

New Legal Realism's Rejoinder

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Abstract

This rejoinder responds to criticisms by Jan Klabbers and Ino Augsberg of 'The New Legal Realist Approach to International Law' (*Leiden Journal of International Law*, Volume 28:2, 2015). The New Legal Realism brings together empirical and pragmatic perspectives in order to build theory regarding how law obtains meaning, is practised, and changes over time. In contrast with conceptualists, such as Augsberg, legal realists do not accept the priority of concepts over facts, but rather stress the interaction of concepts with experience in shaping law's meaning and practice. Klabbers, as a legal positivist, questions the value of the turn to empirical work and asks whether it is a fad. This rejoinder contends that the New Legal Realism has deep jurisprudential roots in Europe and the United States, constituting a third stream of jurisprudence involving the development of sociolegal theory, in complement with, but not opposed to, analytic and normative theory.

Key words

conceptualism; empiricism; legal positivism; new legal realism; pragmatism; sociolegal theory

I thank Ino Augsberg and Jan Klabbers for their engagement with the New Legal Realist approach to international law, which was the subject of the last issue of the *Leiden Journal of International Law* that I organized and to which I contributed.¹ To recap, the New Legal Realism is part of a third stream of jurisprudence distinct from normative theorizing of law and analytic jurisprudence, that of sociolegal theory. Rather than addressing traditional abstract jurisprudential questions such as the concept of law (in analytic jurisprudence) or the relation of law to morals (in natural law theory and Dworkin's interpretive theory), the New Legal Realism investigates three interrelated questions regarding law's operation – how law obtains meaning, is practised (the law-in-action), and changes over time. The New Legal Realism is thus distinct from both conceptualism (advanced by Augsberg) and formal positivist understandings of law (advanced by Klabbers) because it asks questions that these approaches do not and cannot answer. The different approaches are not opposed, as I explained in my initial article, and should be careful not to talk past each other. Augsberg and Klabbers assume the internal perspective of formal legal arguments before a judge. New Legal Realists, in contrast, apply an external perspective of how law operates in practice, including to inform our understanding from an internal perspective. Such an approach is useful not only for lawmakers who adopt new law, but also for legal practitioners advancing particular cases under existing law. Such

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1 G. Shaffer, 'The New Legal Realist Approach to International Law', (2015) 28 LJIL 479.

an approach contributes to our knowledge about law's relation to social and political processes. Given international law's expanding scope across domains of social life,² a New Legal Realist approach is particularly called for today.

New Legal Realism, especially of the American variant,³ brings together two key perspectives regarding law's operation, one largely backward-looking (that of empiricism) and one largely forward-looking (that of philosophical pragmatism). The New Legal Realism thus stresses the importance of theory that is not model-driven, but rather problem-orientated, engaging with experience in the world and purposive interventions in it through law. Empirical study is important, as pragmatists stress, because knowledge and learning develop from experience, not from a priori logic, and because decision-making should be grounded in such knowledge. Pragmatism is important for its understanding of human fallibility so that we are not trapped by our conceptual priors, and in its problem-centredness since we have no choice but to use the best evidence available for our interventions in the world.

Augsberg and Klabbbers question the New Legal Realist approach from two vantage points. Augsberg raises a theoretical question regarding whether there is a contradiction between empiricism (which he grounds in scientific realism from a philosophical perspective) and pragmatism (with its problem-orientation and distrust of claims of universal truth). Klabbbers, a legal positivist, appears to question the usefulness of an empirical approach to law and legal questions, suggesting that the New Legal Realism is yet another academic fashion that will pass into the graveyard of fashions.

Augsberg, in his response, 'Some Realism About New Legal Realism: What's New, What's Legal, What's Real?', questions whether the two roots of the New Legal Realism – empiricism and philosophical pragmatism – are 'mutually exclusive'. He suggests they are because the first is based on an understanding that 'reality exists independently from our means of cognition, though we may not easily identify it', and the second contends that 'what counts as "truth", "objectivity" or reality has to be analyzed against the functional background in which these concepts are used'.⁴ He draws upon philosophically challenging lines of criticism levelled against empiricism, in particular.

