THE NEW LEGAL REALISM, VOLUME II

Studying Law Globally

This is the second of two volumes announcing the emergence of the New Legal Realism. At a time when the legal academy is turning to social science for new approaches, these volumes chart a new course for interdisciplinary research by synthesizing law on the ground, empirical research, and theory.

Volume II explores the integration of global perspectives and information into our understanding of law. Increasingly, local experiences of law are informed by broader interactions of national, international, and global law. Lawyers, judges, and other legal actors often have to respond to these broader contexts, while those pursuing justice in various global contexts must wrestle with the specific problems of translation that emerge when different concepts of law and local circumstances interact. Using empirical research, the authors in this path-breaking volume shed light on current developments in law at a global level.

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To Elizabeth Mertz, a creative and tireless advocate for New Legal Realism

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Preface to *The New Legal Realism*, Volumes I and II

Michael McCann

The publication of this two-volume set by New Legal Realist (NLR) scholars marks an important moment in sociolegal development. To a large extent, NLR scholars follow the original Realists in pushing to integrate social science with study and research about law in action. But NLR scholars do so with an astute grasp of fundamental developments in the character of both contemporary sociolegal scholarship and the legal academy. From the start, scholars involved in this movement have been concerned in particular about the limitations and arguable myopia of law school fascination with other movements like Empirical Legal Studies (ELS) or Law and Economics (L&E) in recent years. NLR offers a compelling alternative vision that engages these and other approaches while expanding beyond their limitations. These two volumes make the substantive intellectual case, by argument and example, for the value of such a comprehensive, multidimensional approach to sociolegal studies within the legal academy. The timing of these two new volumes is also propitious and marks a new self-conscious form of engagement. Law schools are in a moment of heightened panic about the crisis of their professional mission, and these volumes outline new directions in both research and teaching that can help to reconcile contradictory pressures that mark the current uncertain situation.

The internal logic of each volume is both sensible and exciting. Volume I's essays focus on practices in U.S. law school teaching, conceptualization, and research about "real-life" law. The key goal is to encourage more successful integration of theoretically sophisticated empirical research from the law-and-society tradition into law school agendas. The collection begins by addressing analytical and epistemological dimensions of law school teaching, conceptualizations, and preparation; then shifts to method; and concludes by offering various "translations" of NLR into specific research questions. This volume is very much a project by and for law school professors who aim to "make law real." Volume II focuses on "studying law globally." It proposes to focus "translation" of NLR approaches on "diverse global, national, and local sites of law." The collection begins with two chapters exploring the concept of "globalism" in relation to specific legal phenomena, and then shifts to questions of global norm transfer (globalism is all about flows, about exports and

imports); it then proceeds to institutions and actors, and ends up with inquiries into normative issues of global justice.

It is worth underlining at the outset that both the editors and the individual essay contributors are very distinguished scholars; they include some of the most accomplished sociolegal scholars of the past half century. It is very tempting for me to review and engage the outstanding essays in the collection on their individual merits. But it is to the whole of the enterprise rather than the distinguished parts of this new volume that I choose to direct the remainder of my prefatory comments.

I. WHAT IS NEW LEGAL REALISM?

The core commitment of New Legal Realism to date has been summarized by its advocates as theory-driven empirical research about law in action that values qualitative as well as quantitative and experimental methods.[1] This could be contrasted with the most hard-core adherents of Empirical Legal Studies (ELS), who have tended to limit the scope of empiricism to quantitative data with very little theory, and classical Law and Economics (L&E) scholars, who tend to focus on deductive theory with limited attention to grounding in systematic data collection. (Of course one could point to notable exceptions in each case.)

While I do not disagree with any of these claims, I propose a slightly altered framing of what the New Legal Realist effort is advancing. I begin with the observation that the law-and-society experiment fifty years ago aimed for a partnership and exchange between law professors and social scientists committed to replacing the traditional case law focus of legal scholarship and teaching with more sophisticated analysis of legal behavior. The exchange was generally reciprocal, although the common commitment to social science study of law animated both sides of the joint effort. Over time, the behavioral focus of early sociolegal study was joined by attention to legal practices, legal discourse, constructions of legal meanings, post-structural analysis of legal institutions, law and social change, sociology of legal fields, and much more. New Legal Realists have rightly pointed out, however, that the cross-disciplinary sociolegal partnerships, and especially the new interpretive turns, have not influenced the broader legal academy as much as many had originally hoped. NLR scholars thus aspire to repackage the cutting-edge insights of sociolegal research, amplify their significance, and revitalize their impact for law

[1] Suchman and Mertz write in a classic essay comparing and contrasting New Legal Realism to Empirical Legal Studies: "From the outset, the group focused on building an integrative model for studying law – one that would bring together multiple empirical methodologies to be used in service of resolving theoretically-informed questions.. . . Rather than prejudging what kind of method would be used (quantitative, qualitative, experimental), these scholars argued that research methods should be chosen based on the kinds of questions being asked. This approach emulates the inclusive approach of the law-and-society movement – and, indeed, NLR remains closely allied with Law-and-Society still." (2010, 562).

school teaching and research. But will this repackaging of sociolegal scholarship as NLR make a difference?

