A New Legal Realism: Method in International Economic Law Scholarship

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This essay begins with a typology and brief assessment of four varieties of international economic law scholarship: formalist/doctrinal, normative/activist, theoretical/analytical, and empirical. It notes some of the strengths and limitations of each of these, and explores the relationship between them. The essay argues that, while we may engage, at different times, in all four varieties of scholarship, a new legal realist empirical approach provides important insights that are currently being missed in scholarship in the international economic law field.

The essay then stresses the importance of empirical work from what it terms a “new legal realist” orientation in international economic law. This new legal realist approach to scholarship calls, in particular, for the use of qualitative methods to understand how international law is made and received, at least as a complement to quantitative analyses. It is wary not only of normative prescriptions based on abstract principles, but also of purely deductive theoretical models for examining legal change without examining institutions in operation. The essay situates “new legal realism” in relation to the original legal realist movement in the United States. A larger work-in progress addresses its relation to the predominant theoretical perspectives on international law that have emerged.

I. Four Categories of International Law Scholarship.

Scholarship in international economic law can be divided into four broad categories: traditional legal interpretation (also known as legal formalism, textualism or doctrinal work); normative advocacy (including through formal interpretation); theoretical exposition (which often takes the form of analytic frameworks); and empirical analysis (which varies in its approach and rigor). Of course, in practice there is not always a clear divide between these categories. Good empirical work is conducted under some sort of organizing theoretical or analytic framework. The questions posed are typically shaped by some sort of normative concern with normative implications. Theoretical and analytic frameworks are built from prior observation and inductive or intuitive understandings. Much doctrinal work is likewise informed by, and infused with, normative theory and purpose. Yet the categories are nonetheless helpful for understanding tendencies in scholarship that are different in kind, and, in particular, to see what can be further developed in international economic law scholarship.

A. Doctrinal Work/Legal Formalism.

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Although doctrinal analysis has often been debunked for its formalist nature, it arguably remains the predominant form of legal scholarship, reflecting the comparative advantage of legal scholars over philosophers and social scientists. Most practitioners of law—judges, national and international civil servants, and lawyers who need to decide cases or advise and represent clients in respect of actual disputes—likely find this conventional approach to be the most useful, although legal realist insights are arguably just as important “for attorneys who must advise clients what to do” in light of how law operates in practice.\(^2\) Law’s legitimacy is grounded in its formal, quasi-“scientific” character, so that legal scholars may play a more effective role in debates over the legal interpretation of treaty provisions and case law when their scholarship retains its formal analytic nature. This strategy is particularly important at the international level where judicial bodies’ legitimacy is more likely to be put in question.

Academic scholarship that is predominantly doctrinal in character can be quite influential. Directly or indirectly, it can be used as a form of *amicus curiae* brief to shape the understanding of judges, and it may be cited by them in legitimation of a legal ruling that has important consequences for many communities. Perhaps even more pervasively, it can affect how a broad community of scholars and decision-makers (including judges) see legal provisions whose interpretation has significant effects, provisions which could be linguistically ambiguous, but have only one “normal” meaning within a particular “interpretive community.”

**B. Normative Advocacy.**

A second form of scholarship, often linked with the first (and sometimes with the third), takes an explicitly normative bent. North American law academics have been socialized in graduate school (unlike their counterparts in other disciplines) to be advocates, whether they believe they are attempting to *win* for their clients in an adversarial proceeding, or to deploy law altruistically as activists to make the world a better place. Most legal academics, and especially those who are most successful within academic hierarchies, arguably see themselves as *actors* in the world, engaged in struggles to advance principles and norms, and thus see their work as more than doctrinal or theoretical “scholarship.”

Authors writing in a normative vein typically advance a particular normative goal and then address how the institution, treaty or case law needs to be reformed, revised or interpreted to advance that normative goal. The goal could be resource allocation efficiency (as epitomized in the basic norm of international trade economics, the theory of comparative advantage), or it could be a particular social goal, such as sustainable development, the protection of labor and other human rights, equality, fairness, due process, transparency and participation. Critical scholars, taking from post-modern discourse theory, find any engagement with legal analysis to have a normative dimension, whether or not the author is self-conscious of it. The distinction of normative scholarship is that it *explicitly* aims to be transformative, while traditional legal formalist scholarship aims to be objective, purporting to describe law in neutral terms.

