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JUDGING THE QUALITY OF LEGAL RESEARCH: A QUALIFIED RESPONSE TO THE DEMAND FOR GREATER METHODOLOGICAL RIGOUR

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I INTRODUCTION

The quality of legal research[1] is increasingly being scrutinised by scholars from other disciplines. Demonstrated internationally in incidents like the damning 2002 critique by two leading social scientists of the empirical methods used in American law review articles,[2] the phenomenon manifests itself in Australia in a number of different settings. Whether applying for competitive research grants, justifying senior university appointments, or submitting articles to interdisciplinary journals, Australian legal academics are today routinely required to explain what they do in terms accessible to outsiders.[3] No longer is it possible for them to shelter behind the claim that their research is fundamentally different from that being produced elsewhere in the university, or that it should be assessed in every case only by those with the requisite legal-professional training. The quality of legal research is already being assessed by scholars from other academic disciplines, and frequently found wanting.[4]

This article argues that the way legal academics respond to this challenge needs to be sensitive to the distinction between

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1 As used here, the term 'legal research' refers to research produced by legal academics.

2 Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1. See also Gerald N Rosenberg, 'Across the Great Divide (Between Law and Political Science) (2000) 3 *Green Bag* 2d 267.

3 The general nature of the challenge is set out in the Council of Australian Law Deans 'Statement on the Nature of Legal Research' (May and October 2005). The statement summarises CALD's response to the call by the Department of Education, Science and Training for submissions to the then applicable Research Quality Framework. This article largely agrees with the position taken in the CALD statement, but fleshes out some of the arguments a little more.

5 See Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, 633 ('traditional legal analysis adopts an "internal" approach', which involves 'the analysis of legal rules and principles taking the perspective of an insider in the system').

traditional doctrinal research and the other types of legal research that have emerged over the last forty years. In the former case, it would be helpful to articulate the criteria legal academics use to assess the quality of doctrinal research in a way that can be understood by scholars from other disciplines. There is no need, however, fundamentally to overhaul the way doctrinal research is conducted and assessed. In the case of the newer types of legal research, and particularly the specific variant of socio-legal research in which legal academics are engaged, the response needs to be less defensive. Here, the pertinent question is whether legal academics ought to try to meet the research standards set by the disciplines on which they are drawing. The answer to that question is generally 'yes', but with some qualifications.

II THE DISTINCTIVENESS OF DOCTRINAL RESEARCH

As will be apparent, the argument developed in this article depends on a foundational distinction between doctrinal research and the various other types of legal research that have emerged over the last forty years. It is thus necessary to begin by explaining how this distinction is drawn and defending it against claims that the boundary between doctrinal research and these other types of legal research is becoming increasingly blurred.

As traditionally understood, doctrinal research is aimed at the systematisation and critique of a defined body of positive law. The characteristic feature of this sort of research is that it is offered as a participant act in the legal system. The general aim is to persuade other legal professionals — fellow legal academics, practising lawyers, judges and law reformers — of the researcher's understanding of the state of the law and the seriousness of any deficiencies identified. Understood in this way, doctrinal research is research conducted by legal insiders for other legal insiders.[5] It has no purpose beyond convincing other actors in the legal system of the merits of the argument made out. Of course, since legal norms have external social effects, doctrinal research may, and often does, have consequences beyond the legal system. Arguments about deficiencies in the current state of the law also typically draw, not just on a critique of the particular body of law's internal coherence, but also on its external social effects. For this reason, it is wrong to think of doctrinal research as research that

[5] See Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, 633 ('traditional legal analysis adopts an "internal" approach', which involves 'the analysis of legal rules and principles taking the perspective of an insider in the system').

necessarily treats law as an autonomous social system.[6] Nevertheless, the traditional view runs, the focus is always on a particular body of law, and how *it* ought to be understood and how *it* might be improved.

But is this traditional understanding of the nature and distinctiveness of doctrinal research still tenable? In recent years, it has come under attack from two sides. On the one hand, it has been observed that doctrinal research frequently and, on a stronger version of the critique, *necessarily* relies on empirical claims that may be established only by appropriate social science research methods.[7] To this extent, the disciplinary boundary between doctrinal research and social science research is allegedly a porous one, and doctrinal researchers should become expert in, and correctly apply, social science research methods, at least if their research is to have any standing in the wider scholarly community. On the other hand, many social scientists these days adopt an interpretive approach.[8] When their attention is directed at judicial decision-making and other forms of legal practice this means that their research inevitably engages with legal doctrine as the formal expression of the value-laden, institutionally significant, motivations of legal actors. In this case, the walls supporting doctrinal research's claim to disciplinary distinctiveness are allegedly being breached from within the interpretive practice of law,[9] but the effect in both cases is said to be the same: the disintegration of any notion of doctrinal research as a separate academic discipline with its own distinctive rationale and methods.

