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The New Legal Realism and The Realist View of Law

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MERTZ, ELIZABETH, STEWART MACAULAY, and THOMAS W. MITCHELL, eds. 2016. *The New Regal Realism: Translating Law-and-Society for Today's Legal Practice*. New York: Cambridge University Press. Pp. xxi + 303.

KLUG, HEINZ, and SALLY ENGLE MERRY, eds. 2016. *The New Regal Realism: Studying Law Globally*. New York: Cambridge University Press. Pp. xxiii + 282.

New legal realism (NLR) furthers the legal realist legacy by focusing attention on both the pertinent social science and the craft that typifies legal discourse and legal institutions. NLR's globalized ambitions also highlight the potential of a nonstatist view of law. The realist view of law raises three challenges facing NLR: identifying the "lingua franca" of law as an academic discipline within which NLR insights on translation and synthesis should be situated; conceptualizing NLR's focus on bottom-up investigation, so that it does not defy the rule of law; and recognizing the normative underpinning for NLR's reformist impulse.

I. INTRODUCTION

A little more than a decade after the inaugural conference of the new legal realism (NLR) convened by Elizabeth Mertz and her colleagues (Erlanger et al. 2005), we can now benefit from the publication of two volumes, jointly entitled *The New Legal Realism*, in order to distill the voice and evaluate the contribution of this emerging school of legal thought.[1] These books include a rich array of fascinating essays dealing with such diverse legal issues as child custody, real estate partition, offshore financial systems, and the prosecution of atrocities. Many of the essays in these books delve into specific case studies; others address their topic from a pedagogical perspective; and some offer historical or theoretical perspectives on the NLR approach of studying law, both domestically and globally.

There is no way to do justice to all the insights these volumes offer in one short essay; our task here will accordingly be much more focused. We will attempt

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1. Having spent much time working on "old" legal realism, we have followed developments in new legal realism with interest for over a decade, including productive exchanges with some of its founding members, including Howard Erlanger, the Review Section editor of this journal, and, especially, Beth Mertz.

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to offer a broad perspective on the NLR, namely, to: (1) elaborate its core mission and signature, (2) consider how it relates to the main tenets of the original legal realism, and (3) assess its prospects. The main claim of this essay integrates our second and third tasks. We will argue that a helpful avenue for appreciating both NLR's main promises and its most significant challenges entails situating it within legal theory, or what might be termed an expansive view of jurisprudence. In particular, we will compare NLR to the view of law that emerges from the main sources of "old" American legal realism (to which we refer below simply as "legal realism").

The legacy of legal realism, as one of us has expounded at length (Dagan 2013), provides a subtle view of law as a set of institutions distinguished by the irreducible cohabitation of power and reason, science and craft, tradition and progress. On its face, this view has little to do with the NLR project, at least as its self-understanding emerges from the books under review. However, a closer look reveals important existing, as well as potential, continuities.

NLR, as we elucidate in Section II, is a species of empirical legal studies. Although it is promoted, and rightly so, as a "big tent" (Mertz, I, 4), it has five distinctive features: (1) NLR is law centered—it carefully addresses both legal doctrine and legal institutions; (2) NLR is deeply concerned with translating social science and synthesizing its findings into law; (3) NLR is oriented bottom up, focusing on law on the ground rather than law in appellate cases or doctrinal treatises; (4) NLR scholars are often committed to constructive legal action; and finally, as a twenty-first-century school, (5) NLR is profoundly attuned to both the risks of parochialism and the proliferation of legal forms in an increasingly globalized environment.

These features of NLR further the legal realist legacy—briefly summarized in Section III—in (at least) two ways. The first, and more obvious one, is by carrying its promise of situated empiricism. NLR, moreover, presents compelling work indicating the power of combining attention to *both* the pertinent social science that can guide the law *and* the craft that typifies legal discourse and legal institutions. Whereas many other descendants of legal realism offer either an external, social scientific perspective on law, or an internal craft-based alternative, NLR (at its best) offers the winning combination.

The second promise of NLR is evinced by the very structure of these books. Dedicating the second volume to the global perspective manifests NLR's ambition to transcend realism's US roots by investigating how other domestic settings, as well as the transnational and substatist contexts, inform our understanding of law. Legal realism did not anticipate this move explicitly, but the realist view of law is open to nonstatist understandings. NLR's globalized ambitions—and, of course, performance—validate what others may see as an unfortunate omission.

Alongside these two significant promises, Section IV of this essay explores three related challenges facing NLR, which are again best highlighted by reading NLR scholarship in the context of legal theory. The first and most general challenge is to identify the "lingua franca" of law as an academic discipline within which NLR insights on translation and synthesis should be situated. Another challenge emerges from the possible ambiguity of NLR's characteristic focus on bottom-up investigation, which may—but need not—imply a celebration of legal ad-hocism

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in defiance of the rule of law. Finally, the third challenge, which may be particularly daunting given NLR's global emphasis, is to identify a solid underpinning for the reformist impulse, which suggests that NLR cannot stand solely on empirical commitments.

II. NLR AS A SPECIES OF EMPIRICAL LEGAL STUDIES

William Twining describes NLR as "an activist movement concerned to integrate empirical studies … into legal practice, especially law teaching and legal scholarship" (Twining, I, 131). Twining knows that this characterization cannot distinguish NLR from other empirical approaches to law, but as he testifies, NLR seems to be "a lively, fast-moving, and stimulating movement, [which] is admirably open-ended and, for that reason, difficult to characterize or generalize about" (131). Twining's impression may be fortified by the lack of any "official" statement of mission in these books and the varied attempts at defining NLR. Despite the caveats, a slightly less circumspect reading of these books reveals the emergence of a distinctive NLR voice. Twining himself seemed to intuit as much (132).

Law Centered

NLR's first feature is aptly articulated by Michael McCann's "Preface." Other approaches to empirical research about law, he writes, "aim to use microeconomic or behavioral methods to identify the nonlegal independent variables causing or determining law defined as a dependent variable." By contrast, NLR studies tend to recognize that "law itself—as language/discourse, as institutional practices, as aspirational ideals, as actual or potential enforcement of state violence, and so on—actually matters." So one "distinctive … NLR sensibility" is the attention "to the 'constitutive' role of law, or how legal meaning matters, or how legal actors perform legal practices, or how institutional norms and pressures interact with other factors." McCann connects this sensibility to NLR's "clarity of focus on a targeted audience": it is a project that "has been developed mostly by law school professors, with varying degrees and kinds of disciplinary and interdisciplinary connection, writing to and for other law school professor colleagues" (McCann, I & II, xiv–xv, xix).

Anticipating this first NLR pillar, Stewart Macaulay, one of NLR's godfathers, emphasizes that while "empirical approaches to law … come in very different flavors," there is "no perfect way to study the law in action or the living law." This means that while "those who write about the consequences of law should make an effort to draw on social science," they should also realize that none of the social science methodologies produces "'facts' that we can just plug into the legal analysis." Rather, their findings need to be translated "into terms we can use" for addressing law's "normative questions," which necessarily implies that "we must face the question of what risks of being wrong we are willing to take" (Macaulay, I, 30, 37, 40, 42, 44).

We return to these challenges below. For now, it is important to appreciate their law-centric perspective. This perspective implies that "doctrine, and legal

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texts, [must be] taken quite seriously" because "doctrine is an important language or backbone that lies behind the hurly-burly of law on the ground," and thus is necessarily "a part of 'law in action'" (Mertz, I, 20). Indeed, "[d]octrine is the vernacular of American law"; "it is a language all who are trained in law . . . have been taught; indeed, it is one of the ways in which lawyers can recognize one of their own" (Case, I, 291). This law-centric perspective also entails a requirement of careful attention to the role of legal institutions. It means that we must "examine how abstract law is translated in different institutional environments in which law is made, interpreted, and applied." We must recognize that "the pursuit of goals will always be mediated in different ways through different institutional processes," which are all necessarily imperfect (Shaffer, II, 152; see also Wilson, II, 259, who emphasizes the required attention to "organizational culture").

