

A Call for a New Legal Realist Approach to International Law: The Need for *Method*

by Gregory Shaffer, Melvin C. Steen Professor of Law Inaugural Speech

Thank you all for coming. I feel extremely fortunate and grateful to be part of this thriving community. This is the greatest job in the world.

I want to thank the funders of this Professorship, it's an impressive list which includes the Sherman Fairchild Foundation, the Cargill Foundation, the 3M Company Foundation, Northwestern National Life Insurance, and West Publishing Company. And let me extend that thank you to the funders of all of our Professorships for the support they make possible for the creative work that is being done here, giving rise to this this wonderful faculty of which I am so proud to be a part.

Melvin C. Steen graduated first in his class from this law school in 1929, a tough year in our history, one that perhaps seems less far away today than it did a few months ago. He went on to join the law firm of the internationalist Elihu Root (who won the Nobel Peace Prize in 1912 for his work on international cooperation and dispute settlement through arbitration) before he left Root's firm to found the international law firm of Cleary Gottlieb, Steen and Hamilton, one of the leading international law firms in the world. The Paris branch of the firm, which is located a few blocks from where I practiced law for seven years before entering academia, is particularly well-respected, and Melvin C. Steen received the French Legion d'Honneur, France's highest honor.

I follow two great scholars and teachers in this Professorship, Robert E. Hudec and John Matheson. John Matheson most of you know well, and I am honored to follow him.

Bob Hudec some of you may know, but students and newer faculty, perhaps not. Bob worked in the legal realist tradition and thus lies at the center of what I have to say today. He understood law in broader political and economic context and he bridged research disciplines. He gave both law and political economy their due, and was highly respected by economists, political scientists, diplomats and international civil servants. Bob was *the* giant of his time in the world of international trade law.

Now those of you who knew Bob may take one look at skinny me, and think in light of his grand stature that I cannot fit into his shoes. Yet we have much in common in our fundamental approach to the study of international law. I considered him my mentor though he was at another university. And I dedicated my second book to him, *Defending Interests*, a socio-legal study of WTO litigation in the US and Europe.¹

Let me give two quotes from two non-legal literary sources to get to the spirit of a new legal realist approach. The first is from a letter from Anton Chekhov to Alexey Suvorin of 1892: “*Let her first say what is, and only then I will listen to what one can and must do.*”² Now for those interested in the history of American legal thought, those words sound quite similar to these of the American legal realist Karl Llewellyn, who maintained in 1931 (two years after Melvin Steen’s birth): “*The argument is simply that no judgement of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.*”³ Karl Llewellyn thus called for “the temporary divorce of Is and Ought for purposes of study.” The quote from Chekhov, a doctor, is highly relevant to a field—that of law and legal scholarship—which is dedicated to prescriptions, yet spends far too little time on diagnoses.

Here is a second quotation, one from James Baldwin. Baldwin is quoted as saying: “*The purpose of art is to lay bare the questions which have been hidden by the answers.*”⁴ Let me paraphrase that statement in terms of the theme of this talk: The purpose of engaging in research in a new legal realist vein is to uncover issues to which otherwise we are ignorant, to which otherwise we are blind. That is the art in New Legal Realism.

¹ GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003).

² Letter from Anton Chekhov to Alexey Suvorin (Dec. 3, 1892), in *The Portable Chekhov* 626 (Avrahm Yarmolinsky ed., Penguin Books) (1977).

³ Karl Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236-37 (1931).

⁴ It turns out that this widely-used, pithy quotation has not been found in anything Baldwin ever published. He did once write that we “must drive to the heart of every answer and expose the question the answer hides.” Curiously, the frequent use of the quotation supports the point attributed to it -- the need to probe behind received legal thinking to unpack questions and perspectives that have been overlooked. Of course those engaged in work involving race and gender have been at the forefront of exposing questions that were assumed away in conventional legal prescriptions. Today I wish to address why this remains a critical challenge for the study of international law which is dominated by we here writing from the United States or Europe as if our perspectives are universal and not colored by our experience.

Those engaged in work involving race and gender have been at the forefront of exposing questions that were assumed away in conventional legal thinking and the prescriptions derived from it. Today I wish to address why this remains a critical challenge for the study of international law in a world characterized by constituencies with differing priorities, perspectives and opportunities to be heard. We writing from the United States or Europe need to be careful before we advance prescriptions based on a presumption that our perspectives are universal and not shaped and colored by our position and experience.