There are at least three responses to Augsberg's contentions. First, one does not have to be a scientific realist, from a philosophical perspective, to defend the critical importance of empirical work. Second, the apparent tension was addressed by Quine who showed how, although material objects exist outside of our cognition of them, and although our cognition is based on concepts that make any claim to truth

2 See T. C. Halliday and G. Shaffer, *Transnational Legal Orders* (2015); G. Shaffer, *Transnational Legal Ordering and State Change* (2013).

3 See J. v. H. Holtermann and M. R. Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible', (2015) 28 LJIL 211 and their Rejoinder in this issue. Although the American and Scandinavian variants of the realism are distinct, they are allied in their interest in empirical study of how law operates, especially in their focus on how legal meaning develops and stabilizes as in Bourdieian field analysis.

4 I. Augsberg, 'Some Realism About New Legal Realism: What's New, What's Legal, What's Real?' (2015) 28 LJIL 457, at 458.

impossible, we have no choice but to do our best to understand that reality in light of our experience. To again quote from Quine:

as an empiricist I continue to think of the conceptual scheme of science as a tool, ultimately, for predicting future experience in the light of past experience. . . . But in point of epistemological footing, the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conceptions only as cultural posits.⁵

Third, and most importantly, Augsberg's critique highlights the contributions of the New Legal Realism, including in relation to the old legal realism. For some, the old legal realism could be viewed as incorporating the social sciences, which themselves were in relative infancy as disciplines, into the analysis of law. The New Legal Realism, however, as Augsberg notes, places empiricism and pragmatism in relationship with each other. As my initial article explained, the risk of empiricism is scientism, while the risk of pragmatism is relativism. The two keep each other in check. Pragmatism keeps us vigilant that our conceptual priors can be misleading so that we remain open to revising them in light of new problems and contexts that we encounter. Empiricism keeps us vigilant of the empirical grounding of our pragmatic interventions and aids us in evaluating them in light of their consequences.⁶

Augsberg attempts to counter the New Legal Realism's commitment to empirical study by questioning whether 'reality' is not simply a construction, and contending that 'fictitious scenarios can prove more relevant and reliable and in this sense more "realistic" than any so-called real thing'.⁷ To make his point, Augsberg turns to a famous Henry James story, 'The Real Thing', in which a London artist must make a series of illustrations of bourgeois figures for a book and is approached by a bourgeois couple who have lost their income but propose to pose for him as 'the real thing'. He hires them but finally rejects them as models in favor of a Cockney woman from East London and an Italian male immigrant because of the greater suppleness of the latter in assuming the positions and attitudes that the artist wishes to capture. The moral of the story is that the apparently 'real thing' may be less conducive for the making of representational art.

Augsberg captures the moral of the James story but he misses two key aspects from a New Legal Realist perspective. First, what makes the story compelling is not its 'moral' but rather its characters, a middle-aged couple who have lost their material means and propose to be models and are willing to do anything in order to retain their sense of identity as a gentleman and a lady. It is not the 'idea' that makes the story, but the compelling characters that underlie the idea. Second, and most importantly, law is not art because the context, stakes, and consequences are entirely different. As my initial essay stressed, for New Legal Realists, law involves not just

5 W. V. Quine, 'Two Dogmas of Empiricism', in W. V. Quine, *From Logical Point of View* (1980), 20; see also W. V. Quine, 'Epistemology Naturalized', in W. V. Quine (ed.) *Ontological Relativity and Other Essays* (1969), 69 (maintaining that our very thinking is constructed within a context from which it cannot be completely free).

6 For further development of the argument regarding empiricism and pragmatic experimentalism as needed complements, see V. Nourse and G. Shaffer, 'Empiricism, Experimentalism and Conditional Theory', (2014) 67 *SMU Law Review* 101.

7 See Augsberg, *supra* note 4, at 460.

reason, but also power. Unlike art, law has material (shall we say ‘real’), coercive consequences for individuals. The development and application of law recognizes (or fails to recognize) rights and duties, and potentially strips individuals of their assets and their liberty. The ‘real’ consequences of law mean something different for a person in prison or (in the United States) on death row than for a reader of Henry James in a café, an armchair, or a bed. One can learn about law, society, and power from art, but individuals, including artists, suffer consequences from the application of law.

