



# ORDINES

*Per un sapere interdisciplinare sulle istituzioni europee*

ISSN 2421-0730

NUMERO 2 – DICEMBRE 2022

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## **The Many Faces of Modern Legal Realism**

**ABSTRACT** - This work offers an overview of the consequences and implications of the work of the American Legal Realists. First, the article considers Brian Leiter's naturalist understanding of the realist project and how he uses it as an occasion to argue for a generally naturalist approach to legal philosophy. Second, Frederick Schauer transforms a legal realist-like focus on the concerns of average citizens for legal enforcement to advocate for the view that coercion is central to understanding law. Third, self-styled New Legal Realists try to merge a realist-inspired search for the effects of legal rules with a more traditional respect for the importance of legal doctrine in understanding behavior within and in relation to law. Finally, with the comment, "we are all Legal Realists now", the article discusses the ways in which the American Legal Realists have – and have not – significantly transformed legal thinking and legal education in the United States.

**KEYWORDS** - american legal realism - naturalist approach - coercion - new legal realism - legal thinking

2/2022

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## The Many Faces of Modern Legal Realism

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### 1. *Introduction*

The American legal realist movement was a loosely affiliated group of American legal scholars. The movement's roots go back to the end of the 19<sup>th</sup> century, but it came to dominate American legal thought only in the 1930s and 1940s<sup>1</sup>. Today, there are scholars who refer to themselves as "New Legal Realists" or "Modern Legal Realists", and many others still who, without such labels, work very much in the tradition of what the original American Realists wrote. (There are other important 'realisms' – Scandinavian Legal Realism<sup>2</sup> and Genoese Legal Realism<sup>3</sup>, to name two prominent examples – all of which are very much worthy of study, but I will not have time to discuss in the present article). I want to focus today on four topics connected with the American version of legal realism:

(1) Brian Leiter's arguments about legal realism and contemporary jurisprudence: (a) that the American Legal Realists were best understood as philosophical naturalists; and (b) that analytical legal philosophy should similarly move to being entirely naturalistic. I will also discuss, briefly, Dan Priel's alternative naturalist approach.

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<sup>1</sup> One partial list of important works and contributors can be found in K.N. LLEWELLYN, *Some Realism about Realism – Responding to Dean Pound*, in *Harvard Law Review*, 44, 1931, 1222-1264, 1257-1259; see also W.W. FISHER III, M.J. HORWITZ & T.A. REED (eds.), *American Legal Realism*, Oxford University Press, Oxford, 1993 (a collection of excerpts from important realist works).

<sup>2</sup> See, e.g., J. BJARUP, *The Philosophy of Scandinavian Legal Realism*, in *Ratio Juris* 1 18, 2005; G.S. ALEXANDER, *Comparing the Two Legal Realisms – American and Scandinavian*, in *American Journal of Comparative Law*, 50, 2002, 131-174.

<sup>3</sup> See, e.g., M. BARBERIS, *Genoa's Realism: A Guide for the Perplexed*, in *Revista Brasileira de Filosofia*, 240, 2013, 13-25.

(2) The argument associated with Frederick Schauer, but also with other theorists (e.g., Kenneth Einar Himma), that emphasizes coercion as the most important aspect of law (Schauer) or conceptually necessary for law (Himma).

(3) A contemporary variation of legal realism, which its advocates label “New Legal Realism.”

(4) Finally, I want to say a brief word about the notion, common among American academics, that “we are all legal realists now.”<sup>4</sup>

From the survey of these four quite different topics, I hope to convey the continuing significance of the American Legal Realist project, while also, perhaps, indicating the ongoing uncertainty and controversy regarding its meaning and importance.

## 2. Brian Leiter, *Realism and Naturalism*

In the course of a number of publications, Brian Leiter has made a series of claims regarding the roles of naturalism within American Legal Realism and the role he believes that naturalism should play in contemporary jurisprudence<sup>5</sup>. The basic idea of naturalism (not to be confused with “Natural Law Theory”, which is a very different approach) is that philosophical investigation should be consistent with scientific, empirical investigation<sup>6</sup>. It is a rejection of conceptual analysis, among other things.

Leiter argued that the American Legal Realists should be understood as making empirical claims about judicial decision-making, and that this was the central point of the movement. (I will not enter debates here about what the true essence or predominant theme of the American Legal Realists was. Those who self-identified, or were identified by others, as American Legal Realists,

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<sup>4</sup> See, e.g., M.S. GREEN, *Legal Realism as Theory of Law*, in *William & Mary Law Review*, 46, 2005, 1915-2000, 1917 («... it is often said – indeed so often said that it has become a cliché to call it a ‘cliché’ – that we are all realists now» [footnotes omitted]).