6 This claim is now typically associated with autopoiesis theory's idea that 'law' is 'normatively closed' but 'cognitively open': Niklas Luhmann, *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow trans, Routledge & Kegan Paul, 1985) 283. The actual claim made by autopoiesis theory is more complex than this and the shift of focus here from 'law' to 'doctrinal research' is significant. For a critical discussion, see Roger Cotterrell, 'The Representation of Law's Autonomy in Autopoeisis Theory' in Jiří Přibáň and David Nelken (eds), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Ashgate, 2001) 80.

7 The weaker version of this claim is made, for example, by Epstein and King, above n 2. For a forceful version of the stronger version of the claim in the Australian context, see Kylie Burns and Terry Hutchinson, 'The Impact of "Empirical Facts" on Legal Scholarship and Legal Research Training' (2009) 43 *The Law Teacher* 153 (summarising research showing use of empirical facts in legal reasoning in Australia and calling on traditional models of legal research and legal research training to be adapted accordingly).

8 See Christine B Harrington and Barbara Yngvesson, 'Interpretive Sociolegal Research' (1990) 15 *Law & Society Review* 135.

9 Roger Cotterrell's work is representative of this line of critique. See, for example, Roger Cotterrell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171. For a direct response to this line of argument, see David Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407.

The first critique largely has to do with the use of empirical arguments in doctrinal research. On the weak version, doctrinal research does not necessarily involve the making of testable empirical claims, and thus legal researchers are only bound to observe social science research methods to the extent that they choose to found their arguments on such claims.[10] On the strong version, legal decision making in the common-law world has evolved over the last century to become unavoidably reliant on testable empirical claims, not just as a matter of expert witness testimony or social scientific evidence, but also as a matter of legal reasoning.[11] It follows that doctrinal researchers need to familiarise themselves with the methods used to establish such claims.

The weak version of the critique is not necessarily fatal to the distinctiveness of doctrinal research. On this view of things, as long as doctrinal researchers restrict themselves to the sort of armchair observations about the social effects of legal norms that have long been the stuff of common-law legal argument, there can be no complaint. Since such observations are routinely used by judges to justify case outcomes, it would be wrong to object when doctrinal researchers, whose work typically has less immediate social consequences, use similar reasoning techniques. It is only when doctrinal researchers become more ambitious, and try to persuade law-makers to engage in a major piece of social reform, that problems arise. When that happens, social scientists have legitimate reason to be upset about the influence that doctrinal researchers wield, sometimes in inverse proportion to the rigour of their methods. But doctrinal researchers can meet this objection, and safeguard the distinctiveness of their discipline, by exercising the necessary caution.

On the stronger version of this critique, there can be no such escape. On this view, legal reasoning in the common-law world has evolved over the last century to become *unavoidably* reliant on testable empirical claims. Starting in the United States under the influence of legal realism, legal reasoning in the United Kingdom, Canada, Australia and elsewhere is today highly consequentialist in character: the answer to many legal questions (and perhaps most of those that make their way to appellate courts) depends less on determining the precise semantic content and scope of the legal norms being applied and more on understanding which of the outcomes contended for would best serve the applicable norms' underlying purposes.[12] In such a context, to say that doctrinal researchers can avoid making testable empirical claims is fanciful. If law is to serve society, all participants in the legal system, as

[10] Epstein and King, above n 2, limit their critique in this way.

[11] See Burns and Hutchinson, above n 7.

[12] See P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987) 5-11.

Oliver Wendell Holmes long ago argued,[13] had better become well versed in social science research methods. Not just that, but doctrinal research must be understood, not as a discipline in its own right, but as a species of applied social science research concerned with the rational use of law for the effectuation of collective social purposes.

The persuasiveness of the strong version of the first critique depends on the strength of its contention that legal reasoning, at least in appellate cases, is unavoidably reliant on testable empirical claims. In the nature of things, this is a question that must be determined jurisdiction by jurisdiction, and conceivably also area of law by area of law.[14] Thus, for example, doctrinal research on the US legal system, which has long been influenced by legal realist notions of law as an instrument of social policy, would likely be the first form of doctrinal research to become indistinguishable from empirical social science research. And within the US legal system, doctrinal research on family law, with its broad underlying rationale of securing the best interests of the child, might be expected to take on the qualities of empirical social science research before more traditionally rule-bound areas like torts or contract law. In the end, whether the disciplinary boundary surrounding doctrinal research has collapsed depends on the legal reasoning methods used in the area of law concerned, and whether they have indeed become predominantly empirical in nature.

