Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?

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In 1930, during the Great Depression, Professor Karl Llewellyn declared in the Harvard Law Review that “ferment” was abroad in the land and legal scholarship, proclaiming “realism” a powerful scholarly force. In the past year, we have seen our own ferment: the world has shown us the folly of some of legal scholarship’s most powerful intellectual assumptions about the wisdom and rationality of markets and the inevitable failures of politics. These events should renew interest in “realist” approaches to law and render salient an emerging body of legal scholarship that has dubbed itself “new legal realism.” This Article surveys this scholarship and argues that “new legal realism” is a response to a “new formalism”—that derived from neo-classical law and economics. New legal realists are not anti-economics (some of them are economists themselves), but they are challenging the new formalism’s assumptions about the individual, the state, and judging, as well as its approach to legal scholarship. This Article assesses and critiques the various forms of new-legal-realism scholarship, from behavioral economics to legal empiricism, and offers suggestions about future directions for a scholarly agenda more capable of addressing our vulnerable national order. We argue that new legal realism in its many forms holds out greater promise than existing formalisms. At the same time, we contend that some forms of “new legal realism” risk reducing law to other academic ideas or to unimportance altogether.

Here, we begin the effort to outline a “dynamic new realism” that emphasizes the best of the old realism without indulging its excesses. Our form of dynamic realism focuses on “mediating” theory, which aims self-consciously to theorize the bridge between the world and legal institutions without reducing one to the other. We believe that law cycles recursively over time between the world and legal institutions, which is why empirical and

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historical inquiry is essential to understanding law’s actual operation, its failures and successes. Unlike much of the old realism, this dynamic realism recognizes that law has purchase within its sphere, if for no other reason than that legal institutions have the power to alter the very concepts or ends law seeks. This recognition, in turn, requires critical engagement with the most basic concepts and values that shape institutions, assumptions as fundamental as the relationship between individual liberty and collective vulnerability, law’s violence and its reason, law’s bias toward the status quo and yet its inherent dynamic qualities. A dynamic new realism would recognize the “principle of simultaneity,” that law, politics, and society, not to mention markets and governments, cannot be reduced to one another because they interact simultaneously. It is this dynamic interaction that the best of realism must study and theorize.

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INTRODUCTION

Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men. . . . Beyond decisions stand people whom rules and decisions directly and indirectly touch. . . . The ferment is proper to the time. The law of schools threatened at the close of the century to turn into words—placid, clear-seeming, lifeless, like some old canal.††

In the past year, the world has shown us the folly of some of legal scholarship’s most powerful intellectual assumptions. The sudden collapse of our world economy has led to economists’ open confessions that markets are not self-regulating and that they can be skewed by systematic irrational behavior, oppugning frequent assumptions of neoclassical law and economics.1 Similarly, despite scholarly predictions about the futility of voting, the recent U.S. election has shown that massive political engagement is not only possible but real.2 If these events carry any purchase for law’s fate, then we suspect that, before long, scholarship will move away from assumptions about the efficiency and optimality of the status quo and toward a new form of legal theory, scholarly agenda, and practice that recognizes our vulnerabilities as well as our capabilities, market power as well as political power, the judiciary’s place and its constraints—a theory that will reengage with the possibility (and difficulty) of positive political and legal action.

†† Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222, 1222 (1930).

1 See, e.g., Richard A. Posner, A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression 260 (2009) (“The depression is a failure of capitalism, or more precisely of a certain kind of capitalism (‘laissez-faire’ in a loose sense, ‘American’ versus ‘European’ in a popular sense) . . . .”); id. at 267 (“Many economists have been converted—virtually overnight—from being Milton Friedman monetarists to being J.M. Keynes deficit spenders. . . .”). Judge Posner, arguably the most important figure in law and economics, also stated in a Federalist Society address, “You can have rationality and you can have competition, and you can still have disasters.” Press Release, Columbia Law School, Financial Crisis: A Business Failure to a Government Failure: Judge Richard Posner Lectures at Columbia Law School (Nov. 26, 2008), available at http://www.law.columbia.edu/media_inquiries/news_events/2008/november2008/posner; see also George A. Akerlof & Robert J. Shiller, Animal Spirits: How Human Psychology Drives the Economy, and Why It Matters for Global Capitalism 5 (2009) (“This book is derived from a different view of how economics should be described. The economics of the textbooks seeks to minimize as much as possible departures from pure economic motivation and from rationality.”); Anatole Kaletsky, Goodbye, Homo Economicus, PROSPECT, Apr. 2009, at 46 (“The economics profession must bear a lot of the blame for the current crisis. If it is to become useful again it must undergo an intellectual revolution—becoming both broader and more modest.”).

There is no more urgent time than now to reach for a new legal theory and scholarly agenda. Neither simple legal doctrine nor simple economics will solve the grave problems facing us. Nor is it enough to dismiss law as just another form of politics (however fashionable that might be). Neither law and economics in its neoclassical form nor critical legal studies is capable of responding to the current crisis. If there is to be a new move in legal theory, we believe that it will neither be simply law “and” some other discipline nor a revival of the New Deal administrative state. We need a framework of law strong enough to restrain human weakness and irrationality but supple enough to allow people to govern themselves, a framework supported by a scholarly agenda that provides new analytic and theoretical tools to understand a world in which we have come to see ourselves as both highly vulnerable to institutional collapse and yet capable of effecting change.

Several candidates for this synthetic project have been building over the years, dubbing their approaches a “new legal realism.” This scholarship has new relevance because of recent events, including the election of President Barack Obama and a massive financial collapse, both of which belie the “lack of realism” in existing formal approaches to law. Over the past eight years, over 300 papers have cited the term “new legal realism.” Several kinds of scholarship have claimed the mantle of new legal realism—from behavioral economics to legal empiricism, from ethnographic qualitative research to large-N quantitative studies, from comparative institutional analysis to historical criticism. Earlier articles have elaborated on these variants in isolation; combining them is now particularly important given the President’s search for legal approaches resonant with the people’s needs and real life problems. In this Article, we map the precursors to an emerging “new legal realism,” address how the varieties of new legal realism build from their realist forbears, critique these varieties, and attempt to provide a new framework for moving forward.

We argue that new realists share a vision that provides an alternative to new formalism, the theory of neoclassical law and economics, and the variants of new formalism derived from it. There have, of
course, been many academic critiques of neoclassical law and economics predating the new legal realism. Recent events, however, highlight in dramatic fashion how the formal assumptions of neoclassical theory failed to predict or prevent a massive world economic collapse, not to mention massive political mobilization and a historic election. It may be “old news” to critique neoclassical law and economics, but neoclassical reasoning still permeates much judicial reasoning and policymaking. As recently as 2007, Judge Richard Posner, a founder of neoclassical law and economics, stressed the specific successes of economists regarding the pricing of derivatives and executive compensation in his textbook *Economic Analysis of Law*, he maintained, “[E]conomists have created new methods of pricing financial and other products, new financial trading strategies, new methods of employee and executive compensation . . . . These interventions have worked, suggesting that economic theory is more than just pretty math.”\(^5\) The Reagan revolution and successive Bush administration appointments to the judiciary, moreover, have entrenched the neoclassical view among judges, and neoclassical law and economics will continue to be part of the training of the next generation of legal elites in the top law schools.

Each of the varieties of new legal realism defines itself in part in opposition to the assumptions of neoclassical law and economics’ theory of judging, its theory of the individual and the state, and its approach to legal scholarship. By neoclassical law and economics, we refer to the “straightforward application of microeconomic (or price-theoretic) analysis to the law,”\(^6\) often associated with the “Chicago school,” and with Judge Posner as its early leading and path-breaking advocate.\(^7\) Neoclassical law-and-economics theory builds from the

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\(^5\) Richard A. Posner, *Economic Analysis of Law* 16 (7th ed. 2007) [hereinafter Posner, *Economic Analysis*]. See also Judge Posner’s earlier contention that a “market may behave rationally, and hence the economic model of human behavior apply to it, even if most of the individual buyers (or buys) are irrational. Irrational purchase decisions are likely to be random and hence cancel each other out, leaving the average behavior of the market to be determined by the minority of rational buyers (or purchases).” Richard A. Posner, *Overcoming Law* 16 (1995) [hereinafter Posner, *Overcoming Law*] (footnotes omitted). Judge Posner now argues that these interventions and assumptions of economists were devastating failures. See Posner, *supra* note 1.


\(^7\) The foundational 1972 text by Judge Posner was *Economic Analysis of Law*. It has been updated (and significantly revised) through seven editions. See Posner, *Economic Analysis*, *supra* note 5; see also Mercuro & Medema, *supra* note 6, at 102 (“[Posner’s] *Economic Analysis of Law* . . . served both to develop the field well beyond the classical applications to property, contract, tort, and criminal law, and to present the subject matter in a way that facilitated its integration into the law school curriculum.”). See generally Robert Cooter & Thomas Ulen, *Law & Economics* (5th ed. 2008) (arguing that economic analysis has changed the nature of law); A. Mitchell Polinsky, *An Introduction to Law and Economics* (3d ed. 2003) (explaining how to understand legal issues from an economic
premise that individuals act as rational preference-maximizers who respond to incentives and views law as a price that shapes such incentives. The theory combines such positive vision, often rigidly applied for the sake of parsimonious models, with the normative claim that legal rules should be evaluated in terms of outcome efficiency, defined by Judge Posner to mean “wealth maximization” or Kaldor-Hicks efficiency,8 such that all other concerns (including distributive implications) are bracketed or ignored.9 The theory prescribes that policymakers should accordingly rely predominantly on market mechanisms.10

8 MERCURO & MEDEMA, supra note 6, at 26 (explaining that wealth maximization or the Kaldor-Hicks efficiency principle, as formulated by Judge Posner, “holds that a change from one state to another (brought on, for example, by legal change) that favors some individuals at the expense of others can be said to result in an unambiguous improvement in society’s welfare—with almost the same force as the Pareto principle itself—if those who gain from the change could hypothetically compensate the losers for their losses and still be better off themselves”). Some law and economics scholars, in contrast, focus only on “Pareto efficiency.” As Lewis Kornhauser writes, “A legal rule is Pareto efficient if and only if there is no other rule that would induce behavior such that no person was worse off and at least one person in society was better off.” Lewis A. Kornhauser, Economic Rationality in the Analysis of Legal Rules and Institutions, in The Blackwell Guide to the Philosophy of Law and Legal Theory 67, 67 (Martin P. Goldberg & William A. Edmundson eds., 2005). But as Mercuro and Medema point out, “It is generally recognized that there are few policies, however creatively structured, whose effects leave no one worse off, as required by Pareto efficiency. Typically legal change creates winners and losers.” MERCURO & MEDEMA, supra note 6, at 26; see also Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 YALE L.J. 1211, 1224 (1991) (“[T]he failure of the Pareto criterion to be of any real guidance makes inevitable a thoroughgoing and open discussion of distribution and of interpersonal comparisons.”).

9 See, e.g., SHAVELL, supra note 7, at 1–2 (“Given the characterization of individuals’ behavior as rational, the influence of legal rules on behavior can be ascertained. This can be done with definitude in the world of the models, because all relevant assumptions about individuals’ desires, their knowledge, their capabilities, and the environment will have been made explicit.”). Steven Shavell also states, “[I]t is standard for economic analysts to restrict attention to fairly simple measures of social welfare, and I will do that here.” Id. at 3. He highlights two key assumptions. The first is that “the measure of social welfare will usually not accord importance to the distribution of utilities” because “society has an income tax and transfer system that it can utilize to redistribute income.” Id. The other assumption “concerns notions of fairness and morality,” which he “usually exclude[s] . . . from the analysis proper for analytical convenience.” Id. at 3–4; see also LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 5 (2002) (“Under a common understanding of normative economic analysis, legal rules are assessed by reference to wealth maximization or efficiency, criteria that many construe as omitting important aspects of individuals’ well-being and as ignoring distributive concerns.”); cf. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 19–23 (2003) (empirically exploring different varieties (economic, social, and moral) of incentives and how changed incentives often produce unforeseen results).

10 See MERCURO & MEDEMA, supra note 6, at 102 (explaining that Chicago-school theory holds that “decision-makers should rely heavily on markets”); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 329 (1972) (“There is abundant evidence that legislative regulation of the economy frequently, perhaps typically, brings about less efficient results than the
There is, of course, a risk of caricature in any depiction of an opponent, just as the old realists risked caricature in attacking the old formalists. What we depict as the target is the use of neoclassical law-and-economics models that reduce the complexity of social goals to that of wealth maximization (or resource-allocation efficiency) and assume away cognitive bias, baseline inequalities, distributive implications, and all so-called “transaction costs” (albeit often with an aside that such a “frictionless” world is not the real world), and then use these models (directly or indirectly) for law and policy prescriptions.

As we discuss below, neoclassical law and economics appears on the surface to be the opposite of the old formalism, which advocated a “science” of doctrine based on common-law principles. Neoclassical market–common law system of resource allocation.

Law-and-economics scholars who focus on achieving Pareto efficiency (as opposed to Kaldor-Hicks efficiency) implicitly acknowledge that many more questions are political ones that political bodies must address because of the need to balance different social goals. Those advocating Kaldor-Hicks-efficient outcomes focus solely on the question as to which legal rule will maximize wealth, regardless of any negative effects on third parties from a market transaction. For them, where individual market transactions have negative external effects on a third party, policymakers should simply weigh the total costs of the rule (including all negative externalities) against the total benefits. In contrast, those focusing on Pareto-efficient outcomes implicitly recognize that political tradeoffs arise whenever there is a negative externality for a third party and that party is otherwise not compensated. These scholars may still favor market mechanisms, but Pareto efficiency criteria alone cannot decide the policy question. One can still use law-and-economics tools to assess how to reach a given social goal in a more efficient manner in these cases, but one first needs to decide on the social goal, which is a political question.

See e.g., Calabresi, supra note 8, at 1224–25 (discussing tradeoffs); Lewis Kornhauser, Economic Analysis of Law, 16 Materiali per una storia della cultura giuridica 235 (1986); Lewis A. Kornhauser, A Guide to the Perplexed Claims of Efficiency in the Law, 8 Hofstra L. Rev. 591 (1980) (discussing different approaches within law and economics).
theory, in contrast, aimed to be explicitly instrumentalist rather than doctrinal. Neoclassical theory aimed for law to structure incentives to produce “efficient” outcomes and thus enhance aggregate social welfare. Yet, as we are not the first to show, the new formalism turns out, upon examination, to parallel the old in its form of reasoning and the substantive prescriptions derived from it—in other words, in both its means and its ends. As Arthur Leff wrote in his review of the first edition of Judge Posner’s *Economic Analysis of Law*,

> [I]t must immediately be noted, and never forgotten, that [Judge Posner’s] basic propositions are really not empirical propositions at all. They are all generated by “reflection” on an “assumption” about choice under scarcity and rational maximization. . . . Nothing merely empirical could get in the way of such a structure because it is definitiona.l. That is why the assumptions can predict how people behave: in these terms there is no other way they can behave.17

As Judge Posner himself subsequently wrote, “Economic analysis of law is a formalist edifice erected on a realist [i.e., instrumentalist] base.”18

We emphasize that the new realism is not a movement against economics. That would be silly, as economics is a vast, rich, and evolving field that has a broad array of competing movements. Many of the scholars attacking the assumptions of neoclassical law and economics and its formalism are economists, and there are economists working changing social contexts. See Lawrence M. Friedman, *A History of American Law* 288, 476 (3d ed. 2005) (explaining that for most U.S. judges of the late nineteenth century, “formalism was a protective device. They were middle-of-the-road conservatives, holding off the vulgar rich on one hand, the revolutionary masses on the other” and that formalism “provided a screen of legitimacy against attack from left and right”).

14 See, e.g., Posner, *Economic Analysis*, supra note 5, at 14–15 (arguing that “maximizing the value of output” is a “generally accepted goal of a commercial society”).


16 See infra Part III.

17 Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451, 457 (1974) (emphasis omitted) (footnotes omitted); see also Mark Kelman, *A Guide to Critical Legal Studies* 117 (1987) (“[B]ut [law and economics] does have an answer for every legal issue, and, perhaps more important, the answers can be derived from a very short list of normative and descriptive propositions . . . .” (emphasis omitted)); Mark V. Tushnet, *Critical Legal Theory*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, supra note 8, at 80, 81 (“The scientism of Chicago-style law-and-economics was even more obviously formalistic [than that of the legal process school]; here substantive legal rules were to be deduced from extremely thin assumptions about individual motivation and self-interest.”). Bruce Ackerman took a somewhat kinder view, finding that Chicago neoclassical law and economics was a “prologue” for the reconstruction of American law, although “there is nothing that forces the rest of us to mistake the prologue for the play.” Bruce A. Ackerman, *Reconstructing American Law* 65 (1984).

in each of the three variants of new legal realism that we identify.\textsuperscript{19} Moreover, one of the founders of law and economics, Judge Guido Calabresi, has long been a critic of Chicago-school neoclassical law and economics because of its conservative, status-quo bias,\textsuperscript{20} as have others in the so-called New Haven school of law and economics.\textsuperscript{21} Reflecting realist insights, Judge Calabresi distinguished his mode of reasoning as starting from facts as opposed to high theory.\textsuperscript{22} In fact, we contend that Judge Posner himself has moved decisively toward the new-legal-realist camp.\textsuperscript{23} At the very least, the experience and demands of our time have forced him to rethink many of neoclassical

\textsuperscript{19} To name just a few such scholars, whom we discuss further in Part I: among the behavioralists, behavioral economists Christine Jolls and Richard Thaler; among the institutionalists, Neil Komesar; and among the contextualists, in our view, John Donohue and Ian Ayres. See also Part II concerning economists in the old legal realism, and in particular the institutional economists.

\textsuperscript{20} Judge Calabresi offered powerful critiques of Judge Posner’s concept of justice in terms of wealth maximization for its status-quo bias, because wealth depends on initial distribution: “Wealth in any society depends on tastes, on what people want, on what they value. But what they value depends on what they have to begin with.” Guido Calabresi, The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?, Maccaean Lecture in Jurisprudence (May 14, 1981), in \textit{PROC. BRIT. ACAD.} (1982), at 85, 90. Thus, in \textit{The Costs of Accidents}, Judge Calabresi emphasized that “[n]o system of accident law can operate unless it takes into account which acts are deemed good, which deemed evil, and which deemed neutral. Any system of accident law that encourages evil acts will seem unjust to critic and community even if economically it is very efficient indeed.” Guido Calabresi, \textit{The Costs of Accidents: A Legal and Economic Analysis} 294 (1970).

\textsuperscript{21} \textit{See} Ackerman, \textit{ supra} note 17, at 21; Mercuro & Medema, \textit{ supra} note 6, at 284–90 (discussing the New Haven school of law and economics); Bruce A. Ackerman, \textit{Law, Economics, and the Problem of Legal Culture}, 1986 \textit{DUKE L.J.} 929, 929–30; Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 15 \textit{COLUM. J. ENVTL. L.} 171, 171–72 (1988); Susan Rose-Ackerman, \textit{Law and Economics: Paradigm, Politics, or Philosophy}, in \textit{Law and Economics} 233, 237–39 (Nicolas Mercuro ed., 1989). These scholars have attempted to improve regulatory policies with incentive-based regulation. See, \textit{e.g.}, Ian Ayres & John Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate} 19 (1992) (“We argue for a minimal sufficiency principle in the deployment of the big and smaller sticks: the more sanctions can be kept in the background, the more regulation can be transacted through moral suasion, the more effective regulation will be.”); Susan Rose-Ackerman, \textit{Rethinking the Progressive Agenda: The Reform of the American Regulatory State} 14–27 (1992) (developing a progressive approach to law and economics by contrasting it with the Chicago school).

