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Getting Real About Legal Realism, New Legal Realism and Clinical Legal Education

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ABOUT THE AUTHOR: Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. I owe an intellectual debt to the professors at the University of Wisconsin Law School, whose engagement with the "law in action" indelibly marked my perspective on the law; and to my former colleagues at the Frank J. Remington Center, who put the "action" into "law in action." I also want to thank the following persons for providing helpful feedback on earlier drafts of this paper: Mary Berkheiser, Ann Cammett, Fatma Marouf, Elizabeth MacDowell, Jay Mootz, Mae Quinn, Leticia Saucedo, Anne Traum, Louise Trubek, and Ian Weinstein.

I. INTRODUCTION

One of the earliest calls for clinical legal education came from the American Legal Realist movement of the 1920s and 1930s, in Jerome Frank's plea for the creation of "clinical lawyer-schools."[1] Like many calls for reform in legal education, Frank's plea was based on a critique of the appellate case method of legal instruction. However, unlike most critiques, which focus on the paucity of lawyering skills instruction in traditional legal education,[2] the legal realist critique was embedded within a jurisprudential challenge to the meaning of law itself.[3]

Running through legal realist jurisprudence was a distinction between the "law in books" and the "law in action," with the idea that law is not found primarily in statutes and judicial opinions, but rather in the behavior of judges and other legal officials.[4] As Karl Llewellyn wrote, a realist study of law must capture "the area of contact between judicial (or official) behavior and the behavior of laymen."[5] Missing from the law in books are the myriad ways the meaning of law shifts as it filters down from appellate opinions to lower court cases; as it spreads from lower court cases to local practices; as local practices influence the information and advice about the law transmitted by lawyers, court clerks, social workers, probation officers, friends, neighbors, employers, and others; and as it ultimately shapes the lives of people who receive information or advice from these multiple sources of legal authority. From the legal realist perspective, the value of clinical legal education lay in its potential to force law students out of the artificial world of the law in books and expose them to the complex and variegated world of the law in action.

As histories of clinical legal education have recounted, the legal realist call for clinical legal education waned without generating Frank's proposed legal educational

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1. Frank published two articles in 1933 calling for the creation of clinical lawyer-schools. *See* Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933) [hereinafter Frank, *Why Not?*]; Jerome Frank, *What Constitutes a Good Legal Education?,* 19 A.B.A. J. 723 (1933) [hereinafter Frank, *Good Education*]. In 1947, Frank repeated his plea for clinical lawyer-schools, noting that his proposals had garnered little support in the intervening years. *See* Jerome Frank, *A Plea for Lawyer-Schools*, 56 Yale L.J. 1303 (1947) [hereinafter Frank, *A Plea*]. For a discussion of Frank's ideas within the context of the history of clinical legal education, see George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. Legal Educ. 162, 166 (1973–1974).

2. The failure of law schools to provide practical training has been the focus of critiques over a number of years. *See, e.g.*, Alfred Z. Reed, Training for the Public Profession of the Law (1921); Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum: Report of The Task Force on Law Schools and the Profession (1992) [hereinafter "MacCrate Report"]; William M. Sullivan Et Al., Educating Lawyers 87 (2007) [hereinafter "Carnegie Report"].

3. Karl Llewellyn, The Bramble Bush: The Classic Lectures on the Law and Law School 5 (11th ed. 2008) (emphasizing in a series of lectures to incoming students at Columbia Law School that the business of law was the settling of disputes by legal officials, and "*[w]hat these officials do about disputes is, to my mind, the law itself*").

4. *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 15 (1910) (coining the distinction between law in books and law in action).

5. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431, 455–56 (1930).

reform.[6] When the clinical legal education movement gained momentum in the 1960s, it developed around other goals: a social justice mission[7] and a pedagogy of generalized lawyering skills.[8] Although clinical scholars have grappled with the complexities of implementing these dual goals,[9] there has been relatively little analysis of how clinics might be consciously designed around exposing students to gaps between the law in books and the law in action.[10] Meanwhile, empirical scholarship in the legal realist tradition has explored both behavioral trends in judicial decisionmaking and gaps between the law in books and the law in action.[11] Yet such scholarship often fails to connect its behavioral insights to the tasks of legal representation, and draws criticism that social scientific "law and" scholarship is irrelevant to judges and lawyers engaged in the practice of law.[12]

This article argues that there are significant barriers to integrating the behavioral study of law into clinical legal education that come into focus through an examination of why Jerome Frank's call for clinical lawyer-schools failed to gain traction within the American Legal Realist movement. One barrier is the dominant focus on appellate adjudication that pervades legal scholarship and legal education. Although the early legal realists defined law in action broadly to include the creation of law by lower courts and other legal officials, the pull of appellate decisions operated strongly within the Legal Realist movement and continues in empirical legal studies today.[13] Another barrier is an inevitable "relevance gap" between the behavioral study of law

6. Grossman, *supra* note 1, at 169. *See also* Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 Clinical L. Rev. 1, 8 (2000–2001) (describing Legal Realists John Bradway and Jerome Frank as pioneers of clinical legal education).

7. *See* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. Rev. 1461 (1998); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 Clinical L. Rev. 307 (2001); Stephen Wizner, *Beyond Skills Training*, 7 Clinical L. Rev. 327 (2001).

8. *See* David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 Clinical L. Rev. 191 (2003); David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. Rev. 1507 (1998).

9. *See, e.g.*, Jane H. Aiken, *Walking the Clinical Tightrope: Embracing the Role of Teacher*, 4 U. Md. L.J. Race, Religion, Gender & Class 267 (2004); Sameer M. Ashar, *Law Clincs and Collective Mobilization*, 14 Clinical L. Rev. 355 (2008); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 Clinical L. Rev. 333 (2009); Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. Md. L.J. Race, Religion, Gender & Class 259 (2004).

10. *But see* Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 Clinical L. Rev. 779, 791–93 (2007) (describing the intellectual roots of the University of Wisconsin's "systems approach" to clinical legal education in legal realism).

11. *See generally* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 Cornell L. Rev. 61 (2009).

12. *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992) (questioning the value of "impractical," "Critical Legal Studies," and " Law and Economics" scholarship to judges).

13. *See* discussion *infra* Part III.A.

and the practice of law, created in part by the need for lawyers to argue cases on the basis of doctrinal rules rather than on behavioral facts about the legal process.[14] While the behavioral study of law is interesting as an academic pursuit, it is not always apparent how the insights of social science can be translated into knowledge with practical utility to lawyers and jurists. As a result of these barriers, most of the reforms to legal education that came out of the American Legal Realist movement remained comfortably within the confines of appellate case classroom teaching; to the extent that they strayed too far from legal doctrine into pure social science, they were criticized for their lack of relevance to legal education and legal practice.

Both clinical legal education and scholarship in the legal realist tradition have matured since the time of Jerome Frank's call for a clinical lawyer-school, giving rise to the hope that more sophisticated thinking in each area can help to overcome these barriers. Most promising among the myriad revivals of new legal realist scholarship in the past decade is a call for research that aims to examine law from the "bottom up" perspective of those who lack power in society;[15] to critically question the neutral and objective standpoints traditionally associated with social scientific research; [16] and to use pragmatic engagement in the world as a platform for legal research.[17] Clinicians are naturally situated to answer this call for embedded research, which fits closely with the social justice goals and reflective practice methods that have developed within clinical legal education since Jerome Frank's time.[18] And, I argue, answering the call of new legal realist scholarship promises both to enrich clinical education by expanding clinicians' understanding and integration of systemic issues into their clinical teaching and to focus the new legal realist study of the law in action by shaping research around pragmatic goals inherent in the social justice practice.

Part II of this article explores the history of Jerome Frank's call for a clinical lawyer-school and situates his proposed legal educational reforms within the context of his legal realist writings. Part III of the article describes the historical barriers within the American Legal Realist movement to integrating a social scientific study of the law into the practical and professional training of lawyers. Part IV describes the emergence of new legal realist scholarship and explores both the potential benefits and barriers to clinicians engaging with this scholarship.

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14. *See* discussion *infra* Part III.B.

15. *See, e.g.*, Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 Wis. L. Rev. 335, 339–40 (2005).

16. *See id.* at 342–45.

17. *See* Nourse & Shaffer, *supra* note 11, at 84–85.

18. Taking seriously the commitment to this research arguably requires a blurring of the boundaries between classroom and clinical teaching. *See* Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 Wis. L. Rev. 455, 472–76 (2005).