Yet, from a new legal realist perspective, research should not be predetermined by a normative slant, for the very process of inquiry can lead to new understandings of perspectives and priorities of affected constituencies, and the contexts and dynamics in which any policy proposal will play out. Scholars should thus be open to changing their normative prescriptions in light of what they learn of the social and political context and power dynamics in which any proposal will unfold.³

C. Theoretical Exposition

A third form of scholarship, one that receives the most attention in the premier US law reviews, takes, or purports to take, a theoretical orientation. In many cases, the scholarship does not constitute theory in a positivist sense in which theory signifies the making of propositions (or axioms) that can be tested and refuted, but rather puts forward a positive or normative analytic framework for understanding law.

Theories (or analytic frameworks) vary greatly and form a central part of the competitive field in legal scholarship. Important examples of theoretically-oriented scholarship that can be applied to the international economic law context include the following: functionalist problem-solving theories (such as those assessing international trade as a public good, or those addressing international regulatory cooperation as a means to handle cross-border concerns); public choice theory’s conception of the political economy of international trade relations (in which government authorities respond to producer interest groups and pursue mercantilist trade negotiating positions); rational choice game theoretic explanations of trade policy (viewing multilateral trade regimes as a means to resolve a prisoner’s dilemma); the New Haven School’s policy-oriented approach (seeing international law as a process of authoritative decision-making of politically-relevant actors); revisionist or structural realist theories about power and the limits of law (sometimes taking a conservative policy bent to accommodate the powerful); liberal theories about the importance of states’ democratic characteristics and the role of non-state actors; various constructivist theories about the influence of norms (such as of fairness) and the role of process (as per the legal process schools); theories taking more of a sociological bent; and critical theories of the power of discourse in legitimating substantive law choices, in creating professional identities and in advancing and reconstituting hierarchy.

Theory and analytic frameworks are of course essential in providing lenses to see and understand complexity and to address policy choices, such as through regime design. However, they implicitly have a normative dimension in structuring what we look for and what we see. For this reason, the new legal realist approach advanced here prefers to avoid strong theory, wary of how strong theory can shape what we regard and, in this way, predetermine outcomes. Rather, such an approach prefers more open analytic frameworks that permit for predispositions to be unsettled in the face of inevitably conflicting perceptions and priorities of constituencies from around the world.⁴

In many cases, theory is put forward as a lens for the reader, but it is not applied empirically. As Dunoff and Trachtman write, “While law and economics is rich in theory, it exalts empiricism (in which it is surprisingly poor). In fact, we are critical of a law and economics that has immodestly been willing to prescribe solely on the basis of theory.” Similarly, Goodman and Jinks write regarding their sociological “acculturation” perspective, “Further empirical research is required to illustrate more concretely how states are acculturated... Our conceptual analysis of the mechanisms of social influence, for expositional clarity, is pitched at a fairly high level of abstraction.” Theories and analyses based on “seat-of-the-pants” empiricism can be problematic, and even treacherous, where they do not take account of particular social contexts and power dynamics.

The explanation for the predominance of theoretical over empirical work in the field is likely two-fold. First, legal academics note that they are not trained in empirical work unlike their colleagues in other disciplines, and thus it makes more sense for them to create theoretical frameworks regarding law that build from the empirical work of other disciplines, or that others might use when engaged in empirical work. Another more critical explanation, adopted by some in the socio-legal field, is that the structure of competition within the legal academic profession has discouraged scholars from the time-consuming (and for many, boring) work of dirtying their hands in going out and investigating underlying facts. As Lawrence Friedman wrote two decades ago, “research itself—hard, grubby research—is less honored among scholars than ‘theory’ or ‘model-building’; this tends to drain talent from the work of building up, and critically examining, a concrete body of knowledge.” In either case, the result is that much (if not most) legal scholarship is not backed by original empirical investigation of the divergent social contexts and power dynamics in which the law that is being investigated is made, interpreted and received.