\textsuperscript{22} \textit{See} Guido Calabresi, \textit{Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem} xv, 11 (1985) (noting his method of “trying to build up from cases, hypothetical and real, [rather] than . . . working down from great principles” and the importance of “thinking on the issue of who gains and who loses”); \textit{see also} Calabresi, \textit{ supra} note 8 (“[T]he failure of the Pareto criterion to be of any real guidance makes inevitable a thoroughgoing and open discussion of distribution and of interpersonal comparisons.”).

\textsuperscript{23} Over time, Judge Posner has moved away from (if not renounced) his earlier neoclassical law-and-economics claims. \textit{Cf.} Posner, \textit{ supra} note 18, at 31, 387 (acknowledging that “this book modifies some of my previously published views” and maintaining that “we should be cautious in pushing wealth maximization; incrementalism should be our watchword”). One might say, with his new book, that Judge Posner too has become a new legal realist. \textit{See generally} Posner, \textit{ supra} note 1.
law and economics’ most insistent assumptions, a reflexive process that itself characterizes the new legal realism.

In Part I, we offer a taxonomy of work aspiring to a new legal realism. First, we discuss behavioral approaches: studies that borrow from other scholarly disciplines, in particular behavioral economics and political science, to reach conclusions about law-as-behavior—in one case, law viewed as reflective of behavior and, in particular, of judges’ politics; in the other case, law viewed as progressively shaping behavior by considering individuals’ rational and irrational predispositions. Second, we consider contextual approaches: empirical work that includes studies engaged in bottom-up, participatory forms of empiricism (what we dub “action studies”), based on philosophical pragmatism’s premise that one cannot know one’s ends until one assesses means because one’s means open up new understandings of ends. Third, we examine institutional approaches: studies focusing on the power of institutions and institutional choices to determine our policies and shape our very ideas of self, society, and the state. In Part II, we place this “new realism” in the context of the “old” realism, discussing commonalities and divergences in these approaches, giving particular attention to the ways in which the new realism builds and yet diverges from the “old” realism.

Parts I and II are largely descriptive, while Parts III through V offer more critical, and more controversial, claims. We argue in Part III that neoclassical law and economics became a functionalist version of the old formalism, presenting a “new formalism” for the next generation of legal theorists. We explain how all of the new realists take their inspiration from realism’s opposition to neoclassical law and economics’ theories of judging, its models of the individual and the state, and its approach to scholarship (deductive reasoning from simplified assumptions). In Part IV, we consider the risks of new legal realism, arguing that each of the varieties of new realism must grapple with risks of reductionism, scientism, vagueness, false totalizing theories, value-evasion, and the failure to grapple fully with the central divide of twentieth-century legal theory: the law/poitics divide. As Dean Hanoch Dagan writes, among the challenges for legal realists is to stand for more than “nominalism, sheer critique, or incoherent eclecticism.” In Part V, we outline a form of dynamic realism that is consistent with many forms of the new legal realism but that also makes

24 See Posner, supra note 1. One interpretation of Judge Posner’s trajectory is historical: i.e., his advocacy of neoclassical law and economics initially responded to perceived failures of the New Deal regulatory state in the 1960s and 1970s, but the theory went too far, leading to his own retrenchment.

25 These are ideal types of these approaches; there is variation within each camp that we explore.

substantial departures from existing new-legal-realist alternatives. We aim to capture the “best” version of realism while, at the same time, avoiding its worst pitfalls.

I

MAPPING NEW LEGAL REALISM

Just as the old legal realism was a reaction to the challenge of real-life experience, so too the new legal realism is an effort to respond to obvious problems in our world. The experiences of industrialization and labor violence, of human suffering attendant on grand scales, and of repressive government action against dissent, were standing indictments for realists—like Karl Llewellyn, Judge Jerome Frank, and their predecessors, Justice Louis Brandeis and Dean Roscoe Pound—of common-law categories inapposite to social needs, of talk of property and contract rather than human rights and welfare, and of the primacy of laissez-faire economics over government intervention.27 Today, we face different challenges—of globalization, terror, and the inability of financial markets to restrain themselves, of gaping income inequality (with eighty percent of gains in U.S. net income over three decades going to one percent of the population),28 of societies poised as if on a hair trigger to react globally to the latest crisis, of states realizing their mutual dependence and vulnerability but not knowing how to address them. This confluence of challenges comprises the new world order that confronts us. The question that recent events asks for legal scholarship is precisely the question confronting the old realists: whether the theoretical categories that have dominated law, of markets and efficiency, of rights and texts and pro-

27 See Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value 93 (1973) (“In attacking traditional abstractions and nonempirical concepts of justice, they were usually assailing what they considered the practical injustices of American society. Abstraction in economics and politics, as in the law, they believed, had been one of the biggest obstacles to the attainment of a truly democratic society. Frank, Oliphant, Clark, Arnold, Douglas, and Felix Cohen all became ardent New Dealers, sharing a strong hostility to the method of juristic reasoning that struck down social welfare laws and wrought what they considered great human injustices. Most of the other realists expressed equally strong disapproval of the social and economic situation in the thirties, and they viewed themselves as fighting to extend democratic social values.”).

28 Larry M. Bartels, Inequalities: Since World War II, Republicans and Democrats Have Presided over Startlingly Different Economies, N.Y. TIMES MAG., Apr. 27, 2008, at 22 (“Economists say 80 percent of net income gains since 1980 went to people in the top 1 percent of the income distribution, boosting their share of total income to levels unseen since before the Great Depression.”).
cedures, are capable of addressing the experience confronting us on the front pages of our newspapers, an unprecedented market collapse, and the unexpected triumph of political mobilization of a vast nation.

History tells us that the old legal realism receded in importance when real-life challenges impaled its more extreme manifestations. All movements that aim toward novelty have a tendency to lead to extremes. The old realism had many branches, but three are worth noting here: (1) the realism that aimed to redefine law in terms of the centrality of facts and empirical evidence; (2) the realism that aimed to inform law through social science such as sociology and psychology; and (3) the realism that aimed to construct a theory of judging that refused to accept doctrine’s determinacy and sufficiency.29

The more extreme forms of realism fell in the face of external threat. Hitler’s fascism laid waste to the notion that law itself could or should be discarded as a restraint against politics and the New Deal administrative state.30 The realists’ empirical efforts were ridiculed; one imagined Underhill Moore watching over parking enforcement in New Haven as the heavens fell.31 Judge Frank’s faux psychoanalysis of judges32 was seen as dangerously subversive of the rule of law as judges and priests found themselves interned in concentration camps.33 If it was true that everyone knew that doctrine was not

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30 See G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 Va. L. Rev. 999, 1026 (1972) (arguing that the rise of European fascism made legal realism’s apparent relativism unpalatable); see also Neil Duxbury, Jerome Frank and the Legacy of Legal Realism, 18 J.L. & Soc’y 175, 179 (1991) (“Quite simply, realists suddenly found themselves charged with offering an apologia for totalitarianism.” (footnote omitted)).


32 See Frank, Modern Mind, supra note 29, at 108–26 (analyzing judicial decision making); see also Robert Jerome Glennon, The Iconoclast as Reformer; Jerome Frank’s Impact on American Law 44–46 (1985) (discussing Frank’s theories on judges and judging).

33 See Purcell, supra note 27, at 82–85; Duxbury, supra note 30, at 179 (discussing the fact that Judge Frank and other realists were accused of being traitors); White, supra note
enough, doctrine was at least something, rights were powerful in some cases, and courts did have a job to do. What lived on after World War II and was so successful as to make everyone a realist was the core claim of realism that doctrine is necessary but insufficient to explain judging.

Today we live in a very different legal universe with a very different set of challenges to legal theory and practice. In some ways, our law has, in the past twenty years, become more formalist than the Langdellians could have dreamed. The Harvard men might have hoped that common law could be a science, but it was still a common law, which in retrospect was quite a bit more flexible than some have imagined. In constitutional law, there was neither text parsing nor debate about methods of interpretation; there were simply common-law analogies like nuisance and categories like the “police power” broad enough to affirm vast amounts of governmental regulation, even as it preserved a rather weak federal government. Measure today’s average Supreme Court decision against the mere paragraphs that were once used to decide such cases, and one gasps for air. We have more laws, more words, more opinions, more procedures, and a massive bureaucratic state that is criticized by all as unresponsive, unaccountable, and ineffectual.

30, at 1026 (arguing that with the rise of the Axis powers, “the position of the Realists became a source of acute embarrassment”).

34 It was in the late 1930s and early 1940s that the Supreme Court aggressively moved to protect First-Amendment and other rights. See, e.g., Victoria F. Nourse, In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics (2008) (discussing the history of Skinner v. Oklahoma and its role in equality and rights jurisprudence). For this historical story, see generally Purcell, supra note 27.

35 See Joseph William Singer, Legal Realism Now, 76 CAL. L. Rev. 465, 467 (1988) (reviewing Laura Kalman, Legal Realism at Yale: 1927–1960 (1986)) (“To some extent, we are all realists now.”).

36 See Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267, 275 (1997), reprinted in Leiter, supra note 29, at 21–22 (“[T]he Core Claim of Realism is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law.”).


Within this doctrinal sprawl, a new formalism has asserted itself not only in constitutional law but also in administrative law, criminal law, private-contract law, and foreign-relations law.\(^{40}\) The new formalism is different than the old in its instrumentalist vision, but it has similarities in its reasoning and in its ends. Like the old formalists, neoclassical law and economics has deployed axiomatic reasoning, substituting assumptions of rational behavior and self-correcting markets for the old formalists’ common-law principles.\(^{41}\) Through such reasoning, neoclassical law and economics avoided attending to human psychology and social, historical, and institutional contexts. It derived substantive prescriptions similar to those of the old formalists, favoring market mechanisms at the expense of statutory and constitutional intervention to address social inequalities and market failures. In the case of neoclassical law and economics, it has often reached these ends through a jurisprudential turn to textualism in order to limit, in the words of one of its leading scholars (and now judges), “statutes’ domains.”\(^{42}\) The selection of federal judges from the Reagan administration through the second Bush administration ensures that such forms of legal reasoning, and their attendant outcomes, will be entrenched within legal institutions and thus present an ongoing foil for new realists.

It is not surprising that, as a result of these developments, many legal scholars have, in the past eight or so years, aimed to practice and theorize a new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism. They have called the theory by many names, suggesting different methods and emphases. For Daniel Farber, work in behavioral economics should claim the mantle of new legal realism.

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41 See Douglas G. Baird, The Future of Law and Economics: Looking Forward, 64 U. CHI. L. REV. 1129, 1132 (1997) (“Graduate students sometimes reduce all of microeconomics to only four words—people maximize, markets clear. Richard Posner’s achievement was to use these same axioms to illuminate the forces at work in the Anglo-American legal system.”); Anita Bernstein, Whatever Happened to Law and Economics?, 64 Mo. L. REV. 303, 308 (2005) (“On the first page of Economic Analysis of Law, Richard Posner declared a first axiom: ‘man is a rational maximizer of his ends in life.’” (footnote omitted)).

Thomas Miles and Cass Sunstein have claimed the title for quantitative empirical studies addressing political influences on judging. Stewart Macaulay and Elizabeth Mertz, along with a group of empirical researchers from an array of social-science disciplines, have claimed the title for “law-in-action studies” in which scholars use different empirical methods, including (importantly) qualitative research such as fieldwork that engages law’s subjects on the ground. In our view, such action studies are implicitly based on the philosophically pragmatic insight that one cannot posit the “ends” of law or research without understanding fully its “means.” Finally, a diverse group of scholars has claimed the title for different forms of institutional analysis. Building on Komesar’s comparative-institutional analysis and neoinstitutionalist theory, Edward Rubin has argued for a comparative microanalysis of institutions. The “new governance” school that has flourished at Columbia would shift attention away from rights and courts and instead emphasize stakeholder involvement and learning through experimental engagement in the creation of new forms of regulatory governance. Most recently, a set of criti-

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45 See, e.g., Howard Erlanger et al., Foreword: Is It Time for a New Legal Realism?, 2005 Wis. L. Rev. 335, 345–56 (providing examples of “on the ground” legal research); Stewart Macaulay, Renegotiations and Settlements: Dr. Pangloss’s Notes on the Margins of David Campbell’s Papers, 29 Cardozo L. Rev. 261, 262 (2007) (using “new legal realism” to refer to an analysis of law-in-action).


49 For the seminal work, see Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1016, 1094 (2004) (“As a form of direct rather than representative democracy and as an informal process without fixed criteria of standing or operation, the stakeholder process departs from the traditional premises of American constitutionalism. But it is potentially a valuable elaboration . . . .”); William H. Simon, Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes, in Law and New Governance in the EU and the US 37 (Gráinne de Búrca & Joanne Scott eds., 2006). Scholars of the European Union have played an important role in developing this work,
cal scholars at Emory, led by Martha Fineman, has urged that the state and its institutions should be premised not on the idea of the autonomous, rational actor but should recognize instead a universal “vulnerability” of individuals to both public and private institutional forces.\textsuperscript{50}

Very little of this work, however, has directly engaged its counterparts. In fact, the varieties of new legal realism have generally failed even to acknowledge each other’s existence, reflecting, from an institutionalist perspective, their own path dependencies. In what follows, we provide a taxonomy and overview of the literature that has dubbed itself, or been designated by others, as “new legal realist” in order to evaluate this literature and facilitate mutual engagement among these scholars.

A. The Behaviorists

There are two forms of what we call the “behavioral wing” of new legal realism. One takes its inspiration from behavioral economics and the other, the attitudinal model in political science.

1. Behavioral Economics

In 2001, Farber reviewed Sunstein’s work on behavioral economics and proclaimed that studies challenging the rational-actor model were the new legal realism.\textsuperscript{51} Farber argued that behavioral economists had successfully attacked the rational-choice models underlying neoclassical law-and-economics and public-choice theory by present-

\textsuperscript{50} See infra notes 104–10 and accompanying text.
\textsuperscript{51} See Farber, supra note 43.
ing a “more realistic description of human behavior.” As Farber explained, “Efforts by traditionalists to dismiss the significance of these gaps are ultimately unpersuasive. Bluntly, a rational actor who had a significant stake in an outcome would not rely solely on rational choice theory to predict the behavior of others.” Since that time, research on behavioral economics, cognitive biases, and heuristics has flowered. This research emphasizes systemic departures from rationality such as hindsight bias, overoptimism, and the endowment effect’s status-quo bias. In 2004, Russell Korobkin was confident enough to assert that the “behavioral” approach to law and economics was “rapidly gaining adherents and becoming the mainstream version of the analytical approach.” Behavioral economics represents a frontal assault within economics itself on the simplifying assumptions of neoclassical law and economics.

2. The Attitudinal Model

In a 1997 article, Frank Cross urged that a “new legal realism” would take account of the “attitudinal model” of political scientists, which, in its more extreme variant, holds that legal reasons are irrelevant and that judicial decisions can be predicted based on ideological variables and political affiliations. Cross was skeptical of some as-

52 Id. at 280.
53 Id. at 280–81.
55 Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 NW. U. L. REV. 251, 253–54 (1997). On the attitudinal model more generally, see Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 2 (2002) (arguing that American history is replete with “egregious” examples of partisan judicial policymaking); see also Lee Epstein et al., The
pects of the model but held out the possibility of bridging the gap between internal doctrinal and external positive legal theory. In the years after Cross wrote, mainstream academics, beginning with Richard Revesz, began to do large-scale quantitative studies of appellate judging in administrative-law cases.\textsuperscript{56} This work led to a flurry of seemingly endless studies that suggested religious bias, political-party bias, ideological bias, labor bias, immigration bias, and so forth, representing a subset of the empirical-legal-studies movement.\textsuperscript{57} By 2008, Miles and Sunstein dubbed such studies the cutting edge of new legal realism, referring to a vast body of work that has documented “panel effects” in judicial decision making.\textsuperscript{58} Similarly, in international law, Eric Posner and Miguel de Figueiredo assessed the nationalist biases of judges on the International Court of Justice and, on this basis, called into question the court’s legitimacy.\textsuperscript{59}


\textsuperscript{58} Miles & Sunstein, supra note 44, at 834. The term “panel effects” refers to the observation that different combinations of appellate judges appointed by Republican and Democratic presidents affects judicial outcomes because panels of judges appointed by Democrats tend to be more liberal than panels appointed by Republicans. Miles and Sunstein advocate the use of panels consisting of at least one judge appointed by each party. See id.

B. The Contextualists

Macaulay has deployed the term “law in action” to capture Wisconsin’s variety of new legal realism that emphasizes the importance of an empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world.\footnote{Macaulay, \emph{New Versus the Old}, supra note 46, at 367–68.} Statistical studies are not enough for this version of “new legal realism”; indeed, such studies can be sorely misleading if used without proper caveats and care. What many (although not all) contextualists require is some variant of sympathetic engagement in the subject matter akin to ethnography—what Max Weber called \textit{Verstehen}.\footnote{See Max Weber, \emph{The Theory of Social and Economic Organization} 87 n.2 (Talcott Parsons ed., A. M. Henderson & Talcott Parsons trans., Free Press 1964) (1947) (“As Weber uses [Verstehen] this is a technical term with a distinctly narrower meaning than either the German or the English in everyday usage. Its primary reference in this work is to the observation and theoretical interpretation of the subjective ‘states of mind’ of actors. But it also extends to the grasp of the meaning of logical and other systems of symbols, a meaning which is usually thought of as in some sense ‘intended’ by a mind or intelligent being of some sort.”). “Participant observation,” an intensive observational method originating in the field of anthropology, is the approach that yields the most information regarding the many complex inputs as to how law works on the ground. See generally Mark Goodale & Elizabeth Mertz, \textit{Anthropology of Law}, in \textit{Encyclopedia of Law & Society: American and Global Perspectives} 68 (David S. Clark ed., 2007). Qualitative sociologists also employ participant observation, along with interviewing and other qualitative approaches whose roots go back to scholars like Weber and Durkheim. See Emile Durkheim, \textit{The Elementary Forms of the Religious Life} 19–33 (Joseph Ward Swain trans., Free Press 1968) (1915) (discussing the concept of collective belief or effervescence within a society); Weber, supra, at 10–11 (describing Weber’s methodology).} Macaulay’s canonical study of how businessmen make bargains (largely in complete disregard of the law) is the starting but not the ending point of this model.\footnote{See generally Macaulay, \textit{Contracts}, supra note 46 (providing a comprehensive study of contract law in action).} In a related vein, Mertz, a leading new legal realist in the contextualist vein, has argued that law’s language depends on contextualization to convey its meaning. Building on research in anthropological linguistics, she has closely analyzed the language used in law schools.\footnote{See Elizabeth Mertz, \textit{The Language of Law School: Learning to “Think Like a Lawyer”} 3–4 (2007); see also Elizabeth Mertz, \textit{An Afterword: Tapping the Promise of Relational Contract Theory—“Real” Legal Language and a New Legal Realism}, \textit{94 Nw. U. L. Rev.} 909, 923 (2000) (discussing linguistic anthropological research analyzing the complex ways that “‘chunks’ of written language become ‘texts’ (entextualization), are removed from prior contexts (decontextualization), and are reconfigured in new settings (recontextualization)”)} We call this work, for purposes of distinguishing it from other forms of empiricism, “action studies,” reflecting the subject of study—the law in action.

There are, of course, variations within the contextualist approach that reflect the variations in the law-and-society movement from which
this version of new legal realism builds. Each of these variants investigates behavior in social context, using different empirical tools. Economists working in a contextualist vein, such as Ayres, Donohue, and Steven Levitt, deploy quantitative large-N studies and multivariate regressions. Sociologists working in the contextualist vein, such as Robert Nelson and Laura Beth Nielsen, use mixed qualitative and quantitative methods. Legal historians working in the contextualist vein, like Lawrence Friedman, Robert Gordon, and William Novak, use qualitative and quantitative methods as well as critical reflection. The American Bar Foundation has long supported such interdisciplinary research on law and, working together with the University of Wisconsin Law School, has helped to fund a number of conferences on new legal realism.


