

# 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-realist 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 . . . . [B]eyond 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.<sup>1</sup> 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.<sup>2</sup> 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 re-engage with the possibility (and difficulty) of positive political and legal action.

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

<sup>1</sup> 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](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.").

<sup>2</sup> See, e.g., Michael Falcone, *One More Round of Voting, as Electors Do Their Duty*, N.Y. TIMES, Dec. 16, 2008, at A18 (noting that voter turnout in the November, 2008 election reached "its highest level since 1968").

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.”<sup>3</sup> 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.<sup>4</sup> 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

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<sup>3</sup> As of August 27, 2009, 312 documents were retrieved by the search “new legal realism” in Westlaw’s Journals and Law Reviews (JLR) database. This number understates actual interest, as some authors simply refer to this scholarship as “legal realism,” and Westlaw does not capture book chapters and non-legal publications. See, e.g., Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, in *HOW LAW KNOWS* 93, 94 (Austin Sarat et al. eds., 2007). The number also largely excludes the general explosion in “empirical legal studies,” which scholars vaguely associate with realism. See generally Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (discussing empirical legal studies’ variant of new legal realism).

<sup>4</sup> See Jeffrey Rosen, *What’s a Liberal Justice Now?*, N.Y. TIMES MAG., May 31, 2009, at 50.

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.”<sup>5</sup> 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,”<sup>6</sup> often associated with the “Chicago school,” and with Judge Posner as its early leading and path-breaking advocate.<sup>7</sup> Neoclassical law-and-economics theory builds from the

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<sup>5</sup> 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.

<sup>6</sup> NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND* 102 (2d ed. 2006).

<sup>7</sup> 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,<sup>8</sup> such that all other concerns (including distributive implications) are bracketed or ignored.<sup>9</sup> The theory prescribes that policy-makers should accordingly rely predominantly on market mechanisms.<sup>10</sup>

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perspective); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* (2004) (outlining the elements of economic analysis in central areas of law).

<sup>8</sup> 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 Mercurio 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.”).

<sup>9</sup> *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).

<sup>10</sup> *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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> Neoclassical

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market-common law system of resource allocation.” (footnote omitted)). 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* 233 (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).

<sup>11</sup> See Brian Tamanaha, *Balanced Realism on Judging: Beyond the Formalist–Realist Divide*, ch. 3 (Aug. 5, 2009) (unpublished manuscript, on file with authors).

<sup>12</sup> See, e.g., KAPLOW & SHAVELL, *supra* note 9, at 3–13; MERCURO & MEDEMA, *supra* note 6, at 68–93; POSNER, *ECONOMIC ANALYSIS*, *supra* note 5, 3–21 (outlining the fundamental concepts of economic analysis); SHAVELL, *supra* note 7, at 1–5. The “Coase theorem” states that, “[i]f rights are fully specified and transaction costs are zero, parties to a dispute will bargain to an efficient and invariant outcome regardless of the initial specification of rights.” MERCURO & MEDEMA, *supra* note 6, at 110 (footnote omitted). Coase, however, “pointed to the unrealistic nature of the zero transaction cost assumption.” *Id.* at 113 n.37.

<sup>13</sup> See *infra* Part III; see also Thomas C. Grey, *Langdell’s Orthodoxy*, 45 *U. PITT. L. REV.* 1, 5–6, 11–13 (1983); Thomas C. Grey, *The New Formalism* 5–7 (Stanford Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 4, 1999), available at <http://papers.ssrn.com/abstract=200732> [hereinafter Grey, *Formalism*]; cf. Tamanaha, *supra* note 11, at ch. 4 (differentiating nineteenth-century scholars’ ideal conceptions of law from their observations of the actual state of the law and contending that describing American jurisprudence as “formalism” is overstatement at best). Brian Tamanaha provides strong evidence regarding the political use of the term formalism to differentiate the realists from more conservative scholars and judges. See Tamanaha, *supra* note 11, at ch. 4. In particular, Tamanaha explores the way judging actually operated compared to what Christopher Columbus Langdell and others advocated in an ideal sense. See *id.* However, even if the categories of formalism and realism are overstated in terms of what judges actually did, we find that the terms are useful in differentiating positions regarding the application of legal principles in

theory, in contrast, aimed to be explicitly instrumentalist rather than doctrinal.<sup>14</sup> Neoclassical theory aimed for law to structure incentives to produce “efficient” outcomes and thus enhance aggregate social welfare.<sup>15</sup> 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.<sup>16</sup> 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 definitional. That is why the assumptions can predict how people behave: in these terms there is no other way they can behave.<sup>17</sup>

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

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”).

<sup>14</sup> 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”).

<sup>15</sup> See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 88–115 (1983) (presenting efficiency as justice).

<sup>16</sup> See *infra* Part III.

<sup>17</sup> 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).

<sup>18</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24 (1990).

in each of the three variants of new legal realism that we identify.<sup>19</sup> 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,<sup>20</sup> as have others in the so-called New Haven school of law and economics.<sup>21</sup> Reflecting realist insights, Judge Calabresi distinguished his mode of reasoning as starting from facts as opposed to high theory.<sup>22</sup> In fact, we contend that Judge Posner himself has moved decisively toward the new-legal-realist camp.<sup>23</sup> At the very least, the experience and demands of our time have forced him to rethink many of neoclassical

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<sup>19</sup> 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 Komisar; 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.

<sup>20</sup> 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?*, Macabaeian Lecture in Jurisprudence (May 14, 1981), in *PROC. BRIT. ACAD.* (1982), at 85, 90. Thus, in *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, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 294 (1970).

<sup>21</sup> See ACKERMAN, *supra* note 17, at 21; MERCURO & MEDEMA, *supra* note 6, at 284–90 (discussing the New Haven school of law and economics); Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 *DUKE L.J.* 929, 929–30; Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 *COLUM. J. ENVTL. L.* 171, 171–72 (1988); Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics, or Philosophy*, in *LAW AND ECONOMICS* 233, 237–39 (Nicolas Mercurio ed., 1989). These scholars have attempted to improve regulatory policies with incentive-based regulation. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *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, *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).

<sup>22</sup> See GUIDO CALABRESI, *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"); see also Calabresi, *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.").

<sup>23</sup> Over time, Judge Posner has moved away from (if not renounced) his earlier neoclassical law-and-economics claims. Cf. POSNER, *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. See generally POSNER, *supra* note 1.

law and economics' most insistent assumptions,<sup>24</sup> 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.<sup>25</sup> 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/politics divide. As Dean Hanoch Dagan writes, among the challenges for legal realists is to stand for more than "nominalism, sheer critique, or incoherent eclecticism."<sup>26</sup> 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

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<sup>24</sup> 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.

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

<sup>26</sup> Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 608 (2007).

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.<sup>27</sup> 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),<sup>28</sup> 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-

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<sup>27</sup> 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.”). The “rights revolution” of course came much later, but it had its precedents in the old legal realism and the New Deal, which implemented its ideas. In his 1944 State of the Union speech, for example, President Franklin Delano Roosevelt called for a second economic Bill of Rights that would provide economic security and prosperity. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 9–16 (2004).

<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> The realists' empirical efforts were ridiculed; one imagined Underhill Moore watching over parking enforcement in New Haven as the heavens fell.<sup>31</sup> Judge Frank's faux psychoanalysis of judges<sup>32</sup> was seen as dangerously subversive of the rule of law as judges and priests found themselves interned in concentration camps.<sup>33</sup> If it was true that everyone knew that doctrine was not

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<sup>29</sup> Compare JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 14–36 (1950) [hereinafter FRANK, COURTS], and JEROME FRANK, LAW AND THE MODERN MIND 3–13 (Anchor Books 1963) (1930) [hereinafter FRANK, MODERN MIND] (emphasizing the first type of realism), with John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 459–64 (1979) (emphasizing the second type of realism), and BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15–30 (2007) (emphasizing the third type of realism and criticizing variants of the first and second types).

<sup>30</sup> 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)).

<sup>31</sup> See Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 3–4 (1943) (studying conformity with parking ordinances and suggesting a degree of conformity with any law is in accord with a psychological-behavioristic theory of learning). Moore's studies of parking in New Haven are "a symbol of the ridiculous and expensive pursuit of trivia by the highly talented," a perfectly "empirical" study that had no impact whatsoever on law or legal theory. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 63, 65–66 (1973).

<sup>32</sup> 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).

<sup>33</sup> 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.<sup>34</sup> What lived on after World War II and was so successful as to make everyone a realist<sup>35</sup> was the core claim of realism that doctrine is necessary but insufficient to explain judging.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> Measure today’s average Supreme Court decision against the mere paragraphs that were once used to decide such cases, and one gasps for air.<sup>39</sup> 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.

