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American Legal Realism: Research Programme and Policy Impact

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'Legal realism, whatever exactly it is, now has sufficient prestige in many circles that scholars compete to claim the mantle of the "Realist program", whatever exactly it is.'
Brian Leiter[1]

1. Introduction and questions

Legal Realism (LR) was a North American movement[2] active in the first part of the 20th century. It was related to the Progressive movement.[3] Some 20 years ago New Legal Realism arrived on the shores of legal scholarship and social science research. Stephenson described Legal Realism as a 'jurisprudential movement of lawyers, judges, and law professors'.[4] Prominent legal realists were Karl Llewellyn, Jerome Frank, Underhill Moore, Felix Cohen, Leon Green, Herman Oliphant, Walter Wheeler Cook, Max Radin, Hessel Yntema and Thurman Arnold.[5]

Legal Realism opposed Legal Formalism[6] where 'legal rules and logical reasoning are central to judicial decision-making. In more extreme versions of legal formalism, legal rules are the Alpha and Omega – the beginning and the ending of judicial decision-making'.[7] Legal Realism was in favour of Rule Skepticism, seen as a

> distrust of traditional legal rules and concepts as effective guidance for deciding cases. Realists considered an attack on the rigidity of legal rules to be a critical step toward better legal decision-making and a more accurate understanding of what courts were actually doing when they decided cases.[8]

Another LR characteristic was the interest paid to the social sciences, which were believed to help LR in their 'search for reality'. Curtis refers to

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1 B. Leiter, 'Legal Realisms, Old and New', (2013) 47 *Valparaiso Law Review*, p. 949.

2 There has also been a less well-known Scandinavian Legal Realism. See Leiter, supra note 1 and M. Martin, *Legal Realism: American and Scandinavian* (1997).

3 M. Horwitz, *The Transformation of American Law, 1870-1960* (1960), p. 169: 'For many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism.'

4 M. Stephenson, 'Legal Realism for economists', (2009) 23 *Journal of Economic Perspectives*, p. 196.

5 Leiter, supra note 1, p. 951.

6 B. Tamanaha, 'Legal Realism in Context', in E. Mertz et al. (eds.), *The New Legal Realism: Translating Law-and-Society for Today's Legal Practice* (2016), Vol. 1, p. 157, is of the opinion that the 'story that LR fought to dispel classical Legal Formalism which was dominant at the time, is largely a myth'.

7 V. Tumonis, 'Legal Realism & Judicial Decision-Making', (2012) 19 *Jurisprudence*, p. 1362.

8 M. Curtis, 'Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence', (2015) 27 *Yale Journal of Law & the Humanities*, adds that '"judicial modesty" can also be seen as belonging to American Legal Realism' (p. 167). However, at the same time this modesty did not prevent LR from playing an important role in assisting President Roosevelt with the implementation of his New Deal. I will discuss that role in Section 3.

> a strong commitment to applying a social scientific approach to the study of law. The idea was that if a functional approach to law required constant reexamination of the fit between law and society, then legal analysis required empirical studies of social behavior to assess the interplay between law and human conduct.[9]

Consequentialism, meaning that legal questions should be addressed 'with a view to the social consequences that would flow from a particular ruling',[10] was also an ingredient of American LR.

And finally, LR's inclination towards policymaking, and in particular Roosevelt's New Deal is a pertinent characteristic. Legal Realism lawyers assisted in designing regulation and functions of agencies that were established during the New Deal period. 'The Legal Realists were influential largely because they advocated statutory reform and distrusted traditional courts and the common law', Hoverman wrote.[11] Shamir referred to the exchange relationship between LR professors and regulators. 'Legal academics offered a scientific rationale for the Administration's policies and contributed their services to the governmental state apparatus, [while] in return law professors reached positions of influence and prestige they had never before.'[12]

Although the reader may believe that American LR can be regarded as a successful movement *all the way*, the opposite is actually the case. Almost 100 years after the birth of (American) LR, there are still disputes about its importance for scholarship, practice and research. Alongside Curtis[13] who called it the most important jurisprudential movement of the 20th century and saw it as 'iconoclastic in its core' and Tamanaha's[14] reference that, we're all realists now', others have strongly criticized LR. It

- was (believed to be) too anecdotal;[15]
- had a one-sided focus on data (without articulating relations between data and theories[16]);
- provided naive analysis ('the personality of the judge' would determine the outcome of cases, but what exactly is a judge's personality?);
- focused too much on trivial topics ('(...) the effect of certain ordinances on the behavior of drivers and parkers'[17]);
- put forward claims without realizing them;[18]
- mixed too easily research, politics and law (i.e. the New Deal);[19] and
- appeared to be more a protest movement than a movement presenting a programme (for legal action).[20]

9 Curtis, supra note 8, p. 167. One can also see a relation between Roscoe Pound's Sociological Jurisprudence and this focus. See J. Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)', (1961–1962) 7 *Villanova Law Review*, pp. 9-10.

10 Curtis, supra note 8, pp. 164 et seq.

11 H. Hoverman, *The Opening of American Law* (2015), p. 118.

12 R. Shamir, *Managing Legal Uncertainty: Elite lawyers and the New Deal* (1995), p. 152.

13 Curtis, supra note 8, p. 157.

14 Tamanaha, supra note 6.

15 J. Schlegel, *American Legal Realism and Empirical Social Science* (1995).

16 Ibid.

17 The parking study was done by W.U. Moore & C.C. Callahan, 'Law and Learning Theory: A Study in Legal Control', (1943) 53 *Yale Law Journal*, no. 1, pp. 1-136. Criticism comes from Posner and Twining. R. Posner, 'The Sociology of the Sociology of Law: A View from economics, (1995) 2 *European Journal of Law and Economics*, pp. 265-284: 'The empirical projects of the legal realists, which not only failed but in failing gave empirical research rather a bad name among legal academics, illustrate the futility of empirical investigation severed from a theoretical framework.' W. Twining, *Karl Llewellyn And The Realist Movement* (1973), pp. 65-66 called the parking study 'a symbol of the ridiculous and expensive pursuit of trivia by the highly talented (…) and a perfectly "empirical" study that had no impact whatsoever on law or legal theory.'