Thomas Mitchell's discussion of the legal disenfranchisement of African American landowners provides a vivid example of this NLR feature as well as an introduction to the following three features. Mitchell criticizes "debates about reforming partition law" for the "empirical vacuum" in which they have been conducted. He finds that "empirical analysis undermines many of the arguments made by those who have claimed that existing partition law currently works well in economic terms for those who exit various common ownership structures" because "actual partition sales . . . normally yield prices that are significantly below market." This is not "merely" a data point about how partition law sometimes works in practice, which may be expected "where those conducting the auctions [do not] abide by the forced-sale procedures," or in cases of "poor and minority" tenants-in-common "who lack resources to appeal partition sales ordered by trial courts." Rather, this crucial empirical fact is also the result of "the types of procedures courts actually use" in partition actions according to their pertinent state laws. These laws are not designed "to attract an adequate number of bidders" nor to ensure that co-tenants receive "fair-market value for their extinguished property interests," but instead merely set "formal" exogenous requirements. Such defective design may explain why absent "evidence of mistake, fraud, or other misconduct" challenges for inadequate price are rarely accepted even where the sales price is as low as 20 percent of the fair-market value. Mitchell's chapter concludes with a narrative of his own "transition from scholarship to reforming the law," in which he emphasizes "the value of utilizing bottom-up perspectives and knowledge" of "representatives from the public interest and civil rights law firms," whose "experience working with many property owners in the trenches" was particularly conducive to "identifying issues" that were not previously noted by legal scholars or addressed by published judicial opinions (Mitchell, I, 205, 207–10, 213, 216, 219, 221).

Mitchell's chapter introduces the significance of translation and of the bottom-up perspective as well as the typical NLR reformist inclination. However, before we turn to these features, it is important to appreciate it as an example for NLR's law centrism. Law is not imagined here as a transparent mechanism through which policy is simply implemented; instead, legal rules and legal institutions exhibit a specific character and distinctive forms of reasoning, worthy of independent analysis. Indeed, as Heinz Klug and Sally Engle Merry claim, the NLR approach is distinguished from "a purely social science approach to law" in being "driven primarily by

problems that arise in legal practice" and in placing greater emphasis "on doctrine and legal processes to explain legal outcomes" (Klug and Merry, II, 2).

Klug and Merry suggestively add that NLR "takes seriously law as a somewhat autonomous phenomenon not reducible to other social phenomena" (Klug and Merry, II, 2). Along similar lines, Gregory Shaffer, in his chapter on the NLR approach to international law, argues that NLR's bridge building with the social sciences is aimed at facilitating "a two-way learning," rather than "the mere adoption of lessons from the social sciences" in a way that "subsume[s] law under the language of another discipline" (Shaffer, II, 148). As we will see in Section IV, articulating the distinctive added value of law as a discipline (and thus of legal academics) may be the most important challenge NLR faces as it distinguishes itself from other empirical studies of law.

Translation and Synthesis

As the subtitle of the first volume under review—*Translating Law-and-Society for Today's Legal Practice*—testifies, the core mission of NLR is "to create productive yet rigorous ways of bringing pertinent social science into legal training and analysis"; to begin a "process of integration" by finding "successful ways to translate between law and social science" (Mertz, I, 2). Such translation and synthesis are crucial in order "to generate a more complete picture of law and the social world it inhabits," and to facilitate "the employment of empirical research to shed light on issues of importance to lawyers and policymakers" (Tomlins 2006, 795).

As Mitchell's chapter, just described, implies, some minimal degree of fluency in both law and the pertinent social science is a prerequisite to successful translation. Jane Aiken and Ann Shalleck's chapter provides an interesting example of this requirement and also illustrates NLR's pedagogic agenda. Aiken and Shalleck describe a teaching exercise they developed for a joint custody problem involving domestic violence. This subject "is an area of significant social science research," which both "played a role in the development of the formal law" and is "implicated when custody decisions involve inquiries into violence between parents." Aiken and Shalleck's exercise illustrates to students many aspects of the craft of effective lawyering, working within constraints of money and time, and developing a capacity to "deploy facts to achieve the desired result while meticulously following the formal law." It also "requires the students to read the social science material in such a way that they can draw upon it effectively within their representation of [their] client." This process pushes students to translate the pertinent studies "into legally operable advocacy" so as to make the judge "comfortable with social science understanding of the situation." This task—the punch of this exercise—"implicates the use of a theory of the case that incorporates facts, [legal doctrine], and insights from social science," as well as "principles and techniques of trial advocacy" and "evidentiary rules structuring the consideration of expert testimony" (Aiken and Shalleck, I, 52, 59–60, 65–66).

This classroom example illustrates the difficulties of integrating social science into the law, which requires, as Mertz notes, "to consider the interdisciplinary

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communication process itself." The challenge is twofold: to provide lawyers, judges, and legal academics "better access" to the extensive relevant knowledge generated in the typically "removed [and] careful world in which social scientists produce their research" and also "to translate that knowledge into forms that speak to pressing legal issues," namely, into "the normative, engaged world in which lawyers must act" (Mertz, I, 2, 10–11). Both prongs are quite complex. Thus, "one cannot just pick up the 'findings' generated by a social science method" and "apply it mechanically to legal data" without also "understanding the theories and assumptions behind that method" and appreciating its "limitations and power"; in other words, "'findings' without their disciplinary contexts may be meaningless or, worse, downright misleading" (Mertz and Barnes, I, 181–82). By the same token, "it will not suffice for social scientists to employ their own frames and perspectives without giving some serious thought to the distinctive approaches of those trained in law" (Mertz, I, 3). Because "law is an explicitly normative endeavor, with its own methods and priorities . . . social science will never be able to provide simple 'how-to' instructions for solving many of the core problems addressed by the legal system" (Mertz and Barnes, I, 181).

Moreover, a full-blown NLR approach amplifies both difficulties. Thus, NLR's commitment to adapt its research question so as "to match the kinds of questions being asked" implies "methodological eclecticism" (Suchman and Mertz 2010, 562). This means that NLR scholars aspire to be versed in (or work together in order to combine) both quantitative methods that are "best suited to discovering and confirming general patterns" and qualitative ones that help "uncovering the meaning of these patterns within particular contexts" (Mertz and Barnes, I, 184–86). Combining "diverse, sometimes contradictory methodological traditions of the social sciences" promises additional insights, but also entails further translation difficulties (Mertz and Barnes, I, 199; Suchman and Mertz 2010, 573). NLR's global ambition also adds complexity because "translation between two legal systems that have differently structured institutions and ideas will always create difficulties" (Bellos and Scheppele, I, 267, 287).

Both in her coauthored (with Katherine Barnes) chapter here and in the rich introduction she coauthored (with William Ford) for a companion volume—informatively entitled *Translating the Social World for Law: Linguistic Tools for the New Legal Realism*—Mertz approaches this set of challenges from a linguistic perspective. This viewpoint implies that translations never simply duplicate, and that we must always "pay attention to which dimensions of the language—or discipline, or disciplinary language/method—we wish to hold more or less constant, and why" (Mertz and Barnes, I, 183). This means that the "recurrent difficulties faced by interdisciplinary legal scholarship" are best explained by reference to the "intertwined differences in purpose, epistemology, and discursive conventions between social science and law." This is why at times "some forms of social science are not applicable to legal problems," whereas in other cases the social sciences may be able to provide "valuable guidance to lawyers, judges, and lawmakers" (if, and only if, "their limitations as well as their utility are fully understood"). Thus, "law can make the best use of social science" only "through a realistic recognition of the barriers to interdisciplinary translation" (Ford and Mertz 2016, 2, 9, 18).