II. JEROME FRANK AND HIS CALL FOR A CLINICAL LAWYER-SCHOOL

Jerome Frank's failed call for a clinical lawyer-school is cited so frequently in clinical scholarship that it borders on the canonical. Yet there is a danger in assuming that all calls for clinical legal education—including Frank's—share the values and goals that animate clinical legal education today. Nothing illustrates this danger better than clinicians' incautious invocations of William Rowe's 1917 proposal for a program of clinical legal education.[19] Although often cited uncritically in clinical scholarship,[20] Rowe's advocacy for clinical legal education was grounded in an appallingly xenophobic reaction to the rapidly diversifying bar of his time. Clinical legal education was necessary, Rowe argued, to socialize the "great flood of foreign blood, much of it antagonistic by instinct, which is now sweeping into the bar,"[21] and to instill in such foreign-born lawyers "the instinct for right and the consciousness of wrong, which constitute the true spirit of the profession."[22] Although some of the most "thirsty seekers for knowledge and light and material progress" are found among immigrant lawyers of "foreign stock," Rowe warned that their thirst for knowledge "has slight relation to those qualities having to do with morals and character," and is instead "centered mainly upon their own selfish advancement, in a material way."[23] In the many citations of Rowe's article, it is disturbing that only one article—written by a legal ethicist rather than a clinician—places Rowe's call for clinical legal education within the historical context of the racist and protectionist bar politics of his day.[24]

Frank's proposal for a clinical lawyer-school was historically situated in the goals and concerns of the Legal Realist movement. To get a fuller understanding of how and why Frank's legal realist call for clinical lawyer-schools failed to catch on in his time, we must examine it within the fuller context of the American Legal Realist movement. This examination reveals barriers to integrating the behavioral study of law into the practical training of lawyers that bear attention today as we contemplate

19. William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 Ill. L. Rev. 591 (1917).

20. *See, e.g.*, Barry et al., *supra* note 6, at 6–8; Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 Clinical L. Rev. 57, 73 (2009); Andreas Bücker & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 German L. J. 575, 585–86 (2008); Phillip W. Broadhead, *A Model Program for Establishing a Criminal Appeals Clinic at Your School: More Bang for the Buck*, 75 Miss. L.J. 671, 676 (2006); Grady Jessup, *Symbiotic Relations: Clinical Methodology—Fostering New Paradigms in African Legal Education*, 8 Clinical L. Rev. 377, 393–94 (2002).

21. Rowe, *supra* note 19, at 593. The "foreign element" that was invading the legal profession, Rowe cautioned, was "largely of the blood of southern, eastern and central Europe" and was "[b]y inheritance more or less hostile to all authority, and with little inherited sense of fairness, justice and honor as we understand them." *Id.* at 602.

22. *Id.* at 598.

23. *Id.* at 602.

24. James E. Moliterno, *Politically Motivated Bar Discipline*, 83 Wash. U. L.Q. 725, 729 n.14 (2005) (identifying Rowe's essay as an example of attempts to cloak anti-immigrant bar restrictions in neutral-sounding concerns about competence and moral character).

the space that clinician-scholars might occupy within recent calls for a new legal realist study of the law in action.

A. Jerome Frank's Clinical Lawyer-School

In 1933, Jerome Frank called for a truly radical reform to legal education. He proposed not merely to add practical training to the law school curriculum, but to change the central focus of legal education from appellate case study to immersion in the day-to-day work of practicing lawyers. Unlike proposals for curricular reform today, which value the Langdellian method of appellate case instruction as one among many necessary components in the preparation of students for the practice of law,[25] the clinical lawyer-school Frank proposed amounted to "a complete abandonment of Langdell's central aim and a reversion to the apprentice system but on a more sophisticated level."[26]

Frank launched his critique of the appellate case method of instruction with a searing critique of the man behind the method: Christopher Columbus Langdell.[27] In Frank's view, the case method of instruction was indelibly stamped with the "neurotic escapist character"[28] of Langdell, whom he described as a man who preferred the "hush and quiet of a library" to the "all-too-human clashes of personalities in law office and courtroom."[29] Frank derisively quoted Langdell as saying, "The library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist,"[30] acerbically noting that studying law from books was akin to training "prospective dog breeders who never see anything but stuffed dogs."[31] The real laboratory for the study of law, according to Frank, was not the law library, but the law office; and there was no better way to implement a realist study of law than "to have such laboratories inside the law school."[32]

What legal education needed, argued Frank, was the development of full-fledged "lawyer-schools" in which "[t]heory and practice would . . . constantly interlace" and

25. *See* Carnegie Report, *supra* note 2, at 47–63; MacCrate Report, *supra* note 2, at 233–45.

26. Frank, *Good Education*, *supra* note 1, at 723.

27. *See* Frank, *Why Not?*, *supra* note 1, at 907–08; Frank, *Good Education*, *supra* note 1, at 723; Frank, *A Plea*, *supra* note 1, at 1303–04. Frank's focus on Langdell's character was not simply an ad hominem attack. Rather, it was consistent with Frank's view that judges' decisions were derived primarily from their personal idiosyncrasies and only later justified with reference to the legal rules and principles espoused in their written opinions.

28. Frank, *A Plea*, *supra* note 1, at 1304.

29. Frank, *Good Education*, *supra* note 1, at 723. Frank chronicled Langdell's career from law school, in which Langdell was said to have spent his time "almost constantly in the law library," to his "peculiarly secluded life" in practice as an appellate attorney who spent most of his time in the "inaccessible retirement of his office" and the library of the New York Law Institute writing briefs for other attorneys. Frank, *Why Not?*, *supra* note 1, at 907–08.

30. Frank, *A Plea*, *supra* note 1, at 1304.

31. Frank, *Why Not?*, *supra* note 1, at 912.

32. Frank, *A Plea*, *supra* note 1, at 1329.

"students would learn to observe the true relation between the contents of upper-court opinions and the work of practicing lawyers and courts."[33] At the center of law school activity would be a legal clinic in which law students would represent clients on a range of issues included in the work of a legal aid society, and also "take on important jobs, including trials, for government agencies, legislative committees, or other quasi-public bodies."[34] The study of appellate doctrine would be consigned to a peripheral role, as a way for students to learn the linguistic formalities needed by lawyers to present legal arguments.[35] Rather than excerpted appellate cases compiled in casebooks, Frank proposed that students in the classroom study the full record of cases from pleading to verdict and appeal.[36] The study of law would be integrated with the study of social science, bringing the insights of history, psychology, economics, ethics, and anthropology to bear on what might otherwise be considered "strictly legal problems."[37]

Although Frank's proposal touted the benefits of real-world exposure to law in action at the trial court level, he did not have a pedagogical program that went much beyond immersing students in practice. Frank proposed that his clinical lawyer-school be a laboratory for teaching students about "the human side of the administration of justice"[38] with all the distortions of its personal, idiosyncratic features of trial-level fact-finding. In the clinical lawyer-school Frank envisioned, students would learn, among other things, the inherent uncertainty and subjectivity of facts in contested cases; the way the "facts of a case" may vary based on "the faulty memory of witnesses, the bias of witnesses, the perjury of witnesses"; the "effects of fatigue, alertness, political pull, graft, laziness, conscientiousness, patience, impatience, prejudice and open-mindedness of judges"; and the methods used in negotiating disputes and drafting documents.[39]

Although such lessons in real-world trial-level practice do a good job of challenging the prevailing orthodoxy of Langdell's case method, they failed to spell out an affirmative pedagogy designed to prepare students for the practice of law. By the more sophisticated pedagogical standards of clinical teaching today, Frank's vision of clinical education lacked a structure for helping students generalize from and transfer the knowledge gained from exposure to practice in his clinical lawyer-school to their experience as lawyers in the future. As the next section will demonstrate, the inability to articulate how students might generalize from their

33. *Id.* at 1317.

34. *Id.* at 1316. *See also* Frank, *Good Education*, *supra* note 1, at 723–24; Frank, *Why Not?*, *supra* note 1, at 917–18.

35. Frank, *Why Not?*, *supra* note 1, at 914–15; Frank, *Good Education, supra* note 1, at 723; Frank, *A Plea*, *supra* note 1, at 1315.