What is the situation in Australia? Has legal reasoning evolved to the point where doctrinal research should be understood as a form of applied social science research? In a recent paper, Kylie Burns and Terry Hutchinson have pointed to a number of studies showing the way in which Australian judges are increasingly referring to 'social facts' in their decisions.[15] The evidence also suggests, however, that these references are overwhelmingly being made without proper empirical support. If the methodological standard for doctrinal research is set by the professionally accepted conventions of legal reasoning in the legal system concerned, these studies do not yet suggest that the disciplinary boundary surrounding doctrinal research has collapsed, or even that all Australian doctrinal researchers ought to become expert in social science research methods. On the contrary, the increasing reference to social facts in judicial decision-making *without proper*

[13] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457. For a more recent version of this call, see Bob Hepple, 'The Renewal of the Liberal Law Degree' (1996) 55 *Cambridge Law Journal* 470, 481 (arguing that law students should acquire 'at least the ability to comprehend the evidence and methods of social scientists').

[14] See McCrudden, above n 5.

[15] Burns and Hutchinson, above n 7.

empirical support arguably licences Australian doctrinal researchers to follow suit.

This is not the whole story, however. One of the social functions legal academics have traditionally performed has been to hold up a mirror to prevailing judicial-reasoning methods to reveal their weaknesses and improve their rigour.[16] Legal academics have to this extent acted as a sort of doctrinal clean-up team, noting changes in judicial-reasoning methods, and suggesting ways in which these changes can be accommodated without compromising the legal system's foundational commitment to fair and rational decision-making. If that is correct, there is clearly considerable merit in Burns and Hutchinson's argument that undergraduate law school students need to be trained in empirical research methods.[17] As the legal professionals of the future, law school students need to be able to refer to social facts and generally deploy newer forms of reasoning in the most rigorous way possible, if only to ensure that bad empirical arguments do not prejudice their clients' interests. The same goes for higher degree research (HDR) students, although in this case, as we shall see,[18] there is an independent reason to offer empirical research methods training that is associated with the diversification of legal research over the last forty years.

The fact that there are strong arguments for introducing empirical research methods training at both undergraduate and postgraduate level does not mean, however, that doctrinal research in Australia has lost its disciplinary distinctiveness. While suggestive of some blurring of the divide between doctrinal research and social science research, doctrinal research still evinces several characteristics that justify classifying it as a separate discipline with its own distinctive rationale and methods. In addition to the conceptual clarification and harmonisation work already noted, doctrinal research has a normative dimension, in so far as it seeks to compare the moral attractiveness of different understandings of legal doctrine. Often, the social effects of a proposed legal norm are not in dispute as an empirical matter. What needs to be analysed is whether the norm may be reconciled with core legal-systemic values, and whether the norm is generally one that is morally desirable. No amount of social science research training will help doctrinal researchers resolve these sorts of questions (although a little moral philosophy might assist). It is this unique blend of conceptual, empirical and normative argument, together with a participatory-insider perspective, that distinguishes doctrinal research from the law-related research

16 The classic example is Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, 1960) (recommending a return to the 'Grand Style' of adjudication).

17 Burns and Hutchinson, above n 7.

18 See section 2 below.

undertaken by scholars from other disciplines. When the undeniably useful social function that doctrinal researchers perform is added to the mix, the case for the continued recognition of doctrinal research as a distinctive academic discipline is strong.

The second critique of the disciplinary distinctiveness of doctrinal research concerns the so-called 'interpretive turn' in the social sciences.[19] Here, the argument is that researchers in other disciplines, including the sociology of law, anthropology, legal theory, and political science,[20] are increasingly adopting a hermeneutical approach to the study of law and legal institutions that seeks to understand legal phenomena by understanding the meaning that legal norms have for actors within the legal system. In this way, these researchers are supposedly colonising doctrinal research from the inside, again turning it into a species of social science research, although this time not a form of applied social science directed at improving law's effectiveness, but a form of interpretive social science research devoted to analysing and explaining the practices and traditions of the area of law being considered.[21]

While this critique is able to take account of the normative dimension of doctrinal research, and indeed of all the distinctive features of legal reasoning within a particular legal system, its claim to have collapsed the boundary separating doctrinal research from social science research is once again undone by the peculiar nature of doctrinal research as a participant act in the legal system. While both doctrinal research and interpretive social science research adopt an insider-perspective, the latter form of research typically does not offer its insights as a contribution to the understanding and construction of legal doctrine. Rather, such research is offered as a contribution to an external body of social scientific knowledge about law and legal institutions. That body of knowledge may include insights and empirical data (for example, on the social impact of norms) on which participants in the legal system may draw in argument. It may also be subject to post-modernist concerns about whether it is possible ever to adopt a

19 For a general critical discussion, see Michael S Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' (1989) 41 *Stanford Law Review* 871.