68 See American Bar Foundation, The New Legal Realism Project, http://www.americanbarfoundation.org/research/The_New_Legal_Realism_Project.html (last visited Aug. 29, 2009). The economists Ayres, Donohue, Levitt, and Austin Goolsbee have all been senior fellows at the American Bar Foundation (ABF), as have sociologists working explicitly in a new-legal-realist vein, such as Nelson (the ABF’s current director), Terrence Halliday, and Nielsen.
Many contextualists foreground the role of institutions. They enter the institutions of the world and observe, systematically interview, and survey individuals within them. These contextualists uncover how law works in practice, whether within supplier and dealer chains (as in Macaulay’s classic studies), courts and agencies (as in the work of Nelson, Nielsen, and K.T. Albiston), corporations (as in the work of Lauren Edelman), international trade and economic networks (as in the work of John Braithwaite, Peter Drahos, and Gregory Shaffer), law-firm practices (as in the work of Marc Galanter, 


Bryant Garth, Jack Heinz and David Wilkins), 73 or law schools themselves (as in the work of Mertz). 74 So, too, an institutional focus has been central to the work of contextualist legal historians (as in that of Novak) and political scientists (as in that of Stephen Skowronek) studying regulation and the legal order more generally as it develops over time. 75

A number of scholars, such as Garth, Halliday, Sally Merry, and Shaffer have applied these methods in the global context. 76 Garth has worked with the French sociologist Yves Dezalay to investigate the careers of international arbitrators in the construction of this field of practice; 77 Merry has done ethnographies of human-rights institutions; 78 Shaffer has done fieldwork on the World Trade Organization and in national capitals to unpack what lies behind the use of the

mercail Arbitration and the Construction of a Transnational Legal Order (1996) (studying how transnational lawyers created an autonomous legal field that gives them a key role in the global marketplace).


74 See generally Mertz, supra note 63.

75 See William Novak, supra note 67, at 8 (emphasizing "the actual day-to-day conduct of governance" (emphasis omitted)). The work of legal historians such as Novak fits within that branch of political science known as American Political Development (APD), which has sought to recover the history of institutional transformation. See, e.g., The Democratic Experiment: New Directions in American Political History 384–90 (Meg Jacobs et al. eds., 2003) (discussing the APD school). Like new legal realists, APD posits that legal institutions both reflect and generate political order and that law and institutions operate in a "bi-directional" fashion, reflecting the will of the citizenry and in turn creating new forms of citizenship. See, e.g., Julian E. Zelizer, History and Political Science: Together Again?, 16 J. Pol'y Hist. 126, 127–28 (2004) (discussing APD’s history). For the founding work of this school, see generally Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920 (1982).


77 See generally Dezalay & Gart, supra note 72; Yves Dezalay & Bryant G. Garth, The Internationalization of Place Wars: Lawyers, Economists, and the Contest to Transform Latin American States (2002) (analyzing the careers of elites in the reconstruction of state power in Latin America).

78 See generally The Practice of Human Rights: Tracking Law Between the Global and the Local (Mark Goodale & Sally Engle Merty eds., 2007) (analyzing how human rights play out in practice with anthropological data).
WTO’s legal system;79 and Halliday has done fieldwork throughout the world on issues ranging from bankruptcy reform to criminal procedure to the role of lawyers in the “legal complex” of different countries.80 A team of scholars organized by Janet Halley has taken a contextualist approach in examining the consequences of international feminist projects for local women in developing countries.81 Drawing from fieldwork in Egypt and India, Hila Shamir examines how initiatives can “systematically overlook[] the shifts in bargaining power, distributive consequences, and production of winners and losers yielded by feminist legislative reforms.”82

For Mertz, the key point is “translation between high-quality research using a variety of methods, on the one hand, and law/policy, on the other.”83 In her view,


81 See generally Janet Halley et al., 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 H ARV. J. L. & G ENDER 335 (2006) (examining law-in-action/law-in-the-books contingency in international law pertaining to these issues). Contextualism, however, lies at the core of the feminist project in its distrust of abstract reasoning, which fails to take account of women’s lived experiences. See, e.g., Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 2 (1989) (addressing the problem of a “focus on abstract rights rather than the social context that constrains them”). Deborah Rhode focuses on “particular legal issues within their broader historical, social, and economic settings” in order “to build a theoretical framework from the ground up.” Id. at 5–6.

82 Halley et al., supra note 81, at 361 (emphasis omitted). From her work on the “red-light” areas of Kolkata and Tirupati, Prabha Kotiswaran contends that

[W]hile the international effects an enormous shift in the bargaining power of stakeholders at the national level, at some point, international mandates and international law become ensnared in a web of multiple legal regimes operative at the national and local levels that effectively lead the international to become just one more tool in the hands of the most powerful player in that context, typically the nation-state backed by Indian [Governance Feminism].

Id. at 376.

83 E-mail from Elizabeth Mertz, Professor, University of Wisconsin Law School, to the authors (May 26, 2009) (on file with authors); see also Elizabeth Mertz, Inside the Law School Classroom: Toward a New Legal Realist Pedagogy, 60 V AND. L. R EV. 483, 487 (2007) (“[L]eaders of public and socio-legal scholars have urged empirical legal researchers to combine multiple methods where possible, to consider evidence from studies using a variety of ap-
[l]egal scholars don’t have to themselves conduct the research, but they need to be able to find, read, and use available research from social science—and this process will be more likely to occur if there are practicing social scientists in the legal academy, making their epistemologies and standards more a part of the culture there (and more a part of the training of lawyers). Also, social scientists often fail to understand how their work will be read and assimilated by lawyers—so the process requires better understanding on both sides.

In our view, contextualists ground their theory on the Jamesian/Deweyan pragmatist insight that theory must come from the world; that only theory that works has established its truth; and that there is no way to divorce theory from fact: indeed, this is a false dichotomy, as John Dewey once insisted. What stands out in much of the work

proaches, and/or to take care in fitting research questions to research methods (and in being appropriately modest about the reach of their results).” (footnote omitted)).

84 E-mail from Elizabeth Mertz to the authors, supra note 83; see also Joel 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, 489 (“[I]t is not enough to just hand lawyers social science findings, or to hand social scientists areas of law to explore. Instead, we need to commence a sophisticated conversation about the process of translation itself, an exchange in which we ask about the frame around the findings, about what the language is for, about the impact of using one method or another, and so forth. Lawyers may need to let in a little more nuance and curb their punch line mentality for a time. Social scientists may need to understand that lawyers are people who do not have the luxury of waiting another five years to find out what is going on, because there is a decision that has to be made tomorrow. The challenge of bridging these fundamental chasms is a core task of new legal realist translations.”); Elizabeth Mertz, Introduction to THE ROLE OF SOCIAL SCIENCE IN LAW xiii–xxx (Elizabeth Mertz ed., 2008); Elizabeth Mertz, Translating Science into Family Law: An Overview, 56 DePaul L. Rev. 799, 801 (2007) (“An adequate translation of social science to law must look at the intervening steps just as systematically and carefully as it looks at the initial findings.”). Similarly, Christopher Tomlins writes that “a core mission of the New Legal Realist project is . . . the development of a sophisticated process of translation and exchange between law and social science.” Christopher Tomlins, In This Issue, 31 LAW & SOC. INQUIRY 795, 795 (2006); see also Gulati & Nielsen, supra note 70, at 797 (“The movement has emerged at a time when there is said to be a growing disjunction between social scientists and law professors to the detriment of our scholarly and practical understanding of the relationship between law and social change. New Legal Realism is dedicated to combating that disjunction.”).

85 Dewey’s views are often poorly expressed; however, the action-theorist Joas has fairly described them in the following terms: Dewey means more than [a] simple difference between goals and results. In his world view . . . , the results of present actions do not exist because they still lie in the future. . . . [A]s anticipations, they belong to the present. . . . Dewey therefore introduces the concept the ‘end-in-view’ in order to define the role of goals in the organization of present action. . . . Dewey speaks of a reciprocal relationship between an action’s end and the means involved. In other words, he does not presuppose that the actor generally has a clear goal, and that it only remains to make the appropriate choice of means. On the contrary, the goals of actions are usually relatively undefined, and only become more specific as a consequence of the decision to use particular means. Reciprocity of goals and means therefore signifies the interaction of the choice of means and the definition of goals. Only
under this variety of new legal realism is the combination of empirical engagement with recursivity: scholars study a real problem in the world (they do not start with a theory or a normative agenda), and as they encounter the problem, scholars emerge with different ideas and new strategies, learning from those who must deal with the problem (the “legal subjects”). In the view of many scholars who take this approach (including ourselves), the measure of the success of many studies is not “prediction” and verification (indeed, it can be viewed as the opposite of prediction). Rather, the measure is discovery—finding something that, in theory, was not thought, nor perhaps even “thinkable,” within the existing paradigms of legal scholarship.86 These scholars stress, and provide numerous examples of, how “[l]eaving one’s office and venturing into the field transforms one’s core assumptions regarding one’s subject of study”87—a methodology that we call “emergent analytics.”

C. The Institutionalists

We have identified three broad forms of institutional approaches that self-consciously embrace the title of new legal realism.

1. **Comparative Institutionalism, Neoinstitutionalism, and Microanalysis**

Building from different traditions in economics and sociology, some scholars have claimed that new legal realism should focus on institutional forces. Komesar, for example, has taken a particularly important institutional turn for new legal realists, showing how the “choice of social goals or values is insufficient to tell us anything about law and public policy” because the pursuit of all goals (whether they be Epstein’s libertarianism or Dworkin’s or Rawls’s vision of liber-
alism) will be shaped and determined by institutional processes.88 As Komesar contends, “[i]t is institutional choice that connects goals with their legal or public policy results.”89 Unlike legal-process theorists, Komesar claims that only “comparative” analysis, not essentialist institutional “competences,” provides the proper analytic. Komesar, an economist, insists that comparative analysis constitutes, in fact, the “essence” of economics, rather than the privileging of the market as a social institution or the “single institutional analysis” of market or governmental failure.90

Working in this vein, Rubin argued that a synthesis of trends in continental social thought and law and economics “suggest[ed] the possibility of a new, unified methodology for legal scholarship based on the analysis of institutions.”91 To fill the gap, Rubin offered his theory of a microanalysis of institutions, recognizing that the question was “how politics interacts with law at both the descriptive and normative levels.”92 Like those who urge contextualized inquiry, Rubin self-consciously emphasizes a phenomenological approach, suggesting actual participation in the processes studied.

New legal realists’ microanalysis of institutions is not limited to public institutions but includes studies of private organizations as well, building on neoinstitutional insights from sociology as applied to law.93 The work of Edelman and her collaborators, for example, in-

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88 KOMESAR, supra note 47, at 271; see also NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 11–34 (2001) [hereinafter KOMESAR, LAW’S LIMITS] (assessing the relationship between property law and institutional choice). Komesar nonetheless stresses the difference of his form of institutionalism from that of the new institutional economics, as exemplified by Oliver Williamson and Douglass North. See NEIL KOMESAR, THE ESSENCE OF ECONOMICS: RETHINKING THE ECONOMIC ANALYSIS OF LAW AND PUBLIC POLICY 3–5 (June 2009) (unpublished manuscript, on file with authors) [hereinafter KOMESAR, ESSENCE] (seeing “institutions as decision-making processes” that give rise to law’s meaning, as opposed to the institutional-economics view of institutions as “rules of the game [that] . . . provide the context for economic activity”).

89 KOMESAR, supra note 47, at 5.

90 See KOMESAR, supra note 47, at 1424. As Rubin writes, “[t]he one element of legal process theory that was not explicitly attacked by law and economics or critical legal studies was the call for comparative institutional analysis.” Id. at 1403.

91 Id. at 1426 (“Determining the mere quantity of political influence, however, does no more than attack the defunct legal process claim that law is politically neutral. A much more productive inquiry concerns the way political forces act upon, or are translated into, social institutions, the law that governs them, and the law that they establish and administer.” (emphasis added)); see also EDWARD RUBIN & MALCOLM FEELEY, CREATING LEGAL DOCTRINE, 69 S. CAL. L. REV. 1989, 1994 (1996) (arguing for a “phenomenology of institutional thought” to understand “how individual human beings, on the basis of their own thoughts and actions, are shaped by their institutional context, and how, in turn, they shape that context in response to changing circumstances or conceptualizations”).

92 Neoinstitutionalism (or new institutionalism) is a movement that develops a sociological view of how institutions work and have social effects, which contrasts with the ra-
vestigates how internal business policies and procedures shape the perception of public law, transforming its meaning. In a study of business "diversity" policies, Edelman, Sally Riggs Fuller, and Iona Mara-Drita document how, "as legal ideas move into managerial and organizational arenas, law tends to become ‘managerialized,’ or progressively infused with managerial values." They find that managerial discretion in implementing civil-rights laws within organizations reframes diversity issues to include not only gender and race but also personality and cultural-lifestyle traits, thus transforming the legal ideals underlying civil-rights law. Similarly Edelman, Christopher Uggen, and Howard Erlanger find, in their study of internal business practices applying civil-rights laws, that professionals "promote a particular compliance strategy, organizations adopt this strategy to reduce costs and symbolize compliance, and courts adjust judicial constructions of fairness to include these emerging organizational practices." Further, they conclude that "courts have become more likely to defer to organizations’ grievance procedures and to consider them relevant to determinations of liability." From the neoinstitutional perspective of the sociology of organizations, these studies show how public law is defined in the shadow of business practice, thus acquiring meaning and having effects through internal business policies and procedures.

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95 See id. at 1590–91.
97 Id. at 409. Similarly, Edelman and Mark Suchman highlight how internal business-legal practice can colonize public law by "redefining what is seen as 'normal,' 'reasonable,' 'rational,' and 'compliant'" in terms of internal business grievance procedures created in response to public law. Lauren B. Edelman & Mark C. Suchman, When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law, 33 Law & Soc'y Rev. 941, 963 (1999). They state that courts “often defer to the results of internal hearings” and “dismiss the claims of any plaintiffs who have failed to exhaust their in-house remedies.” Id. at 965 (citation omitted).
2. **The “New Governance” Theory**

Coming out of Columbia Law School in particular, the “new governance” theory of law focuses on efforts to move beyond a court-centric and rights-focused basis of law and toward new forms of problem solving involving institutional experimentation in a pragmatist sense. These new forms involve “collaborative, multiparty, multilevel, adaptive, problem-solving methods” for law creation and implementation “that to varying extents supplement or supplant traditional regulation.”

The goal of new governance theory is to get a broad range of stakeholders involved, including regulated entities, private interest groups, government enforcement agencies, and the class of people that the law is intended to benefit. Ideally, these various groups . . . utilize their collective energy in achieving effective and context-specific solutions.

These solutions, however, are viewed as tentative because, as William Simon writes, new-governance theory emphasizes the importance of innovation and learning such that norms and practices are “continuously revise[d] . . . in the light of shared experience.” In a similar vein, Neil Walker and Gráinne de Búrca stress that “New Governance . . . is seen as a highly pragmatic and flexible approach to and modality of regulation, a method for ensuring maximum responsiveness and adaptability, with an emphasis on open-ended and provisional goals, and ensuring revisability and corrigibility.” Scholars have advanced new-governance approaches to regulation to address regulatory challenges in domestic, regional, and international settings.

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98 Columbia professors have authored a number of the leading works. See, e.g., Sabel & Simon, supra note 49; Scott & Sturm, supra note 49; Simon, supra note 49.


100 *Id.* at 482.

101 Simon, supra note 49, at 57; see also Sabel & Simon, supra note 49, at 1016 (“Instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency.”).

102 Neil Walker & Gráinne de Búrca, *Reconceiving Law & New Governance*, 13 Colum. J. Eur. L. 519, 522 (2007); see also de Búrca & Scott, supra note 49, at 514 (explaining that “new governance” refers “to a wide range of processes and practices that have a norm-setting or regulatory dimension but do not operate primarily or at all through the conventional mechanisms of command-and-control-type legal institutions”).


Thus, unlike the contemporary message regarding extralegal activism that privileges private actors and nonlegal techniques to promote social goals, the new governance scholarship is engaged in developing a broad menu of legal reform strategies that involve private industry and nongovernmental actors in a variety of ways while maintaining the necessary role of the state to aid weaker groups in order to promote overall welfare and equity. A responsive legal architecture has the potential to generate new forms of
3. The Legal Subject/State and Antidomination Model

Some self-described new legal realists have sought to envision a new form of state and state obligation that is based on a new idea of the legal subject, an approach that has its roots in critical theory and feminism. Among such scholars, Fineman has attacked the root image of an individualistic subject as prior to the state, not on the grounds of potential irrationality, but on grounds of interdependence. Fineman has posited that “vulnerability is—and should be understood to be—universal and constant, inherent in the human condition,” a post-identity substitute for the ideal of the autonomous actor. “Vulnerability analysis,” according to Fineman, does not focus on inequality with respect to defined groups (it is a post-identity theory) but “concentrates on the structures” and institutions—public and private—that manage our common, ever-present, vulnerabilities. Thus, institutional responsibility and choice become central to accountability and social responsibility and to link hard law with “softer” practices and normativities.

Id. at 983; see also Charles Sabel et al., Beyond Backyard Environmentalism, in CHARLES SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 3, 8–9 (Joshua Cohen & Joel Rogers eds., 2000) (arguing that the emergent environmental regulatory regime is successful based on cooperation between government officials and other actors); David M. Trubek & Louise G. Trubek, New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation, 13 COLUM. J. EUR. L. 539, 541 (2007). For new governance in international law and global governance, see Kenneth W. Abbott & Duncan Snidal, Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit, 42 VAND. J. TRANSNAT’L L. 501, 509 (2009) (stating that new governance “(1) incorporates a decentralized range of actors and institutions, both public and private, into the regulatory system, as by negotiating standards with firms, encouraging and supervising self-regulation, or sponsoring voluntary management systems; (2) relies on this range of actors for regulatory expertise; (3) modifies its regulatory responsibilities to emphasize orchestration of public and private actors and institutions rather than direct promulgation and enforcement of rules; and (4) utilizes ‘soft law’ to complement or substitute for mandatory ‘hard law’” (footnote omitted) (emphases omitted)). See generally Charles F. Sabel & William H. Simon, Epilogue: Accountability Without Sovereignty, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, supra note 49, at 395 (comparing new governance in international law to traditional legal theory).

See generally Martha Albertson Fineman, Gender and Law: Feminist Legal Theory’s Role in New Legal Realism, 2005 WIS. L. REV. 405 (using feminist research to formulate a new legal-realist paradigm).


Id. at 1.