36. Frank, *Why Not?*, *supra* note 1, at 916; Frank, *A Plea*, *supra* note 1, at 1315.

37. Frank, *Good Education*, *supra* note 1, at 724; Frank, *Why Not?*, *supra* note 1, at 921–22.

38. Frank, *Why Not?*, *supra* note 1, at 918.

39. *Id.*

experience in his proposed lawyer-school can be traced to a basic contradiction within Frank's legal realist thought.

B. Jerome Frank's Legal Realist Thought

Jerome Frank was a central figure in both developing and exemplifying legal realist thought.[40] While practicing as a Wall Street lawyer in 1930, he published *Law and the Modern Mind*, a book that propelled him to the forefront of the American Legal Realist movement.[41] Frank's prominence in the Legal Realist movement was cemented in 1931 when Karl Llewellyn credited Frank as a co-author of one of the seminal articles that defined the emerging Legal Realist movement.[42] In the 1930s, Frank served in the New Deal administration as general counsel to the Agricultural Adjustment Administration and as a commissioner on the Securities and Exchange Commission.[43] In 1941, he was appointed to the U. S. Court of Appeals for the Second Circuit.[44] Throughout this time, Frank continued to publish numerous books and law review articles that developed his ideas about the nature of fact-finding and the judicial process, particularly focusing on what Frank came to call "fact-skepticism," the view that trial-level findings of facts were determined primarily by factors that are idiosyncratic to the fact-finder.[45] Although he was denied appointment as a faculty member at Yale Law School in 1935, due in part to anti-Semitism and a conservative backlash against New Dealers,[46] Frank continued to write prodigiously and taught as a lecturer at Yale from 1946 until his death in 1957.[47]

Among Legal Realists, Frank was known for insisting that judges decided cases not on the basis of reasoned and principled analysis of prior doctrine, but primarily on "hunches" arising from an intuitive sense of right and wrong under the

40. Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J. L. & Soc'y 175, 175 (1991); Brian Bix, *Introduction in* Law and the Modern Mind xi (Transaction Publishers 2009) (1930).

41. Duxbury, *supra* note 40, at 176; Bix, *supra* note 40. As Neil Duxbury put it, the book "arrived on the crest of the realist wave" and "captured the mood of many progressive lawyers both in the universities and in practice." Duxbury, *supra* note 40, at 181. *See also*, Symposium, *Law and the Modern Mind*, 31 Colum. L. Rev. 82 (1931) (providing reviews of Frank's book by Karl Llewellyn, Mortimer J. Adler, and Walter Wheeler Cook). After the publication of *Law and the Modern Mind*, Frank was appointed as a visiting research associate at Yale Law School, where he also taught part-time from 1946 until his death in 1957. Duxbury, *supra* note 40, at 176–77.

42. Karl Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1222 (1931).

43. Duxbury, *supra* note 40, at 176.

44. *Id*.

45. *See generally* Jerome Frank, If Men Were Angels (1942); Jerome Frank, Courts on Trial: Myth and Reality in American Justice (1949); Jerome Frank & Barbara Frank, Not Guilty (1957). For a comprehensive list of books, articles and miscellaneous writings of Jerome Frank, see Julius Paul, The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process 158–62 (1959).

46. Laura Kalman, Legal Realism at Yale 138–39 (1986).

47. Duxbury, *supra* note 40, at 177.

circumstances and used legal reasoning to rationalize these intuitive conclusions.[48] He speculated that the factors that produce a judge's "hunch"—the true basis for the judge's decision—are "multitudinous and complicated" and that at least some of these factors cannot be predicted because they are "uniquely individual" to each judge.[49] Controversially, Frank drew on psychoanalytic theory to argue that both the legal system and the study of law were plagued by the "basic legal myth that law is, or can be made, unwavering, fixed and settled,"[50] and that this "basic myth" derives from a childish longing for a father-substitute in the form of authoritative law.[51]

Frank's legal realist writings were also distinctive in focusing skeptical attention, not only on the rules that judges announce in deciding cases but on the fact-finding process in trial court proceedings, a view known as "fact-skepticism."[52] Fact-finding at the trial court level was more crucial to the administration of justice than appellate court decisionmaking, Frank argued, because "the overwhelming majority of decisions are not appealed; the disputes in most of the relatively few appealed cases turn on such issues of fact, and the appellate courts accept the trial court's determination of the facts in a large percentage of such cases."[53] As Frank pointed out, trial-level fact-finding is a form of lawmaking; whenever a court applies the law to the facts incorrectly, it essentially nullifies the applicable statute.[54] Further, trial courts have the power to evade appellate review by cloaking their decisions in findings of fact rather than rulings of law.[55]

The arguments Frank mounted in support of clinical lawyer-schools grew directly from his emphasis on the central role of fact-finding and the idiosyncrasy of judging in his legal realist writings. In his call for clinical lawyer-schools, Frank argued that the appellate case method does not really study *cases* but "the so-called legal rules and principles . . . spelled out" in "judicial *opinions*."[56] Yet, the central concern for lawyers

48. *See* Jerome Frank, Law and the Modern Mind 111–12 (Transaction Publishers 2009) (1930) [hereinafter Law and the Modern Mind]. Frank adopted the "hunch" theory of judicial decisionmaking from the work of Joseph Hutcheson. *See* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L. Q. 274 (1928–1929).

49. Law and the Modern Mind, *supra* note 48, at 114. Frank recognized that legal rules and principles also play a role in producing the judge's "hunch," as do broader political, economic, and moral sentiments that are capable of sociological study. *Id.* at 113–14. However, he argued that the role of idiosyncratic personality traits renders systematic study of judicial trends difficult to discover. *Id.* at 120–25.

50. *Id.* at 21.

51. *See id.* at 19.

52. *See generally* Edmond Cahn, *Jerome Frank's Fact-Skepticism and Our Future*, 66 Yale L.J. 824 (1957); Sam A. Beatty, *On Legal Realism—Some Basic Ideas of Jerome Frank*, 11 Ala. L. Rev. 239 (1958–1959); Julius Paul, *Jerome Frank's Contributions to the Philosophy of American Legal Realism,* 11 Vand. L. Rev. 753 (1958).

53. Jerome Frank, *Say It With Music*, Harv. L. Rev. 921, 922 (1948).

54. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259, 1274 (1947).

55. Frank, *supra* note 53, at 927–28.

56. Frank, *Why Not?, supra* note 1, at 910.

in advising and advocating for their clients is not how principles and rules fit together in the abstract, but predictions about how courts are likely to decide specific cases involving their clients.[57] The study of judicial opinions provides little insight into such predictions, Frank argued, because the reasons recited by judges in their printed opinions were largely post hoc rationalizations for the results the courts wanted to reach, rather than the real reasons that motivated the decisions.[58] Moreover, Frank argued that appellate cases were of limited pedagogical use, because they provide no insight into "the transcendent importance of the facts of cases."[59] The Langdellian case method's focus on appellate decisions, Frank argued, misleads students into thinking that "the difficulty of predicting decisions stems largely from uncertainty in or about the rules."[60] However, the greatest perils of prediction do not lie primarily in uncertain rules, but in "the obstacles to guessing what the trial courts will guess to be the facts" of a case.[61]

Despite his centrality as a legal realist figure, Frank's ideas are commonly described as "extreme" or "fringe" realism.[62] The very features of Frank's jurisprudence that motivated his call for clinical lawyer-schools—his emphasis on the personal and idiosyncratic nature of lower-level judicial decisionmaking and his focus on the trial-level fact-finding process—put him at the margins of legal realist thought. Legal Realists, especially those whom legal historian William Twining has called the "prudents,"[63] sought a more accurate picture of the operation of law with the pragmatic goal of better predicting its application;[64] they also hoped to guide law and policy reform in ways that were more responsive to societal needs and conditions.[65] Frank's views about the inscrutability of judicial decisionmaking were antithetical to the Legal Realists' quest to discover the patterns of behavioral regularity at the heart of the prudential Legal Realists' predictive and reformist missions.[66]

Moreover, at the center of Frank's jurisprudence stood a glaring contradiction. As Frank insistently pointed out, from the perspective of lawyers representing clients, what is important is the prediction of what the judge will do in *their case*, not social

57. *See id.* at 911.

58. *See id.* at 910–11.

59. Frank, *A Plea*, *supra* note 1, at 1306.

60. *Id.* at 1310.

