A New Legal Realism: Elegant Models and the Messy Law in Action

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Recently there has been a flurry of interest in empirical approaches to law. What makes this noteworthy is that many law professors are involved. Scholars are beginning to talk of a "new legal realism," although it is not clear whether they mean similar things or how much of what they point to is truly "new." Clearly, we can list many earlier examples of empirical work: Charles Clark's studies of the business of courts; the University of Chicago's jury project and the University of Wisconsin's Civil Litigation Research Project are only some of what legal scholars done in the past.[1] Indeed, my own two major empirical projects are now 45[2] and 29[3] years old. While we can cite such examples, people in law schools long have talked more about looking at the law in action than doing it, but, as I said, things may be changing.

I want to tell three stories. First, I will describe some of the recent interest by law professors in an empirical approach to law. It comes in very distinct flavors, and it is not just more of what has been done in the past.[4] Second, I will look at the challenge that we who do not have Ph.D.'s in any social science face when we seek help from our colleagues who do this kind of work. We have to translate their findings into terms that we can use, and we must be aware of the limitations that surround work in the various approaches to social science. Third, I will ask what difference adding a picture of the law in action might make to traditional legal scholarship.

I. Another Empirical Turn for the Law Schools

Let me offer some examples of the recent growing empirical turn by legal academics, sometimes acting alone and sometimes with social scientist partners. We can call any or all of this work "new legal realism" to draw attention to efforts to broaden the factual base of legal analysis. Those of us who see confronting the law in action and the living law as vital may find

[1]See Stewart Macaulay, The New Versus the Old Legal Realism: "Things Ain't What They Used to Be," 2005 Wis. L. Rev. 365.

[2]See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 American Sociological Rev. 55 (1963).

[3] See Stewart Macaulay, Lawyers and Consumer Protection Laws, 14 Law & Society Rev. 115 (1979).

[4]The American Bar Association's Section on Legal Education, Out of the Box Committee issued a report in 2009. The report states: "[I]t is next to impossible today for a young lawyer to get appointed or to earn tenure based only on careful, rigorous, incisive legal analysis that takes cases seriously." The report concludes "The right way to do 'law and' is to connect a brilliant legal scholar with a brilliant 'and' scholar . . . Too many law professors neither train their students for their chosen profession nor contribute as scholars to that profession. But they do have a good time." With respect, I dissent for many reasons. One is that I have not seen an army of law and scholars crowding out the lawyers in law school. Second, it is very hard to connect a legal scholar with a social scientist. They have to learn to talk and to listen to each other. The translation problems are great.

the term a useful marker, flagging a new and better approach. One audience for the term could be those law professors doing this work. The other would be outsiders. We can ask whether "new legal realism" communicates something of what is involved to each audience. Obviously, the term has no established and precise boundaries. Nonetheless, it still may be useful.

Thomas J. Miles and Cass R. Sunstein discuss what they call "*The* New Legal Realism."[5] This work is "an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets." It involves "the close examination of reported cases in order to understand how judicial personality, understood in various ways, influences legal outcomes, and how legal institutions constrain or unleash these influences." Notice that they want to use new tools to broaden our approach to classic problems of legal scholarship -- how can we predict and explain what courts are going to do?[6]

Sunstein, Schkade and Ellman[7] present a major example of one version of new legal realism. They looked at 4,958 published opinions of United States Courts of Appeal and the votes of 14,874 individual judges from 1995 to 2004 in areas where the authors thought that ideology might matter. They offer three hypotheses:

> *1. Ideological Voting.* In ideologically contested cases, a judge's ideological tendency can be predicted by the party of the appointing president. Republican appointees vote very differently from Democratic appointees. . .
>
> *2. Ideological dampening.* A judge's ideological tendency . . . is likely to be dampened if she is sitting with two judges of a different political party. For example, a Democratic appointee should be less likely to vote in a stereotypically liberal fashion if accompanied by two Republican appointees, and a Republican appointee should be less likely to vote in a stereotypically conservative fashion if accompanied by two Democratic appointees.
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> *3. Ideological amplification.* A judge's ideological tendency . . . is likely to be amplified if she is sitting with two judges from the same political party. . . as the president who appointed her.

What did they find? All three hypotheses were confirmed in cases involving: (1) Affirmative action; (2) Sex discrimination; (3) Sexual harassment; (4) Americans with

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[5]Thomas J. Miles & Cass R. Sunstein, The New Legal Realism, 75 U. Chi. L. Rev. 831 (2008).
[6]See, also, Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823 (2006). For another study establishing judicial behavior by the use of statistics, see Lori A. Ringhand, Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court, 24 Constitutional Commentary 43 (2007). See, also, Howard Gillman, What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making, 39 Law & Social Inquiry 465 (2001)(noting that political scientists have done somewhat similar work for a very long time).
[7]Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeal: A Preliminary Investigation, 90 Virginia L. Rev. 301 (2004).

Disabilities Act cases; (5) Piercing the corporate veil; (6) Campaign finance; (7) Environmental regulation; (8) Contracts Clause violations; and (9) Title VII. The authors caution: "Ideology is not everything; there is substantial overlap between the votes of Republican appointees and those of Democratic appointees." The likely result often is not foreordained by the composition of the panel. But the litigant's chances, in the cases they examine, are significantly affected by the luck of the draw. They say:

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> 2 Consider, for example, a case in which a woman has complained of sex discrimination. In front of an appellate panel of three Democratic appointees, she wins 75 percent of the time. But if the panel has fewer Democratic appointees, her chances decline. With two Democratic and one Republican appointee, she wins 49 percent of the time; with one Democratic and two Republican appointees, she wins 38 percent of the time. And with a panel of three Republican appointees, she wins just 31 percent of the time.[8]
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However, the authors found no significant differences in the voting patterns of Republican and Democratic appointees in: (1) Criminal appeals; (2) Federalism and Commerce Clause cases; and (3) Takings claims. Finally, they found ideological voting without amplification or dampening by the other judges on the panel in cases involving: (1) Abortion and (2) Capital punishment.

The authors seek to explain why ideological voting is not greater. They argue that often the law itself imposes constraints, and those nominated and confirmed as Court of Appeals judges seldom are ideologues or extremists. Also, the one Democrat, on a panel with two Republicans, might influence other judges, at least where the panel would otherwise fail to follow existing law -- this is the "whistleblower effect." The two Republicans often will not want to face a well reasoned dissent. Sometimes, however, it just is not worth dissenting, and the Democrat will go along with her colleagues. Writing a dissenting opinion, after all, is more work for a busy judge.