As a conceptualist, Augsberg questions what Andrew Lang (in his symposium contribution) means by ‘in part’ when Lang writes, ‘the categories we use to apprehend the world are not natural but in part politically and socially constructed’.⁸ The ‘in part’ is critical because, unlike an approach based on a priori thought, the New Legal Realism stresses the role of experience. It is the confluence and interaction of concepts and experience in the world that matter.

When Augsberg turns to law he repeats the traditional positivist critique of legal realism that legal realism’s main claim is that ‘law is constituted by decisions, meaning judicial decisions. But as I explained in my initial article, the core interest of legal realists is not in the question of “what is law”, but rather in the question of how law operates – how it obtains meaning, is practised, and changes. When asking those questions, attention to legal decisions becomes important, although judicial decisions are just part of a much broader legal process. To understand how international law obtains meaning, is practised, and changes, one must look to more than judicial decisions.

Augsberg, writing from an internal perspective on law which stresses formal legal arguments before judges and judge’s formal reasoning regarding the law, contends that ‘rules, not facts, come first’,⁹ and that ‘law comes “after the fact”, thus creating its own causes’.¹⁰ In both cases, he wishes to stress the priority of concepts in constructing reality. Augsberg’s remarks make clear the political and social dimensions of law, but not the priority of abstract rules themselves. From an internal perspective, a legal practitioner advancing a client’s interests has choices regarding how to present facts so that certain rules are applied as opposed to others, and so that these rules will more likely be interpreted in particular ways in light of the context. The lawyer and judicial decision-maker can select among facts to affect a legal decision, which supports the legal realist point. From an external perspective, law is a continuous, not a static, phenomenon. It develops through practice, involving the *interaction* of concepts and experience.

The problem with Augsberg’s anti-empirical, purely conceptual approach is revealed in his diction. He uses italics to stress the importance of the idea that ‘the law *presents itself*’ (i.e. that concepts are prior). But the law is not an agent and cannot present itself. Even before traditional courts, law can only be presented by lawyers making arguments on behalf of clients who have interests, and by judges justifying

8 Ibid., at note. 20.

9 Ibid., at 460.

10 Ibid., at 462.

their decisions in terms of what the law is and thus affecting those interests. These agents work within a particular institutional context so that certain arguments count and others do not. But those arguments concern not only interpretations of the law; they also concern characterizations of the facts to know which law to apply and how to apply it. Legal realists wish to understand these agents and their role in law's construction, interpretation, practice, and effects within the legal field, as well as in the broader social world.

Augsberg turns to Kant and Kelsen to contend that 'different forms of cognition [such as the is and the ought] depend on different transcendental schemes and categories'.¹¹ Here, some legal realists will raise an eyebrow because the material objects and consequences of law do not simply 'depend on different transcendental schemes'; rather people are killed, raped, tortured, silenced, stripped of their assets, denied access to health care; they pay taxes, have their goods blocked at the border; some become ludicrously rich and others lose hope; air and water become soiled, causing cancer, or they become cleansed and people live longer and healthier lives. While Felix Cohen wrote about formalism's 'transcendental nonsense',¹² the same can be levelled at the privileged distancing of some postmodernist theory. And yet, at the same time, a New Legal Realist recognizes the importance of conceptual and normative thought and of formalist doctrine in the study of law and their interaction with experience. It is just that these approaches alone are insufficient for getting at the questions that New Legal Realists ask since, for a legal realist, knowledge comes from human experience, and concepts should be developed and revised over time in light of that experience.

In the end, Augsberg calls for a new concept of law that comes out of legal realist inquiry, one that is aware of its own limitations but nonetheless adds a new framework through which "empirical" findings can be properly understood and integrated into the legal process'.¹³ For legal realists, a concept, such as a concept of law, should not come from theory alone, but from theory informed by experience. There is thus no trans-historical concept of law for all places and all time. Concepts are adopted and adapted because they are useful for purposes of human interventions in the world. Thus, such a concept cannot be derived by those (like Augsberg) who stress the 'priority of conceptual thinking'. Perhaps a new concept will emerge out of New Legal Realist study, but it will be a concept that operates within a particular context.