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Zooming in on these barriers brings us back to NLR's law centrism because it implies particular attention to the "very distinctive, normatively charged set of linguistic practices" that typify lawyers and legal scholars. "These language practices have underlying goals and ethics that diverge sharply from those underlying most (if not all) of the social sciences" (Ford and Mertz 2016, 19). Successful translation into law requires a robust understanding of law's "underlying worldview," its "unspoken assumptions," "deeply felt attitudes," and—maybe most importantly—"core mission" (9). This lesson will be a key to our attempt to articulate NLR's challenges.

Bottom Up

NLR pays particular attention to "the local delivery of law on the ground." Although focusing on "the real mess of social life may be inconvenient to some legal thinkers, ignoring it dooms legal debate to an ever-more obscure . . . position increasingly removed from other discussions of law across the academy and in society." The NLR insists that our understanding of law must be "grounded in the experiences of those who are ruled by the law" and thus pushes researchers to "examine the workings of law in the lives of people in the bottom and middle of the social hierarchy" (Mertz, I, 7, 13, 19). Hence, the NLR commitment to the analysis, interpretation, and assessment of "complex, contingent, dynamic, multidimensional features of real-life situations" (McCann, I & II, xvii).

Robert Gordon's chapter on "Legal Storytelling as a Variety of Legal Realism" illustrates this NLR tenet. Gordon studies an emerging genre of legal scholarship: "pieces relating in detail the background of well-known cases—who the parties were and the social milieu they lived in, why and how their disputes began, what they wanted from the legal system and what their lawyers tried to get from them." Gordon celebrates this scholarship that counters the way in which the legal system tends to "rapidly and impatiently boil[] down [people's] stories into stereotyped claims" and law schools tend to inculcate in students forms of reasoning that abstract law "away from everyday experience . . . by stripping away merely sentimental facts of cases," and thus help "to numb the moral sense of legal novices." He recognizes, to be sure, that "wholly situational decision making is not law." He also appreciates the concern that "this mode of legal decision [may be] counterproductive" in complex (say: commercial) contexts where "[j]udges can't understand the nuances of the equities of the disputes," and furthermore acknowledges that such an abstraction polices judges' sympathies and biases, thus promoting "the liberal rule of law virtues of equal treatment."

Gordon nonetheless insists that "law can never be purely formal" because it "is inescapably a storytelling as well as a rule-making enterprise." And it is a good thing, too: in contrast to the product of "the high theoretical mandarins of the law," legal storytelling "expands the study of context beyond the narrow framings chosen by courts." It thus "tells us a good deal about the suffering the legal system can respond to and redress, and what it ignores and suppresses"; it allows us to distinguish the virtues of equal treatment from the vices of neutralizing law's subjects

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in a way that "conceal[s] actual disparities in power and status" (Gordon, I, 169, 174, 176–77). The normative impulse is never far from the choices entailed in deciding which elements of context are truly important.

This subtle analysis is suggestive. Gordon does not advocate the kind of "nominalist impulse" or an ad hoc approach of case-by-case adjudication, which is at times associated with legal realism, typically by its critics (e.g., Dworkin 1978, 15–16; Smith 2012, 2128). He recognizes that legal categories and rules are part of the life of the law and that these legal forms are not only obstacles to justice; that in fact they can be its servants. But he suggests that stories have their important role as well, which should be cherished and nurtured. Is Gordon merely trying to misleadingly have the cake and eat it too? Or can these two very different modes of thinking—which are, indeed, both prevalent in NLR work—be accommodated in legal discourse and legal practice? Here is, again, an intriguing question these books invite, to which we will return below.

Constructive Legal Action

NLR's fourth tenet is already implicit in the previous ones. The main reason for NLR's bottom-up emphasis is its commitment to trace and then alert against injustices and thus to help ensure that our legal systems deliver on their promise to do justice for all. By the same token, NLR's methodological eclecticism is premised on the dictates of the normative, engaged world in which NLR is embedded. Finally, its profound engagement with translation is likewise driven by the aspiration to provide legal actors the most holistic understanding of the legal phenomena under consideration that the social sciences can offer, so that these actors can bring it to bear on these specific legal issues.

We have already encountered two examples of this feature in two different legal activities. The first is Mitchell's chapter that describes how he used his empirical perspective as a scholar—alongside other sources of bottom-up knowledge—in the service of law reform: drafting a uniform partition act that has by now been enacted into law in six states and is under consideration in several others (Mitchell, I, 220). Another setting in which NLR's commitment to constructive legal action manifests itself is adjudication, as Aiken and Shalleck's chapter on child custody disputes illustrated.[2] Their chapter manifests another aspect of NLR's constructive orientation, namely, using social science "to bring law students more in touch with the real worlds of law practice and law on the ground, in people's lives" (Mertz, I, 15). The emphasis on legal education is evidence of the wide scope of constructive, reformist thinking that NLR encompasses.

Sindiso Mnisi Weeks's study of "Women Seeking Justice" provides another particularly powerful example—this time from outside the US context—of NLR's constructivism (as well as of its bottom-up approach). Mnisi Weeks follows NLR's

2. It is interesting to note as an aside that the conventional wisdom, in which legislative hearings are a much better venue for incorporating social scientific input into the law, may actually be wrong. See Ford and Mertz (2016, 15).

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demands of "in-depth understanding of the everyday experiences of ordinary people, particularly the disenfranchised" and of focusing on "hierarchies of power"—in her context, women's subordinated position—in an effort to inquire "what can be done toward justice." She analyzes nine cases of disputes in the deep rural area of Msinga in KwaZulu-Natal in which women played a central role in vernacular dispute management fora. Mnisi Weeks sympathizes with these fora, which affect the lives of "the 16 to 21 million South Africans living in rural areas," because they offer "a public airing of disagreement and basic counseling" that accommodates the need to address long histories of interactions and the possibility of creative remedies aimed at "restoring harmony." But she is also critical of their performance on the ground, notably insofar as "the quest for justice and security by rural women in Msinga" is concerned.

Mnisi Weeks's case studies display both the depth of patriarchy (typified by accusations of witchcraft and requirement that women prove their virginity) as well as the daily vulnerability to gender-based violence under which these women live. This predicament is unfortunately exacerbated by the crucial role played by the vernacular grouping, which accords prime value to "full participation" at the expense of its individual members. It further involves the patriarchal features of these fora themselves: "the fact that women are generally required to be represented by or appear alongside their male relatives" as well as the family's entitlement to claim redress for the wrong done to a woman (even in a case of rape). Mnisi Weeks therefore concludes with some critique of the pending draft legislation aimed at regulating these fora for not adequately addressing women's needs and vulnerabilities, for leaving "virtually untouched" their representation by men and their deprivation of remedy by their family, and for too strongly assuming that these fora indeed facilitate long-term social harmony. The proposed legislation thus reinforces the "rather conservative and patriarchal … notions of 'customary law' that developed during colonialism and apartheid." Mnisi Weeks recognizes the "inherent difficulty" of regulating these institutions in a way that both "allow[s] them to flourish" and "brings them under the positive influence and effective direction of universal human rights." However, she claims that "if the function of law is to provide justice … recognition should surely be made to the realities of those most vulnerable." The evaluation of whether these fora indeed provide justice must be made "at least partly [by] the people—including women—who rely on [them]," rather than "almost exclusively" by "traditional leaders" (Mnisi Weeks, II, 113–14, 116–17, 123, 125, 131–38, 140).

In many ways this example follows Gregory Shaffer's more general observations regarding NLR's constructivism. NLR's signature, in Shaffer's account, lies in its commitments to first assessing—through serious empirical research—the "what is," and only then turning to prescriptions, using the "new vantages and perspectives" uncovered by empirical engagement. This is the "critical, reflective, [and] pragmatic edge" of NLR's empirical work, which is also attentive to the inequalities and imperfections that typify "all decision-making processes." NLR, for Shaffer, is "catalyzed by normative concerns in light of power asymmetries and distributive conflict." It aims to employ "its empirical analysis for purposes of addressing social problems" so as to "advance social welfare and distributive justice." Indeed, Shaffer

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explicitly celebrates that NLR's empirical commitment is "necessarily linked to normative questions."[3] Shaffer is aware of the "tensions among stakeholders' perspectives and priorities in a culturally diverse and changing world." He is therefore suspicious of "universalist claims" and opts for "a pragmatist conception of values that develops from experience and learning," catalyzing "a dynamic and revisable understanding of the ends in view that we should pursue and the means through which we pursue them" (Shaffer, II, 145–46, 150, 152, 156).