18 E. McWinney ('Methodology and values in American Legal Education: some interactions and reciprocal influences', note, in (1959) *Natural Law Forum*, paper 43) referred to 'many bold calls to action but little concrete action'. Experimental jurisprudence is an example. F. Beutel, 'Some Implications of Experimental Jurisprudence', (1934) 48 *Harvard Law Review*, no. 2, pp. 169-197 and F. Beutel, 'The Relationship of Experimental Jurisprudence to Other Schools of Jurisprudence and to Scientific Method', (1971) *Washington University Law Quarterly*, p. 385. He defined experimental jurisprudence as 'a science of law based on a rigorous application of the scientific method to the study of the phenomena of law-making, the effect of law upon society and the efficiency of laws in accomplishing the purposes for which they came into existence'. I have not found empirical work in this tradition done by Realists. Over the last few decades, experimental evaluations (amongst others of crime and justice policies) are easy to find, but there is no apparent link with 'experimental jurisprudence'.

19 Shamir, supra note 12.

20 McWinney, supra note 18.

All this implies that the jury is still out debating the value of American Legal Realism. To bring some more light to this debate, this paper discusses the following two questions:

1. Can LR be seen as a *scientific research programme* enabling growth of knowledge? To answer that question, I will use Lakatos's[21] work on the methodology of scientific research programmes as a frame of reference.
2. What has been the role of American LR during the first part of the 20th century in helping to develop and implement the New Deal policy vis-à-vis its scientific work?

These questions are not only important from a historical or epistemological perspective, but also because New Legal Realism, which arrived on the shores of legal and social science scholarship the past two decades and seems to be thriving, may learn something from my answers to these questions.[22]

2. Has there been a Legal Realism research programme enabling growth of knowledge?

2.1 Background

Although the concept of a research programme has been somewhat corrupted over the years (sometimes even a list of a few topic titles is considered to be a 'research programme'), in epistemology a research programme is usually seen as a set of research activities around one or several problems, where researchers are exchanging ideas and confronting theories and evidence, while the results of these processes are synthesised in terms of validity (truth claims) and their relevance for practice. Such a programme is characterised by several common characteristics or perspectives and does not address an isolated hypothesis, an isolated empirical finding or (only) a methodological point, approach or procedure.

According to Lakatos's[23] methodology of scientific research programmes (MSRP), scientific research programmes include:

– *a hard core* (= the explanatory centre);
– *a positive heuristic*, which defines problems, outlines the construction of a belt of auxiliary hypotheses and foresees anomalies. This positive heuristic serves to strengthen the research programme by the discovery of novel facts that the hard core can explain; and
– *a negative heuristic* which protects the hard core of the programme by deflecting criticism from it to the auxiliary hypotheses stated to be the subjects of examination or by denying the significance of anomalies, with the proviso that eventually they will be explained.[24]

Research programmes are characterized by types of *problem shifts*. Theory-oriented, progressive problem shifts are moves to new theories that explain more than their predecessors. A problem shift is empirically progressive if, in addition to predicting new evidence, evidence indeed *is* found confirming these predictions. Degenerative problem shifts are moves in the other direction, leading to stagnation. Once the research work results in no new testable predictions, or when (continually) ad hoc adjustments are made to the core to account for observed phenomena that criticize that core (and that may even become immunization strategies), then the research programme starts to degenerate.

Lakatos's methodology has been applied in the political sciences, sociology, organisational studies, economics, theology, empirical legal studies, education and genetics, and evolutionary studies.[25]

21 I. Lakatos, 'The Methodology of Scientific Research Programmes', in I. Lakatos & A. Musgrave (eds.), *Criticism and the Growth of Knowledge* (1970), pp. 91-197.

22 B. Garth & E. Mertz, 'Introduction: New Legal Realism at Ten Years and Beyond', (2016) 6 *UC Irvine Law Review*, pp. 121-134. See also a new series of Cambridge University Press books on New Legal Realism and <http://www.newlegalrealism.org/> (last visited 24 November 2017).

23 Lakatos, supra note 21.

24 G. Peterson, 'The Scientific Status of Theology: Imre Lakatos, Method and Demarcation', (1998) 50 *Perspectives on Science and Christian Faith*, pp. 22-31.

25 See F. Leeuw & H. Schmeets, *Empirical Legal Research: a guidance book for lawyers, legislators and regulators* (2016), Chapter 10, who reconstructed four (mini) Lakatossian research programmes within the realm of empirical legal studies. In this book references to

2.2 In search of a Legal Realism scientific research programme

A first step to look for when trying to reconstruct a research programme is to find out if there are *common ('foundational') categories of thought* in the work of Legal Realists.[26] Martin studied the work of five LR scientists (including Moore, Cook and Frank) from this perspective and found several of these categories.[27] Llewellyn produced in 1925 and 1931 'lists' of characteristics[28] that can also be seen as foundational categories of thought. I have added other literature summarising common categories.

- *A focus on behaviour*

Legal Realism addressed above all 'judicial behavior/behavior of judges';[29] the idea was that human behaviour (faced with 'foibles, frailties, biases and other imperfections') had to be brought on board when studying judges' decisions.

- *Rule scepticism*

Several legal realists consider the importance of legal rules to be a problem without denying the existence of such rules. 'What they questioned was the importance of legal rules to the study of law and legal practice, that is, to the prediction and explanation of legal behavior.'[30]

- *The use of scientific methods*

Martin's quintet of LR scientists and others stressed the importance of the use of scientific methods and insights in the study of law. Moore & Callahan[31] carried out an experimental study on the impact of ordinances on the behaviour of parkers and drivers, while earlier Moore had, along with Hope,[32] reported about the degree of variance between institutional ('usual') behaviour and the behaviour that constitutes the facts of the lawsuit before the court. Llewellyn & Hoebel used anthropological insights to understand the functioning of justice in a (non-state) society.[33]

- *Value judgments*

Legal Realism scholars did not have 'a well-articulated value theory'.[34] Some of them assumed that value judgments 'were always made in a concrete context of previous moral commitments', others, like Oliphant and Llewellyn, had different views and advocated the 'temporary divorce of *is* and *ought* for purposes of study'.[35]

- *Focusing on impact*

Earlier we referred to 'consequentialism' and the functional approach (see Section 1). Legal Realism scholars stress the point that their work should have an impact on man and society and not only on rules, court and laws ('paper').

applications of Lakatos's work in organisational and strategy studies, Keynesian economics, sociology, consociatonalism and political sciences are also given. See also M. Niaz, 'Competing research programs in science education; a Lakatossian approach', (1993) 24 *Interchange*, no. 1-2, pp. 181-190 and K. Mbugua, 'Explaining Same-Sex Sexual Behavior: The Stagnation of the Genetic and Evolutionary Research Programs', (2015) 46 *J Gen Philos Sci*, pp. 23-43.