D. Empirical Approaches.

These tendencies bring us to a fourth variety of scholarship, empiricism, including (but not limited to) new legal realist scholarship described below. There is a small but increasing amount of international economic law scholarship that takes an empirical approach, whether the focus is historical or contemporary. A pioneering figure for this approach in international economic law was Bob Hudec, whose databases and studies of GATT dispute settlement form the groundwork for analysis of international trade dispute settlement in not only law, but also in economics and political science. Hudec went to Geneva frequently to obtain a better understanding of what lay beneath the surface of GATT disputes and decisions, at a time when the trade regime was much less transparent than it is today.

Empirical work itself is conventionally divided into two forms—quantitative and qualitative—each of which has its attributes and deficiencies, thus involving tradeoffs.

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Some scholars, in turn, combine quantitative and qualitative methods to check and test their suppositions and findings under each method.

Quantitative work on international economic law has become increasingly rigorous, much of it conducted by those outside of the discipline, or in collaborations between legal scholars and those from other disciplines. For those concerned about their lack of competence to “do it yourself,” collaborations can be an enriching way to proceed, although a number of scholars are proceeding on their own. This scholarship’s strength lies in the use of more refined data collection techniques and control variables to help to determine the relevance of different factors in explaining international economic law developments. Economists and political scientists, deploying sophisticated mathematical models and multi-variate regressions, are at the forefront of this research. The power of quantitative methods is their ability to test perceptions in a rigorous manner, especially as regards policy choices, against actual data.

This scholarship’s major weakness is that its analysis relies on numbers and assumptions that reduce complex social dynamics to defined variables in order to test theoretical propositions, raising an initial question about the quality of the data, followed by questions concerning the inferences that can be made from it. In addition, the models are static, so they fail to capture dynamic and recursive processes of interaction on account of social, political and institutional context. In some cases, researchers attempting to distinguish themselves may mine the data until they find what appear to be counter-intuitive, non-conventional inferences, which may make for original scholarly claims in the academic market, but, in light of the weaknesses of the data, may be of little value, or even harmful, if actually followed.

Qualitative work can offer the advantage of paying closer attention to social context and dynamics, as it typically involves field work, such as to the sites of decision-making. Important work in this area from a socio-legal perspective that builds from interviews and that is theoretically grounded includes John Braithwaite and Peter Drahos’ *Global Business Regulation*, Yves Dezalay and Bryant Garth’s *Dealing in Virtue*, and Terry Halliday’s new series of articles on the diffusion of global bankruptcy norms.\(^8\) Much of my work has taken a qualitative methodological approach, whether to assess the dynamics of WTO trade litigation,\(^9\) the politics of trade-environment legal debates,\(^10\) the definition and application of WTO “technical assistance,”\(^11\) the addition of a

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parliamentary dimension to the WTO, or the export of regulatory policy and approaches abroad.13

Much (though by no means all) of this qualitative work is based on structured elite interviews. One potential weakness of this work is that it reflects the subjective perspectives of those interviewed (elites or otherwise). In addition, legal academics unschooled in qualitative methods are particularly susceptible to the charge of simply engaging in scattered interviews that confirm their normative inclinations, so that interviewing serves to “build a case” in the context of ongoing policy debates in which they see themselves as “actors.” There are nonetheless techniques that help to control for these biases, such as that of triangulation in which the researcher “compares different kinds of data from different sources to see whether they corroborate each other.”14 The researcher can, for example, interview those who have opposing interests in respect of the issue at stake, and who come from different backgrounds, using the same set of questions.

A third critique is that the findings from qualitative work tend to be less generalizable because they are context-specific, so that they are of less relevance to those who must make policy for the future. Yet what these studies can lose in terms of “parsimony,” also makes them more reliable in terms of examining how social context matters, and how plugging in abstract models based on simplifying assumptions can go horribly wrong in law and social policy. As Garth writes, “systematic interviews bring insights that simply cannot be gained by other methods.”15 As Laura Beth Nielsen points out, it is often qualitative work that generates theory that quantitative work can test.

