New Legal Realism and International Law

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Distinctive features of a new legal realist approach to international law are its commitment to empirical work, its assessment of the role of institutions in mediating the pursuit of social goals, its engagement with critical analysis in a self-reflective manner to question incoming biases, and its grounding in social problems in a pragmatist vein. The purpose of engaging in research in a new legal realist vein is to uncover issues and perspectives through empirical engagement about which we are otherwise ignorant, permitting our incoming predispositions (inevitable no matter how neutral we try to be) to be challenged and transformed. This is particularly important in a world characterized by constituencies with different priorities, perspectives, and opportunities to be heard. The chapter situates new legal realism in relation to the original legal realist movement in the United States and the current transnational context. It provides research examples of what a new legal realist approach to international law offers.

To tap the spirit of a new legal realist approach to international law, let us begin with two quotations from two non-legal sources that capture two defining aspects of a new legal realism. The first is from a letter written by Anton Chekhov (1977, 627) to Alexey Suvorin in 1892: “Let her first say what is, and only then I will listen to what one can and must do.” Those words parallel a famous statement of Karl Llewellyn (1931, 1236), a leader of the original American legal realism, who maintained: “The argument is simply that no judgement of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.” Llewellyn thus called for “the temporary divorce of Is and Ought for purposes of study.” The statement of Chekhov, a doctor, is particularly relevant to a field — that of law and legal scholarship, and particularly international law and international legal scholarship — which is dedicated to prescriptions, yet spends far too little time on diagnoses. Let us call the Chekhovian approach the empirical strand of new legal realism.

The second complementary slant comes from the writer James Baldwin who, disillusioned with American racism, left the United States (U.S.) in 1948 for
France where he lived much of his remaining life as a cosmopolitan outsider seeing things anew. Baldwin is quoted as saying: “The purpose of art is to lay bare the questions which have been hidden by the answers.”

Let us paraphrase that statement to reflect a central, pragmatist tenet of new legal realism: A purpose of engaging in research in a new legal realist vein is to uncover issues and possibilities to which otherwise we are ignorant, to which otherwise we are blind because we are caught in a single way of viewing a situation. That is the creative aspect of a New Legal Realism, and it is uncovered through a critical, experimental approach to learning. Let us call the Baldwinian component the Deweyan pragmatist strand of new legal realism.

The purpose of engaging in research in a new legal realist vein is to uncover new vantages and perspectives through empirical engagement, permitting our incoming predispositions (inevitable no matter how neutral we aim to be) to be challenged and potentially transformed (Nourse & Shaffer 2014). This approach is particularly important for the analysis of international law in a world characterized by constituencies with differing priorities, perspectives and opportunities to be heard in which the most read and influential international law scholarship tends to be written by those from particular backgrounds working in a particular language, English. This chapter situates new legal realism in relation to the original legal realist movement in the United States and the current transnational context. It provides a number of research examples of what a new legal realist approach offers.

1. New Legal Realism, Old Legal Realism and International Relations Realism

Legal realism rose and gained prominence at the time of social ferment in the 1930s, a time where progressives pushed for social legislation to address the hardships and inequalities of the Great Depression following the Roaring 20s and the earlier Gilded Age. It responded to what it viewed as formalist legal scholarship and the conservative social policies that legal formalism tended to support. It responded to the legitimization of inequalities that formal law gave with its constitutional doctrines of liberty of contract and its restraints on federal and state legislation to address them. It critiqued formalism for its failure to consider the operation of power in the private market place, and thus the law-in-action and the consequences of the legal doctrines and interpretive methods legal formalists used. It addressed, for example, issues of the work place, so that legal doctrines would no longer block legislation on child labor, maximum hours, and collective bargaining.