When we look at studies of selecting appellate judges, we should not be surprised by the results produced by this study. To a large extent, the judges are picked by our presidents in our now highly politicized federal judicial selection process to do just what they are doing.[9]

Sunstein, Schkade and Ellman is a kind of "new legal realism" which in its methods resembles the approach of many of the articles in the new *Journal of Empirical Legal Studies.* JELS' Editors' Introduction tells us: "JELS seeks to encourage, promote, and provide an impetus for the careful collection of empirical data and the dispassionate, rigorous testing of

[8] David A. Schkade and Cass R. Sunstein, Judging by Where You Sit, N.Y. Times, June 11, 2003, at A31.

[9] See., e.g., Sheldon Goldman, Elliot Slotnick, Gerard Gryski and Sara Schiavoni, W. Bush's Judiciary: The First Term Record, 88 Judicature 244 (2005).

empirical hypotheses. The central purpose of JELS is to add to knowledge of the legal system based on observation or empirical analysis, including experimental analysis . . ."[10]

Two phrases catch my eye -- "empirical data" and "rigorous testing." If we skim the first two volumes, we find tables of numbers and statistics in most of the articles. We might argue that a better name for the enterprise would be the Journal of Quantitative Legal Studies. But the questions JELS asks are broader than why judges do what they do. The focus of most articles is on the impact of the legal system, and the approach is instrumental. The authors ask such things as have the amounts awarded by juries increased over the last forty years?[11] Are there common clusters of problems that go to court and, if so, what are their social and demographic indicators?[12] An entire issue was devoted to the "vanishing trial" in the United States. The numbers show that we have had a sharp decline in the number of trials, and twelve articles seek to explain why this is so and appraise the consequences.[13] Many of these articles

[10] Editors' Introduction, 1 Journal of Empirical Legal Studies v (2004).

[11] Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, Forty Years of Civil Jury Verdicts, 1 Journal of Empirical Legal Studies 1 (2004).

[12] Pascoe Pleasance, Nigel J. Balmer, Alexy Buck, Aoife O'Grady and Hazel Genn, Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators, 1 Journal of Empirical Legal Studies 301 (2004).

[13] See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 Journal of Empirical Legal Studies 459 (2004); 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, id at 571; Stephen B. Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah? id at 591; Paul Butler, The Case for Trials: Considering the Intangibles, id at 627; Shari Seidman Diamond & Jessica Bina, Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals, id at 637; Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration and Anti-Plaintiff Appellate Outcomes, id at 659; Lawrence M. Friedman, The Day Before Trials Vanished, id at 689; Gillian K. Hadfield, Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, id at 705; Herbert M Kritzer, Disappearing Trials? A Comparative Perspective, id at 735; Brian J. Ostrom, Shauna M. Strickland and Paula L. Hannaford-Agor, Examining Trial Trends in State Courts: 1976-2002, id at 755; Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, id at 783; Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution," id at 843; Elizabeth Warren, Vanishing Trials: The Bankruptcy Experience, id at 913; Stephen C. Yeazell, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial, id at 943. 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. of Conflict Resolution 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 much adjudication occurs before trial and outside the courts.")

suggest that data and statistics can take us only so far, and the authors turn to other approaches to explain the patterns found in the tables of numbers.[14]

There also is a growing body of writing labeled "behavioral law and economics." This is a very large subject,[15] and I can only offer a few recent examples. Wilkinson-Ryan and Small look at bargaining at divorce.[16] They review "empirical evidence suggesting that men and women bargain differently because of motivational and cognitive factors." For example, they cite an article published in *Psychological Bulletin* that finds "women are more communally-oriented than men and that their self-concept is more dependent on their relationships with others which in turn makes them focus on interpersonal goals and less on task-specific goals." The authors argue that this may affect how men and women bargain. Of course, we can suspect that some men are more dependent on their relationships with others than some women, and we can wonder whether the strength of this conclusion might change as women's roles in society change. Broad quantitatively-supported conclusions often leave finer-grained qualitatively/contextual/historical nuances and variations unexplored. A particular dispute will involve the personalities and histories of the parties involved. The *Psych Bulletin* article takes us beyond some image of equal rights-bearing-individuals, but once we open that door many questions about particular parties are left unanswered by this line of empirical evidence.

Another example is offered by an exchange between Oren Bar-Gill[17] and Richard A. Epstein.[18] Bar-Gill argues that consumers suffer from systematic misperception of the costs and benefits associated with certain products, such as credit cards. Sophisticated sellers design their products, contracts, and pricing schemes in response to consumer misperception. This is welfare-reducing. As a result, Bar-Gill argues that some type of legal intervention is warranted. Epstein is not persuaded. He tells us at the outset:

> There is little doubt that the major new theoretical approach to law and economics in the past two decades does not come from either of these two fields. Instead it comes from the adjacent discipline of cognitive psychology, which has now morphed into behavioral economics. [803]

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[14] For an excellent qualitative study printed in JELS, see Herbert M. Kritzer, Daubert in the Law Office: Routinizing Procedural Change, 5 J. Empirical Legal Studies 109 (2008).

[15] See, e.g., Jolls, Sunstein & Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1470 (1998); Hanson & Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630 (1999); Robert Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 Chicago-Kent L. Rev. 23 (1989); Robert Korobkin, Removing the Rationality Assumption from Law and Economics, 88 Calif. L. Rev. 1951 (2000).

[16] Tess Wilkinson-Ryan and Deborah Small, Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining, 26 Law and Inequality 109 (2008).

[17] Oren Bar-Gill, The Behavioral Economics of Consumer Contracts, 92 Minn. L. Rev. 749 (2008).

[18] Richard A. Epstein, The Neoclassical Economics of Consumer Contracts, 92 Minn. L. Rev. 803 (2008).

Epstein is not a great fan of cognitive psychology. He thinks that consumers learn how to protect themselves, and this makes markets work. He turns to the large amount of information available on the Web as evidence that consumers now are even more able to cope with practices of credit card companies and lenders. One of his comments about a study that supports his views suggests his skepticism about behavioral economics reliance on cognitive psychology. Epstein[19] says:

> What I regard as most valuable about this study is that it does not rely on looking at studies of college students' behavior, but tries to organize extensive data about the behavior of real people of all ages in credit markets. [811]

At the least, this exchange suggests that those who take economics approaches to law are confronting and will confront serious problems about establishing facts. To what degree can law professors just pick up findings from cognitive psychology and plug them into their analyses? The unthinking "plug in" approach risks ignoring the limits of the studies. If cognitive psychology cannot be used this way, can it at least suggest hypotheses? To the extent that it can, we still would have to test these hypotheses or decide to accept them based on our intuitions which might be completely wrong. Epstein raises a valid concern about Bar-Gill's reliance on cognitive psychology that often rests on testing undergraduates who must gain experimental points for a course. Nonetheless, we can wonder as well about the limits of the study that Epstein draws on. It is not easy to get hard data about the "behavior of real people of all ages in credit markets." Gregory Mitchell finds that scholars doing behavioral law and economics often replace the assumption of rational human behavior found in traditional work with a view that individuals have systematic biases and errors in judgment. However, Mitchell offers much evidence that situational variables affect the rationality of human behavior.[20] Of course, this means that it is much more difficult to offer theories about the impact of law that yield precise and neat results. Instead of an elegant formula, the scholar is left to say "it depends."

