each other. Actors also use them as antagonists to contest rival norms, including to undermine existing ones.[97] Given the shifts in economic and political power in the world, and rising inequality within states, managing the interface between countries' policy choices through international law will raise increasing tensions. Crises now besetting international law and institutions reflect heightened contests over the norms governing international relations in many domains, which, in turn, affect domestic law and politics.[98]

Because legal realism engages with empirics in combination with legal practice, it builds better understanding of the nature and seriousness of the purported crises in international law. In investment law, it addresses the challenges of different institutional alternatives for handling disputes in light of their relative biases and trade-offs. In trade law, it focuses attention on the need to respond to concerns over rising inequality within states, and the challenges of social inclusion. Historical studies of the interwar period illustrate the seriousness of the challenges. Legal realism's complementary attendance to pragmatic reasoning in law, building from experience, provides a way forward.

While traditional positivist legal scholars focus on state consent as a central feature of international law, legal realists show how global norm-making becomes effective through recursive processes involving hard and soft law, and state and non-state actors, that shape norms transnationally, so that law's meaning and practice adapt to changing contexts. Indeed, we may see a turn to less formal, stealthier means of ordering through international law, including greater use of soft law and private ordering to address perceptions of transnational problems.[99] Legal realism's conditional theorizing and emergent analytics helps us understand these developments, and on that basis, both engage and shape them.

---

[97] Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010).

[98] See Gregory Shaffer, *How Do We Get Along?: International Law and the Nation-State*, 117 MICHIGAN L. REV. (2019 forthcoming).

[99] JOOST PAUWELYN & RAMSES WESSELS, INFORMAL INTERNATIONAL LAWMAKING (2012); Block-Lieb & Halliday, *Global Lawmakers*, *supra* note 68.

6. Conclusion

Legal realism constitutes the third pillar of jurisprudence alongside legal positivism and normative legal theorizing. It assesses the interaction of internal legal and external sociopolitical factors in international law's development, interpretation, and practice to build conditional theory on how international law obtains meaning, operates, and changes. As transnational social connectedness intensified and international institutionalization deepened, legal realism became more salient for the study of international law. With expanded opportunities and demands for transnational pragmatic decision-making and developments in the empirical social sciences, a new legal realism has become increasingly important for the study, understanding, and development of international law. This new legal realism is grounded in empiricism and pragmatism, which are critical for responding to the purported crises of international law today.