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

<sup>34</sup> 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.

<sup>35</sup> 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.”).

<sup>36</sup> 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.”).

<sup>37</sup> See Daniel A. Farber, Essay, *Missing the “Play of Intelligence”*, 36 WM. & MARY L. REV. 147, 149 (1994) (decrying the increasingly “bureaucratic” flavor of Supreme Court writing); Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98 (1993) (describing the Court as “trapped in the grips of mechanical jurisprudence,” characterized by “an almost medieval earnestness about classification and categorization”); see also ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 121–55 (1989) (arguing that modern constitutional doctrine is “formulaic”).

<sup>38</sup> See OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 163–64 (1993); Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 751–53 (2009).

<sup>39</sup> See generally Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401 (1997) (documenting this trend and casting it as a “making” of doctrine in the image of realism, a not-entirely successful project).

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.<sup>40</sup> 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.<sup>41</sup> 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."<sup>42</sup> 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

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<sup>40</sup> See generally David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999) (discussing the role of new formalism in contract law); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing new formalism's approach to statutory construction); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999) (discussing new formalism in foreign relations law); Grey, *Formalism*, *supra* note 13 (discussing varieties of new formalism); Nourse, *supra* note 39 (discussing new formalism in constitutional law); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing court-made law); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) (discussing formalism in contract law); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)); Bryant G. Garth, *Privatization and the New Formalism: Making the Courts Safe for Bureaucracy*, 13 LAW & SOC. INQUIRY 157 (1988) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)).

<sup>41</sup> 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 MD. 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)).

<sup>42</sup> E.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–51 (1983). See generally Scalia, *supra* note 40 (discussing court-made law).

legal realism.<sup>43</sup> Thomas Miles and Cass Sunstein have claimed the title for quantitative empirical studies addressing political influences on judging.<sup>44</sup> 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.<sup>45</sup> 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.”<sup>46</sup> Finally, a diverse group of scholars has claimed the title for different forms of institutional analysis. Building on Komesar’s comparative-institutional analysis<sup>47</sup> and neoinstitutionalist theory, Edward Rubin has argued for a comparative microanalysis of institutions.<sup>48</sup> 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.<sup>49</sup> Most recently, a set of criti-

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<sup>43</sup> See Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 302–03 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)).

<sup>44</sup> See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834–37 (2008).

<sup>45</sup> 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).

<sup>46</sup> See Erlanger et al., *supra* note 45, at 339–45; Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1165–70 (2006) [hereinafter Macaulay, *Contracts*]; Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”*, 2005 WIS. L. REV. 365, 385–91 [hereinafter Macaulay, *New Versus the Old*]. For further elaboration of this concept based on the “action theory” of Hans Joas, see generally HANS JOAS, *THE CREATIVITY OF ACTION* 154 (Jeremy Gaines & Paul Keast trans., Univ. of Chi. Press 1996) (1992) (exploring “action” as a concept in philosophy and social and cultural sciences); New Legal Realism, <http://www.newlegalrealism.org/> (last visited Aug. 29, 2009) (attempting to create an interdisciplinary approach to empirical legal study). In this sense, the “action studies” movement diverges from the almost exclusively quantitative work of the “empirical legal studies” movement.

<sup>47</sup> See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (emphasizing the need for an analysis of institutional choice).

<sup>48</sup> See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996).

<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> Farber argued that behavioral economists had successfully attacked the rational-choice models underlying neoclassical law-and-economics and public-choice theory by present-

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often in collaboration with U.S. counterparts. See, e.g., LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (offering research by a group of European and American scholars on the new-governance phenomenon); Gráinne de Búrca & Joanne Scott, Introduction, *Narrowing the Gap?: Law and New Approaches to Governance in the European Union*, 13 COLUM. J. EUR. L. 513 (2007) (examining how new governance in the European Union has affected the understanding of the law and the role of law); see also Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, 14 EUR. L.J. 271 (2008) (contending that member states establish EU framework goals jointly and lower-level units advance these goals as they see fit); Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2006) (illustrating how courts can execute their authority to enhance the capacity of other actors to make legitimate and effective decisions); David M. Trubek et al., ‘Soft Law’, ‘Hard Law’ and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra*, at 65, 65 (describing the role of “soft law” in new governance). For new-governance work on administrative law, see generally Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (proposing a model of collaborative governance rather than interest representation); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (arguing that governance is a set of negotiated relationships between public and private actors); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (discussing the shift from a regulatory to a governance model).

<sup>50</sup> See *infra* notes 104–10 and accompanying text.

<sup>51</sup> See Farber, *supra* note 43.

ing a “more realistic description of human behavior.”<sup>52</sup> 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.”<sup>53</sup> 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.”<sup>54</sup> Behavioral economics represents a frontal assault within economics itself on the simplifying assumptions of neo-classical 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.<sup>55</sup> Cross was skeptical of some as-

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<sup>52</sup> *Id.* at 280.

<sup>53</sup> *Id.* at 280–81.

<sup>54</sup> Russell Korobkin, *A “Traditional” and “Behavioral” Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 445 (2004); see also Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) (proposing a model for predicting judicial behavior based on psychological research and empirical analysis); Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioural Law and Economics*, 29 QUEEN’S L.J. 563 (2004) (arguing that more attention should be given to how people understand the world than is given by law and economics); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) (“Even when the use of mental shortcuts is rational, it can produce predictable mistakes. . . . Actual judgments show systematic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory.”); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 24 (2000) [hereinafter Korobkin, *Behavioral Analysis*] (arguing that the behavioral approach combined with economic analysis makes rational-choice theory more complete); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000) (“Research in the behavioral sciences has demonstrated that individuals are systematically biased in their predictions of the probable results of various events.”); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 741–42 (2000); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 63 (2002) (arguing that implicit behavior rationality exists in areas of federal administrative law).

<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS (4th ed. 2007). We note that the attitudinal model is now under attack by political scientists themselves. See, e.g., Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369, 381 (2008) (using a strong comparative statistical model and finding “strong evidence that legal principles are influential”); see also Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 263, 266 (2006) (noting institutionalists’ attack on attitudinalists and research that tends to undercut attitudinalists’ result-oriented assumptions).

<sup>56</sup> See generally Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (studying the impact of judicial ideology on the D.C. Circuit’s role in development of environmental law).

<sup>57</sup> Michael Heise uses the attitudinalist model as his primary example of empirical legal studies. See Heise, *supra* note 3, at 836–39. For some of the underlying studies, see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) [hereinafter Miles & Sunstein, *Real World*]; Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); Revesz, *supra* note 56; Max M. Schanzbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

<sup>58</sup> 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.*

<sup>59</sup> See Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624–26 (2005).

## 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.<sup>60</sup> 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 *Verstehen*.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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

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<sup>60</sup> Macaulay, *New Versus the Old*, *supra* note 46, at 367–68.

<sup>61</sup> See MAX WEBER, *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, *Anthropology of Law*, in *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, *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).

<sup>62</sup> See generally Macaulay, *Contracts*, *supra* note 46 (providing a comprehensive study of contract law in action).

<sup>63</sup> See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 3–4 (2007); see also Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory—“Real” Legal Language and a New Legal Realism*, 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)”).

this version of new legal realism builds.<sup>64</sup> 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.<sup>65</sup> Sociologists working in the contextualist vein, such as Robert Nelson and Laura Beth Nielsen, use mixed qualitative and quantitative methods.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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<sup>64</sup> On the law-and-society movement, see generally Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409 (1998); David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1 (1990); see also The Law and Society Association, <http://www.lawandsociety.org/> (last visited Aug. 29, 2009).

<sup>65</sup> See, e.g., LEVITT & DUBNER, *supra* note 9, at x (“[H]e approached economics in a notably unorthodox way. He seemed to look at things not so much as an academic but as a very smart and curious explorer . . . .”); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817–19 (1991) (using 180 independent negotiations to study gender and racial discrimination in negotiations for new-car purchases); Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1200–01 (2003) (using statistical evidence to study whether state handgun laws reduce crime); John J. Donohue III, *Law and Economics: The Road Not Taken*, 22 LAW & SOC'Y REV. 903, 911–18 (1988) (stressing law and economics as a tool and emphasizing that it must shed any ideological predispositions); John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379, 381–83 (2001) (using empirical facts to study the relationship between abortion and falling crime rates); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (examining available statistical evidence on the death penalty and arguing that it can provide insight but also mislead).

<sup>66</sup> See, e.g., Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 664.