The interviewer who approaches his subject in an open and objective manner is often, if not always, surprised by how wrong the initial research assumptions were, whether one be a right-of-center law-and-economics scholar or a left-of-center critical legal studies scholar. This point is a key methodological one for ethnographers in the field of anthropology, including those who are otherwise quite distinct, ranging from the material and functional orientation of Bronislaw Malinowski to the symbolic anthropology of Clifford Geertz.

From my own experience, leaving one’s office and venturing into the field often transforms one’s core conceptions and perceptions of one’s subject of study. As a novice academic, for example, when I obtained a National Science Foundation grant to examine the political economy of trade-environment issues and went to Geneva with a conventional conception (within the U.S. academic context) that the WTO was trade-biased and needed “to balance” competing environmental norms and objectives, I soon

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learned how much more complex were the issues. Interviews turned into lectures from developing country representatives and groups about how my questions reflected a northern bias. I learned about how environmental issues, and thus the trade-environment debate, was constructed (and being constructed) differently by US and European representatives, NGOs and academics than by their developing country counterparts, with the Americans and Europeans having the advantage of the resources and status that US and European universities bring, greater access to Western media and learned journals, and so forth. I learned how the term “environment” has vastly different meanings to stakeholders in developing countries where it is much more difficult to separate the concept from that of “development” because people’s livelihoods are more intimately connected on a day-to-day basis with the environment.17 My assumptions and expectations were upset by the experience of weeks of interviewing and discussing the issues with people coming from a much broader range of experience and priorities than I could study on Westlaw or meet at US academic conferences. Ever since then, that experience has had a transformative impact on all of my scholarship. Whether it has been through interviewing regulators, parliamentarians and their staffers, technical assistance providers and recipients, private and government trade lawyers, civil society advocates, or international organization secretariat members, my initial predispositions (inevitable no matter how neutral and unassuming I try to be) have always been challenged and transformed.

In sum, legal scholarship will be enriched if more of it is grounded in empirical study of the actors, institutions and processes that give rise to international law, and international law’s reception and effects within the world. Scholars can combine empirical methods, including through collaborative projects and checking one’s work against others’ empirical findings. It is in this way that legal scholarship can contribute greatly to informing ongoing debates and strategies for legal and institutional reform.

II. A New Legal Realist Approach.

The scholarship advocated in this essay can be conceptualized as a new legal realism.18 Legal realism refers to a scholarly movement, particularly active in the 1920s and 1930s that responded to what it viewed as formalist legal scholarship and the conservative social policies that legal formalism tended to support.19 Legal realists argued, among other matters, for the need to study the context in which law is made, operates and has effects before making any proposition about what a law means or should do. Llewellyn called for “the temporary divorce of Is and Ought for purposes of study.”20

As does any scholarly analytic approach, new legal realism has its divisions along a spectrum, and in particular among those who rely more on traditional social science research tools, and those who exhibit a relatively greater critical skepticism of the use of

17 See Shaffer, The WTO under Challenge, supra note…, at 61-68.
those tools in practice, on the one hand, and those who orient their work more on pragmatic policy questions than on apolitical social science investigation, on the other. What, in my view, is nonetheless “new” in new legal realism is, first and most importantly, that it actually engages in empirical work, unlike most of the legal realists themselves. While the legal realists called for greater empirical work, so that the practice (and thus meaning) of law would be better understood, they were less accomplished in practicing what they preached. In this sense, they have much in common with those international law theorists today who call for empiricism, but who rarely engage in it in any sustained way. New legal realism, in contrast, builds from the socio-legal tradition of “law and society” to engage in actual empirical work.

Second, new legal realism takes into account critical, epistemological challenges to legal constructions of “fact” and “law.” Critical legal theories have made us more skeptical of presentations of legal doctrine, as well as of “fact.” We are more aware that presentations of “fact” reflect, to varying extents, a subjective, normative element that is socially constructed, even in the very framing of the questions posed, and that these presentations, in turn, play into social dynamics with their dimensions of hierarchy and power. Ought and Is are not so simple to disentangle.