Social science, of course, is not just large data sets and fancy statistics or experiments run in a laboratory to test the ideas of social psychology. There is a rich tradition of careful qualitative work as well. Understanding the law in action often requires such qualitative work. Tables of data may not be available, and those involved may have reasons not to advertise what they have been doing. Counting things may not answer the questions that we need to answer or there may be no way to get something to count.

For example, while police and administrative agencies do take some proactive steps to enforce the law, taking legal action often requires ordinary people to perceive that they have

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[19] Sumit Agarwal et al., The Age of Reason: Financial Decisions over the Lifecycle (Mass. Inst. of Tech. Dep't of Econ. Working Paper Series, Working Paper No. 07-11, 2007), available at http://ssrn.com/abstract=973790.

[20] Gregory Mitchell, Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law, 43 Wm. & Mary L. Rev. 1907 (2002); Gregory Mitchell, Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence, 91 Geo. L.J. 67 (2002); Gregory Mitchell, Tendencies Versus Boundaries: Levels of Generality in Behavioral Law and Economics, 56 Vand. L. Rev. 1781 (2003).

been wronged, find someone they see as responsible, and decide to make a claim.[21] It is hard to study those who did not take action when they might have done so. It is not easy to find those who had legal rights and failed to assert them. Catherine Albiston studied workers who likely had rights under the Family and Medical Leave Act of 1993.[22] She located respondents from a telephone information line run by a nonprofit organization that gives informal legal assistance to workers by Albiston. Twenty four of the thirty five people who called over the course of a year agreed to be interviewed. Obviously, she could not generalize to all of the people who might consider using their rights under FMLA, but she discovered patterns that likely hold true for many employees. She found that cultural norms influenced employees' decisions about using those rights. One who takes time from work to care for a member of the family may be viewed as not taking the job seriously. The "good employee" puts the job first. Employees worried that if they took leave, they might be sanctioned. They could be fired, denied raises or assigned to unrewarding tasks. Both true and inaccurate stories about what happened to others can pass through the employees' social networks, deterring claims.

We add to our confidence in Albiston's study when we look at Phoebe A. Morgan's paper: "Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women."[23] She looks at thirty-one women who reported their sexual harassment to authorities and considered litigation: "[T]he decision to sue rested upon assessments of their abilities to do so while also being good mothers, wives, and daughters. If the filing of the suit threatened the well-being of family members or to strain family ties, then potential plaintiffs were reluctant to embrace such a choice." Thus, Morgan found costs here that were analogous to those found by Albiston.[24]

Several of us at Wisconsin, the American Bar Foundation and elsewhere have offered another kind of new legal realism: one that expands legal scholarship by demanding that it take into account the almost fifty years of the modern law-and-society movement.[25] In 1984, I gave

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[21] William L. F. Felstiner, Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . , 15 Law & Society Review 631 (1981).

[22] Catherine R. Albiston, Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights, 39 Law & Society Review 11 (2005).

[23] Phoebe A. Morgan, Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women, 33 Law & Society Review 67 (1999).

[24] For another study of rights claiming that qualifies as a model of new legal realism, see Deborah L. Brake and Joanna L. Grossman, The Failure of Title VII as a Rights-Claiming System, 86 North Carolina L. Rev. 859 (2008). Brake and Grossman draw on social science literature about "how people perceive and respond to discrimination in the real world," and contrast this evidence with the demands of Title VII doctrines about asserting claims clearly and promptly.

[25] Richard A. Posner, The Sociology of the Sociology of Law: A View from Economics, 2 J. L. & Econ. 265 (1995), finds the sociology of law to be a "weak field." Its focus has been "narrow, theoretically limited, and, empirically, limited in both scope and method." Posner seems to miss that much of law and society work challenges the explicit and implicit theory of most legal writing, including at least some of law and economics. Marc Galanter decodes this cognitive map or paradigm of legal reality in his unpublished paper, Notes on the Future of Social

the Mitchell Lecture at the State University of New York at Buffalo.[26] I asked what, if anything, twenty years of work in the Law and Society Association had accomplished. I offer the main headings now as a quick way to review a large field. Here they are:

1. Law is not free.
2. Law is delivered by actors with limited resources and interests of their own in settings where they have discretion.
3. Many of the functions usually thought of as legal are performed by alternative institutions, and there is a great deal of interpenetration between what we call public and private sectors.
4. People, acting alone and in groups, cope with law and cannot be expected to comply passively.
5. Lawyers play many roles other than adversary in a courtroom.
6. Our society deals with conflict in many ways, but avoidance and evasion are important ones.
7. While law matters in American society, its influence tends to be indirect, subtle and ambiguous.[27]

I advocate a new legal realism where anyone writing about a legal problem would keep these ideas in mind and add them to her analysis. The impact of law is always an empirical question, and we cannot just assume that words on paper have little legs so they can wiggle down off the page and enforce themselves. At a minimum, those who write about the consequences of law should make an effort to draw on social science where it offers relevant information. Clearly, those who have the skills to do empirical research can add to what we know about the law in action and the living law.[28] Sometimes partnerships between those with legal training and those who can play social science at a high level can be very profitable. Moreover, I advocate multiple methods of fact gathering. The effects of law are unusually difficult to capture, and we cannot privilege any one approach. Sometimes we will have to use less rigorous methods.[29] We should accept this as long as the scholar is appropriately humble about what s/he has proved and discloses the limits of his or her approach.[30]

Research in Law (1974). It is reprinted in Stewart Macaulay, Lawrence M. Friedman and John Stookey, Law & Society: Readings on the Social Study of Law 25 (1995). This received paradigm offers a "picture of a hierarchy of agencies applying a hierarchy of rules, more or less in accordance with the picture propounded in our higher law . . ." The key assumption is that the "authoritative normative learning generated at the higher reaches of the system provides a map for understanding it." At the very least, law- and-society work teaches how misleading this received paradigm is.

[26] For an article based on this lecture see Stewart Macaulay, Law and the Behavioral Sciences: Is There Any There There?, 6 Law & Pol'y 149, 182 (1984).