61. *Id.*

62. Bernie R. Burrus, *American Legal Realism*, 8 How. L.J. 36, 43 (1962) (describing *Law and the Modern Mind* as "the most interesting espousal of 'fringe-realism'"); Duxbury, *supra* note 40, at 178 ("Commonly and with reason, [Frank] has been classified as a 'fringe' or 'left-wing' realist."); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 7 Tex L. Rev. 267, 269 ("Even among the Realists, of course, Frank's view represented a particular sort of extreme . . . .").

63. William Twining, Karl Llewellyn and the Realist Movement 56–59 (1973).

64. *See* Joseph William Singer, *Legal Realism Now*, 76 Calif. L. Rev. 465, 469–73 (1988) (book review).

65. *See* G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 823 (1986).

66. *See* Kalman, *supra* note 46, at 42–43; *see also* Leiter, *supra* note 62, at 279–81.

scientific generalities of what judges often do in cases like theirs.[67] However, as Frank acknowledged—particularly in his later writings—honest appraisal of the "unruly" process of fact-finding revealed such profound uncertainties that the most one could hope to discover were regularities at the level of rules; fact-skepticism left little ground for predicting the outcome of results in particular cases.[68] This contradiction at the heart of Frank's jurisprudence also infected the pedagogical program of his proposed clinical lawyer-school, which was heavy on exposing students to trial-level practice but thin on tools for abstracting or generalizing from their experiences. Frank's focus on the "unruly" nature of fact-finding and judicial decisionmaking provided little ground on which such a pedagogy could be built.

III. BARRIERS TO INTEGRATING THEORY AND PRACTICE IN THE LEGAL REALIST MOVEMENT

Although Jerome Frank's call for a clinical lawyer-school suffered limitations arising from the internal contradictions between his individual client-predictive goals and his views about the idiosyncrasy of judicial decisionmaking, there were deeper barriers within Legal Realism to the project of integrating the behavioral study of law and clinical legal education. These barriers posed natural impediments to the Legal Realists' consideration of clinical legal education as a site for the study of law in action. This section will explore two such barriers as they are reflected in the history of the Legal Realist movement: the strong pull that the study of appellate cases exerts in legal scholarship and legal education; and the "relevance gap" between the behavioral study of law and the practice of law.

A. Appellate Case Dominance

As the history of American Legal Realism demonstrates, it has been remarkably difficult for behavioral legal scholars to break free of the dominance of appellate case law, even when they have recognized the importance of studying the behavior of lower-level officials. Legal Realists historically recognized that there is something profoundly unrealistic about the world of law as portrayed in appellate court decisions. In calling for a realist study of law, Karl Llewellyn was emphatic that "the focus, the center of law, is not merely what the judge does . . . but what *any* state official does, officially."[69] Elsewhere, he insisted that "the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*"[70]

Yet, these insights did not always translate into actual study of law beyond appellate cases. Llewellyn's own behavioral studies of "the law itself" eventually came

67. *See, e.g.*, Law and the Modern Mind, *supra* note 48, at 46–52.

68. *See* Jerome Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 Rutgers L. Rev. 425, 444–52 (1954).

69. Llewellyn, *supra* note 5, at 456.

70. Llewellyn, *supra* note 3, at 5.

into focus on the process of appellate judging, supported by analysis of the patterns that emerge from the study of outcomes of judicial decisions.[71] Llewellyn's brand of realism eventually developed into a view that although formal legal doctrine presents many "leeways" for judicial interpretation,[72] the appellate judicial process also carries institutional constraints that make the results of adjudication reasonably "reckonable,"[73] especially when considered in light of the equities of the recurring fact-situations that appellate cases present.[74] His later work focused on discerning the behavioral uniformities and regularities beneath the surface reasoning in appellate opinions.[75]

Frank repeatedly criticized the tendency of Llewellyn and other Legal Realists to confine their study to the "artificial two-dimensional legal world" of upper-court decisions without questioning whether the regularities they sought in appellate decisionmaking had any bearing on predictions of trial court decisions.[76] He differentiated his work from Llewellyn's later writings and criticized other legal realists for allowing their "eagerness" to draw predictability out of court decisions to "blind themselves, and others, to the circumstances" of trial court fact-finding that render predictions inherently unreliable.[77]

B. Behavioral Scientific Study of Law and the "Relevance Gap"

Even when the behavioral study of law and legal institutions breaks free from the vortex of appellate cases, it is not always apparent how the insights of social science can be translated into knowledge with practical utility to lawyers and judges. There is an inherent tension between the internal perspective necessary for the practice of law and the external perspective that researchers adopt in studying the law from a behavioral point of view.[78] As H.L.A. Hart famously pointed out in his jurisprudential critique of Legal Realism, the "external point of view" captured by the legal realist

71. *See generally* Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960).

72. *Id.* at 75–91. Llewellyn is well-known for pointing out the opposing canons of statutory construction that create leeway for judicial interpretation of statutes. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1949–1950).

73. Llewellyn, *supra* note 71, at 19–50. By "reckonability," Llewellyn meant a level of predictable regularity that fell short of "certainty in the law" but was "equivalent to that of a good business risk." *Id.* at 17–18.

74. *Id.* at 121–32.

75. Law and the Modern Mind, *supra* note 48, at xxii. For a discussion of legal realist "trend analysis" of appellate cases in the "scientific wing" of Legal Realism, see S.N. Verdun-Jones, *Cook, Oliphant and Yntema: The Scientific Wing of American Legal Realism (Part II)*, 5 Dalhousie L.J. 249, 261–71 (1979) [hereinafter Verdun-Jones, *Part II*].

76. *See* Law and the Modern Mind, *supra* note 48, at xxiii–xxiv.

77. Jerome Frank, *"Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U. L. Rev. 545, 548 (1951) (critiquing the work of Felix Cohen). *See also* Jerome Frank, *Modern and Ancient Legal Pragmatism—John Dewy & Co. vs. Aristotle,* 25 Notre Dame L. 207 (1950) (critiquing the work of Walter Wheeler Cook on these grounds).

78. For a recent exploration of this tension see Tracey E. George et al., *The New Old Legal Realism*, 105 Nw. U.L. Rev. (forthcoming 2011), *available at* http://ssrn.com/abstract=1647179.

predictive theory of law disregarded the "observable fact of social life" that persons in society accept and use rules as normative guides to conduct.[79] While the "external point of view" adopted in the behavioral study of judging may help explain the underlying dynamics of judicial decisionmaking, it fails to capture the way that judges and lawyers look at law in making legal arguments and decisions.

The disconnection between the external and scientific perspective needed for behavioral study of law in action and the cultivation of internal perspectives necessary to the practice of law is illustrated by the troubled fit of the "scientific wing" of the Legal Realist movement within the legal academy.[80] The Scientific Realists—a group that included Walter Wheeler Cook, Herman Oliphant, Hessell Yntema, William O. Douglas, Leon Marshall, and Underhill Moore—were outsiders to the practice of law.[81] Although many in this "scientific wing" of legal realist thought broke successfully from the dominance of appellate cases to examine the workings of legal systems on the ground, they explicitly eschewed goals associated with either law reform or the practical training of lawyers.[82]

According to those in the scientific wing of the Legal Realist movement, serious attention to the behavioral study of law required institutional separation from professional training. Accordingly, when Herman Oliphant spearheaded a movement at Columbia Law School for curricular reform, he proposed that the school abandon its professional training functions and become a "community of scholars" engaging in the scientific study of law.[83] This proposal divided the faculty between professors who believed "that the school should have as its principal objective scientific research into law as an aspect of social organization" and those who favored the view that "professional training should continue to be the school's principal function, albeit by means of a radically different approach."[84] When Oliphant was passed over as dean of Columbia in 1927, a number of faculty members in the scientific wing of Legal Realism resigned in protest.[85] Several of the disaffected Columbia realists joined Walter Wheeler Cook, who had left Columbia in 1922 to found the Johns Hopkins Institute of Law, a research institute devoted to the empirical study of law.[86] The Johns Hopkins Institute was eventually forced to close before its first series of projects

79. H.L.A. Hart, The Concept of Law 138 (Peter Cane et al., eds., 2d ed. 1997).

80. *See generally* S.N. Verdun-Jones, *Cook, Oliphant and Yntema: The Scientific Wing of American Legal Realism*, 5 Dalhousie L.J. 3 (1979) [hereinafter Verdun-Jones, *Part I*]; S. N. Verdun-Jones, *Part II*., *supra* note 75. *See also* Twining, *supra* note 63, at 54–55.