Interpreting Martha Fineman’s theory of vulnerability and applying it for the first time within disability legal studies, I argue that vulnerability to disability and the vulnerabilities disabled individuals experience more acutely than those without disability are both universal and constant.”). Vulnerability analysis is coincident with work in other disciplines, particularly recent theoretical work by sociologists and political scientists. See Joans, supra note 46, at 147 (challenging the rational-actor model on the basis that it presumes first that an “actor is capable of purposive action, secondly that he has control over his own body, and thirdly that he is autonomous vis-à-vis his fellow human beings and environment”); see also Peadar Kirby, Vulnerability and Violence: The Impact
any policy analysis. As Fineman writes, the “structural focus” of this approach “brings institutions—not only individual actions—under scrutiny,”\(^{108}\) because “institutions are simultaneously constituted by and producers of vulnerability.”\(^{109}\) This work resonates with the constitutional and political theory of Robin West, which emphasizes constitutional duties of the state, and Yasmin Dawood’s recent invocation of an “antidomination” model of law’s role in democracy.\(^{110}\)

II

BUILDING FROM THE OLD LEGAL REALISM

New legal realism is neither old wine in a new bottle nor wholly new. It takes from the spirit of the old–legal-realist movement, builds from new methods and insights that have since been developed, and applies these methods and insights to the historic context that confronts us. As Roberto Mangabeira Unger writes, goals “can be reached only by obeying Piaget’s maxim that ‘to imitate is to invent.’ The new will have to be combined with the old.”\(^{111}\)

Each of the varieties of new legal realism builds from what came before in different, revitalizing ways. For example, psychology was central to the old legal realism. For Judge Frank, “[o]ur law schools must become, in part, schools of psychology applied to law in all its phases,”\(^{112}\) because “the judge should be not a mere thinking-machine but well trained, not only in rules of law, but also in the best available methods of psychology.”\(^{113}\) Those working in behavioral law and economics now state the same. They import cognitive psychology’s more sophisticated methods, which have advanced greatly since Judge Frank’s references to Sigmund Freud and “father-worship.”\(^{114}\) Behavioral law-and-economics scholars now build from the work of

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\(^{108}\) Fineman, \textit{supra} note 105, at 18.

\(^{109}\) \textit{Id.} at 13 n.31.


\(^{111}\) Roberto Mangabeira Unger, \textit{Free Trade Reimagined: The World Division of Labor and the Method of Economics} 111 (2007).

\(^{112}\) Frank, \textit{Modern Mind}, \textit{supra} note 29, at 156.

\(^{113}\) American Legal Realism 310–11 (William W. Fischer III et al. eds., 1993) (citing Frank, \textit{Modern Mind}, \textit{supra} note 29). Similarly, the political scientist Harold Lasswell, who formed a long collaboration with the legal realist Myres McDougal at Yale, wrote in 1930, “The findings of personality research show that the individual is a poor judge of his own interest.” Harold D. Lasswell, \textit{Psychopathology and Politics} 194 (Univ. of Chi. Press 1977) (1930).

\(^{114}\) See Frank, \textit{Modern Mind}, \textit{supra} note 29, at 261, 394.
Daniel Kahneman, Amos Tversky, and Paul Slovic in psychology. Such work was adapted by economists such as Thaler and Dan Ariely, and it was imported into the analysis of law by Sunstein, Jolls, Jeffrey Rachlinski, Chris Guthrie, Korobkin, and others.

Similarly, the attitudinalists' core arguments are reflected in the views of Justice Oliver Wendell Holmes, Justice Benjamin Cardozo, Herman Oliphant, Llewellyn, Joseph Hutcheson, and Judge Frank, among the old legal realists. What motivated realists’ concepts of law were sociopolitical struggles. Realists distrusted judges who created barriers to Progressive and then New Deal social regulation based on what realists viewed as formalist reasoning that masked political choices. Justice Holmes long ago defined law in terms of predictions of judges’ behavior (what they do) as opposed to judges’ discourse (what they say). As he famously wrote in his “bad-man” theory of the law, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” In a similar vein, Llewellyn contended that “a right . . . exists to the extent that a likelihood exists that A can induce a court to squeeze, out of B, A’s damages.” Hutcheson wrote of judicial decisions based on

123 See Benjamin N. Cardozo, The Nature of the Judicial Process 115 (1921) ("The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator’s wisdom.").
124 See Herman Oliphant, Stare Decisis—Continued, 14 A.B.A. J. 159, 159 (1928) ("Not the judges’ opinions, but which way they decide cases will be the dominant subject matter of any truly scientific study of law.").
125 Justice Oliver Wendell Holmes, Supreme Judicial Court of Massachusetts, Address at the Dedication of the New Hall of the Boston University School of Law: The Path of the Law (Jan. 8, 1897), in 10 Harv. L. Rev. 457, 461 (1897).
126 Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431, 448 (1930) (emphases omitted).
“hunches,” and Judge Frank went furthest, speaking openly of judges’ “biases.” Once again, it is Judge Frank’s position that is arguably most clearly reflected in the attitudinalists’ views. In *Law and the Modern Mind*, Judge Frank contended that “the personality of the judge is the pivotal factor in law administration.” Attitudinalists simply substitute ideology for personality.

Attitudinalists bring to Judge Frank and other old legal realists new social-science quantitative statistical methodologies that were not readily available in the old legal realists’ time. As Cross writes, “Justice Holmes may have believed that the future belonged to the man of statistics, but he himself did not employ the methodology when analyzing judicial decisions.” Without high-speed computers and data-analysis software, Justice Holmes and his followers did not have the same means to do so.

Contextualists also follow in the old legal realists’ footsteps. It was Dean Pound who popularized the term “law in action,” and it was Dean Pound’s sociological jurisprudence that called for an understanding of actual industrial working conditions to make mincemeat of doctrinal claims of freedom of contract. Functionalists like Felix Cohen called for legal analysis that borrows from the behavioral social sciences. Llewellyn collaborated with the anthropologist Adamson Hoebel in their classic study *The Cheyenne Way*. What’s “new” in this version of new legal realism is that many more scholars actually engage with empirical work, whether conducted by themselves or others, unlike many of the legal realists themselves. While the legal realists

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128 *Frank, Modern Mind*, supra note 29, at 114; see Jerome Frank, *What Courts Do in Fact*, 26 U. ILL. L. Rev. 645, 655 (1932) (“How... does a judge arrive at his decision? In terse terms, he does so by a ‘hunch’ as to what is fair and just or wise or expedient.”).
129 *Frank, Modern Mind*, supra note 29, at 120.
130 See *Cross, supra* note 55, at 253–55. However, as Edward Purcell writes, already “[d]uring the twenties a number of political scientists attempted quantitative, behavioral studies of the process of American government.” *Purcell, supra* note 27, at 107.
131 *Cross, supra* note 55, at 256.
132 *See Roscoe Pound, Law in Books and Law in Action*, 44 Am. L. Rev. 12 passim (1910).
136 *See, e.g., Neil Duxbury, Patterns of American Jurisprudence* 158 (1995) (“Legal realists made a good deal of fuss about bringing social sciences to the law schools. But they did disappointinglly little with such sciences once they had got them there.”); Brian Leiter, *American Legal Realism, in The Blackwell Guide to the Philosophy of Law and Legal Theory, supra* note 8, at 50, 51 (“For most of the Realists, however, the commitment to ‘science’ and ‘scientific methods’ was more a matter of rhetoric and metaphor than actual scholarly practice...”); Macaulay, *New Versus the Old, supra* note 46, at 375 (“The classic realists talked about doing empirical research, but relatively little was accomplished.”); cf.
called for greater empirical work so that the practice of law would be better understood, they were less accomplished in practicing what they preached.137 Empiricism has exploded in the legal academy in the past ten years, as manifested in the birth of a new empirical legal studies movement,138 yielding vast numbers of converts to law and society’s call for a sophisticated use of empiricism at the heart of contextualists’ scholarly commitment.139 More social scientists have entered the law schools and engaged in legal scholarship, more legal scholars have studied empirical methods and approaches, and there has been more active collaboration between lawyers and social scientists.

Contextualists, together with institutionalists and behavioralists, take from the old realists, but they move beyond the courts in studying law and legal institutions to a far greater extent.140 They study the reciprocal interaction of law and society, which includes how organizations receive law and affect its meaning through practice and (more broadly) how public law and private practice interact dynamically.141 Private ordering is often developed in response to the public legal system, to preempt public law’s creation as unnecessary, to internalize public law by creating new internal policies and procedures, or to exit from the public legal system through the development of alternative-dispute-resolution mechanisms. Publicly made law is likewise often a response to developments in the private sphere. Sometimes publicly made law addresses private ordering’s purported deficiencies; other times, it codifies privately made law (such as lex mercatoria), business custom, and business institutional developments (such as alternative dispute resolution) into national statutes, regulations, and institutional practices. Legal interpretation and enforcement affect economic behavior; organizational behavior, including business internalization practices, in turn, affects public law.142 The one (public law) cannot be understood without the other (private ordering).

JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 8 (1995) (focusing on legal realism in terms of what these scholars did, including “the attempts of some of the Realists to do empirical social science,” as opposed to what they thought from a jurisprudential perspective).

137 See sources cited supra note 136.
138 See generally Heise, supra note 3.
139 See Friedman, supra note 64, at 776–80; Garth & Sterling, supra note 64, at 409–14; Trubek, supra note 64, at 6.
140 See generally Macaulay, New Versus the Old, supra note 46.
142 See supra notes 94–97 and accompanying text. For a sampling of the proliferating work on private lawmaking, private legal systems, and private ordering, see generally LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983) (proposing an interdependence between commercial and legal practice in business law); Alan
Institutionalists likewise have antecedents among the old legal realists. Institutional economists have built from the work of intellectual forbears such as Robert Hale and John Commons. Hale was an economist who moved to Columbia Law School, where he challenged laissez-faire economics and its legal incarnations and supported progressive political reforms. Commons was based for the most part at the University of Wisconsin, where he developed ideas that became the foundation for institutional law and economics, setting forth “a theoretical challenge to classical economic theory and its laissez-faire economic policies.” He also called “for progressive government intervention in economic life,” stressing in particular the protection of labor.

Similarly, new-governance theorists have their forerunners in the experimentalism of Dewey and his legal-realistic followers. For example, Judge Frank wrote in experimentalist terms in the New-Deal context, maintaining that “those who sympathize (whether or not avowedly) with experimental jurisprudence have found it easy to work for the ‘new deal.’ . . . Accordingly, the experimentalists are stimulated by the opportunity to help contrive new governmental agencies to be used experimentally as means for achieving better results.” New-governance scholars have (importantly) turned their gaze be-
Beyond federal agencies and courts, but their scholarship has parallels in old-legal-realist precedents.149

Finally, legal-subject theorists hope to build a new theory of the state from the false dichotomy of the public–private distinction, a concept that legal realists first frontally challenged when they took on common-law contract and property doctrine as applied to labor. These theorists grounded their work in critical epistemological challenges to legal constructions of “fact” and “law.” Today, we are more aware that presentations of “fact” reflect, to varying extents, a socially constructed, subjective, normative element, even in the very framing of the questions posed.150 We are also more aware that these presentations, in turn, play into social dynamics, with their dimensions of hierarchy and power.151 Yet here, too, one readily finds precedent in the work of Judge Frank, who wrote: “The trial court’s facts are not ‘data,’ not something that is ‘given’; they are not waiting somewhere, ready made, for the court to discover, to ‘find.’”152 And so, today, institutionalists working from legal-subject and antidomination perspectives stress how not only facts, but also identity itself, is shaped by public and private institutional norms and practices.

III
RESPONSES TO THE NEW FORMALISM IN NEOCLASSICAL LAW AND ECONOMICS

Like the old realism, the new realism rejects formalism and finds that rationalism is not enough; theories are necessary, but insufficient, to explain law’s reach and aspirations.153 And, like the old realism,
camps diverge. Some scholars dissolve law into politics, sociology, or psychology, and others seek something proactive, recasting law to account for human irrationality or rethinking the state and its response to human vulnerability. Unlike the old realism, however, the new realism’s formalist opponent is not doctrinalism.154 Rather, new realism takes neoclassical law and economics as its primary formalist opponent. New realism provides alternatives to neoclassical law and economics’ theories of judging, the individual, politics, and the state. In this Part, we examine this intellectual response.

Brian Tamanaha, among others, has usefully categorized formalism in terms of two variants: (i) a descriptive and prescriptive theory of law based on a complex of rationally organized principles that can and should be deductively applied to any set of facts; and (ii) a view of law as rule-bound, under which judges apply rules to facts as part of a rule-of-law system regardless of consequences in particular cases.155 Neoclassical law and economics can be understood as a new version of formalism in the first sense in that it sets forth coherent principles (efficiency and wealth maximization) that can be applied objectively and deductively to any set of facts in all areas of law.156 As we stress again, Judge Posner recognized this when he wrote that “[e]conomic analysis of law is a formalist edifice erected on a realist [i.e., instrumentalist] base.”157 Similarly, within economics itself, “formalism was taken to be the abstract deductive reasoning of orthodox economic

154 The relationship of the common law and formalism to the Lochner period (in which federal courts struck down statutes on various constitutional grounds) is more complex than the standard view, but it is fair to say that the Lochner era’s constitutional doctrine was imbued with common-law ideas of the police power and its limits, ideas associated with, and constrained by, the common-law concept of public nuisance. See Nourse, supra note 38. The old formalism was based on doctrinalism, and such old formalist doctrine, especially constitutional doctrine, was largely immune from theorizing about judging. See generally Nourse, supra note 39. The old legal realists and their immediate predecessors generally associated the common law with reactionary doctrine. See generally Pound, supra note 133; Tamanaha, supra note 11 (regarding overstatements of the formalist–realist divide from a jurisprudential perspective).

155 See Tamanaha, supra note 11, chs. 2, 4; cf. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 5 (2006) (“[W]e may distinguish two senses of formalism. In the first, formalism refers to the attempt to deduce legal rules from intelligible essences, such as ‘the nature of contracts’ or ‘the rule of law,’ while excluding considerations of morality and policy. . . . In another sense, however, formalism refers to a rule-bound decision-making strategy. . . . [that] can be justified only on empirical grounds, indeed consequentialist grounds . . . .”). See generally Grey, Formalism, supra note 13 (providing an excellent overview and assessment of the varieties of “new formalism”).

156 Such reasoning, of course, is not limited to law and economics but also characterizes much of analytic philosophy. Yet it is not, for example, Rawlsians who gained power in U.S. institutions over the past decades, and it is thus not Rawlsians who are the focus of the new-legal-realist challenge. Cf. ERNST J. WEINRIB, THE IDEA OF PRIVATE LAW 22–55 (1995) (detailing Ernest Weinrib’s version of formalism in private law).

157 POSNER, supra note 18, at 24.
analysis that enthroned universally valid reason; assumed passive, ra-
tional, utility-maximizing behavior; and demonstrated an inordinate
concern over the equilibria of comparative statics.”158 Scholars such
as Frederick Schauer,159 Adrian Vermeule,160 and Justice Antonin
Scalia161 have emphasized the second sense of formalism, although
both Justice Scalia and Vermeule arguably are significantly influenced
by neoclassical law-and-economics thought. The two variants thus
often overlap, especially because neoclassical law-and-economics
scholars have contended that bright-line rules lead to greater legal
certainty, predictability, and efficiency in market transactions.

The new legal realists’ primary target is the first view of formalism
embedded in neoclassical law and economics.162 There is a certain
irony to this challenge because some have claimed that law and eco-
nomics is a “realist” enterprise since it rejects formal, self-contained
doctrinalism. For example, Brian Leiter has dubbed law-and-econom-
ics scholars as realists in the sense that they, like the old realists, reject
the Bealist notion that doctrine is sufficient and autonomous and pro-
ceeds by deductive reasoning.163 But rejecting doctrinalism does not
mean that neoclassical law and economics is not formalist; it is formal-
ism on an instrumentalist base. Neoclassical law and economics
embraces the first version of formalism but advocates the second version
only if it serves the instrumentalist end of wealth maximization. Table
1 summarizes the difference between the new and old formalism.

New realists argue that neoclassical theory turns realism on its
head. They contend that neoclassical theory seeks hypothetical end-
states-of-affairs (wealth or welfare maximization) deduced from sim-
plicated assumptions rather than real-life facts and institutional
processes. New realists acknowledge that the new formalism differs
from the old because of its instrumentalist roots, but they contend
that the new formalism arrives at conclusions remarkably like the old
doctrinal formalism of the late nineteenth century. This tendency is
most striking in the way that the new formalism embraces the com-
mon law, justifying this embrace not on grounds of doctrinal auton-

158 Mercurio & Medema, supra note 6, at 209 (emphasis omitted).
159 See Frederick Schauer, Formalism, 97 Yale L.J. 509, 510 (1988).
160 See Vermeule, supra note 155, at 289 (advocating textualism in judicial interpreta-
tion on the grounds of institutional capacity and systemic effects, and concluding that
judges should “adopt an unassuming posture of rule-bound, relatively inflexible decision-
making, using a small set of interpretive tools and deferring to agencies and legislatures
where texts are anything less than clear and specific”).
161 See generally Scalia, supra note 40; Scalia, supra note 40 (exploring court-made law).
162 See Dagan, supra note 26, at 618; Leiter, supra note 136.
163 See Brian Leiter, Is There an ‘American’ Jurisprudence?, 17 Oxford J. Legal Stud. 367,
381 (1997) (arguing that law-and-economics scholars are realists). Joseph Henry Beale was
a leading scholar at Harvard Law School at the beginning of the twentieth century who is
often characterized as an exemplar of formalism.
NEW V. OLD FORMALISM

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Key concepts: Doctrine Efficiency Welfare

...efficiency. As Judge Posner wrote, “[T]he common law is best understood not merely as a pricing mechanism but as a pricing mechanism designed to bring about an efficient allocation of resources, in the Kaldor-Hicks sense of efficiency.”

In their survey of economics and the law, Nicholas Mercuro and Steven Medema thus also find that the neoclassical law-and-economics “literature on the efficiency of the common law bears more than a passing resemblance to doctrinalism and, in certain respects, functions as an attempt by the Chicago school to return to formalism and to autonomous legal thought.”

Just as the old doctrinal formalists had a preference for common law and a fear of legislation so, too, the new formalists have constructed theories of statutory interpretation that privilege the common law and narrow the scope of statutes so as to limit their “domain.”

Like the old formalists, the new formalists see statutes as reflective of politics, not law. Again like the old formalists, the new formalists attempt to constrain statutes’ reach through judicial interpretation, but now they do so on instrumentalist grounds, often in light of public-choice theory’s conception of a debased political process. These two moves are linked. As Mercuro and Medema note,
the view “that the common law is efficient serves as an ideological barrier to the general promotion of statutory law.” Although we realize that not all neoclassical law-and-economics scholars engage in such textualist readings and that not all textualists are informed by neoclassical law and economics and its antiregulatory orientation, we contend that there is a significant overlap that is not coincidental, to which new legal realists provide a response.

The varieties of new legal realism vary in the degree of their challenge to neoclassical law and economics, ranging from behavioral economists’ tending to see themselves as correcting neoclassical law and economics to legal-subject theorists’ rejecting neoclassical law and economics’ core assumptions. The different varieties also respond to distinct policy challenges, from attitudinalists’ questioning of some form of market failure, society need not rely on the legislative branch to adopt regulatory statutes or bureaucratic mechanisms to remedy these problems; all one needs to do is rely on the common law to generate the efficient outcome.”. Mercuro and Medema note that, for the Chicago school, “common law tends toward efficiency, whereas the machinations of the political process . . . suggest that the tendency of statute law is toward inefficiency.” Id. at 204.

169 Mercuro & Medema, supra note 6, at 125; see id. at 126 (“[G]iven the existence of some form of market failure, society need not rely on the legislative branch to adopt regulatory statutes or bureaucratic mechanisms to remedy these problems; all one needs to do is rely on the common law to generate the efficient outcome.”). Mercuro and Medema note that, for the Chicago school, “common law tends toward efficiency, whereas the machinations of the political process . . . suggest that the tendency of statute law is toward inefficiency.” Id. at 204.