<sup>5</sup> B. LEITER, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford University Press, Oxford, 2007; B. LEITER, *Naturalized Jurisprudence and American Legal Realism Revisited*, in *Law and Philosophy*, 30, 2011, 499-516 (B. LEITER and M. X. ETCHENDY, *Naturalism in Legal Philosophy*, 2017, in E.N. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/lawphil-naturalism/>).

<sup>6</sup> See, e.g., D. PAPINEAU, *Naturalism*, 2020, in E.N. ZALTA (ed.), *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/naturalism/>.

constituted a large and amorphous group, who collectively did not abide by any set dogma, nor was there any consensus about topics, viewpoints, or methodologies. At times, it seems that every theorist has his or her own view of the significance of the Realists<sup>7</sup> – for example, many critical legal studies (CLS) theorists saw Robert Hale (with his writings on coercion and the public/private distinction) as central to the American legal realism<sup>8</sup>, while other commentators (Leiter included) saw Hale as a figure marginal to the movement, whatever the significance of his writings on their own terms).

Leiter's naturalist view of the American Legal Realism<sup>9</sup> is roughly as follows. Naturalism about epistemology argues that any theory about how knowledge is justified should not be an entirely abstract set of "armchair" speculations, but rather should be grounded on how people in fact make knowledge claims<sup>10</sup>. Similarly, the argument goes, theories about how judges *should* decide cases need to be grounded on observations about how judges *in fact* decide cases. In both areas of discourse, it is unwise – indeed, perhaps pointless – to posit an abstract ideal that may be unattainable, and that, in any event, is detached from actual practice.

Leiter, both in his more focused discussions on the American Legal Realists, and in his broader discussions of legal philosophy in general, argues for a focus on empirical matters, and an aversion of anything that sounds conceptual, anything that looks like "armchair theorizing", anything that seems too abstract. Leiter at one point summarizes his view of "replacement naturalism": «if no normative account of the relation is possible, then the only theoretically

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<sup>7</sup> Including the current author: see B.H. BIX, *Jurisprudence: Theory and Context*, 8<sup>th</sup> ed., Sweet & Maxwell, London, 2019, 197-209 (arguing that central to the realist project was the attack on formalism). For other readings of American Legal Realism, see, e.g., J.W. SINGER, *Legal Realism Now*, in *California Law Review*, 76, 1988, 465-544; N. DUXBURY, *Patterns of American Jurisprudence*, Clarendon Press, Oxford, 1995, 65-259; F. SCHAUER, *Legal Realism Untamed*, in *Texas Law Review*, 91, 2013, 749-780; D. PRIEL, *The Return of Legal Realism*, in M.D. DUBBER & C. TOMLINS (eds.), *The Oxford Handbook of Legal History*, Oxford University Press, Oxford, 2018, 457.

<sup>8</sup> R.L. HALE, *Coercion and Distribution in a Supposedly Non-Coercive State*, in *Political Science Quarterly*, 38, 1923, 470-494; R.L. HALE, *Bargaining, Duress, and Economic Liberty*, in *Columbia Law Review*, 43, 1943, 603-628.

<sup>9</sup> Other scholars have also tried to re-characterize some of the *Scandinavian* Legal Realists as naturalists. See, e.g., J.v.H. HOLTERMANN, *Naturalizing Alf Ross's Legal Realism – A Philosophical Reconstruction*, in *Revus*, 24, 2014, 165-186.

<sup>10</sup> See generally H. KORNBLITH (ed.), *Naturalizing Epistemology*, 2<sup>nd</sup> ed., MIT Press, Cambridge, Mass, 1994.

fruitful account is the descriptive/explanatory account given by the relevant science of that domain»<sup>11</sup>. Leiter argues that this approach should be applied to the relation between legal reasons and judicial decisions<sup>12</sup>.

Leiter's advocacy of naturalism for (all aspects of) legal philosophy, and his dismissal of conceptual analysis, has predictably evoked some strong reactions by more traditional legal philosophers<sup>13</sup>. Leslie Green offers a sharp comment on Leiter's conclusion that naturalism should replace normative approaches judicial decision-making: «This sounds more like a reason for studying a *different* domain, one tractable to the methods that 'naturalism' approves»<sup>14</sup>. Green's view reflects a general concern with Leiter's approach: some areas of discourse and investigation fit naturalism better than others. Leiter's sometimes express, sometimes implied argument is that areas that do not fit well should be either transformed or dropped altogether.