Among internationalists there is great hope for an avulsive change in the United States' image abroad, that the United States will now be viewed as a contributor toward the building of a more stable and just international order in which law plays a progressive role. I do not hide from you that I have such hope, though a tempered one.

Our new president's name, Barak Hussein Obama, may have raised concerns among some in this country, but internationally it has incredible resonance. You may have noticed that suddenly commentators are touting that name in a way that was silenced during the campaign. Now, curiously, our new president has chosen as his chief of staff Rahm Emmanuel, another skinny guy with a funny name (whose middle name you might not know is Israel). So perhaps there is some hope. I say that not just metaphorically (Hussein, Emmanuel, Israel), because I believe in the force of symbols and the power of images; I recognize—in political science terms—the critical place of soft power, a form of power which includes law when law is perceived as legitimate.

International law's significance is increasingly recognized not only within the legal academy, but across the social sciences of economics, political science, sociology and anthropology. Yet despite sophisticated attempts to bridge the disciplines over the years, there remains a critical gap between international law scholarship and the approaches of social science.

Do you know why? My answer, for many of you, might get you to squirm, or even discretely stand up and leave the room, but let me assure you that there is nothing more important and more needed in a field which needs hope. That difference revolves around the concept of *method*.

Let me give an example. In 1999, the introduction to a “Symposium on Method” in the *American Journal of International Law*, the leading international law journal in this country, first noted the conventional definition of “methodology of legal research,” as the “ways to identify and locate primary and secondary sources,” that is, the formal sources to determine what is the law.⁵ Such a definition is a legal positivist one, a formalist one, one which involves a type of empirical work, though which does not look outside of the law-in-the-books. The introduction noted, however, how we have moved beyond such definitions in light of the heady developments that have occurred in international law scholarship. The introduction then introduced a series of analytic frameworks as “methods,” each of which was represented in one of the subsequent articles. The articles respectively covered Positivism, Law and Economics, New Legal Process, Critical Legal Studies, Rational International Relations Theory, Feminist Methods, and the Yale School of Policy-Oriented Jurisprudence.⁶ The issue concluded with an essay entitled “The Method is the Message.”⁷ Yes, how exemplary of a concluding essay, because not one of the articles in that special issue on “method” addressed method in the way that any social science discipline would. There lies the gap.

In the rest of these remarks, I will do two things. First, I will typologize international law scholarship into four predominant modes (which you will recognize in terms of domestic law scholarship), addressing their relative attributes and limitations. In this way, I will locate the place of NLR in the context of legal scholarship. Second, I will call for a greater focus in international law scholarship on empirically-grounded work that involves *method* in a social science sense. In doing so, I will define my view of a “new legal realist” approach, which has four attributes: normative commitment, commitment to empirical work, critical self-reflection and translation of empirical findings for both policy and practical tools.⁸

⁵ Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291, 292 (1999) (citing SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW (1984)).

⁶ The Yale School came out of legal realism but itself did not engage with method in a social science sense, and was focused on US policy in the context of the Cold War.

⁷ *Id.* at 410.

⁸ Third, if I had time I would also advance a particular analytic framework with policy relevance into which an empirically-grounded new legal realist approach can fit — that of comparative institutional analysis — one that is sufficiently open-ended that it does not predispose the researcher toward any particular policy prescriptions that reflects the researcher’s incoming ideological biases.

Let me first place new legal realism in the contexts of four broad categories of legal scholarship: traditional legal interpretation (also known as legal formalism, interpretivism or doctrinalism); normative advocacy; theoretical exposition; and empirical analysis. In practice, of course, the lines between the categories blur. Good empirical work is conducted under some sort of organizing theoretical or analytic framework. The questions posed are typically shaped by some sort of normative concern and have normative implications. Theoretical and analytic frameworks are built from prior experience, observation and inductive and intuitive understandings. Much doctrinal work is likewise informed by, and infused with, normative theory and purpose.⁹ Yet the categories are helpful for understanding tendencies in scholarship that are different in kind, and, in particular, to see what remains the least developed in the field of international law — empirically-grounded work.