20 See for example Howard Gillman, 'The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-making' in Cornell W Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, 1999) 65.

21 See Mathias M Siems, 'A World without Law Professors' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 71; Geoffrey Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67 *Cambridge Law Journal* 288 (arguing that law's status as social science is uncertain, mainly because it is an authority discipline). McCrudden, above n 5, 643.

vantage point that is outside the value-laden ideologies that we use to make sense of the world. But it is nevertheless in the end a body of knowledge that is conceptually distinct from legal doctrine.

The implication of this argument is that the assessment of the quality of doctrinal research should be left to disciplinary specialists, and ideally to researchers working in the particular area of law concerned. This does not mean, however, that doctrinal researchers need not explain the criteria they apply when assessing the quality of their research. Since the quality of doctrinal research may affect such things as the academic reputation of a university's PhD program or a university's overall rating as a research institution, researchers from other disciplines have a legitimate interest in ensuring that rigorous standards are applied to the assessment of doctrinal research. Doctrinal researchers, too, might usefully benefit from having to be more explicit about the criteria they apply. The next section accordingly turns to the criteria for assessing the quality of doctrinal research, and in particular to the question whether these criteria might be influenced by (1) the legal-cultural specificity of doctrinal research; and (2) legal-theoretical differences about the nature of doctrinal research.

III STANDARDS FOR DOCTRINAL RESEARCH

There is a tendency nowadays to regard doctrinal research as somewhat old-fashioned, and its practitioners as mired in the ways of the past. But a significant number of legal academics in Australia, including some of the most talented early-career researchers and PhD students, still engage in this form of research.[22] There is also little doubt that doctrinal research is still needed by government and the profession and, as such, is socially significant.[23] Indeed, if anything, the social significance of such research has increased with the increased volume and complexity of statutory regulation and the internationalisation of many areas of legal work. Doctrinal researchers today must be familiar with more areas of law and synthesise more legal materials than ever before. Their work is crucial to the functioning of all major regulatory frameworks and to the integration of statutory law into the framework of common-law principles. By this measure alone,

[22] In a survey conducted at the University of New South Wales Law School (*What Makes You Tick? Report on a Survey of the Factors that Condition High Quality Research* (UNSW Law, 2013)), 71% of respondents characterised their research as socio-legal, but there was a marked trend towards either pure doctrinal or pure theoretical research among younger researchers.

[23] See Jeremy Webber, 'Legal Research, the Law Schools and the Profession' (2004) 26 *Sydney Law Review* 565 and Harry T Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91 *Michigan Law Review* 34 (bemoaning the trend away from pure doctrinal research in the US).

such research deserves to be publicly funded and its practitioners recognised as valuable members of the academic community.

But the value of doctrinal research is not always understood. To non-lawyers, the preparation of a legal textbook may seem like an entirely descriptive undertaking in which the author does no more than summarise court decisions and put them into some kind of logical order. In a, still relatively formalist, legal culture such as Australia's, this problem is exacerbated by the tendency of doctrinal researchers to play down their discretionary interpretive choices. Far from foregrounding the often considerable analytic work that goes into their preparation, legal textbooks and journal articles typically conceal the process of their construction and thus come across as more descriptive than they really are. Adherence to the conventional criteria of sound doctrinal research in this way actually works against the acceptance of such research as academically credible.

For the most part, this problem has few practical consequences. Doctrinal researchers typically do not require major grant funding. They also tend to publish their work in specialist law journals where the criteria for good doctrinal research are intuitively understood. But there is at least one setting in which doctrinal research is unavoidably subject to the standards applied by other disciplines, and that is the supervision and examination of PhDs. Most Australian law faculties today conduct annual progress reviews in which the scholarly quality of PhD research projects is assessed. The very notion of a PhD in law also assumes that some kind of cross-disciplinary standard must be met. Even when annual review panels are composed entirely of legal academics and where examiners are themselves academic lawyers, the criteria they are expected to apply are framed in cross-disciplinary terms. In effect this means that, however intuitive, and however resistant to specification in social science terms, the criteria for good doctrinal PhD research must be recast in terms that fit, or at least are not antithetical to, the standard elements of a sound doctoral research dissertation, namely a clear and confined research question, a comprehensive and targeted literature review, an appropriate methodology that is rationally related to a governing theoretical framework, and a plausible statement of the project's research significance.