Legal realists argued, among other matters, for the need to study the context in which law is made, operates, and has effects before making any proposition about what a law means or should do. For a legal realist, the focus (in terms of “Is”) lies in the social context in which law operates, and not only in the formal assessment of what the ‘law’ says in the ‘books.’ Legal realists thus called
for empirical study of the contexts in which law operates (our Chekhovian strand) and pragmatist learning to address the challenges society faced (our Baldwinian strand). Legal realism gained ascendancy with the political victories of Franklin Delano Roosevelt, his policies in the New Deal, and the rise of the administrative state in which many legal realists served. Given the dire domestic economic straits and inward-looking focus of the time, the original legal realism had no interest in international law. It was a U.S. domestic law movement focused on domestic law in a domestic context and was unengaged with the broader international and transnational challenges of the interwar period.

What is new in a new legal realism for purposes of the study of international law is primarily, on the one hand, the shift in temperament within the legal academy toward empirical work and the development of empirical methods in the social sciences more generally, and, on the other hand, the shift in social relations so that international law today has greater implications across substantive areas, including the areas of business, regulatory, and human rights law.

First, what is “new” in new legal realism is arguably most importantly, the empirical turn in legal scholarship and developments in empirical methods. While the legal realists called for greater empirical work, so that the practice (and thus the meaning) of law would be better understood in context, they were less accomplished in practicing what they preached. They were less accomplished, in part, because the social sciences themselves were much less developed. New legal realists engage in empirical work, unlike many of their old legal realist predecessors.

Second, today we live in a different global context, one characterized by greater transnational social connectedness where policymakers across legal domains increasingly view problems in transnational and global terms. Accordingly, the legal academy and the social science disciplines, including economics, political science, sociology, and anthropology, increasingly recognize international law’s significance (Shaffer & Ginsburg 2012). The old legal realists wrote at a time of national autarchy and retrenchment. The new legal realists write at a time of economic and cultural globalization in which the ambit of international law covers most substantive domains of law (Halliday & Shaffer 2015).

The greater recognition of international law’s role today also reflects a shift in views from the time of the Cold War in which another form of realism dominated, that of international relations (IR) realism. Legal realism is not IR realism and should not be confused with it. IR realism views international law as epiphenomenal because state power, and not law, determines international relations outcomes. If international law is epiphenomenal, then there is little reason for social scientists to study it other than to prove it is epiphenomenal.
International relations realism rose in the 1950s and 1960s to critique the legal liberalism of those who elided issues of power and interest in negotiating and relying on international law agreements, particularly those affecting a country’s national security. IR realism did not focus on international economic law that it viewed as an issue of low politics, but when it did, it addressed the role of self-interest and balance of power, and remained wary of strong international institutions. Many of its adherents were political conservatives concerned with the spread and expansion of the Soviet block and, more generally, communist ideology.

Legal realism has parallels with international relations realism in that both respond to formal idealist views of law, whether formalism (for legal realism) or international law liberalism (for IR realists). They both attempt in different ways to get underneath what shapes international law and how it operates in practice. In doing so, both are interested in the interaction of power and interest with law. But there the resemblance ends, in part because legal realism and international relations realism arose in different moments in response to different contexts.

Legal realism differs from IR realism in two ways. First it arises within the legal academy and thus law, and not power, is its central unit of analysis. Second, it is interested in the prospect of international law in shaping outcomes, including through doctrine, legal institutions, and legal professionals. It is not idealist in that it calls for conditional theorizing of international law’s role, and incorporates both the study of power and legal reasoning in its analysis. But it aims to study when and how law matters.

Like the old legal realism, new legal realism aims to build bridges with the social science disciplines. Those bridges, however, are to facilitate a two-way learning and not the mere adoption of lessons from the social sciences, such as international relations for international lawyers. New legal realists both incorporate social science findings in their study of international law, and pay close attention to such traditional international law matters as doctrine, institutions, and professions to assess the ways in which international law can shape social understandings and practices in different domains. New legal realism thus does not subsume law under the language of another discipline, such as power in international relations.