Let us first turn to work in a legal positivist vein. Doctrinal analysis arguably remains the most frequent style of legal scholarship, reflecting the comparative advantage of legal scholars before legal audiences. From the internal litigator's and judge's perspective, going back to the sociologist of law Max Weber, law's legitimacy is grounded in its formal, quasi-“scientific” character, so that legal scholars play a more effective role in debates over the legal interpretation of treaty texts and case law when their scholarship retains its formal analytic nature. This strategy of legal academics is particularly important at the international level where judicial bodies' legitimacy is more likely put into question. As Martii Koskenniemi writes, “An appeal from the bench, however articulate and sincere, is always an appeal from formal authority, defined by its claim to universality and neutrality.”¹⁰

⁹ The presence of these overlaps is reflected in claims by scholars such as William Eskridge that “we are all textualists” now, (cf. Jonathan R. Seigel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) and Brian Leiter that “we are all realists now.” See Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261 (Dennis Patterson ed., Blackwell Publishing) (1999),

¹⁰ Martii Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 358 (1999). Academic scholarship that is predominantly doctrinal in character can be quite influential in international law. Article 38 of the Statute of the International Court of Justice even provides that the court “shall apply... the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.” In civil law jurisdictions in particular, academic treatises are often viewed by judges as cogent compilations of the state of the law. More broadly, and using the WTO context as a specific example, academic scholarship can be deployed as a form of *amicus curiae* brief to shape the understanding of judges, and it may be cited by them in legitimation of a legal ruling that has important consequences for many communities. Even more pervasively, it can affect how an elite community of scholars and decision-makers (including judges) see legal provisions whose interpretation has significant

This makes a lot of sense and we almost all engage in such analysis. That being said, there are severe limitations to this approach. First, practically, litigation is only a small part of law. You will see when you go into practice. From a legal realist perspective, lawyers most frequently are called upon to advise clients what to do. Here they will not perform their task if they fail to take account of how law operates in practice. Second, it does not help us to evaluate law and proposals for legal reform.

That takes up to the second mode—Normative Advocacy. This second form of scholarship takes a predominantly normative bent. The scholars at the top of the academic hierarchy who write in this vein have been called the “high priests” of international law. It is not by accident that, in many countries, lawyers wear robes all the time, much less as we do at the ceremony of graduation]. The distinction of such normative scholarship is that it aims to be transformative. Legal academics (or perhaps better stated, North American legal academics) have been socialized in graduate school (unlike their counterparts in other disciplines) to be advocates, whether we believe we are attempting to *win* for our clients in an adversarial proceeding, or to deploy law altruistically as activists to make the world a better place. Most legal academics arguably see themselves as *actors* in the world, engaged in struggles to advance principles and norms, and thus see their work as more than doctrinal or theoretical.

That makes a lot of sense. The world is a messy place. And those adapting a new legal realist perspective should embrace normative commitment in their work. However, a new legal realist approach calls us to be wary that our answers to questions are not predetermined by a normative slant which reflects our experience and position in the world. To paraphrase James Baldwin, the very *methodology* of new legal realism will help us to unpack questions where we might have thought that we already knew the answers. The very process of empirical inquiry can lead to new understandings of perspectives and priorities of affected constituencies we otherwise don’t encounter, and the contexts and dynamics in which any legal

effects, provisions which could be linguistically ambiguous, but have only one “normal” meaning within a particular “interpretive community.” For example, so many European and other foreign practitioners and academics in the “trade law community,” including in the WTO secretariat, have studied under the foundational trade law scholar John Jackson, and been influenced by his knowledgeable presentation of GATT and WTO materials, which is now reflected in their own understandings of the texts. The tongue-in-cheek self-identification of many trade law practitioners in Geneva as part of a “Jackson mafia” reflects the pervasive influence of Professor Jackson’s expositions of GATT and now WTO law.

prescription will play out, affecting outcomes in ways that otherwise were not predicted.

Third, let us turn to Theoretical Exposition. This third form of scholarship, one that arguably receives the most attention in the premier US law reviews, takes, or purports to take, a theoretical orientation. And yes, we need theories to make sense of the mass of phenomena before us. Theory and analytic frameworks provide us with lenses to understand complexity.

Yet purely theoretical perspectives also pose risks. They can structure what we see, and thus shape what we find. In most cases in the legal academy, theory is not applied in an empirical manner, but is nonetheless used for policy proposals. Given the complexity and diversity of the world, this is particularly problematic in the area of international law and policy.