This concern is raised perhaps most sharply by Leiter's disdain for theories about the nature of law. With theories about judicial decision-making, there is an obvious naturalist alternative to abstract theorizing: one can investigate the actual way judges (in a particular legal system, or perhaps judges in general) make decisions. What is the analogous recourse for investigations into the nature of law? One might look to the actual practice of using the word, "law", but this does not seem to answer the task – even if one first made sure, somehow, to exclude similar – sounding but separate notions, like "laws of nature" and "divine law." Legal theories aspire to be more than dictionary entries; as John Finnis wrote: «[J]urisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history, or even a juxtaposition of all lexicographies conjoined with all local histories»<sup>15</sup>.

One response Leiter might offer is that if theories about the nature of law do not have any correlate in empirical, observable facts of the world, then so much the worse for theories about the nature of law. This just shows that the

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<sup>11</sup> B. LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in *Texas Law Review*, 76, 1997, 267-315, 293.

<sup>12</sup> *Id.* at 294-296.

<sup>13</sup> See, e.g., J. COLEMAN, *The Practice of Principle*, Oxford University Press, Oxford, 2003, 210-216.

<sup>14</sup> L. GREEN, *Positivism, Realism and Sources of Law*, in T. SPAAK and P. MINDUS (eds.), *The Cambridge Companion to Legal Positivism*, Cambridge University Press, Cambridge, 2021, 39, 57.

<sup>15</sup> J. FINNIS, *Natural Law & Natural Rights*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2011, 4.

whole project should be abandoned<sup>16</sup>. However, the “project” cannot in fact be so easily dismissed.

The “law”/“not law” distinction is important – and assumed – in almost all we speak about in relation to law: and not just in connection with legal theory, but also with legal practice. Consider Leiter’s own favorite topic in connection with the American Legal Realists: the connection between legal sources and judicial reasoning. To even begin that analysis, one must have a basis for distinguishing *legal* sources from “extra-legal” sources. If one does not have at least a rough, presumptive, intuitive sense of what makes something “law” or “legal”, then much of the discussion becomes mysterious. And once one has a rough or intuitive sense of what makes something “law” or “not law”, there is a need for, or at least a space for, a deeper or more careful philosophical investigation into that same division<sup>17</sup>.

On reflection, it soon becomes clear that this is just one example of a surprisingly common problem to many approaches to legal theory: while the theorist purports to offer a novel approach to the nature of law, or a dismissive view of legal theory in general, one discovers that the approach has “borrowed” or assumed some more conventional understanding of law. This is perhaps most evident in the quite radical approaches to law and legal theory one finds in the works of Ronald Dworkin and Mark Greenberg<sup>18</sup>. Dworkin argues that law is the product of the best “constructive interpretation” of the “pre-interpretive data” regarding past legal officials’ actions<sup>19</sup>. Even more sharply, Greenberg equates law with the effects on our “moral profile” of the actions of legal officials<sup>20</sup>. In both cases, what counts as “law” requires a calculation in which “law” is already one of the premises – a determinant of which “inputs”

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<sup>16</sup> Which is roughly what he argues in a number of places. See, e.g., B. LEITER, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, in *American Journal of Jurisprudence*, 48, 2003, 17-51; B. LEITER, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, in *Oxford Journal of Legal Studies*, 31, 2011, 663-677.

<sup>17</sup> Cf. COLEMAN, *The Practice of Principle*, op. cit., 213 («Leiter is himself aware that the project of a naturalized jurisprudence requires an analytical jurisprudential component, but he underestimates its extent»).

<sup>18</sup> I am indebted to Larry Alexander for the observation. I wrote about it in B.H. BIX, *When Law Becomes Morality: Comments on Mark Greenberg’s Moral Impact Theory of Law*, 2014, available at <https://ssrn.com/abstract=2434075>.

<sup>19</sup> See R. DWORKIN, *Law’s Empire*, Fontana Press, London, 1986.

<sup>20</sup> See M. GREENBERG, *The Moral Impact Theory of Law*, in *Yale Law Journal*, 123, 2014, 1288-1342.

to consider in determining or calculating the “output” that is law. How can we tell which actions count as those of a *legal* official, and which “pre-interpretive” data is *legal*, if the content of law cannot be determined until the calculation is complete?

Returning to Leiter and naturalism, Dan Priel raised a different set of objections, basically arguing that Leiter was *not naturalist enough*:

«If naturalistic jurisprudence turns out to consist of descriptive, empirical work on how judges (or other legal actors) behave, the project of naturalistic jurisprudence looks in peril. Three closely related objections may be raised against it: first, “naturalistic jurisprudence” is just a new label for something that has been around for many decades [empirical legal scholarship]. Second, so understood, naturalistic jurisprudence does not tackle many of the questions that non-naturalistic jurisprudence is interested in, and as such does not look like a challenge to it. [...] Because of the fundamental difference between the two projects [naturalism and conceptual analysis], they can happily co-exist. One may even go further; not only does naturalistic jurisprudence (conceived in this way) not pose a challenge to traditional jurisprudence, it actually validates it»<sup>21</sup>.