I very much think that NLR scholarship does have something concrete, simple, and fundamental to offer. In short, L&E and ELS refashion in new ways old-fashioned realism in that they generally aim to use microeconomic or behavioral methods to identify the nonlegal independent variables causing or determining law defined as a dependent variable. In these frameworks generally, law has relatively little power, or its limited independent power matters only when bolstered by other independent, intervening extralegal factors (as in judicial or legal impact studies).[2] By contrast, NLR tends to encompass a wide variety of approaches that recognize that law itself – as language/discourse, as institutional practices, as aspirational ideals, as actual or potential enforcement by state violence, and so on – actually matters as power, and is interrelated with other dimensions of extralegal or mutually constitutive power. Most NLR studies view this power complexly, attending 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. The focus is on more relational, contingent, context-sensitive, or process-based understandings of law, where law is both dependent variable and independent variable (and hence neither in the classic linear causal logic). This is not true for all NLR scholarship, but the generalization at least points to something distinctive about much of the broader NLR sensibility. And declaring and demonstrating that "law matters" (even in these complex, qualified ways) would seem to be a great mantra to preach in law schools.

For the preceding reasons, I urge more attention to epistemology and analytical theory (of law/power) as the key to how NLR differs from ELS and L&E. In this regard, the familiar qualitative and/versus quantitative relationship strikes me as ill-conceived and misleading, or at least overemphasized. After all, many scholars use qualitative study to make linear causal claims in the positivist mode, and some very quantitatively oriented studies are self-consciously postpositivist and noncausal (and, as such, reject regression). Much L&E scholarship refers to little or no data at all; it is all deductive theory. ELS tends to be all data and little theory, or theory that is presumed rather than directly addressed in critical ways. While NLR embraces both economic theory and quantitative methods – and thus much of the work emerging from ELS and L&E – it tends to insist on more attention to background theories and assumptions regarding how best to translate between different kinds of social science understandings of law and (or in) social context. Hence, it is not the types of data that mark NLR, but the differences in the relationships among theorization, analytical premises, and empirical data.

[2] This claim may understate the commitment of ELS scholars to assessing how much law matters. But most ELS studies follow the gap tradition of impact studies and tend to confirm that law is a limited resource for changing power relations in society.

It is quite possible that my effort to push for clearer delineation of the NLR project in these ways narrows the enterprise too much, mutes big differences among NLR scholars, and deflates the big tent. And I do think that the NLR is a big tent, in at least two ways. First, NLR is self-consciously the ambassador to contemporary law schools for a tradition of law-and-society scholarship that itself has expanded dramatically in recent decades to include diverse interpretive as well as behavioral research, qualitative as well as quantitative research methods, and a host of critical theoretical frameworks applied to an ever-expanding array of legally constituted phenomena around the entire globe. We should celebrate this robust, dynamic expansion of analytical formats and topics of study. Second, NLR may distinguish its general orientation from ELS and L&E, but the former advocates have consistently reached out, welcomed, and engaged the latter in a host of ways, sometimes critical but always friendly. There is no reason to exaggerate conflict, when in fact there is a lot of vigorous, constructive engagement going on. NLR scholars tend to shrink the tent a bit only in an effort to define its boundaries in coherent ways, a dilemma that has long been shared and perhaps abandoned by spokespeople for the law-and-society tradition and its professional association, the Law and Society Association (LSA).

II. ADDRESSING THE CURRENT LAW SCHOOL CRISIS: JUDGMENT, GLOBALISM, AND ACCESSIBILITY

The "crisis" that has beset contemporary law schools has received a great deal of attention. My primary faculty appointment is not in a law school, but I have viewed the development of panic in law schools with some interest and concern. The core challenge, as I see it, has been in defining clearly the mission of contemporary law schools in a rapidly changing environment. Law schools have long experienced tensions and been subject to disagreements about their various academic, practical, and professional credentialing roles. These tensions have remained unresolved for many decades, but they have been compounded and forced to the forefront by changing fiscal pressures. Law school tuitions have increased dramatically at the same time that demand for legal services generally, and entry jobs specifically for new lawyers, have declined, thus resulting in substantial declines in law school applications and enrollments as well as forced termination of some programs. Old tensions about the mission and role of law schools have been intensified and multiplied as these fiscal pressures have escalated.

