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Howard Erlanger, Bryant Garth, Jane Larson,
Elizabeth Mertz, Victoria Nourse, David Wilkins

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FOREWORD

IS IT TIME FOR A NEW LEGAL REALISM?

HOWARD ERLANGER, BRYANT GARTH, JANE LARSON, ELIZABETH MERTZ, VICTORIA NOURSE, & DAVID WILKINS*

INTRODUCTION

This Symposium issue of the *Wisconsin Law Review* is part of a conversation that has been gathering momentum across the legal academy and sociolegal studies in recent years.[1] The renewed interest in bridging law and social science among legal scholars is apparent in the decision of the American Association of Law Schools to devote its annual meeting this year to the topic of empirical research on law, and in the new AALS President Bill Hines's designation of this kind of

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* At the insistence of some of the coauthors to this Foreword, we note here that authors' names are listed alphabetically; the ordering does not reflect their relative contributions. Howard Erlanger is Director of the Institute for Legal Studies, Voss-Bascom Professor of Law and Professor of Sociology at the University of Wisconsin, Madison. Bryant Garth is Dean of Southwestern University School of Law and Director Emeritus of the American Bar Foundation. Jane Larson is Voss-Bascom Professor of Law at the University of Wisconsin Law School. Elizabeth Mertz is Professor of Law at the University of Wisconsin Law School, Senior Research Fellow at the American Bar Foundation, and Affiliated Faculty in the Department of Anthropology at UW-Madison. Victoria Nourse is Professor of Law at the University of Wisconsin Law School. David Wilkins is the Kirkland and Ellis Professor of Law, Director of the Program on the Legal Profession, and Director of the Program on Lawyers and the Professional Service Industry at Harvard Law School in addition to being a Fellow of the American Bar Foundation.

1. We would like to express a special debt to the members of the *Wisconsin Law Review*, who have taken an active role in this project since before the original conference was held. They helped in preparing for and carrying out the actual conference, and have been hard at work ever since to bring this Symposium issue to fruition—a challenging task. From our initial meetings, Editor-in-Chief Laura Schulteis and Symposium Editors Josh Gildea and Rebecca Mason have been enthusiastic and patient supporters of this project. Both at planning meetings and at the conference itself, they reminded us of the importance of student perspectives and energy in any project of this kind. Their imagination and vision was particularly evident at the *Wisconsin Law Review*'s own New Legal Realism Symposium on Law, Poverty, and Land (held February 18, 2005 in Madison, Wisconsin, and cosponsored by the Black Law Students Association and the Latino/a Law Students Association). This event was entirely student-planned and run (generously funded by the Gwynette E. Smalley Law Review Fund and the Ralph M. Hoyt Memorial Lectureship in Real Estate). Faculty participants were energized and humbled by the level of student participation and involvement. Also, we would be remiss if we did not extend special thanks to Senior Managing Editors Laura Dickman and Nathan Kipp, who saw the project through to fruition through numerous unexpected difficulties with professional aplomb and perseverance.

research as a top priority for the legal academy today.[2] Furthermore, there are signs of convergent lines of thinking from different corners of law and social science, pointing toward the possibility of a new synthesis.[3]

However, as the contributors to this Symposium issue make clear, the process of formulating a new interdisciplinary paradigm for the study of law is by no means transparent or simple. There are important differences in epistemology, methods, operating assumptions and overall goals, even just among the social sciences—let alone between the social sciences and law. Translating respectfully among these differences is a challenging task. The issue of translation between law and social science is a core issue for New Legal Realism, as we will explain below. Our goal is to create translations of social science that will be useful even to legal academics and lawyers who do not wish to perform empirical research themselves, while also encouraging translations of legal issues that will help social scientists gain a more sophisticated understanding of how law is understood "from the inside" by those with legal training. To date, some would argue that lawyers and social scientists have often talked past one another. Professors Lee Epstein and Gary King put it very succinctly:

> While a Ph.D. is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence *against* his or her theory, an attorney is taught to amass all the evidence *for* his or her hypothesis and distract attention from anything that might be seen as contradictory information. An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.[4]

While this may overstate each side of the equation to some extent, it casts useful relief on how core differences between these fields can

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2. N. William Hines, *Empirical Scholarship: What Should We Study and How Should We Study It?*, AALS NEWSL. (Ass'n of Am. Law Sch., Washington, D.C.), 2005, at 1, 1–7.

3. *See infra* Part II.A (discussing the convergence of interest in studying law from the "bottom up" with qualitative social science methodologies); *infra* Part II.D (describing the legal and social science interest in studying global law). *Compare* Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, *and infra* Part III (discussing pragmatism and linguistic context (pragmatics)), *with* Handler et al., *supra*, at 492–503 (discussing contextual legal analysis and the "new governance").

4. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9 (2002).

make productive communication between them difficult. There is always a temptation for legal academics to approach social scientists as mere methodologists who simply provide the means of investigating questions formulated by lawyers. On the other hand, social scientists may also prefer to frame their investigations solely with reference to theories and questions from their own fields, without thinking about the need to translate into the language of law.

The research presented in this Symposium issue exemplifies one set of allied responses to the formidable challenge of translation, an approach that can be called a "New Legal Realism." Like the original Realists, who also sought to use social science in service of advancing legal knowledge, new legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.[5] These papers and others were presented at a three-day conference cosponsored by the American Bar Foundation and the University of Wisconsin Law School's Institute for Legal Studies, two institutions with long histories of leadership in the area of empirical research on law.[6] And, as will be apparent from the list of conference participants, the boundaries of the project extend far beyond these two institutions (and hopefully will expand further yet). For a number of years now, scholars from a variety of backgrounds and institutions have met, given presentations at conferences, and in other ways paved the way for this effort.[7] In addition to these articles in the

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5. There are also some striking differences between the original Legal Realism and New Legal Realism, as we will see. *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be"*, 2005 WIS. L. REV. 365.

6. 1st New Legal Realism Conference: New Legal Realist Methods at the University of Wisconsin-Madison (June 25–27) [hereinafter New Legal Realism Symposium]. As noted above, the Symposium was also carried out in cooperation with the members of the *Wisconsin Law Review* and under the overarching guidance of the Institute for Legal Studies' associate director, Pam Hollenhorst, both of whose help we gratefully acknowledge.

7. Examples of discussions that paved the way for the Symposium include: Is It Time for a New Legal Realism, Roundtable Held at the 1997 Law and Society Association Meetings (1997); LSA at the Start [1966]: Law on the Books and Law in Action—Legal Realism, New Formalism, and the New Legal Realism, Invited Anniversary Panel Held at the Fortieth Anniversary Meetings of the Law and Society Association (2004); Arthur McEvoy, Legal History and the New Legal Realism, Paper Presented at the Midwest Law and Society Retreat (2002); and The New Legal Realism, Panel Held at the Twentieth Anniversary Feminism and Legal Theory Workshop (2003). *See also* the *From the Trenches and Towers* discussion of plea bargaining in volume 19 of *Law and Social Inquiry*; the discussion of legal ethics in volume 23 of *Law and Social Inquiry*; the discussion of a proposed social science study of the American Law Institute in volume 23 of *Law and Social Inquiry*; the discussion of possible legal protection for social science research in volume 24 of *Law and Social Inquiry*; and the discussion of the exportation of U.S. models of conflict management in volume 27 of *Law and Social Inquiry*. Similar ideas can be found in Edward L. Rubin, *The New Legal Process, the*

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Wisconsin Law Review, some of the other papers from that conference will be published in *Law & Social Inquiry*, a leading peer-reviewed journal in sociolegal studies published under the auspices of the ABF. This is, quite possibly, the first time that a law review and a social science journal have teamed up in this way. It is precisely this kind of bridge between quite different worlds[8] that the New Legal Realism hopes to encourage, in search of a genuinely interdisciplinary approach to research on law. And, as we noted above, our focus is not only on performing this kind of research, but on creating adequate translations for lawyers and law professors who might find empirical work useful although they do not engage in the research themselves.

