

Elizabeth Mertz spoke at the AALS Plenary Session “Conducting Empirical Research in a Law School Setting,” held at the 2006 AALS Meetings in Washington, D.C. Her talk was entitled: “New Legal Realist Models for Collaborating with Social Scientists: Translating Qualitative and Quantitative Research..”

The following description of the New Legal Realism Project (which is co-sponsored by the American Bar Foundation and the Institute for Legal Studies at the University of Wisconsin Law School), was written by Mertz as a contribution to a Roundtable at a conference on New Legal Realism. It was eventually edited and published as a part of the Roundtable feature in the *Wisconsin Law Review*'s 2005 symposium on New Legal Realism. There will be a companion symposium published by *Law & Social Inquiry* during the upcoming year. The website is still under construction: www.newlegalrealism.org

Readers are also referred to the websites of the American Bar Foundation and the University of Wisconsin Law School's Institute for Legal Studies for information about interdisciplinary empirical research on law, as well as to the website of the Law & Society Association, the premier professional organization for this kind of research in the U.S. The LSA is actively working to link with parallel professional organizations in other parts of the world, providing an avenue for collaborative empirical research on law beyond the borders of the U.S. as well: www.lawandsociety.org

Thoughts on New Legal Realism.

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This is an exciting moment in the legal academy. A number of scholars coming from seemingly divergent perspectives share the sense that there is a possible convergence emerging, a convergence that could generate a new paradigm (or closely-allied set of paradigms) for the interdisciplinary study of law. The need for this new paradigm has been evident for a number of years, and there have already been some important efforts to develop the conversation we hope to encourage under the aegis of a “new legal realism” in the legal academy. As with the “old” legal realism, new legal realism envisions a “trilectic” focus on law, social science, and policy, and a similarly broad sense of the interdisciplinary (i.e., encompassing multiple social science disciplines and methodologies). However there are also a number of differences between the older approach and our newer project.

Here I will sketch some suggested points of convergence for the new paradigm, always in the spirit of opening rather than finalizing or ending the discussion. I should

also note that along with areas of agreement, we will undoubtedly disagree amongst ourselves on some ideas, as have members of every tradition to date in the legal academy (and elsewhere!) – from law and economics to feminist legal theory. One such issue, which we will likely be discussing for some time, is that of the politics of our scholarship. It is by now commonplace in the philosophy and sociology of science, anthropology, history, and other disciplines, that all scholarship is situated and hence carries cultural and political valences. This applies to the so-called “hard” or natural sciences as well as to the social sciences. Within the social sciences, the postmodern turn has given this insight even greater prominence as a point of debate or departure, depending on one’s position (--always!). There are enormous differences in the degree to which scientists – social or otherwise -- will go in incorporating this perspective, and in their ensuing trajectories, but certainly since Hume and Einstein (to drop just a few of the salient names), we have had to reckon with relativity of one kind or another in formulating our epistemological standpoints. At the same time, at the risk of sounding somewhat old-fashioned, I think that many of us agree that the methods of social science – when used self-consciously and with care – can bring us more accurate understandings of social (including legal) events and systems. To the degree that there is a politics to all knowledge, from legal scholarship to anthropology to economics, we cannot escape the issue. Indeed, taking account of the “instruments” of research – of their limitations as well as their possibilities – is good science, and those of us who perform empirical research are of course implicated as part of the means or instrument by which information is obtained and analyzed. But I would also insist on the power of social science method to push us beyond our personal politics or situations, to enforce a form of humility in

which we must listen to other voices than our own. If what we find out when we study law empirically doesn't match our favorite theories, then it is the theories rather than the results of sound research that must be reconsidered. To that degree the new legal realism that I propose is no more political, nor less scientific, than law-and-economics or other attempts to merge social science and legal studies. I'm sure there will be ongoing discussion among us on this point, and that's to the good. I'd like to turn back now to perhaps less difficult issues, as part of our search for a common paradigm.

1. Possible points of convergence for a New Legal Realism

(a) A “**bottom up**” as well as “top down” perspective¹ – in multiple senses:

Although there have long been studies of law at the ground level, it is still the case that scholarship in the legal academy centers differentially on appellate cases – an interest reflected in much of the original realist scholarship as well as in subsequent attempts to merge legal and empirical scholarship. Even research that is not specifically focused on appellate court decisions often centers on institutions and elites rather than on law at the “ground” level, in the everyday lives of the people it purportedly serves.