81. Twining, *supra* note 63, at 54–55; Verdun-Jones, *Part I*, *supra* note 80, at 3–4.

82. Twining, *supra* note 63, at 60–67.

83. *Id*. at 51; Kalman, *supra* note 46, at 73–74.

84. Twining, *supra* note 63, at 51. Twining called these factions the "scientists" and the "prudents." *Id*. at 54.

85. *Id*. at 52–53; Kalman, *supra* note 46, at 74.

86. Kalman, *supra* note 46, at 32–34; Verdun-Jones, *Part I*, *supra* note 80, at 4.

was complete, having run out of funds in the aftermath of the Great Crash and Depression.[87]

The work of these scholars, along with the empirical studies of William O. Douglas and Underhill Moore at Yale, created a heyday of legal realist empiricism, which produced a number of large-scale empirical studies of judicial administration.[88] Yet these realist empirical studies were criticized on the ground that they produced knowledge without practical application.[89] Although the Johns Hopkins Institute was designed around a vision of studying "the complex relationship between law and the social process," the work of the institute became bogged down in the "mindless amassing of statistics without reference to any guiding theory."[90] As one critic put it, "Because the initial research was an attempt to study facts about the complicated and far-flung judicial machinery of three states, little or no attention was paid to the problem of determining the usefulness of individual legal devices in solving specific social problems."[91] As a result, "[i]t might be said that the scientific work of the Institute reached approximately the same stage as botany would, had its efforts been devoted solely to counting leaves on trees."[92]

C. Legal Realism and Curricular Reform

The barriers to integrating the behavioral study of law into legal scholarship also affected the reforms Legal Realists pursued or proposed to legal education, which either stayed comfortably within the confines of classroom teaching of appellate cases or fell prey to the criticism that they lacked relevance in preparing law students for the practice of law. The 1920s and 1930s saw a "realist revolution in casebooks," as Legal Realists published casebooks that reorganized law school courses around factual trends or problem situations rather than according to doctrinal categories based on legal principles.[93] During the 1920s, Legal Realists at Columbia Law School engaged in an extensive study of the reclassification of their curriculum according to functional rather than doctrinal categories.[94] The purpose of these

87. Twining, *supra* note 63, at 62.

88. *Id.* at 60–67.

89. *Id.* at 62, 64. *See also* Karl Llewellyn, *On What Makes Legal Research Worth While*, 8 J. Legal Educ. 399, 401 (1956) ("The Hopkins ebullition and its partial counterparts at Yale had a single notable effect. For twenty-five years, they pretty thoroughly choked off foundation interest in such research in law as quested beyond doctrine.").

90. Verdun-Jones, *Part I*, *supra* note 80, at 42–43.

91. Frederick K. Beutel, Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science 112 (1957). *See also* Verdun-Jones, *Part I, supra* note 80, at 42 (describing Beutel as "[o]ne of the more sympathetic critics").

92. Beutel, *supra* note 91, at 112.

93. Kalman, *supra* note 46, at 78–97.

94. *Id.* at 67–78; Twining, *supra* note 63, at 41–55.

reforms was to "bring about a closer integration between law and the social sciences"[95] by classifying law according to the social purposes that law served.[96] The proposed reorganization at Columbia divided the law school curriculum into four major categories: business relations, familial relations, communal-political relations and law administration.[97] To fit within the new system of classification, new courses were created that cut across doctrinal categories, such as a course on industrial relations that "overlapped with constitutional law, contract, torts, agency and equity."[98]

A similar fluorescence occurred at Yale Law School in the late-1940s, when faculty members published a number of casebooks that incorporated social science and social policy.[99] Professors Lasswell and MacDougall proposed a wholesale revision of the law school curriculum designed around the role of lawyers as policymakers, a movement in "policy science" that built on but moved beyond the realist insights about the limits of doctrinal study of law.[100] And, in the late-1940s, the Yale curriculum "witnessed an explosion of electives" that combined the study of social science, public policy, and law.[101]

The waves of curricular revision and casebook production at Columbia and Yale were in many respects the most successful legacy of the legal realist educational reforms. Although the reforms did not succeed in large-scale reformation of the law school curriculum, they made inroads that affect legal education today. Courses organized around functional rather than doctrinal categories—landlord-tenant law; family law; debtor-creditor law—have become staples in the law school curriculum. And, most law school textbooks now include both cases and other materials that add explicit discussion of public policy concerns relating to law.[102]

However, a larger-scale merging of the social scientific study of law into the law school curriculum was neither easy nor uncontroversial. Yale's specialized law and social policy courses did not draw deep student interest, and a summer session proposed in January 1948 "for advanced study in law and allied social sciences"—which aimed to attract a mix of lawyers, law student, and interdisciplinary researchers—had to be canceled for lack of enrollment.[103] In April 1948, spurred on by backlash against the political activism of Yale faculty, the Yale Corporation voted "to instruct the President to cause a thorough study to be made of educational policy

95. Twining, *supra* note 63, at 45.

96. *Id.* at 49–50.

97. *Id.* at 48.

98. *Id.* at 46.

99. Kalman, *supra* note 46, at 150–53.

100. Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 Yale L.J. 1345, 1349 (1947). *See also* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203 (1943).

101. Kalman, *supra* note 46, at 153–54.

102. Singer, *supra* note 64, at 473–75.

103. Kalman, *supra* note 46, at 154.

and programming at the Law School."[104] A memorandum authored by Yale College graduate John Dempsey (a lawyer trained at Harvard), charged that Yale Law School was "a school of government, economics, philosophy, and law in which the emphasis is not placed on law;" and that students could earn a law degree without taking many of the basic courses needed for law practice.[105] Ironically, the lack of student interest was raised by the law school in defense of its curriculum: its internal study of law student enrollment demonstrated that the vast majority of students passed over the "fringe" law and social policy courses in favor of more traditional bar courses "considered essential for Wall Street practice."[106]

Going in a different direction, Karl Llewellyn urged a reorganization of the law school curriculum around the acquisition of craft skills, both in his own writings[107] and in the 1944 report of the Association of American Law Schools's (AALS) Committee on Curriculum that he chaired (the "Llewellyn Report").[108] Although Llewellyn's reform agenda failed to catch on in its day, his conceptualization of the case method of instruction as merely one form of skills training foreshadowed current calls for curricular reform in legal education.[109] Llewellyn argued that the appellate case method was an inefficient way of learning substantive law and should be viewed primarily as a method for honing the analytical skills necessary for lawyering.[110] After the first year of law school, Llewellyn argued, most students had mastered the skill of case analysis, and classroom instruction should turn to teaching students how to apply the law to other lawyering tasks such as drafting and client counseling.[111] The Llewellyn Report similarly proposed that the law school curriculum beyond the first year be organized around teaching other basic skills of the lawyer's craft, including statutory construction, appellate advocacy, drafting and client counseling.[112]

Though conceptually innovative, Llewellyn's proposals stayed comfortably within the basic structure of classroom study. Despite its radical reorientation of the curriculum around skills, the Llewellyn Report was self-consciously conservative in

104. *Id.* at 159. The concern was no doubt motivated by the political activism of the Yale Law School faculty, twenty-two out of twenty-seven of whom had signed a letter in 1947 calling for the abolition of Joseph McCarthy's House Committee on Un-American Affairs. *Id.* at 158–60.

105. *Id.* at 161.

106. *Id.*

107. *See generally* Karl Llewellyn, *The Current Crisis in Legal Education*, 1 J. Legal Educ. 211 (1948) [hereinafter Llewellyn, *Crisis in Legal Education*]; Karl Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 Colum. L Rev. 651 (1935) [hereinafter Llewellyn, *What is Wrong*].

108. Comm. on Curriculum, Ass'n of Am. Law Sch., *The Place of Skills in Legal Education*, 45 Colum. L. Rev. 345 (1945) [hereinafter *Llewellyn Report*].

109. *See generally* Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577 (1987); Carnegie Report, *supra* note 2; MacCrate Report, *supra* note 2.

110. Llewellyn, *Crisis in Legal Education*, *supra* note 107, at 216.

111. *Id.* at 216–18.