Two features of doctrinal research in particular make these standard elements difficult to apply: (1) the fact that doctrinal research is often presented in a highly rhetorical style; and (2) the fact that the criteria for sound doctrinal research, quite apart from doctrinal PhD research, are rarely articulated.

The first point goes to the form in which doctrinal research is presented. The style, like that of legal-professional practice, is often very argumentative: the aim is to undermine, by verbal dexterity rather than empirical refutation, the weight of contending

viewpoints — the very antithesis of the style most scholarly disciplines regard as necessary to the production of reliable knowledge.[24] This makes the idea of falsifiability, in particular, difficult to apply to doctrinal research. In one of the first confirmation of candidature reviews conducted at my own law faculty, for example, a very able student attempted to treat the rival understanding of legal doctrine that his research was aimed at refuting as his research hypothesis. This somewhat harrowing experience convinced us of the need for a set of discipline-specific guidelines that we could use to translate the standard elements of a doctoral dissertation into criteria that made sense to doctrinal researchers.[25] The outcome was not altogether satisfactory: it soon became clear that there were as many views on how the standard elements ought to be recast to suit doctrinal research as there were members of the committee drafting the guidelines. But the exercise was nevertheless instructive for what it revealed about the compatibility of doctrinal research with the standard PhD elements.

Our main insight was that doctrinal research does not proceed on the back of a research question in the traditional sense, i.e. a question aimed at filling a gap in a defined body of scholarly knowledge. Instead, doctrinal research is directed at addressing an alleged lack of coherence, disputed issue of application or normative shortcoming in a defined area of law. While there are similarities between the two types of research question, the body of knowledge in the case of doctrinal research is legal doctrine itself. Crucially, too, the method used to answer a legal-doctrinal research question is seldom a purely empirical one, although factual data may be relevant to the argument. Rather, the method is to wield the reasoning norms of the legal system concerned to arrive at a convincing statement of the law. On the one hand, this makes doctrinal research a highly institutionalised type of research in which the range of permissible arguments is tightly circumscribed by the system-specific conventions of sound legal reasoning. On the other, these criteria are seldom made explicit, but are instead assumed to have been internalised by the recipients of the argument in the course of their legal-professional socialisation.

The lack of explicit criteria for the assessment of doctrinal research is the second reason why the standard elements of a sound doctoral dissertation are difficult to apply to doctrinal research. In the absence of explicit disciplinary standards, particularly regarding methodological questions and the link between theory

[24] There are, of course, intense debates in other disciplines over this issue. See Brian Z Tamanaha, 'The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies' (1996) 30 *Law & Society Review* 163, 165.

[25] See UNSW Law Confirmation of PhD Guidelines (available from author).

and methodology, it is difficult for members of PhD review panels to give candidates clear guidance on how to satisfy these elements. This is a problem that doctrinal researchers urgently need to remedy if they are to convince scholars from other disciplines of the quality of doctrinal PhD research. To a lesser but still significant extent, it is also something they need to address if they are to convince academics from other disciplines of the quality of their own research or that of colleagues who are put up for promotion or who are seeking competitive grant funding. To this end, the rest of this section offers some tentative thoughts on the questions that need to be addressed, with a view to at least starting a conversation among doctrinal researchers about appropriate criteria for assessing the quality of their research.

As suggested earlier, the difference between bad (or simply uninteresting) doctrinal research and good doctrinal research has something to do with the difference between research that is purely descriptive, in the sense that it merely restates uncontested legal propositions, and genuinely analytic research in the course of which the researcher pushes through settled legal questions to address questions that are complex and unresolved in the legal system. The skill set required to perform this task includes the ability, on the one hand, clearly and succinctly to express the norms (principles, standards and rules) that are relevant to the area of law under examination and, on the other, creatively to develop the implications of settled law for unresolved questions. Thus, for example, new technological developments may throw up novel questions of liability for harm caused. In this instance, good doctrinal research will anticipate the types of question that might arise in litigation and suggest how they ought to be decided. It might also suggest the need for law reform to the extent that the problems arising are not amenable to judicial resolution. Another standard type of doctrinal research concerns recently enacted legislation, where the implications of the new statutory framework for current legal practice need to be teased out. Such research may also address itself to the likely effectiveness of the legislation in achieving its objectives—not in general policy terms, but in the narrower sense of whether the legislative drafter has properly thought through how the legislation fits into the existing body of law. One of the important social functions doctrinal researchers perform, as these examples indicate, is to assist law-makers and judges in grasping the system-wide implications of novel legal developments, whether these take the form of judicial decisions or statutes.