Part I of this Foreword begins with a consideration of the themes, methods, and overall approach that might be said to characterize a "New Legal Realism." We offer this in part as a distillation of discussions at the conference and elsewhere, but also as the beginning of an ongoing conversation with you, our readers, as we invite you to join in this endeavor.[9] In Part II, we briefly summarize some examples of new legal realist research. Using these "on the ground" examples to illustrate our emergent paradigm is actually one aspect of the new legal realist methodology for which we argue, which brings us to the central

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Synthesis of Discourse, and the Microanalysis of Institutions, 109 HARV. L. REV. 1393 (1996). Although they represent some vastly differing approaches to the question, there have been a growing number of calls for some form of New Legal Realism or novel legal pragmatism in recent years. *See, e.g.*, ANTHONY J. SEBOK, NEW LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295 (1998); *see also* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); BRIAN Z. TAMANATHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW (1997); Patricia Ewick et al., *Legacies of Legal Realism: Social Science, Social Policy, and the Law*, *in* SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 1 (Patricia Ewick et al. eds., 1999); Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005).

8. By different worlds, we mean the quite distinct approaches and sets of expectations governing legal and social science knowledge. For example, the process by which articles are accepted and edited by law reviews differs significantly from the process in peer-reviewed journals; thus, specialized knowledge and understanding of both worlds is necessary to create this kind of joint effort or bridge.

9. Our website, New Legal Realism, http://www.newlegalrealism.org, is still under construction, but will serve as a point for communication as it develops.

theme of Part III of this Foreword.[10] There we explore how a "pragmatist" method in multiple senses might serve as a sound foundation for a new interdisciplinary approach to understanding law. Part IV considers how new legal realist perspectives might be brought to bear on the teaching of law. We conclude with a brief overview of the articles in this symposium issue, setting them in the context provided by this Foreword and by discussions at the 2004 New Legal Realism ("NLR") conference.

I. FORMULATING A NEW LEGAL REALISM

The larger new legal realist project seeks to develop a new set of approaches to interdisciplinary research on law. Thus, the outline of basic tenets and orientations in this Part is, by definition, merely a first step in an ongoing exploration. There are already some divergences among the scholars undertaking that exploration, and these divergences are serving as fruitful points for sharpening and clarifying our ideas. There are also, of course, many points of convergence and agreement. In this Part, we will distill some core concepts that have emerged from discussions and articles on New Legal Realism to date, while also indicating issues that are sparking interesting debate.

A. "Bottom-Up" As Well As "Top-Down" Empirical Research

The concept of "bottom-up" legal scholarship captures a combination of important aspects of NLR's approach to research.[11] First, at a methodological level, a bottom-up approach requires that assertions about the impact of law be supported by research at the "ground" level. This in turn requires that we rely on (or actually undertake ourselves) empirical research rather than using projections based simply on our theories or individual experiences. A bottom-up approach takes an expansive and open-minded view of the impact of law, and also includes within its purview a wide range of socio-economic classes and interests.[12] Indeed, at times, this approach will reach outside of the boundaries of formal legal processes and institutions altogether to examine other forms of regulation and ordering. In order to do this, researchers will need to use empirical tools to help them move beyond formal categories, and they will have to remain skeptical

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10. In other words, we do not begin only by telling you what New Legal Realism is about, but also by showing you, by examining actual examples of new legal realist research.

11. The idea of a "bottom-up" focus initially emerged in a discussion of New Legal Realism that included Professors Boa Santos and Stewart Macaulay.

12. *See* Handler et al., *supra* note 3, at 480–82 (commentary by Joel Handler).

about the impact of formal law.[13] All of these admonitions can be understood simply as tenets of doing good social science research, because they seek to limit the degree to which unexamined assumptions made by researchers wind up blinding them to important parts of the picture they are studying. Another methodological corollary is that in order to study the "bottom"—the impact of law on ordinary people's lives—we need to include in our toolkit some of the social science methods best suited for this task; the qualitative methods developed by fields like anthropology and history for examining everyday experience.[14]

At the same time, it is also important to continue research on the institutions and decision-makers at the "top" as well,[15] and to remain receptive to evidence showing that formal law can have effects. These are also part of the picture of how law works. However, because these aspects of law tend to receive a great deal of attention in legal scholarship, new legal realist methodology can make a vital contribution by building in a continual reminder of the need to include the "bottom."[16]

This brings us to a second aspect of "bottom-up" scholarship, which is the way it requires us to be sensitive to the realities of power arrangements and hierarchies in studying law.[17] Again, this is a requirement of sound social science research; ignoring the impact of these arrangements will result in analyses that miss large parts of what is going on. As Professors Guadalupe Luna and Thomas Mitchell show us, including the "bottom" of the social hierarchy in our analyses of law

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13. *See* Bryant Garth, A New Legal Realism in Transnational Studies: Empirical Paths Between Idealism and Skepticism, Paper Presented at the New Legal Realism Symposium (June 25-27, 2004).

14. Handler et al., *supra* note 3, at 482–89 (commentary by Elizabeth Mertz). As we note in the text, this does not mean that we advocate the use of qualitative research over the use of quantitative methods. Rather, we seek to combine both in developing a new synthesis for social science studies of law.

15. Professor David Wilkins, for example, makes the case for why we should study elite lawyers, arguing that the power of elites in the private sector is an important part of how the law is shaped. *See infra* Part II.B. Similarly, Elizabeth Boyle noted the importance of institutional analysis for understanding the administration of law on the ground; thus, a New Legal Realism needs to problematize when and how to focus on both the "bottom" and the "top" as they intertwine. Elizabeth Boyle, From Human Rights to the Human Race: A New Perspective on Progressivity, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004).

16. Similarly, all kinds of empirical methods can be useful in developing new legal realist studies, but a truly integrative model would have to include qualitative, along with quantitative, approaches.