[27] *Id.* at 152–55.

[28] See, e.g., Paul J. Heald, Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers, 92 Minn. L. Rev. 1031 (2008)(Landes and Posner defend extending copyright to give incentives to invest in maintaining and exploiting intellectual works. This article offers data challenging this position).

[29] Elizabeth Chambliss, When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies," 71 Law & Contemp. Probs. 17, 36 (2008), quotes my remark: "[o]ften we are faced with a choice between doing nothing and relying on assumed facts or

publishing a study that other scholars cannot precisely replicate." Stewart Macaulay, Contracts, New Legal Realism, and Improving the Navigation of the Yellow Submarine, 80 Tul. L. Rev. 1161, 1185 n. 99 (2009). She then says: "Or, as one blogger put it, 'if it's worth doing, it's worth doing badly.'" Sometimes the best methods possible will be very suspect -- that is, best may equal "badly" if measured against ideal methods. If we disclose what we have done and are humble about what we conclude, this beats ignoring real problems or making up facts by looking at the ceiling tiles in our offices.

[30] Matthew Braham, Non-Contractual Relations in Business Re-examined: A Critical Assessment of Macaulay's Legal Realism, 16 Homo Oeconomicus 463 (2000), asserts that my 1963 paper "is so methodologically flawed that it should be treated with extreme care." Id. at 465-66. He calls for a study of "a comparison of the number of disputes that are resolved by recourse to contract law with those resolved without it, or by using the number of cases dropped." Id. at 469. I would be delighted to see such a study. I cannot imagine how one could produce it. First, Braham's terms hide many difficulties: What is a dispute? What counts as resolving a dispute by recourse to contract law? Indeed, what counts as contract law as distinguished from other kinds of law? What counts as resolving a dispute without recourse to contract law if contract law exists in the background as a possible resource in case the dispute is not resolved otherwise? For example, suppose the parties quote clauses in their written agreement to each other without ever explicitly threatening to sue. Is this an application of contract "law?"

Second, even if one could gain agreement on the answers to these questions, how would one gain the needed data? Most business people do not keep counts of the number of disputes that are resolved by recourse to contract law compared to those resolved without it. Few business people would welcome a team of researchers invading their offices and watching them negotiate contracts and deal with performances that disappoint them. Undoubtedly, objective statistics based on a random sample of business people and business lawyers would be better evidence. However, creating reliable statistics about the number of contract disputes in a particular industry would be almost impossible. Discovering the number of contract disputes that business people took to lawyers would not be much easier. Very few would know that they sued in 2.37% of all disputes or of "serious" disputes. Even getting a precise count of the number of business contracts cases filed in all American courts would present real difficulties. Various government agencies report such data, but there are many reasons to wonder about their accuracy.

Just finding people willing to talk candidly about business practices was not easy. A law professor does not have subpoena power to compel testimony about behavior that many business people and their lawyers see as confidential. I once found a lawyer who had data in front of him about when the automobile company he represented had been sued and when it had gone to court making claims against suppliers, dealers and customers. He told me that this was confidential proprietary information, and he refused to reveal anything about it to me. I think that many, if not most, business people and their lawyers would take this stance. *f*

Moreover, Braham finds "logical inconsistencies" in my claims. He says that I assert that contract law plays no role in business and then find that its role increased as the world economy changed over time. Any inconsistencies arise from his misreading of the 1963 article and two

A few years after this lecture, I advocated study of the legal ideas held by ordinary people and elites that are offered by education, entertainment, and spectator sports.[31] This was not a new idea. In the early days of American sociology, Professors William Thomas and Dorothy Thomas observed that what people think is so, is in fact so for them.[32] Law can be part of a project to mislead people. I have cautioned, however, that Americans seldom are trapped in the rhetoric of law. Ordinary people in this country are great jazz musicians, ready to improvise on legal tunes. Moreover, many of our legal ideas come in matched contradictory sets so that almost every position can be challenged in totally predictable ways.[33]

Professor David Ray Papke, in a series of articles,[34] has asked about the impact of television and film on jurors who participate in the trial process and on average citizens' views of the courts. Among other things, he discussed with six Indiana trial judges the differences between the picture of courts and trials in popular culture and the real thing. In real-life trials, he says, "irrelevant actions and testimony, randomness, purposelessness, and delay abound." TV does not have time for this. Moreover, he notes that at least some prosecutors think that the CSI

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that follow. I never asserted, as he assumes, that contract law plays no role in planning, avoiding and resolving business disputes. As the 1963 article says, sometimes contract law as applied is useful; sometimes it plays an indirect role as an express or implied threat; sometimes it is almost totally irrelevant. My claim is that we lack a clear picture of when contract law plays a role in different situations and just what that role is. Moreover, I claim that academics often assume that contract law plays a larger role than it does or could play. I am reassured by all of the later studies in many countries that reach roughly the same conclusions that I did about forty years ago. See, e.g., Tommy Roxenhall & Pervez Ghauri, Use of the Written Contract in Long-Lasting Business Relationships, 33 Industrial Marketing Mgmt. 261 (2004)("Our study confirms that contracts are rarely used in connection with disputes. Business people probably feel that contracts should remain in the drawer because they strive for good relations with their customers and suppliers. They solve disputes informally without resorting to contracts or the legal profession."); Rosalinde Klein Woolthuis et al., Trust, Contract and Relationship Development, 26 Organizational Studies 813, 835 (2005)("We have empirically shown that trust and contract need not be 'opposing alternatives' and, more important, shown why this is the case: trust and contract can well be complements because contracts are in practice often not used and interpreted in a strictly legal fashion with opportunism as a central focal point.") Of course, these studies also rest largely on opinion evidence gained from informants who should know what is going on.

[31] Stewart Macaulay, Popular Legal Culture: An Introduction, 98 Yale L.J. 1545 (1989).

[32] William I. Thomas & Dorothy Swaine Thomas, The Child in America 572 (1928) ("If men define situations as real, they are real in their consequences.").

[33] Marvin Harris, Cultural Materialism: The Struggle for a Science of Culture 274, 274–75 (1980).

[34] See David Ray Papke, The Impact of Popular Culture on American Perceptions of the Courts, 82 Indiana SL.J. 1225 (2007); David Ray Papke, The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice, 40 S. Tex. L. Rev. 919 (1999). See, also, Kimberlianne Podlas, Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry, 39 Am. Bus.L.J. 1 (2001).

shows have made jurors expect highly sophisticated forensic evidence that seldom is available.[35]

All of this work contributes to the legal culture -- the public's stock of ideas about what should and should not be done in the legal system. It may affect voters' willingness to support candidates and increases in taxes to pay for such things as police and administrative agencies. And this stock of ideas may be carried into legal proceedings by lay jurors and judges and lawyers as part of what they take for granted.