<sup>67</sup> See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 1–12 (2002) (conducting a comprehensive analysis of legal change in twentieth-century America); LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* (1977); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* ix–x (1996) (using historical analysis of nineteenth-century governance to analyze twentieth-century understandings of “the people’s welfare in a democratic republic”); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) [hereinafter Gordon, *Histories*]; Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 U. MIAMI L. REV. 373 (2003).

<sup>68</sup> See American Bar Foundation, *The New Legal Realism Project*, [http://www.americanbarfoundation.org/research/The\\_New\\_Legal\\_Realism\\_Project.html](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),<sup>69</sup> courts and agencies (as in the work of Nelson, Nielsen, and K.T. Albiston),<sup>70</sup> corporations (as in the work of Lauren Edelman),<sup>71</sup> international trade and economic networks (as in the work of John Braithwaite, Peter Drahos, and Gregory Shaffer),<sup>72</sup> law-firm practices (as in the work of Marc Galanter,

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<sup>69</sup> See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 56–62 (1963). See generally STEWART MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966) (studying business relationships between American automobile manufacturers and their dealers). For work in a related vein, and which builds from economic insights, see Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) (“The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members.”).

<sup>70</sup> See, e.g., HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES xiii–xx (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (using behavior before courts and agencies to discuss antidiscrimination law); THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) (using research on individual experiences of legal rights to understand the law's role in creating social change); THEORETICAL AND EMPIRICAL STUDIES OF RIGHTS xi–xviii (Laura Beth Nielsen ed., 2007) (conducting an empirical analysis of individuals' understandings of rights); Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 398–99 (2007) (discussing government's role in managing the conflict between work and family); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 869–72 (1999) (using empirical analysis of judicial opinions on the Family and Medical Leave Act to investigate repeat-play influence on development of law); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089–91 (2007) (conducting an empirical study on how *Buckhannon* affected the private-enforcement systems); Mitu Gulati & Laura Beth Nielsen, *Introduction: A New Legal Realist Perspective on Employment Discrimination*, 31 LAW & SOC. INQUIRY 797 (2006) (emphasizing the importance of empirical analysis in studying employment discrimination); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1593 (2006) (conducting an empirical study of public-interest organizations); Nielsen & Nelson, *supra* note 66, at 663–65.

<sup>71</sup> See, e.g., Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992); see also Gulati & Nielsen, *supra* note 70 (applying new legal realism in the context of employment law).

<sup>72</sup> On international trade networks, see generally GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003) (evaluating the effect on private behavior of legalizing an international trading system); Gregory Shaffer, *What's New in EU Trade Dispute Settlement? Judicialization, Public-Private Networks and the WTO Legal Order*, 13 J. EUR. PUB. POL'Y 832 (2006) (discussing the politics of EU trade policy); Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008). On domains of global business regulation, see JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 11–14 (2000). On international arbitration, see generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COM-*

Bryant Garth, Jack Heinz and David Wilkins),<sup>73</sup> or law schools themselves (as in the work of Mertz).<sup>74</sup> 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.<sup>75</sup>

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

MERCIAL 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).

<sup>73</sup> See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 77–120 (1991); JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 3–28 (2005); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1571–91 (2004); David B. Wilkins, *“If You Can’t Join ‘Em, Beat ‘Em!”: The Rise and Fall of the Black Corporate Law Firm*, 60 STAN. L. REV. 1733, 1737 (2008); David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 434–38 (2007).

<sup>74</sup> See generally MERTZ, *supra* note 63.

<sup>75</sup> 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).

<sup>76</sup> See Gregory Shaffer, *A Call for a New Legal Realism in International Law: The Need for Method* 8–11 (Legal Studies Research Paper Series, Research Paper No. 09-02), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1323912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323912); see also TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* (2009); Bryant G. Garth, *Introduction: Taking New Legal Realism to Transnational Issues and Institutions*, 31 LAW & SOC. INQUIRY 939, 941 (2006); Bryant G. Garth, *Rebuilding International Law After the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists*, 4 LOY. U. CHI. INT’L L. REV. 3, 5–6 (2006) [hereinafter Garth, *Rebuilding*].

<sup>77</sup> See generally DEZALAY & GARTH, *supra* note 72; YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE 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).

<sup>78</sup> See generally *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* (Mark Goodale & Sally Engle Merry eds., 2007) (analyzing how human rights play out in practice with anthropological data).

WTO's legal system;<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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."<sup>82</sup>

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."<sup>83</sup> In her view,

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<sup>79</sup> See generally SHAFFER, *supra* note 72; Gregory Shaffer et al., *supra* note 72. For Shaffer's work on the law and politics of trade and environment issues in the WTO, based on extensive field work and review of primary sources, see Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001).

<sup>80</sup> From this fieldwork, Halliday has developed a theory of how the globalization of bankruptcy law has proceeded through recursive cycles of national law and global norm-making. See generally HALLIDAY & CARRUTHERS, *supra* note 76; Terrence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007). In addition, see FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM (Terrence C. Halliday et al. eds., 2008); Sida Liu & Terrence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law*, LAW & SOC. INQUIRY (forthcoming).

<sup>81</sup> 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 HARV. J.L. & GENDER 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.

<sup>82</sup> 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.

<sup>83</sup> 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 VAND. L. REV. 483, 487 (2007) ("[L]eading 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.<sup>84</sup>

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.<sup>85</sup> What stands out in much of the work

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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)).

<sup>84</sup> 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.”).

<sup>85</sup> 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.<sup>86</sup> 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”<sup>87</sup>—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-

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when we recognize that certain means are available to us do we discover goals which had not occurred to us before. Thus, means not only specify goals, but they also expand the scope for possible goal-setting. ‘Ends-in-view’ are not, therefore, vaguely conceived future situations, but concrete plans of action which serve to structure present action.

JOAS, *supra* note 46, at 154 (footnote omitted).

<sup>86</sup> See, for example, the many turns taken by Jane Larson in Erlanger et al., *supra* note 45, at 346–50; Macaulay, *New Versus the Old*, *supra* note 46, at 390–94; Nourse, *supra* note 38; Shaffer, *supra* note 76, at 6; Symposium, *New Legal Realism*, 31 LAW & SOC. INQUIRY 939 (2006). In addition, see the “method” of Nourse in writing, NOURSE, *supra* note 34 (offering a deeply contextualized history of a single Supreme Court case showing simultaneity of legal and political developments). This is an issue on which views diverge within the qualitative social sciences as well, with some taking more of a positivist view than others. For example, some qualitative research is framed as affirming or rejecting existing ideas, while other research is viewed as “hypothesis generating.” We thank Beth Mertz for this point.

<sup>87</sup> Shaffer, *supra* note 76, at 8.

alism) will be shaped and determined by institutional processes.<sup>88</sup> As Komesar contends, “[i]t is institutional choice that connects goals with their legal or public policy results.”<sup>89</sup> 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.<sup>90</sup>

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.”<sup>91</sup> 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.”<sup>92</sup> 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.<sup>93</sup> The work of Edelman and her collaborators, for example, in-

<sup>88</sup> 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”).

<sup>89</sup> KOMESAR, *supra* note 47, at 5.

<sup>90</sup> Neil Komesar, *The Essence of Economics: Law, Participation and Institutional Choice (Two Ways)*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT 165, 165 (Sandra S. Batie & Nicholas Mercuro eds., 2008).

<sup>91</sup> Rubin, *supra* note 48, 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.

<sup>92</sup> *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”).

<sup>93</sup> 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.”<sup>94</sup> 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.<sup>95</sup> 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.”<sup>96</sup> Further, they conclude that “courts have become more likely to defer to organizations’ grievance procedures and to consider them relevant to determinations of liability.”<sup>97</sup> 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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tionalist approaches of neoclassical law and economics. See, e.g., JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 1–19 (1989). See generally Paul J. DiMaggio & Walter W. Powell, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1–38 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983) (studying the causes of bureaucratization and organizational change); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977) (studying the formal structures of organizations in postindustrial society).

<sup>94</sup> Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1599 (2001) (emphasis omitted).

<sup>95</sup> See *id.* at 1590–91.

<sup>96</sup> Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 406 (1999).

<sup>97</sup> *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,<sup>98</sup> 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.”<sup>99</sup>

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.<sup>100</sup>

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.”<sup>101</sup> 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.”<sup>102</sup> Scholars have advanced new-governance approaches to regulation to address regulatory challenges in domestic, regional, and international settings.<sup>103</sup>

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<sup>98</sup> 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.

<sup>99</sup> Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 480 (2007).

<sup>100</sup> *Id.* at 482.

<sup>101</sup> 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.”).

<sup>102</sup> 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”).

<sup>103</sup> For a sampling, see generally Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> “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.<sup>107</sup> Thus, institutional responsibility and choice become central to

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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).