Although one sometimes hears within the legal academy that “we are all legal realists now,” (Leiter 1999, 261) that is far from the case. On the one hand, legal formalism without attention to empirical context and processes arguably remains predominant in much of the legal academy, including as applied to the study and teaching of international law. On the other hand, even those scholars who aim to move beyond legal doctrine often pay little heed to the empirical study of international law.
The gap between the focus of international law scholars and social sciences, for example, is reflected in their different treatment of the concept of method. In the social sciences, the term method refers to different approaches to empirical study, such as quantitative, qualitative, and experimental methods. But in international law, the term method traditionally refers either to techniques for locating legal sources, or to an analytical or theoretical method. For example, in 1999, the *American Journal of International Law* aimed to break new ground by publishing a “Symposium on Method.” The symposium’s introduction first noted the conventional definition of “methodology of legal research” as the “ways to identify and locate primary and secondary sources.” (Ratner & Slaughter 1999b, 292 (citing Rosenne 1984)). Such use of the term focuses on the formal sources used to determine what the applicable law is. Such empiricism is entirely internal and self-referential to law, looking only to legal pedigree and thus only to law books. The introduction then noted how the legal academy has moved beyond such a formalist conception to include a heterodox range of different analytic and theoretical frameworks as “methods.” The subsequent articles separately presented these analytic methods, and respectively covered Positivism, Law and Economics, New Legal Process, Critical Legal Studies, Rational International Relations Theory, Feminist Methods, and the Yale School of Policy-Oriented Jurisprudence. The issue concluded with an essay entitled “The Method is the Message” (Slaughter & Ratner 1999a). It was an ironic title for a concluding essay, because neither the conclusion nor any of the articles in the special issue addressed method in the way that the social sciences do — which in itself was a message.

2. Four Attributes of a New Legal Realism

New legal realism as applied to international law, in my view, should include four key attributes. First (and most importantly) it should call for and engage in empirical work to understand how international law obtains meaning, operates, and develops over time. Second, and complementarily, it should take seriously critical concerns about the biases inherent in methods, and thus engage with critical analysis in a self-reflective manner to question incoming biases that a researcher brings, but without losing sight of the importance of empirical inquiry. Empirical work should have a critical, reflexive, pragmatist edge so that results of inquiry are treated as provisional and probative and the researcher remains open for fresh analytics to emerge. Third, it should stress the role of institutions in mediating the pursuit of any social goal, so that normative analysis must be grounded in institutional analysis in which no single institutional choice is prioritized and all institutions are subject to interaction giving rise to the potential for recursive learning. Fourth, it should be catalyzed by normative concerns in light of power asymmetries and distributive conflict. It should provide its
empirical analysis for purposes of addressing social problems that both transcend and permeate the nation state.

These attributes have much in common with the old legal realists, which is the reason for the common label, one that we adapt to capture ongoing struggles within the legal academy and the broader social sciences. The old realists too were concerned with inequality and the biases masked by the formal legal doctrines of their time which were used by lawyers and courts to attempt to limit progressive and New Deal reforms. They too responded to these normative concerns in their particular historical-political context. They too called for empirical work and the bridging of the disciplines. They too wished to translate their endeavors in practical terms within that context, engaging with institutional development and reform at a time of ferment.

Just as there was great diversity among the old legal realists, there is great diversity today among those adopting the new legal realist mantle. Thomas Miles and Cass Sunstein have written of new legal realism in terms of the study of legal and extralegal influences on judicial decisionmaking. Daniel Farber has written of new legal realism in terms of behavioral economics. Elizabeth Mertz and Stewart Macaulay have written on new legal realism from a law and society perspective. Victoria Nourse and I have added an institutionalist vantage.9

In my view, what these approaches all should have in common is a call for empirical questioning of assumptions through engaging with empirics that is problem-centric and open to the emergence of new analytics. There is an increasing amount of international law scholarship that takes an empirical approach to the study of international law (Shaffer & Ginsburg 2012). For me, a pioneering figure in my field of international trade law was Robert Hudec of the University of Minnesota. Hudec understood law in broader political and economic context and he bridged research disciplines. He frequently went to Geneva to obtain a better understanding of what lay beneath the surface of trade disputes and litigation. He gave both law and political economy their due, and was highly respected by economists, political scientists, diplomats, and international civil servants. Hudec’s databases and studies of GATT dispute settlement formed the groundwork for analysis of international trade diplomacy and litigation across disciplines (Hudec 1993; Trubek 2008). He provided an example of the value of cross-disciplinary collaboration, building bridges between the law school, the broader academy, and practice. Today, empirical work on international law has become a common and flourishing enterprise.