Priel’s own view is not grounded in American legal realism – though, elsewhere, he has interesting things to say about that movement, which he helpfully divides into “traditional realists”, who want legal thinking and legal education to better reflect social reality, and “scientific realists”, who want legal thinking to be improved by the social sciences<sup>22</sup>.

Priel’s critique of conceptual jurisprudence is more subtle than Leiter’s. Priel does not doubt that there are important philosophical questions to be asked in connection with the nature of law; what he doubts (and rightfully so, I think) is that these questions are *distinctive* to law. The questions we legal theorists are now asking about the metaphysics (ontology, grounding) of law are important, but there is no reason to assume that the answer in regards to law will be different than that for other social practices. Similarly, when we ask about the “normativity” of law – the inquiry on how mere facts of legal official

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<sup>21</sup> D. PRIEL, *The Philosophy of Law for a Naturalist: An Introduction to Artificial Law*, (2020) (man. at 3-4) (footnotes omitted), available at <https://ssrn.com/abstract=3604527>.

<sup>22</sup> D. PRIEL, *The Return of Legal Realism*, *op. cit.*

actions appear to create reasons for action – Priel correctly points out that this question becomes less mysterious once we notice *the many other ways* in which human actions apparently create new norms (of different types): from promises to etiquette to the norms of proper language use.

Priel's own version of naturalist legal theory – and he offers both a naturalized Natural Law Theory and a naturalized Legal Positivism – involves locating the psychological, sociological, and evolutionary grounding of authority and normativity<sup>23</sup>. It is a worthy and provocative project, but one that would take us too far afield to consider at greater length now.

### 3. *Law and Force*

In a recent work, *The Force of Law*<sup>24</sup>, Frederick Schauer argued for a reorientation of the way legal theorists discuss the nature of law. In particular, he urged analytical legal philosophers to move away from traditional questions about the properties “necessary” or “essential” for something to be “law”:

«[W]e should not too quickly accept that the domain of inquiry designated as “philosophical” should be limited to the search for essential properties ... [T]he various analytic and argumentative tools of philosophy might well be deployed with profit to forms of understanding other than the largely nonempirical search for necessary ... conditions that characterizes contemporary conceptual analysis»<sup>25</sup>.

While Schauer does not deny that law may have essential or necessary properties, he does not think that focusing on them is the best way to approach understanding the nature of law<sup>26</sup>.

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<sup>23</sup> D. PRIEL, *The Possibility of Naturalistic Jurisprudence*, in *Revus*, 32, 2017, 7-35.

<sup>24</sup> F. SCHAUER, *The Force of Law*, Harvard University Press, Harvard, 2015. Instructive critiques of Schauer's text can be found in C. BEZEMEK and N. LADAVAC (eds.), *The Force of Law Reaffirmed*, Springer, 2016; see also M. GREENBERG, *How to Explain Things with Force*, in *Harvard Law Review*, 129, 2016, 1932-1979 (review of *The Force of Law*); F. SCHAUER, *How (and If) Law Matters*, in *Harvard Law Review Forum*, 129, 2016, 350-359 (responding to Greenberg).

<sup>25</sup> F. SCHAUER, *The Force of Law*, *op. cit.*, 4.

<sup>26</sup> *Id.* at 35-41, 157, 164.



Schauer draws on a parallel with the nature of birds. The ability to fly is neither necessary nor sufficient to make something a bird. Some animals not categorized as birds – like bats and insects – fly, and some animals we *do* categorize as birds do *not* fly: *e.g.*, penguins, ostriches, and emus. Nonetheless, «it is surely of great interest that almost all birds fly and almost all non-bird vertebrates do not fly, and thus if we think about why, how, and when birds fly we are likely to learn something of great interest about birds»<sup>27</sup>. Schauer argues, that even granting the claims (by Joseph Raz and others<sup>28</sup>) that coercion might not be “necessary” or “essential” to the concept of law – that one could imagine a normative, institutional, guidance system without sanctions (say, among angels) that would still warrant the label “law” – there is still more that a legal theorist can and *should* say about the role of coercion in understanding the nature of law.

Schauer might point out that the example of coercion with law is, in fact, far stronger, than that of flight with birds. As mentioned, there are a number of well-known examples of birds that do not fly, but there are *no* examples of past or present legal systems that do not use coercive force. The only counter-examples are hypothetical ones (whether an *imagined* social system that did not use sanctions would still warrant the label “law”), often involving supernatural or fantastical creatures (angels, or the like).