<sup>104</sup> 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).

<sup>105</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 11 (2008).

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.*; see also Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 513 (2008) (“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 JOAS, *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,”<sup>108</sup> because “institutions are simultaneously constituted by and producers of vulnerability.”<sup>109</sup> 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.<sup>110</sup>

## 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.”<sup>111</sup>

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,”<sup>112</sup> 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.”<sup>113</sup> 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.”<sup>114</sup> Behavioral law-and-economics scholars now build from the work of

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OF GLOBALISATION (2006) (arguing that vulnerability and violence are characteristic features of neoliberal globalization); BRYAN S. TURNER, *VULNERABILITY AND HUMAN RIGHTS* (2006) (arguing that human rights exist as a result of individuals’ shared vulnerability).

<sup>108</sup> Fineman, *supra* note 105, at 18.

<sup>109</sup> *Id.* at 13 n.31.

<sup>110</sup> See Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1428–39 (2008); Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI-KENT L. REV. 1127, 1129 (2006); see also PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 80–109 (1997).

<sup>111</sup> ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* 111 (2007).

<sup>112</sup> FRANK, *MODERN MIND*, *supra* note 29, at 156.

<sup>113</sup> AMERICAN LEGAL REALISM 310–11 (William W. Fischer III et al. eds., 1993) (citing FRANK, *MODERN MIND*, *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, *PSYCHOPATHOLOGY AND POLITICS* 194 (Univ. of Chi. Press 1977) (1930).

<sup>114</sup> See FRANK, *MODERN MIND*, *supra* note 29, at 261, 394.

Daniel Kahneman, Amos Tversky, and Paul Slovic in psychology.<sup>115</sup> Such work was adapted by economists such as Thaler<sup>116</sup> and Dan Ariely,<sup>117</sup> and it was imported into the analysis of law by Sunstein,<sup>118</sup> Jolls,<sup>119</sup> Jeffrey Rachlinski,<sup>120</sup> Chris Guthrie,<sup>121</sup> Korobkin,<sup>122</sup> and others.

Similarly, the attitudinalists' core arguments are reflected in the views of Justice Oliver Wendell Holmes, Justice Benjamin Cardozo,<sup>123</sup> Herman Oliphant,<sup>124</sup> 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."<sup>125</sup> 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."<sup>126</sup> Hutcheson wrote of judicial decisions based on

<sup>115</sup> See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (offering an approach to the study of judgment).

<sup>116</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 17–39 (2008). See generally Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986) (studying standards of fairness as they apply to firms' setting of price, wage, and rent levels).

<sup>117</sup> See generally DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008) (finding irrationality in human decision making in a series of behavioral experiments).

<sup>118</sup> See THALER & SUNSTEIN, *supra* note 116, at 13–14.

<sup>119</sup> See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971–73 (2006).

<sup>120</sup> See Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207, 207–09 (2006).

<sup>121</sup> See Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 879–82 (2008).

<sup>122</sup> See Russell Korobkin, *Possibility and Plausibility in Law and Economics*, 32 FLA. ST. U. L. REV. 781, 781–83 (2005).

<sup>123</sup> 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.").

<sup>124</sup> 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.").

<sup>125</sup> 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).

<sup>126</sup> Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1930) (emphases omitted).

“hunches,”<sup>127</sup> and Judge Frank went furthest, speaking openly of judges’ “biases.”<sup>128</sup> 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.”<sup>129</sup> 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.<sup>130</sup> 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.”<sup>131</sup> 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,”<sup>132</sup> 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.<sup>133</sup> Functionalists like Felix Cohen called for legal analysis that borrows from the behavioral social sciences.<sup>134</sup> Llewellyn collaborated with the anthropologist Adamson Hoebel in their classic study *The Cheyenne Way*.<sup>135</sup> 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.<sup>136</sup> While the legal realists

<sup>127</sup> Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision*, 14 CORNELL L.Q. 274, 275–76 (1929).

<sup>128</sup> 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.”).

<sup>129</sup> FRANK, MODERN MIND, *supra* note 29, at 120.

<sup>130</sup> 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.

<sup>131</sup> Cross, *supra* note 55, at 256.

<sup>132</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 *passim* (1910).

<sup>133</sup> See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454–55 (1909).

<sup>134</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833–49 (1935).

<sup>135</sup> See generally K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

<sup>136</sup> 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 disappointingly 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.<sup>137</sup> Empiricism has exploded in the legal academy in the past ten years, as manifested in the birth of a new empirical legal studies movement,<sup>138</sup> yielding vast numbers of converts to law and society's call for a sophisticated use of empiricism at the heart of contextualists' scholarly commitment.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> The one (public law) cannot be understood without the other (private ordering).

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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).

<sup>137</sup> See sources cited *supra* note 136.

<sup>138</sup> See generally Heise, *supra* note 3.

<sup>139</sup> See Friedman, *supra* note 64, at 776–80; Garth & Sterling, *supra* note 64, at 409–14; Trubek, *supra* note 64, at 6.

<sup>140</sup> See generally Macaulay, *New Versus the Old*, *supra* note 46.

<sup>141</sup> See Edelman & Suchman, *supra* note 97, at 963; Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, CONN. L. REV. (forthcoming 2009) (manuscript at 3–5, available at <http://papers.ssrn.com/abstract=1426302>); Robin Stryker, *Mind the Gap: Law, Institutional Analysis and Socioeconomics*, 1 SOCIO-ECON. REV. 335, 342 (2003).

<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup> 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.”<sup>145</sup> He also called “for progressive government intervention in economic life,” stressing in particular the protection of labor.<sup>146</sup>

Similarly, new-governance theorists have their forerunners in the experimentalism of Dewey and his legal-realist followers.<sup>147</sup> 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.”<sup>148</sup> New-governance scholars have (importantly) turned their gaze be-

Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (studying the ALI and NCCUSL); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003) (studying the pervasiveness of privately made law). For an earlier study, see generally Stewart Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445 (Leon Lipson & Stanton Wheeler eds., 1986).

<sup>143</sup> See DUXBURY, *supra* note 136, at 107–08. See generally BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) (describing Hale’s role as a key figure).

<sup>144</sup> Barbara H. Fried, *Hale, Robert Lee*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW? 243, 243 (Roger K. Newman ed., 2009).

<sup>145</sup> Katherine V.W. Stone, *John R. Commons and the Origins of Legal Realism; Or, the Other Tragedy of the Commons*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ (Daniel W. Hamilton & Alfred L. Brophy eds., forthcoming 2009) (at 13, available at <http://ssrn.com/abstract=1311461>); see MERCURO & MEDEMA, *supra* note 6, at 214–21 (calling Commons a foundational figure and assessing the “economic impact of alternative legal structures,” and thus the central role of institutions). Commons’s many works include JOHN R. COMMONS, THE DISTRIBUTION OF WEALTH (1893); JOHN R. COMMONS, INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY (1934); JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (Univ. of Wis. Press 1957) (1924).

<sup>146</sup> Stone, *supra* note 145, at 13.

<sup>147</sup> See, e.g., JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 144 (1916) (“[I]t is only in experience that any theory has vital and verifiable significance. . . . [A] theory apart from an experience cannot be definitely grasped even as theory.”); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 27 (1924) (“[I]nfiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.”).

<sup>148</sup> Jerome N. Frank, *Experimental Jurisprudence and the New Deal*, Address Before the Senate of the United States, in 78 CONG. REC. 12412, 12413 (1934).

yond federal agencies and courts, but their scholarship has parallels in old-legal-realist precedents.<sup>149</sup>

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.<sup>150</sup> We are also more aware that these presentations, in turn, play into social dynamics, with their dimensions of hierarchy and power.<sup>151</sup> 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.’”<sup>152</sup> 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.<sup>153</sup> And, like the old realism,

<sup>149</sup> See, e.g., Lobel, *supra* note 49, at 344.

<sup>150</sup> See generally Gordon, *Histories*, *supra* note 67 (going beyond a critique of formalism as legitimization and critiquing legal realists for their functionalism, presumption of inevitability, and the blindness toward domination that it entails). For a more “critical” new-legal-realist perspective, see generally Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433 (2005). For a philosophical investigation of these issues, see generally JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995). Cf. David M. Trubek & John Esser, “Critical Empiricism” in *American Legal Studies: Paradox, Program, or Pandora’s Box?*, 14 LAW & SOC. INQUIRY 3, 39–40 (1989) (rejecting “universal scientism”); William C. Whitford, Review Symposium Comment, *Critical Empiricism*, 14 LAW & SOC. INQUIRY 61, 61–65 (1989) (noting that the goal is to increase the chances of accuracy).