170 As we note below, Judge Posner himself has become a pragmatist and is thus an antitextualist and has been criticized from those within neoclassical law and economics for this move. But compare the work of John Manning, one of the textualists who borrows from public-choice theory as support. See John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2415–17 (2003); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 19 (2001) (“Relying on the social choice theory developed by Kenneth Arrow and others, textualists argue that it is difficult, if not impossible, to aggregate individual legislators’ preferences into a coherent collective decision; moreover, legislative outcomes frequently turn on non-substantive factors, such as the sequence of alternatives presented (agenda manipulation) or the practice of strategic voting (logrolling).” (footnotes omitted)). Curiously, the idea that there is no collective legislative intent was a keynote of early realism. See Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870 (1930) (explaining why legislative intent is undiscoverable). As in the case of neoclassical law and economics’ instrumentalism, however, this move turns realism on its head, for it seeks to use this “realist” insight (no collective intent) to further formalist ends (to support a claim of deductive reasoning about texts). A new-realist view would accept the notion that there is no legislative intent but argue against textualism as capable of providing the determinant-deductive solutions to interpretive problems any more than legislative intent is capable of providing determinant meanings: one can pick and choose one’s texts just as easily as one’s friends in a legislative debate. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 13–47 (1994). See generally Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575 (2002) (using interviews with legislative staffers to provide a more textured picture of the legislative process and to provide empirical scrutiny of judicial assumptions).

171 See, e.g., Korobkin, Behavioral Analysis, supra note 54; Korobkin & Ulen, supra note 54, at 1053.

172 See Fineman, supra note 105, at 7–8 (explaining that neoclassical law and economics does not typically address unquantifiable public values).
the role of doctrine in courts, to new-governance scholars’ addressing failures of the regulatory state, to comparative institutionalists’ addressing the failures of single-institutional analysis, whether it focuses on court, state, or market failures. In all cases, however, neoclassical law and economics is viewed as radically insufficient and thus as potentially dangerous if its postulates are taken as truths. This has been the case when the alleged “utility” of the analytic model (which often assumes a frictionless world for the sake of analytic clarity) becomes reified in policy decision making. Neoclassical law and economics’ reasoning regarding rational, self-correcting markets provides a justification for policymakers and judges who make real-life regulatory (or nonregulatory) decisions.

Each of the varieties of new legal realism directly or indirectly challenges aspects of neoclassical law and economics’ reasoning on empirical and conceptual grounds. In particular, each challenges the assumptions that serve as axioms within neoclassical law and economics’ system of thought. Behavioral economists challenge neoclassical law and economics’ rational-actor model. Attitudinalists implicitly challenge the neoclassical law-and-economics notion of the efficiency of judging in the name of wealth-maximization.\textsuperscript{173} Contextualists and institutionalists challenge the possibility of an economics that does not compare institutional alternatives and their relative imperfections, or that fails to consider that individuals are vulnerable human beings who often have poor reasoning skills (however rationally calculating they may be, as the financial crisis has exemplified) and that individuals’ situations vary (so that some are in privileged or dominant positions vis-à-vis others). Like the old legal realists, new legal realists take aim at the “status quo bias” of formalist reasoning,\textsuperscript{174} a bias once entrenched in Herbert Spencer’s “laissez-faire” philosophy and its libertarian ideal and, subsequently, Chicago-school neoclassical law and economics’ recast exposition of that same ideal.\textsuperscript{175} Table 2 summa-

173 Cf. infra note 191.


175 Much of neoclassical law and economics came out of the University of Chicago at a time when markets were less in favor and its adherents were not in positions of power. See, e.g., George J. Stigler, Regulation: The Confusion of Means and Ends, in The Citizen and the
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rizes the differences between the new legal realism and the new formalism.

NEW FORMALISM V. NEW REALISM

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A. Judging

The old legal realists were enormously successful in positing a radical theory of judging as a challenge to formalist legal reasoning. This theory’s core claim is that doctrine alone cannot determine outcomes and that judges respond (and should respond) to facts and factual contexts.176 So, too, each of the varieties of new legal realism builds from this core claim. They do so, however, in new ways because each is responding to a new variant of “formalism”—a “textualist” variant with an instrumentalist rationale that limits the scope of judicial and legislative intervention in the market.

The theory of judging most typically associated with neoclassical law and economics differentiates between common-law judging and statutory and constitutional judging. First, as regards common-law judging, neoclassical law and economics posits a theory of market-driven efficiency, under which litigants repeatedly challenge ineffi-

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176 See Leiter, supra note 36, at 21–25.
cient doctrine and common-law judges respond accordingly. Like the old formalists, neoclassical law and economics valorizes the common law, but it does so not as inherently right or fair, but as efficient, leading (for Judge Posner) to “wealth maximization.” In this way, neoclassical law and economics again posits an institutional preference for the market and private ordering over the intervention of the administrative state. Second, and concomitantly, as regards statutory and constitutional interpretation, neoclassical law-and-economics scholars and judges often turn to textualism and its strict constructionist variant. Textualists contend that judges will be restrained from engaging in politicized “lawmaking” by standing closely to the text. As Judge Easterbrook wrote, statutes’ domains should be narrowed both because lawmaking qua lawmaking by judges is unaccountable and because such lawmaking, from a libertarian perspective, is inefficient. The result of limiting statutes’ domains is to privilege the market as an institutional choice for regulating social interaction, sub-

177 For an excellent overview, see generally Francesco Parisi, The Efficiency of the Common Law Hypothesis, in 2 The Encyclopedia of Public Choice 195 (Charles K. Rowley & Friedrich Schneider eds., 2004). For the foundational and related articles, see Posner, supra note 164. See generally George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977) (arguing that common law tends toward efficiency); Paul H. Rubin, Common Law and Statute Law, 11 J. Legal Stud. 205 (1982) (examining efficiency in common law versus statute law using changes in the costs of organizing interest groups); Paul H. Rubin, Why is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977) (showing that the efficiency of common law and the decision to use courts to settle disputes are related). For critiques of the efficiency hypothesis, both positive and normative, see Duxbury, supra note 136, at 411. R

178 See Duxbury, supra note 136, at 414 (“[M]odern Chicago and Chicago-inspired lawyer–economists reveal a clear preference for the common law over statute law as a system for the ordering of private affairs. . . . [O]ne prefers the common law as a system of private ordering because it is a matter of fact that, unlike statute law, it tends to be driven by the ethic of wealth-maximization.”). Similarly, during the Lochner era, common-law principles such as nuisance structured constitutional-law limits on public power, and lawyers sought to use common-law principles like the right to contract as significant limits on state power (even if they largely failed outside the labor context). See, e.g., Nourse, supra note 38, at 126–27. R

179 In constitutional interpretation, however, so-called textualist judges can be quite interventionist, such as Justice Scalia on the issue of the “taking” of property rights. See, e.g., Komesar, Law’s Limits, supra note 88, at 91. R

180 See, e.g., Scalia, supra note 40, at 17–25 (arguing that “the text is the law” and that deviation from textualism may lead a judge to render a decision based on what the judge thinks the text of the law should mean). R

181 Judge Easterbrook writes, My suggestion is that unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter in question outside the statute’s domain. The statute would become irrelevant, the parties (and court) remitted to whatever other sources of law might be applicable. Easterbrook, supra note 42, at 544. R
ject primarily to traditional common-law doctrines (such as nuisance) as opposed to legislative or administrative regulation.  

Vermeule provides a highly sophisticated version of formalism, which gestures toward new realism (for instance, he calls for comparative institutional and empirical analysis) but ultimately favors a "no frills" textualism.  

Vermeule prescribes the systematic use of formalism in judicial interpretation following a series of moves that bring him to decision theory, a branch of rational choice that is grounded in the basic premises of neoclassical law and economics.  

First, Vermeule starts from the new-realist premise that the proper approach to constitutional and statutory interpretation is a comparative institutional and empirical one. He ties this approach to two variables: the "capacities of interpreters and . . . the systemic effects of interpretive approaches."  

Second, Vermeule acknowledges that empirical work has been done on the impact of different interpretive methodologies. He cites the work of William Eskridge, which shows that judicial overrides are more likely to occur if judges adopt formalist "plain meaning" decisions, thus indicating that formalist readings are more likely to contradict congressional purpose and therefore be "countermajoritarian.")  

Third, Vermeule rejects such empirical work, although "among the best available," for a series of reasons, the most important being that it suffers from a "fallacy of composition: the assumption that a feature true of a subset of cases will hold true when generalized to all cases."  

Fourth, he offers no empirical work or empirical analysis of his own, but rather finds that empirical work generally cannot help courts because of the problem of "trans-science"; that is, he contends that the resolution of interpretive debates is "empirical in principle but intractable in practice."  

He thus, fifth, turns to the logic of decision theory and the theory of "second-best," pursuant to which rational decision makers maximize ex-


183 For a new-realist response, see William N. Eskridge, Jr., No Frills Textualism, 119 Harv. L. Rev. 2041, 2046 (2006) (reviewing Vermeule, supra note 155) (finding Vermeule's book to suffer from "agency nirvana"). Eskridge maintains that "[t]o reduce statutory interpretation to an institutional cost-benefit analysis threatens, especially in criminal cases, to anesthetize an arena of public inquiry that is relentlessly moral, normative, and socially constitutive." Id. at 2051.

184 See Douglas G. Baird et al., Game Theory and the Law 46 (1994) ("[G]ame theory shares its basic premises with classical economics.").

185 Vermeule, supra note 155, at 2.

186 Id. at 159–61 (citing William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991)).

187 Id. at 161.

188 Id. at 162.
pected utility in light of uncertainty and capacity constraints. On these grounds, he concludes that judges should stick close to the surface-level or literal meaning of clear and specific texts, resolutely refusing to adjust those texts by reference to the judges’ conceptions of statutory purposes, legislators’ or framers’ intentions or understandings, public values and norms, or general equity. Where texts are intrinsically ambiguous, the legal system does best if judges assign the authority to interpret those texts to other institutions... [such as] administrative agencies...[or] legislatures.

The new legal realists have resisted new-formalist theories of judging in several aspects, even if they have converged on no unified theory. The attitudinalists suggest that formalism can never be enough to constrain judges because of judges’ ideology. This point is as old as realism itself, but attitudinalists examine it in a new context using new methodologies. If their data is correct, neither text nor the dynamics of the common-law process restrains judges as neoclassical law and economics would predict. Instead, for attitudinalists, judging is explained primarily (or, depending on the scholar, at least in significant part) by political inclination. The behavioralists’ position implies something more accommodating. On the one hand, judges should respond to actual patterns of individual behavior as opposed to presuming rationality across the board; on the other hand, judges too are people with blind spots and thus exhibit predictable cognitive fail-

189 Id. at 80–81 (discussing second-best accounts of interpretation); see id. at 171 (discussing decision theory under uncertainty). Vermeule also discusses and applies cost-benefit analysis, the “principle of insufficient reason,” the “maximin criterion,” the importance of “picking” a clear rule, and the desirability of “fast and frugal heuristics.” Id. at 171–81.

190 Id. at 4.

191 See supra Part I.A.2; see also Thomas M. Keck, Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools, 32 LAW & SOC. INQUIRY 511, 528 (2007) (reviewing Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004); Jeffrey Rosen, The Most Democratic Branch? How the Courts Serve America (2006); Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law (2006)) (“Legal scholars and political scientists have long debated how to understand judicial decision making. One school, that of the formalists, argues that judges decide cases by interpreting legal sources... . A competing school, that of the realists or attitudinalists, argues that judicial interpretation mainly reflects the personal values of judges.” (quoting Klarman, supra)).

192 It is true that we are dealing here with statutes and administrative regulations, not common law. However, statutory provisions and regulations are often quite open-ended and remain unmodified over time, such that judges develop forms of common-law reasoning, building from precedent. Take the following three examples: Sections I and II of the 1890 Sherman Antitrust Act; SEC Rule 10b–5, 17 C.F.R. § 240.10b–5 (2008); and Title VII of the 1964 Civil Rights Act. The statutory or regulatory text of each, in itself, provides much less guidance as to the law’s meaning for application to specific disputes than does the corresponding jurisprudence that has developed over time.
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ures.\textsuperscript{193} As Christoph Engel and Gerd Gigheranzer write, behavioral law and economics’ use of heuristics applies to “those who make and apply the law as well as the general public to whom the law applies.”\textsuperscript{194} If the behavioralists were in charge, they would insist that legal doctrine and judging should account for these predictable failures of rationality and that, without accounting for such failures, no interpretation of text or pursuit of efficiency could possibly yield rational, much less optimal, results.\textsuperscript{195}

The contextualists are particularly pointed in their attack on textualism and deductive reasoning from first principles, and they argue that texts alone are insufficient to explain judging, whether descriptively or normatively.\textsuperscript{196} Many contextualists argue that, in practice, legal text often matters little to law’s subjects. First, people do not simply run to the statute books if they find themselves in a dispute; they are driven primarily by social norms, business norms, and lay understandings of the law and of legal rights.\textsuperscript{197} Second, if they turn to legal texts, they (and, more precisely, the lawyers they hire) tend to start with the facts and search for legal texts and interpretations that respond positively to their factual claims (they do not simply turn to legal texts and apply the texts deductively).\textsuperscript{198} Moreover, judges are situated decision makers; they respond to the facts of particular cases reflecting particular factual, social, and historical contexts.\textsuperscript{199}

\textsuperscript{193} See Christoph Engel & Gerd Gigheranzer, \textit{Law and Heuristics: An Interdisciplinary Venture, in Heuristics and the Law} 1, 4 (G. Gigheranzer & C. Engel eds., 2006) (noting that there are “two overlapping topics: heuristics as law, and heuristics as facts to be taken into account of by the law”).

\textsuperscript{194} Id.

\textsuperscript{195} See, e.g., Chris Guthrie et al., \textit{Inside the Judicial Mind}, \textit{86} \textit{Cornell L. Rev.} 777, 778 (2001) (“Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment.”); Rachlinski, \textit{supra} note 54, at 744 (“[Behavioral decision theory] certainly suggests that all social institutions, including courts, legislatures, and administrative agencies, will be subject to cognitive biases.”).

\textsuperscript{196} See \textit{supra} Part I.B.


\textsuperscript{198} See Leiter, \textit{supra} note 36, at 25 (“[T]he way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination . . . .” (quoting \textit{Frank, Modern Mind, supra note 29, at 102)).

\textsuperscript{199} See Catharine Wells, \textit{Situated Decisionmaking}, \textit{63} \textit{S. Cal. L. Rev.} 1727, 1728 (1990); \textit{see also} Cass R. Sunstein, \textit{After the Rights Revolution: Reconceiving the Regulatory State} 163 (1990) (defending interpretive principles for the regulatory state based on “constitutional norms, institutional understandings, and efforts to correct statutory failure”); William N. Eskridge, Jr. & Philip P. Frickey, \textit{Statutory Interpretation as Practical Reasoning}, 42
Other contextualists contend that the very idea of what counts as a legal text is contestable. They argue that the primacy of textual analysis is generated by law school education, which prizes logic over social knowledge, abstraction over engagement, and detachable texts over historical meanings.\textsuperscript{200} These contextualists find that, in this way, lawyers are socialized to privilege a vision of autonomous, rationalist, market-oriented individuals (and the values that accompany this vision) over the lived experience of social and institutional dynamics.\textsuperscript{201}

The institutionalists have, in parallel, put forward a different, complementary critique. Textual provisions and goal choices are necessary but insufficient; they, in themselves, run out, and judges must turn elsewhere.\textsuperscript{202} For neoinstitutionalists, judges work in institutional settings that shape their decision making.\textsuperscript{203} For comparative institutionalists, textual analysis tends to conceal institutional choice rather than to illuminate it. Ultimately, in individual cases, judges must determine such issues as whether to apply a rule or an exception, or a bright-line rule or a fuzzy standard, or how to balance conflicting principles.\textsuperscript{204} In doing so, judges must ultimately make

\textsuperscript{200} See Mertz, supra note 63, at 44–45.

\textsuperscript{201} See id. at 100 (“[L]egal narratives convert people into speaking subjects whose primary identity is defined by their location in an argument . . . . With this focus comes a concomitant, often tacit characterization of people as strategists . . . .”).

\textsuperscript{202} Komesar, supra note 47, at 209–71.

\textsuperscript{203} See, e.g., Rubin & Feeley, supra note 92, at 1991–92 (building from neoinstitutionalism and addressing the interaction of judges’ personal beliefs and the institutional setting in which they work, which includes doctrine).

\textsuperscript{204} Walter Wheeler Cook wrote, legal norms have “the habit of hunting in pairs.” Walter Wheeler Cook, Book Review, 38 Yale L.J. 405, 406 (1929); see also Dagan, supra note 26, at 615 (“For legal realism, the choice among rules competing to control the case is the major (and inescapable) source of doctrinal indeterminacy . . . .”); id. at 616 (“[F]act situations admit of more than one classification . . . .”); cf. Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., 2002) (1986) (discussing the balancing of principles); Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 Colum. J. Transnat’l L. 73 (2008) (discussing proportionality analysis and
institutional choices and determine which institution is relatively more likely to accomplish a given purpose in a given context. For example, applying a standard involving balancing allocates more authority to a court, while applying a rule or an exception allocates more authority to a legislature or the market. Doctrine tends to obscure these inherent institutional choices and their consequences. For institutionalists, law can be understood only in terms of the dynamic interaction of institutions. And for new-governance scholars, in particular, texts and judging are means by which law does not definitively decide a matter so much as catalyze other institutions to respond to the needs of legal subjects.

In sum, new legal realists generally oppose a neo-formalist conception of judging that is blind to real-life behavior and to the institutional implications of judicial decision making. Concepts (such as the rational actor, efficiency, and public choice in neoclassical law and economics, or the competing concepts that new legal realism puts forward, such as behavioralism, factual and social contextualization, and institutional choice) confer theoretical structure on judicial practice and shape what courts do through doctrine. Neoclassical law and

arguing that the key to its success is its social logic). For a current example, judges implicitly grapple with how to weigh a state’s interest in protecting security against individual liberty interests, and judges can use different categories, rules, and exceptions to reach different outcomes. See, e.g., Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008) (holding that noncitizen Guantánamo detainees have right to challenge their detention in federal court); Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (holding that military commissions established by Bush administration in Guantánamo violated Geneva Conventions); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that due process requires giving U.S. citizen held as unlawful combatant a meaningful opportunity to challenge his detention); Rasul v. Bush, 542 U.S. 466, 484 (2004) (holding that courts have jurisdiction under federal habeas statute to hear Guantánamo detainees’ challenges to legality of their detention); Joined Cases C-402/05 & C-415/05, Kadi & Al Barakaat Int’l Found. v. Council & Comm’n., 3 C.M.L.R. 41 (2008) (holding that U.N. Security Council sanctions against alleged terrorists were subject to European constitutional guarantees of fundamental rights).

KOMESAR, supra note 47, at 14–50 (using Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970), as an example of institutional choices in a case involving a cement plant’s air emissions). Judges such as Judge Easterbrook make an institutional choice, shifting decision making from a legislature to the market when they find through interpretation that a statute does not apply. Vermeule, in his defense of formalism on institutionalist grounds, also wishes to limit any expansion by courts of statutes’ domains. He advocates leaving interpretation of a statute’s purpose to legislatures (through subsequent clarifications) and to administrative bodies, as under the Chevron doctrine. See VERMEULE, supra note 155 at 1, 183–229.

Scott & Sturm, supra note 49, at 568–75.

economics produced powerful concepts that had tremendous effects on what courts do, including through judicial doctrine and interpretive method, helping to give rise to a new textualism. New legal realists challenge those concepts and put forth competing ones. Textualism, new realists contend, is insufficient for judging, both descriptively (judges always bring some concepts to bear, and these concepts shape the categories that doctrine uses), institutionally (the nature of judging tends to transform nonjudicial ideals into judicial ideals), and normatively (the choice of categories and law’s coercive force have real consequences for people).