On this understanding, good doctrinal research is both a matter of experience (which concerns whether the researcher knows and understands all the legal materials potentially relevant to the question being addressed) and skill (which is about whether the writing is economical and disciplined, technically accurate but also

creative in its anticipation and resolution of likely questions of law). The best doctrinal researchers are able to draw on a vast field of reference, and are familiar with a lot of positive law (both local and foreign) that potentially has a bearing on the questions they are addressing. In this way they are able to see system-wide implications of new legal developments that less experienced researchers may miss. They are also able to resolve questions arising in ways that promote greater coherence in the affected body of law.

As to the question of skill, the best doctrinal researchers are expert rhetoricians in as much as they are able to use language to produce a legal 'truth effect' — a statement of the law that appears to a person familiar with the area of law concerned to be more persuasive and compelling than the other contending interpretations. To non-lawyers, as noted earlier, this rhetorical style may be quite alarming. Instead of exposing propositions to the possibility of contradiction, the purpose of the exercise is to undermine contrary arguments and artificially foreground evidence that favours the conclusion being contended for. When mistakenly used to present non-doctrinal research findings, this style is indeed cause for concern, and one of the major reasons why legal researchers have come under attack by scholars from other disciplines.[26] In pure doctrinal research, however, the style is permissible — indeed it is desirable — provided that opposing arguments are given their due. The best doctrinal research thus does not try to suggest that there is only one legally plausible way of resolving a question, but that, of the several available, one is preferable to the others for reasons of technical fit, social consequence, and normative attractiveness.

The relative weight that doctrinal research gives to these three criteria is partly a matter of legal culture and partly a matter of legal-theoretical approach. Some legal cultures prioritise giving effect to the moral and political considerations informing a legal rule over strict adherence to the application of the rule according to its semantically defined scope. The point is expressed in the notion of the weak American doctrine of precedent, which reflects US legal culture's greater tolerance for consequentialist policy reasoning.[27] This legal-cultural difference, as noted earlier, is reflected in doctrinal scholarship, so that articles in US law reviews tend to focus to a greater degree on the consequences of competing legal-rule choices than articles in English or Australian law journals, which are more preoccupied with questions of semantic scope. It follows that good doctrinal research is partly in

[26] See Epstein and King, above n 2. For a defence of the rhetorical style used in legal research, see Jack Goldsmith and Adrian Vermeule, 'Empirical Methodology and Legal Scholarship' (2002) 69 *University of Chicago Law Review* 153, 156.

[27] See Atiyah and Summers, above n 12, 5-11.

the eye of the beholder, in as much as a US legal academic reading an article in an Australian law journal might find the argument overly formalistic, while an Australian reading an article in a US law review might be unnerved by how little 'actual law' is being discussed.

Legal-theoretical differences about the nature of law and legal reasoning should also, in theory, affect assessments of the quality of doctrinal research.[28] For example, on the theoretical approach associated with the work of Ronald Dworkin, legal professionals (including judges, but also legal academics engaged in doctrinal research) do not go outside the law to resolve a question of legal interpretation. Rather, the answer to every legal question must be sought in the practices of the relevant legal tradition, seen as an interpretive community.[29] It follows that there is no such thing as a gap in the law, and any analogy with the notion of a gap in a body of social science knowledge is misleading, and misses the fundamental nature of legal reasoning as an interpretive social practice. For legal positivists, by contrast, the law may run out in the same way that a body of social science knowledge runs out.[30] In this situation, the doctrinal researcher is required to fill the gap in the law using 'ordinary evaluative reasoning'.[31] On this view, the identification of applicable legal norms is a specialist undertaking that occurs in accordance with legal-professional conventions, but legal reasoning itself is not an autonomous form of reasoning distinct from the types of reasoning used in the humanities or social sciences.

Initially, these legal-theoretical differences appear to have profound consequences for the assessment of the quality of doctrinal research. On the first view, the answer to any doctrinal research question lies in resources always already present in the legal system — in the practices of the relevant interpretive community, retrieved and then creatively applied to the problem at hand. On the second view, the researcher needs to be familiar with the authoritative sources of law in the legal system concerned, and also the conventionally accepted criteria for reasoning from those sources to legally defensible conclusions. However, the law (in the sense of positively enacted legislation or judge-made legal rules) may, in the end, provide no answer to the question. In that case, the researcher must go in search of the answer unguided by law,

[28] See Jenny Steele, 'Doctrinal Approaches' in Simon Halliday (ed), *An Introduction to the Study of Law* (W Green, 2012) 5.