The explanation for the predominance of theoretical over empirical work in the field is likely two-fold. First, legal academics point out that they typically are not trained for it, and thus it makes more sense for them to create theoretical frameworks regarding law. I think that is both mistaken and a loss for scholarship, given the knowledge we have of law. To give just two examples, neither my former colleague the great socio-legal scholar Stewart Macaulay nor my former professor Bob Ellickson, who took socio-legal insights to law and economics received advanced degrees beyond law, but they respectively transformed our understandings of contract and property law through their empirical work.

Another more critical explanation, adopted by those in the socio-legal field, is that the structure of competition within the legal academic profession has discouraged scholars from the time-consuming work of dirtying their hands in going out and gathering data and investigating actual legal processes. As my former professor Lawrence Friedman wrote two decades ago, “research itself—hard, grubby research—is less honored among scholars than ‘theory’ or ‘model-building’; this tends to drain talent from the work of building up, and critically examining, a concrete body of knowledge.”¹¹ In either case, the result is that much (if not most) legal scholarship is not backed by an empirical investigation.

¹¹ Cf. Lawrence Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).—I couldn’t find that actual quote anywhere.

This tendency brings us to a fourth variety of scholarship, empirical work, which includes that in a new legal realist vein. There is a small but increasing amount of international law scholarship that takes this approach, for which, thanks to the formidable work of Mary Rumsey and research assistants I am writing a literature review across all substantive domains of IL. The pioneering figure in international economic law was our very own Robert E. Hudec of the University of Minnesota. Bob's data bases and studies of GATT dispute settlement form the groundwork for analysis of international trade diplomacy and litigation in all disciplines. He provides an example of the value of cross-disciplinary collaboration, including here at the University of Minnesota, building bridges between the law school and the broader academy. He went to Geneva frequently to obtain a better understanding of what lay beneath the surface of trade disputes and litigation. I remain indebted to him for introducing me to that world.

Empirical work itself is conventionally divided into quantitative and qualitative methods, each of which has its attributes and deficiencies. Each has its tradeoffs which we could discuss, but which I will not take the time to address now.¹²

So why do I insist on the importance of such empirical work? I have learned from experience that the researcher who approaches a subject in an open and objective manner is almost always surprised by how wrong his or her initial assumptions were, whether one's politics be to the right or left (whatever that means in international law).¹³ Thus, this is an approach that calls into question ideological presumption. This is the key *methodological* point. Leaving one's office and venturing into the field transforms one's core assumptions regarding one's subject of study.

Let me give some examples. First, as a beginning academic, when I obtained a grant to examine the law and politics of trade-environment issues and went to Geneva with a conventional conception (within the US

¹² Empirical work ultimately will be based on some theoretical or analytic framework. Theorists of knowledge, from Popper and Lakatos to Kuhn and Quine, disagree on some basic issues as to how we understand the world, but, in their different ways, they agree that knowledge ultimately builds from experience.¹² What we need is an interactive process between the analytic framework used and crucial empirical inquiry. The new legal realist approach permits us to challenge the presuppositions that we unavoidably bring to our work.

¹³ Given the bias against those left-handed and the dual meanings of the word right, the terminology seems a bit stacked in English, though the terms actually come from the seating arrangements of the French legislative assemblies, given salience in the legislative assembly under the constitution of 1791.

academic context) that the WTO was trade-biased and needed “to balance” competing environmental norms and objectives (recall the Battle of Seattle and those wearing paper mache Sea Turtle Heads). Do you know what happened? My interviews turned into lectures from developing country representatives and groups about how my questions reflected an American frame. I learned about how environmental issues, and thus the trade-environment debate, was constructed (and being constructed) by US and European academics representatives, and NGOs compared to their developing country counterparts. I learned of the advantages of the resources and status that US and European universities bring, of our greater access to Western media and learned journals, and our advantages with English being the international language used to diffuse our framings of the issues. I learned how the term “environment” has vastly different meanings to stakeholders in developing countries where it is much more difficult to separate the concept from that of “development” because people’s livelihoods are more intimately connected on a day-to-day basis with the environment.