<sup>151</sup> See, e.g., Rubin, *supra* note 48, at 1401 (“As Horkheimer and Adorno, the founders of the Frankfurt School, observe, claims of neutrality are designed to mask the exercise of power, to communicate a pseudo-scientific methodology that disables people from perceiving the possibility of rebellion or dissent.”); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, The Thirteenth Thomas E. Fairchild Lecture (Nov. 2, 2001), in 2002 WIS. L. REV. 1, 7–8 (discussing the credit industry’s effect on reshaping the Bankruptcy Code).

<sup>152</sup> FRANK, *COURTS*, *supra* note 29, at 23; see also FRANK, *MODERN MIND*, *supra* note 29, 115 n.6 (“Judges, we are advised, are far more likely to differ among themselves on ‘questions of fact’ than on ‘questions of law.’”).

<sup>153</sup> Cf. Macaulay, *New Versus the Old*, *supra* note 46, at 391–92.

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.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup> 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."<sup>157</sup> Similarly, within economics itself, "formalism was taken to be the abstract deductive reasoning of orthodox economic

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<sup>154</sup> 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).

<sup>155</sup> 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”).

<sup>156</sup> 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).

<sup>157</sup> POSNER, *supra* note 18, at 24.

analysis that enthroned universally valid reason; assumed passive, rational, utility-maximizing behavior; and demonstrated an inordinate concern over the equilibria of comparative statics.”<sup>158</sup> Scholars such as Frederick Schauer,<sup>159</sup> Adrian Vermeule,<sup>160</sup> and Justice Antonin Scalia<sup>161</sup> 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.<sup>162</sup> There is a certain irony to this challenge because some have claimed that law and economics is a “realist” enterprise since it rejects formal, self-contained doctrinalism. For example, Brian Leiter has dubbed law-and-economics scholars as realists in the sense that they, like the old realists, reject the Bealist notion that doctrine is sufficient and autonomous and proceeds by deductive reasoning.<sup>163</sup> But rejecting doctrinalism does not mean that neoclassical law and economics is not formalist; it is formalism 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 simplified 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 common law, justifying this embrace not on grounds of doctrinal auton-

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<sup>158</sup> MERCURO & MEDEMA, *supra* note 6, at 209 (emphasis omitted).

<sup>159</sup> See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

<sup>160</sup> See VERMEULE, *supra* note 155, at 289 (advocating textualism in judicial interpretation 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”).

<sup>161</sup> See generally SCALIA, *supra* note 40; Scalia, *supra* note 40 (exploring court-made law).

<sup>162</sup> See Dagan, *supra* note 26, at 618; Leiter, *supra* note 136.

<sup>163</sup> 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

	Old Formalism	New Formalism
Individual	Autonomous	Autonomous
State	Laissez-Faire	Market state
Doctrine	Common Law	Common Law
Scholarship	Doctrinal	Neoclassical Law and Economic
Key concepts	Doctrine	Efficiency Welfare

omy but 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.”<sup>164</sup> 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.”<sup>165</sup>

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.”<sup>166</sup> Like the old formalists, the new formalists see statutes as reflective of politics, not law.<sup>167</sup> 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.<sup>168</sup> These two moves are linked. As Mercuro and Medema note,

<sup>164</sup> Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1, 5 (1987).

<sup>165</sup> MERCURO & MEDEMA, *supra* note 6, at 120.

<sup>166</sup> On statutory interpretation, see generally Easterbrook, *supra* note 42; for public-choice theorists’ prescription of a mechanical approach to constitutional interpretation, see, for example, 7 THE COLLECTED WORKS OF JAMES M. BUCHANAN: THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 89 (1975) (explaining that at the constitutional stage of choice, “[t]he participants agree on a structure of individual rights or claims that is to be enforced, and violation requires only the findings of fact and the automatic administration of sanctions”). For a different variant of formalism (with neoclassical law-and-economics roots) applied to both statutory and constitutional interpretation, see *infra* notes 177–82 and accompanying text.

<sup>167</sup> See, e.g., Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–17 (1984) (discussing statutes as the rent-seeking product of competing interest groups).

<sup>168</sup> See *id.* at 15; see also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 285–90 (2d prtg. 1999). On the foundations of public-choice theory in neoclassi-

the view “that the common law is efficient serves as an ideological barrier to the general promotion of statutory law.”<sup>169</sup> 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,<sup>170</sup> 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<sup>171</sup> to legal-subject theorists’ rejecting neoclassical law and economics’ core assumptions.<sup>172</sup> The different varieties also respond to distinct policy challenges, from attitudinalists’ questioning

cal law and economics, see JAMES M. BUCHANAN, *WHAT SHOULD ECONOMISTS DO?* 17–37 (1979); GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 115 (1988). See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (providing an overview of public-choice theory).

<sup>169</sup> 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.”). Mercurio 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.

<sup>170</sup> 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).

<sup>171</sup> See, e.g., Korobkin, *Behavioral Analysis*, *supra* note 54; Korobkin & Ulen, *supra* note 54, at 1053.

<sup>172</sup> 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.<sup>173</sup> 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,<sup>174</sup> 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.<sup>175</sup> Table 2 summa-

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<sup>173</sup> Cf. *infra* note 191.

<sup>174</sup> See, e.g., Dagan, *supra* note 26, at 618 (noting Dewey's critique of syllogistic reasoning in law that "'give[s] an illusion of certitude'" based on "'the doctrine of undoubtable and necessary antecedent rules,'" thus "[p]rivileging—indeed, perpetuating—the *status quo*" (quoting John Dewey, *Logical Method and Law*, reprinted in *AMERICAN LEGAL REALISM* 191, 193 (William W. Fisher et al. eds., 1993))). Judge Calabresi also criticized Judge Posner's concept of justice in terms of wealth maximization for its status-quo bias. See Calabresi, *supra* note 20, at 90; see also HEGEL ON ECONOMICS AND FREEDOM (William Maker ed., 1987) ("The problem with Posner's concept of economic justice is that it lacks an appreciation that people can be dominated, coerced, and constituted by a market plagued by distributional inequalities . . ."); Gary Minda, *Toward a More "Just" Economics of Justice—A Review Essay*, 10 *CARDOZO L. REV.* 1855, 1865 (1989) (reviewing RICHARD DIEN WINFIELD, *THE JUST ECONOMY* (1988)).

<sup>175</sup> 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*

rizizes the differences between the new legal realism and the new formalism.

NEW FORMALISM V. NEW REALISM

	New Formalism	New Realism
Individual	Autonomous	Subject to irrationality, political behavior, institutional influence and vulnerability
State	Market State	No market default in institutional choice
Doctrine	Common-law default	No common-law default
Scholarship	Neoclassical Law and Economic	Empirical, multidisciplinary, multimethod; includes political science, behaviorism, institutional analysis, contextualism

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.<sup>176</sup> 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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STATE: ESSAYS ON REGULATION 167, 167 (1975) ("A few people, indeed, believe that almost all regulation is bad, and by a singular coincidence a significant fraction of the academic part of this group resides within a radius of one mile of my university [Chicago]."); Milton Friedman, *Schools at Chicago*, U. CHI. MAG., Autumn 1974, at 11 ("'Chicago' stands for belief in the efficacy of the free market as a means of organizing resources, for scepticism about government intervention into economic affairs . . ."). Contrast the vision of Friedrich Hayek (who was also long based at the University of Chicago) of the "spontaneous order" of markets through the price system with our dramatic experience of the "spontaneous disorder" of markets during the 2008 financial crisis. See F.A. HAYEK, *THE ROAD TO SERFDOM* 72–87 (50th anniversary ed. 1994) (discussing "spontaneous order").

<sup>176</sup> See Leiter, *supra* note 36, at 21–25.

cient doctrine and common-law judges respond accordingly.<sup>177</sup> 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.”<sup>178</sup> 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.<sup>179</sup> Textualists contend that judges will be restrained from engaging in politicized “lawmaking” by standing closely to the text.<sup>180</sup> 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.<sup>181</sup> The result of limiting statutes’ domains is to privilege the market as an institutional choice for regulating social interaction, sub-

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<sup>177</sup> 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.

<sup>178</sup> 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.

<sup>179</sup> 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.

<sup>180</sup> 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).

<sup>181</sup> 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.

ject primarily to traditional common-law doctrines (such as nuisance) as opposed to legislative or administrative regulation.<sup>182</sup>

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.<sup>183</sup> 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.<sup>184</sup> 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.”<sup>185</sup> 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.”<sup>186</sup> 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.”<sup>187</sup> 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.”<sup>188</sup> He thus, fifth, turns to the logic of decision theory and the theory of “second-best,” pursuant to which rational decision makers maximize ex-

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<sup>182</sup> See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 134 (1995) (“[C]onfine the ends of the police power to common law nuisances . . .”).