New legal realism, however, is relatively better positioned to show how presentations of law and fact are shaped. Given that academics in the United States, in particular, are well-placed to participate in international policy debates because they write from the center of global power (economically, militarily, linguistically, and in terms of the relative status of US universities), their presentation of “law” and of “fact” (whether they write in a formalist, normative, empirical or other vein) is more likely to have an impact on a broader policy community’s perceptions and understandings. This international law “community” makes decisions that affect others’ livelihoods and lives, and in particular those who are more marginalized, in large part because the perspectives and priorities of those who are marginalized are less likely to be heard by those making the decisions. The very process of engaging in field work, however, inevitably pushes us beyond our initial assumptions, so that we too listen to other voices and perspectives, something particularly important in the field of international law research.

A new legal realist approach does not abandon empiricism for postmodern musing, but, at its core, stresses the importance of empirically-informed analyses of the contexts in which law is made and operates. A new legal realist approach maintains that while “social science” is never entirely “correct,” it is the best way for us to proceed toward a better understanding of the world in which law operates. A new legal realist

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21 See, e.g. Stewart Macaulay, “The New Versus the Old Legal Realism: Things Ain’t What They Used to Be,” 2005 Wis. L. Rev. 365, 375-76 (2005) (“The classic realists talked about doing empirical research, but relatively little was accomplished”); Leiter, American Legal Realism, supra note…, at 51 (“For most of the Realists, however, the commitment to ‘science’ and ‘scientific method’ was more a matter of rhetoric and metaphor, than actual scholarly practice”).


approach calls for the integration of different empirical methods and framings, quantitative and qualitative, as complements toward a better understanding of law’s practice. It contends that the story one conveys from empirical work will always be partial, so that scholars should be careful to provide appropriate caveats to their analyses and conclusions. It argues that researchers (and readers) need to be constantly on guard for biases that reflect their own social and national backgrounds and contexts. In other words, what it takes from more critical perspectives is to engage in a closer examination of potential biases in the service of relatively more objective empirical study.

A new legal realist approach takes both a top-down and a bottom-up approach in terms of how international economic law is made and how it is received. It combines them to have a better understanding of international law and its impact. It looks at the role of individuals, groups and states in the law’s making; and it looks at the effects of international economic law among and within states and society, how it is translated, transplanted and resisted. From such study, one can see the ways in which the national/local and international/transnational are linked, the ways in which they reciprocally inform and affect each other.

A new legal realist analysis will often distinguish itself through the inclusion of qualitative field work. It stresses the particular importance of thicker description built from sustained observation and intensive interviewing over time. Although not exclusively, it sometimes takes an inductive approach, building from observation as opposed to testing theory deductively through using explanatory and control variables to make assessments. Such an inductive, empirical approach recognizes that not all riddles will be “solved” through a model, but rather that understanding and outcomes are shaped dynamically through social and political *inter-action* in which law is both an impetus and an effect. In this way, it can better address the recursive qualities of law—the way law and legal actors interact and reciprocally affect each other in the process, issues that are of significant importance in international economic law in a world characterized by diverse interests, norms, perspectives and priorities. In this way, new legal realist scholarship can better address the dynamic, recursive interaction of law, method and social practice, as part of broader dialogic processes.

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24 See also Elizabeth Mertz, “Challenging Translations: New Legal Realist Methods,” 2005 *Wis. L. Rev.* 482, 483-84 (2005) (“Ethnography and participant observation, as well as qualitative interviewing techniques, take their place alongside experimental and quantitative methods—not as rivals or competitors, but as necessary tools for those seeking a more rigorous picture of law’s impact”).


27 For an example of feminist legal scholars drawing on empirical research in a new legal realist vein, see e.g., Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism,” 29 *Harv. L. J. & Gender* 335 (2006) (taking a consequentialist approach examining the background conditions in which legal prescription will have effects. Halley, for example, writes of how “the legal instrumentality of rape in humanitarian law… may well have very different effects in the world than anticipated, I think, by the feminists who promoted them”).
To give an example, as applied to WTO law, a new legal realist perspective maintains that the law is not some essentialist (formal) “thing” that can be understood by academics independently from its application, from its practice, from its life in the world. WTO law does not exist in a separate, autonomous sphere—such as in the treaty texts or in the Appellate Body’s adopted decisions—but operates within particular legal cultures in which these texts and decisions play a part. These legal cultures include the interaction of the WTO judicial process with those who bring arguments to it, on the one hand, and the national institutions and “civil society” to whom the judicial decisions are addressed, on the other. It is national institutions who must translate the legal decisions into practice, and, by “implementing” them, give those decisions effect. Since the United States is the most active participant in the WTO legal process as complainant, defendant and third party, the United States and its constituencies play a significant role in the construction of WTO law. Much international economic law analyses, in particular, fails to take account of how the targets of international legal decisions (states, and in particular powerful states, and indirectly corporate and civil society constituencies) influence both the legal decisions themselves and their implementation in practice—what they mean in the world.