26 Martin, supra note 2.

27 Ibid., pp. 29 et seq.

28 Examples are: 'Study of the actual social effects of legal institutions and legal doctrines'; 'Sociological study in preparation for lawmaking' and 'a sociological legal history; study of the background and social effects of legal precepts, legal doctrines, and legal institutions in the past, and of how these effects have been brought about'. See also K. Mackey, 'The Triumph of Legal Realism', Working Paper, Michigan State University, DCL (2004), pp. 7-9 who refers to (unpublished) papers by Llewellyn as sources for the list(s).

29 Martin, supra note 2, pp. 30 et seq.

30 Ibid., p. 39.

31 Moore & Callahan, supra note 17, p. 3.

32 W.U. Moore & T. Hope, Jr., 'An Institutional Approach to the Law of Commercial Banking', (1929) 38 *Yale Law Journal*, no. 6, pp. 703-719.

33 K. Llewellyn & E. Hoebel, *The Cheyenne Way. Conflict and case law in primitive jurisprudence* (1941).

34 Martin, supra note 2, p. 53.

35 Ibid., p. 55.

Next to shared foundations, the *existence of a 'school'* of Legal Realists could also be seen as a step en route to (the reconstruction of) a research programme. However, most authors are of the opinion that LR has never formed such a school.[36] The differences in vision, approaches and what 'LR' constituted were serious. The *Realist Controversy* between Pound and Llewellyn is an interesting example (see Box 1).

Box 1 The Realist Controversy

The controversy was fought in several articles. Llewellyn, along with Frank, designed a questionnaire which was sent to Legal Realists to find out about the core of LR and to submit a reply to Pound, who had in 'The Call For A Realist Jurisprudence'[37] been critical about 'juristic realists'. These 'newcomers' attached in his opinion too much importance to 'the actualities of the legal order as the basis of a science of law. But a science of law must be something more than a descriptive inventory'. Their focus on presenting 'a faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law'(p. 700). And he argued that 'new realists have their own preconceptions of what is significant, and hence of what juristically must be. Most of them merely substitute a psychological must for an ethical or political or historical must.' (ibid).

Pound stressed that his intentions were not polemical ('it is much more important to understand than to criticize'). 'Nonetheless, the core of Pound's article consists of sweeping criticisms of a number of ideas that he attributed to juristic realism'.[38]

Llellewyn's rejoinder ('Some Realism about Realism') criticised the empirical content of Pound's analysis and commentary. He selected 20 'realists' ('There are doubtless twenty more. But half is a fair sample') and received replies to his questionnaire that were analysed. 'In no instance is the support offered [i.e. for Pound's interpretation] strong, unambiguous or unqualified' according to Llewellyn.[39] He did so in no uncertain terms: 'The trial of Pound's indictment is not easy. It is a blanket indictment. It is blanket as to time and place and person of each offense. It specifies no one offender by his name.'[40]

Lapiana[41] interpreted this controversy in terms of 'quibbles, quarrels, misunderstandings, tender egos, and outright bad temper'. Shamir[42] called it 'a public and much-celebrated debate' and suggested that Llewellyn's 'official and whispered list of members and recruits created a sense that a secret society of fellows did exist'.

Despite the lack of an *LR school*, Martin searched for (an) LR research programme(s). He found that if one gives LR (and its critiques) '*a sympathetic reading*', one could argue that there existed *several* research programmes. However, they (only) 'recommended certain *methods* for the study of law, rather than [producing/testing] specific empirical claims'.[43] An example of what, in Martin's perspective, could be seen as a research programme is presented in Box 2.

36 K. Culver (ed.), *Readings in the Philosophy of Law* (1999), p. 243; M. Cohen, *American Thought. A critical sketch* (1954), p. 211; K. Llewellyn, 'Some Realism About Realism – Responding To Dean Pound', (1931) 44 *Harvard Law Review*, pp. 1222-1264; L. Fuller, 'American Legal Realism', (1934) 82 *University of Pennsylvania Law Review*, p. 430; Tumonis, supra note 7, p. 1462; N. Duxbury, 'The reinvention of American legal realism', (1992) 12 *Legal Studies*, pp. 137-177, presented evidence that differences in perspectives of LR were too large to speak of a 'school'. See also N. Duxbury, *Patterns of American Jurisprudence* (1995).

37 R. Pound, 'The Call For A Realist Jurisprudence', (1931) 44 *Harvard Law Review*, pp. 697-711.

38 W. Twining, *Karl Llewellyn and the Realist Movement* (1973), p. 72.

39 Llewellyn, supra note 36, p. 1233.

40 Llewellyn, supra note 36, p. 1227.

41 W.P. LaPiana, Review of N.E.H. Hull. *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (1997), <https://networks.h-net.org/node/16794/reviews/16899/lapiana-hull-roscoe-pound-and-karl-llewellyn-searching-american> (last visited 29 November 2017).

42 Shamir, supra note 12, p. 213.

43 Martin, supra note 2, pp. 94-95.

Box 2 An example of Martin's reconstruction of a LR programme is the 'Predictive Definition [PD] of Law' programme:

- PD-1 define 'law' in terms of the future behaviour of courts.
- PD-2 investigate the impact of law as defined by PD-1 on society and its institutions.
- PD-3 study the impact of statutes, precedents, and codes on the law as defined by PD-1.
- PD-4 investigate the impact of judicial personalities, economic and social factors, and so forth on the law as defined by PD-1.
- PD-5 base your legal practice on the law as defined in PD-1.
- PD-6 base legal education primarily on law as defined in PD-1.
- PD-7 emphasise, in legal education, findings of empirical legal research brought about by following PD-2, 3 and 4.
- PD-8 in reforming the law as based on PD-1, take into account the findings brought about by following PD-2.
- PD-9 in making decisions, do not follow PD-1, but take into account the findings of legal scientists who follow PD-2.

