

Firms, Markets, and Hierarchies: The Transaction Cost
Economics Perspective

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CHAPTER TEN

Revisiting Legal Realism

The Law, Economics, and Organization

Perspective

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Although American Legal Realism fell on hard times, the objections of the Realists with legal formalism had substance earlier in the century and have substance today. As developed in this paper, there are many parallels between Legal Realism and older style institutional economics. Both failed for lack of operationalization.

The New Institutional Economics works out of a law, economics, and organizations perspective and takes operationalization much more seriously. This same approach could be applied to the concerns of Legal Realism, bringing added value in the process.

1. Introduction

The contrast between American Legal Realism, which 'ran itself into the sand' (Schlegel, 1979, p. 459), and the law and economics movement, which is 'perhaps the most important development in legal thought in the last quarter century' (

Posner, 1986, p. xix), is dramatic. That one foundered while the other flourished is explained largely by the absence of an intellectual framework for Legal Realism and the use by law and economics of the powerful framework of neoclassical economics.

Although movements that lack a 'coherent intellectual force' (Schlegel, 1979, p. 459) ordinarily collapse, the concerns of Legal Realism do not go away. Some may regard that as stubborn refusal to admit defeat, but many social scientists share the conviction of the Legal Realists that 'announced legal rules may differ from what courts actually do and that embedded presuppositions regarding the law's effects and relevance to social behavior are often quite wrong, and at the very least, worthy of serious testing'

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Publication information: Book title: Firms, Markets, and Hierarchies: The Transaction Cost Economics Perspective. Contributors: Glenn R. Carroll - Editor, David J. Teece - Editor. Publisher: Oxford University Press. Place of publication: New York. Publication year: 1999. Page number: 197

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