17. For examples of these kinds of remarks by Symposium participants, see Handler et al., *supra* note 3, at 505–06 (comment by Boa Santos); *id.* at 507–08 (comment by Risa Lieberwitz); *id.* at 508–09 (comment by David Trubek); *id.* at 510 (comment by Jane Larson); and *id.* at 510–11 (comment by Bryant Garth).

is not always easy; the less powerful people in society are often more invisible and silenced.[18] At a very basic level, it is methodologically more difficult to count the number of homeless people than the number of homeowners. However, a study of law and housing that omitted the homeless would arguably be inadequate under any scientific set of criteria. Professor Martha Fineman notes that we need to incorporate the kind of insights that feminist and other theories from marginalized perspectives can give, in order to prevent this kind of institutionalized blindness.[19]

B. Translating Social Science and Law To Build an Interdisciplinary Paradigm

Another important issue for the new legal realist agenda is how to achieve adequate translations of the very disparate fields involved.[20] A first step is simply to take this issue of translation seriously, rather than assuming a certain transparency of one discipline to the other.[21] Too often scholars in one discipline simply assume that they can pick up an article from another and understand enough of it to use it in their own work; but, it is possible that their own disciplinary training limits their ability to grasp the intended import of the article's findings. An important initial step in overcoming this difficulty is for scholars to communicate more cautiously across these disciplinary divides, in order to make each other aware of divergent assumptions, epistemologies, or goals. Just as when translating between languages, scholars can consciously attempt to translate the categories or predicates of one discipline into another, while carefully pointing to areas that (somewhat like idiomatic language) do not translate well, or maybe, at all. Because the effort is conscious and deliberate, over time these conversations about the translation process itself can result in a new legal realist

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18. *See* Guadalupe T. Luna, *Legal Realism and the Treaty of Guadalupe Hidalgo—A Fractionalized Legal Template*, 2005 WIS. L. REV. 519; Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557; *see also* Boa Santos, The Unfinished Decolonization: Land, Law, and Dispossession in Africa and Latin America, Paper Presented at New Legal Realism Symposium (June 25–27, 2004).

19. Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405.

20. Handler et al., *supra* note 3, at 482–89 (commentary by Elizabeth Mertz). Professor David Trubek also made comments in the final session of the New Legal Realism Symposium, *supra* note 6, positing the "translation, dissemination, and evaluation of social knowledges" as a core mission for New Legal Realism.

21. *See* JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990). Professor Elizabeth Mertz argues that attention to metalinguistic ideologies is an important part of an adequate translation between disciplines. Handler et al., *supra* note 3, at 482–89 (commentary by Elizabeth Mertz).

interdisciplinary theory and practice that does better justice to both law and social science.

Professor Edward Rubin, for example, takes quite seriously the need to translate into the "rational actor" framework that dominates so much of law school discourse today. He suggests that "[t]he reason that interdisciplinary scholarship between microeconomics and law has proceeded so well is that microeconomics is based on a model of human behavior that can be readily applied to legal issues."[22] He suggests that other disciplines have not been as successful in the legal arena because they proceed from different underlying models of human behavior and social interaction. Thus, Rubin's effort to translate between currently accepted models and a different approach, based upon the microanalysis of institutions, exemplifies the new legal realist concern with problematizing and improving the translation process.

C. The Politics and Sociology of Scholarship: Situated Knowledge

Perhaps one of the most difficult issues facing the social sciences today is that posed by our increased awareness of the politics of knowledge. For some time, philosophers and sociologists studying science have cast doubt on the complete neutrality of even the natural or "hard" sciences.[23] All scientific endeavor takes place within social contexts, and these social contexts have some effect on the process by which ideas are accepted as part of existing or new scientific paradigms. When those paradigms deal with human social life itself, the issue becomes still more complicated. Awareness of the role of the social scientist as a human and political being in shaping research outcomes has brought an unsettling relativity into the calculation. As the well-known cultural anthropologist Clifford Geertz notes, this "unsettledness is hardly limited to anthropology, of course, but, in one form or another, is perfectly general in the human sciences. (Even economics has begun to squirm; even art history.)"[24] In anthropology, growing awareness of the ways in which early anthropologists were implicated in colonialism fueled interest in examining the "standpoint" from which social scientists pursue their research.[25] Heightened skepticism about the possibility of neutral or objective scholarship—scholarship devoid of

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22. Handler et al., *supra* note 3, at 489–91 (commentary by Edward Rubin).

23. *See, e.g.*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (1986).

24. CLIFFORD GEERTZ, AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST 133 (1995).

25. Mark Goodale & Elizabeth Mertz, *Anthropology of Law*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (forthcoming 2005).

political or social skewing—contributed to a postmodernist turn among some social science scholars. Within the field of law-and-society studies, a split widened between standpoint scholarship and more positivist approaches—a split that the field is still working to overcome.[26]

While most would agree that it is important to monitor the politics of knowledge, there are different points of view about what we should take from our awareness of the social context of social scientific endeavor. For some, this monitoring is simply an important part of an overall methodology that seeks to bracket the influences and prejudices of one's own background (to the degree possible) in order to better understand the social world we study.[27] For others, the monitoring poses a more profound epistemological challenge to the nature of the endeavor itself.[28] The issue of the implications flowing from the politics of social science research is a very difficult and complicated question around which there are likely to be many different positions, even among new legal realist scholars. It is likely to be an ongoing subject of debate, and there is certainly room under the expansive roof of New Legal Realism for multiple points of view on this topic. One point of likely agreement, however, is that the problem extends across all of the social sciences; no field or method is above questioning in this regard, and many would feel that engaging in this kind of questioning is itself an important signal of rigor in any social science discipline.

D. Global Dimensions to New Legal Realism

Legal realism originally had a purely domestic focus, but now it is impossible for legal scholars to ignore transnational issues and arenas. One of the key tests of New Legal Realism will be its success in taking on major issues involved with the so-called "globalization of law."

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26. For an attempt to bridge this division, see Howard S. Erlanger, *Presidential Address: Organizations, Institutions, and History of Shmuel: Reflections on the 40th Anniversary of the Law and Society Association*, 39 LAW & SOC'Y REV. 1 (2005).

27. *See* Handler et al., *supra* note 3, at 482–89 (commentary by Elizabeth Mertz). Note that for the early phenomenologists such as Husserl and Merleau-Ponty, from whose work Rubin draws, a process of "bracketing" (in a more complex sense) was a crucial step on the road to improved interpretive method; this methodological move was challenged and theorized differently in subsequent work by sociologists such as Alfred Schutz. *See* HERBERT SPIEGELBERG, THE PHENOMENOLOGICAL MOVEMENT: A HISTORICAL INTRODUCTION (1965); Maurice Natanson, *Alfred Schutz on Social Reality and Social Science*, 35 SOC. RES.: AN INT'L QUARTERLY 217 (1968).

28. In this Symposium, Professor Arthur McEvoy eloquently articulates the issues as they might shape new legal realist approaches, and Macaulay's article balances the concern of both kinds of perspectives. *See* Macaulay, *supra* note 5; Arthur McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433.

Transnational organizations and networks now play a crucial role in shaping national policies in the United States and elsewhere, and the foreign policy of the United States has increasingly embraced an active role in promoting democracy and the rule of law abroad. The challenges for NLR are both to develop a "bottom-up" approach appropriate to the era of globalization and to explore the institutions and decision-makers who are calling the shots. It is not enough simply to export the analytical tools that work well in the context of the United States.