In summary: the Predictive Definition of Law Research Programme (PDRP) = Follow Maxims PD-1 to PD-9.

Martin's[44] conclusion was that this and a few other programmes[45] can be seen as *research programmes*, though only when programmes are '*understood as providing methodological directives to guide legal research and inquiry*'. However, the Lakatossian conception of a scientific research programme is much broader and deeper. Martin addressed the question as to what extent his approach is similar to that of Lakatos. He answered by saying that Lakatos's approach:

> is rather different from mine (…) At best it is analogous to Lakatos' positive heuristic, but with important differences. My methodological rules do not provide directions for adding auxiliary hypotheses that may or may not be connected with a series of theories. Rather, they give directions to legal researchers for developing definitions, social scientific theories and moral theories.

Leiter[46] tried to reconstruct LR in *terms somewhat related* to Lakatos.[47] Leiter's starting point is the '*Core Claim* of LR, a descriptive thesis about judicial decision-making'. It is the statement that 'judges respond primarily to the stimulus of facts (…) rather than to the applicable rules of law'.[48] His reference to the stimulus concept has to do with the dominant behavioural approach at the time of Legal Realism. Leiter distinguished his 'Core Claim' from the '*Received View*' on LR, which was that 'judges exercise unfettered discretion when deciding, in order to reach results based on their personal tastes and values, which they then rationalize after-the-fact with appropriate legal rules and reasons'.[49] This Received View built on two foundational statements. One is the '*Judicial Volition*' thesis, which repeats that judges exercise unfettered choice in picking a result. The other (the '*Judicial Idiosyncrasy*' thesis) says that judges make this choice *in light of* personal or idiosyncratic tastes and values. If one combines both theses, the conclusion is that judicial decisions are utterly unpredictable.[50]

44 Martin, supra note 2, p. 100.
45 This articulated several other programmes, like the Moral Research Program (Martin, supra note 2, p. 116) and the Fact Skepticism Program (ibid., p. 111). Hart (H. Hart, *The concept of law* (1961), pp. 141-147) has been rather critical about the Predictive Definition of Law programme.
46 B. Leiter, *Naturalizing Jurisprudence; essays on American Legal Realism and naturalism in legal philosophy* (2007), pp. 21-30.
47 M. Green, 'Leiter on the Legal Realists', (2011) *Faculty Publications*, *Paper* 1365, <http://scholarship.law.wm.edu/facpubs/1365> (last visited 4 December 2017).
48 Leiter, supra note 46, pp. 22-23.
49 Ibid., p. 16.
50 Ibid., p. 25.

Next, Leiter goes on to say that this conclusion 'ought to raise a question about its adequacy. For surely one of the most familiar themes in the writings of the Realists is their interest in *predicting* judicial decisions'.[51] The answer to this question is that next to idiosyncrasy, there is *also* a *sociological perspective*, indicating that judges in their decisions connect to societal values, norms and patterns *that they know from their professional and social lives*.[52] This enables (to some extent) the predicting of judicial decisions.

Commenting on Leiter's reconstruction, Twining suggested that if one were to take his *Core Claim* seriously other than as a partial historical claim, one

> would have to rephrase it as a hypothesis to be tested, or as an open question (e.g. what factors have influenced common law/American/federal judges?), because the *Core Claim* is an empirical generalization or hypothesis about (American?, appellate?) judges at some unspecified times in the past.[53]

In a later study, Leiter added an important aspect to the reconstruction, i.e. the suggestion that there were '*paradigmatic Realist inquiries*'.[54] Paradigmatic inquiries presuppose the existence of a (LR) 'paradigm' and 'paradigms' and 'research programmes' are related.[55] Paradigmatic inquiries were

> Oliphant ['s work] on the promise-not-to-compete cases, Llewellyn on the New York sales cases, Green on 'proximate cause' in tort law, [and] Handler on trademark—[they] consisted in careful scrutiny of the underlying facts of lines of cases, bringing out the gap between the official 'doctrinal' explanation for the decision and the actual sotto voce norms of 'decency' and the 'felt sense' of 'the right result on the facts of the case and situation' that seemed to be at work in the judge's thinking.[56]

A crucial part of the Lakatossian research programme is the role that *theories* play. Confronting theory and empirical evidence is an important driver behind progress (or stagnation) of knowledge. In the world of American LR, two types of theories seem to have been discussed.[57]

The first is *the operational or substantive theory*: propositions that 'may be verified directly or indirectly through another proposition, either by a contrived experiment or by observation of a process without such an experiment'.[58] An example was Moore & Callahan[59] who linked 'the quantity and degree of conformity to the (parking) ordinances with the theorems of a psychological behavioristic theory of learning'. Another example is Llewellyn's *Law-Jobs theory*. According to this theory, no group can survive and flourish unless the *law-jobs* are properly performed. The function of law-jobs is to develop (legal) 'arrangements and adjustment of people's behavior [so]that a society remains society and gets enough energy unleashed and coordinated to keep on with its job as a society. Crucially, authority must be established, goals set, conduct regulated, and disputes resolved.'[60] These needs arise from a facet of human nature, that human beings have drives, desires and interests which tend to be incompatible.[61] Adams & Brownsword add that

> although the theory is vague, open to interpretation, and arguably tautological, it is a rough but useful tool for functional analysis, and it is undoubtedly capable of generating some important insights. It prompts the following question about the function of statutes dealing with private law: are such statutes intended to

51 ibid., p. 25, emphasis added.
52 Ibid., pp. 28-29.
53 W. Twining, 'Legal Realism and jurisprudence: ten theses', in E. Mertz et al. (eds.), *The New Legal Realism*: *Translating Law-and-Society for Today's Legal Practice* (2016), Vol. 1, p. 127.
54 Leiter, supra note 1.
55 In the 1960s and 1970s there had been a serious debate between I. Lakatos and T. Kuhn (*The structure of scientific Revolutions* (1970)) who became famous through his work on paradigms.
56 Leiter, supra note 1, p. 955.
57 We do not claim completeness. See for an in-depth analysis M. Green's ('Legal Realism as Theory of Law', (2005) 46 *Wm. & Mary L. Rev.*, p. 1927) analysis of LR's *theory of law* ('basically the realists' rejection of legal rules'), LR's *prediction theory of law* ('inadequate', ibid., p. 1927) and LR's *decision-theory of law* ('according to which all and only concrete decisions are law', ibid., p. 1986).
58 Martin, supra note 2, pp. 51-52.
59 Moore & Callahan, supra note 17, p. 3.
60 J. Adams & R. Brownsword, 'Law Reform, Law-Jobs, and Law Commission', (1988) 51 *Modern Law Review*, no. 4, p. 481.
61 W. Twining, 'Two Works of Karl Llewellyn—II: II. The Cheyenne Way', (1968) 31 *Modern Law Review*, no. 2, p. 175.