It is instructive to read Shaffer and Mnisi Weeks's contributions alongside one another. The combination yields an insight: strong normative claims are those that survive the kind of awareness and scrutiny that Shaffer proposes. Scholars should be careful about the historical abuses of purportedly universalist claims, but such suspicion should not leave them in a helpless relativism: as Mnisi Weeks shows, claims framed in the language of universal human rights have a place in contextually situated and culturally sensitive analyses. Finding the balance between a hermeneutic of suspicion and a constructive use of universalism is a serious challenge NLR will continue to face.

Facing Globalization

NLR is openly concerned with a "wide range of legal forms—at transnational, regional, supranational, and even global levels" (Twining, I, 139). For NLR scholars, studying these legal forms is both a challenge and "an opportunity to understand the role law might play in achieving the goals of justice and stability sought by communities across the globe." This expansive realm of inquiry helps de-parochializing the project. It also adds "layers of complexity" by requiring heightened attention to the "relationship between law and culture" given the "radically plural" legal "practices, habits, and meanings" as well as the "different assumptions about the role of the law and the state" that typify "the contemporary era."[4] This complexity is taken as an opportunity to study both the globalizing role of norm diffusion and the embeddedness of law and legal institutions in local practices, contexts, histories, and even communal self-definitions. It thus further "open[s] up the relationship between the normative claims of global law and [the] more contextual and social scientific understandings of the role of law as it moves across boundaries of professions, states, and disciplines" (Klug and Merry, II, 1, 3–8).

This ambition is showcased throughout the second volume of the books under review in diverse contexts that challenge any robustly statist understanding of law.[5] Thus, Susan Sell portrays intellectual property lawmaking on the supranational

3. Indeed, although NLR scholars do not ignore the possible "prices" of the pull of the policy audience, they do not disengage, but rather rely on "mindful self-awareness" Suchman and Mertz (2010, 575–76).

4. Sida Liu's chapter (II, 180) on "The Changing Roles of Lawyers in China: State Bureaucrats, Market Brokers, and Political Activists" is particularly illustrative of this last observation.

5. It also manifested itself in the NLR scholarship on international law, helpfully analyzed in Shaffer (2015).

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level as "a fluid and dynamic process" in which "states, nongovernmental organizations (NGOs), and firms, wield various forms of economic, discursive, and institutional power" in a "recursive process both in time and in space" at both the national and the transnational levels (Sell, II, 52, 64).[6] In a very different context, Carol Heimer and Jaimie Morse depict the important role of local intermediaries with no legal training in dealing with legal prescriptions that cross geographical boundaries. The medical staff they studied were key actors in interpreting the rules, adapting them "to local realities," making "local realities appear more legible to and in line with what the rules require," and at times even resisting their application (Heimer and Morse, II, 69, 91–92). They thus highlight that, sometimes, it is not simply that the source of transnational rules lies beyond the state, but that their local application may circumvent state legal actors altogether.

A final example of NLR's nonstatist emphasis involves the comparison of "transnational (here, Islamic) and international (here, human rights) legal orders that circulate within national boundaries" in Mark Fathi Massoud's analysis of how displaced persons confront "two visions of legal modernity, one from state authorities and another from state workers" in Sudan. Both are "portrayed as universal, unchanging, and designed to stabilize the state and prevent it from descending deeper into chaos." Thus, Sudan state authorities mask its "legacy of legal pluralism" and the "mixed origins"—which include "non-Islamic principles sometimes labeled Islamic"—as being all parts of "a single, top-down and Islamic legal order." This "inflexible and absolutist system of law" was "manufactured" by government officials in order to "[c]apitaliz[e] on the broad appeal of the *shari'a*, . . . claim[] political authority, demand[] citizen compliance, and consolidate[] state power." Moreover, "[t]he state's claim to rule according to divine [law] also allows it to reject international human rights law as a constraint on state behavior and, thus, on divine law." Interestingly, Massoud identifies a "parallel structure" in the way "human rights activists use human rights charters and documents": "Just as the . . . government portrays *shari'a* as an unchanging, top-down system of legality, international rights activists disguise" the "plural beginnings" of human rights law and re- (or mis-) present it as "the universal foundation of modern legal systems—an abstract and timeless form of law—and, thus, more authoritative than Sudanese state law." They "encourage the war-displaced poor to see human rights similarly, as a form of incontrovertible law that would replace the immutable law promoted by the government." Meanwhile, "local activists turn to human rights for many reasons, including material gain." Massoud concludes that the legal discourses of both Islamic law and human rights law "become the political tools of elite actors seeking to win the hearts and minds of the poor"; parallel kinds of "homogenizing authority." As he notes, the use of the same universalizing strategy by these two discourses brings them into direct conflict: their subjects cannot see both as universal and unchanging; they must perceive at least one of them as fallible. Scholars should thus recognize that "the local and contextual factors that enable deeper

6. Relatedly, Alexandra Huneeus's account of "Pushing States to Prosecute Atrocity" highlights the "experimental methods, such as holding hearings in which all stakeholders participate in creating an implementation plan," which the Inter-American Court used in order "to overcome some of the structural barriers and state-actor resistance that impede prosecution and other transitional justice measures" (Huneeus, II, 226).

questioning of the grassroots experience of universalizing discourses" are of prime importance (Massoud, II, 97–98, 100, 103–04, 108–09).

These intriguing accounts of law not only go beyond the domestic US soil in which both the original legal realism and the NLR are rooted, but also defy the statist paradigm of many jurisprudential accounts. They further raise complex questions, notably regarding the conceptual alternative to these statist understandings of the law as well as the underpinnings of a view of law that is attentive to the risks of self-serving universalizing discourses, but nonetheless offers normative guidelines that enable an engaged, critical, and constructive approach to law.

III. THE REALIST VIEW OF LAW

Thus far we have distilled five tenets defining NLR's mission and signature as they emerge from the two new volumes under review. For each tenet we also raised some preliminary questions that inform Section IV of this essay in which we comment on NLR's most significant promises and challenges. As noted at the outset, the perspective we employ in developing these comments draws heavily on the reconstruction of legal realism that one of us developed and defended elsewhere in detail (Dagan 2013).

There are many readings of realist scholarship as well as several perspectives on realism's contribution to US law and legal education. Our account of realism here is narrowly tailored; it is not intended as a piece of intellectual history, and is thus really orthogonal to Tamanaha's (I, 147). Instead, it draws from the realist corpus a vision of law that we believe is currently relevant and valuable. We emphasize a set of jurisprudential insights that ground legal realism as a legal theory, the key to which is interrogation of the law as a set of coercive normative institutions. Further, we posit that a distinctive aspect of realism as a legal theory is its stubborn maintenance of three constitutive tensions within law: the tension between power and reason, between science and craft, and between tradition and progress.

Accounts of realism often begin by situating it as a mode of critique and, in particular, as a critique of doctrinalism. Law, in the doctrinal understanding, is perceived as a comprehensive and rigorously structured science, which can generate determinate and internally valid right answers; it need not resort to any social goals or human values and is thus strictly independent of the social sciences and the humanities (Carrington 1995, 707–08; Horwitz 1992, 9, 198–99). However, equating law with doctrine is wrong, realism argues, because the doctrine *qua* doctrine is radically indeterminate.[7] Since legal norms are "in the habit of hunting in pairs" (Cook 1929, 406)—because legal doctrine always offers at least "two buttons" between which a choice must be made (Rodell 1940, 154)—none of the doctrine's answers to problems is preordained or inevitable. The multiplicity of contemporary understandings regarding any given legal concept (such as property or contract), as well as the wealth of additional alternatives that legal history offers, defy the doctrinalist quest to find a single answer for any given legal issue (e.g., Dagan 2011, Pt. I).