Much of the energy of New Legal Realism and its antecedents in the United States has gone toward bringing together social science and law in the name of social progress through, or in conjunction with, the law. In many parts of the world, however, law does not have the same political importance as it does in the United States, nor is there an institutional context that readily supports progressive advocacy. One essential task of NLR is therefore to see law in relation to other modes of authority and approaches to reform. A second task is to explore the "imperial processes" that may be associated with "legalization" strategies that, for the most part, are exported from the north to the south.[29]

These tasks are consistent with the characteristic skepticism of NLR in relation to formal legal approaches. It is not enough, for example, to expose the limits of standing for environmental organizations before the World Trade Organization (WTO) or the uneven enforcement of trade norms. It is essential to examine, as Professor Gregory Schaffer has done through empirical research, how the agenda for reform is constructed, who it favors, and precisely what developing countries face given the structure of the WTO.[30] Similarly, issues of international human rights raise not only questions of unequal enforcement, hypocrisy, and political bias, but they also raise more subtle issues involving the production of the norms, the relative power of NGOs based in different places, and the relationship between the human rights regime and imperial processes. These types of investigations fall squarely into New Legal Realism's insistence that we combine "bottom-up" and "top-down" interdisciplinary analyses to understand the underpinnings of legal processes empirically. In these examples, we

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29. *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002).

30. GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003); *see also* Boyle, *supra* note 15; Sally Merry, Doing Deterritorialized Ethnography on Global Human Rights Law, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004).

also see another feature of new legal realist research: that it often engages fairly directly with policy issues.

E. Legal Optimism: New Legal Realist Engagement with Policy Issues

Discussions of New Legal Realism at the conference envisioned a core "trilectic" at the heart of this new paradigm—the new legal realist effort would combine empirical research, legal theory, and policy. We come now to a consideration of the third important issue in this agenda: the question of how new legal realist translations of law and social science might be brought to bear on policy issues. How does a concern with policy become part of the new legal realist translation process?

First, we propose a concept of "legal optimism" as an integral feature of New Legal Realism.[31] By this we indicate that skepticism about legal rules and their potential for effectuating legal change need not imply a nihilist surrender to pure critique. In other words, new legal realist research will certainly critically examine the law's failures, but it will not neglect examination of spaces for positive social change in and around the law. This charts a path between idealism and skepticism, by both remaining cognizant of hierarchies of power and the paradoxes they create for law, and also asking what can be done to work toward justice within the existing structures. Note that this requires us to have an adequate understanding of how society and law actually work on the ground, which implies a thorough use of the social science tools at hand. It also implies a rejection of theory-driven orthodoxies that do not take account of people's lived experience of the law in particular settings.

Second, a new legal realist approach requires ongoing rethinking of the ways in which research and policy efforts engage with one another—an endeavor which pulls us toward a reconsideration of pragmatism.[32]

II. BEGINNING WITH PRACTICE: NEW LEGAL REALIST RESEARCH

The work presented in the rest of this Symposium provides many examples of research in a new legal realist vein. In keeping with a new legal realist emphasis on practice, however, we feel it appropriate to also include two additional samples of new legal realist research "in action" in our Foreword. Thus, we devote this Part to brief descriptions of research performed by two of our coauthors, Professors Jane Larson and David Wilkins. Together, these studies exemplify New Legal Realism's concern with examining the law from both the bottom and the

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31. *See* Garth, *supra* note 13.
32. *See infra* Part III.

top, as well as its concern with producing translations between compelling legal issues and high quality empirical research. In addition, this empirical research is fundamentally interdisciplinary and pragmatic, in multiple senses of the words.

A. Studying Law from the Bottom: Law, Land, and the Dilemma of the Colonias

We begin with a study performed by our colleague Jane Larson, who combines empirical study, legal theory, and policy in her work on squatters living in the "colonias," which are settlements on the border between Texas and Mexico. This work demonstrates how a very effective translation can be achieved across a variety of disciplinary traditions. First, more accurate "on the ground" empirical research challenged the existing legal theory regarding property from both ends of the political spectrum. Neither regulation nor the market by themselves were adequate to address the issues involved. Second, Larson's empirical work clearly focuses on the "bottom" in multiple senses; she went and worked in the colonias herself, she used qualitative methods that brought the research down to the level of everyday life experience (but also collected quantitative data where needed), and the people she worked among have been largely invisible and voiceless in the legal policy debates that affect their futures. Furthermore, Larson put the findings of her empirical research to work in a very practical policy effort to use law to benefit the people with whom she worked. Additionally, this effort includes an ongoing assessment at the ground level of what works and what doesn't, in dialogue with the people themselves. In the following excerpt, Larson provides her own account of her new legal realist methods:[33]

> Unregulated subdivisions of substandard housing—sometimes illegally squatted, sometimes lawfully purchased as raw land on which a family self-builds shelter—are ubiquitous throughout the world. They ring the peri-urban area of every major city in the developing world. These settlements have been much studied internationally, but were not recognized as being part of housing strategies for the poor inside the U.S. Yet, in Texas alone, there are more than 500,000 people living in such settlements, regionally known as "colonias."

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33. This summary was written by Professor Jane Larson specifically for inclusion in this Foreword.

Colonias began developing in the 1950s along the U.S.-Mexico border, but their growth and visibility exploded in the 1980s and early 1990s. There was a lot of undeveloped rural land available and Texas has little or no land use regulation outside of city boundaries. As well, virtually all Texas colonia residents are Mexican-origin or Mexican-American with family across the border, and so this population was familiar with this form of housing. Mexico has been a pioneer in developing policies that not only tolerate but seek to upgrade and encourage what they call "colonias populares" or "people's housing." As one local activist said to me regarding Texas colonistas, "We saw a loophole and we went right through it."

Conditions in colonias are gravely substandard. I started this research project in 1993 with a theory-grounded belief that led me to a strong presupposition of the correct legal and policy reforms needed to address those conditions. The poles of the debate in the international context are either regulation or reliance on a deregulated market. Regulation would require conventional standards for housing and land in order to protect occupants and their neighboring cities. Market solutions would remove any restrictions and let the poor house themselves as best they can, even if it means a hovel. Any house is better than sleeping under a bridge.

I began with the belief that the absence of regulation of land and housing in the colonias was a measure of the marginalization of this poor and largely immigrant community. Regulation is a social contract which the members of a polity make with one another for their common good. I saw the colonias as literally shut out of that social contract, and not part of anyone's larger concerns for the common good. The answer, I believed, was to force acceptance of colonias as part of the polity for whom laws are made and to whom laws must be justified. That would mean regulating land and housing as they are conventionally regulated in most Texas towns and cities.

From 1993 to 1995, I began interviewing residents and local informants to document housing conditions, the hardships placed on families, and residents' perception of their circumstances. It did not take me long to understand that the lack of regulation was an opportunity for these families, who

otherwise would have no possibility of ever owning their own homes, living outside of dangerous urban neighborhoods, and finding enough space for large families (and sometimes even goats and chickens as well). Regulated housing and land would close off that opportunity because of increased cost. No one I interviewed thought that things weren't bad, but it was the best option they could manage to reach.

Colonia housing is part of the informal economy where labor, production, distribution, service, and housing are unregulated. It is an economy within which people are outside of the law and its protections, but are able to find economic strategies to survive. Informality means that people exploit themselves in order to create an economic opportunity not otherwise available.

Using a new perspective derived from my empirical research, I became an advocate in various policy settings as debates began in Texas about "what to do about the colonia problem." Those genuinely wanting to alleviate conditions and those who just wanted those places and the people in them gone both pressed for more regulation. I, along with vigorous activists from the colonias, argued that if there was no longer state commitment to affordable housing or adequate income support, letting people do self-help housing was the only defensible policy. In the past two years, for example, I have worked with groups who oppose giving to counties the power to enact building codes, a power they do not now possess. That opposition only makes sense in light of years of qualitative research and a consistent presence over many years in the settlements I study. It reflects the complete shift in my perspective based on empirical research.