> provide a framework for dispute-resolution or is their function to regulate conduct, by deterring, encouraging, or simply guiding behavior? (like a recipe as it were).[62]

The second type of theory that has played (some) role in LR is the *theory of investigation*.[63] This theory suggests that in order to collect data (in a valid and reliable way) the 'trouble case method' should be applied. It

> consists of examining in detail the processes involved in settling actual disputes. What happened, what each participant did in relation to the dispute, what steps were taken by what other persons, the final outcome, the reasoning of the deciders, the effects of the decision on the parties themselves, on future trouble cases and on the general life of the group are to be considered in depth.[64]

In Llewellyn & Hoebel's *The Cheyenne Way*, over 300 pages of interpretation rest largely on this kind of analysis of the 53 cases. However, *The Cheyenne Way* is also an interesting study as it shows that the theoretical work was relevant not only because it guided the field research/data collection, but also because it was to some extent a substantive ('operational') theory. Tuori reminds us that the original research question which the authors were facing was 'whether indigenous people like the Cheyenne had law at all'.[65] *The Cheyenne Way* not only showed that the answer was positive but, by working in a cross-disciplinary way (linking law to anthropology), the book was also able to present a more precise image of what the Cheyenne legal arrangements were and meant in their day-to-day practice.

Despite this, on the basis of my reading of LR work, the two types of theories have played only a minor role in the (empirical) work done by LR scholars. A systematic approach to develop (or deduce) operational theories and test them in different contexts, crucial in Lakatos's methodology, cannot be found. And the same goes for the 'theory of investigation'.

2.3 Was Legal Realism a scientific research programme in the Lakatossian way?

My answer is that there has been a programme but in *only a very rudimentary form.* It was *methodological and procedural* in nature and stressed that attention *should be paid* to sociological and behavioural ('behaviouristic') facts (and [f]actors), when analyzing judicial decision-making. In 1960 Llewellyn said: 'Realism was, and is, a method, nothing more, and the only tenet involved is that the method is a good one. See it fresh. See it as it works (…) Realism is not a philosophy but a technology.'[66] Theories did play some role, but rigorous testing of them was almost never done.[67] Nevertheless, recent work by Tuori[68] on the intellectual interaction between Legal Realists (like Llewellyn) and cultural anthropologists (like Boas) shows how they related their own research to insights from the other discipline.

Following on from the role of theories in research programmes, we now look into research designs and research methods as elements of a scientific research programme. We found some discussion about designs (like surveys and experiments and Moore's & Hope's 'institutional method')[69] and on other methods of collecting and analyzing data. But we also found serious criticism of methodological aspects of empirical

62 Adams & Brownsword, supra note 60.
63 Llewellyn & Hoebel, supra note 33.
64 K. Llewellyn & E. Hoebel, supra note 33.
65 K. Tuori, 'American Legal Realism and Anthropology', (2017) 42 *Law & Social Inquiry*, no. 3, pp. 804-829, at pp. 815 et seq.
66 K. Llewellyn, *The common law tradition: deciding appeals* (1960), p. 510.
67 One of Schlegel's (supra note 15, p. 3) findings was that, when looking at Legal Realists at Yale University, 'the one thing that that really grand crew was not noted for was sustained commitment to anything'.
68 Tuori, supra note 65.
69 Moore & Hope, Jr., supra note 32, describe the normal behaviour for any 'institution' (e.g.,banks); then identify and demarcate deviations from this norm quantitatively, and try to find the point at which deviation from the norm will cause a judicial decision that *corrects the deviation from the norm* (e.g., how far a bank must depart from normal check-cashing practice before a court will decide against the bank in a suit brought by the customer). The goal is a predictive formula: deviation of degree x from '[i]nstitutional behavior – i.e., behavior which frequently, repeatedly, usually occurs' – will cause courts to act.

investigations that were done,[70] while[71] showcases of growth of knowledge in American Legal Realism are very difficult to find.[72]

Nevertheless, the picture is not only critical. Legal Realism provided an opportunity to *formulate more precise research problems* (see Leiter's reconstruction)[73] and to *develop new research problems*. Stephenson gives as an example that LR sought to 'uncover the 'real law'.[74] Economists might [then] investigate more closely *how* judges respond to case fact-patterns and these studies might well provide valuable insights both about judicial behavior and about the law that operates in particular fields.'

Schlegel[75] shows that LR has *contributed* to a lasting interest in empirical-legal questions. Macaulay[76] refers to his own *Contracts: Law in action* (2003) as an example of the sustained influence of LR. And Curtis[77] made the point that

> notwithstanding its shortcomings, the realist campaign to integrate law and empirical social science was an important and, perhaps surprisingly, enduring part of the realist legacy. While the studies themselves may largely have failed to produce much in the way of actionable data, the realists' affair with the social sciences set the agenda for American jurisprudence of the future. (quoting Duxbury[78])

Mackey summarised it by saying that LR was 'an *instrumentalist tool*'.[79] When he added that we then 'can begin to understand the scope of the successes of the Realists',[80] my opinion starts to differ from his. Successes which Mackey mentions are their (high) positions in the (New Deal) government, the demand for social engineering (and federal bureaucracy) that they stimulated and their ability to 'predict and engender changes in law and society'. However, at least two of them cannot be seen as epistemological (or theoretical) successes, but as 'political' ones only (and depending on one's political perspective).