One should note that the question of whether coercion is or is not a “necessary” or “essential” feature of law remains a highly contested question. Kenneth Einar Himma recently published a monograph on the question, arguing at length and in great detail why coercion *is* a necessary or essential part of the concept of law<sup>29</sup>. His argument combines traditional conceptual analysis and a functional analysis – grounded on the view that law’s function is guide behavior (and is supplemented, for those who are interested, by a detailed discussion on the nature of angels)<sup>30</sup>.

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<sup>27</sup> F. SCHAUER, *Necessity, Importance, and the Nature of Law*, in J. FERRER BELTRÁN, J. J. MORESO, and D.M. PAPAYANNIS (eds.), *Neutrality and Theory of Law*, Springer, 2013, 17, 25.

<sup>28</sup> See, *e.g.*, J. RAZ, *Practical Reasons and Norms*, Princeton University Press, Princeton, 1990, 157-162.

<sup>29</sup> K.E. HIMMA, *Coercion and the Nature of Law*, Oxford University Press, Oxford, 2020; see also K. WOODBURY-SMITH, *The Nature of Law and Potential Coercion*, in *Ratio Juris*, 33, 2020, 223-240; L. MIOTTO, *Law and Coercion: Some Clarification*, in *Ratio Juris*, 34, 2021, 74-87.

<sup>30</sup> K.E. HIMMA, *Coercion and the Nature of Law*, *op. cit.*, 231-253.

Schauer's focus on coercion is, in a sense, a response to H. L. A. Hart's famous emphasis on «the internal point of view»<sup>31</sup>. Recall that in arguing for that analysis, Hart was, in turn, responding to John Austin's own coercion-centered theory, Austin's view that law was essentially the command of the sovereign (where "command" required both the ability and willingness to impose a sanction for disobedience)<sup>32</sup>. Part of Hart's critique was that a coercion-centered view did not give adequate account of those citizens who are not responding to the law out of fear, but who simply (for whatever reason) "accept" the law, treating it as giving them reasons for action.

Schauer's response to Hart's critique – to Hart's construction of a legal theory around the «internal point of view» – is that though there may be such people within any society, people who act as the law prescribes because they treat all legal rules as reasons for action, their numbers and significance are in fact small. Schauer cites empirical work that indicates that for the vast majority of citizens, individuals comply with legal rules not because of any acceptance of the legal system, but because of the consequences of *not* complying, that is, because of sanctions<sup>33</sup>.

The link between Schauer's approach and that the American Legal Realists can be found in the echoes of a famous quotation by Oliver Wendell Holmes:

«Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law»<sup>34</sup>.

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<sup>31</sup> H.L.A. HART, *The Concept of Law*, 3<sup>rd</sup> ed., Oxford University Press, Oxford, 2012, 82-91.

<sup>32</sup> See J. AUSTIN, *The Province of Jurisprudence Determined* (1832), Wilfrid E. Rumble ed., Cambridge University Press, Cambridge, 1995.

<sup>33</sup> F. SCHAUER, *The Force of Law*, *op. cit.*, 57-74.

<sup>34</sup> O.W. HOLMES, *The Path of the Law*, in *Harvard Law Review*, 10, 1897, 457 ss., 460-461.

And then, similarly, in Schauer's *The Force of Law*: «Rather than defining law in terms of the nature of its norms or the nature of its sources, we might instead think of law simply as the activity engaged in by courts, lawyers, and the sociologically defined array of institutions that surround them»<sup>35</sup>. (This legal realist inclination towards sociology of law and the actual behavior of legal officials is also prominent with New Legal Realism, discussed in the next Section).

Schauer reminds legal theorists that that it is law's threat of sanctions, and sometimes its offer of rewards, «and nothing more pretentious», that are central to law's nature and function. Though one might still raise the caution mentioned earlier, in connection with Brian Leiter's work, that some conceptual notion of law will still be needed to identify what counts as law<sup>36</sup>.

#### 4. *New Legal Realism*

I want now to turn to a group of academics who see themselves as the inheritors of the legacy of the American Legal Realists. These are the so-called "New Legal Realists"<sup>37</sup> (or, according to the title of a recently published collection, the "Modern Legal Realists")<sup>38</sup>. They are generally connected with the intersection of law and sociology – which goes under various names in different places: "Law and Society", "Sociological Jurisprudence", "Socio-legal Studies", "Law in Context", etc.<sup>39</sup> However, the New Legal Realists distinguish themselves from the general sociological or empirical studies of law, for reasons to be explained presently.

One might first note the obvious connections between (much of) what the American Legal Realists wrote and the work of modern Law and Society

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<sup>35</sup> F. SCHAUER, *The Force of Law*, *op. cit.*, 121.

<sup>36</sup> For this point raised against Schauer, see L. GREEN, *The Forces of Law: Duty, Coercion, and Power*, in *Ratio Juris*, 29, 2016, 164-181, 177.

<sup>37</sup> They have their own website: <http://newlegalrealism.org/>.