Terry Halliday’s work on global bankruptcy law offers an excellent example of scholarship conducted in a new legal realist manner. Halliday has developed an empirical project regarding the interaction between international institutions, transnational networks and national law making in the field of bankruptcy in Asia. Halliday has attended international meetings organized by the IMF, the World Bank and UNCITRAL as an observer and interviewed representatives of those institutions and national representatives from government, law and business in a variety of Asian countries, including China, Korea and Indonesia. From this field work, he has developed theory in an inductive, new legal realist mode. In an article with Carruthers, for example, he develops a theory of how “the globalization of bankruptcy law has proceeded through three cycles: (1) at the national level through recursive cycles of law-making; (2) at the global level through iterative cycles of norm-making; and (3) at the nexus of the two.”

Halliday and Carruthers show how bankruptcy law prescribed at the international level is resisted at the local level, in particular by corporate debtors, resulting in failed reforms, triggering new recursive law reform efforts. They note how strategies at the international level change in response to these national experiences, including through shifting primary norm-making among international institutions, such as from the IMF, World Bank, OECD, regional development banks, to UNCITRAL, the latter being considered more “legitimate” and thus potentially more effective. These institutions bring together not only representatives from states and international institutions, but also interested professionals, such as bankruptcy lawyers and accountants. Halliday and Carruthers address the different types of mechanisms used for different countries, with coercive measures being relatively more effective in Indonesia (such as IMF loan conditionality) than in Korea, which is more likely to require persuasion to effect legal change, and in China, in which change is more likely to occur through Chinese modeling of reforms based on others’ practices. They address how law’s indeterminacy, internal contradictions, struggles over problem-definition, and the impact of different players participating in the law-making and law implementation modes, contribute to these

recursive and iterative cycles. In other words, in the new legal realist mode advocated in this essay, Halliday and Carothers address how repeated interactions among actors, institutions and legal forms at the national, transnational and international levels affect legal and social change in dynamic ways.

III. Conclusion.

There is no single “correct” approach to legal scholarship, and this essay’s purpose is not to call for a universal “new legal realist” approach. Rather, the essay recognizes that all four scholarly modes discussed have their value and often blur in practice. As regards doctrinal analysis, when we engage with actual legal texts for the purpose of persuading judges, we need to use our formalist, interpretive skills to be persuasive. We use a different language to fit the situational context, cognizant of the audience to which we speak if we are to communicate effectively. As regards normative advocacy, most of us are in this profession because of a commitment to contribute to public policy. As regards theory and analytic frameworks, our work will have little resonance for the future if we do not provide coherent and useful theoretical and analytic frameworks to understand how law operates in the world, including the institutional choices that political, judicial and administrative decision-makers face.

The second part of this essay nonetheless calls for greater attention to be paid to empirical work conducted from a “new legal realist” vantage. The essay notes two aspects of new legal realism: an empirical commitment at its core, and its taking seriously critical challenges to such empiricism. Although more quantitative and qualitative empirical work is emerging, the total is small in light of the international economic law work being published, work that can have significant effects on how the legal community prioritizes the creation of new international economic law and interprets existing international economic law, without being informed of how such law operates in the world, especially for under-represented communities. Through empirical inquiry, our predispositions, as researchers, are often called into question, helping us to look outside predominant normative frames that are informed by where we live and work, or at least make us more aware of their impact. Such an approach is crucial for a better social “science” perspective, and is particularly important in the realm of international economic law in a world characterized by considerable diversity of perspectives, priorities, and abilities for affected constituencies to be heard.