My analysis of American Legal Realism as a research programme of a *very rudimentary form*, *largely focused on procedures and methods* with hardly any examples of *progressive problem* shifts to be found, brings me to the second question of this paper: *what has been the role of American LR during the first part of the 20th century in helping to develop and implement the New Deal policy vis-à-vis its scientific work?*

3. Societal relevance of Legal Realism and its impact on scholarship

To transfer knowledge and to stimulate the using of it by relevant (legal and policy) audiences, was a goal pursued by American Legal Realists. Presser[81] refers to the New Deal period, where 'lawyers trained in legal realism expanded the role of the federal government through plastic interpretations of the U.S. Constitution and the creation of a myriad of new administrative agencies'.[82]

70 See Posner, supra note 17, Twining, supra note 17 and Twining, supra note 53, p. 138.
71 See Leiter, supra note 46.
72 As was discussed in Section 2.1, progressive problem shifts are a crucial ingredient to realise growth of knowledge. The case of the Cheyenne way study may be treated as such a shift because the original problem (do natives have laws?), after being studied, could be reformulated at a higher theoretical level (which types of 'laws', how do they work, how are they enforced?). See also Tuori, supra note 65 and N. Duxbury, *Patterns of American jurisprudence* (1995).
73 See Leiter, supra note 46.
74 Stephenson, supra note 4, p. 198.
75 Schlegel, supra note 15.
76 S. Macaulay, 'The New Versus The Old Realism: Things Ain't What They Used To Be', (2005) 2 *Wisconsin Law Review*, pp. 365-403.
77 Curtis, supra note 8.
78 Duxbury, supra note 72, p. 92.
79 Mackey, supra note 28, pp. 11-12.
80 C. Faralli ('The Legacy of American Legal Realism', (2005) 48 *Scandinavian Studies in Law*, pp. 65-75 claims that: 'The legacy of American legal realism consists of phenomena like these: lawyers now recognize that judges are influenced by more than legal rules; judges and lawyers openly consider the policy or political implications of legal rules and decisions; law texts now routinely consider the economic, political, and historical context of judicial decisions. In this sense it is often said that "we are all realists now"'.
81 S. Presser. 'Pound and the Law' (13 April 2016, p. 1), <http://oll.libertyfund.org/pages/pound-and-the-law> (last visited 27 November 2017).
82 Needless to say, there are other topics that could be studied from this perspective such as how legal education and training were related to LR, what LR contributed to the development of policy sciences etc. See H. Laswell & M. McDougal, 'Legal Education And Public Policy: Professional Training In The Public Interest', (1943) 52 *Yale Law Journal*, pp. 203-295.

Some Legal Realists belonged to the *President's Men*, also known as '*the Brain Trust(ers)*'[83] who assisted Roosevelt (as President-elect and President) to think through and implement legislation, including the establishment of new federal executive agencies.[84] The very fact that the Supreme Court was critical about the New Deal and declared (parts of) it unconstitutional, put Roosevelt in dire need of legal advice to help realise his goals. As a reform movement in legal theory and jurisprudence, LR was 'sympathetic with the New Deal's political goals'.[85] Mackay[86] adds that

> the Brain Trusters wrote Roosevelt an economic plan that became the foundation of the New Deal. They influenced Roosevelt's New Deal policies for regulation of banking and securities, railroads, large scale relief, and public works programs. Amazingly, during Roosevelt's first one hundred days in office, the Brain Trust helped enact fifteen major laws, including the Banking Act of 1933, which is credited with ending the banking panic.

Shamir[87] studied this (utilisation) process in depth. It started with 'concerned lawyers warning against the "cancerous growth" of administrative powers not subjected to judicial review' that were part of the New Deal. An example was the National Labor Relations Board and the SEC with their own 'vast discretionary power'.[88] The Supreme Court was critical of the centralisation of power at the federal level through

> superagencies for directing the economy like National Recovery Administration (NRA) and the Agricultural Adjustment Administration (AAA). (…) By the time the Supreme Court declared NRA and AAA unconstitutional in 1935, together with a number of Legal Realists [Roosevelt] set himself to a counter strategy.[89]

Isaacs described debates in which realists took part: they discussed 'the appropriate ways of interpreting the Constitution. (…) This helped New Deal policy makers in their confrontation with the Supreme Court.'[90] Purcell shows that 'Frank, Oliphant, Clark, Arnold, Douglas, and Felix Cohen were all ardent New Dealers who shared a strong hostility to the method of juristic reasoning that struck down social welfare laws and wrought what they considered great human injustices'.[91] Seidman adds that 'Realists insisted that these agendas should be discussed openly and not be obscured by claims that judges were mechanically following the Constitution'.[92, 93]

Curtis discussed another dimension of this development, i.e. the benefits which a number of Legal Realists experienced by linking up with the New Deal movement and President Roosevelt.

> Many realists took leaves of absence from their academic posts to join the New Deal as administration officials, policymakers, and government lawyers. Other realist scholars remained in academia but worked for the New Deal in an advisory capacity. Temporal and ideational overlap seemed to make realism and the New Deal natural bedfellows.[94]

He added that

83 This term was coined by James Kieran, a *New York Times* reporter. See A.A. Berle, *The Columbia Electronic Encyclopedia* (2003).
84 Frank, infra note 95, referred to Roosevelt as the 'Master Experimentalist'.
85 C. Woodard, 'Whose Law Is It?', *New York Times*, 29 September 1990, p. 1.
86 Mackey, supra note 28.
87 Shamir, supra note 12, pp. 3, 12, 101 et seq.
88 M. Janeway, *The fall of the House of Roosevelt: Brokers of ideas and power from FDR to LBJ* (2003), p. 5.
89 Ibid., p. 5.
90 N. Isaacs, 'The Securities Act and the Constitution', (1933) 43 *Yale Law Journal*, pp. 218-226.
91 E.A. Purcell, 'American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory', (1969) 75(2) *American Historical Review*, p. 436.
92 L.M. Seidman, 'The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation', (2014) 17 *Journal of Constitutional Law*, no. 1, pp. 1-113 at p. 66.
93 P.H. Irons, *The New Deal Lawyers* (1982), discussed the role of Legal Realists lawyers. He spoke about 'the work of Llewellyn and a number of other legal realists and their behavioral analysis of the judicial function (…) [that] prepared budding New Deal Lawyers to look on judges as manipulators of law and on regulation as a modern necessity'.
94 Curtis, supra note 8, p. 158.