<sup>183</sup> 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.

<sup>184</sup> See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 46 (1994) (“[G]ame theory shares its basic premises with classical economics.”).

<sup>185</sup> VERMEULE, *supra* note 155, at 2.

<sup>186</sup> *Id.* at 159–61 (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991)).

<sup>187</sup> *Id.* at 161.

<sup>188</sup> *Id.* at 162.

pected utility in light of uncertainty and capacity constraints.<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup> 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.<sup>192</sup> Instead, for attitudinalists, judging is explained primarily (or, depending on the scholar, at least in significant part) by political inclination. The behaviorialists' 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-

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<sup>189</sup> *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.

<sup>190</sup> *Id.* at 4.

<sup>191</sup> *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*)).

<sup>192</sup> 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.

ures.<sup>193</sup> As Christoph Engel and Gerd Gigerenzer 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"<sup>194</sup> If the behaviorialists 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.<sup>195</sup>

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.<sup>196</sup> 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.<sup>197</sup> 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).<sup>198</sup> Moreover, judges are situated decision makers; they respond to the facts of particular cases reflecting particular factual, social, and historical contexts.<sup>199</sup>

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<sup>193</sup> See Christoph Engel & Gerd Gigerenzer, *Law and Heuristics: An Interdisciplinary Venture*, in *HEURISTICS AND THE LAW* 1, 4 (G. Gigerenzer & 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").

<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 *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, *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.").

<sup>196</sup> See *supra* Part I.B.

<sup>197</sup> See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (exploring the role of social norms in property disputes); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 *U. ILL. L. REV.* 447 (1999) (arguing that workers' ideas about their legal rights are shaped by expectations of fairness); Macaulay, *Contracts*, *supra* note 46 (exploring the role of business norms in contractual disputes). For an exploration of lay understandings of the law, see Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 *STAN. L. & POL'Y REV.* 237, 257-58 (2004).

<sup>198</sup> See Leiter, *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 FRANK, *MODERN MIND*, *supra* note 29, at 102)).

<sup>199</sup> See Catharine Wells, *Situated Decisionmaking*, 63 *S. CAL. L. REV.* 1727, 1728 (1990); see also CASS R. SUNSTEIN, *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, *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.<sup>200</sup> 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.<sup>201</sup>

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.<sup>202</sup> For neoinstitutionalists, judges work in institutional settings that shape their decision making.<sup>203</sup> 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.<sup>204</sup> In doing so, judges must ultimately make

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STAN. L. REV. 321, 322 n.3 (1990) (“By ‘practical reason,’ we mean an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law) . . .”). As regards constitutional interpretation, see GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION 4–5 (2009) (arguing that constitutional fidelity is maintained not by returning to original meaning but interpreting the Constitution “in the light of evolving precedent, historical experience, practical consequences, and societal change”); Jack M. Balkin & Reva B. Siegel, *Introduction to THE CONSTITUTION IN 2020* 1, 2–3 (Jack M. Balkin & Reva B. Siegel eds., 2009) (stating that “our Constitution is always a work in progress,” and noting (against the originalist variant of textualism) that it once “protected slavery,” “sanctioned Jim Crow,” “permitted a wide variety of variety of forms of political and artistic censorship,” and “treated women as men’s servants, and gays and lesbians as criminals,” but “does no longer”); see also Llewellyn’s earlier call for breaking down larger legal categories, such as contract and property, into “smaller categories—which may be either sub-groupings inside the received categories, or may cut across them”—that is, to look to context and situation sense. Llewellyn, *supra* note 126, at 453.

<sup>200</sup> See MERTZ, *supra* note 63, at 44–45.

<sup>201</sup> 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 . . .”).

<sup>202</sup> KOMESAR, *supra* note 47, at 269–71.

<sup>203</sup> See, e.g., Rubin & Feeley, *supra* note 92, at 191–92 (building from neoinstitutionalism and addressing the interaction of judges’ personal beliefs and the institutional setting in which they work, which includes doctrine).

<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup>

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.<sup>207</sup> Neoclassical law and

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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).

<sup>205</sup> 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.

<sup>206</sup> *See* Scott & Sturm, *supra* note 49, at 568–75.

<sup>207</sup> *See, e.g.,* Nourse, *supra* note 39, at 1449 (building from the institutionalist insights of the anthropologist Mary Douglas); *see also* MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 79 (1990) (“Institutions establish what count as correct and incorrect patterns of thought.”); Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1, 4 (2008) (“Comparative institutional analysis assesses the impacts of judicial interpretive choices in terms of their allocation of power to alternative institutions.”).

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.<sup>208</sup> Markets are prized as the default institution.<sup>209</sup> Politics and law are generally considered inefficient, except to facilitate market coordination.<sup>210</sup> The state, in the words of Philip Bobbitt, is a "market state," which, "[i]n contrast to the nation state, . . . does not see itself as more than a minimal provider or redistributor of goods and services."<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup> This vision of the state clearly links to neoclassical law and economics' vision

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<sup>208</sup> 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).

<sup>209</sup> 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").

<sup>210</sup> See *id.*

<sup>211</sup> 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).

<sup>212</sup> See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 17–27 (1962).

<sup>213</sup> See LARS UDEHN, *THE LIMITS OF PUBLIC CHOICE: A SOCIOLOGICAL CRITIQUE OF THE ECONOMIC THEORY OF POLITICS* 91–92 (1996) (discussing the literature, including the expressive theory of voting); Geoffrey Brennan & James Buchanan, *Voter Choice: Evaluating Political Alternatives*, 28 *AM. BEHAV. SCIENTIST* 185, 185 (1984). See generally GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* (1993).

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.<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup>

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).<sup>218</sup> They insist that individual values

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<sup>214</sup> See discussion *supra* Part I.A.2.

<sup>215</sup> See discussion *supra* Part I.A.1.

<sup>216</sup> 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." (emphases omitted) (citation omitted)).

<sup>217</sup> See THALER & SUNSTEIN, *supra* note 116, at 83–87.

<sup>218</sup> See, e.g., Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988); see also Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 736 (1985) (discussing the importance of human nature).

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,<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup> The “state” is not imposed from on high, either by governors or by legal theories. It emerges from real-world interaction.<sup>223</sup>

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

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<sup>219</sup> 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.

<sup>220</sup> 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.

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

<sup>222</sup> See JOHN L. CAMPBELL, INSTITUTIONAL CHANGE AND GLOBALIZATION 124–71 (2004) (discussing the increasingly international identity of private organizations and how they influence national regulatory regimes); HALLIDAY & CARRUTHERS, *supra* note 76, at 1–37 (discussing the interdependency of law and commercial markets); GEORG SØRENSEN, THE TRANSFORMATION OF THE STATE: BEYOND THE MYTH OF RETREAT 31–39 (2004); Michael Zürn & Stephan Leibfried, *Reconfiguring the National Constellation*, in TRANSFORMATIONS OF THE STATE? 1, 20–23 (Stephan Leibfried & Michael Zürn eds., 2005) (discussing the impact of supranational legal authorities on national sovereignty); Neil Walker, *Out of Place and Out of Time: Law’s Fading Co-ordinates* 33–34 (Univ. of Edinburgh Sch. of Law Working Paper Series, Paper No. 2009/01, 2008), available at <http://ssrn.com/abstract=1367591>; Gregory Shaffer, *Transnational Transformations of the State: Legal Change, Resistance and Recursivity* (2009) (unpublished manuscript, on file with authors). See generally TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES (Michael Likosky ed., 2002).

<sup>223</sup> 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.<sup>224</sup> 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).<sup>225</sup> 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.<sup>226</sup>

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.<sup>227</sup> This form of reasoning recalls the earlier warning of Dean Pound against formalists' "mechanical jurisprudence,"

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<sup>224</sup> See Fineman, *supra* note 105, at 1–2 (rejecting the notion of an autonomous subject).

<sup>225</sup> See *id.* at 9–10.

<sup>226</sup> See *id.*

<sup>227</sup> In fact, until the rise of "empirical legal studies," there was little empirical work to test neoclassical law-and-economics models. See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *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.").

which he caricatured as “the rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of actual facts.”<sup>228</sup> 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.<sup>229</sup>

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.”<sup>230</sup> 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.<sup>231</sup> Typically, new legal realists contend that positing rationalist assumptions without observing actual behavior, like positing ends

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<sup>228</sup> Pound, *supra* note 133, at 462.

<sup>229</sup> 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.