Let us now turn to Klabbers' rather disenchanted, world-weary, have-seen-it-all comment, 'Whatever Happened to Gramsci? Some Reflections on New Legal Realism'. The main theme of Klabbers, known for his defence of legal positivism and distrust of interdisciplinary exchange,¹⁴ is not so much about New Legal Realism as about any new method, any new theory, any new academic approach to law, from

¹¹ Ibid., at 465.

¹² F. S. Cohen, 'Transcendental Nonsense and the Functional Approach,' (1935) 35 *Columbia Law Review* 809.

¹³ See Augsberg, *supra* note 4, at 467.

¹⁴ See J. Klabbers, 'The Redundancy of Soft Law', (1996) 65 *Nordic Journal of International Law* 167, at 168, and J. Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations', (2009) 23 *International Relations* 119.

Gramscian critical theory to the Yale policy school, which he views as fads that will ‘come to rest in the graveyard of academic fashions’.¹⁵ At one point, Klabbers divides scholarship into formalism and critical theory, and appears comfortable with critical theory because of its focus on theory and formal doctrine rather than experience and sociolegal inquiry. Yet his response about fads goes counter to a great tradition in Europe and the United States with which New Legal Realism links, that of sociolegal theory. The New Legal Realism is not some fad, but has deep jurisprudential roots, constituting a third stream of jurisprudence involving the development of sociolegal theory – in distinction to that of analytic philosophy, reflected in legal positivism, and normative philosophy, reflected in natural law theory and Ronald Dworkin’s interpretivism. It may be that with academic fashion, there will be a turn away from problem-solving and our experience in the world. But the human demand for law, for the pursuit of order and justice, will require engagement with our experience. The New Legal Realism may, at some point, go under another name, but the problems and the approach will remain.

When Klabbers turns to the New Legal Realism, his central comment concerns ‘what “empirical” stands for’.¹⁶ Here he expresses a common misunderstanding of what empirical means, perhaps understandably with the turn to almost exclusively quantitative work in the ‘empirical legal studies’ movement in the United States.¹⁷ Klabbers first addresses quantitative work and then notes that at least one of the symposium’s contributors, Mikael Madsen, ‘often resorts to interviews’ which ‘too counts as empirical’, so that ‘clearly the term “empirical” means different things to different people’.¹⁸ Yet, the term *empirical* is not synonymous with quantitative methods. Rather, empirical has an accepted dictionary definition, which is knowledge derived from observation and experience, differentiated from knowledge based on theory. To take from two leading dictionaries, one English and the other American, ‘empirical’ means (i) ‘Based on, guided by, or employing observation and experiment rather than theory’ (*New Shorter Oxford English Dictionary*), and (ii) ‘originating in or based on observation or experience’ (*Merriam-Webster Dictionary*). Quantitative methods are simply a tool to evaluate and understand experience, as are interviews with insiders, and ethnographic observation.

Klabbers particularly critiques quantitative work, raising the challenge of ‘aggregation’ which tends to flatten facts through their categorization; and the challenge of representation, quoting Benjamin Disraeli’s dismissive ‘lies, damned lies, and statistics’.¹⁹ I too, as a New Legal Realist, have critiqued the risks of quantitative analysis, as all empirical approaches. Yet, as the pragmatist contends, all knowledge is imperfect so that we should engage with empirical work, and not simply dismiss it in order to build better understanding of law’s operation when applying, adapting,

15 J. Klabbers, ‘Whatever Happened to Gramsci? Some Reflections on New Legal Realism’, (2015) 28 LJIL 469 at 469.

16 *Ibid.*, at 474.

17 For a discussion on differentiating New Legal Realism from empirical legal studies, noting their overlaps and distinctions, see E. Mertz and M. Suchman, ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’, (2010) 6 *Annual Review of Law and Social Science* 555.

18 See Klabbers, *supra* note 15, at 476 and note 32.

19 *Ibid.*, at 475.

and reforming it. Klabbers appears to question the value of empirical work generally, to which the empiricist responds that decisions and certainties ungrounded in empirics are dangerous, unpredictable, and can have disastrous consequences. Witness the second war in Iraq initiated in 2003. There the legal justifications were based on false and biased factual claims.