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

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

Let me give a second example. We are now, at least technically, still in the Doha Development Round. The key to the launching of the round was the creation of a fund for technical assistance and capacity building for developing countries. *But do you know what was the first focus for this program?* It was technical assistance provided by the WTO and WIPO for developing country implementation of intellectual property protections. Now economists have shown how such IP protections result in net wealth transfers from developing countries to the US and Europe. What is the lesson? If we talk about foreign aid and capacity building, we also have to ask about who defines the objectives, the programs and who selects the experts, and how are they received? I found this out in a bottoms-up way through interviews and archival research in Geneva.

A former student and research assistant of mine, Brian Larson, also worked on this issue separately. He applied for and received support to go to Vietnam and Geneva during the summer after his second year to engage in interviews and original research with respect to the WTO technical assistance program for Vietnam. He came to the same conclusions and built proposals from his empirical study. He wrote this up as his law review note entitled "Meaningful Technical Assistance in the WTO,"¹⁴ and he won the Francis Deak Prize of the ASIL for the best international law article published by a student in 2005. So don't tell me students can't do work in this vein. I imagine if you have heard this before. Yes you can.

Let me give a third example. There has been a call for adding a Parliamentary dimension to the WTO. Sounds good? More democratic oversight. More transparency. Do you know who is for it and who opposes it, and why? The European Parliament is the greatest proponent of this initiative, and the US Congress ignores or opposes it. Through dozens of interviews in Europe and the US, with parliamentarians, staffers, international civil servants, and others, I unpacked first that the European Parliament had no voice on trade policy in the EU and so was attempting to obtain it directly via the WTO. In contrast, US congressional representatives have a direct voice on US trade policy. At WTO ministerials, they do not meet with other parliamentarians. They meet directly with national negotiators, playing bad cop, in parallel with the US executive as good cop,

¹⁴ Brian T. Larson, Comment, *Meaningful Technical Assistance in the WTO*, 2003 WIS. L. REV. 1163 (2003).

over the terms of the deal. In other words, to be relevant in discussing the creation of an international parliamentary dimension in the WTO, you first need to understand domestic institutional contexts.

Let me give a final example. There are many advocates of US unilateral sanctions on labor rights ground, including through a US program for granting “trade preferences” to developing countries. India brought a case against the EU’s implementation of such a program in 2004. In an article entitled *The International Law and Politics of Rights* which I wrote with a Geneva-based program officer from Ghana, we showed how such “preferences” programs have reflected legacies of colonialism in Europe, and how they have been manipulated in practice.¹⁵ To give two examples, the Reagan administration found labor violations in Nicaragua but not in El Salvador or Guatemala in the 1980s and the EU gave special privileges to Pakistan for aiding in the “war on drugs” following September 11, 2001, but not to India, Bangladesh or Sri Lanke. In other words, these programs to aid development, when unilaterally applied, are not neutral.

I could give many more examples, from the law and politics over GMOs, the FATF on money laundering, female circumcision, patents and access to medicines, and bankruptcy reform.

A New Legal Realist Approach. Let me briefly examine NLR’s heritage in the legal realist movement, what makes it new, and why such a new approach is important today. Legal realism refers to a scholarly movement, particularly active in the 1920s and 1930s that responded to what it viewed as formalist legal scholarship and the conservative social policies that legal formalism tended to support. Legal realists argued, among other matters, for the need to study the context in which law is made, operates and has effects before making any proposition about what a law means or should do. For a new legal realist, the focus (in terms of “Is”) lies in the social context in which law operates, and not in a formal assessment of what the “law” says in the “books.”

Now I realize that whenever we see the word “new,” there is reason to be suspect. After all, when I see a “new ager” they seem to be about twenty years older than me and I’m no spring grass-fed chicken. And whenever I try

¹⁵ Gregory Shaffer & Yvonne Apea, *Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences: The Law and Politics of Rights*, 39 J. WORLD TRADE 977 (2005).

to get someone to see a nouvelle vague (new wave) film, they think that's soooo out-dated, if they know what I'm talking about. And if art nouveau is in vogue again, it's time to take out the heirlooms.

So what is new and what is old in new legal realism? To me, new legal realism has four key attributes: first it is driven by normative concerns over inequality and it foregrounds the questions of power and distributive conflict in international law; second it is concerned with empirical method to understand how international law operates and has effects; third it takes seriously critical concerns about the biases inherent in methods; and fourth, it aims to translate its findings for actors who can use them as practical tools to work toward a more just and stable international legal order.