> the New Deal allowed proponents of realism to 'operationalize' realist jurisprudence[95] by putting its tenets into practice, while also allowing realist theoreticians to consider the implications of realism in new areas, such as constitutional and administrative law. It was Realism that provided the theoretical justification for allowing the New Deal to guide the scope of the government's regulatory authority under the Constitution, as opposed to letting the Constitution constrain the New Deal. It was Realism that helped provide the rationale for the rise of the administrative state (...) Realists had a hunger to make the law *do* something and the New Deal provided a prime opportunity to demonstrate the utility of law as a tool for shaping social policy.[96]

The conclusion is that a number of Legal Realists were active in what would currently be called *knowledge diffusion*, *utilisation* and *valorisation.* The question is, what was in it for them? The answer is high-ranking positions in the (legal) administration for the work that was done, helping to expand Legal Realism into the (Federal) government, which combination was rather attractive. Macaulay said: 'Of course, some of the realists found the chance to go to Washington, D.C. to work for the New Deal to be far more attractive than remaining on the sidelines as a scholar'.[97, 98] Janeway said: 'Frankfurter, Jackson and Douglas [were sent] to the Supreme Court, Frank and Arnold to the Federal circuit courts of appeal, he [Roosevelt] made Fortas undersecretary of the Interior and Rowe de facto deputy attorney general, when they were each thirty-two.'[99] Based on Mackey,[100] I constructed the following table of 15 of 42 Legal Realists 'that "left for Washington", either as (part-time) organiser, regulator, administrator or advisor'.[101]

Table 1 Positions of Legal Realists who went to Washington on behalf of or related to F.D. Roosevelt's New Deal policy

FDR = F.D. Roosevelt.

Walter W. Cook	US Treasury Dept., 1934-43.
Jerome Frank	Judge of the US Court of Appeals, 2nd Circuit 1941-57. Served FDR in the Agricultural Adjustment Administration Federal Surplus Relief Corporation, Reconstruction Finance Corporation, Commissioner and Chair of the SEC, and at the National War Labor Board.
W. Underhill Moore	Special representative of the National War Labor Board with Jerome Frank.
Herman Oliphant	General Counsel at the Farm Credit Administration; in 1934 became the first General Counsel of the US Treasury Department.
Samuel Klaus	Legal advisor to FDR.
Wesley Sturges	Department of Agriculture, chief representative of the Office for Economic Warfare for French North and West Africa.
Joseph C. Hutcheson	Advisor to the National Commission on Law Observance and Enforcement (the Wickersham Commission).
Thomas Reed Powell	Special assistant to US Attorney General, 1936;1941; Member of FDR's five-man President's Emergency Board on National Railway Strike, 1941.
Thurman Arnold	Member of FDR's 'Brains Trust', US Assistant Attorney General and FDR appointed head of the Antitrust Division of the Justice Department.
William O. Douglas	Commissioner of the SEC/Chairman of the SEC. Justice of the US Supreme Court.
Felix Frankfurter	US Assistant Attorney under Henry L. Stinson. Supreme Court Justice, from 1939 until 1962.
Justin Miller	Special Assistant to US Attorney General, 1934-36; Chairman, Attorney General's Advisory Committee on Crime, 1935-36.
Edmund M. Morgan	Member of the Advisory Committee of the US Supreme Court on Rules of Civil Procedure; Chairman of the War Shipping Panel of the War Labor Board.

95 See also: 'Experimental Jurisprudence and the "New Deal"'. Extension of remarks by the Hon. Homer T. Bone of Washington in the Senate of the USA Monday, 18 June 1934 Address by J. Frank, General Counsel of the Agricultural Adjustment Administration.
96 Curtis, supra note 8, p. 199, 173.
97 Macaulay, supra note 76, p. 376.
98 K. McMahon, *Reconsidering Roosevelt on race: how the presidency paved the road to Brown* (2003), pp. 31-32. He made the point that Roosevelt 'kept these young Realists at arm's length because of his desire to be the "father to all the people" and not only to Realists'.
99 Janeway, supra note 88, p. 6.
100 Mackey, supra note 28.
101 N. Hull, 'Reconstructing The Origins Of Realistic Jurisprudence: A Prequel To The Llewellyn-Pound Exchange Over Legal Realism', (1989) *Duke Law Journal*, pp. 1302-1334**.** Also: D. Ernst, *Of Sheepdogs and Ventriloquists: Government Lawyers in Two New Deal Agencies* (2015).

Milton Handler	General counsel to the National Labor Board under FDR. Helped draft the National Labor Relations Act 1935, the Federal Food, Drug and Cosmetic Act 1938, and the GI Bill of Rights. Helped set up the War Refugee Board of 1944.
James M. Landis	Law clerk to Justice Brandeis, US Supreme Court; Member, Federal Trade Commission, 1933-34; Member, Securities and Exchange Commission, 1934-37; Chairman, SEC, 1935-37; Regional Director, US Office of Civil Defense, 1941-42.

Schlegel described the work that the 'Washingtonians' did for the New Deal as '[attacking] the doctrinal structure of both common law and constitutional law'. He also made the point that 'somehow, amid all of the running back and forth [to Washington] and all the excitement, scholarship got done'.[102] Shamir interpreted the (intensive) interaction between law and policy making on the one hand and legal realism on the other hand as '*the professor-realist revolution*'.[103] Given the realists' focus on law as an instrument of social change and their work on 'socially informed law[s]', Shamir shows that

> the realist program was strongly tied to the agenda of the interventionist state and to the legislative plans of a reform-oriented administration; it legitimated the administration's experiments and in the process allowed the realists to assume positions of power and influence.[104]

The *conclusion* is that American LR played an important role as *knowledge transfer agent* (to use a contemporary concept) during the 1930s and 1940s, with *utilisation* high on the agenda. The 'professor-realist-lawyer-relationship', however, was not undisputed. One point that was made is that the focus of the Legal Realists on Washington and the New Deal politics hampered the development of a scientific research programme. Curtis mentions the possibility that LR 'waned as many of its most prominent theorists went to Washington to work for the New Deal'.[105] Working in Washington on complicated and contested topics goes hand in hand with serious transaction costs like travel, meeting and negotiation time loss that can contribute to fragmentation when doing scientific work. Moreover, policy issues are raised and discussed often at a different pace from theoretical and methodological research issues. What adds to this is that when, in later years (from the mid-1940s), the criticism of the New Deal and its 'service state'[106] increased, this also jeopardised the *scientific character* of LR.[107]

4. Discussion: 'old' and New Legal Realism

For the past two decades, New Legal Realism has been active in the world of empirical-legal scholarship. Although it draws on the older Legal Realism, New Legal Realism (New LR) differs in important ways.