[29] See, for example, Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

[30] H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

[31] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) 310-24; Joseph Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 *Legal Theory* 1.

but rather using non-specialist forms of logical, moral and empirical argument.

It would seem to follow from this that the doctrinal researcher's (or the assessor's) underlying view of law should affect such things as the extent to which the doctrinal researcher is required to search for the answer to the research question in pre-existing legal norms as opposed to materials notionally external to the law. In reality, however, most doctrinal researchers do not espouse a particular theory of law. It is thus rarely the case that doctrinal researchers think consciously about how their own theoretical view of law might affect their presentation of the legal materials, or that a legal academic reviewing a piece of doctrinal research for a specialist law journal would recommend rejection of the piece on legal-theoretical grounds. For the most part, the legal-cultural factors just mentioned, operating as a function of legal academics' professional socialisation, are what determine the assessment of the quality of doctrinal research. Doctrinal research is in this sense an under-theorised type of research, one that is reliant much more on unarticulated standards inculcated through the researcher's legal-professional socialisation than it is on theoretically-driven standards.

The implications of this discussion for the assessment of the quality of doctrinal research, and doctrinal PhD research in particular, should now be apparent. Doctrinal research is a specialist undertaking that needs to be assessed in terms specific, not just to academic lawyers, but to the particular legal system and area of law in which the research is being conducted. While researchers from other disciplines will and should continue to criticise doctrinal researchers when they attempt to make arguments that ought to be made in the very different register of the social sciences, doctrinal researchers should not be forced to conform to social science research standards when they respect the traditional boundaries delimiting their discipline. This does not mean that doctrinal PhD research cannot be assessed according to some reworked version of the standard criteria, or that the notion of a doctrinal PhD in law should be abandoned in favour of a specialist professional doctorate like the SJD. But it does mean that doctrinal researchers need to articulate more explicitly the criteria used to assess the quality of their research. In relation to PhD research, this means thinking through how the standard assessment criteria need to be applied to conform to the nature and aims of doctrinal research. In other settings, such as the peer review of submissions to specialist law journals, this means going beyond the current 'I know it when I see it' approach, and spelling out the criteria actually applied.

IV STANDARDS FOR LEGAL RESEARCH THAT IS NOT PURELY DOCTRINAL

Despite the continuing social importance of doctrinal research, most current surveys of legal academics in the English-speaking world reveal that only a minority conceive of themselves as engaging in this type of research in its pure form or, what amounts to a slightly different thing, in pure doctrinal research *to the exclusion of other types of legal research*.[32] Logically, this must mean that most legal academics think of themselves as doing one of three things: (1) engaging in research that is wholly non-doctrinal; (2) engaging in interdisciplinary research (in the specific sense that their research is directed both at legal doctrine and at another body of scholarly knowledge); and (3) engaging in pure doctrinal research, but at the same time, as a *separate* undertaking, pursuing some other type of non-doctrinal or interdisciplinary research.

While categorisations of these other types of legal research are contested and liable to disintegrate when pressed, it is necessary to adopt some sort of categorisation in order to determine the extent to which legal research that is not purely doctrinal ought to conform to the scholarly standards emanating from other disciplines. The discussion that follows begins with socio-legal research, which is the most prevalent form of such research, and then moves on to 'law and __' research, comparative legal research, legal philosophy and its cognates (legal theory and jurisprudence), and the various critical approaches to law. In each case, the purpose of the discussion is to characterise the type of research in question and then to spell out the criteria according to which research falling into the particular category should be assessed.

A *Socio-legal Research*

'Socio-legal' (or 'law and society') research is an umbrella term that encompasses a vast array of research practices that are all concerned in one way or another with understanding law in its social context. At its foundation in the United States in the 1960s, the field was dominated by social scientists interested in using empirical methods to study the relationship between law and other

[32] The major study of UK legal academics is Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing, 2004). Cownie reported that 50% of legal academics surveyed thought of themselves as being engaged primarily in socio-legal or critical legal research. On the trend in the US, see Edwards, above n 23.

social processes.[33] Over the last twenty-five years or so, the field has come to incorporate the interpretive turn in the social sciences, so that the term 'socio-legal research' is no longer exclusively identified with empirical research, and instead encompasses any research on law and society that goes beyond the confines of traditional doctrinal research.[34] It is no wonder, then, that many Anglo-American legal academics think of themselves as pursuing this form of research: if they are not engaged in traditional doctrinal research then whatever else they are doing almost certainly falls under this capacious rubric.[35]

The sheer breadth of the term 'socio-legal research' undermines its usefulness for purposes of this article. Since so many different types of legal research fit under this heading, categorising a research project as socio-legal does not immediately suggest the standards by which it should be assessed. Rather, the standards will depend on the particular approach taken and the particular (combination of) methodologies used.