The first and last attributes have much in common with the old legal realists. They too were concerned with inequality and the biases masked by the formal legal doctrines of their time which were used by lawyers and courts to attempt to limit progressive and New Deal reforms. They too responded to these normative concerns, although in their own particular historical-political context. They too wished to translate their endeavors in practical terms within that context. They too did so at a time of national and international crises, in their case, first financial and then security crises.

So if it is time for a reinvigoration of legal realism, what is new here? What is "new" in new legal realism is, first and most importantly, *method*—that we actually engage in empirical work, unlike most of the legal realists themselves. While the legal realists called for greater empirical work, so that the practice (and thus the meaning) of law would be better understood, they were less accomplished in practicing what they preached. In this sense, they have much in common with many international law theorists today. Empiricism, in contrast, lies at the heart of the new legal realist scholarly commitment.

There was also great diversity among the legal realists, and there will be great diversity today among those using the new legal realist mantle. For example, former UM McNight Presidential Professor of Public Law Dan Farber has written of NLR in terms of behavioral economics. Others write from law and society and historical institutional perspectives. At the annual conference of the AALS this January, we have organized a special panel on new legal realism which brings together scholars from these three vantages.

For our purposes, what matters most, is the common call for empirical questioning of assumptions, is the importance, in other words, of *method*.

In addition, in my view, a new legal realism must be self-reflective in terms of its critical inquiry. It must address how context and frameworks of inquiry shape what we see. It should include, where possible in light of the research question posed, some form of open-ended attention to actors presenting their views in their own terms so that the researcher does not simply impose the researcher's particular frame which predisposes research outcomes. We need to be more aware of how presentations of "fact" reflect, to varying extents, a subjective, normative element that is socially constructed, even in the very framing of the questions posed. We need to be aware that these presentations, in turn, play into social dynamics with their dimensions of hierarchy and power. Ought and Is are not so simple to disentangle.

Yet that being said, new legal realism is better-positioned to show how all presentations of law and fact are not equal. Given that academics in the United States, in particular, are well-placed to participate in international policy debates because they write from the center of global power (economically, militarily, linguistically, and socially, including in terms of the relative status of US universities), it is incumbent on us to question our own proclivities. As my former colleague Beth Mertz writes, "the power of social science methodology [is] to push us beyond our personal politics or situations, to enforce a form of humility in which we must listen to voices other than our own."¹⁶ While "social science" is never entirely "correct," it is the best way for us to proceed toward a better understanding of the world in which law operates. If we are to participate in an endeavor to make international law more legitimate, and thus more sustainable, our power lies in uncovering, from a bottoms-up perspective the processes that construct it.

Finally, a new legal realism is committed to communicating its empirical findings in a manner that is relevant for actors who wish to participate practically in the construction of a more just, legitimate and sustainable international legal order. In particular, I believe we need to work in league with those who have traditionally not played a significant role in

¹⁶ Elizabeth Mertz, *Challenging Translations: New Legal Realist Methods*, 2005 WIS. L. REV. 482, 483-84 (2005).

the construction of international law, be they developing country NGOs or developing country representatives.

Let me give examples from my domain of international economic law, in which we draw practical implications from our empirical work. From a top-down perspective, the WTO legal regime and its dispute settlement system seem to be based on consensus and neutrality. Dispute settlement under the WTO has been described as a system where law prevails over power politics, where “*right* perseveres over *might*.”¹⁷

Yet such optimistic declarations beg a series of questions about how the WTO legal system actually operates in practice and about its impact in the world. Who predominantly uses this legal system and who prevails? Can the legal system work for smaller players, such as small developing countries? To what extent has legal capacity –the ability to mobilize legal resources to prepare and litigate a WTO case– replaced the premium provided by market power? These are the questions, and implicit within them, the challenges, that a new legal realist approach poses, ones that are part of a book project of mine.