Outside of the legal academy, however, many social science disciplines have concerned themselves with studying the “bottom” as well as the “top” of the law. In recent decades, the study of law in everyday life has increasingly occupied the attention of scholars in the interdisciplinary Law & Society Association. The fields of anthropology and qualitative sociology have for many years specialized in developing methodologies for analyzing life and law on the ground, although both of these fields have also pioneered scholarship that

¹ I am indebted to a discussion with Boa Santos and Stewart Macaulay for this formulation.

insists on bringing “top” and “bottom” together for a more holistic and accurate understanding of how law operates.²

If New Legal Realism (NLR) pushes us to include a “bottom up” perspective in terms of *objects* of study, it then also requires legal scholars to take seriously the *methods* that bring us closer to the ground – to the lived experience of law’s subjects.

Ethnography and participant observation, as well as qualitative interviewing techniques, take their place alongside experimental and quantitative methods – not as rivals or competitors, but as necessary tools for those seeking a more rigorous picture of law’s impact. Qualitative methods are perhaps more difficult to absorb; the results they produce are not easily summarized in sound bites, and the methodology itself looks more transparent than it actually is. (Simply sitting and watching an event without training in participant observation will not produce ethnography, nor will merely reflecting on one’s own experience; unsystematic conversations with people will not yield the findings that one would get from an interview study.³) The legal academy has yet to wrestle successfully with incorporating these very subtle social science approaches, often preferring more readily-accessible quantitative methods. However, the best

² Anthropology, my own home discipline, has long struggled productively to develop models and methods for integrating the study of local knowledge and experiences with analysis of wider-scale political, legal, and economic structures and systems. In 1986, legal anthropologist Sally Falk Moore, for example, published a book analyzing the many layers of law from local courts and “customary” legal decisions through widescale national and historically-based colonial influences. SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: CUSTOMARY LAW ON KILIMANJARO, 1880-1980* (1986); see also JOHN L. COMAROFF & JEAN COMAROFF, *OF REVELATION AND REVOLUTION: THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER* (1977). (As is apparent from these titles, anthropologists have also joined historians in studying all these layers and dynamics across time.) As more sophisticated approaches are developed, the boundaries between “top” and “bottom” obviously begin to blur, because we see that wider structural processes must of necessity be translated at the local level in order to have any impact, while policy decisions made by institutions and elites do have powerful effects on everyday lives.

³ This is not to denigrate use of experience, self-reflection, and conversation in our scholarship, but merely to note that doing so does not yield the gifts that qualitative social sciences have to offer.

interdisciplinary research on law would incorporate all the available tools in order to give us a more thorough picture.

At the level of policy, insisting on inclusion of a “bottom-up” as well as a “top-down” perspective indicates a democratic concern with hearing all voices, raising issues of justice and empowerment at the ground level. The bottom-up perspective also fits well with a return to pragmatism at the theoretical/philosophical level, evident in current work by legal scholars like Bill Simon, Orly Lobel, Victoria Nourse, and others.

(b) **“Middle-range” theory** that develops in interaction with empirical findings, policy applications, and/or local practices:

This is an idea borrowed from Robert Merton and translated to legal scholarship by Martha Fineman. Fineman’s work provides an example of this kind of approach; she draws on empirical and textual analyses (her own and others’) to develop middle-range theories regarding the impact of cultural discourses on legal approaches to gendered issues. Jane Larson performed fieldwork on the border between Texas and Mexico, and used her empirical findings to build an alternative to abstract theories (from both the right and the left) regarding regulation – a middle-range theory that speaks to broader issues from the grounded perspective of life as it is actually lived by those inhabiting the borders. Larson’s work then became the springboard for policy initiatives to aid these border inhabitants, squatters, in gaining legal title to their homes. This is one of a number of ongoing efforts to put legal theory and practice into productive communication with empirical research – efforts that can inform the new legal realist enterprise.⁴

⁴ See, e.g., the “Trenches and Towers” features in the journal *Law & Social Inquiry*.

(c) A focus on the **complex subject**, and on group dynamics, analyzed in social **context**:

In recent decades, many legal scholars seeking to draw on the social sciences have looked exclusively to economics, and to “rational actor” models of human behavior. Although new legal realist analysis would certainly include consideration of individual actors, economic incentives, rational motivations, and the market – for these are clearly important to the trajectory of law in our own society and globally, the new paradigm would seek to cast a broader net. This broader scope would look to the rest of the social sciences in addition to economics. Indeed, economists themselves are beginning to open up a more encompassing, “socioeconomic” vision of human social behavior and motivation. Fields such as sociology, anthropology, psychology, history, and political science have much to contribute to a broader paradigm, which would take as its core focus the “complex subject” – the human being with a full range of capacities, including less rationalist, more emotional and/or culturally-laden orientations to the world. This also brings us to consideration of groups, large and small, and institutions; of societies and cultures; of the many layers of complicated context that inform the path of the law today and through history.