7. The reason for indeterminacy is not primarily the difficulty of assigning meaning to a discrete doctrinal source (Hart 1961, 123, 141–42, 144), but the multiplicity of doctrinal materials potentially applicable at each juncture in any legal decision-making process (Llewellyn 1962a, 58).

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The indeterminacy of doctrinal legal materials evokes two major concerns. First, can the law generate enough guidance for its addressees to ensure that they will be able to plan their lives? And second, can the law provide a bulwark against arbitrary exercises of power, especially by those who wield the force of the state? Realism answers this challenge by advancing the view that law is a going set of institutions distinguished by the difficult accommodation of the three constitutive yet irresolvable tensions mentioned above—the tensions between power and reason, science and craft, and tradition and progress.

The realist view of law finds room for both power and reason, although it recognizes the difficulties of their coexistence. The critical focus on power is justified because law's carriers typically recruit the state's monopoly of force to back their commands. More subtly, law employs institutional and discursive means that tend to downplay some dimensions of its own reliance on power. These built-in features of law—notably the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, together with our tendency to "thingify" legal constructs and accord them an aura of correctness and acceptability—render the danger of obscuring law's coerciveness particularly troubling (Holmes 1920b, 230, 232, 238–39; Dewey 1924, 24; Cohen, 1935, 811–12, 820–21, 827–29).

But realism rejects as equally reductive the mirror image of law, which portrays it as sheer power, interest, or politics (see also Williams 1992, Ch. 8). Law is also a forum of reason, and legal reasoning imposes real—albeit elusive—constraints on the choices of legal decision makers, and thus on the subsequent implementation of state power. Law is not only about interest or power politics; it is also an exercise in reason giving. Normative reasoning must aspire to appeal beyond the parochial or the arbitrary; at the same time, legal theory invites analyses that expose some instances of existing legal argumentation as covers for interest. Giving up on the aspiration to reasoned persuasion is an abdication of a dual responsibility: responsibility to generate critique of unjustly wielded power; and responsibility for supporting the option of marshaling law for morally required social change (Yntema 1931, 955; Llewellyn 1940, 1362–65, 1367–68, 1370–71, 1381–83, 1387; Jones 1961, 809).

Power and reason hold each other in mutual distrust. For the legal realist, the lesson is constant caution. The quest for justification is a perennial process that constantly invites criticism of law's means, ends, and other (particularly distributive) consequences (Holmes 1920a, 181; Yntema, 1941, 1169; Llewellyn 1962b, 211–12). Realism does not solve the mystery of reason or demonstrate how reason can survive in a coercive environment. But the recognition that power and reason are doomed to coexist in any credible account of the law is significant in pressing the theorist's attention to the complex interaction between them. Realism thereby seeks to minimize the corrupting potential of the self-interested pursuit of power, as well as the perpetuation of preferences and interests purporting to be supported by reason.

This raises the question of the content of legal reasoning, a question that unfolds immediately into law's second constitutive tension, between science and craft. The connection between realism and the use of social science methods is the

inspiration for NLR, and so needs no elaboration here except perhaps to note that empirical data cannot obviate normative judgment (Cohen 1934, 45; 1935, 849; Twining 1993, 151–53). Realist attention to the craft of lawyering, on the other hand, may be somewhat less familiar. Understanding law's shared professional norms, and lawyers' "ways of doing," "working knowhow," "operating technique," and "craft consciousness," are important parts of appreciating how the law works (Llewellyn 1933, 77; 1960, 466, 214). If much of the day-to-day life of the law exists as craft, the more reflective aspects lean toward scientific thinking. For the lawyer or the scholar in search of justification for legal arrangements, neither science nor craft can be safely ignored.[8]

The third constitutive tension, between tradition and progress, results from law's inherent dynamism and the fact that law can always be recruited for projects of social change. Realism does *not* contest the felt predictability of the doctrine at a given time and place. Quite the contrary: it recognizes that the social practice of law at a given time and place provides insiders to the pertinent legal community determinate answers or at least widespread convergence regarding many recognized legal questions. But this legal determinacy does not inhere in the doctrine as such and rests instead on the broader social practice of law. What accounts for law's stability and predictability is not law's pedigreed sources, but their prevalent understanding within the legal community—the implicit sense of obviousness insiders share as per "on-the-wall" interpretations of the doctrine (Dagan 2015a, 1900–02).

This means that under the realist view, law is "a going institution" (Llewellyn [1941] 1987, 183–84) or, in John Dewey's words, "a social process, not something that can said to be done or happen at a certain date" (Dewey [1941] 1987, 77). As an evolving institution, law is designed to be an "endless process of testing and retesting" (Cardozo 1921, 179). Thus understood, law is a human laboratory constantly seeking improvement (Dewey [1941] 1987, 77). However, this quest for "justice and adjustment" in the legal discourse is constrained by legal tradition. The law's past serves as the starting point for contemporary analysis because it is an anchor of intelligibility and predictability. Moreover, because existing doctrine ideally combines both scientific and normative insights within a framework of legal professionalism premised on institutional constraints and practical wisdom, it deserves a modicum of respect (Llewellyn 1933, 77; 1960, 37–38, 191, 222).

Contemporary accounts of law enhance our understanding of law's characteristics, but the current debates between law-as-power and law-as-reason, law-as-science and law-as-craft, or law-as-tradition and law-as-progress miss the boat. From the perspective of legal realism, all these unidimensional accounts of law are deficient. Law is best analyzed and understood when we retain the realist appreciation of law's uneasy accommodation of power and reason, science and craft, and tradition and progress.

8. Indeed, understanding the nature of law requires "to identify and understand" not only what the law is, but also the "standards by which it should be judged," remembering that these additional elements need not imply "that purported instances of law which do not perform that task and do not realize those values are not, or are not really, law at all" (Dickson 2009, 169).

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IV. NLR'S PROMISES AND CHALLENGES

We are now ready to connect the dots: to explain why NLR provides important promises to carry on, and maybe even to deliver, some of the promises of the realist view of law and how it can benefit from this view in facing a few of its most important challenges. We make no attempt to exhaustively cover the NLR's achievements or difficulties—our discussion here is limited to those that are particularly illuminated by the encounter between NLR and the realist view of law. But the scope of these comments may indicate that the connection between the new legal realism and the realist view of law is not one in name only. We return to this conjecture in our concluding remarks.

Science and Craft

The realist view of law synthesizes two different approaches to law and about law. It acknowledges the significant craft-like features of law that both account for the set of practices and implicit know-how that constitute the legal community and—at its best—nourish some of the legal profession's qualities that potentially contribute to law's legitimacy. But at the same time legal realism was correctly identified with the aspiration of "truly scientific study of law" (Duxbury 1995, 80), which is why contemporary schools with a strong scientific emphasis—notably the various strands of both empirical legal research and economic analysis of law—are frequently identified as the rightful heirs of legal realism (see, respectively, Suchman and Mertz 2010, 557; Kitch 1983, 184).

The cohabitation of craft and science—of law as a professional ideal and the ideal of a legal science—is, as Anthony Kronman argued, difficult: there is a real distinction between the "educated sensibility" of the legal craft and the technical expertise and rationality of legal science (in either its empirical or its normative aspect) (Kronman 1993, 223–25). It may thus seem natural to present science and craft as competing, if not conflicting, responses to the realist obliteration of the doctrinalist view of law; this, at least, is their predicament in contemporary scholarship (Kronman 1988, 336–39). Some realists indeed shared this sense of rift and placed themselves on one side of the emerging divide; for these legal realists, it may be right to argue that legal realism stands for two radically different views of law (Priel Forthcoming). However, many important realists, especially Cohen and Llewellyn, did not share this view. For them, and for our reconstructed realist view of law, science and craft are complementary rather than incompatible.