B. The Individual and the State

If new realists typically resist their formalist forbears in matters of judging, they also resist the normative theories of the individual and the state implicit in neoclassical law and economics. That theory prizes individual autonomy and rejects the notion of an active state. Markets are prized as the default institution. Politics and law are generally considered inefficient, except to facilitate market coordination. The state, in the words of Philip Bobbitt, is a “market state,” which, “[i]n constrast to the nation state, . . . does not see itself as more than a minimal provider or redistributor of goods and services.” Under the economic model of politics known as “public choice,” the presumption is that most legislation is costly because it tends to distribute benefits to small, concentrated interests at the expense of large, latent majorities. In other words, true majoritarianism is unlikely. Indeed, as many public-choice theorists have insisted, there is really no economic reason for individuals to vote. This vision of the state clearly links to neoclassical law and economics’ vision.

208 See supra text accompanying notes 176–82; see also Mercuro & Medema, supra note 6, at 94–155 (discussing the role of the University of Chicago in the development of the law-and-economics movement).

209 See Mercuro & Medema, supra note 6, at 102 (stating that one key premise of Chicago law-and-economics theory is that “in formulating public policy, decision-makers should rely heavily on markets”).

210 See id.

211 See Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 88 (2008). Bobbitt maintains that market states are minimal states that “see their role as enabling . . . citizen’s interaction with choice. . . . The total wealth of the society is to be maximized . . . .” Id. (footnote omitted).


of judging. If political processes are viewed as inevitably malfunctioning, then judges should deploy interpretive mechanisms to allocate decision making to the market, limiting statutes’ reach.

New legal realists have attacked this vision in several different ways. Attitudinalists suggest that majoritarian politics is not only possible but pervasive, for good or for ill; they do so (at least implicitly) when they reject the notion that judges eliminate ideology or naked preference by formally interpreting texts, but rather (on average) reflect the politics of the party of the President who selected them. Behavioralists suggest that, to be responsive, a government must respond to how people actually understand the world, not the ideal of rationality that undergirds neoclassical law and economics’ theory of the market and the state. Under the behavioralist view, true majoritarianism is possible but subject to grave individual and collective malfunctions. The behavioralists aim to gain insight into law by emphasizing the gap between rationalist assumptions and real-life human behavior. While neoclassical law and economics defaults to a position that prefers market solutions, behavioral economists tend to believe in a more liberal interventionist state and urge that the state must intervene to correct not market failures but rationality failures.

What motivates much of behavioral economics is a “libertarian paternalism”: a concern with promoting individual freedom in the face of habitual individual failures. Sunstein and Thaler contend that the state and the private sector cannot avoid being “choice architects” that frame people’s choices. Therefore, the state and the private sector should use behaviorist insights to choose frames that can help to improve people’s lives, though without burdening people or blocking them from making choices as judged by themselves.

Contextualists and institutionalists tend to resist strong theories of the individual (such as the assumption that individuals are autonomous and unaffected by power and oppression) and of the state (such as that of public-choice theory). They insist that individual values

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214 See discussion supra Part I.A.2.
215 See discussion supra Part I.A.1.
216 See, e.g., Thaler & Sunstein, supra note 116, at 4–6; cf. George Lowenstein & Emily Haisley, The Economist as Therapist: Methodological Ramifications of “Light” Paternalism, in THE FOUNDATIONS OF POSITIVE AND NORMATIVE ECONOMICS: A HANDBOOK 210, 212 (Andrew Caplin & Andrew Schotter eds., 2008). (“Whereas the conventional justification for government regulation is to limit externalities—costs people impose on other people that they don’t internalize—to promote the public good, the justification for paternalism is to limit internalities—costs that people impose on themselves that they don’t internalize.”) (emphasis omitted) (citation omitted).
and priorities must be discovered, not posited, that political and administrative processes vary in terms of whether they are captured by concentrated minoritarian interests or majoritarian demands, and that individual situations vary in terms of their social contexts. Contextualists and institutionalists urge that it is essential to investigate particular situations and institutional processes to explain variation. For some contextualists and institutionalists, “private governments” hold more power than the institutions we typically associate with government; for others, the question is how institutions interact over time. Comparative institutionalists focus on the relative advantages of different forms of state and market institutions in different contexts. Such recognition informs pragmatist new-governance theory, which calls for institutional experimentation, including hybrid public–private governance mechanisms. The “state,” in this sense, is emergent; it emerges from the interaction of legal subjects and of different institutions. In a world of globalization, the state is constantly reshaped by its need to respond to global market processes and new publicly and privately made transnational legal orders. The “state” is not imposed from on high, either by governors or by legal theories. It emerges from real-world interaction.

Those new realists who focus on the legal subject are most insistent on the unavoidable role of structures and institutions and suggest some of the most radical changes to the concept of the individual and

219 See, e.g., KOMESAR, supra note 47, at 53–54 (positing a “two-force” model of politics involving minoritarian and majoritarian bias). See generally FARBER & FRICKEY, supra note 168.

220 See, e.g., Edelman, supra note 71 (discussing the creation of formal protections of due-process rights by employers); Shaffer, supra note 141 (discussing private law created and enforced by private institutions); see also Macaulay, Contracts, supra note 46, at 1169–72.

221 On new-governance theory, see supra Part I.C.2. On hybrids, see generally Trubek et al., supra note 49.


223 Cf. John Dewey, The Ethics of Democracy, in 1 THE EARLY WORKS OF JOHN DEWEY 1882–1898, at 227, 234 (1969) (“A vote, in other words, is not an impersonal counting of one; it is a manifestation of some tendency of the social organism through a member of that organism.”).
the nature of the state. For example, Fineman does not challenge the rational part of the rational-actor model but rather the implicit assumption that the rational actor is autonomous.\textsuperscript{224} She seeks to build a new ideal of the state that takes account of universal vulnerability—the proposition that we all have periods in our lives when we are completely dependent on others and that we all are vulnerable to dependency on others no matter how much we like to deny it (think of infectious diseases, terrorist attacks, or market meltdowns).\textsuperscript{225} The point for Fineman is not that democratic politics is impossible (as many public-choice theorists assert) but that we must focus our attention on the construction of institutions in a more activist state that is responsive to individuals who are connected to each other in complex ways over a lifespan.\textsuperscript{226}

In sum, the new legal realists, in opposition to the new formalists, tend to be far more comfortable with a neutral or positive view of the state than do the formalists. Yet, at the same time, they are arguably more skeptical toward the state than their realist forbears. Public decision makers offer no panacea; they too are subject to cognitive biases, interest group pressures, and institutional blindness. All institutions are imperfect; all policy choices comparative. New legal realists believe it prudent and necessary to engage these imperfections, whether the suggested remedy is through citizens’ and stakeholders’ deliberation and dialogue, the imposition of new choice “architectures,” or comparative institutional or empirical analysis.

C. Scholarship

The new legal realists’ scholarly commitments are broad, but they have in common a scholarly agenda that challenges the assumptions and methods of the new formalism and that stresses the role of critical engagement with institutional processes. Neoclassical law and economics proceeded by positing one or more assumptions (such as rational individual behavior and self-correcting markets) and a single principle (efficiency) and then reasoning deductively to reach specific legal prescriptions.\textsuperscript{227} This form of reasoning recalls the earlier warning of Dean Pound against formalists’ “mechanical jurisprudence,”

\begin{tabular}{l}
224 See Fineman, \textit{supra} note 105, at 1–2 (rejecting the notion of an autonomous subject). \\
225 See id. at 9–10. \\
226 See id. \\
227 In fact, until the rise of “empirical legal studies,” there was little empirical work to test neoclassical law-and-economics models. See, \textit{e.g.}, Jeffrey L. Dunoff & Joel P. Trachtman, \textit{The Law and Economics of Humanitarian Law Violations in Internal Conflict}, 93 Am. J. Int’l L. 394, 394 (1999) (“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.”).
\end{tabular}
which he caricatured as “the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of actual facts.”\textsuperscript{228} In formal neoclassical law-and-economics scholarship, there is no need to leave one’s desk to venture into the world and investigate. Neoclassical law and economics uses formal logic, whether under neoclassical assumptions and goal-positing or under the more recent use of game theory, to develop optimal rules (or a lack of rules) in the name of rational, self-correcting, and self-enforcing private orders.\textsuperscript{229}

New legal realists—a group that includes economists—challenge neoclassical law and economics’ mode of reasoning and its associated formalisms. As we have seen, new realists claim that embedded in such a scholarly agenda are assumptions about individuals, the state, and institutions that empirical scrutiny often belies. Variants diverge substantially, but, broadly speaking, we see three central repetitive themes of a new legal realism, all of which amplify old-realist concerns: (i) an emphasis on the need for empirical study; (ii) a focus on institutions, of which markets are only one form; and (iii) a grounding in philosophical pragmatism.

Many, if not all, new realists stress the importance of empirical engagement, although the nature of the empiricism and their actual engagement with it varies quite a bit. Attitudinalists use sophisticated regression analyses, behavioralists use controlled experiments, and many contextualists tend toward thick-description ethnography and process tracing. These empirical methods can be viewed as complements to each other in generating better legal analysis because they allow scholars to question their own biases and underlying assumptions. Some new realists thus stress “the power of social science methodology to push us beyond our personal politics or situations, to enforce a form of humility in which we must listen to voices other than our own.”\textsuperscript{230} Others refuse to accept a strong fact/value dichotomy in social science and thus insist that methods include some form of open-ended attention to actors presenting their views in their own terms so that the researcher’s frame does not predispose research outcomes.\textsuperscript{231} Typically, new legal realists contend that positing rationalist assumptions without observing actual behavior, like positing ends

\textsuperscript{228} Pound, \textit{supra} note 133, at 462.

\textsuperscript{229} We recognize that there has been a flourishing of empirical work using econometrics and building from neoclassical law and economics’ assumptions. We applaud the empirical engagement while addressing the risks of reductionism and scientism in such work in Part IV.


\textsuperscript{231} See Shaffer, \textit{supra} note 76, at 8–11.
without an understanding of means, is unrealistic and likely to fail.\textsuperscript{232} They argue that scholarship must avoid the temptations of top-down prescription without a grounding in the bottom-up appreciation of individuals, social contexts, and the dynamics of institutional processes.\textsuperscript{233}

For many new legal realists, \textit{institutions} and \textit{institutional analysis} thus play a critical role. Attitudinalists, such as Miles and Sunstein, are interested in panel studies precisely because they believe institutional forms can skew results. They show how different combinations of judges on panels tend to increase or decrease the role of ideology in legal decisions.\textsuperscript{234} Similarly, behavioral economists’ research on heuristics emphasizes the role of differences in institutional rationality\textsuperscript{235} and explores how institutions shape individual choice by creating choice architectures.\textsuperscript{236} For new-governance scholars, goals, such as what we want from our lives, are defined as part of a process, not as a deduction from a priori principles.

For comparative institutionalists, most centrally, the pursuit of any goal (whether it be efficiency or otherwise) necessarily involves institutional choice.\textsuperscript{237} Formalism represents one institutional choice that judges make through legal interpretation (the allocation of decision making to the market by limiting “statutes’ domains”). Yet the defects of this and alternative institutional choices must be evaluated with equal scrutiny. Government intervention is imperfect, but so are markets. Interpretive choices have institutional implications that must be weighed as imperfect alternatives in different situations; these

\textsuperscript{232} See KOMESAR, \textit{supra} note 47, at 3–13 (arguing that an understanding of institutional choice is essential to an analysis of law and public policy); Rubin, \textit{supra} note 48, at 1432 (asserting the need to look at institutional means); \textit{supra} note 215 and accompanying text.

\textsuperscript{233} See Erlanger et al., \textit{supra} note 45, at 339 (“[A]t a methodological level, a bottom-up approach requires that assertions about the impact of law be supported by research at the ‘ground’ level.”).

\textsuperscript{234} See Miles & Sunstein, \textit{Real World, supra} note 57, at 784–91.

\textsuperscript{235} Engel & Gigerenzer, \textit{supra} note 193.

\textsuperscript{236} See THALER & SUNSTEIN, \textit{supra} note 116, at 5.

\textsuperscript{237} Efficiency, for example, is an important concept, but it is insufficient. Individuals and societies first need to determine what they want, and then institutional processes must be assessed in terms of how they affect the pursuit of such aims. Engaging with those very institutional processes will, in turn, affect the definition of goals, leading to new institutional choices in a recurrent process between means and ends. For example, the efficient balancing of security and liberty is not deductively determinable because individuals vary in their perspectives and because the dynamics of participation within available alternative institutions affect the pursuit (and definition) of any goal. Moreover, other values besides efficiency arise because an efficient balancing of concerns can differentially (and oppressively) affect a minority group. Judge Posner later recognized the existence of more than a single value when he combined the goals of liberalism and efficiency in \textit{Overcoming Law}. See POSNER, \textit{OVERCOMING LAW, supra} note 5, at 22–24.
choices must not be mechanically applied. Although neoclassical law-and-economics scholars tend to engage in single-institutional analysis, favoring the market over other institutional alternatives, and some critical legal scholars tend to distrust all institutions as reifications of power, scholars with diverging normative predispositions and methodological approaches should be able to agree, at a minimum, that there are better and worse institutional choices that can be made and that these need to be appraised.

Finally, as with the original realism, there is a heavy dose of philosophical pragmatism inherent in the theorizing behind many of these approaches. Many contextualists trace their methodology to the notion that the simple dichotomy between fact and value is illusory; their inquiry thus oscillates between intellectual hypothesis and real-
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world testing and back again. Similarly, new-governance advocates specifically invoke the methods of James and Dewey in an effort to upend the “top-down” qualities of law and regulation. They argue that affected stakeholders should set their goals rather than have goals imposed upon them. Behavioral economists, in particular, insist that mind matters and that the interaction of mind and matter is crucial to understand; neither life nor law proceeds based on pure analytic logic, such as the rationalist postulates of neoclassical law and economics. The legal-subject theorists resist top-down theory because it fails to account for law’s subjects. New realists, in sum, are skeptical of models that presume known goals and the determinants of individual response.

IV
POTENTIAL PITFALLS

No project as diverse and ambitious as this one is without risks. In this Part, we turn our critical gaze on the varieties of new realism and highlight potential pitfalls common to the project. We first emphasize the perils of a new reductionism (a law “and” movement that, like “law and economics,” simply dissolves law into another discipline). We next consider the risks of a new scientism. Every legal age in the United States since the Founding has sported its science of law; lawyers have made sciences of common-law doctrine and of law in relation to economics and behavior. The question is whether we are aware of how dangerous a false science can be. We then consider the pitfalls of totalizing theory (strong theory that seeks to explain too much from a single premise), deliberately undertheorized frameworks (weak theory holding out the possibility of discovery but risking vagueness), and mediating theory (theory that does not reduce law to a single discipline but rather addresses the reciprocal interaction of law and forces external to it). We next examine the central question, and difficulty, posed by the old realism: the law/politics divide. We assess whether the new realists have satisfactorily attacked this problem and provide a guide for how to do so. Finally, we address the risks to a new legal realism that does not coherently

241 See supra note 85 and accompanying text; see also Erlanger et al., supra note 45, at 339 (“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.”).

242 See supra Part I.C.2.

243 See supra Part I.A.1.

244 See supra Part I.C.3.

link its more rigorous work on method to a critical interrogation of its implicit values.

A. The Perils of a New Reductionism

One of the most significant critiques of neoclassical law and economics is that it reduces law to a single science (economics), a single norm (efficiency), and privileges a single institution (the market).\textsuperscript{246} The challenge posed for new realists is whether they have simply replaced one scientific reduction for another. Both behavioral economists and attitudinalists borrow heavily from other academic disciplines; the former depend on research by experimental psychologists and the latter on research by political scientists.\textsuperscript{247} If they reduce concepts of judging, the individual, the state, and the law to rigidified forms derived from the latest findings in cognitive psychology or political polling, then attitudinalists and behavioral economists risk becoming the “new formalists” against whom others rail. Just as for neoclassical law and economics, the question is whether we can use and benefit from the tools that social science offers without reifying generalized findings as reality itself. Reification would give rise to new forms of policy bias, whether it be the debasing of the judiciary (based on attitudinalist samplings) or the privileging of paternalist administrative regulation (based on behavioralist insights regarding individual cognitive failures).

Contextualists and institutionalists do not share this risk to the same degree, although they face others that we discuss below. For example, to both, the kind of panel-effects studies that Miles and Sunstein prescribe as the “new legal realism”\textsuperscript{248} are important but insufficient. For many contextualists, these studies are insufficiently “empirical.” No study, they argue, would be complete if it did not also observe and talk to judges, clerks, and litigants, and, in this way, better avoid imposing the researcher’s concepts on the subjects of study.\textsuperscript{249} These contextualists thus reject reductionism and are skeptical of the simple importation of quantitative social-science methodology into law. They often stress the kind of theory-neutrality that is characteristic of ethnographic study.\textsuperscript{250} Under this approach, scholars do not begin with a theory of efficiency or morality or class domination or much of anything else. Instead, hypotheses develop inductively out of research—they emerge. Those hypotheses are then tested against the research, leading to new empirical engagement in a recursive process.

\textsuperscript{246} See supra Part III.
\textsuperscript{247} See supra Parts I.A.1, I.A.2.
\textsuperscript{248} See Miles & Sunstein, supra note 44, at 837–38.
\textsuperscript{249} See supra Part I.B.
\textsuperscript{250} See id.
It is precisely the refusal simply to borrow others’ data and theoretical assumptions, urge these contextualists, that can lead to true “discovery” of how law operates in a dynamic world confronting ever-new problems. Legal scholars must engage with such data and theories but engage with them skeptically, as pragmatists.

Institutionalists, like contextualists, do not borrow concepts wholesale from other disciplines and then apply those concepts to law. They do not ascribe to a single philosophy or methodology. Unlike many contextualists, however, institutionalists reject the notion that empiricism is possible without a clear analytic or theoretical framework, and, in particular, without a consciousness of institutional choice and effects. The institutionalists aim to provide theory and analytic frameworks that complement contextualists’ endeavors. Institutionalists would argue, for example, that the very choice to study a “panel” or “judging” is an institutional one. From a comparative-institutional-analytic perspective, all institutions are highly imperfect, so one must necessarily assess the relative defects of institutional alternatives for policymaking purposes. One also must assess how these imperfect institutions interact. Eric Posner points this out in his critique of the panel studies. He switches the institutional baseline from the panel to the entire Constitution and, having done that, examines how one’s institutional choice may lead to the opposite conclusion of that reached by the panel studies, concluding instead that judicial “bias” might actually be a constitutional virtue from a multiple-institutional perspective.

B. The Risks of Scientism

If there are dangers of reductionism, there are also the related risks of scientism. Empiricism is a word that covers a vast amount of territory, not only in terms of the methodologies it denotes but also the ideas it connotes. One of the ideas empiricism connotes is science. Law has had a tendency, since the days when William Blackstone reigned, to aspire to science. Neoclassical law and economics does so, as does cognitive psychology and, more recently, the new “empirical legal studies” movement with its large-N regression analyses. One of the grave dangers of a “your science is better than my science” approach is the risk that it hides important (and perhaps false) normative claims through the very categories it chooses. That

251 See supra Part I.C.
253 Many scholars engaged in empirical-legal-studies work within the assumptions of neoclassical law and economics (presuming rational utility-maximizing behavior and efficiency as the driving policy goal), employing econometrics to test their theories.
is, just by saying something is “science,” one asserts its authority, without having to justify that authority and without having to inquire into the assumptions built into the model.

Scholarship has a tendency to revert to disciplinary self-referentiality. Scholars can count votes in mathematically intricate ways and write thick narrative descriptions of messy relationships. Yet there is a smell of the lamp, a risk of implicit and self-interested disciplinary order about the idea that method will solve our problems, as if method has more power than ideas, money, votes, history, or action to shape the world. The question remains the extent to which behavioralists’ and contextualists’ methods can have purchase in a world of action. The world of law is a world of action, not simply of settlement and evolutionary consensus. In critiquing formalist concepts of the autonomy of law, new-legal-realist scholars who focus solely on method risk sealing themselves in their own autonomous methodological bubbles. Some new-legal-realist scholars thus foreground the importance of translating empirical work for the world of law and policy.

