

**The New Legal Realism Volume I Abstracts**  
**Translating Law-and-Society for Today's Legal Practice**

*Edited by Elizabeth Mertz, Stewart Macaulay, and Thomas W. Mitchell*

1. Introduction: New Legal Realism: Law and Social Science in the New Millennium  
Elizabeth Mertz

**Section I: The Place of New Legal Realism in Legal Thought and Teaching**

2. A New Legal Realism: Elegant Models and the Messy Law in Action  
Stewart Macaulay

Many legal scholars are talking about “a new legal realism.” Most distinguish an old legal realism that, for the most part, focused on empowering appellate judges to make policy based decisions and to abandon legal formalism. However, those who speak of a new legal realism mean different things. This article reviews many examples of what is captured under the term. Some have looked at variables other than the law itself that may influence and explain judicial decisions. Others find large sets of data about the consequences of law and apply sophisticated statistics. There is an active challenge to the underlying assumptions of much of law-and-economics. Behavioral law-and-economics primarily draws on social psychology to change our views of how people behavior in the market and rationalize some legal regulation. Careful qualitative work looks at such things as when people will and will not assert their legal rights and catalogues the normative and sanction systems, other than the law, which govern much of life. Some issues concerning the legal system demand methods of study that would be difficult to replicate, and we face all of the difficulties involved in asking actors to explain their behavior. Study of the law in action and the living law does not solve all problems. Indeed, sometimes command of the facts and an appreciation of what we do not know make it harder to find acceptable solutions to problems. Moreover, people coping with problems often settle disputes rather than litigate and appeal. Almost always this makes predicting the consequences of adopting particular legal rules extremely difficult if not impossible. Settlements rest on bargaining power, and bargaining power seldom is equal. A new legal realism raises challenges to the legitimacy of law and questions much legal scholarship.

3. Putting the “Real World” into Traditional Classroom Teaching  
Jane Aiken & Ann Shalleck

This chapter argues for the importance of integrating law on the ground into teaching in the traditional law school classroom. Through a specific example demonstrating how to accomplish this integration using a problem situated in the real world, the chapter explains and shows how this integration furthers the project of the new legal realism. In the design and implementation of this problem, the chapter draws on the critical intersection between the traditions of new legal realism and the theoretical orientations of clinical thought. Using teaching activities developed from clinical methods, the authors identify some of the key questions, methods, and aspirations that each of these traditions highlights in seeking a restructuring and reorientation of traditional classroom activity. The chapter demonstrates how legal and social science understanding can be

woven together in the foundational experiences students have of studying law. The authors also begin the longer-term effort of probing whether and how such classroom teaching experiences can enrich legal experts' understanding of law on the ground and also embed in the legal academy and in the profession a sense of law on the ground as "real law" - a constitutive part of law – and not just an application of formal law. Law professors convey through their teaching both intentionally and inadvertently an understanding of what law is. Students absorb that understanding and take it with them into practice, even as they confront law on the ground in their daily work. The project of bringing law on the ground into the classroom for examination and reflection advances the ambitions of the new legal realism by making study of law on the ground fundamental to the law school classroom - a formative site for shaping understanding of law and lawyering.

4. Some Realism about Realism in Teaching about the Legal Profession  
Catherine Fisk, Ann Southworth, and Bryant Garth

UC Irvine Law School has adopted a first-year course designed to introduce students to the rich empirical literature on the legal profession and to give them an understanding of practice realities and critical perspectives on those practices. It also seeks to provide students with information about the social and cultural contexts of law practice that they will find useful as they navigate their careers. This chapter describes and assesses the course and our experience while teaching it.

5. "Fielding" Legal Realism: Law Students as Participant-Observers?  
Riaz Tejani

Legal realism has never been a more important tool for students of professional law. As this chapter suggests, one highly effective way to develop this in the classroom is through careful, well-directed legal ethnography—also known as participant-observation. Legal ethnography offers an empirical method by which students can leave "law in books" to observe and document "law in action" in the complicated, social environments in which they reside. This chapter justifies the use-value of that method by addressing general problems of adopting social science in law teaching, and by describing classroom experience using ethnographic assignments in first-year doctrinal and upper-division courses. Drawing upon several years of qualitative data, it suggests ethnography as one streamlined approach to the employment of social science theory and method complementary to law pedagogy.

**Section II: Philosophy and Methods for a New Legal Realism**

6. Legal R/realism and Jurisprudence: Ten Theses  
William Twining

This paper nails to the door ten theses about ways in which "realistic" and empirical approaches are central to the task of understanding law at local, national, sub-global and global levels.

7. Legal Realism in Context  
Brian Z. Tamanaha

Legal theorists and historians continue to debate what legal realism was about. Discussions of legal realism typically revolve around a particular group of jurists and their views. In this chapter I argue that a more fruitful way to understand legal realism is to observe the broader currents at

work in law at the turn of the twentieth century, a generation before legal realism supposedly emerged.

#### 8. Legal Storytelling as a Variety of Legal Realism

Robert Gordon

This paper examines the role of contextual narratives in famous cases. Law teachers and scholars use narrative for a variety of different purposes, but one of them is to show how case law, like sausages and legislation, is made -- in particular how "facts" in the appellate case are constructed out of raw materials, by different participants -- parties, lawyers, brief writers, judges, etc. This method is slightly different from that of empirical social studies of law in action or law on the ground, but it is similar in its aims. Another broader form of contextualization is bottom-up legal history, illustrating how claims arise and are shaped and are processed at various levels of legal institutions. These projects had their counterparts in the Old Legal Realism -- especially in Jerome Frank's treatment of fact-construction in *Courts on Trial*, William O Douglas's narratives of how debtors came to bankruptcy, Walter Nelles work on the history of labor law, Walton Hamilton's articles on the history of mercantilist ideas in vogue at the founding, and, as a late flowering of Realism, Willard Hurst's studies of everyday law at the working level.