Neither Cohen nor Llewellyn fully worked out the terms of this uneasy coexistence of science and craft, but one of us has developed two arguments that may help respond to the claim of their seeming incompatibility. While the temperamental tension between the lawyer-as-an-Aristotelian-judge and the lawyer-as-a-social-engineer suggests that there may be no fast and easy formula for their accommodation in the person of one lawyer, it does not imply that a person with the former character traits is incapable of also applying value judgments and paying attention to relevant social facts (Dagan 2013, 52). Further, craft and science may occupy

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different moments of the legal drama. Lawyers' embeddedness in the legal craft accounts in large part for the "normal science"[9] of law and thus also for the wide convergence of the way they read legal doctrine at a given time and place. By contrast, the potential amenability of doctrine to different readings—law's inherent dynamism—implies that *some* legal actors (such as legislators and judges of appellate courts) should *occasionally* use new social developments and cases as triggers for an ongoing refinement of the law, namely: as opportunities for revisiting the normative viability of our existing understandings of legal doctrine.[10] At these times (which we might metaphorically call "paradigm shifts"), law's embeddedness in the social sciences and the humanities becomes apparent. When conventional understandings are no longer considered obvious, arguments about their consequences on the ground and their putative injustice are no longer merely external criteria for evaluating the law; rather, they are *also* perceived, as the realist view of law implies, as part and parcel of what it means to argue about what the law is (Dagan 2015a, 1902, 1916; n.d.)

NLR's yield collected in the books under review significantly vindicates and enriches the first argument just noted and adds an important third line of defense against the position of inevitable fragmentation. Thus, Aiken and Shalleck describe their class exercise as "a micro example" through which "students can recognize the complexity of practice, see how to use their practice as lawyers to further how they understand justice, learn how drawing on social science knowledge can expand and deepen their understanding of the social world and the operation of law, and reflect on the ambiguities and the limitations of their role" (Aiken and Shalleck, I, 70). As Mertz intimates, these and similar teaching efforts of training lawyers into both the legal craft and the social sciences "help to dissolve [the] rigid boundaries between … empiricism and law practice" (Mertz, I, 15–16). They imply, in other words, that the ideal realist lawyer, who mixes empirical knowledge and normative insight with a devotion to the legal office and sensitivity to the context at hand, is not (at least need not be) a sheer myth (Gordon 2009).

NLR's promise of integrating science and craft along the lines suggested by the realist vision of law goes even further than that. As we have seen, NLR scholars not only preach, but also practice: they combine in-depth inquiries into legal practice and legal institutions in various settings with broader investigations of law's consequences and causes. They take pains to integrate qualitative inquiries that highlight the latter with quantitative studies that help elucidate the former and furthermore to examine the nontrivial way of translating both sets of findings into the normative language of law. They are thus also careful to appreciate the virtues of recruiting science, *without* falling into some of the risks of scientism (Nourse and Shaffer 2009, 117–19; see also Calabresi 2016).

Neither of these contributions is complete. The relative rarity of integrative teaching efforts accounts for the significant role NLR places on its training and

9. The reference here to "normal science," and later to "paradigm shifts," evokes, of course, Thomas Kuhn's distinction (Kuhn 1962).

10. For a compelling account of how that happens, see Levi (1962). To be sure, reasonable people may differ regarding how occasional the revisiting of normative arrangements should be.

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educational agenda; it seems to be a prime impetus for the birth of NLR as a movement. By the same token, the identification of translation as a core NLR mission is, as we have seen, still ongoing and the difficulties of integrating different social scientific methods and incorporating them into law have not been fully resolved (we return to what the realist view of law offers as a contribution on this score momentarily). But even as things stand now, the two exciting developments just noted show what we are losing as long as protagonists of science and champions of craft keep competing rather than engaging each other. Amid a gradual process of fragmentation of the legal academy (Dagan 2015b), NLR vividly offers the promise of reintegration.

Avoiding (Statist) Parochialism

Our survey of NLR's global dimensions already conveys the significance of the second important promise of NLR that we want to highlight, so a brief restatement is all that is necessary here. Studying law globally dramatically increases the scope and variety of legal forms beyond the familiar domestic statist model. This observation—while not novel—is devastating for an important tradition of thinking about law, which is, explicitly or implicitly, statist; think, for example, of the crucial role Hart's rule of recognition or Hans Kelsen's Grundnorm play in their respective positivist accounts of the law (Kelsen 1945; Hart 1961). Indeed, when analytical legal philosophers attempt to elucidate the nature of law, they typically assume—or discuss—the mutual dependence of law and the state, or at least some other well-defined form of political community (Raz 2011, 101).

In an era that increasingly acknowledges both trans-statist and sub-statist forms of law, this premise cannot be sustained. Borrowing from Cardozo's critique of the caricature realist conception of law as prediction, we can say that since trans-statist and sub-statist forms of law "are facts confirmed every day to us all in our experience of life, [if] the result of [the statist understanding] is to make them seem to be illusions, so much the worse for [that understanding]" (Cardozo 1921, 126). It is thus not surprising that even as prominent a philosopher as Joseph Raz recently acknowledged that we need to rethink that statist truism (Raz 2017).

The question, then, is how to proceed beyond the statist paradigm. Some use the flourishing of nonstatist forms of law as a vindication of the claim that the enterprise of a conceptual inquiry of the nature of law should be abandoned (e.g., Tamahana forthcoming), while others try to salvage its original form by reimagining a positivist but nonstatist conception of law (Culver and Giudice 2010). The NLR work does not fit into the positivist mold, but it also does not—at least it need not—stand for the proposition that the attempt to divine the nature of law is meaningless: after all, NLR scholars surely have at least some sense of what law is when they study its on-the-ground manifestations. So here again the marriage between NLR (now, with a special emphasis on its nonstatist feature) and the realist view of law is necessary. Recall that realists talk about a set of institutions typified by three constitutive tensions (between power and reason, science and craft, and tradition and progress) *simpliciter*, rather than about state or political institutions.

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Legal Theory and the Challenge of Translation

We turn now to three challenges facing NLR, starting with a "missing link" in its account of interdisciplinarity. Recall that unlike many other scholars who study law from or with a social scientific perspective, NLR scholars fully appreciate the complexities inherent in this endeavor. They know that law cannot be fully understood by simply employing the theories or methodologies of some other discipline, and that insights about law from such disciplines cannot be seamlessly incorporated into the law; and they thus take seriously the tasks of translation and integration. They conceptualize these tasks in terms of the distinctive languages of law and the social sciences (Ford and Mertz 2016).

Before embarking on our main point about the usefulness of the realist view of law for interdisciplinary translation, we should make one terminological clarification and raise a provisional warning flag about the very term "translation," one we have often resorted to ourselves. The terminological clarification relates to the audience for translation. Some NLR work is concerned with translating the products of social science research for *legal practitioners*, in particular advocates and judges (Gruber 2016; Matoesian 2016), while other NLR work focuses on translation among academic practitioners. Our concern here is limited to the latter. In that sense, NLR's scope in thinking about translation is broader than ours. For us, courtrooms are not so important for the discussion of translation because the academic discipline of law does not happen there. Our focus in what follows is primarily on the interaction of legal scholarship with social science scholarship, and only derivatively with how those bodies of scholarship might impact legal practice. In that regard, there may be a gap between the senses in which we engage with the term translation.

This potential gap leads us to a more general circumspection regarding translation as a useful metaphor for the interaction between disciplines. Our core understanding of translation comes from the use of natural language. But natural language, as a general matter, is not a theoretical practice. Academic disciplines, on the other hand, are by their nature theoretical: they constantly rely on and produce justifications, according to reasoning procedures developed in those disciplines themselves. The suggestion, then, is that "translating" may not be the best description of what we are after when we pursue interdisciplinarity. Instead, we are looking for a way to combine two sets of tools—the endeavor may be more like a joint engineering project than a translation.[11] All of this is just to call attention to the fact that we are dealing with a metaphor, and one that should probably be handled with more caution than we have accorded it ourselves. With that warning in mind, we move onto to grappling with the challenges facing NLR.