History is full of examples of sciences that have failed and sciences that have become quite dangerous—even when their methodologies were considered the soundest of the day. This is because of the garbage-in/garbage-out phenomenon. If the categories one uses in a study are themselves biased, inaccurate, or false, then the statistical form will simply add a veneer of legitimacy and power to what might

254 See, e.g., John O. McGinnis, Age of the Empirical, 137 Pol’y Rev. 47, 58 (2006) (“This accelerating power of empiricism does not guarantee enduring agreement on all aspects of the social policy and political structure. I am not here offering a fact-driven version of Francis Fukuyama’s End of History . . . . But the growing importance of factual investigation will generate a continuing tailwind for politics based on consensus and facts rather than special interests and special pleading.”). For a pragmatist view of science, see generally Susan Haack, Defending Science—Within Reason: Between Scientism and Cynicism (2003).

255 For a recent example of the challenges for empirics, Ron Suskind, a former official in the George W. Bush administration, recalls the response of an administration official to his journalistic commentary:

The aide said that guys like me were “in what we call the reality-based community,” which he defined as people who “believe that solutions emerge from your judicious study of discernible reality.” I nodded and murmured something about enlightenment principles and empiricism. He cut me off.

“That’s not the way the world really works anymore,” he continued. “We’re an empire now, and when we act, we create our own reality. And while you’re studying that reality—judiciously, as you will—we’ll act again, creating other new realities, which you can study too, and that’s how things will sort out. We’re history’s actors . . . and you, all of you, will be left to just study what we do.”


256 See, e.g., The Role of Social Science in Law i (Elizabeth Mertz ed., 2008).
be entirely false. Eugenics is the classic example of this kind of process. Eugenists were not crackpots; their founders created the science of statistics, and the leading geneticists of the first third of the twentieth century were all eugenists. Francis Galton, the founder of eugenics, also discovered the regression to the mean. Regression analyses, however, are only as good as the categories that one seeks to measure. If one puts in ideas like the “moron, idiot” (the eugenists’ terms, which they borrowed from the psychologists who created the first IQ tests), then one will get such ideas out, only valorized by a procedure that declares them science.

Scientism is a greater risk for some forms of new legal realism than others, particularly those with the strongest commitments to the statistical method. In many cases, the stronger the theory, as in the case of attitudinalism, then the greater likelihood is of significant error. By contrast, theories with the weakest opening assumptions or theories that appear theoretically naïve or deliberately undertheorized reduce this risk. Emergent research—research that uses categories that develop out of qualitative empirical engagement—will have the strongest possibility of reflecting what transpires in the world. Yet such research also faces its own challenges.

C. Totalizing Theory, Deliberately Undertheorized Frameworks, and Mediating Theory

One of the grave dangers of any strong theory of law is self-referentiality; the risk is that the theory will simply seek to prove its own worth, avoiding a truly impartial approach that would seek to falsify its own assumptions. Is it any surprise, after all, that political scientists focus on polls and parties and ideology; that economists focus on mar-
kets and prices and deadweight losses; or that sociologists repeatedly sound the death knell for law as relatively unimportant compared to “larger” social forces? Any attempt to undertake a newly impartial or objective study must take this self-referentialism into account. A truly positive analytic approach must explain variation, as any statistician will attest. Totalizing analytics risk serious error ex ante. Any explanation that simply reaffirms the self-referentiality of a particular discipline is suspect.

Here, again, the attitudinalists and the behavioral economists face the greatest risk of veering toward the self-referential.261 One consideration for both the attitudinalists and behavioral economists is to move to “mediating theory,” theory that does not simply seek to explain law through the eyes of another discipline. Rather, mediating theory mediates between the strong assumptions of self-referential disciplinarity—that only politics (or psychology) counts or only law counts—and seeks to account for both: that is, in terms of how law and politics (or psychology) interact. New-governance and legal-subject theorists face related charges if their theories and institutional prescriptions are based on normative predispositions such that they are not subject to evaluation and contextualization based on institutional experience.

The challenge for contextualists lies in the opposite direction: the tendency toward vagueness and lack of analytic power. Contextualists have known for some time of the “vagueness” problem, or what Robert Ellickson (citing Arthur Leff) called the “swamp” of law and society as opposed to the “desert” of law and economics.262 Unless one identifies principles from contextualization, how is one to learn, to pursue further study, or to make choices in a dynamic world? What payoff does engaged inquiry yield in understanding law in a more systematic way if the only thing produced is so complex that it cannot be translated beyond its four corners? Law and society has produced some of the most important research in the academy; it has shown that “[l]aw is not free,”263 that there are structures that support the

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261 For a critique of this kind of self-referentiality, see Friedman, supra note 55, at 262–63.

262 ELLICKSON, supra note 197, at 147 (“The late Arthur Leff, who read extensively in both, saw law-and-economics as a desert and law-and-society as a swamp.”).

“repeat play” of the haves against the have-nots. But contextualists must be analytically vigilant that their labors do not get lost in a miasma of detail.

In our view, contextualists’ most powerful contributions have been what we would call “emergent analytics,” that is, studies that not only describe the world but also discover new ways of looking at the world. Macaulay’s study of businessmen’s contractual relationships is the classic example. We call this an “emergent empirical analytic” because it “discovered” something in the world, and that discovery became integrated into a body of scholarship truly important to the field of contracts—relational contracting. The study “bridged” the gap between legal theory and the world. It offered powerful “mediating theory” that emerged from a consciously undertheorized methodology (refusing to start with a strong theory). In the pragmatist tradition of distrusting dichotomies, such as the dichotomy of “theory and practice,” Macaulay’s study provides an example of an engagement in theorizing as part of a dynamic, recurrent, interactive process with empirical assessment of practice.

D. Overcoming the Law/Politics Divide

One of the most basic intellectual divisions in twentieth-century American legal thought is the law/politics divide. For the old formalists, law (by which they meant the common law) consisted of principle and reason, in contrast to the deal-wielding and expedient compromises of politics. In other words, the private (common) law of contracts, tort, and property constituted law in its pure form, unlike the sullied world of public law. Federal judges coming out of this tradition brought common-law principles to their constitutional jurisprudence, as exemplified in the *Lochner* era. A central aim of the old realists was to unmask the implicit politics in the old formalists’ principles and mode of reasoning, which for them represented an antimajoritarian politics that favored capital over labor.

This law/politics divide plays a central role in both the “new formalism” and the “new realism.” Neoclassical law and economics (which gave rise to the new formalism) took as its founding premise that law necessarily imbibes policy because consequentialism cannot be avoided. On such grounds, neoclassical law-and-economics theorists advocate rules to further wealth-maximization goals, rules that

266 Cf. WILLIAM JAMES, *Pragmatism* 16 (Dover Publ’ns 1995) (1907) (offering pragmatism as a “mediating way of thinking”).
have taken a new-formalist turn as captured in the title to Richard Epstein’s book *Simple Rules for a Complex World*. The idea that legal decisions have political consequences is, as we have seen, an old-realist position, one that has led some to view neoclassical law and economics as a form of realism (despite the theory’s founders’ dubiety about that proposition).

The “new realism” likewise assumes that law and politics are linked conceptually. Each variety of new realism adopts a theory of judging in which something more than formalist, deductive reasoning plays a role—whether the “and” factor be behaviorism, political ideology, institutional commitment, or social demand. *The question remains whether any of these new approaches has fruitfully addressed the conceptual assumptions of the law/politics distinction so as to provide a theory of the mediation between law and politics.* All of the new-legal-realist theories start by assuming a dichotomous approach to law and politics: one is either doing something we put in the “politics” camp or doing something we call “law.” The extreme attitudinalists then reduce law to politics, defining politics as ideology and finding judging to be predicted by ideological orientation. The behavioral economists, in contrast, are more moderate, urging that politics should intervene through law to counter lapses of individual rationality (with such intervention typically defined in objective, technocratic terms). Contextualists tend to see politics, defined as social practices and norms, everywhere. Institutionalists tend to define politics by the structure of institutions, differentiating legislative and administrative processes from judicial ones.

Notice that each variety has a different view of what politics is: naked preferences, ideologies, social norms, institutions, practices. But notice as well that each variety starts with a basic dichotomy between what it refers to as “law” and what it refers to as “politics.”

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267 Epstein, *supra* note 182, at 53 (“[T]he simple rules are self-ownership, or autonomy; first possession; voluntary exchange; protection against aggression; limited privilege for cases of necessity; and takings of property for public use on payment of just compensation.”); see also Posner, *supra* note 10.


269 See *supra* Part I.A.2. For a counter to the tendency of some attitudinalists to ignore law, see generally Friedman, *supra* note 55 (arguing that positive scholars must take law and legal institutions seriously).


One of the reasons that the old realism floundered and left us with a nihilistic streak in critical legal studies was the grossly exaggerated idea that law could be reduced to politics. Any new legal realism must anticipate this objection and respond to it. In our view, new legal realism must refuse to reduce law to politics or vice versa, and it must recognize the simultaneity of law and politics as institutional and participatory practices. Courts operate differently from Congress because they have different institutional dynamics and structural constraints; speeches made on the floor of the Senate would sound perverse if they emerged from the mouth of a Supreme Court Justice. Law is thus defined, at least in part, by the internal, formal characteristics of legal institutions. Courts legitimize their decisions by using an objectifying discourse. They develop a form of reasoning (through doctrine) that is internal to itself and assertive of a particular kind of power. Congress speaks in a different voice, seeking an audience of popular affirmation, and thus its law sounds (and is) very different from the law that emerges from courts. Recognizing this difference returns doctrine to the fold, albeit in a new way: it is the recognition of the power of institutions to create self-reinforcing forms of thought that are themselves claims of power (Congress’s power of public affirmation, courts’ power of legal reasoning, and the Presidency’s power of moral suasion).

The simple dichotomy of law-versus-politics is not only undertheorized but also falsely dichotomized; the two constantly interact and operate in parallel, simultaneously. When courts engage in legal reasoning and develop legal doctrine, they are responding to the positions of advocates with particular ends. Courts’ discourse, in turn, has a normativity that feeds back into political processes. Jurisprudence is, in this way, not only context-dependent but also context-productive. Any theory of law, then, must hold law and politics together.

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272 See, e.g., The Moral Authority of Government: Essays to Commemorate the Centennial of the National Institute of Social Sciences 1–81 (Moorhead Kennedy et al. eds., 2000) (focusing on presidential leadership through moral authority).

273 To use a metaphor, electrons and protons are different from each other, but they are different in particular ways, and they exist simultaneously. Some of the social-norms literature, dubbed by Larry Lessig as the “new Chicago school,” touch on this, opening a progressive role for the state in shaping norms. E.g., Lawrence Lessig, The New Chicago School, 27 J. LEGAL STUD. 661, 661, 672 (1998) (identifying “tools for a more effective activism”); see Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. REV. 338, 354 (1997) (discussing “the ability of law to shape norms”); Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 947–52 (1996) (arguing that government action can advance desirable norms).

274 See Neil Walker, supra note 222, at 7 (citing Hans Lindahl, Immigration, Political Indexicality and a Politics of Indexicality, 2 Teoria e Critica della Regolazione Sociale 16 (2007)); see also JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY xi (William Rehg trans., Mass. Inst. of Tech. 1996) (1992). It is law’s normativity in terms of its formal characteristics that theorists such as
long enough to explain them both in terms that the participants in these processes would understand. This task is a challenge for each of the varieties of new legal realism; indeed, it is a radical challenge to the “self-satisfied” instrumentalism of the old realism, as it refuses to reduce law to politics. In our view, new-legal-realist theory must return doctrine provisionally to the fold as semiautonomous. Any other position risks either the dogmatism of the old formalism (in which the two are deemed to never meet) or the nihilism to which the old realism and critical legal studies found themselves reduced (in which law collapses into politics). New legal realism must address, in Dean Dagan’s words, the “constitutive tensions: between power and reason” in its very concept of law.275 This may require new methodological techniques, such as “double accounts,” which trace the simultaneous trajectories of law and politics in different participatory and institutional contexts.276 It may also require a kind of participatory reconstruction of legal constructs from reified legal terms to politically engaged action, as, for example, when one reconsiders political agencies not as functions but as forms of participation.277

The original realism considerably overshot its mark. The ravages of fascism and communism made clear the need for the rule of law. Similarly, in our own time, critical legal studies, although now domesticated in many forms, overshot its mark, leaving us in the land of the status quo.278 The way to avoid this problem is to do what appears banal but is really quite radical, at least for sociolegal theorists: to acknowledge that, in the end, although theory may depart far from law (as formally conceived), its purchase must lie partly in law, even in the dreaded name of “doctrine.” Realism influenced legal doctrine enormously by changing the vocabularies of the day from the common-law-based doctrines to sociologically based ones. Indeed, if one were to

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276 *See generally* Nourse, supra note 38 (offering a double history of *Lochner* in the nation’s political and legal history and considering various forms of relationships between legal ideas and a political order, such as amplification, condensation, and switching).


278 *See* Schauer, supra note 159, at 529 (discussing the rule of law).
measure the influence of realism on doctrine, it would be ironically long-lived, perhaps its greatest influence (even if not always a success).\footnote{See generally Nourse, \textit{supra} note 39.} A new-legal-realist approach that succeeds in infiltrating the very ways in which lawyers talk will be a strategy that has won something important.

New legal realists thus should not simply reject law’s formal qualities as meaningless. Law structures politics to constrain arbitrary decision making and demand reasoned justification. As Schauer has written, law’s formal characteristics are part of government rule in a nonarbitrary manner (characterized as “rules-based decision-making”), in which government action must be justified by reason.\footnote{See \textit{Schauer}, \textit{supra} note 159, at 510–11, 547–48.} The problem with formalism is when it becomes automatic and blind to the politics and institutional biases that drive it and the status-quo biases that it can legitimize. When formalism is used simply to limit the administrative state and allocate authority to private ordering and the market, then it is problematic. Seeing law in terms of rules and doctrine may be insufficient, but recognizing that different forms of institutions produce different forms of discourse as forms of power is central to understanding, evaluating, and critiquing law and its place. As Dean Dagan writes, law must be conceptualized in terms of an uneasy relation between coercion and reason.\footnote{See \textit{Dagan}, \textit{supra} note 26, at 637.} To paraphrase Llewellyn, actors struggle to capture the backing of power and law; but when they do, they simultaneously strive to persuade that the result will “serve the commonweal.”\footnote{K.N. Llewellyn, \textit{The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method}, 49 \textit{Yale L.J.} 1355, 1383 (1940).} New legal realists must reject both “purist alternatives” of law as power and law as reason.\footnote{Dagan, \textit{supra} note 26, at 637.} Law’s reason requires justification and, in this way, provides the possibility to question and challenge the exercise of power. Yet law’s reason is also put forward by real actors (in justification of the exercise of real power), and so law’s reason must always be subject to skepticism and critique. Only in this way may law be accountable to its subjects.

**E. The Risk of Evading Implicit yet Opaque Normativity**

While new legal realism refuses to believe that all law and politics should be determined by a single, consequentialist political goal, new legal realism also must not indulge in the fantasy of ethical relativity. As Felix Cohen, one of the leading figures of the old legal realism, wrote in evaluating its successes and challenges,
We never shall thoroughly understand the facts as they are, and we are not likely to make much progress towards such understanding unless we at the same time bring into play a critical theory of values. . . . The positive task of descriptive legal science cannot, therefore, be entirely separated from the task of legal criticism. . . . Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values.  

Legal realism died, in part, because it did not engage fully with the question of values that Cohen called for, the consequences of which were made clear with the rise of fascism in the 1930s.

New legal realists vary in how clearly they present their values, with some tending to be less than transparent about the values driving their scholarly commitments. As with old realists, many new legal realists tend to avoid the question of values, despite the fact that one can quite readily see that values play some role in all of their work. Attitudinalists embrace a form of positive political theory that asserts a value-free science but in fact makes assumptions about the relative values and nature of politics and law. Contextualists and neoinstitutionalists likewise tend to focus on social-science method, noting (if at all) the normative implications of their findings without directly defending a theory of value. Behavioral law-and-economists are more likely to posit their values, clarified by those who put forward the concept of “libertarian paternalism,” stressing the importance of preserving human choice, and thus liberty.  

Institutionalists vary. Those who focus on comparative institutional analysis provide an analytic framework for inserting policy goals based on values, but they do not posit those values—although the value of participation in the formulation of goals is inherent in some of their frameworks, especially in their more recent work. In new-governance theory, values emerge from stakeholder processes, but a theory of values is not stated transparently—other than their advocacy of participation, transparency, flexibility, learning, and accountability. Legal-subject theorists are by far the most openly normative, positing the value of responding to real-life human vulnerabilities and thereby taking a more activist stance than, for example, the behavioral-economics version of libertarian paternalism.

Other than the vulnerability theorists, new legal realists have not openly taken up Cohen’s challenge to engage with a theory of the present’s values, which, in our view, must be a “critical” one. By “criti-
cal,” we recall the often unexpressed idea of the “best” of realism, which sought to use legal discourse not simply to affirm the status quo but to question the existing order, to fight legal institutions’ inherent tendency to preserve the status quo, and to discover ways to think “anew” about what the present denies.

Although new legal realists often fail Cohen’s challenge directly, there remain hints that the new-realist approach, even if inarticulate on this point, is on surer footing than its formalist competitor, high deductive reasoning. To the extent that new realists stress bottom-up methods—for example, to assess participation in institutions or the power of social contexts to mold individual identity—they assume, in our view, a “working, real life,” baseline value of human liberty. Liberty does not come from high theory but instead requires engaging with how individuals actually live, work, and address each other in the world, in light of their vulnerabilities. In this sense, the methodological commitments of many new realists reflect, at the least, the operationalization of a critical theory of the value of human liberty.

As Sunstein explained in *The Second Bill of Rights*, one of the most important of the old realists’ claims was to critique laissez-faire in relation to poverty and liberty.\(^{287}\) This cannot be done by reducing law to social-science method, by assuming all law is politics, or by rejecting law as just another form of veiled power. These approaches are all evasions of Cohen’s hope for a theory of law’s implicit values, one that (in our view) retains a critical dimension. If history is any measure, these evasions may be dangerous, for in ceding the field of law’s virtues, one opens the world to those who would have no qualm with simply seizing law for its vices—its violence. History will judge, but there is reason to worry that, while the academy indulged for the past twenty years in postmodern skepticism about law’s “hollow hope,” those who had no qualms about the use of law as power took the field, openly embracing the power to torture.

V

A Dynamic New Realism for a New World Order

In conclusion, it is worthwhile to ask whether the “new legal realism” we see is capable of responding to real-world events. There are several factors that we believe suggest that new legal realism has a much better shot at responding to our new world order—the facts on the ground—than its competitor, the new formalism. New legal realism is, in pragmatist terms, a better fit for our times. In this Part, we move from the descriptive and critical to the prescriptive, setting forth our own particular view of a “dynamic” new legal realism. In the pro-

\(^{287}\) *See* Sunstein, *supra* note 27, at 25.
cess, we aim to synthesize the commitments that we believe new legal realists should share.

Law and economics in its neoclassical form was and is a theory of limited government in several senses of that term. It is a theory of limited power for judges (restraint in the sense of deference to private ordering, applying a common-law baseline). It is a theory of limited power for legislators (most legislation is viewed as burdening majorities to benefit minorities called concentrated interests). It is a theory that valorizes the common law (with its ancient antecedents) as opposed to statutory and administrative law (with its future orientation). It is a theory driven by the backdrop assumption of the power of markets to resolve all kinds of disputes more efficiently. It is a theory that suggests the power of the individual as an autonomous (nonvulnerable) actor and the primacy of liberty (defined in terms of autonomy) as a value.