112. *Llewellyn Report*, *supra* note 108, at 369–77.

the pedagogical methods it proposed,[113] explicitly eschewing any changes that would challenge the traditional values of legal education or require additional resources.[114] Even outside the context of his AALS committee work, where Llewellyn was able to voice his own views about legal education more freely, he dismissed law students' engagement in real-world practice as a supplementary activity, primarily beneficial "in the livening up, the making real, of theoretical work by practical complement."[115] Llewellyn explicitly rejected Frank's proposals for clinical education, characterizing them as insufficiently theoretical.[116]

Frank's views on legal education were received with similar skepticism by his colleagues at Yale. Some dismissed the idea of a clinical lawyer-school as unaffordable,[117] and others perceived Frank's pleas for practical training as playing into the hands of the conservative and anti-intellectual backlash by Yale alumni against the progressive political activities of faculty members.[118] In the end, Frank wearily acknowledged the challenges of swimming against the tide of legal academic culture, recognizing that "[s]o long as teachers who know little or nothing except what they learned from books under the case-system control a law school, the actualities of the lawyer's life are there likely to be considered peripheral and as of secondary importance."[119]

Although Frank's comment could easily be repeated today,[120] clinical legal education has taken tremendous strides since Frank penned those words in 1947. An infusion of money in the 1950s and 1960s helped establish clinics as a significant presence within legal education.[121] A series of amendments to the American Bar Association's standards for the accreditation of law schools helped to solidify the

113. *Id.* at 348.

114. *Id.* at 347. For example, in choosing which craft skills to teach in law school, the Committee suggested looking "for lines of craftsman's skill which are, first, identifiable, communicable; second, within the knowledge and teaching power of law professors in general; third, capable of instruction in classes run with case-books or supplemented case-books; fourth, capable of such instruction without material disruption of the current law curricula." *Id.* at 369.

115. Llewellyn, *What is Wrong, supra* note 107, at 675. He supported the idea of law schools working with law firms to create "interstitial apprenticeship[s]," and encouraged afternoons off so that students could attend various courts with an instructor to observe and critically reflect on what they had seen. *Id.*

116. *Id.*

117. Kalman, *supra* note 46, at 175.

118. *Id.* at 172–73.

119. Frank, *A Plea*, *supra* note 1, at 1314.

120. Indeed, the recent Carnegie Report includes an observation similar to Frank's, that lawyering skills courses at most law schools are elective courses taught by faculty with lower academic status, and that "[i]n many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance." Carnegie Report, *supra* note 2, at 87–88.

121. *See* Wallace J. Mlyniec, *The Intersection of Three Visions—Ken Pyle, Bill Pincus and Bill Greenhalgh—and the Development of Clinical Teaching Fellowships*, 64 Tenn. L. Rev. 963, 964–67 (1997).

status of clinicians within the legal academy.[122] An increasingly professionalized corps of clinicians has developed a more sophisticated pedagogy of clinical instruction that integrates theory and practice and helps students generalize from their clinic casework to larger issues of law, lawyering, and social justice.[123] And this pedagogy has been articulated, debated, and honed in a body of literature about clinic teaching, clinic design, and lawyering, which has come to be known as "clinical scholarship."[124]

With an increasing number of clinical faculty members in tenure-track positions under the same or substantially similar expectations for scholarship as their non-clinical colleagues, clinician-scholars have increasingly turned their attention to other forms of scholarship.[125] The next section looks to the potential of this new generation of clinician-scholars to connect with the new generation of scholars claiming the heritage of the Legal Realism movement.

IV. BACK TO THE FUTURE: NEW LEGAL REALISM AND CLINICAL SCHOLARSHIP

Legal Realism has a paradoxical legacy in American legal thought. On the one hand, it is credited as one of the most influential movements in American legal history, whose insights about judicial decisionmaking have so pervaded contemporary legal thought that they seem too obvious to mention. [126] As it is commonly put, "[w]e are all realists now."[127] On the other hand, Legal Realism is seen as a failed movement that "simply ran itself into the sand."[128] Among legal philosophers, Legal Realism is described as a "jurisprudential joke," not taken seriously since H.L.A. Hart refuted realist rule-skepticism as an "incoherent" and "obviously false" description of law in

122. *See* Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 Tenn. L. Rev. 183 (2008).

123. *See generally* Spiegel, *supra* note 109 (propositioning that the terms "theory" and "practice" may not be mutually exclusive within legal education).

124. Stephen Ellmann et al., *Why Not a Clinical Lawyer-Journal?*, 1 Clinical L. Rev. 1, 4 (1994) (launching the *Clinical Law Review* and articulating its editorial commitment to "publishing pieces that represent the many voices within the clinical legal education community"). This article announced the formation of the *Clinical Law Review*, a "peer-reviewed journal devoted to issues of lawyering theory and clinical legal education." *Id.* (citing journal masthead).

125. *See, e.g.*, Ass'n of Am. Law Sch. Section on Clinical Legal Educ's Task Force on the Status of Clinicians & the Legal Acad., Report and Recommendations on the Status of Clinical Faculty in the Legal Academy 12–14 (Mar. 29, 2010), http://ssrn.com/abstract=1628117.

126. *See, e.g.* Leiter, *supra* note 62, at 267; Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 Ohio St. L.J. 599, 633–34 (1989); Singer, *supra* note 64, at 467. *But see,* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 Tex. L. Rev. 731 (2009) (disputing the historical accuracy of the commonly-told story about the legal realist influence and viewing Legal Realism as merely a reflection of wider trends in thinking about the law).

127. Neil Duxbury, *The Reinvention of American Legal Realism*, 12 Legal Stud. 137, 137–38 (1992).

128. John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Yale Experience*, 28 Buff. L. Rev. 459, 459 (1979).

his 1961 classic *The Concept of Law*.[129] Moreover, in the post-World War II atmosphere of rising totalitarianism, the legal realist divorce of law from morality was criticized as promoting authoritarian and anti-democratic values.[130]

Despite its paradoxical legacy—or perhaps because of it—Legal Realism has continued to captivate legal scholars. In the 1970s and 1980s, the Critical Legal Studies movement (CLS) claimed the legacy of Legal Realism, drawing connections between the legal realist "debunking" of legal doctrinal rules and CLS claims that law is radically indeterminate.[131] Law and economics scholarship[132] can also claim intellectual roots in the legal realist idea that law is (or should be) directed according to social scientific norms of rational behavior rather than frozen in patterns of doctrinal logic.[133] More recently, legal theorist Brian Leiter and others are re-situating legal realist thought within a pragmatist and natural law jurisprudential tradition.[134] And, within the past decade, a host of diverse legal scholars interested in empirical study of the law and legal institutions have been invoking the title of "New Legal Realism" to describe their work, attesting to the vitality of the urge to move beyond formalistic accounts of law and legal institutions and to test assumptions deeply embedded in legal scholarship with empirical evidence of human behavior in legal systems.[135]

A. The Rise of "New Legal Realist" Scholarship

Scholars who explicitly lay claim to a legal realist legacy are engaged in a variety of endeavors with arguably little in common, and, surprisingly, "have generally failed to even acknowledge each other's existence."[136] The fields of study under the New Legal Realist banner include behavioral economics,[137] studies of the influence of personal factors such as judges' race, gender and political attitudes on judicial decisionmaking;[138] and action research that integrates the fields of law and social

129. Leiter, *supra* note 62, at 270. *See also* Mark Steven Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915, 1917 (2005); Hart, *supra* note 79, at 136–47.

130. *See* Duxbury, *supra* note 127, at 144.

131. White, *supra* note 65, at 820–22. *See also* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 Harv. L. Rev. 1669 (1982).

132. *See generally* Minda, *supra* note 126, at 604–22 (discussing the connections between law and economics and Legal Realism).

133. *Id.* at 633–636.

134. *See* Lieter, *supra* note 62. *See also* Wouter de Been, Legal Realism Regained: Saving Realism from Critical Acclaim (2008).

135. Nourse & Shaffer, *supra* note 11, at 64 (noting that over 300 articles in the past eight years had invoked the phrase "New Legal Realism").

136. *Id.* at 76.

137. *See* Daniel Farber, *Toward a New Legal Realism*, 68 U. Chi. L. Rev. 279 (2001).

138. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw. U. L. Rev. 251 (1997); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. Chi. L. Rev. 831 (2008).

science through pragmatic study of real-world problems.[139] Whether the various branches and offshoots of New Legal Realism that are currently springing to life in the legal academy can successfully integrate the study of law in action into legal education depends on whether they can overcome the barriers that impeded the original Legal Realists from creating space within the legal academy.