II. Teaching Old Dogs New Tricks? Dealing with Social Science.

There was a day when many in law and economics loved to remind us that "there ain't no such thing as a free lunch." The new empirical turn in legal studies comes with its costs and risks. Of course, some of those in the legal academy boast both law degrees and Ph.D.s in a social science. While they are unlikely to make some of the mistakes that we amateurs risk, the various social sciences differ over methodologies and basic assumptions. Moreover, there are strong differences within particular social science fields as well as between them. Put simply, these kinds of scholarly research do not yield clearly defined "facts" that just sit there waiting for a legal scholar to pick them up and plug them into her or his analysis. Even social science research that seems to support our pet ideas must be read skeptically and carefully if we care about what is going on rather than just seeking rhetoric and authority to back up our position.[36] My colleague Elizabeth Mertz, who holds both a law degree and a Ph.D. in anthropology, sees the problems as one of "translation."[37] Lawyers have to learn to read social science, and the social scientists need to learn some law if they venture into the rough and tumble of policy and reform.

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[35] Tom R. Tyler, Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction, 115 Yale L.J. 1050 (2006). There is no direct evidence, but the studies on pretrial publicity suggest that watching CSI may prompt jurors to acquit but it might prompt more convictions as well. It is also possible that CSI has no effect at all.

[36] We must avoid the social science equivalent of "law office history." It is far too easy to find a scrap of history to prop up an argument in a brief without doing the job any historian would find acceptable. See, e.g., Adam Small, Reviving "Law Office History": How Academic and Historical Sources Influence Second Amendment Jurisprudence, 45 American Criminal L. Rev. 1213 (2008). See, also, Richard Lempert, Empirical Research for Public Policy: With Examples from Family Law, 5 Journal of Empirical Legal Studies 907 (2008)(Lempert offers five points that consumers of policy relevant empirical research should keep in mind. I particularly like the fifth: "[I]f results seem too good to be true, this is often because they are not true.")

[37] See Elizabeth Mertz, Translating Science into Family Law: An Overview, 56 DePaul L. Rev. 799, 800 (2007).("[Lawyers] may be tempted to dip into science only to locate findings that fit their preferred points of view, rather than reevaluating a point of view when the bulk of the science fails to support it.")

Let me offer an example by venturing into the swamp of whether the death penalty deters murders. Sunstein and Vermeule[38] "suggest . . . that on certain empirical assumptions, capital punishment may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives." [705] They look at several studies that conclude that capital punishment deters, including one that suggests that each execution prevents on average eighteen murders.[39] They argue: "[i]f the current evidence is even roughly correct . . . then a refusal to impose capital punishment will effectively condemn numerous innocent people to death." [706] They ask those who find the social science unconvincing "to suspend their empirical doubts in order to investigate the moral issues that we mean to raise here." [709] Even if we cannot prove that capital punishment deters, it should be imposed "if there is a significant possibility that it will save large numbers of lives." [715]

They concede that the legal system will make mistakes, and some innocent people will be wrongly executed. However, "no legal system can ensure complete accuracy in criminal convictions." [728] Estimates suggest, they tell us, that the number wrongly executed over the past thirty or forty years is very low -- three to five people. [fn. 93 736]

John Donohue and Justin Wolfers responded with a searching examination of the studies that had found that capital punishment deters murder.[40] They find the claims of these studies to be highly questionable. They say: "[a]ggregating over all of our estimates, it is entirely unclear even whether the preponderance of evidence suggests that the death penalty causes more or less murder." Donohue and Wolfers quote another noted economist, Steven Levitt: "I really think not that the answer is 'yes' or 'no,' . . . but that there's not enough information to figure it out. There may never be enough. It may just be a question that can't be answered."

Sunstein and Vermeule were conducting a thought experiment. They asked us to assume that there was adequate evidence that the death penalty saves a significant number of lives. If you make this assumption, then they argue on moral grounds that you would have to impose capital punishment. I have trouble playing their game. First, I am disquieted by how they slip past the problem of executing the innocent. Even as they have framed their thought experiment, this risk must be considered. The innocence projects at various law schools leave me most uneasy about how our system works in capital cases.[41] I recall that Governor George Ryan of Illinois declared a moratorium on executions in 2000, when new evidence cleared 13 men who had been convicted and sent to death row since 1977.[42] I also found Samuel Gross', "The Risks

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[38] Cass R. Sunstein and Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703 (2005).

[39] See, e.g., Hashen Dezhbakhsh et al., Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003).

[40] John J. Donohue and Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791 (2005).

[41] See Dirk Johnson, Poor Legal Work Common for Innocents on Death Row, N.Y. Times, Feb. 5, 2000, at A1; `Shaila Dewan, Releases From Death Row Raise Doubts Over Quality of Defence, N.Y. Times, May 7, 2008.

[42] See Sara Rimer, Questions of Death Row Justice for Poor People in Alabama, N.Y. Times, Mar. 1, 2000, at A1.

of Death: Why Erroneous Convictions Are Common in Capital Cases,"[43] worth attention. The subject is a matter of current debate among various justices and professors.[44]

Moreover, another hard part comes for me when you decide that the evidence for a deterrent effect is suspect. Sunstein and Vermeule say that even if we cannot prove that capital punishment deters, it should be imposed "if there is a significant possibility that it will save large numbers of lives." [715] How do we know that there is such a "significant possibility" if we cannot establish it statistically? How many will we deem to be a "large numbers of lives," and how do we net the total benefit when we subtract the mistakes that seem likely? In short, social science does not necessarily yield clear and certain answers to normative questions. When it does not yield such answers, we must face the question of what risks of being wrong we are willing to take.

But the death penalty and deterrence may offer another example of the problems we face when we try to translate social science into law or law into social science. Fagan, Zimring and Geller[45] point to a risk of work based on large data sets and statistics. Such work usually appears to offer clear answers. We must, however, understand what the tables of numbers and rates represent. The authors point out that the Supreme Court has required states to define the kind of murders that are eligible for the death penalty. Less than 25% of criminal killings could prompt capital punishment under constitutional standards. However, almost all of the studies that find a large deterrent effect for capital punishment use in their work *the number of total intentional homicides.* This includes both those crimes where the death penalty *could be imposed* and many more where *it could not*. [46]

Fagan and his colleagues argue that this is a serious aggregation error: "If execution risk is driving homicide levels, then this should be a specific effect observed in death-eligible cases but not in other types of homicide." [1824] They reanalyze the data, looking for an impact of the threat of execution on cases that could receive the death penalty. They conclude: "Our search for death penalty deterrence where it should be a strong influence on homicide rates has

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[43] Sanuel R. Gross, The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases, 44 Buffalo L. Rev. 469 (1996). See, also, Samuel R. Gross & Barbara O'Brien, Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases, 5 J. of Empirical Legal Studies 927 (2008)("From 1973 on, we know basic facts about all defendants who were sentenced to death in the United States, and we know which of them were exonerated. From these data we estimate that the frequency of wrongful death sentences in the United States is at least 2.3 percent.")