<sup>230</sup> Elizabeth Mertz, *Challenging Translations: New Legal Realist Methods*, 2005 Wis. L. Rev. 482, 483–84.

<sup>231</sup> See Shaffer, *supra* note 76, at 8–11.

without an understanding of means, is unrealistic and likely to fail.<sup>232</sup> 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.<sup>233</sup>

For many new legal realists, *institutions* and *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.<sup>234</sup> Similarly, behavioral economists' research on heuristics emphasizes the role of differences in institutional rationality<sup>235</sup> and explores how institutions shape individual choice by creating choice architectures.<sup>236</sup> 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.<sup>237</sup> 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

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

<sup>233</sup> See Erlanger et al., *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.").

<sup>234</sup> See Miles & Sunstein, *Real World*, *supra* note 57, at 784–91.

<sup>235</sup> Engel & Gigerenzer, *supra* note 193.

<sup>236</sup> See THALER & SUNSTEIN, *supra* note 116, at 5.

<sup>237</sup> 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 *Overcoming Law*. See POSNER, *OVERCOMING LAW*, *supra* note 5, at 22–24.

choices must not be mechanically applied.<sup>238</sup> 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.<sup>239</sup>

Finally, as with the original realism, there is a heavy dose of *philosophical pragmatism* inherent in the theorizing behind many of these approaches.<sup>240</sup> 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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<sup>238</sup> See generally KOMESAR, *supra* note 47 (offering an analytic framework for institutional comparison). For Komesar, a bottom-up approach using comparative institutional analysis is actually the “essence of economics” but is unfortunately lost in much economic analysis. Komesar, *Essence*, *supra* note 88, at 1.

<sup>239</sup> For a critical perspective, see CLARISSA RILE HAYWARD, *DE-FACING POWER* 7 (2000) (“[S]ocial critics need to elaborate criteria for distinguishing better from worse forms of power relation, or, more specifically, relations that promote participants’ political freedom—that is, their capacity to act in ways that affect norms and other political mechanisms defining the field of the possible—from those that approximate states of domination.”).

<sup>240</sup> Judge Posner likewise has turned to characterize his views as pragmatist. See generally POSNER, *supra* note 10 (applying directly the neoclassical economic assumptions and concepts of price theory); POSNER, *OVERCOMING LAW*, *supra* note 5 (offering pragmatism as the central claim and viewing law and economics as providing tools for policymaking and for empirical analysis). In *Overcoming Law*, Judge Posner argues that “a taste for fact, a respect for social science, an eclectic curiosity, a desire to be practical, a belief in individualism, and an openness to new perspectives—all interrelated characteristics of a certain kind of pragmatism” will best advance legal theory. POSNER, *OVERCOMING LAW*, *supra* note 5, at viii. He likewise writes that the “real antithesis to pragmatism is the kind of rationalism, fairly termed Platonic, that claims to use purely analytic methods to reason to the truth about contested metaphysical and ethical claims.” *Id.* at 10 (footnote omitted). See also, within his vast oeuvre, RICHARD A. POSNER, *HOW JUDGES THINK* 13 (2008) (“The pragmatic judge is a *constrained* pragmatist.”); POSNER, *supra* note 18, 27–31 (arguing for a “new pragmatist jurisprudence”). We agree and find that Judge Posner’s work has increasingly taken a new-legal-realist trajectory, as when he states in *Overcoming Law* that the pragmatist “thinks of theories, including scientific theories, as tools rather than as visions of reality.” POSNER, *OVERCOMING LAW*, *supra* note 5, at 9. Others have already noted how Judge Posner’s turn to pragmatism is at odds with his original neoclassical law-and-economics methodology and represents a significant shift because it has some affinities with critical approaches. See, e.g., Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1222 (1991) (reviewing POSNER, *supra* note 18) (“[T]here is reason to believe that he is engaged in an intellectual odyssey in which he is subjecting some of his most cherished conceptions to re-analysis or, at the very least, to a refinement that takes account of differing perspectives.”); see also Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 341 (1990) (“Judge Posner should be every CLS scholar’s hero.”). For explications of law and economics in terms of tools as opposed to ideology, see generally Donohue, *Law and Economics*, *supra* note 65 (stressing the importance of law and economics as a tool rather than a ideology); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875.

world testing and back again.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> The legal-subject theorists resist top-down theory because it fails to account for law’s subjects.<sup>244</sup> 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.<sup>245</sup> 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

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<sup>241</sup> 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.”).

<sup>242</sup> See *supra* Part I.C.2.

<sup>243</sup> See *supra* Part I.A.1.

<sup>244</sup> See *supra* Part I.C.3.

<sup>245</sup> Cf. JÜRGEN HABERMAS, A BERLIN REPUBLIC: WRITINGS ON GERMANY 61 (Steven Rendall trans., 1997) (1995) (calling for “a reason that puts itself on trial”).

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).<sup>246</sup> 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.<sup>247</sup> 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”<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> 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.

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<sup>246</sup> See *supra* Part III.

<sup>247</sup> See *supra* Parts I.A.1, I.A.2.

<sup>248</sup> See Miles & Sunstein, *supra* note 44, at 837–38.

<sup>249</sup> See *supra* Part I.B.

<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup>

## 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.<sup>253</sup> 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

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<sup>251</sup> See *supra* Part I.C.

<sup>252</sup> See generally Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008).

<sup>253</sup> 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.<sup>254</sup> The question remains the extent to which behavioralists’ and contextualists’ methods can have purchase in a world of action.<sup>255</sup> 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.<sup>256</sup>

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

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<sup>254</sup> 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).

<sup>255</sup> 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.”

Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAG., Oct. 17, 2004, at 44, 51.

<sup>256</sup> See, e.g., THE ROLE OF SOCIAL SCIENCE IN LAW i (Elizabeth Mertz ed., 2008).

be entirely false.<sup>257</sup> 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.<sup>258</sup> Francis Galton, the founder of eugenics, also discovered the regression to the mean.<sup>259</sup> 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.<sup>260</sup> Is it any surprise, after all, that political scientists focus on polls and parties and ideology; that economists focus on mar-

<sup>257</sup> Similarly, Llewellyn warned that although originally formulated on the model of at least some observed data, [categories] tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data even when these data are not in fact present, and to twist any fresh observation of data into conformity with the lines and shape of the categories.

KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 28 (1962).

<sup>258</sup> See generally MICHAEL BULMER, FRANCIS GALTON: PIONEER OF HEREDITY AND BIOMETRY (2003); NOURSE, *supra* note 34.

<sup>259</sup> BULMER, *supra* note 258, at 184 (stating that Galton invented regression and correlation).

<sup>260</sup> Sociologists often refer to what we call “strong theory” in terms of “metatheory,” involving “fundamental assumptions about how the world works, what questions we should ask, and how we should go about answering them. . . . [M]etatheories represent world views; they cannot be disproved.” E-mail from Elizabeth Boyle, Associate Professor of Sociology, University of Minnesota, to Gregory Shaffer (Oct. 20, 2008, 05:47 PM) (on file with author) (discussing new legal realism and sociological theory). See generally RAYMOND BOUDON, *Theories, theory, and Theory*, in THE CRISIS IN SOCIOLOGY: PROBLEMS OF SOCIOLOGICAL EPISTEMOLOGY 149 (Howard H. Davis trans., 1980) (dissecting the notion of “theory”). As Charles Peirce wrote from a philosophical-pragmatist perspective,

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.<sup>261</sup> 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.<sup>262</sup> 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,”<sup>263</sup> that there are structures that support the

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[W]e perceive what we are adjusted for interpreting, though it be far less perceptible than any express effort could enable us to perceive; while that, to the interpretation of which our adjustments are not fitted, we fail to perceive although it exceed in intensity what we should perceive with the utmost ease, if we cared at all for its interpretation.

CHARLES SANDERS PEIRCE, *Pragmatism and Abduction*, in 5 COLLECTED PAPERS 112, § 5.185 (Charles Hartshorne & Paul Weiss eds., 4th prtg. 1974) (1934).

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

<sup>262</sup> 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.”).

<sup>263</sup> Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL’Y 149, 152–56 (1984).

“repeat play” of the haves against the have-nots.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup>

#### 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

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<sup>264</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–114 (1974).

<sup>265</sup> See, e.g., IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed., 2001) (offering insights on the understanding of modern contract).

<sup>266</sup> 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*.<sup>267</sup> 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).<sup>268</sup>

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.<sup>269</sup> 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).<sup>270</sup> 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.<sup>271</sup> 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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<sup>267</sup> 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.