Some of the self-proclaimed heirs to the American legal realist tradition today are situated squarely within the behavioral study of appellate courts, employing social scientific methods that far exceed the early legal realist analysis of patterns in the outcomes of appellate cases.[140] Today's studies use large databases of appellate opinions to examine the influence of a variety of measurable and testable aspects of judicial personality on the outcomes of their opinions; they also study institutional influences, such as whether sitting on appellate panels with judges of similar or different gender, race, or political affiliation has a tendency to amplify or dampen the effects of judicial personality.[141] Such studies deliver more complex and fine-grained findings than Llewellyn's general typology of the precedential leeways and institutional constraints on appellate court decisionmaking.[142] Yet the focus of these studies on appellate judging limits the ability to generalize from these studies about the interplay of law and other personal or institutional factors in controversial appellate cases to the vast majority of run-of-the-mill cases that create the law in action.[143] Even for lawyers representing clients in appeals, the behavioral insights about the impact of personal factors on appellate judging bear only little on the task of arguing before an appellate panel, which requires the tools of legal analysis and reasoning.

Other heirs to the legal realist tradition—especially those who come to it through the portal of socio-legal study in the Law and Society movement—have broken out of the appellate case mold quite decisively to study the law in action.[144] Some of these studies focus on identifying gaps between law in books and law in action, documenting the differences between the ideals expressed in law and the actual practices of judges

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139. Erlanger et al., *supra* note 15, at 336 ("Our goal is to create translations of social science that will be useful even to legal academics and lawyers who do not wish to perform empirical research themselves, while also encouraging translations of legal issues that will help social scientists gain a more sophisticated understanding of how law is understood 'from the inside' by those with legal training."); Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 Law & Soc. Inquiry 237, 237 (1998) (calling new legal realism "a synthesis that would draw together empirical work on law and the legal profession, legal and policy scholarship, and the insights of those 'in the trenches'").

140. *See, e.g.*, Miles & Sunstein, *supra* note 138, at 834.

141. *See id.* at 835–36.

142. *See id.* at 839–41.

143. *Id.* at 841 (noting this limitation, but noting that "to the extent that an objective of the New Legal Realism is to understand the impact of judicial personality on law, rather than quotidian decisions lacking precedential value, published cases are relevant subjects of analysis").

144. Nourse & Shaffer, *supra* note 11, at 79–80. *See generally* Symposium *Is It Time for a New Legal Realism?*, 2005 Wis. L. Rev. 335 (2005). For a history of the development of the Law and Society Movement, see Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 Law & Soc'y Rev. 409, 434–40 (1998); White, *supra* note 65, at 832–33.

and other legal officials in implementing the law.[145] Others go beyond conventional "gap studies" to investigate a broader field of "norms, sanction systems and institutions" that sociologist Eugen Ehrlich called "living law."[146] This second kind of inquiry looks not only at law in lower courts but at societal practices that interact with law and influence the behavior of people who form agreements and resolve disputes in the "shadow of the law."[147] Studies of the law in action undermine the accuracy of what Stewart Macaulay calls the "standard map" of legal scholarship, in which appellate opinions at the top of the pyramid of dispute resolution are accepted uncritically as the most important material for legal analysis despite the infrequency with which disputes actually reach the appellate level.[148]

However, these law-in-action studies have faced challenges in bridging the social scientific study of law and legal scholarship.[149] The empirical study of law within the context of social institutions often reveals the marginal or indirect influence that law has on social behavior.[150] And, the drive for accuracy in social scientific research uncovers complexity that fails to provide the quick and easy functional conclusions

145. *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be,"* 2005 Wis. L. Rev. 365, 386 (2005); Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 Law & Soc'y Rev 769, 771 (1995).

146. Stewart Macaulay, *Contracts, New Legal Realism and Improving the Navigation of the Yellow Submarine*, 80 Tul. L. Rev. 1161, 1169 (2006); Macaulay, *supra* note 145, at 386; Eugen Ehrlich, Fundamental Principles of the Sociology of Law (Walter L. Moll trans., Transaction Publishers, 4th ed. 2009) (1936). Macaulay credits David Nelkin for clarifying the distinction between "law in action" and "living law" research. David Nelkin, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 Legal Stud. 157 (1984).

147. Macaulay, *supra* note 146, at 1169–70.

148. *Id.* at 1162–63.

149. For one analysis of the failure of the Law and Society movement to capture attention within the legal academy, see Lawrence M. Friedman, *The Law and Society Movement*, 38 Stan. L. Rev. 763 (1986).

150. *See* Macaulay, *supra* note 145, at 383. Macaulay lists seven lessons learned from law and society research, first presented in 1984 in the Mitchell Lecture at SUNY-Buffalo:

1. Law is not free.
2. Law is delivered by actors with limited resources and interests of their own in settings where they have discretion.
3. Many of the functions usually thought of as legal are performed by alternative institutions, and there is a great deal of interpenetration between what we call public and private sectors.
4. People, acting alone and in groups, cope with law and cannot be expected to comply passively.
5. Lawyers play many roles other than adversary in a courtroom.
6. Our society deals with conflict in many ways, but avoidance and evasion are important ones.
7. While law matters in American society, its influence tends to be indirect, subtle and ambiguous.

Id. at 383–84.

demanded in the typical mode of legal scholarship.[151] Moreover, it has not always been clear how to interpret the gaps that the behavioral study of law reveals between the law in books and the law in action. The "old" Legal Realists generally took the view that the law in the books was an outmoded impediment to social progress, suggesting that the study of the law in action would reveal the workings of informal social norms more responsive to the fluctuations of a rapidly changing society.[152] The gap studies generated in the later Law and Society movement generally take a more pessimistic view that the intended purposes of the law in the books were distorted in implementation by controlling elites.[153]

The premises of the Law and Society movement were questioned in turn by critical theorists, who viewed law as a form of ideology designed to legitimate existing power and who questioned the claims to neutrality and objectivity inherent in the behavioral study of law.[154] The pessimism of this critical perspective on law was seen by many as deeply disabling to the project of using law as a method of social justice reform, which animated much of the social science research about the law.[155]

Against this backdrop, a brand of law in action New Legal Realism has emerged, claiming the title for research that seeks to integrate the critical theoretical insight that social science research is always situated without the resultant "skepticism about the possibility of neutral or objective scholarship."[156] The New Legal Realism remains committed to the basic premise that a full study of the law must occur from the "bottom up," defined as a focus on "the impact of law on ordinary people's lives" as well as a sensitivity to the fact that "less powerful persons in society are often more invisible and silenced."[157] To capture the full reality of the impact of law in society, New Legal Realists call on scholars to supplement quantitative methods with qualitative research, using established methods of ethnographic or "participant observer" research.[158] Seeking to avoid the pitfalls of empirical legal scholarship in

151. Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 Wis. L. Rev. 479, 489 (2005) (remarks of Elizabeth Mertz).

152. White, *supra* note 65, at 823–24.

153. *Id.* at 831–32.

154. *Id.* at 833–34; Kessler, *supra* note 145, at 772. *See generally* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575 (1984).

155. *See* Joel F. Handler, *Postmodernism, Protest and the New Social Movements*, 26 Law & Soc'y Rev. 697 (1992). Handler's paper was delivered as the Presidential Address at the Law and Society conference in 1992, and sparked an internal debate within the Law and Society movement about the value of postmodern and critical theory. *See* Howard S. Erlanger, *Organizations, Institutions and the Story of Shmuel: Reflections on the 40th Anniversary of the Law and Society Association*, 39 Law & Soc'y Rev. 1, 7 (2005).

156. Erlanger et al., *supra* note 15, at 342. *See also* Handler et al., *supra* note 151, at 483. However, both Erlanger and Mertz note in this observation that exactly how deeply the New Legal Realism takes the critical insight about the "politics of knowledge" is a matter of open debate and likely ongoing controversy.