[44] See Adam Liptak, Consensus on Counting the Innocent: We Can't, N.Y. Times, March 25, 2008, at A14.

[45]Jeffrey Fagan, Franklin E. Zimring and Amanda Geller, Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty, 84 Texas L. Rev. 1803 (2006).

[46] It is possible that the death penalty deters killing in situations where the accused legally could not get the death penalty because most people do not know the legal standards and their application. Misunderstanding of the law can have impact. Proving that this is, or is not, the case with capital punishment is far beyond my skills in social science. Proving why people do not do something is hard.š

produced consistent results: the marginal deterrent effect of the threat or example of execution on those cases at risk for such punishment is invisible." [1860] Sometimes we must get the law right before we start analyzing numbers.

Turning to another example of the difficulties in drawing on social science for law, I mentioned the growing body of books and articles that analyze law in popular culture. I find almost all of the work that I have seen to be interesting and entertaining. But this body of work illustrates a common difficulty when we try to put law in context. These kinds studies face the problem of showing impact. The scholar does an analysis of what was sent out to the audience in a novel, a film, a television program or series, or even spectator sports. However, it is very hard to know what various members of the public took in. Good drama offers conflicting themes, and a reader or viewer can focus on what is salient to her or identify with a secondary character or even the villain.[47] Some will just not get it. Moreover, there are competing stories, and we can watch or read one this week and one with a very different lesson next week. But how do various kinds of people in the society translate what they see? Unless we seek answers to this question, we may err seriously as we rely on our own "readings" of popular entertainment, assuming that everyone else reads it the same way.

We receive information about law through many channels, and each of us must translate it into our assumptions and expectations. Furthermore, people are also influenced by their own experiences with law as well as by those of friends and relatives. A bitterly contested divorce may influence a man or a woman far more than conventional pictures of lawyers and the legal system found in film, television or novels.

III. So What?

If we put law in context, we should begin to produce a more accurate picture of the legal system as it actually operates, as opposed to relying on ideological claims based on the idealistic images of law. For example, context teaches us to question the stock picture of law vindicating rights through procedures fashioned to establish the truth. Yet what are the consequences of a more realistic portrait of the law in action and the living law? In Wisconsin we say that if you love sausage, never go see it being made.[48] Would an unretouched picture of the legal system damage its claims to legitimacy? More particularly, many of those interested in law and development advocate the spread of "the rule of law." But. in fact, does this "rule of law" prevail in the United States or the United Kingdom? More broadly, if we put law in context, what does it do to the kind of legal analysis being taught in most law schools, including my own? What does it do to what law professors publish as scholarly work?

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[47] Mezey and Niles assert: "[T]he more complex the message, the more various the interpretations. Thus, viewers may focus on the sense of redemptive sacrifice, the pathos of the story, the injustice, the rebellion, or none of these. . . . One of the characteristic features of popular culture, and film in particular, is the availability of an abundant variety of readings of the same text from an array of audience members." Mezey and Niles, Screening the Law: Ideology and Law in American Popular Culture, 28 Columbia Journal of Law & Arts 91, 166 (2005).

[48] Another variation is that if you love the ballet, never go backstage: She is not a swan. She is a sweaty athlete.

We can agree that the rule of law is a good thing insofar as it limits government officials violating the human rights of their own citizens. Trials, and even plea bargains, are better than torture and summary executions. However, much of the talk about the rule of law today focuses on making the world safe for business. Ginsberg notes:

> The United Nations Development Program . . . when designing a package of assistance to promote market-oriented reforms in Vietnam, stated that the two most essential elements were a complete definition of property rights and a complete system of contract law. . . This view has become a new orthodoxy for law and development programs all over the world.[49]

My colleague, John Ohnesorge, has reviewed the various publications of international organizations, political leaders and scholars who deal with the rule of law.[50] He finds that those who are not lawyers tend to assume that either a society is characterized by the rule of law or it is not. These writers assume that legal rules are "not subject to significant indeterminacy, and that these are sufficient to provide single correct solutions without resorting to principles, policies or purposes."[51]

Wolf Heydebrand, however, argues that while scholars today persist in debating Max Weber's formal and substantive rationality[52] of legal rules, the reality of most western legal systems is something that Heydebrand calls "negotiated process rationality."[53] This is a mode of governance based on the "logic of informal, negotiated processes within social and sociolegal networks."[54] These networks are not accountable to elected or appointed officials.[55] Negotiated process rationality tolerates diversity and indeterminacy, and it does not yield transparent highly predictable law.[56] To the degree that it affects the outcome of disputes, we lose constitutional

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[49] Tom Ginsburg, Does Law Matter for Economic Development? Evidence From East Asia, 34 Law & Society Review 828, 835.

[50] John Ohnesorge, The Rule of Law, Economic Development, and the Developmental States of Northeast Asia (Christoph Antons, ed., 2003).

[51] Id. at fn. 9.

[52] See Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality: Or, Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought, in Max Weber's Economy and Society 322 (Charles Camic et al. eds., 2005); Ronen Shamir, Formal and Substantive Rationality in American Law: A Weberian Perspective, 2 Social & Legal Studies 45, 46 (1993), argues that we have a history of formal rationality leading to internal contradictions. This provokes reform by substantive rationality, but this leads to routinization and demands for more predictable law. Id. A new formalism then arises. Id. In time, it too will bend to the irrationality of its rationality, and we get a demand for a substantive qualitative approach. Id.

[53] Wolf Heydebrand, Process Rationality as Legal Governance, 18 International Sociology 325, 325 (2003).

[54] Id. at 326.

[55] See id.