Second, and complementarily, a new legal realism should be self-reflective in terms of its critical inquiry in order to support experimentation and learning in a pragmatist vein. It should address how context and frameworks of inquiry shape what we see, but without forsaking empirical inquiry. It should include, where possible in light of the research question posed, some form of
open-ended attention to actors presenting their views in their own terms so that the researcher does not simply impose the researcher’s particular frame in a way that predisposes research outcomes.

Empirical work is conventionally divided into quantitative and qualitative methods, each of which has its attributes and deficiencies, involving tradeoffs. Yet while theorists of knowledge, from Karl Popper and Imre Lakatos to Thomas Kuhn and William Quine, disagree on some basic issues as to how we understand the world, they agree that theory ultimately must be tested against observation and experience. Quine, who was completely skeptical of any ‘truth’ of perception that is independent from cultural context, also was a committed empiricist, but one who recognized the impact of the social environment in which empiricism takes place. As he wrote, "As an empiricist I continue to think of the conceptual scheme of science as a tool, ultimately, for predicting future experience in the light of past experience…. But in point of epistemological footing, the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conceptions only as cultural posits."10

Taking from the work of Quine and others, we need to be aware of how presentations of ‘fact’ reflect, to varying extents, a subjective, normative element that is socially constructed, even in the very framing of the questions posed. We need to be aware that these presentations, in turn, play into social dynamics with their dimensions of hierarchy and power.11 What we need is an interactive process between the analytic framework used and critical empirical inquiry. A new legal realist approach should permit us to challenge the presuppositions that scholars unavoidably bring to their work.

New legal realism nonetheless is better positioned to show how all presentations of law and fact are not equal. The researcher aiming to approach a subject in an open and objective manner is almost always surprised by how wrong his or her initial assumptions were. The new legal realist approach calls into question ideological presumption. This is a key methodological point. Leaving one’s office and venturing into the field can transform one’s core assumptions regarding one’s subject of study. As Mertz (2005, 483) writes, “the power of social science methodology [is] 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.” While social science is never entirely ‘correct,’ it is the best way for us to proceed toward a better understanding of the world in which law operates. If we are to participate in an endeavor to make international law more legitimate, and thus more sustainable, our power lies in uncovering, from a bottoms-up perspective the processes that construct and develop it.

Third, a new legal realism should foreground the role of institutions that engage with law. New legal realism should examine how abstract law is translated in different institutional environments in which law is made, interpreted, and
applied, aware that all institutional alternatives are imperfect and thus the pursuit of goals will always be mediated in different ways through different institutional processes. In particular, because all decision-making processes are characterized by unequal participation, a key question for new legal realists should be how affected constituencies participate, or otherwise are represented, directly or indirectly, in an institutional context in comparison with alternative non-idealized institutional settings (Komesar 1994; Shaffer 2005a).

Fourth, and complementarily, a new legal realism in international law should be grounded in addressing social problems that are transnational in scope, and, in doing so, engage with normative values. It should be committed to communicating its empirical findings for contributing to the advance of social welfare and distributive justice in a world characterized by power asymmetries and inequality, including unequal opportunities to be heard. New legal realism’s empirical commitment thus must necessarily be linked to normative questions.

Since there are tensions among stakeholders’ perspectives and priorities in a culturally diverse and changing world that raise questions regarding any universalist claims, a new legal realism should adopt a pragmatist conception of values that develops from experience and learning. Empirical study, building from experience, should catalyze a dynamic and revisable understanding of the ends-in-view that we pursue and the means through which we pursue them. Participation and reciprocal learning should be key values in the construction, practice, and development of international law.