157. Erlanger et al., *supra* note 15, at 339–41.

158. *Id.* at 340; Nourse & Shaffer, *supra* note 11, at 79; Handler et al., *supra* note 151, at 485.

the past, which "has divided between the unregenerate pessimists . . . (the gap studies) and the unregenerate optimists who believe that law always succeeds (the efficiency studies),"[159] the New Legal Realism proposes a principle of "legal optimism" that would "critically examine the law's failures . . . but not neglect examination of spaces for positive social change in and around the law."[160]

The New Legal Realists' proposed "path between idealism and skepticism" is paved by pragmatist methods of engaged, embedded or experimental research with its genesis in real-world problem-solving.[161] According to Victoria Nourse and Greg Shaffer, pragmatism contributes to the New Legal Realism "insight that theory must come from the world; that only theory that works has established its truth; and that there is no way to divorce theory from fact."[162] Hence, they argue, pragmatism supports "action research," in which "scholars study a real problem in the world" and investigate it by "learning from those who must deal with the problem."[163] It is through "leaving one's office and venturing into the field" to engage in the world, rather than merely studying it, that new legal realist scholars hope to draw on social science research and methods to make new and transformative discoveries about law and legal institutions.[164]

B. Clinician-Scholars in the New Legal Realist World

The tenets of the New Legal Realism—the commitment to studying law from the "bottom up" perspective of those who lack power in society, the critical questioning of neutral and objective standpoints, and the call for engagement in the world as a platform for legal research—fit closely with the goals and methods of clinical legal education.[165] As a result, there is much that the new legal realist scholars and clinicians can offer to one another with the potential to enhance and deepen both the new legal realist conception of law in action scholarship and a pedagogically rich conception of clinical legal education.

First, clinical pedagogy is ideally suited to overcome the seemingly intractable problem of how to integrate social science insights into law teaching. It can be challenging to introduce the insights of behavioral study of the law into classroom teaching that emphasizes appellate legal doctrine and is several steps removed from law's implementation. In clinics, students are immersed in the heart of the law in action, representing clients in lower-level courts, administrative agencies and other venues for dispute resolution. Students daily encounter the gaps between what the law says, what it aspires to be, and what legal officials actually do, and are therefore

159. Erlanger et al., *supra* note 15, at 358.

160. *Id.* at 345.

161. *Id.*; *see* Nourse & Shaffer, *supra* note 11, at 84–85.

162. Nourse & Shaffer, *supra* note 11, at 84.

163. *Id.* at 85. *See also* Handler et al., *supra* note 151, at 485–86.

164. Nourse & Shaffer, *supra* note 11, at 85.

165. *See generally* Trubek, *supra* note 18.

poised to engage questions about the role of law in society. Clinical teaching also provides ready-made tools for reflective analysis on students' observations. Clinical pedagogy relies heavily on carefully structured individual supervision meetings, in which the professor takes the student through largely non-directive Socratic questioning on issues involving the exercise of professional judgment to help the student learn the process of making professional decisions in the face of uncertainty.[166] Case round sessions—recently described as a "signature pedagogy" for clinical teaching—are similarly designed to draw out and generalize from the experiences that students are having in individual cases for group discussion, helping clinic students draw deeper lessons about law and lawyering.[167]

Deeper engagement in the behavioral study of the law and legal systems from the "bottom up" also holds out the promise of sharpening and enhancing clinical teaching. As Jane Aiken has written, one of the biggest challenges in clinical education is figuring out how to structure clinic experiences that will do it all: help students understand what it means to be a lawyer, help them advance and acquire lawyering skills, expose them to the dynamics of social and economic injustice, and "instill in them an abiding desire to use their legal skills to remedy these injustices."[168] One of the criticisms of clinical legal education is that the individual client representation model focuses too narrowly on the interpersonal skills and values of the lawyer-client relationship to the exclusion of broader systemic social justice issues.[169] The study of the law in action is often focused on analyzing the dynamics of legal systems. To the extent that clinical professors familiarize themselves with studies produced by new legal realist scholars, it can help them focus questions, introduce readings, and structure analysis that will assist students in making the connections between individual advocacy and systemic or social justice reform, even if the clinic itself remains focused on individual client representation or combines individual representation with broader systemic advocacy.[170]

Clinicians also have a valuable perspective to bring to new legal realist scholarship. Because clinicians teach students "in role" as lawyers, they have a natural standpoint from which to bridge the "relevance gap" between the insights of social science *about law* and the practice *of law*. Law school clinics offer probes into the world of lower-level court systems, which can be used to generate hypotheses about the impact of law in society that can be studied through a combination of quantitative and

166. *See generally* Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109 (1994).

167. Susan Bryant & Elliott Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 Clinical L. Rev. 195, 196 (2007).

168. Jane H. Aiken, *Provocateurs for Justice*, 7 Clinical L. Rev. 287, 287–89 (2001).

169. *See* Ashar, *supra* note 9, at 357–58 (2008).

170. *See, e.g.,* Brodie, *supra* note 9; Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 Clinical L. Rev. 451, 451–52, 473–74 (2010).

qualitative methods.[171] Moreover, clinics typically take a self-consciously client-centered approach to legal representation, which seeks to understand the clients' legal issues from the clients' perspectives and within the larger context of the clients' non-legal concerns.[172] As a consequence, clinicians regularly engage the elusive "bottom-up" perspective of those with less power in society that the new legal realist scholars hope to capture in their redefined "law and society" research.

However, there are also challenges endemic to the choice of clinical law professors to engage with the New Legal Realist law-in-action project. Engagement with social science requires methodological rigor and expertise that few clinicians possess from their prior training and experience. Learning social science methodologies, or collaborating with those who know how to use them, can help clinicians sharpen and deepen their scholarly insights beyond case-based anecdotes. However, empirical research—like clinical teaching—is notoriously time-consuming. While there are natural synergies between studying the law in action and teaching law in clinical settings, the economies of doing both can be daunting. Clinicians at schools without an historic commitment to empirical research may be reluctant to test the waters of institutional acceptance with scholarship that is viewed as marginal or controversial.[173] As Bryant Garth has pointed out, scholars who conduct research that is outside the political mainstream "will be scrutinized more carefully, and if not methodologically beyond reproach, may be dismissed as merely 'political.'"[174] Institutional barriers based on prestige and status may also prevent clinicians from collaborating with academic law faculty holding advanced social science degrees. It is notable that a law school's academic commitment to studying the law in action does not necessarily come hand-in-hand with valuing clinicians as full members of the academic community;[175] at least one historic Law and Society stronghold—Northwestern University—has been openly and actively hostile to including clinicians in its long-term full-time faculty.[176]

171. *See* Nourse & Shaffer, *supra* note 11, at 85.

172. *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 Clinical L. Rev. 369, 419–26 (2006).

173. Much of law and society research is marginalized within legal academia precisely because it does not contribute to doctrinal argumentation in appellate cases. *See* Bryant G. Garth, *Strategic Research in Law and Society*, 18 Fla. St. U. L. Rev. 57, 58–59 ("For example, studies of the social role of small urban courts do not arm lawyers with marketable 'arguments.'").

174. *Id.* at 58.

175. The schools historically associated with the Law and Society movement are Northwestern University, the University of Wisconsin, the University of California at Berkeley, and the University of Denver. Garth & Sterling, *supra* note 144, at 412–13.

176. *See* Joy & Kuehn, *supra* note 122, at 224–27 (detailing Northwestern University's public resistance to ABA accreditation standards that require security of position for clinical faculty).

V. CONCLUSION

When Jerome Frank put out his call for clinical lawyer-schools, it fell mostly on deaf ears. This was partly due to Frank's own marginalization both within the legal academy and on the fringes of the American Legal Realist movement. But the proposal also failed because it offered no program for bridging the gaps between the academic study of law and the realities of professional training for trial-level law practice. In this article I have identified two such gaps: the tendency of the academic study of law to become ensconced in the study of appellate cases, and the "relevance gap" between the external point of view taken in the social scientific study of law and the internal point of view required of law practice.

Both clinical legal educators and new legal realist scholars seek—in their separate ways—to blur the boundaries that separate each from the dominant focus on appellate doctrine in legal education.[177] Yet to succeed where Jerome Frank failed, they also need to cross the institutional and psychological boundaries that separate them from one another. New legal realist scholars need to value their lesser-status clinical colleagues as potential collaborative partners rather than "professional skills trainers" outside the academic sphere of their law schools, and to understand the potential of clinics as sites for making visible the issues and questions that marginalized persons encounter when facing legal systems. Clinicians need to value the systemic and behavioral study of law and legal institutions by faculty members with advanced degrees in social science who may never have practiced law and envision ways that such knowledge can be incorporated into the social justice education of their students. Through such collaboration, mutual exploration and experimentation, the "relevance gap" between the behavioral study of law and the practical education of lawyers has the potential to be bridged.

177. Trubek, *supra* note 18, at 474.