Like many complex social realities, the legal response is also complicated and has many downsides. Resisting conventional regulation is an approach that currently tolerates living conditions for some that the rest of society has deemed below human standards. But, by reaching into international human rights law with the guidance of colleagues, I have proposed instead a policy of "progressive realization"—gradually escalating standards with incentives such as micro-credit programs to allow families to reach minimal levels of housing quality incrementally.

Seeking to help colonia self-builders to gain greater security and thus, the ability to use their houses as assets for loans to start a small business, fund a child's education, or take other economic steps up the ladder, I became involved in a titling project run by an NGO, Community Resource Group (CRG) and funded by the Ford Foundation. There is considerable developer fraud in an unregulated housing market, and many people had no documentation of ownership or were purchasing on what was essentially a rent-to-own basis—meaning that one missed payment could lose them any equity they had built over years. The NGO converted all ownership claims into warranty deeds and refinanced any balance that remained owing.

Titling has been strongly advocated by economist Hernando de Soto, who argues that if the poor of the developing world could secure their houses, land, and businesses with title, they could negotiate with these assets, creating wealth and alleviating poverty. Over five years, CRG issued 2500 deeds to houses occupied by 8000 to 10,000 people. They also replatted the subdivisions in order to create clear lot lines and legal descriptions. Some of these subdivisions had literally been laid out on the back of the developer's envelope. Here, being a land-use lawyer proved quite useful on a day-to-day basis, as I helped to oversee the legal work required to meet title requirements. Interdisciplinary work by no means excludes strictly doctrinal legal analysis.

Two years later, I participated with a team of scholars asked to evaluate the impact of the titling program. We wanted to know how clean title had changed households and communities across a range of dimensions from economic investment, building improvements, psychological security, and community organization. We also wanted to determine if having secure title raised the price of colonia houses as they were sold in the market. Again, reigning theory would predict that we would see all of these results.

We used both quantitative and qualitative methods, including a large house-to-house survey, a dozen focus groups, economic analysis of the land market using public tax and land records, a random sample of the claim forms used to seek title from CRG, and a legal analysis of the entire settlement's

history with special focus on the complex legal process required to get the NGO the secure ownership they needed in the land in order to deed it back to the residents. We also documented the context-sensitive set of rules for accepting or rejecting claims to land that grew up organically through the informal, community-based process of adjudicating these claims.

And again, theory guides the questions you ask, but without empirical investigation we cannot be sure that theoretical predictions will prove to be true. Although increases in land value may take a longer time to show up, we found no evidence after two years that a colonia house with clear title was worth more than one without. There was some economic investment and building improvement, but these were people doing that already before they gained title. On the other hand, we found overwhelming evidence of psychological relief. Yet the community, having struggled together through this long and difficult process of gaining political visibility and then attracting this model titling project to its colonias, seems no more organized than other settlements not affected by the titling project.

What we found that we had not thought to investigate, but which came up spontaneously in many face-to-face settings, was a greater sense of political entitlement. Many colonia residents cannot vote, but because they are now property tax payers, they feel entitled to make demands of political officials. Where once I had posited that regulation would bring the colonias into the polity and its social contract, it turns out the secure property ownership and status as taxpayers has done so.

The methods used in this interconnected set of research projects were legal, sociolegal, and economic; both qualitative and quantitative; and interdisciplinary even within the field of law as I gained insights from legal colleagues who work in areas wholly unrelated to land or housing.

B. Studying the Journey from the Bottom to the Top: Elite Law Firms and the Challenge for Black Lawyers

Our colleague David Wilkins's work demonstrates another aspect of new legal realist scholarship: combining studying the "top" of the social

hierarchy of law with concern about previously excluded or marginalized populations. In a sense, this can be understood as research that asks what happens when those who were originally relegated to the bottom of the hierarchy are able to open previously closed doors at the top. In particular, Wilkins examines the issues faced by black lawyers who seek to enter the traditionally white environments of elite law firms. Methodologically, Wilkins' work exemplifies the "ground level" emphasis of new legal realist scholarship in his use of empirical research; he has spent years interviewing and talking face-to-face with the people about whom he writes. Like Larson, Wilkins introduces complexity into the picture, using what he finds on the ground to add nuance and to generate a more mixed understanding of how social change and law intersect. In the following transcript excerpt from the conference, Wilkins gives a brief summary of one finding from his ongoing project:

> The first question is: why study elites? The second question is: why elite lawyers in particular? And, then, the third question is what I like to call the Tina Turner question, which is: what's race got to do with it, got to do with it—or, why is studying race in the legal profession an important lens?
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> On the first issue, I'd point to the power that elites have, and particularly elites in the private sector. A number of scholars have commented on the hollowing out of the state in current times—so, what does that leave? That leaves a lot of very powerful private actors, and elites are the people who are in control of these institutions and groups—in the professions, in the world of corporations, and so forth. Moreover, a lot of the story when we talk about social justice is a story of upward mobility: the question of whether people are going to be able to move up, whether from the very bottom rungs to the next-to-the-bottom rungs—or, as we have seen over the last fifty years, some members of marginalized groups moving up into the elite level. This is another reason that it is important to study elites.
>
> Elite lawyers are an important part of this phenomenon. There has been a long and rich tradition of studying the sociology of the legal profession in the law-and-society movement, but more recently we are hearing more about the role of lawyers as intermediaries. Lawyers are very important intermediaries, and often those intermediaries are elite lawyers. Of course, nonelite lawyers such as those discussed

by Lucie White, Boa Santos, and others are important as well.[34] But, elite lawyers have played a vital intermediary role, both in the legal profession itself, and between other groups in society.

Finally, we turn to the issue of why we should study race in the legal profession. Not only have the law-and-society and legal realist traditions been concerned with issues of racial justice, but it is also believed that you can learn a lot about social dynamics in general by looking at marginalized groups that have experienced discrimination. This is very much a part of the "bottom-up" orientation.

In my own research, I've interviewed over two hundred black lawyers in depth about their careers. One frequently asked question regarding the entry of previously marginalized groups into elite ranks of the profession is the issue of whether the presence of some members of those groups at senior levels will encourage an ongoing process of integration. Building on the general scholarly research on this question, Mitu Gulati has painted a bleak picture regarding the odds that senior minority attorneys will be of help to junior-level minority entrants into the legal profession.[35] The data I (along with others studying the legal profession) have collected suggest a somewhat more complicated picture, demonstrating the utility of on-the-ground empirical research in particular settings to gaining an accurate understanding of the dynamics involved. In this case, while some of my findings seem to confirm the bleaker picture, there are also results showing that black partners can and do play an important role for their junior black colleagues.

The lawyers interviewed for my study come from a wide spectrum of both law firms and places around the country, as well as—a key point here—time periods or generations. In particular, my research examines the question of who is a pioneer, and how that has changed over time. At the beginning of the fifty-year time period since *Brown v. Board*

34. *See* Santos, *supra* note 18; Lucie White, Action Research, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004).