[56] See id. at 327–28.

safeguards, and we lose both substantive and procedural rights.[57] Moreover, some individuals and interests will be able to play the game of informal, negotiated processes better than others.[58] Rather than imposing some restraint on power, this form of governance often amplifies the benefits of holding power. It is highly attractive to the interests of corporate and transnational governance. This picture of "negotiated process rationality" is very consistent with a law and society view of the functioning American legal system.[59]

Dezalay and Garth look at the "Rule of Law versus relational capitalism."[60] They say that if we look at what is going on, the two are not opposed but work together: "[T]he holders of economic power can play simultaneously on a double register, that of law and that of business custom, depending on their strategies and interests of the moment." [118] They tell us:

> The great law firms come dressed up in the "rule of law," but they also do not hesitate to mobilize all their own networks of influence (especially their "old boy networks" . . .) [121] [L]egal rationality is not the only aspect of the North American model. The model is characterized by the extraordinary relational capital that the large law firms possess -- resulting from their position at the crossroads of the different places of power. [122]

Can we say that the rule of law exists in the United States? Not if we look at the law in action and measure that against an idealized and formal statement of "the rule of law." [61] And this conclusion alone should prompt us to question those idealized and formal statements.

Even with its uncertain contract and property law in action, America, nonetheless, has enjoyed great economic success. When Americans make a contract, it is not certain that it will be performed to the letter of its text. Yet, it is a good bet that the parties will perform acceptably. Most people and corporations need not fear that their property will be expropriated. Much of the functioning economy is supported not by transparent rules of formal law, but, rather, by the norms and sanctions of long-term continuing relationships.[62] The possibility of legal action

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[57] See id. at 335–36.

[58] See id. at 334, 336.

[59] See also David M. Trubek and Louise G. Trubek, Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination, 11 European L. J. 343 (2005) which explores the operation of non-binding objectives and guidelines in the European Employment Strategy.

[60] Yves Dezalay and Bryant Garth, Law, Lawyers and Social Capital: "Rule of Law" versus Relational Capitalism, 6 Social & Legal Studies 109 (1997).

[61] See Emily Albrink Hartigan, Unlaw, 55 Buffalo L. Rev. 841, 843 (2007)("We are in the time of unlaw. None of the top alleged state defenders or enforcers of law behave as if law did not come out of the barrel of a gun.")

[62] Compare Kieran McEvoy, Beyond Legalism: Towards a Thicker Understanding of Transitional Justice, 34 Journal of Law and Society 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.")

offers some additional incentives in certain situations. There is a rule of law in America, but, as any lawyer knows, it hardly offers crystal clear certainty or eliminates discretion and negotiation. Yet as Karl Llewellyn put it, the law is reckonable.[63] Lawyers can make judgments that are good enough to allow business to function.

When we put law in context, what does it do to traditional legal analysis? How does this affect what we teach and what we write? Those of us who teach in law schools can justify at least part of what goes on in class by pointing out that some cases do get tried, appealed and even appealed again to the highest court with jurisdiction. Our students must be ready to make legal arguments if and when this happens. Moreover, Mnookin and Kornhauser[64], in a famous article, argue that we "bargain in the shadow of the law." Instead of being something enforced through legal procedures, rights become bargaining entitlements to be sold for whatever they will bring. A good technical legal analysis becomes something lawyers use to show the other side that it must consider the risk of losing the case, if the dispute went forward through the legal process.

The problem, of course, is that lawyers bargain in the shadow of the legal system operating in its full messy and uncertain context.[65] The rule as applied to the facts of this case may be unclear, and the facts that can be proved may be more uncertain. Moreover, we bargain in the shadow of factors other than the words of the law and the problems of proof. One side may be better able to absorb the costs of the process than the other. Furthermore, clients usually must depend on lawyers to handicap the horse race and predict the odds on what would happen were they to invest enough to litigate. Lawyers often have their own self interest at stake, favoring in a quick settlement that will provide them with needed fees sooner than fighting through the courts. Moreover, a settlement means that the lawyer is highly likely to be paid while one who litigates often runs the risk that she may lose the verdict and face difficulty collecting from an unhappy client.

Of course, in our scholarship we law professors can always ask whether a legal rule reflects some goal that the society values. The statement of the rule may symbolize the good, the true and the beautiful -- although we always can wonder who sees and responds to such symbols. We do not need an empirical approach as long as we limit ourselves to this kind of normative analysis.

However, if our approach demands that we ask what might be the likely consequences of adopting a legal rule, we must then understand law in its full context or we may make a very bad guess and be very mistaken. While bargaining in the shadow of the law-in-full-context may still demand excellent legal craft, it makes it harder for judges and legislatures to seek substantive ends through adopting rules. If lawmakers champion a legal rule because it will produce good

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[63] Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 4 (1960).

[64] Robert Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale Law Journal 950 (1979).

[65] See Samuel R. Gross, The American Advantage: The Value of Inefficient Litigation, 85 Mich. L. Rev. 734, 754 (1987)("[I]nefficiency limits the effectiveness, the 'penetration' of formal legal rules, and creates room for divergent results and for patterns of behavior based on nonlegal norms.")

public policy, they cannot be sure that the rule will ever go into effect as they hope.[66] It also makes it harder for legal scholars to advocate any legal rule on the basis of its certain and good consequences -- be those consequences efficiency, redistribution of the wealth or anything else. Scholars could draw on about fifty years of modern law-and-society research and come closer to understanding what would likely happen if they adopted a particular rule. They would be unlikely to gain precise and certain answers, but they should do better than if they continued to follow the law review tradition of ignoring the questions.

I have argued for a "new legal realism" wherein those writing about law would take into account these findings of about fifty years of the modern law-and-society movement. Such a view of law in context undercuts a style of law review writing that offers a brief for a position and advocates it with certainty. A bottom-up empirical approach often means that the honest answer to a question about the impact of law can be no more than "it depends." We do know something about what "it depends" on, but this usually takes us back to context -- in these circumstances and when we have parties such as these we should look for the following outcomes. I think that more humility about the consequences of law would be a gain for legal scholarship.

Recently, I wrote a comment on two papers by David Campbell.[67] It can serve as an example of some of what I mean by a new legal realism. It is a contracts example, but I think that the approach would apply to almost any area of law. Conventional contracts talk says that if there is an unexcused material breach of contract, the law will seek to put the aggrieved party in the position she would have been in had the contract been performed. Campbell points out that this is not what we do. He says, "Far from it being the function of the law of contract to (so far as possible) prevent breach, the function of that law is to make breach possible although on terms which the law regulates." As one who has been teaching contracts for many years, I can assure you that this is a most unorthodox position. Nonetheless, it has great plausibility.