Most WTO legal scholarship starts with WTO rules, then examines how they are interpreted, and concludes in one of two ways. Either it explains why such interpretation is wrong from juridical science of interpretation perspective. Or it assesses the benefits or detriments of such interpretation in relation to the writer’s normative perspective (in Ronald Dworkin’s terms, making the law the best it can be).¹⁸

A new legal realist project reverses the telescope, starting with analysis of why certain WTO members and certain of their constituents use (or fail to use) WTO law and thereby give (or fail to give) WTO law meaning. Only then do we turn to examine whether WTO procedures, the approach of WTO case law, the WTO’s rules on remedies, and individual WTO member strategies could be modified in order to facilitate a more cost-effective representation of weaker parties.

To show how international trade law actually works in practice, I have worked with two political scientists, using a combination of quantitative and

¹⁷ See, e.g., Marc Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation* (2007 in ICTSD) (on file with the author).

¹⁸ Cf. RONALD DWORKIN, *LAW’S EMPIRE* 411 (1986).

qualitative methods, to assess the role of legal capacity in the use of WTO law, both in actual dispute settlement and in the shadow of the legal system.¹⁹ The conventional wisdom is that the WTO's more legalistic dispute settlement system upholds the rule of law over that of power, right over might. Yet there had been virtually no empirical evaluation as to how to measure legal capacity in order to evaluate how it affects patterns of litigation and discriminatory trade protection. Our results strongly bore out our expectations that WTO members with more legal capacity are more likely to challenge before the WTO and are less likely, up-front, to have discriminatory duties imposed on their products in the first place. We found that legal capacity mattered at least as much, if not more than raw market power, in affecting patterns of dispute initiation and protection.

So what can we do with this knowledge? I will give two examples, one involving system reform and the other involving the development of practically tools for actors. I am working with a Geneva-based NGO to assess ways in which the dispute settlement system could facilitate greter developing country participation. In a forthcoming publication with a Swedish trade economist in a multi-disciplinary Geneva-based journal, we first showed how the WTO dispute settlement system discriminated against those with small claims and we put forward a proposal for a "small claims" procedure for these countries.²⁰

Second, there is the question of what can be done outside of institutional reform so that law can be better used by a wider variety of actors. Building from years of field work in collaboration with two Brazilian legal academics, we just published a study which showed how Brazil's effort to use the WTO legal system has had a broader impact both within Brazil and on the WTO.²¹ Within Brazil, it has had an impact on legal education, government-business relations, and even the organization of the state itself, building more transparent government processes, and developing new competitions for trade expertise.²² In the process, Brazil has dramatically engaged the WTO system in challenging US and European agricultural subsidies. In that project, we linked the national and the global settings. We

¹⁹ See Marc Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation* (forthcoming 2007 in ICTSD) (on file with the author).

²⁰ Hakan Nordstrom & Gregory Shaffer, *Access to Justice in the WTO: The Case for a Small Claims Procedure* (forthcoming 2008).

²¹ Gregory Shaffer, Michelle Ratton-Shanchez, & Barbara Rosenberg, Winning at the WTO: What Lies Behind Brazil's Success? 41:2 Cornell Internatinal Law Journal .(Summer 2008).

²² *Id.* at pincite.

showed how developing country actors, wanting to promote different agendas to make international law reflect their priorities, have used international legal tools to their own advantage, including through reforming their own domestic systems. I am now editing a volume containing 9 such developing country studies, and have helped to coordinate a series of workshops around the world to share such knowledge and experience.

In sum, a new legal realist approach shows both a healthy skepticism toward international law, and takes international law quite seriously. Unlike internationalist idealists, a new legal realist perspective questions what constitutes international cosmopolitanism. It questions whose voices are not heard when one focuses on “international society” with a presumption that international law is there to serve “common” interests.²³ To adapt from Ed Rubin, Dean of Vanderbilt Law School, new legal realism attends to “all the social forces, inequalities, and ideological [factors] [that law-promoting theories have] ignored.”²⁴

With the election of Barack Obama, internationalists have the ascendancy within American politics. But if we are to fashion a more sustainable and credible international legal order, we will need to do more than assume that international law is legitimate and to struggle for its respect. To return to Anton Checkhov, let us first study what is, and *only then listen to what one can and must do*. The best way to get there is to reevaluate what we mean by international law *method*.

Thank you for coming.

²³ That is, who constitutes the international law “community” and “international society,” or, to paraphrase the great human rights scholar Oscar Schachter, “the invisible college” of international lawyers. See Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977-78).

²⁴ Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1428 (1996).