As we have seen, NLR at least implicitly acknowledges in this context the significance of some of the core features of law. However, NLR scholars have yet to come up with a more systemic account of what these features are and how they

11. Another way of thinking about this is to imagine hiring a translator for a work of literature: we are much more likely to seek out a poet, a writer in her own right, than we are to look for a linguist or a grammarian. But if we want to understand a foreign grammar, we do not quite think of ourselves as translating. For additional reflection on this difficulty, see Mertz (2016, 239–40).

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affect the application and the design of empirical research on law. Notwithstanding some strong claims to the contrary (Macaulay, 2005; Twining, I, 122, 130, 133), we argue in what follows that legal theory—specifically, the realist view of law—can play a useful role in this respect. Legal theory provides a solid starting point for the systemic account required for a sophisticated practice of translation and integration NLR anticipates.

Mary Anne Case's observations on the predicament of the (US) legal academic discourse can usefully introduce this claim. Case notes that while the language of doctrine is spoken fluently by all lawyers, including academic lawyers, "it is not the language in which [American legal academics] generally choose to express their most elevated thoughts." For *those* purposes, she claims, the closest that comes to the status of a "lingua franca" is "the language of law and economics and rational choice" (Case, I, 291–92). Case's observation may be correct (especially at The University of Chicago, where she teaches), but if we take law seriously (as NLR does), this predicament cannot be acceptable (and is indeed agonized over by Case [296]). And yet, if we dismiss the implausible equation of law with doctrine (as NLR also does) —its sheer knowledge cannot exhaust the contribution of law as an academic discipline. Rather, the proper lingua franca of legal academics must be the distinctive theoretical voice of *legal* scholars; legal theory is the most important added value they bring to any interdisciplinary table, including the table of empirical analyses of law.

In a separate paper coauthored with Tamar Kricheli-Katz (Dagan, Kreitner, and Kricheli-Katz forthcoming), we develop this claim. We argue that both the use and the design of empirical research can benefit from paying attention to the three components highlighted by the realist view outlined above—law's coercion, its normativity, and the institutional settings in which it is manifested—as well as to their complex interrelationships: the ways in which law's power and its normativity align and in which their discursive cohabitation manifests itself institutionally. We cannot rehearse here this effort, which will be published soon in this journal, but the following brief comments can convey its main outline.

The realist view of law is helpful in the *application* of empirical studies into legal research because it elucidates the choices involved in the selection of empirical data and facilitates their translation into the grammar of law. We do not deny that in some cases legal scholars can rely on their know-how, which means that their use of empirical studies regarding law passes through a set of assumptions about the relationship between coercion and normativity and the instantiation of that relationship within institutions. But we claim that explicit reflection on those assumptions, which refines propositions and elucidates dilemmas, will often drive the uses of empirical study in more rigorous and useful directions. Thus, for example, appreciating the institutional capacity of pertinent legal actors may suggest that scientifically accurate, but overly complicated, formulae may be counterproductive if translated too readily into the normative realm of prescription. While highly technical analyses may be essential for generating insights unavailable to the naked eye, they often require the kinds of idealizations that counsel caution when shifting gears from penetrating insight to broad-based normative conclusions. Similarly, respecting law's normativity and

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recognizing the threats of its coerciveness imply that legal prescriptions must meet the justificatory constraints both of the rule of law and of public reason. Each of these points alerts us to the pitfalls of generating normative conclusions from scholarly methods too distant from normative inquiry. We believe that the occasional unease of legal scholars regarding some importations of interdisciplinary analyses of law—especially complex statistical analysis—into legal discourse implicitly reflects these concerns.

Legal theory—especially of its realist rendition—is not only useful for the application of empirical findings, but also to the development of a coherent *research agenda* on law, or on any particular legal field or phenomenon, as well as for the *design* of many specific empirical projects. As Cohen suggested, theory, whether well-articulated or mostly implicit, will always drive the kinds of questions we submit to empirical inquiry; so legal theory is necessary for making facts intelligible, rather than "a horrid wilderness of useless statistics," as well as for justifying the study of one set of social facts rather than another (Cohen 1935, 849). Competing theories generate different sets of empirical questions, each attempting to test those aspects of the theory that are open to empirical proof or support. Our simple claim here is that explicitly articulated theory will usually do a better job of driving that research than assumed understandings.

Specifically, we argue that seriously thinking about law as a set of coercive normative institutions generates a guiding thread in developing a research agenda and in designing specific research. Thus, understanding law as a *set of institutions* that operate simultaneously requires attention to a variety of individual players and a long list of legal institutions as well as to the interactions among them. Focusing on a set of *coercive* institutions, in turn, calls for empirical studies of both mechanisms and outcomes; it invites, for example, explorations of the ways power is disguised or obscured, as well as inquiries into law's effects on people's behavior and beliefs. Finally, the focus on law's *normativity* raises two complementary aspects of the investigation: the constraining effects of legal normativity and its function as a legitimizing mechanism.

These broad directions and the illustrations we provide from two case studies—dealing with legal compliance, and with equality and discrimination—are by no means new to NLR scholars. Indeed, we think that the alliance we advocate of legal empiricism with legal theory is already implicit in the prevailing practice of empirical study. But, as usual, reflection on what we customarily do is useful: interrogating law as a set of coercive normative institutions may help organize existing empirical research in a coherent way; it highlights how disparate studies complement each other and enhance our understanding of their common subject matter; and it points out gaps in our understanding of law by exposing holes in our existing empirical knowledge.

Law on the Ground and the Rule of Law

Another NLR challenge emerges from our discussion of NLR's commitment to rethink law from the bottom up and thus pay close attention to the way people—

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especially people on the receiving end of the law—experience it on the ground. The worry that this discussion raised concerns the possibility of accommodating such sensitivity with law's tendency to employ rules and categories.

This is a significant concern for two reasons: first, descriptively, law does not operate as a fully case-by-case decision-making apparatus; second, and more importantly, such an apparatus threatens to undermine justice. Ad hoc decision making inhibits law's ability to provide effective guidance, thereby infringing on people's ability to form reasonable expectations and plan for the future. Legality's typical reliance on rules and categories is thus not just an instrumental matter of legal technique, but is also intimately connected with people's autonomy understood as self-authorship (Raz 1979, 213, 218, 220, 222). Moreover, *ad hocism* implies that decision makers face no restricting framework of public norms, thereby paving the way for decision makers' "preferences, their own ideology, or their own individual sense of right and wrong" to determine the outcomes of cases (Waldron 2008, 6). Everyone should be wary of such a system.

Indeed, the realist view of law, which, as noted, is mindful of the fallibility of law bearers, and is also committed to the use of law to improve the condition of people, rejects the nominalist approach of open-ended discretionary decision making. Legal realism neither endorses nor implies the need to focus on the equities of the particular case or the particular parties. Rather, it recognizes law as an arena in which the pull of justice between particular parties may be in tension with the normative significance of respecting the relative stability of the social practice of law and the expectations it engenders. The balance between those goals is not decided once and for all as an abstract matter. A worthwhile legal theory must be able to accord weight to both ends of the tension. In doing so, it must be accountable to two aspects of the rule of law: the requirement that law guide its subjects' behavior, and the prescription that law not confer on officials the right to exercise unconstrained or arbitrary power (Dagan 2015a, 1902–03).