<sup>38</sup> S. TALESH, E. MERTZ, and H. KLUG (eds.), *Research Handbook on Modern Legal Realism*, Edward Elgar, Cheltenham, 2021.

<sup>39</sup> See, e.g., A. SARAT (ed.), *The Blackwell Companion to Law and Society*, Blackwell, Malden, Mass., 2004; S. MACAULAY, L.M. FRIEDMAN & E. MERTZ (eds.), *Law in Action: A Socio-Legal Reader*, Foundation, 2007; R.L. ABEL (ed.), *The Law & Society Reader*, NYU Press, New York, 1995.

scholars. First, the American Legal Realists emphasized that the legal materials are generally inadequate on their own to explain judicial decisions (and that too often the gap between what the legal sources state and the outcome of actual legal disputes is filled in by the conscious or sub-conscious biases and policy preferences of judges)<sup>40</sup>. The Realists argued that the gap between the legal materials and the resolution of cases *should* be filled in by what some later scholars would call “policy science”, but which corresponds in part to the sort of sociological/empirical work that “Law and Society” scholars do<sup>41</sup>. Secondly, Karl Llewellyn in particular<sup>42</sup>, but other Legal Realists as well, emphasized that legal scholars should focus on the effects legal rules have on behavior: both the behavior of citizens and the behavior of judges deciding cases that would seem to fall under the rules in question. Llewellyn’s point (made by others as well<sup>43</sup>) was that one should not conclude from the fact that a particular prescription is enacted by the legislature, that it either will be followed by most citizens, or even that it will affect the decision-making of judges. Sometimes it will, and sometimes it will not – but that is a matter for empirical investigation, not blind assumption.

Where the New Legal Realists most clearly diverge from (most) Law and Society scholars and other empirical legal theorists is in the emphasis New Legal Realists have on *not* ignoring doctrinal analysis. As some have put it, New Legal Realism can be seen as the combination of doctrinally informed sociological work and sociologically informed doctrinal work. Also, as one representative definition offers, «[t]he core commitment of New Legal Realism ... [is] theory-driven empirical research about law in action that values qualitative as well as experimental methods»<sup>44</sup>.

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<sup>40</sup> See, e.g., the texts collected at W. W. FISHER III, M.J. HORWITZ & T.A. REED (eds.), *American Legal Realism*, *op. cit.*, 164-231.

<sup>41</sup> Cf. N. DUXBURY, *Postrealism and Legal Process*, in D. PATTERSON (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2<sup>nd</sup> ed., Wiley-Blackwell, Malden, 2010, 279, 279-283.

<sup>42</sup> See K.N. LLEWELLYN, *A Realistic Jurisprudence – The Next Step*, in *Columbia Law Review*, 30, 1930, 431-465.

<sup>43</sup> E.g., R. POUND, *Law in Books and Law in Action*, in *American Law Review*, 44, 1910, 12 ss.

<sup>44</sup> M. MCCANN, *Preface to The New Legal Realism*, Volumes I and II, in E. MERTZ, S. MACAULAY, and T.W. MITCHELL (eds.), *The New Legal Realism*, vol. 1, at xiv, Cambridge University Press, 2016 (footnote omitted).

As noted, there are obvious continuities between the original American Legal Realists and the “New Legal Realists”. However, there are also noticeable differences, both in tone and in objectives. While remembering the necessary caution, noted above, in generalizing about the American Legal Realists, one might observe that, for the most part, it was a movement that challenged traditional ways of legal reasoning, judicial reasoning, and law teaching. There was an underlying (often unstated) preference that the substance of law change as well; it is unsurprising that many of the American Legal Realists became involved in law reform, including the New Deal reforms under President Roosevelt.

By contrast, the goals of the New Legal Realists seem much less grand and much less radical. They are not rebels. The primary objective(s) of the movement is not to change the substantive law (though, like the original American Legal Realists, their political sympathies are generally left of center). Their objective is to change the way in which (empirical) research on law is conducted: making it more interdisciplinary, more qualitative (as opposed to entirely quantitative), and more attentive to doctrinal rules and categories. These objectives are undoubtedly important, but still (for better or for worse) on a significantly smaller scale than those of the original Realists.

##### 5. *“We are all Legal Realists now”*

Finally, I want to come to that expression that is nearly a cliché among American law professors: “We are all realists now”.

There is a sense that when one reads the articles of the American Legal Realists from the early part of the 20<sup>th</sup> century, much of what they are arguing for energetically seems obvious to us: that legal and judicial reasoning are not just a matter of syllogistic deduction, that law should be viewed instrumentally and that legal rules should be reformed when they do not achieve their ends, that judges legislate, and that legal rules and concepts are often indeterminate. These ideas seem uncontroversial now, perhaps even trivial in their obviousness, but, arguably, this is because the American Legal Realists were so successful in changing the way we view law. But these views were all once controversial, some even, in their time, “radical”.