<sup>268</sup> Cf. POSNER, *OVERCOMING LAW*, *supra* note 5, at 2–3 ("The law and economics movement owes little to legal realism . . ."); Leiter, *supra* note 163, at 381 (claiming law and economics as a form of realism). Judge Posner linked legal realism to critical legal studies and to left-leaning politics, which is why he disassociated himself from the movement. See POSNER, *OVERCOMING LAW*, *supra* note 5, at 393–94.

<sup>269</sup> 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).

<sup>270</sup> See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL. STUD. 199, 200–01 (2006).

<sup>271</sup> See, e.g., KOMESAR, *supra* note 47, at 53–123; Neil K. Komisar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 695 (1988) (discussing the "dominant structural characteristic of the judiciary").

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).<sup>272</sup>

The simple dichotomy of law-versus-politics is not only undertheorized but also falsely dichotomized; the two constantly interact and operate in parallel, simultaneously.<sup>273</sup> 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.<sup>274</sup> Any theory of law, then, must hold law and politics together

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<sup>272</sup> 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).

<sup>273</sup> 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).

<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup>

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.<sup>278</sup> 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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Lon Fuller and others in the legal-process school found attractive in light of the authoritarian politics of Nazism and Stalinism in the mid-twentieth century. See PURCELL, *supra* note 27, at 163 (“Fuller linked realism to the worldwide crisis of the late thirties. . . . Although he [Fuller] did not equate relativism with totalitarianism as many critics did, he called it the necessary first step toward the disintegration of society and the ultimate rule of brute force.”).

<sup>275</sup> Dagan, *supra* note 26, at 610. As regards international law, see a similar articulation of this central tension in law in Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 370–71 (2005).

<sup>276</sup> 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).

<sup>277</sup> See, e.g., V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 892 (2004) [hereinafter Nourse, *Constitutional Anatomy*] (discussing interpretive approaches to the Constitution); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 753 (1999) [hereinafter Nourse, *Vertical Separation*] (emphasizing a participation-centered model of politics).

<sup>278</sup> 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).<sup>279</sup> 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.<sup>280</sup> 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 legitimate. 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.<sup>281</sup> 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."<sup>282</sup> New legal realists must reject both "purist alternatives" of law as power and law as reason.<sup>283</sup> 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,

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<sup>279</sup> See generally Nourse, *supra* note 39.

<sup>280</sup> See Schauer, *supra* note 159, at 510–11, 547–48.

<sup>281</sup> See Dagan, *supra* note 26, at 637. Dean Dagan examines three sets of constitutive tensions in the realist conception of law: "between power and reason, science and craft, and tradition and progress." *Id.* at 610.

<sup>282</sup> K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355, 1383 (1940).

<sup>283</sup> Dagan, *supra* note 26, at 637.

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.<sup>284</sup>

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.<sup>285</sup> 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.<sup>286</sup> 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-

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<sup>284</sup> Cohen, *supra* note 134, at 848–49.

<sup>285</sup> See, e.g., THALER & SUNSTEIN, *supra* note 116, at 4–6. Sunstein addresses more directly his views on rights in SUNSTEIN, *supra* note 27.

<sup>286</sup> See generally Komesar, Essence, *supra* note 88; Shaffer, *supra* note 207.

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.<sup>287</sup> 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-

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<sup>287</sup> 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.<sup>288</sup> 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.<sup>289</sup> 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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<sup>288</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008) (holding that the Second Amendment confers an individual right to keep and bear arms); *Bush v. Gore*, 531 U.S. 98, 110 (2000) (holding that manual recounts ordered by Florida Supreme Court did not satisfy the Equal Protection Clause and that remand would be an inappropriate remedy). Conservative scholars and appellate judges, such as Judges Michael McConnell, Posner, and Harvie Wilkinson, have criticized both decisions. See, e.g., Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 660 (2001) (indicting the Supreme Court for appearing partisan); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009) (manuscript at 2, available at <http://ssrn.com/abstract=1265118>) (“Second, each [*Roe v. Wade* and *Heller*] represents an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves.”); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 35 (“If constitutional decisions are to be determined by the balance between liberals and conservatives on the Supreme Court, the fig-leaving that we find in *Heller*—the historicizing glaze on personal values and policy preferences—will continue to be irresistibly tempting to the justices, with their large and tireless staffs and their commitment to a mystique of ‘objective’ interpretation.”).

<sup>289</sup> 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.<sup>290</sup>

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.<sup>291</sup> 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-

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<sup>290</sup> 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)).

<sup>291</sup> 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

constantly cycling interaction between law and society.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup>

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.<sup>295</sup> 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*.<sup>296</sup> 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”<sup>297</sup> 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*).

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<sup>292</sup> See Halliday & Carruthers, *supra* note 80, at 1192. Old legal realism had a dynamic element, but it remained highly undertheorized.

<sup>293</sup> For a “double story,” see generally Nourse, *supra* note 38.

<sup>294</sup> 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.”).

<sup>295</sup> For an example of mediating theory, see *id.* at 142–44 (discussing amplification, condensation, and switching).

<sup>296</sup> 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.

<sup>297</sup> Dagan, *supra* note 26, at 610.

The following table summarizes the key concepts of a dynamic new realism.

NEW DYNAMIC REALISM

Individual	Subject to institutional influence and vulnerability
State	Institutions that support resilience; all institutions subject to malfunction
Scholarship	Empirical but non-reductive, recursive studies
Key Concepts	Participation, mediating theory, recursivity, simultaneity of law and politics

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.<sup>298</sup> A dynamic realism calls for regulation responsive to new information and public input<sup>299</sup> and resilient enough to withstand great and unexpected crises based on known vulnerabilities.

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<sup>298</sup> 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.

<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup> 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.<sup>302</sup> 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

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<sup>300</sup> See Posner, *supra* note 164.

<sup>301</sup> See *supra* Part III.A.

<sup>302</sup> AKERLOFF & SHILLER, *supra* note 1, at 1–7.

American toys.<sup>303</sup> Icelandic workers are laid off because of American defaults on home mortgages.<sup>304</sup> If China 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.<sup>305</sup>

*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.<sup>306</sup> 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.

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<sup>303</sup> *China's Toxic Toymaker*, ECONOMIST, Aug. 18, 2007, at 58 (describing Chinese-made toys containing lead).

<sup>304</sup> *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).

<sup>305</sup> See Walker, *supra* note 222, at 33–34. On new-legal-realist approaches to international and transnational law, see generally Garth, *Rebuilding*, *supra* note 76, at 9; Symposium, *supra* note 86. For different functional, institutionally oriented approaches, see generally CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006) (explaining Joerges's conflict-of-laws approach); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to Global Constitutionalism* (Harvard Pub. Law Working Paper, No. 08-57, 2009), available at <http://papers.ssrn.com/abstract=1311983> (discussing global constitutionalism and providing a "constitutional matrix" that allows for analysis of different constitutional settlements); Symposium, *Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (2005); Miguel Poiares Maduro, *Interpreting European Law—Judicial Adjudication in a Context of Constitutional Pluralism* (Working Paper IE Law School, No. WPLS08-02, 2008), available at <http://papers.ssrn.com/abstract=1134503> (analyzing the European Court of Justice by reference to pluralism). On the contemporary challenges that these transnational developments pose for traditional concepts of law, or "law's coordinates," see Walker, *supra* note 222.

<sup>306</sup> 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.<sup>307</sup> 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.<sup>308</sup>

*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-

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<sup>307</sup> 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 ALEXI, *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.").

<sup>308</sup> 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." ISALAH BERLIN, *LIBERTY* 216 (Henry Hardy ed., 2002).

dictive theory, be it “positive political theory” or otherwise.<sup>309</sup> 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.<sup>310</sup> He then suggested that if there were to be a next chapter, it could well involve a new pragmatism.<sup>311</sup> 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”<sup>312</sup> (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,

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<sup>309</sup> As Farber writes, “The assumption on both [the rational choice and behavioralist] sides is apparently that the sine qua non of social science is having a unified predictive theory. But perhaps this is merely another symptom of economics’ famous case of ‘physics envy.’” Farber, *supra* note 43, at 295; see also JÜRGEN HABERMAS, ON THE LOGIC OF THE SOCIAL SCIENCES 3 (Shierry Weber Nicholsen & Jerry A. Stark trans., Mass. Inst. of Tech. 1988) (1967) (“[T]he social sciences must bear the tension of divergent approaches under one roof . . .”).

<sup>310</sup> See DUXBURY, *supra* note 136.

<sup>311</sup> See *id.* at 502.

<sup>312</sup> See HABERMAS, *supra* note 274, at 390.

and academic theorizing. It rejects the privileging of markets by neo-classical 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.