3. Some Examples of A New Legal Realism Applied

Let me give some examples from my own work in terms of the potential for learning and discovery in a new legal realist vein that implicates normative pursuits in the area of international trade law. As a beginning academic, I obtained a National Science Foundation grant to examine the law and politics of international trade and environment issues and went to Geneva with a conventional conception that the World Trade Organization (WTO) was trade-biased and needed to ‘balance’ competing environmental norms and objectives. What happened next is that my interviews turned into lectures from individuals from developing country governments and non-governmental organizations (NGOs) about how my questions reflected an American frame. I learned about how environmental issues, and thus the trade-environment debate, were constructed (and being constructed) by U.S. and European academics, representatives, and non-governmental organizations compared to their developing country counterparts. I learned of the advantages of the resources and status that U.S. and European universities bring, of U.S. and European scholars’ greater access to Western media and learned journals, and their advantages with English being the international language used to diffuse their framings of the issues. I learned how the term ‘environment’ has vastly different meanings to
stakeholders in developing countries where it is much more difficult to separate the concept from that of ‘development’ because people’s livelihoods are more intimately connected on a day-to-day basis with the environment.

I then tested what I learned from interviews by reviewing the minutes of WTO trade and environment committee meetings and noting who spoke at such meetings on which issues. I aggregated the data, and, in this way, I showed how environmental issues were framed in the WTO context, and how differently representatives from northern and southern countries understood trade-environment issues, and how NGOs from the north and south tended to reflect these frames. In this way, I addressed how legal scholarship in the U.S. reflected a particular national framing of trade-environment issues, and how the solutions sought and the answers given by liberal-minded U.S. scholars imposed all the costs of adaptation on the poor, on those without voice.

In short, my assumptions and expectations were upset by the experience of weeks of interviewing and discussing the issues with people coming from a much broader range of experience and priorities than I could meet on Westlaw or at U.S. academic conferences. That experience had a transformative impact on my scholarship. Whether it has been through interviewing regulators, parliamentarians and their staffers, technical assistance providers and recipients, private and government trade lawyers, civil society advocates, or international organization secretariat members, my incoming predispositions (inevitable no matter how neutral and unassuming I try to be) have always been challenged and transformed.

To give a second example, the key to the launching of the Doha Development Round was the creation of a fund for technical assistance and capacity building for developing countries. The first focus for this program was technical assistance provided by the WTO and the World Intellectual Property Organization (WIPO) for developing country implementation of intellectual property protections, even though economists have shown how such intellectual property protections result in net wealth transfers from developing countries to the U.S. and Europe. The lesson is that if we talk about foreign aid and capacity building, we also must ask about who defines the objectives and programs, who selects the experts, and how are they received. One discovers these processes only in a bottoms-up way through interviews and archival research.

To turn to a third example, most WTO legal scholarship starts with WTO rules, then examines how they are interpreted, and concludes regarding why such interpretation is right or wrong from a legal positivist or a normative perspective (such as in Ronald Dworkin’s terms, making the law the best it can be) (Dworkin 1986, 411). A new legal realist project often reverses the telescope, starting with analysis of why certain WTO members and certain of their constituents use (or fail to use) WTO law and thereby give (or fail to give) WTO law meaning
(Shaffer 2009). Only then does one turn to examine whether WTO procedures, the approach of WTO case law, the WTO’s rules on remedies, and individual WTO member strategies could be modified in order to facilitate a more cost-effective representation of weaker parties.

From a top-down perspective, the WTO legal regime and its dispute settlement system seem to be based on consensus and neutrality. Dispute settlement under the WTO has been described as a system where law prevails over power politics, where “right perseveres over might” (Lacarte-Muro & Gappah 2000). Yet such optimistic declarations beg a series of questions about how the WTO legal system actually operates in practice. Who predominantly uses this legal system and who prevails? Can the legal system work for smaller players, such as small developing countries? To what extent has legal capacity – the ability to mobilize legal resources to prepare and litigate a WTO case – replaced the premium provided by market power? These are the questions, and implicit within them, the challenges, that a new legal realist approach poses.