Klabbers raises the question of 'what' the empirics should study, and notes that 'empirical scholarship ends up concentrating rather too much on compliance'²⁰ and issues of high politics. For New Legal Realists, empirics should not be model-driven (of interest to legal theory), but rather problem-driven (of interest to intervening in the world through law), and thus their focus tends to be on effectiveness, not on compliance. Such empirics can address any subject area, from human rights to business and regulatory law. It is the enlarged scope of international law across all domains of social life that makes possible a New Legal Realist approach because international law now implicates almost all domains of social decision making. Sociolegal theory thus must take greater account of it. The key for understanding the place of international law involves much deeper questions than compliance, and includes the broader impact of international law on national institutions, professions, norms, and practices, as well as, in turn, the latter's recursive impact on the development of formal international law.²¹

Finally, Klabbers asks '*cui bono*'?²² What's in it for whom? '*Cui bono*' is a fundamental question that a New Legal Realist asks about the legal system itself, but Klabbers turns the question on those who deploy empirical methods. I have three responses. First, conventionally lawyers think in terms of advocacy for clients and thus the strategic use of empirical work. Empiricists and pragmatists, in contrast, stress the importance of working to eliminate bias, even if it is impossible to reach a wholly neutral stance. This is particularly important when we operate under significant uncertainty regarding the reliability of our priors and the consequences of our interventions.

Second, as Dewey insisted from the position of philosophical pragmatism, we should only have ends in view so that learning can occur, enabling what Victoria Nourse and I refer to as emergent analytics.²³ In a world of uncertainty in which we must make decisions, decisions are likely to be improved if they are informed by experience. Certainly there are strategic actors who can manipulate empirics for particular ends ('lies, damned lies, and statistics'). But those advocating empirics in scholarship take a much humbler stance. Empirics can be abused and so the responsibility of the researcher is not to manipulate statistics to make a counter-intuitive point to advance his or her academic career. It is rather to engage in the world of uncertainty to uncover what is otherwise ignored, especially by the high priests of theory and formalism, not because the latter are irrelevant, but because

20 Ibid., at 476.

21 See Halliday and Shaffer, *supra* note 2; Shaffer, *supra* note 2. See also G. Shaffer, 'How the WTO Shapes Regulatory Governance, Regulation & Governance', (2015) 9 *Regulation & Governance* 1.

22 See Klabbers, *supra* note 15, at 477.

23 V. Nourse and G. Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory', (2009) 95 *Cornell Law Review* 61.

they and their prescriptions may be all too relevant and seriously impact societies and individual lives.

Third, I suspect (although such itself is an empirical question) that empirical work, on average, should bring to the fore the concerns of those who are otherwise less likely to be heard, starting with ethnographic work, but also more broadly. The well-heeled and connected can organize to have their views reflected at the international level, whether they be countries such as the United States and China, regional organizations such as the European Union, or multinational companies such as Citibank, Disney, Shell, Siemens, and Tata. Those with few resources tend to be ignored. Thus much of my scholarship, building indeed from interviews, has been to learn from the experiences of developing countries and their stakeholders to inform debates that occur in Geneva and in the primary academic journals in the United States and Europe that tend to publish authors from the United States and Europe. Empirical research will often uncover the workings of power and bias that otherwise are not addressed by formalist approaches.

Klabbers concludes by noting the importance of keeping lines of communication open. That is the way I opened my initial article and will conclude this Rejoinder. There is no one way of scholarship. Formal scholarship is important, both for advocates and judges, because it addresses judges' internal perspectives in applying law that can have real implications on people's lives. Conceptual and normative analysis is important for orientating our perspectives and our interventions in the world. And the New Legal Realism is critical for emphasizing the interaction between the experiential and the conceptual to understand how law obtains meaning, is practised, and changes; in this way it informs law's application and reform to advance human ends. As I began, what interests New Legal Realists is developing tools to understand and build theory regarding the development and operation of law so that we can more effectively pursue our ends, ends that must remain ends-in-view so that we are open to learning from our experience and are not trapped by our conceptual priors.