35. Mitu Gulati & David Wilkins, Only the Strong Survive, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004). Professor Mitu Gulati uses existing literature to paint a bleak picture of the situation: based on what we know about the likely profiles of minorities who succeed at elite levels, one would not predict that they would be of help in further integrating the profession. *Id.* Professor David Wilkins uses his empirical research among elite black attorneys to test this hypothesis. *Id.*

of Education was decided, the notion of a black corporate lawyer was in effect an oxymoron. Indeed, in *Brown*, attorney John W. Davis, the founding partner of the Wall Street law firm of Davis Polk & Wardwell, argued for the school board pro bono, representing where he thought the public interest in the corporate bar lay. Contrast this situation with today, when Wachtel Lipton, one of the top law firms in the country, announced that they just made their first black partner, in 2004. So there is a long range of pioneers, and those successful minority pioneers have come along at different periods of time, which has affected how they have positioned themselves in the organization. Moreover, this has also affected how they relate to minorities above them, if there are any, and how they relate to those who come below them.

Roughly speaking, we can talk about minority entrants to the profession in terms of four different groups. We have the original pioneers—people like William Coleman, who actually started working at Paul Weiss in the 1940s after clerking for Felix Frankfurter, or Amalya Kearse, who became a partner at Hughes Hubbard & Reed in 1968. These people came at the very beginning before the big increase of minorities in legal education and the Civil Rights Act of 1964, marking the beginning of the modern affirmative action era. They joined law firms that were still in what socio-legal scholars have come euphemistically to refer to as the "Golden Age"—a period characterized by stable, long-term lawyer-client relationships, not much lateral mobility, and a kind of noblesse oblige orientation.[36] Most of these people came in as lateral hires, rather than at the entry level like Coleman and Kearse. There is actually an interesting divide between those in this initial cohort who came later and those who came in at the beginning of the period, most of whom had absolutely the highest possible credentials—how else could they be hired by a large corporate law firm? These earliest people were in fact quite assimilationist in their orientation. Indeed, they thought that this kind of orientation was exactly what was required by the civil rights movement with which they had grown up. That is why Thurgood Marshall said, shortly after *Brown* was decided, that the NAACP was going to change its name to the

36. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991).

NAAP—the National Association of People. The idea was that race was not going to matter any more.

Then we have the *Brown* generation, the generation that forms the bulk of my study. Although they venerated the civil rights movement, in a sense their consciousness was informed by the Black Power movement—by an idea of racialized identification. They brought that orientation into the law firms, which by the 1970s are beginning to undergo the radical transformation that Marc Galanter and others have documented so well. So they come of age during a time when law firms are moving from the "Golden Age" to the "Eat What You Kill" era.

Then, we can point to what could be called the "hip hop" generation, who grew up in the Reagan revolution, a time of turning away from law.[37] Here again we are supposed to be entering a moment of color blindness, in which some would say that we had solved the problem of discrimination. This generation comes into a profession that has radically changed, so that even ideas about what it means to succeed have shifted quite dramatically. And finally, we may in fact be entering yet another wave—we can call them the Millenium Babies.

Thus, there are many factors in play here. First, we see changes in the socioeconomic class from which each generation emerges. The first generation was from a very elite sector of the black society; that's how you got a law school education. The products of affirmative action were much more mixed demographically, as schools reached into the black community to pull people out—literally—from the projects. The hip hop and Millennium generations are increasingly the sons and daughters of the *Brown* generation, the first generation of affirmative action. In addition to these demographic differences among the generations, the legal profession is changing, as is how people think about issues of social justice.

Just to put this in context, let me present one case study, a lawyer I've interviewed several times whom I'll call KF. KF is the son of a janitor, whose mother died when he was five

37. David Trubek and Professor Marc Galanter discussed the issue of generational changes and the changing structure of the legal profession in comments that they made during discussions at the New Legal Realism Symposium, *supra* note 6.

> years old. He was born in 1954, and had four siblings. He grew up in what he says we used to "politely" refer to as "the ghetto," went to public schools, and then was scooped up by affirmative action—first sent to a magnet school, then to a very good state university and eventually to an elite law school, graduating in the late 1970s. From there, he went to a large law firm. He joined a law firm in which there was already a black partner, a lateral hire from government. KF thought this older attorney was, in a word, an Uncle Tom—never forming much of a connection with his younger black colleague, while seeming too friendly with the white people in the law firm. Eventually KF decided to leave the firm, and as a courtesy, he went in to say goodbye to the black partner. But, the senior partner challenged him, saying that KF was leaving because he was a coward, afraid to do what it took to succeed. KF then decided to stay, to prove that he could succeed, and after a time he became a successful partner. Today KF expresses an interesting blend of attitudes toward the new "hip hop" generation. On the one hand, he has no patience with minority associates who deny the impact of race, trusting in a color-blind meritocracy. KF does not believe that whites and blacks occupy the same world, nor does he believe in a true meritocracy. On the other hand, he also has no patience for younger colleagues who want to set up minority counseling programs or argue overtly against the racism of the firm. He has come to agree with the view of the older partner in his original law firm—that at work, one has to live in "their" world in order to succeed. This mix of attitudes both makes KF very tough on minority associates and minority lawyers, because he believes that they have to be twice as good as white attorneys to do well in the profession—but on the other hand, he looks out for any promising young black associate he can find and tries to give them the chance to succeed.
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> So it's a complicated picture. It's not just the simple story of "trickle up"—that just getting minority people into the firm at the bottom means that they will automatically rise to the top. But neither is it the simple sell-out story—that once minorities gain power at elite levels, they completely assimilate to white elite norms.

Putting what we have learned from Larson and Wilkins together, we see the importance of empirical research at the ground level to unpacking how the law works. Both scholars are willing to reconsider

accepted theory-based wisdom in their areas, questioning taken-for-granted propositions from across the political spectrum in the service of more accurate understanding of legal arenas. We can see that they are guided by the problems they are studying in selecting methodologies and sites, so that disciplinary orthodoxies do not wind up setting limits on their investigations. Together, they exemplify the new legal realist goals of looking at both "bottom" and "top," of paying attention to potentially invisible parts of the sociolegal issues they study, and of combining social science with legal theory and policy. To the extent that new legal realist scholarship is in the process of developing new interdisciplinary methods, they shed light on fruitful possible directions—as do the rich exemplar studies presented in the articles in the final part of this Symposium issue.[38] We turn now to the question of how these future methodological directions for new legal realist scholarship might embody pragmatist principles.

III. PRAGMATISM AND NEW LEGAL REALIST METHODS

In the conceptions of "action research" espoused by Professor Lucie White, of "embedded scholarship" suggested by Larson, and of certain forms of microinstitutional analysis described by Professors Susan Sturm and Edward Rubin, we see a shift toward a research practice that has obvious affinities with pragmatist methods.[39] The Roundtable presented in this Symposium also considers another recent development in legal scholarship with similar affinities: the "new governance" model for regulation. In all of these cases, there is an attempt to generate a model for research, law, or policy that builds in a continuous reassessment process, which connects on-the-ground experience with developing legal, regulatory, or other policy categories—an ongoing experimentation. We turn now to a consideration of the possible role of pragmatism in a new legal realist paradigm.

The original realists claimed to honor the philosophy of pragmatism. Yet, there is a good deal of misunderstanding about pragmatism. The philosophical pragmatists were neither fans of

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38. See Handler et al., *supra* note 3, and the articles in Part II of this Symposium issue.