New Legal Realism as a movement does not, as far as I know, offer unique solutions to the economic challenges of legal education. But it seems to me that NLR can contribute to reconciling some of the competing pressures for academic excellence and practical skill development, and thus for clarifying the mission, activity, and standards of law school practice. I offer three points on this matter. The first point transforms a common critique of NLR into a virtue. One objection by some sophisticated critics has been that some leading NLR scholarship has

withdrawn from or failed to realize the positivist goal of linear causal analysis and prediction. NLR scholars should, I think, answer, "Yes, and so much the better!" After all, identifying the indeterminate, contingent, context-specific character of legal meaning and practice is a hallmark of much NLR research. Most NLR scholars do not reject attention to instrumental or linear dimensions of power so much as integrate them into more complex modes of analysis that are attentive to nonlinear, interactive, and constitutive dimensions of institutional and ideological power (see McCann 2007). Indeed, the commitment to understanding contextual contingency is arguably a practical virtue that underlines the relevance of NLR approaches for law school teaching and research.[3] Rather than a specious promise of certainty, NLR scholarship approaches offer to develop capacities of analysts and practitioners alike to exercise sophisticated judgment amid the complexity of multiple interacting institutional, discursive, and instrumental forces. Much NLR scholarship does not offer the simple, confident explanations of the kind that ELS and L&E tend to offer, but for many analysts that is its appeal; it questions the sufficiency of numerical representations and simplistic causal explanation, offering instead rich intellectual analysis and practical skills of informed interpretation and assessment in sorting out complex, contingent, dynamic, multidimensional features of real-life situations. Is this not what lawyers most need? And is this not what we look for in analytical scholarship? In many ways, this commitment recalls Holmes's famous realist claim that the "life of the law has not been logic; it has been experience" (Holmes 1881, 1). Whether NLR is consistent with the old realism is largely irrelevant, not least because, as Brian Tamanaha (Vol. I) has demonstrated, the old realism was rather more variable, complex, and subtle than is often alleged. What matters most is the contribution of NLR now, and I think that the movement is timely in its appeal.

Second, NLR scholarship generally has been ahead of the curve in pressing for study of legal institutions and practices outside the United States, and especially for addressing important dimensions of growing global interdependence. NLR scholars have helped to underline why these commitments are important, even for scholars and lawyers who plan to focus their energies within the United States. For example, one of the signal contributions of recent sociolegal scholarship has been to show how U.S. law has been shaped by global/international forces, by U.S. involvement in the world, and by relationships beyond unilateral U.S. control. This is the thrust of the expansive scholarship on how World War II and the Cold War were critical to creating pressures supporting the civil rights movement, the War on Poverty, and the Great Society in the United States (Dudziak 2011; Tani 2012). Late–Cold War human rights campaigns against the Soviets were similarly critical to narrowing the scope of rights talk in the United States, including the emphasis on legal procedure and rights of the accused that went hand in hand with the rise of the mass incarceration state,

[3] See the discussion by Erlanger, Garth, Larson, Mertz, Nourse, and Wilkins (2005) on the "situated knowledge" that NLR emphasizes.

and fed into neoliberalism's key currents of marketization, contracts, and the like. The entire history of citizenship rights, the right to have rights, was shaped by U.S. struggles against Europe, slave importation from Africa, removal of Native Americans from their traditional homelands, and immigration from all directions; U.S. law was forged out of these engagements with peoples, states, and forces from beyond our borders. Moreover, laws of war continuously shape domestic law and policy, and vice versa, right up through issues with enemy combatants. In addition, U. S. commercial and intellectual property law has evolved to deal with participation in an increasingly globalized economy. And U.S. law schools have been a persistent force in proselytizing (often very misleadingly) for versions of "rule of law" and specific legal techniques around the world, arguably in imperial fashion. In short, the international and global have been critical parts of the context of American domestic law development, and the United States has been a formative force shaping international relations and globalism since its origins. One promise of NLR scholarship is to bring attention about the great power and problematic impacts of American law and lawyers more directly into U.S. teaching of aspiring young legal professionals and academics.

The NLR editors of these volumes are sophisticated and integrate these understandings very well; these are lessons that much of their research well documents. By contrast, demonstrating and interrogating global interdependency is not a focus of much L&E or ELS study, which is largely U.S. centered and often are not methodologically attuned to the complexities of global "interdependence." Indeed, those approaches can be complicit in exporting U.S.–derived models, techniques, and assumptions in quasi-imperial fashion.[4] Volume II of *The New Legal Realism* collection in particular is committed to recognizing the theme of the "U.S. shaping and shaped by the world." One might quibble with the separation of volumes according to a local/domestic U.S. focus or a global focus. Again, the United States and its legal system have always been connected to and shaped by global interdependencies. But the editors fully recognize this connection, and the two-volume pairing underlines integration of the local and global in important, sophisticated ways.