– First, it moves beyond the older field's emphasis on judges, courts, and formal legal systems. New LR also examines law in people's everyday lives.

102 Schlegel, supra note 15, pp. 19-20.
103 Shamir, supra note 12, p. 151; see also pp. 105, 135, 156.
104 Shamir, supra note 12, p. 156.
105 Curtis, supra note 8, p. 158.
106 Presser, supra note 81, p. 2, makes an interesting point when he refers to Pound's *The Ideal Element in Law* (1958), where Pound argued that the Welfare State (or the Service State as Pound called it) cannot do everything, as it is too focused on redistribution and on the Robin Hood principle. Pound: 'A government which regards itself, under pretext of extending a general welfare service to the public, entitled to rob Peter to pay Paul, and is free from constitutional restraints upon legislation putting one element or group of the people for the whole, has a bad effect on the general morale. If government is a device for benevolent robbery, a would-be Robin Hood of today is not likely to see why his benevolently conceived activities are reprehensible' (Pound, *The Ideal Element in Law*, <http://oll.libertyfund.org/titles/671#Pound_0094_941>, last visited 27 November 2017).
107 Although we do not discuss this further, see W.Fisher III for another possible explanation ('American Legal Education and Legal Theory in the Twentieth Century', in C. Tomlins (ed.) *Cambridge History of Law in America* (2008), p. 43): 'By the end of the 1930s, Legal Realism as a coherent movement had died. In part, its demise can be attributed to increasing hostility, both from other legal scholars and from the public at large, to the views expressed by its adherents. Opponents of the New Deal resented the Realists' vigorous sponsorship or defense of Roosevelt's policies. And a growing group of critics argued that the Realists' positivism and tendencies toward ethical relativism had helped weaken the nation's intellectual defenses against the rising tide of Fascism in Europe.' See also B. Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence', (1997) 76 *Texas Law Review*, p. 267.

- Second, as Twining suggests, New LR 'developed in a quite different intellectual and ideological context in an era in which new technology, bureaucratic audit, evidence-based practice, evidence-based policy and globalization are among matters in the foreground of academic concerns'.[108]
- Third, New LR follows a 'Big Tent' approach, which is characterised by working with more different types of data than was the case with 'old' LR. Obtrusive and unobtrusive data, qualitative and quantitative data, and legal big data are (becoming) a part of New LR. Miles & Sunstein show the importance of data analytics and the processing power (of computers) in comparison with the often naïve activities of researchers in the 1930s and 1940s.[109] Research methods are now chosen according to evolving research questions. A focus on working with evidence and research design hierarchies, like the Maryland Scientific Methods Scale, is not part of the Big Tent approach. This is a downside of this approach. Its motto is that 'no single field or methodology is preordained to be privileged as the best source of "answers" to legal problems or questions'. Although this may seem smart, a serious problem encountered in criminology (Logan, Bruinsma),[110] empirical legal research (Leeuw & Schmeets)[111] and evaluation studies (Rossi)[112] may be overlooked: *when* to use *which* research designs (and methods), given the nature of the research problem? In particular, when the research problem addresses explanations and/or the impact of legal arrangements in society, not every design is equally good, i.e. is capable of producing valid and reliable evidence. The choice of an adequate, commendable, i.e. 'fitting' research design is a *conditio sine qua non* for the production of valid and reliable evidence, which is crucial in trying to realise growth of knowledge.
- Fourth, there is a strong focus on knowledge transfer, knowledge translation and utilization. Mertz made clear that translating research findings to policy and practice belong to the 'core' of New LR:

> we bring together law professors and social scientists who approach this persistent puzzle from the perspective of "New Legal Realism" – a project that springs largely from the law-and-society tradition but that adds a focus on translating between the worlds (and words) of, on the one hand, sociolegal researchers and scholars concerned with the practice of law and, on the other hand, legal professionals and more traditional legal scholars. In order to accomplish this translation, we first have to consider the interdisciplinary communication process itself: what challenges face those who wish to integrate knowledge of the social world into legal scholarship, training, and practice? And what approaches will create the best kinds of translations? (…) It is this kind of space that the New Legal Realism seeks to encourage and expand upon – with the added dimension, again, of giving concerted thought to the problem of translation between the legal academy and empirical work on law.[113]

Finally, what can New LR learn from 'old' LR? I think at least three things. New LR must:

1. try to develop one or more substantive scientific research programmes and monitor the progress (or stagnation) in knowledge over the years;
2. be aware of the importance of 'evidence and methods hierarchies' that exist in several disciplines. An 'anything goes' approach may sound nice and open, but can also lead to knowledge stagnation and degenerative problem shifts;
3. be aware of the fact-value gap when focusing on knowledge translation and utilisation. 'Old' LR realised a 'Professor-Realist-New Deal-relationship' which also created unintended and negative side-effects.

108 Twining, supra note 53, p. 122.
109 T. Miles & C. Sunstein, 'The new legal realism', (2007, December) *John M. Olin law & economics working paper no. 372*, p. 5. They have a different perspective as they consider New LR as legal realism that is quantitative.
110 C. Logan, 'Evaluation research in crime and delinquency: a reappraisal', (1972) 63 *Journal of Criminal Law, Criminology and Policy Studies*, no. 3, pp. 378-387. G. Bruinsma, 'Proliferation of crime causation theories in an era of fragmentation: Reflections on the current state of criminological theory', (2016) 13 *European Journal of Criminology*, no. 6, pp. 659-676.
111 Leeuw & Schmeets, supra note 25.
112 P. Rossi, 'The Iron Law of Evaluation and Other Metallic Rules', (1987) 4 *Research in Social Problems and Public Policy*, pp. 3-20.
113 E. Mertz et al. (eds.), *The New Legal Realism: Translating Law-and-Society for Today's Legal Practice* (2016), Vol. 1, p. 2.