39. *See* Handler et al., *supra* note 3, at 489–91 (commentary by Edward Rubin); Jane Larson, Introduction to Panel on Law, Poverty and Land, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004); Susan Sturm, Constructing Workplace Equity Regimes, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004); White, *supra* note 34; *see also* CAROL J. GREENHOUSE ET AL., ETHNOGRAPHY IN UNSTABLE PLACES: EVERYDAY LIVES IN CONTEXTS OF DRAMATIC POLITICAL CHANGE (2002) (discussing the concept of "engaged research" in cultural anthropology).

expedience nor crude functionalists, as some believe. They were contextualists who believed that the best way to resolve a problem was to act; that ends arise and are transformed in the very process of problem-solving. In this sense, John Dewey was the original "law in action" philosopher. Recently, Dewey's prescription has been taken to heart by a set of new realists who have openly embraced what they call democratic experimentalism. This work has been pioneered by Professors Chuck Sabel, Bill Simon, and Susan Sturm.[40] This approach, known as the "new governance," seeks to reinvent governance from the "bottom up" by rejecting ancient administrative strategies of command and control and replacing them with a continuous dynamic process governed by the relevant stakeholders. Examples of work in this vein include that of Professors Greg Shaffer, David Trubek, and their collaborators on global governance, and Professor Louise Trubek and her colleagues on health care collaboratives.[41] This engaged policymaking rejects notions of fixed ends and means; instead, the policymakers rely upon embedded methodologies similar to those suggested by other New Legal Realists.

The meaning of pragmatism for New Legal Realism is not, however, necessarily limited to the question of experimentalism or even new forms of governance. Classic realism was not only a theory of scholarship, nor merely an approach that moved policymakers to contrive new institutions. It also sought to retheorize old institutions. The notion of Deweyan "experience" need not only describe democratic experiments, but may also enrich our understanding of democracy itself. Dewey, after all, was not only an extraordinary philosopher, he was a preeminent political theorist as well. For some time, there have been calls by legal theorists for a richer understanding of democracy and its most basic institutions, a call that recognizes that governmental institutions are neither anarchies nor abstractions, but instead, operate in a constant cycle of very human interaction. Emerging pragmatist theories of government have not only stressed the vertical ties that bind humans to law-governors but, as well, the horizontal contexts of a richer, culture-bound notion of democracy. Such works stress examinations of incentive and accountability rather than the abstractions of constitutional labels.[42] In this sense, the project of a pragmatist

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40. *See* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

41. *See* SHAFFER, *supra* note 30; Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EURO. L. J. 1 (2002); Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J. LAW & MEDICINE 395 (2003).

42. *See, e.g.*, V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835 (2004); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L.

jurisprudence may be to understand not only new governance but to reimagine governance itself, a governance that is realist in the sense that it does not enchant the state, but pragmatic in the sense that it resists simple abstractions, emphasizes dynamism, and invests our vision of democracy with real life human relations. At the same time, consistent with a new legal realism insistence on integrative models, the potential continued utility of older concepts of governance, now often discussed using labels such as "command and control" or "top down", should also be considered.

Pragmatism also holds out promise not only in classic governance stories or new governance stories but in legal theory more generally. The question is not how we describe an entity, a question of legal aesthetics (the stance from afar, the law from nowhere), but how we understand the relations that drive its dynamics from within, in context (the stance as embedded, the law as human interaction and relation). Rather than standing outside any particular institution (whether a classroom or a lawyer's office or the Congress) the investigator-theorist dives in, becomes embedded.[43] In the past decades, legal scholarship has divided between the unregenerate pessimists who find that law always fails (the gap studies) and the unregenerate optimists who believe that law always succeeds (the efficiency studies). The question that a pragmatist asks is different, it is not whether law succeeds or fails according to some end posited as good by the theorist-investigator. Like a good social scientist, it suspends judgment to understand better that which goes on between the means and the ends (the "betweenness" problem). It seeks a qualitative theory of the *translation costs*, if you will, of law's movement from institution to institution. For example, pragmatism acknowledges that sexual harassment law will be transformed in IBM's human resources department and it does not deny that police departments will rewrite, in practice, domestic violence directives. Because rules, according to a pragmatist, are always contextual, the object is to use methods—including the methods of social science—that will bring us closer toward understanding the particular ways in which institutions translate and create law.

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Thus far we have focused almost exclusively on the issue of scholarship and research, sometimes in connection with policy. But, if as teachers we are to take a pragmatist perspective seriously (and certainly in keeping with Dewey we must), we also are obliged to ask what it would mean to translate this new perspective into our practice as professors.

REV. 737 (2004); Jane S. Schacter, Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733 (2004).

43. There are interesting affinities between this idea and the classic anthropological methodology of "participant observation."

IV. LAW TEACHING AND NEW LEGAL REALISM

What, then, would a new legal realist approach to teaching look like? Ultimately it implies a call for sociolegal scholars to take the everyday practice of law seriously, and for legal education to take seriously the fact that lawyers need to be able to systematically analyze the real world in which they operate. Legal doctrine as reflected in statutes and case law is essential to lawyering and must be at the core of what is taught in law school. But, in teaching these materials, there is a tendency to treat law as a closed, logical system; students are often essentially taught—if only by implication—to set aside their understanding of the real world as they learn to "think like a lawyer."

A new legal realist approach to legal education would agree that the central focus of legal education should be rigorous, analytic thinking, but would broaden what is included in the substance of that analysis—not because it is interesting or "enriching," but because it is core to the practice of law. It would merge theory and practice, teaching students to think rigorously and systematically about the problems and situations they will encounter in the practice of law. Traditional legal material is necessary but not sufficient for this project. Decades of sociolegal scholarship have established that law is a social institution that does not operate in a vacuum. Law is an open system, legal rules are not self-enforcing, and informal processes often carry the day; thus, to practice law effectively, lawyers combine their understanding of the law with their understanding of the real world.

But, by and large, traditional legal education tends to view the realities of practice as practical information that can be learned on the job; students are taught how to analyze legal materials systematically, while the social world in which the law operates is left to an ad hoc analysis. A new legal realist approach to legal education would take seriously the fact that lawyers are continually engaged in what amount to mini research projects; they take in data about the world around them, both experientially and from the reports of other people, and process those data to come up with ideas about how things work and what consequences flow from what actions. A new legal realist approach would make students aware that they are collecting data, sensitize them to the importance of being reflective and analytic about those data, give them some basic tools to use in thinking about collection and use of data, and make them aware of some of the basic research that is currently available about the institutions and processes with which they will be working.

In her article in this Symposium, Professor Louise Trubek similarly argues for a new kind of training in both clinical and traditional law teaching, one that would erode old boundaries between "stand up" and

clinical approaches.[44] This erosion would in part be accomplished by a common focus on the "realities of actual legal practice in its social and economic context."[45] She calls for student-professor collaboration in obtaining and using empirical information to aid in that mission. This would bring the process of new legal realist translation into the heart of the law school.

V. CONCLUSION

We have just begun to sketch the broad panoply of issues and areas to which new legal realist perspectives can apply. Further conversations are already underway, and we urge you to join in. As a first step, we invite you to sample the rich array of articles presented in this Symposium issue. The Symposium is divided into two parts.