In all but a limited group of cases, a seller who names a fixed price for a performance is only taking a zone of risk and not committing his or her firm to foolish, if heroic, measures to carry out the deal precisely as written. Empirical research does show that at least in many transactions, buyers go to great lengths to help suppliers who face difficulties outside of the ordinary zone of risk assumed in their deal. (There is a world of *pacta sunt servanda* where a deal is a deal, but it is a very limited one). Campbell points out that the law of contract remedies reflects this sharing of the risks of loss. The law grants specific performance[68] only in a few cases. The law demands that a buyer mitigate any potential loss by covering her needs through a substitute contract with one of the seller's competitors if this can be done. The difference between contract price and cover price is the basic remedy. Rarely will this difference be great enough to warrant litigation, but even then the aggrieved buyer will have to worry that it may push the supplier into bankruptcy. Buyers can seek consequential damages when they cannot cover, but here they run into both the foreseeability requirements of *Hadley v. Baxendale* and the

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[66] See Joseph A Grundfest and Peter H. Huang, The Unexpected Value of Litigation: A Real Options Perspective, 58 Stanford L. Rev. 1267, 1320 (2006).

[67] Stewart Macaulay, Renegotiations and Settlements: Dr. Pangloss's Notes on the Margins of David Campbell's Papers, 29 Cardozo L. Rev. 261 (2007).

[68] That is, order a party to perform a contract or other transaction.

requirement that consequential damages be proved with reasonable certainty. In all but a few situations, these are high hurdles to jump, and most buyers must consider the risk that they will be unable to do so.

In my comment, I turned to the law in action to add to the reasons why bringing a suit for contract damages seldom will be a winning proposition. Parties often deal on the basis of standard form contracts, and very often the seller's form is used. Frequently, seller's forms have *force majeure* clauses that offer broad excuses. One lawyer put it to me that the typical seller's clause excuses performance if there is a cloud in the blue sky. Additionally, seller's forms usually limit recovery to replacement or repair and disclaim consequential damages. Except in a very few jurisdictions, a buyer who wins a contracts action does not recover her lawyer's fees from the losing seller. Even establishing that the seller is in default often is very hard. Performance may not be defined precisely in the contract, and experts can battle about just what the seller did do in many cases. Litigation drags executives and engineers away from making money for the company and puts them in a setting that many of them hate. Many business people are terrible witnesses, and they may prejudice their claim by the way they respond to questions put in a deposition.

All of this pushes for a settlement rather than litigation. However, while most cases are settled, we should note that there is always a chance that the buyer could sue and recover a large sum as consequential damages. It may be unlikely, but it is still possible in the right circumstances. This possibility, I argue, reinforces all of the relational norms and sanctions that push sellers to perform. In Professor Gross' words:

> [N]orms . . . [such as trust, reputation, civility, etc.] may operate very well in practice, and yet be too vague, too complex, too changeable, or too personal to enact as laws, or even fully to articulate. Nor would it help for the legal system to opt out of an area of behavior entirely and give informal norms free rein: a coercive option, but one that is rarely used, is necessary as a boundary, to keep the normative system intact. A separate but inefficient system of legal rules may strike just the right balance.[69]

Some business people know or learn about the law and the odds of the aggrieved party winning big. Others just know that litigation is painful and something to be avoided. (I've compared it to chemotherapy).

Almost all contracts disputes are settled. However, we cannot be sure that settlements are good, efficient, and something to applaud. It is an empirical question in each case. Usually, there is still a loss, and the parties must divide it. The buyer could just abandon the deal and find another source of supply. (Of course, the buyer is likely to remember what happened the next time she needs to purchase this product). The buyer could agree to pay the original supplier something between the contract price and the market price as an adjustment if this is enough to allow the seller to perform.

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[69] Samuel R. Gross, The American Advantage: The Value of Inefficient Litigation, 85 Mich. L. Rev. 734, 756 (1987).

The parties, alternatively, could work out a more complex settlement where the seller gets relief now but the buyer gets benefits in the future beyond the present contract. For example, in October of 2007, SAS airline announced that it had had three landing gear accidents with its Bombardier Q400 turboprop aircraft in less than two months. None of the passengers or crew was injured in these accidents. SAS withdrew its entire fleet of 27 of these planes from service, and it said that it might ask for compensation.[70] John Dueholm, SAS deputy chief executive, said: "The Dash 8 Q400 has given rise to repeated quality related problems" and there was "a risk that use of the Dash 8 Q400 could eventually damage the SAS brand".[71] Nonetheless, in March of this year the airline and the manufacturer reached a settlement.[72] Under the agreement, SAS will receive more than $163 million in compensation, but it will also place a sizable new order with Bombardier. The new order, valued at $883 million, is for a further 27 aircraft and includes CRJ900 jets as well as a new version of the Q400. The airline has options on another 24 aircraft from the Canadian manufacturer. It seems as if there is something for both sides in this settlement. Occasionally, the parties may reach a settlement like this one that makes both even better off than had the contract been performed, but this is not always possible. As I said, settlements can be good, bad or indifferent.

A new legal realism points to the law in action. It also raises many difficult empirical questions that cannot be answered by looking at theory, ideology or the ceiling tiles in one's office. At the very least, this approach offers caution and humility. We know that we must attend to cost barriers to litigation, the possibilities of settlement, discretion and what Marc Galanter has taught us about why the "haves" come out ahead.[73] We know that much of the work that we think of as legal is done by private governments, and there is a messy overlap between private and public and formal and informal action. There is a living law, and the formal legal system often stands at its margin if it has any relevance at all. But, just to keep things interesting, we also know that sometimes the legal system works just as we picture it in law school. However, we have only the beginning of a map of when and how often cases will be tried and appealed or when police and regulators will go by the book.

Those who like to see the world as a simple orderly place have a reason to deny the picture painted by those who would put the law in its full context. Like life, law in action is messy. Yet those with a compulsion for neatness risk dealing in fantasy if they look only to the word and ignore the way things work.

We have known this for a long time. For example, it is sobering to remember that in 1894, Anatole France wrote about law in action. He said, with a touch of sarcasm:

> Our citizenship is another occasion for pride! For the poor it consists in supporting and maintaining the rich in their power and their idleness. At this task they must

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[70] Kevin Done, SAS Acts on Q400 Aircraft, Financial Times, Oct. 29, 2007, at A20.
[71] Ibid.
[72] Bernard Simon, Bombardier and SAS End Dispute Over Turbo-props, Financial Times, March 11, 2008, at 27.
[73] Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Society Review 95 (1974).

> labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.[74]

Maybe this is why the image of an autonomous legal system based on rules is so appealing to many. The law in context often is not very pretty.

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* This paper was developed from a talk that I gave at University of Colorado School of Law, on April 18, 2008. I wish to thank Professor Amy Jean Schlitz for the invitation to Boulder and comments on my remarks. I also wish to thank my friends Lauren Edleman and Elizabeth E. Mertz for reading the paper critically. As always, all mistakes are mine.

[74] Anatole France (pseudonym for Jacques Anatole François Thibault), The Red Lily [Le Lys Rouge] 91 (Winifred Stephens trans.[1894] 1925).