We believe that the new world order directly challenges each of these assumptions. We have seen the power of politics: how massive numbers rose up on both sides of a historic presidential election. We have seen how proponents of theories of judicial restraint have, when it counted, done precisely the opposite: deciding a presidential election and finding new rights, such as the right to bear arms, thereby providing support for attitudinalists’ claims. We have seen how markets can dissolve from massive contests of greed, and we have heard mainstream economists admit that markets cannot regulate themselves. We have seen the power of economic globalization in the way U.S. subprime-home-mortgage defaults catalyzed a global-market collapse. Like the old realism, the varieties of new legal realism reflect their moment in time: addressing the re-triumphalism of mar-

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2889 See generally MARK ZANDI, FINANCIAL SHOCK: GLOBAL PANIC AND GOVERNMENT BAILOUTS—HOW WE GOT HERE AND WHAT MUST BE DONE TO FIX IT (updated ed. 2009).
ket laissez-faire (now chagrined), a cynicism toward an unresponsive state, and the hollowing out of traditional conceptions of law in light of new-governance challenges from below and the challenges of new global and transnational institutions from above—in sum, the new world order before us.290

Given these facts, we believe that new legal realism, in its various forms, holds out hope for a legal theory and scholarly and policy agendas that more adequately respond to a world in which politics is possible even if imperfect, in which judges do not feign restraint while recognizing the inevitable risk of partial judgment, in which markets are no longer assumed to self-regulate, and in which the power of globalization on all of our lives is recognized.

In our own view, this new legal realism should be a “dynamic realism” to fit with our times.291 In large part, we find many of the candidates for the title “new” legal realism to be far too wedded to “old” realism: the tendency to merge wholesale with other disciplines; to dissolve into simplistic instrumentalism; to fail to conceptualize new ways of analyzing law beyond functionalism; to idealize social “science,” as if the history of the twentieth century were not filled with monstrous abuses of scientism. In this Part, we first outline what we believe to be a dynamic new realism—one that, like the old realism, is empirical and contextual—but unlike the old realism is capable of recognizing the power of law. We emphasize “the interactive” because our theory is a dynamic, mediating one, which aims neither to reduce law to other disciplines nor assumes that law exists apart from the world. Similarly, this dynamic realism is not afraid, as some versions of the old realism were, to engage with a theory of values, but it is cognizant about the ways in which values are often insufficient without an understanding of the ways of institutional power.

Unlike the old realism, this dynamic new realism would recognize that law is important within its sphere, in part because legal institutions exert power—the power both of violence and of reason. Theo-

290 For an excellent analysis, see Walker, supra note 222, at 33–34 (“State law, including the frame of state constitutional law, is increasingly rivaled by law otherwise spatially extended, including sub-state law, regional supranational law, transnational domain-specific private ordering, hybrid public-private ordering and, increasingly, new forms of global legal regime that neither claim universality nor obviously emanate from nor respect the aggregative sovereign will.” (footnote omitted)).

291 We are explicitly beholden to William Eskridge for the term “dynamic,” based on our reading of his seminal work, Eskridge, supra note 170. Eskridge’s work prefigured, in our view, many of the ideas that we endorse here, not only in terms of the dynamic, changing quality of law (a central realist premise) and his pragmatism, but also his reliance on empirical work, see William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 334 (1991), and his sophisticated understanding of institutional dynamics, see William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 523–28 (1992), as means of critiquing existing theory.
ries that simply ignore law leave the field open to those who would manipulate the law to achieve not only bad ends, but also literally terrifying ones (even torture). In this sense, realisms that tend to explain law in terms of other disciplines are profoundly "unrealistic" to the extent that they leave law no place to exert its influence for ill or good. Law cannot be reduced simplistically to economics, political science, sociology, or anthropology. Neither the attitudinal model nor behavioral economics, neither large-N quantitative studies nor fieldwork is enough. Why? Because legal institutions have power, and that power may transform knowledge in ways that may make it completely unrecognizable to its authors. Like Ronald Coase's transaction costs, institutions—markets, courts, legislatures—have the ability to shape, reshape, and make unrecognizable any value, goal, or law. Lest one think differently, consider what has happened to the use of economic concepts within the judicial sphere—such concepts have been reduced to valorizing that oh-so-legal idea of the common law.

Law cycles recursively between society and legal institutions over time, which is why empirical inquiry is essential to understanding law's actual operation. This cycle is also why modern and ancient history are so essential to understanding law's best realism. If done right, such inquiry invites the scholar willing to reconsider the present by engaging critically with the most basic concepts that shape institutions, assumptions as fundamental as the idea of human autonomy rather than human vulnerability, or as basic as the law/politics divide. Any new realism should, in our view, be self-consciously transdisciplinary within law. It should move beyond the categories given to lawyers, of torts or crimes or corporations, and transdisciplinary across allied disciplines, refusing wholesale borrowing from sociology, psychology, or economics. More importantly, any new realism should recognize the historical "principle of simultaneity"—that history has shown that law and politics and society, not to mention markets and governments, cannot be reduced to one another because they interact simultaneously over time. The principles of their dynamic interaction must be identified, traced, and theorized.

In the course of this Article, we have suggested, if only preliminarily, conceptual moves that should be associated with a new realism and that were not associated with the old realism. We note, for clarity's sake, five such ideas that, together, diverge substantially from each of the present candidates for the title "new legal realism" and that offer scholars tools to bring different analytics to bear on existing problems. The first notion is recursivity: borrowing from Halliday, we believe that legal-reform efforts are dynamic and that they involve the
The second notion is the simultaneity of law and politics. One of the great (and unfortunate) habits of an age in which everyone is a “realist” has been to tend to reduce law to politics, but law and politics involve different institutional processes that interact simultaneously in real life; any dynamic new realism would attempt to capture this dualism by telling “double stories” of law and politics or “triple stories” of law, markets, and politics, rather than stories that reduce one to the others. The third notion is emergent analytics, which is the idea that any dynamic realism takes its concepts from the world and not from disembodied theory. Discovery requires, as Thomas Kuhn told his students, the humility to first acknowledge and then seek to explain that which appears incomprehensible, not simply to accept the status quo as inherently valuable or natural.

Fourth, functionalism is no longer enough: we cannot simply posit values and expect them to be realized, just as legal scholarship cannot be reduced to other disciplines’ methods and values. Unlike the old realists’ functionalism, dynamic new realism looks for concepts of “mediation” and “participation”—concepts that describe the ways in which law’s purposes are thwarted, amplified, condensed, or switched entirely once translated into the world. We should examine functions, or ends, in terms of how participatory structures of human interaction divert them; functional concepts are not the marching order of a dynamic new legal realism; the concepts of participation and accountability become central. Fifth, and perhaps most importantly, borrowing from Dean Dagan, we believe that law’s constitutive tensions between “power and reason, science and craft, tradition and progress” must be embraced not as a cause of a fundamental essentialist contradiction or defeat, but as productive and positive contradictions, reflecting constant struggle and dialogue about our deepest value commitments (as against value relativism, skepticism, and nihilism).

292 See Halliday & Carruthers, supra note 80, at 1192. Old legal realism had a dynamic element, but it remained highly undertheorized.
293 For a “double story,” see generally Nourse, supra note 38.
294 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52–53 (2d ed. 1970) (“Discovery commences with the awareness of anomaly, i.e., with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science.”).
295 For an example of mediating theory, see id. at 142–44 (discussing amplification, condensation, and switching).
296 See Komesar, Essence, supra note 88, at 2–3; Shaffer, supra note 207, at 67–69. To see how a functional concept can be transformed into a participatory one, see generally Nourse, Constitutional Anatomy, supra note 277 (describing the separation of powers not as a function but as a form of participation); Nourse, Vertical Separation, supra note 277.
297 Dagan, supra note 26, at 610.
The following table summarizes the key concepts of a dynamic new realism.

**NEW DYNAMIC REALISM**

<table>
<thead>
<tr>
<th>Individual</th>
<th>Subject to institutional influence and vulnerability</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>Institutions that support resilience; all institutions subject to malfunction</td>
</tr>
<tr>
<td>Scholarship</td>
<td>Empirical but non-reductive, recursive studies</td>
</tr>
<tr>
<td>Key Concepts</td>
<td>Participation, mediating theory, recursivity, simultaneity of law and politics</td>
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If these are our own views, we also share the sentiments of many of those who call themselves “new legal realists” in their critique and responses to the new formalism. We summarize these commitments as typically, if not universally, shared by new legal realists:

*New legal realists neither romanticize democracy nor assume its futility.* A good deal of economic theory has posited the futility of basic notions associated with democracy, such as voting and majoritarian legislation. New realism does not assume from the start that democracy must run like a competitive market, even if the new realism is not naïve about the ways in which institutional structures may protect the “haves” from the “have nots” and produce systematic malfunction in law and politics. A dynamic realism will engage with the need for regulation but consider it in the light of human vulnerability, limited cognition, and asymmetries of power (not to mention the pathologies of institutional structure and incentives); it will recognize the abuses of power by both majorities and minorities.\(^{298}\) A dynamic realism calls for regulation responsive to new information and public input\(^ {299}\) and resilient enough to withstand great and unexpected crises based on known vulnerabilities.

\(^{298}\) *See supra* Part III. It is noteworthy that President Obama appointed Sunstein, a self-designated new legal realist and proponent of the incorporation of behavioral law and economic insights into policymaking, to head the Office of Information and Regulatory Affairs (OIRA). Jeff Sommer, *When Humans Need a Nudge Toward Rationality*, N.Y. TIMES, Feb. 8, 2009, at BU4, 2009 WLNR 2490951 (describing work of Richard Thaler and Cass Sunstein and noting Sunstein’s appointment as administrator of the White House’s Office of Information and Regulatory Affairs). OIRA is responsible for reviewing all agency draft regulations before they are published to ensure that they comply with the President’s Executive Order for regulatory policymaking. In our view, the Obama administration brings to Washington views toward government’s role that have more of a new-realist orientation, in stark contrast with those of its predecessor.

\(^{299}\) Such responsive regulation would include new internet technologies to catalyze an oscillating conversation between law and its citizen-subjects.
New legal realists neither tout an implausible stimulus/response theory of legal reform nor deem law inevitably ineffectual. Consequentialism in its cruder forms assumes that changes in law yield immediate changes in behavior because they produce incentive structures to which individuals respond, resulting in preferred policy outcomes. This is a particularly strong aspect of neoclassical law-and-economics price theory, which conceptualizes law as a price.\textsuperscript{300} New legal realists have theorized why the crude view is incorrect—that psychological constraints (and failures) of individuals make it impossible for individuals to perform all the necessary mental calculations; that social contexts transform law’s project in ways that cannot be foreseen; that political attitudes inevitably help shape law’s application; and that institutions mediate the force of law.\textsuperscript{301} Dynamic new realism posits that institutions—be they social or political institutions,—pose important mediating forces between law and its realization; these are the much-vaunted “transaction costs” to which legal theory must attend.

New legal realism does not ignore the power of markets for good or ill but insists that law must exist not simply to facilitate markets but also to constrain them. Financial capital rose to prominence at the turn of the twenty-first century just as it had done at the turn of the twentieth. CEO salaries saw few limits, thanks to rigged incentive packages, while worker salaries stagnated. Worker job security plummeted while executive golden parachutes ballooned. Income inequality gaped. From a behavioralist perspective, new legal realism informs us how “animal spirits” can consume markets, with individuals from common home owners to sophisticated investors following blindly.\textsuperscript{302} From a contextualist perspective, new legal realism tells us that the uniform privileging of markets as efficient and self-correcting does not accord with reality. New legal realists recognize that markets work for good and ill and thus require oversight, transparency, and regulation. A dynamic new realism posits that the structure of mediating institutions (from corporate boards to credit-rating agencies to the interaction of disparate government regulators) is central to policy analysis in the economic arena.

New legal realism does not denigrate individual effort nor assume that individuals live alone on islands, especially in a globalizing world. Individuals have always been vulnerable to sickness, disease, and old age. Today, technological advances and global connectedness offer new hopes as well as new risks. The world is a highly interdependent place. Individuals are vulnerable to events across time and space, including national boundaries. Poison in China finds itself, in days, in

\textsuperscript{300} See Posner, supra note 164.
\textsuperscript{301} See supra Part III.A.
\textsuperscript{302} Akerlof & Shiller, supra note 1, at 1–7.
American toys. If Iceland stops buying U.S. government bonds, the U.S. economy implodes. American exceptionalism (whether real or perceived) has its limits. When the U.S. government authorizes torture, its reputation and authority decline, increasing demand for military expenditure and jacking up the national debt. A new legal realism must thus turn its gaze to global and transnational institutions, as well as national ones. A dynamic new realism must address the risks and opportunities of institutional development at the transnational and global levels to deal with these challenges, including the challenges that such institutional developments present to our very conceptions of law and law’s legitimacy.

New legal realists refuse to believe that all law and politics should be determined by a single, consequentialist goal, but they also refuse to indulge the fantasy of ethical relativity. In Part IV, we pointed to the risks of evading a critical engagement with the issue of values. By engaging with “values,” we mean guiding “end-in-view” values in the pragmatist sense, and not an “end state of affairs,” as in a final solution. A dynamic realism thus combines a critical engagement with values while stressing that the operationalization of such values requires close attention to psychological and social context and institutional mechanisms that facilitate participatory processes for deliberation over the means to obtain them. A dynamic new realism thus does not demand a decline into cheap relativism but rather a justification of ends to law’s subjects who, in turn, must have means to participate in the determination of how to achieve those ends.

303 China’s Toxic Toymaker, ECONOMIST, Aug. 18, 2007, at 58 (describing Chinese-made toys containing lead).
304 Cracks in the Crust, ECONOMIST, Dec. 13, 2008, at 81 (describing layoffs resulting from Iceland’s financial crisis); James Surowiecki, Iceland’s Deep Freeze, NEW YORKER, Apr. 21, 2008, at 50 (attributing Iceland’s economic crisis to the U.S. subprime debacle).
306 See supra Part IV.E.
In our view, a dynamic new realism embraces the value of individual liberty while critically grounding this concept in a real-world perspective of human vulnerability and mutual interdependence, whether that vulnerability be viewed in cognitive, social, or institutional terms. Such a conception has powerful ties to theories of liberty based on furthering people's real-life capacities, providing a vision (in Amartya Sen’s terms) of “expanding the real freedoms that people enjoy,” thereby facilitating their functional capacity to make real choices in furtherance of what they value. A dynamic realism, moreover, recognizes that liberty alone is not enough: other concerns may be in tension with liberty, whether they are conceived in terms of separate values or as aspects of liberty itself. These values include concerns over equality, efficiency, and security.

New legal realists refuse to indulge in the nihilistic idea that law means nothing, nor in the romantic idea that heroic Dworkinian judges or technocratic expert administrators will solve our problems. A new legal realism must engage with the mutually constraining and liberating interaction of law and politics by theorizing the mediating forces between them—psychological, ideological, social, and institutional. By developing mediating theories, new legal realism will help us understand the translation of law into the world, rather than assuming perfect reception or inevitable failure. A dynamic new realism distrusts the statics of pre-

307 See Amartya Sen, Development as Freedom 3 (1999). Sen and Martha Nussbaum define liberty in terms of “capabilities,” such that government has a role in furthering them. For Sen, a person’s capability reflects her “ability to achieve valuable functionings and well-being.” Amartya Sen, Freedom of Choice: Concept and Content, 32 Eur. Econ. Rev. 269, 278 (1988); see also Habermas, supra note 274, at 403 (“[L]egal freedom, that is, the legal permission to do as one pleases, is worthless without actual freedom, the real possibility of choosing between the permitted alternatives.”) (quoting Alexy, supra note 204)); Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 4–15 (2000) (providing an overview of the capabilities approach in general and of the philosophy of Sen and Nussbaum); Amartya Sen, Commodities and Capabilities (1985); The Quality of Life (Martha Nussbaum & Amartya Sen eds., 1993); Sunstein, supra note 27, at 25 (noting that in his critique of laissez-faire in relation to poverty and liberty, Sen “is reiterating the realists’ most important claim”); Iris Marion Young, Justice and the Politics of Difference 39 (1990) (“Justice should refer not only to distribution, but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation.”).

308 For example, new realists may take different positions on the complex issue of equality. For philosophical discussions, see T.M. Scanlon, What We Owe to Each Other 78–107 (1998) (discussing the interaction of values for value pluralists, including liberty and equality); Larry S. Temkin, Inequality 19–52 (1993) (discussing inequality as a multifaceted concept). Inequality nonetheless is an animating concern. As Isaiah Berlin wrote, “Pluralism, with the measure of ‘negative’ liberty that it entails, seems to me a truer and more humane ideal . . . . It is truer, because it does, at least, recognise the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.” Isaiah Berlin, Liberty 216 (Henry Hardy ed., 2002).
dictive theory, be it “positive political theory” or otherwise. Our analysis of the “is” and “ought,” and more broadly of theory and practice, must ultimately be pragmatically intertwined.

CONCLUSION

Our goal in this Article has been to map the exciting new-legal-realist work that is being done and its response to the new formalism of neoclassical law and economics, and, in doing so, bring together and evaluate that work with the aim of moving toward a new synthesis and analytic direction.

New legal movements do not arise in the abstract. They resonate if they fit a particular political moment in light of their confrontation of a dominant theory and practice. Old legal realists played this role in the 1930s. So, in our view, will the new-legal-realist movement today. In 1995, in his book Patterns of American Jurisprudence, Neil Duxbury concluded with chapters on law and economics and critical legal studies. He then suggested that if there were to be a next chapter, it could well involve a new pragmatism. In our view, it is time for a new legal realism that is empirically grounded, philosophically pragmatist, institutionally cognizant, and critically ambitious.

Dynamic new realism seeks “a new paradigm” beyond the alternatives of what Habermas calls “bourgeois formal law” and “the purposive programs of welfare law” (old realism’s New Deal administrative state). This new paradigm entails a recursive understanding of law, of how law both responds to and shapes individual and political behavior, and of how law and social and institutional structures reciprocally interact. In this effort, new forms of analysis will emerge that will reconstruct law’s concepts in their participatory, human, and vulnerable forms. This analysis will “discover” new values and concepts from the world in “emergent analytics,” rather than prepackaged statistical programs or canned histories. Law will once more take a lead in its self-understanding; it will not bow simply to other disciplines but will help to transform them.

Dynamic realism, like the broader category of new realism of which it is part, takes its lead from the world, not ethereal, dogmatic,
and academic theorizing. It rejects the privileging of markets by neoclassical law and economics and rejects left-leaning postmodernism, which sees power corrupting all institutions, from markets to courts to bureaucracies to new-governance alternatives. Such a new legal realism stresses the importance of institutions not as essences but as mediating influences, and it seeks to explain the variation in law’s manifestations by the study and theorizing of such mediating forces. This new legal realism emphasizes the importance of empirical engagement, including the bottom-up emergent analytics we have highlighted, but it does not accept that social science is ever impartial. All social science is partial and cannot help but be so; that is social science’s dilemma. Such a new realism nonetheless embraces empirical study because (again) there is no choice if we wish to make more informed decisions. Such a new realism thus makes two additional moves: it turns its critical gaze on itself (including the risks in its empirical work), and it is fundamentally pragmatic, stressing the importance of revisability and learning. It accepts neither the head-in-the-clouds empiric-free reasoning of much of legal scholarship nor the hollow hopelessness of some in social science. It is ultimately optimistic, maintaining that law is a world of action and our responsibility is to participate in it.