In Part I of the Symposium issue, the authors set up historical and theoretical frameworks for the developing new legal realist paradigm, and consider its application to law teaching. The Symposium begins with an article in which Professor Stewart Macaulay assesses the differences between the original realists and New Legal Realism.[46] While there is a shared interest in bringing knowledge from social science to bear on legal issues, Macaulay can point to numerous differences including the new legal realist focus on studying law from the "bottom up." Despite noting a history of resistance within the legal academy to some well-established social science findings about law, he concludes on an optimistic note, pointing to the ways in which the legal academy might be receptive to this kind of approach.

Professor Martha Fineman returns to the issue of law's resistance, noting that unless legal scholars learn to question "the theoretical lens provided by intermediating legal theory," they will allow their unexamined assumptions to distort their readings of empirical results.[47] She draws on feminist theory, with its focus on the "middle range" between grand theory and raw data, as an important model for New Legal Realism. Her article brings the issue of translation, a core NLR question, to the forefront. Professor Arthur McEvoy brings together many of the concerns raised in the first two articles in his own formulation of *A New Legal Realism for Legal Studies*.[48] Like Macaulay, he addresses the question of the relationship between "new"

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44. *See* Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455; *see also* John Conley, Narratives of Diversity in Law Practice, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004).

45. Trubek, *supra* note 44, at 477.

46. *See* Macaulay, *supra* note 5.

47. *See* Fineman, *supra* note 19.

48. *See* McEvoy, *supra* note 28.

and "old" realisms, disavowing any sense of sharp dualism or hierarchy between these and other potentially misleading theoretical dichotomies. Instead, he uses examples of new legal realist research to embody a new approach, in which scholars focus on the reciprocal constitution through "recursive interaction" of law, experience, and culture. Louise Trubek, as noted above, discusses the issue of law teaching, making the case for bringing new legal realist translation into the core law school curriculum. She argues that this would create a beneficial erosion of traditional boundaries between "stand-up" and clinical teaching, between doctrinal and social science approaches, and between students as recipients of already-acquired information and researchers as the source of social science data.

Finally, Part I of the Symposium issue concludes with a Roundtable focusing on points of convergence and divergence between an emerging new legal realist paradigm and arguably similar developments in legal scholarship. One of these developments, discussed at the Roundtable by Professor Edward Rubin, attempts to bring the "micro-analysis of institutions" to bear on legal institutions. The other, which is explained by Professors William Simon and Orly Lobel, argues for a "new governance" approach to legal problems. Professors Joel Handler and Elizabeth Mertz also participated in the Roundtable, giving statements presenting the new legal realist perspective. The Roundtable then moves into an open conversation with audience members; we have included a transcript of this discussion following the five roundtable presenters' statements.

Part II of this Symposium provides examples of new legal realist research in practice, exploring two arenas that have been studied empirically and that are also important domains for ongoing legal and policy debates: employment discrimination, and poverty as it intersects with property.

Part II.A focuses on the intersection of law, poverty and land. The papers in this section explore poverty with an eye toward its roots and persistence, and law's mostly failed attempts to alleviate it. A common thread is the acquisition or loss of wealth as a basic determinant of intergenerational economic position. A new legal realist approach requires that any remediation for poverty begin from a deep understanding of the context in which the poor live, studied from the "bottom up." Professors Thomas Mitchell and Guadalupe Luna both unearth rich social histories of these contexts, in distinct places and communities. Mitchell documents the patterns of segregation, unequal benefits, and social separation of the African American and white segments of a community created as part of New Deal progressive

experiment.[49] His work combines extensive research using quantitative analysis of land records but also qualitative work in historical archives as well as broad-based interviews with residents and government officials. From this thickly documented interdisciplinary work, Mitchell can explain why conditions today in these paired resettlement communities are so different.

Luna uses a wide range of primary and secondary historical and legal sources to describe and explain the dispossession of former Mexican landholders when their territory shifted from Mexican to U.S. possession after the Mexican-American War and the Treaty of Guadalupe Hidalgo.[50] It is a story that weaves together unkept promises by the U.S. government, illegal squatting by white settlers in the West, destruction of vital land records, and a multitude of other forms of neglect and outright chicanery. The result today is that descendants of former landholders now work as agricultural laborers for other owners.

In Part II.B, we present three papers that break new empirical ground in the study of discrimination. For the last three decades of the twentieth century, scholars and policymakers have attempted to document the prevalence of discrimination based on race, gender, age, and disability in American society, and have debated what role law should play in attempting to redress patterns of inequality. Nonetheless, we have made only limited progress in developing a social scientific understanding of antidiscrimination law as a system and its relationship to inequality in labor markets and other spheres of social life. These articles indicate promising new approaches to the problem, using empirical research to address a pressing legal issue.

Professor Devah Pager conducted an experimental study designed to track the effect of a criminal record on entry-level employment. Her research design permitted a carefully controlled comparison between black and white applicants. The study results revealed a stark contrast: white job candidates *with* a criminal record had a better chance of obtaining work than did otherwise identical black candidates *without* a criminal record. This outcome demonstrates the powerful impact that race continues to have on hiring, despite efforts to end discrimination through law.[51] Professors Laura Beth Nielsen and Robert Nelson use social science research to shed light on debates over the use of the courts to discourage this kind of employment discrimination. Looking at the

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49. *See* Mitchell, *supra* note 18.

50. *See* Luna, *supra* note 18.

51. Devah Pager, *Double Jeopardy: Race, Crime, and Getting A Job*, 2005 WIS. L. REV. 617. For a discussion of the psychological contributions to this continuing problem, see Brenda Major & Cheryl Kaiser, A Social Psychological Perspective on Perceiving and Claiming Discrimination, Paper Presented at the New Legal Realism Conference (June 25–27, 2004).

problem from the bottom of the "dispute pyramid" up, they develop a fuller empirical picture than have previous studies of discrimination claims. This picture casts doubt on the common perception that too many discrimination lawsuits are currently being filed. Like Pager, they find evidence that discrimination still poses problems for American workers. On the other hand, they also point to limitations on courts' ability to eliminate continuing discriminatory barriers in employment settings. Instead, they make the case for combining formal legal and alternative strategies in order to better address ongoing difficulties caused by discrimination in U.S. workplaces.[52]

Professor Bruce Price's study suggests one possible nonlitigation alternative that could be useful in promulgating antidiscrimination workplace policies, using the legal profession itself as his focus.[53] Drawing on a neoinstitutional approach developed by sociologists, Price traces the way in which an innovation in salary practices diffused from one mid-size firm in Silicon Valley through many elite law firms across the country. This diffusion was not merely a function of market dynamics but of interinstitutional and intrainstitutional dynamics within the profession. Price suggests that these dynamics could be put to use in service of innovating and diffusing antidiscrimination practices in the legal workplace.

Although discrimination and poverty are particularly apt areas for new legal realist research and discussion, because they are arenas upon which both social science and law have concentrated their energies, there are many other promising areas for translation, and we hope that the examples presented here will help to further a new generation of interdisciplinary efforts across a wide array of legal arenas.

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52. Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663.

53. Bruce M. Price, *A Butterfly Flaps Its Wings in Menlo Park: An Organizational Analysis of Increases in Associate Studies*, 2005 WIS. L. REV. 713. For more legal realist perspectives on discrimination in different professions, including law, see Laura Beny, Does Law Firm Diversity Pay?, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004), and Alexandra Kalev, Two to Tango: Affirmative Action Law, Diversity Management and the Share of Women and African-Americans in Management, Paper Presented at the New Legal Realism Symposium (June 25–27, 2004).