One can see the transformation exemplified in one small corner of contract law doctrine. Towards the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, both English and American contract law tried to resolve a problem raised by the time lag in commercial communication. Letters took days, if not weeks, to get from a party making an offer for a contract to the party receiving it. The question was: what should the law do if someone making an offer tried to withdraw the offer by mail, but before that withdrawal was received, the offeree had already sent a letter accepting an offer? The ultimate rule that was accepted, in both England and the United States, is that an acceptance is (generally) valid when posted, and, thus, the acceptance of the offer takes priority over the withdrawal of the offer. However, at a time when the matter was still unsettled, Christopher Columbus Langdell, both Contract Law scholar and Dean of the Harvard Law School, responded to arguments that the contrary result would be unjust and have bad consequences, by writing: «The true answer to this argument is, that it is irrelevant»<sup>45</sup>. For many “formalist” thinkers, prior to the American Legal Realist critique, legal reasoning was like a kind of logic or geometry, unmoored from either policy or morality. It was, in the sharp terms of American Legal Realist, Felix Cohen, a form of «transcendental nonsense»<sup>46</sup>.

On the other hand, not everyone is convinced that the American Legal Realists significantly changed thinking within or about law. Neil Duxbury writes:

«There are, to this day, lawyers here and there who claim to be ‘Legal Realists’. They are, however, a very rare breed. The common view is that realism is something which modern lawyers outgrew once they had assimilated its primary messages»<sup>47</sup>.

The influential scholar (and former judge) Richard Posner similarly doubts that any of the (later) American Legal Realists had anything valuable

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<sup>45</sup> C.C. LANGDELL, *A Summary of the Law of Contract*, 2<sup>nd</sup> ed., Little Brown and Co, Boston, 1880, 20-21.

<sup>46</sup> F.S. COHEN, *Transcendental Nonsense and the Functional Response*, in *Columbia Law Review*, 35, 1935, 809-849.

<sup>47</sup> N. DUXBURY, *Patterns of American Jurisprudence*, *op. cit.*, 158.

to add to what Oliver Wendell Holmes and Benjamin Cardozo said in their earlier works<sup>48</sup>.

There are senses in which the effects of the American Legal Realists on our reasoning and teaching may have been more symbolic than substantial. One example may seem marginal, but it may be indicative of the greater situation; it deals with legal education. At the beginning of the 20<sup>th</sup> century, the textbooks given to law students had titles like “Cases on Contracts”. This way of organizing a teaching text goes back to Christopher Columbus Langdell, mentioned earlier. As Dean of the Harvard Law School at the time, he introduced the “Case Method” into legal education (he also introduced law school examinations!). We already mentioned his view that legal reasoning was an abstract form of analysis, almost like mathematics or logic. To expand the point, Langdell did see law as like science, perhaps a bit like Botany<sup>49</sup>. Students were to read carefully selected cases, and from these cases they were to derive the basic principles underlying and animating Contract Law, as one might learn basic scientific principles from the careful study of well-chosen plant and animal subjects.

After the American Legal Realists offered their arguments that legal materials on their own were often insufficient to resolve legal disputes – arguing both that decisions often *could not be reached* without further premises *and* that even when decisions could be reached by legal materials alone, those materials *should* be supplemented by policy and moral arguments – textbook names began to change. American law school textbooks were no longer titled simply “Cases on X”, where X was the legal topic. If you look at the post-realist casebooks, they are almost always some variation of “Cases *and* Materials on X”. This reflects the fact that in-between the cases, the textbook now contains discussion of policy considerations for and against the doctrinal rules (and for and against changing them), as well as some discussion of theoretical perspectives on those rules – often some economic analysis of law, occasionally references to corrective justice or other deontological theories, and sometimes some sociological observations about “law in action”. In a sense, this is a significant

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<sup>48</sup> E.g., R.A. POSNER, *Overcoming Law*, Harvard University Press, Cambridge, Mass., 1995, 1-4; R.A. POSNER, *The Problems of Jurisprudence*, Harvard University Press, Cambridge, Mass., 1990, 20.

<sup>49</sup> Thomas C. GREY, *Langdell's Orthodoxy*, in *University of Pittsburgh Law Review*, 45, 1983, 1-53.

change and a victory for the American Legal Realist approach: the newer approach to law school textbooks shares the view that legal materials are not enough, and that they need to be supplemented. In a different sense, though, the alteration is minor. It is still true, at least in first-year American law school courses, that the vast majority of class time (as well as textbook space) is given to the close reading of cases. The policy and theory generally are marginal, spoken of quickly and in passing. In that sense, legal teaching – and the view of law that is embedded there – has not changed that much far from Langdell's time.