(d) A truly **interdisciplinary** conversation, drawing on the full range of social science approaches:

This kind of conversation would require a great deal of careful consideration of the differing epistemologies and motivating questions characterizing the different social sciences. At a less profound, but nonetheless crucial level, it would encourage legal scholars and practitioners to be thoughtful about which kinds of methods are best suited to answering particular questions (-- and to the limits of social science knowledge

altogether). It might also point our attention to examples of successful interdisciplinary training and research in the legal arena. There are a number of longstanding institutions, institutes, and programs dedicated to this very issue – the American Bar Foundation in Chicago, the Institute for Legal Studies at the University of Wisconsin, the Jurisprudence and Social Policy program at Berkeley, the Baldy Center at Buffalo, the Amherst program on Law, Jurisprudence, and Social Thought, among others. To take one example, the University of Wisconsin’s Institute for Legal Studies provides support to entry-level law professors who don’t have social science training; under the Institute’s “Alfie” program,⁵ initiated by Director Howard Erlanger, these new professors can submit proposals for empirical research to a cross-disciplinary group that is the functional analogue of a doctoral thesis committee, and which will continue to meet and give feedback as the projects progress. They can and do also sit in on methods classes elsewhere in the university. This model takes full advantage of the university community that surrounds many law schools, bringing scholars into sustained interdisciplinary conversations.

At a more profound level, an effort to build truly interdisciplinary viewpoints requires that we pay systematic attention to the question of translation. Some legal scholars have approached the issue of interdisciplinary research as if the findings of one discipline were merely fodder for the machine provided by another discipline’s core methods.⁶ This is obviously not true translation, for the person running the machine (whether it be that of legal or economic or sociological analysis) leaves the process with her or his core perspectives untouched by the other discipline. Actual interdisciplinary

⁵ Full name: “What’s It All About, Alfie?” Professor Erlanger is a past President of the Law & Society Association.

⁶ See JAMES BOYD WHITE, JUSTICE AS TRANSLATION (1991).

translation requires a deeper approach. The balance of my comments will focus on what that deeper approach might look like.

2. *The Problem of Translation*

One core focus for research in the field of anthropological linguistics over the past several decades has been examining the impact of what we call “linguistic ideologies” on how we understand each other through language. Linguistic ideologies are one example of the way in which language operates at the meta-level (language reflecting on or structuring itself).⁷ The discovery of the crucial role of linguistic ideologies in human communication followed from what could be called the “pragmatic revolution” in anthropological linguistics.⁸ This revolution drew new attention to the role of social and cultural context as foundational in language and communication. Further empirical research on the use of language in context revealed the crucial function of the metapragmatic level (that is, language reflecting on its own meaning and use in context). One example of metapragmatics in action is provided by linguistic ideologies – that is, our conscious and not-so-conscious ideas about language in context. These ideas provide powerful frames that shape and order our on-line, unfolding comprehension – and therefore also play an important role in efforts at translation.

We can look broadly at law and at the social sciences for an example. Although there are obviously many differences among the social sciences, we could say that one

⁸ Briefly, scholars of language have long divided the sources of meaning in linguistic communication into a number of categories – the most relevant here being the distinction between contextual or pragmatic sources and those that remain more constant apart from use in particular contexts (semantic meaning). While classic approaches took the core meaning of language as derived from semantics, with contextual influences conceived as incidental, the new pragmatists in anthropological linguistics, sociolinguistics and related fields demonstrated that in fact even language structure itself is designed fundamentally for use in context; thus contextual meaning turns out to provide a core foundation for human language and communication more generally. *See generally* Elizabeth Mertz, *Legal Language: Pragmatics, Poetics, and Social Power*, 23 ANN. REV. ANTHROPOLOGY 435 (1994).

point on which many social scientists would agree is a sense that our talk (and writing) about social phenomena has the goal of achieving greater accuracy and understanding of what's happening – and also often involves attempts to explain what we find. By contrast, the goal of much of legal language is that of reaching functional conclusions – guilty or not guilty; do we require mediation prior to divorce, do we allow exceptions (and if we're going to allow them, what kinds of exceptions)? ... and so forth. Thus the organizing linguistic ideologies of law and of social science are very different. It follows that a legal reading of social science texts may often seek a “sound bite” – an abbreviated, functionally-oriented conclusion – while missing the complexity, or eliminating important information because it doesn't seem immediately relevant to the questions and categories dictated by legal frames.

From this perspective, it isn't 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 don't have the luxury of waiting another five years to find out what's going on, because there's a decision that has to be made tomorrow. The challenge of bridging these fundamental chasms is a core task of new legal realist translations.