To show how international trade law actually works in practice, one can use a combination of quantitative and qualitative methods to assess the role of legal capacity in the use of WTO law, both in actual dispute settlement and in the shadow of the legal system. In an empirical study with political scientists Marc Busch and Eric Reinhardt (2008; 2009), we used original surveys combined with semi-structured interviews to show how WTO members with more legal capacity are more likely to challenge before the WTO and are less likely, up-front, to have antidumping duties imposed on their products in the first place. We found that legal capacity mattered at least as much, if not more than raw market power, in affecting patterns of dispute initiation and protection.

A new legal realist also needs to assess how empirical findings can be translated pragmatically for policy. Here are two examples, one involving systemic reform and the other involving the development of practical tools for actors. The International Centre on Trade and Sustainable Development (ICTSD) created a program to solicit empirical work to assess ways in which the dispute settlement system could facilitate greater developing country participation. In a publication with a Swedish trade economist, we showed how the WTO dispute settlement system discriminates against those with small claims, particularly affecting small developing countries. We then put forward a proposal for a “small claims” procedure for such claims (Nordstrom & Shaffer 2008). This work, in turn, has helped bolster calls for supporting subsidized legal support for developing countries through the Geneva-based Advisory Centre on WTO Law (ACWL).

In addition, the empirical work can help countries and their constituencies address what can be done outside of WTO institutional reform so that WTO law can be used effectively by a wider variety of actors. Two Brazilian academics and
I published a study that showed how Brazil's effort to use the WTO legal system has had a broader impact both within Brazil and on the WTO (Shaffer, Ratton-Sanchez & Rosenberg 2008). Within Brazil, this effort has had an impact on legal education, government-business relations, and even the organization of the state itself, building more transparent government processes and developing new competitions for trade expertise. In the process, Brazil dramatically engaged the WTO system in challenging U.S. and European agricultural subsidies. In that project, we linked the national and the global settings. We showed how developing country actors, wanting to promote different agendas to make international law reflect their priorities, can use international legal tools to their own advantage, including through reforming their own domestic systems. The study complemented others regarding developing countries’ experiences with WTO dispute settlement as part of a series of workshops in Africa, Asia, and South America which contributed to the sharing of practices and policy learning (Shaffer & Melendez-Ortiz 2011).

Conclusion.

A new legal realist approach shows both a healthy skepticism toward international law and takes international law seriously. Unlike internationalist idealists, a new legal realist perspective questions what constitutes international law. It questions whose voices are heard and not heard when one focuses on ‘international society’ with a presumption that international law is there to serve ‘common’ interests. To adapt from Ed Rubin (1996, 1428), new legal realism attends to “all the social forces, inequalities, and ideological [factors] [that law-promoting theories have] ignored.” Unlike international relations realists, however, a new legal realism takes international law and legal reasoning seriously and thus also turns to examine the opportunities that international law can provide, building from empirical inquiry.

New legal realism is thus not opposed to traditional doctrinal, theoretical, and normative work. Rather it complements them. New legal realism takes account of legal doctrine in that it examines the potential for law’s normativity to shape social ordering. It aims to build conditional theory regarding international law’s development, practice, and effects, which can inform the normative evaluation and potential transformation of international law.

Engaging in empirical work and translating empirical work for legal and other policy actors remains a critical challenge for the study of international law in a world characterized by constituencies with differing priorities, perspectives, and opportunities to be heard. The translation is not a simple one, and the success of a legal realism will depend in large part on it. Those writing from the United States or Europe need to be particularly careful before they advance prescriptions based on a presumption that their perspectives are universal and not
shaped and colored by their position and experience. Given that academics in the United States, in particular, are well-placed to participate in international policy debates because they write from the center of global power (economically, militarily, linguistically, and socially, including in terms of the relative status of U.S. universities), it is incumbent on them to question their own proclivities. Undertaking empirical work, and doing so with a critical gaze through engagement with the perspectives of those from other jurisdictions, should be a central goal of a new realist approach to international law.