On the other side, there are places where the impact of the American Legal Realists is undeniable. The law that governs the sale of goods throughout the United States<sup>50</sup> is Article 2 of the Uniform Commercial Code, whose primary author was also arguably the primary figure of American Legal Realism, Karl Llewellyn. Llewellyn's sale of goods statute radically changed American commercial law<sup>51</sup>. Among the important changes was a move away from abstract categories (everything turning on "title"), and a focus on the parties' perceptions of their transaction: whether they perceived themselves as being bound (and, if so, from which point in time), and how did *they* understand the terms they used. Zipporah Wiseman makes the connection.

«Llewellyn's realist theory required that law be kept 'close to facts' and tested for this quality by first asking, 'what does law do, to people, or for people?' and then 'what ought law to do to people or for them?' In Llewellyn's view, law was 'a means to social ends,' needing 'constantly to be examined for its purpose, and for its effect' in order to see 'how far it fits the society it purports to serve.' ... [C]ourts, lawyers, and commercial actors all benefit from the realist commitment to resolving legal problems by reference to their factual circumstances rather than to abstract legal categories. The realist goal of grouping legal situations into "narrower categories" that fit, that are based on the actual commercial circumstances, has indeed been achieved in this respect»<sup>52</sup>.

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<sup>50</sup> It is codified as state law in 49 of the 50 states, plus the District of Columbia; the only outlier state is Louisiana.

<sup>51</sup> And would have changed it even more radically, had he not had to compromise on some of his plans to get his proposed statute accepted. See Z. BATSHAW WISEMAN, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, in *Harvard Law Review*, 100, 1987, 465-545.

<sup>52</sup> Z. BATSHAW WISEMAN, *The Limits of Vision*, *op. cit.*, 471, 538 (footnotes omitted).



Another well-known figure from American legal philosophy, Lon Fuller, in one of his earliest publications, also commented on the inclination of the American Legal Realists in general, and Karl Llewellyn in particular, to argue for law reflecting, rather than directing, social life<sup>53</sup>.

At the level of (American) legal scholarship, the effects of the American Legal Realists are undeniable. By undermining the view of legal reasoning as a self-sufficient form of reasoning, the realists showed the value and perhaps need to supplement doctrinal reasoning with other forms of analysis. And from that flows all the inter-disciplinary work that now dominates American legal scholarship. It was Holmes who wrote: «For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics»<sup>54</sup>. Without the American Legal Realists, it would be hard to imagine the current status and influence of the Law and Economics movement – and also Law and Society, Law and Literature, and the many other “Law and ...” schools of thought – in the American legal academy. Doctrinal legal scholarship (“legal dogmatics”) still exists, but in many fields it is secondary (in status in the American legal academy) to interdisciplinary work.

## 6. Conclusion

In this short tour and overview, we have seen many consequences and implications of the work of the American Legal Realists. Brian Leiter’s offers a naturalist understanding of the realist project and uses it as an occasion to argue for a generally naturalist approach to legal philosophy. Frederick Schauer transforms a legal realist-like focus on the concerns of average citizens for enforcement to advocate for the view that coercion is central to understanding law. Self-styled *New* Legal Realists try to merge a realist-inspired search for the effects of legal rules with a more traditional respect for the importance of legal doctrine in understanding behavior within and in relation to law. Finally, with the comment, “we are all Legal Realists now”, one can explore the ways in

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<sup>53</sup> L.L. FULLER, *American Legal Realism*, in *University of Pennsylvania Law Review*, 82, 1934, 429-462.

<sup>54</sup> O.W. HOLMES, *The Path of the Law*, *op. cit.*, 469.

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which the American Legal Realists have – and have *not* – significantly transformed legal thinking and legal education in the United States.

As mentioned, the “essence” and the “legacy” of American Legal Realism remains highly contested, but as someone who has taught, lectured, or presented papers in many different countries, I can attest that the “feel” of American legal education, legal scholarship and legal commentary is distinctly different from that of other countries, and I believe that a large part of that difference comes from the direct and indirect effects of American Legal Realism. The United States has a legal culture, and a legal academic culture, that is skeptical of legal form and naturally suspicious of the claims of legal officials. This certainly has its advantages, but as a number of recent commentators have pointed out, mistrust of legal form also has its own distinctive costs<sup>55</sup>.

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<sup>55</sup> See, e.g., B.Z. TAMANAHA, *How an Instrumental View of Law Corrodes the Rule of Law*, in *DePaul Law Review*, 56, 2007, 469-506; C. SAIMAN, *Law Wants to be Formal*, in *Notre Dame Law Review*, 96, 2021, 1067-1114.