Finally, the strong emphasis of much NLR scholarship on interpretive and qualitative methods, attention to legal discourse and meaning, and sensitivity to institutional context promises to add sophistication and rigor to enterprises in which most traditional law scholars already engage. Whereas ELS and L&E offer exotic, somewhat esoteric methodologies that are foreign to most conventional legal scholarship, much of the NLR scholarship aims primarily to sharpen, refine, and elevate theoretically, analytically, and empirically modes of scholarship that are familiar,

[4] The copious scholarship of Yves Dezalay and Bryant Garth (2002) has raised these and related questions in theoretically sophisticated and empirically rigorous ways. A rich literature on U.S. colonial ventures that were formative in the development of empire also exists. See, for one brilliant example, Merry (2000).

accessible for literate readers, and realistically practicable with only moderate retooling of scholarly skills. There is much sophisticated method involved in good ethnography, qualitative case study, historical narrative, and analytical theory, but it is more accessible than formal modeling or advanced statistical regression. The latter may be attractive for some legal scholars and students, but the former are likely to be much more appealing and available for effective use among a larger number and range of scholars in the law school world.

Together, these virtues of refining capacity for legal judgment in dynamic and complex institutional relations, of viewing local legal practices in comparative and global terms, and of accessibility all offer important value to legal scholars struggling to make modern law schools relevant and effective.

III. REACHING ACROSS DIVIDES: WHY SOCIAL SCIENTISTS SHOULD CARE

One of the most promising aspects of the New Legal Realism project is the clarity of focus on a targeted audience. The project has been developed mostly by law school professors, with varying degrees and kinds of disciplinary or interdisciplinary connection, writing to and for other law school professor colleagues. This targeting is rather more evident in Volume I, which focuses clearly on U.S. law schools and audiences, than in Volume II, but both seem to aim more for law school audiences than for scholars anchored in social science or humanities units or in other intellectual communities largely outside law school orbits. While a virtue, however, this specification of audience can also be narrowing in potentially problematic ways. In short, to the extent that the New Legal Realism is an interdisciplinary sociolegal project that emanates from debates primarily within law schools, then it may offer little of intellectual or professional value to sociolegal scholars largely outside law schools. In that case, the NLR campaign could be viewed as simply the latest campaign in the "palace wars" of contemporary law schools and largely irrelevant to social scientists or humanities scholars. Indeed, at worst, it might exacerbate the split between law professors and those in social science disciplines and interdisciplinary units (not to mention humanities scholars), undermining any sense of common commitments that once existed in the law-and-society traditions.

I again think this potential tension is not a great problem, and in fact it can be viewed as an opportunity. At least three points of productive connection between NLR and social science (and humanities) scholars strike me as promising. First, there is still much *intellectual* reason for continued exchanges and collaboration among law school faculty, social scientists, and humanities scholars. While those scholars outside law schools do not have a direct interest in the relative institutional influence of NLR inside law schools, we still have an intellectual stake in the interaction. After all, the old realist and postrealist sociolegal projects overcame the challenges of different institutional demands, as they imagined (perhaps naively)

a two-way partnership between law professors and social scientists. There is no reason to devalue the aim of partnership now because NLR is repackaging the long collaborative tradition of interdisciplinary law-and-society scholarship for law schools facing new challenges. Indeed, my own experience confirms that we social scientists still have as much to learn from colleagues in law schools as they can learn from us.

Second, many social scientists have become more interested in and involved with law schools, as law schools have become more interested in PhDs. The numbers of PhDs hired in law schools have grown over the past decades, and many PhDs (like me) are adjuncts, affiliates, or just close colleagues with law school faculty. Social scientists in turn often welcome the larger salaries, expanded audiences, elevated public stages, reduced teaching loads, and better food that come with participation in law school activities. Moreover, engagement with law schools can expand the range of venues, terrains, and types of policy or political engagement that many social scientists and humanities scholars value. The New Legal Realism project thus can be viewed as indirectly enhancing these opportunities and inclinations for scholars with a PhD within law schools.

Finally, we should not forget that many faculty members in the social sciences and humanities routinely teach, mentor, and counsel undergraduates who are considering or committed to attending law schools as well as PhD students who may seek employment in law schools. Those of us who believe that an increased role of NLR scholarship would enhance the research and teaching agendas of law schools may find our interests served in these other ways as well. If I knew that NLR approaches were welcomed at some schools, I might be more comfortable recommending professional legal education to students. If NLR approaches became more welcomed overall, my routine and increasing reservations about recommending applications to law schools might be relaxed a bit. And if NLR can create more opportunities for my PhD students, then more power to them, and I am happy to be an ally. In all these regards, intellectual principle and professional interest converge for sociolegal social scientists and humanities scholars.

In sum, there is much to be said on behalf of the New Legal Realism project intellectually and professionally. I find the release of these two volumes to signal an important moment for understanding better, assessing more fully, and advancing the NLR agenda at this historical moment.

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