If we are to fashion a more just, sustainable, and credible international legal order, we will need to do more than assume that international law is legitimate and to struggle for its respect. From a Baldwinian perspective, we must turn a critical gaze on our presumptions so that new learning and new ways of seeing may arise. From a Chekhovian one, we must not prescribe without first assessing what is, and only then listen to what one can and must do. Only then will learning arise that is grounded in experience and that attends to new and ongoing problems in a changing world.

Notes
1. Chancellor’s Professor, University of California, Irvine School of Law. My thanks to Mary Rumsey for her research assistance. This chapter is adapted from my inaugural Melvin C. Steen chair lecture at the University of Minnesota Law School.
2. Or as the artist Paul Klee (1920) wrote, “Art does not reproduce the visible; it makes visible.” I read the quotation attributed to Baldwin and was taken by it, but upon further research discovered that it turns out that, though widely used, the quotation has not been found in anything Baldwin ever published. Baldwin (1962) did once write, analogously, that we “must drive to the heart of every answer and expose the question the answer hides.” Ironically, the frequent use of the quotation supports the point attributed to it — the need to probe behind received thinking to unpack questions, information, and conventional perspectives.
4. Macaulay (2005, 375) (“The classic realists talked about doing empirical research, but relatively little was accomplished.”); Leiter (2005, 51) (“For most of the Realists, however, the commitment to ‘science’ and ‘scientific method’ was more a matter of rhetoric and metaphor, than actual scholarly practice”). On the empirical component of the old legal realism, see Schlegel (1995); Kritzer (2010).
5. See, for example, Morgenthau (1963, 278) (calling international law “a primitive type of law primarily because it is almost completely decentralized law”), and Kennan (1951) (critiquing legalistic approaches to international relations as based on false assumptions). For a more contemporary variant, see Posner (2009).

6. On the role of legal professionals in international and transnational context, see Flood (2007, 45-46) (“In many respects the Cold War was a golden era for international law firms. The West was out to ensure the world adhered to ideas of liberal democracy and free market economics-the Washington consensus-and not be seduced by irrational notions of socialist state-centered economic planning”); and Trubek, Dezalay, Buchanan, & Davis (1994).

7. As Richard Posner (1990, 15) writes, “the formalists had conceived law as an inductive science…. The reports of appellate decisions were the data from which the principles of the common law could be inferred—principles”

8. The Yale School came out of legal realism but infrequently engaged with method in a social science sense, and was largely focused on advancing U.S. goals in the context of the Cold War. Cf. Leiter (2005, 61) (“it had far more to do with rationalizing American imperialism than it did with science”).

9. These different approaches are reviewed in Nourse & Shaffer (2009). See also Miles & Sunstein (2008); Farber (2001) (reviewing Behavioral Law and Economics (Cass R. Sunstein ed. 2000); Erlanger, Garth, Larson, Mertz, Nourse, and Wilkins (2005); Mertz and Suchman (2010); Nourse and Shaffer (2009); Shaffer (2013b).

10. Quine (1980, 20); see also (Quine 1969, 69) (maintaining that our very thinking is constructed within a context from which it cannot be completely free).

11. Those scholars engaged in work involving race and gender often have been at the forefront of exposing questions and data that were assumed away in conventional legal thinking and the prescriptions derived from it. See e.g. Lawrence (1987, 317-388); Matsuda (1989); Alfieri (1999).

12. This research was published in Shaffer (2001).

13. This research was published in Shaffer (2005b).

14. That is, who constitutes the international law “community” and “international society,” or, to paraphrase the great human rights scholar Oscar Schachter (1977, 217), “the invisible college” of international lawyers.

References


International Centre for Trade and Sustainable Development.