#### 9. Combining Methods for a New Synthesis in Law and Empirical Research

Elizabeth Mertz and Katherine Barnes

Legal scholarship is once again turning to empirical research for guidance in analyzing law. Since the time of the original legal realists, there have been many developments across the social sciences. Law as a discipline is uniquely poised to synthesize these developments from across a variety of social science fields, in service of a better understanding of law as it operates everywhere from high courts to people's daily lives. We use examples from our mixed-methods study of law professors to consider how qualitative and quantitative research can be combined to yield more robust insights about this part of the legal profession. In the process, we consider different ways to study and present findings about implicit bias. We highlight how presentation of mixed-methods findings can be more or less precise, depending on how the combined results are framed and translated.

### **Section III: New Legal Realist Translations**

#### 10. New Legal Realism and Inequality

Thomas W. Mitchell

New Legal Realist methodologies afford comparative advantages in showing how law impacts people in their everyday lives and these methodologies sometimes can be especially helpful in increasing knowledge with respect to certain poorly understood and under-theorized legal issues implicating inequalities of one type or another. Further, scholars who use New Legal Realist methodologies can help build a bridge between scholarly understanding and policy change by revealing problems with the law that had not been previously recognized to any significant degree. At the same time, scholarship in and of itself rarely catalyzes legal reform but instead needs to be linked to a broader reform effort if a scholar would like to

contribute to actual reform. Such broader reform efforts often involve coalition building, recruiting important stakeholders both from the bottom and the top, and a media strategy among other components. This chapter traces a line of development from research on African-American land loss through policy changes designed to put research knowledge into action, working to protect poor and minority property owners through empirically-informed legal change. This kind of translation of research on law into policy exemplifies the translation process at the heart of new legal realism.

11. The Financial Crisis and Moral Accountability: Translating Practices of Risk, Profit and Uncertainty  
Alex Tham

In 2009, the Financial Crisis Inquiry Commission (FCIC) was established to “examine the causes of the current financial and economic crisis in the United States”. This essay analyzes part of the FCIC’s first public hearing with the chiefs of four major US banks. On the one hand, the Commission wanted to hold the banks responsible for the sale of toxic subprime mortgage derivatives in a precarious housing market. On the other hand, the banks’ defense was that they were just doing their job and that the causes of the financial crisis were beyond their control. Using perspectives from linguistic and cognitive anthropology and the theoretical insights of pragmatism, this article shows that the beliefs that underpinned the actions of the Commission and the banks constituted an epistemological boundary separating knowledge — or “risk” — from uncertainty. The contestation of causal responsibility between the FCIC and the banks was an act that problematized the contour of this boundary, and therefore the range of possible measures that could be taken to influence the direction of the post-crisis recovery. The multiple meanings of risk as a hedge for the banks’ pursuit of profits and as moral hazard for the American public stem in important part from divergence about the meaning of this boundary, negotiated in and through both professional and legal language.

12. The Moment of Possibles: Some New Legal Realism about a “Reality Thriller” Case  
Hadi Nicholas Deeb

A familiar legal realist insight is that social events or attitudes influence legal processes as much as the other way around. Linguistic anthropologists have shown that this back-and-forth occurs through what people say (semantics) and how they say it (pragmatics) during inexact translations across the filter between law and society. In this chapter, I add to that literature while examining the social controversy about the “realness” of the film, *Catfish*, and its translation into a copyright dispute over originality. Focusing on the summary judgment hearing, I identify a continually recurring “moment of possibles” when linguistic crossing happens during the legal interaction. Specifically, the gap between two speakers’ turns is a time when the forward progression of the conversation coincides with the subtler, timeless experience of living the event in the present moment, providing participants an opportunity to reinterpret the case and reproduce legal authority simultaneously as they craft competing narratives with the potential to persuade.

13. Translating Law across Cultures and Societies: A Conversation with David Bellos and Kim Lane Scheppele

In this transcribed exchange, translation scholar David Bellos and interdisciplinary legal scholar Kim Lane Scheppele discuss the challenges involved in translating law across languages, cultures, and legal systems. Sometimes trying to create an “exact” translation actually backfires,

creating only an illusion of equivalence that does not exist. Scheppele and Bellos discuss how to deal with seemingly untranslatable divisions among differing cultural, social, and legal expectations and understandings- along with the challenges of translating law across different languages.

14. Is There a Lingua Franca for the American Legal Academy?

Mary Anne Case

This chapter examines translation between languages within the legal academy, evaluating the push for rational choice as a kind of lingua franca for law professors as opposed to the traditional “vernacular” provided by legal doctrinal language. I suggest that for much of the American legal academy in the last generation, the language of law-and-economics and rational choice bears the same relationship to the language of legal doctrine (including what is left of law French) as French did to Russian for most Russian aristocrats. In other words, whether or not there is a lingua franca in the legal academy, there is a vernacular, which is the language of doctrine. While rational choice has gained widespread acceptance as a language among some law professors, insights from other disciplines have been more selectively incorporated, in the process often losing the distinct trace of their original disciplinary settings. The paper concludes with an argument against the language of law-and-economics and rational choice as a lingua franca for upcoming generations of law professors and lawyers.