Thus, when realists highlight lawyers' judgment of human situations, they carefully define the task for which it should be employed in terms of capturing the subtleties of various *types of cases* and adjusting the legal treatment to the distinct characteristics of each *category*. Llewellyn, for example, claims that lawyers should develop the law while "testing it against life-wisdom"; but—as he immediately emphasizes—the claim is *not* that "the equities or sense of the particular case or the particular parties" should be determinative; rather, it is that decision making should benefit from "the sense and reason of some significantly seen *type* of life-*situation*" (Llewellyn 1962c, 219–20). So judges and lawyers should not employ their "situation sense" (as Llewellyn called it) as the premise of their responses to each and every particular case (contra Leiter 2007, 23, 28–29), but rather for cases that can serve as opportunities for rethinking the content of the law. They should not discard legal classification, but appreciate the truism that "to classify is to disturb" and hence to "obscure some of the data under observation and give fictitious value to others," which means that law's received categories should be periodically reexamined (Llewellyn 1930, 453). Reexamining doctrinal categorization in this way is also important because it may help expose, rethink, and, one hopes, remedy otherwise hidden and sometimes unjustified choices of inclusion and exclusion (Llewellyn 2011, 95).

So the realist answer to the question on Gordon's chapter on storytelling of whether he can have the cake and eat it too is a fairly simple yes. In capturing the division of labor between (what we metaphorically called) the normal science of law and its paradigm shifts, the realist view of law is able to accommodate law's stability and its growth. Law's stability and the attendant virtues of the rule of law are premised on the realist recognition of the important role of the social practice of law. But at the same time, the malleability of legal doctrine, as well as lawyers' self-understanding as participants in a potentially dynamic endeavor that is always challenged by claims of injustice, opens up a space for reform. It allows—at its best even encourages—constructive critical investigation of law's immanent, albeit all too often unfulfilled, promise of justice. It is on this door, which is presumptively closed, but can always be opened by sufficiently powerful and persistent examples of law's failures, that Gordon's storytellers, other bottom-up NLR scholars, and many cause lawyers, knock. And if breaking down the door of injustice to usher in completely new paradigms is overdramatic, consider the more incremental story, one that divides the field into players with different roles. Recall that Gordon's chapter dealt with scholars telling background stories. The kind of storytelling he invokes as worthwhile scholarly practice is not a model for legal practice, and its direct impact on legal decision makers is tenuous, despite the fact that lawyers are also storytellers in their own right. The point is that scholarship does things (including exposing practice to scrutiny from the perspective of justice) that are difficult or impossible from within the strategic and institutional confines of practice. Scholarship may slowly change the way people (including law students) think. In that sense, it may be part of the paradigm drift that eventually leads to a paradigm shift.[12]

Empiricism and Constructivism

The final challenge we wish to address here grows out of our questions following the discussions of Mnisi Weeks's, Shaffer's, and Massoud's chapters regarding the normative underpinnings of constructive empirical research that also takes seriously the risks of self-serving imposition of contingent preferences masked as universal values.

The risks of Western, white, or Judeo-Christian parochialism are real and troubling. However, they do not imply that NLR scholars should give up on their reformist and constructive commitment and adopt in its stead a posture of neutral observers. The temptation of this path should be resisted because abandoning normativity would abdicate the responsibility of legal scholars (which NLR rightly takes seriously) to develop a "sustained accounting of how law achieves or fails to achieve justice," to inquire into "the nature of individual or social good that law ought to further," and to refine "the legal perspective from which meaningful criticism of law can be mounted" (West 2011, 191–93, 195).

12. This notion of "paradigm drift" can also be used to describe certain ways in which the common law evolves (cf. Raz 1979, 206–09).

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Along similar lines, Victoria Nourse and Gregory Shaffer in an earlier exegesis of the "Varieties of New Legal Realism" warned NLR "not to indulge in the fantasy of ethical relativism." They rightly argue—echoing the realist view of law noted above—that critique and reform "cannot be done by reducing law to social-science method, by assuming all law is politics, or by rejecting law as another form of veiled power." They also note that many NLR scholars do not take this path (as the books under review also illustrate), and helpfully observe that "the methodological commitments of many new legal realists reflect … the operationalization of a critical theory of the value of human liberty." Nourse and Shaffer explicitly endorse this commitment, while carefully adding that "liberty alone is not enough" and that alongside the "critical engagement" of values one needs to pay "close attention to psychological and social context and [to] institutional mechanisms that facilitate participatory processes for deliberation over the means to obtain them" (Nourse and Shaffer 2009, 125, 127, 134–35).

Nourse and Shaffer end up espousing Amartya Sen's conception of liberty (2009, 135); others have advanced views based more directly on autonomy (Dagan 2016). However, the debate among these positions is beside the point here. What matters is that in order to evaluate or criticize the law, push toward its reform, and assess the reform's success (or failure), there is no way around some normative commitments. We are well-advised to expect these commitments to allow—indeed to recognize—a broad menu of incommensurable human alternatives. "Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon" (Berlin 1991, 11). While identifying the specific content of such commitment is obviously a significant task that cannot be undertaken here, normative argument will always need some reference point akin to human dignity (Griffin 2008, 44–48; Dworkin 2011, 315).

Notwithstanding the understandable reluctance of Shaffer (noted earlier) toward universalistic claims, legal discourse on justice will always find it difficult to avoid reference to a universal premise. That premise—at least within the humanist "cosmology" in which NLR operates and this essay is written—must refer to some notion of equal human freedom. While there is a difference between the liberal position that grounds freedom in self-authorship and the more communitarian view that the value of freedom is founded on authenticity, they are, as Leslie Green notes, "not completely distinct": the former must recognize the significance of the "unchosen features of life" that "friends of authenticity" emphasize as "means to, or constituent parts of, various life plans"; the latter, in turn, must recognize the significance of choice associated with "friends of autonomy," if not "in order to *choose* one's path in life, then in order to discover it" (Green n.d.).

It is not surprising then that given Mnisi Weeks's commitment to combat female subordination, she is committed to the cause of bringing the vernacular dispute management fora she studied "under the positive influence and effective direction of universal human rights" (Mnisi Weeks, II, 138). And this is also the way we prefer to read Massoud's chapter. While exposing the possible instrumentalization of human rights and other universalizing discourses by their carriers, he does not suggest a repudiation of either Islamic faith or liberalism. In fact, he emphasizes "the many commonalities between these two visions" as well as the scholarly efforts "to link Islamic and human rights norms" (Massoud, II, 105).

We would like to pull these reflections back to the realist view of law. Realism embraces normative discourse and appreciates its humanist foundation. However, it also counsels being on guard against its abuse. Realism thus invites critical perspectives that expose power structures and identify self-serving portrayals of contingent preferences as universal truth. But it resists the relativist trap: the sheer fact that claims of universalism are not always true and are open to possible abuses should not undermine our responsibility or our commitment to work on behalf of what we believe to be universal rights.

V. CONCLUDING REMARKS

None of the foregoing comments implies that NLR is merely the latest manifestation of American legal realism. The view that accentuates profound differences between the former and the latter (Leiter 2013) seems to us exaggerated, and we are inclined to the view that posits NLR's continuity with legal realism (e.g., Erlanger et al. 2005; Nourse and Shaffer, 2009). But this essay is not one of intellectual history and therefore cannot purport to contribute to this historical debate.

Be it as it may, we believe that NLR is intimately connected to the realist view, in which law is perceived as a set of institutions typified by the difficult accommodation of three constitutive tensions: between power and reason, science and craft, and tradition and progress. This view, which some NLR scholars seem to embrace or at least sympathize with (Klug and Merry, II, 2–3, 8; Nourse and Shaffer 2009, 131; see also Mertz, I, 8–9), highlights NLR's achievements in accommodating science and craft and in validating, indeed enriching, its nonstatist understanding of law. It also fits NLR's law centrism and deep commitment to constructive legal action.

Furthermore, the realist view of law helps refine three challenges NLR faces and may even provide some guidance. It not only vindicates the emphasis on translation, but also refines some of the law's "filters" for the importation of social scientific data into law as well as law's demands from the social scientific methods utilized for its study. The realist view of law also helps setting up the role of storytelling and other bottom-up inquiries within a framework that does not belittle the guidance and constraint virtues of the rule of law and yet realizes the pitfalls of legal rules and legal categories. Finally, the realist view of law provides a framework for committed humanist scholars who rely on the demands of justice and morality at the same time as they are concerned about the capture of these demands by self-serving interested parties.

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