Two general points may nevertheless be made. The first is that the existence of a broadly defined field of socio-legal research tends to confirm the correctness of the earlier definition of doctrinal research as research that uses the conventionally accepted reasoning methods in a particular legal system to contribute to the construction of legal doctrine. It is precisely because doctrinal research is narrowly conceived in this way that the need arose for a separate term to describe the other types of legal research that began emerging in the 1960s. Similarly, if all that socio-legal researchers were doing was responding to the increasing reference to social facts in doctrinal argument, socio-legal research would not have emerged as a field in its own right. There is a difference, in other words, between the argument that doctrinal research must perforce become more empirical as the nature of legal practice changes, and the argument that socio-legal

[33] There are numerous detailed accounts of the foundation and continuing research interests of the Law and Society Association in the United States. See, for example, Lawrence M Friedman, 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 763, 773; Felice J Levine, 'Goose Bumps and "the Search for Signs of Intelligent Life" in Sociolegal Studies: After Twenty-Five Years' (1990) 24 *Law & Society Review* 7; Bryant Garth and Joyce Sterling, 'From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State' (1998) 32 *Law & Society Review* 409; Stuart Scheingold, 'A Home Away from Home: Collaborative Research Networks and Interdisciplinary Socio-Legal Scholarship' (2008) 4 *Annual Review of Law and Social Science* 1. In the UK, the Centre for Socio-Legal Studies at Oxford was founded with the express intention of conducting empirical research. See D J Galligan, 'Introduction' in D J Galligan (ed), *Socio-Legal Studies in Context: The Oxford Centre Past and Future* (Blackwell, 1995) 1 (also published as special issue of the *Journal of Law and Society* Vol 22).

[34] One only needs to look through any issue of the *Journal of Law and Society*, for example, to see that much of the socio-legal research published in the UK is of this sort.

[35] The leading UK study is Cownie, above n 32.

research has the capacity to overcome some of the limitations of pure doctrinal research. The first argument goes to the question of which research methods doctrinal researchers need to master if they are to be competent participants in the legal system in which they are working, the second to the value of socio-legal research as a distinct form of legal research.

The second general point is that, despite the capaciousness of the term when used to describe the multidisciplinary field of socio-legal studies, socio-legal research *as a distinct form of research pursued in the legal academy* may not be quite so unbounded. On the one hand, as we have seen, socio-legal research conducted by legal academics is clearly different from traditional doctrinal research. On the other, such research is arguably also different from pure (in the sense of mono-disciplinary) social science or humanities research on law and legal institutions.

The second of these suggested boundaries is more controversial than the first, and thus requires some justification. As noted, at its foundation in the United States, socio-legal research was driven mainly by social scientists and humanities scholars interested in studying the role of law in society. The field was multidisciplinary in the sense that it included scholars from a range of disciplines, and also academic lawyers interested in empirical research on law. In the United Kingdom, too, although driven much more by legal academics than by social scientists,[36] socio-legal studies developed as a meeting point for scholars from a range of different disciplines. As a multidisciplinary field, then, socio-legal studies is bounded only by its participants' shared interest in studying the role of law in society and their comparative lack of interest in traditional doctrinal research. Within this broad multidisciplinary field, however, the kind of socio-legal research that legal academics engage in evinces certain common characteristics. Trained as they invariably are in the law of a particular legal system, legal academics who engage in socio-legal research rarely abandon altogether their interest in contributing to legal doctrine, even as they throw off the *methodological* shackles associated with traditional doctrinal research. At the same time, however, they often have only an indirect interest in contributing to a free-standing body of social scientific knowledge about law. Rather, what drives them to engage in socio-legal research is an understanding that transforming doctrinal understandings is a powerful form of social intervention, and that the conventional techniques of doctrinal research do not always provide them with sufficient material to influence doctrinal understandings. They

[36] See Galligan, above n 33; Simon Halliday, 'Empirical Approaches' in Simon Halliday (ed), *An Introduction to the Study of Law* (W Green, 2012) 32, 33.

must thus paradoxically abandon the traditional methods of doctrinal research in order to achieve their primary purpose.

Socio-legal research of this sort is clearly very different from legal sociology or anthropology, even though its legal-academic practitioners may engage with these other kinds of socio-legal research in the multi-disciplinary field of socio-legal studies. Crucially, this distinction remains true despite the interpretive turn in the social sciences.[37] As argued earlier, notwithstanding their adoption of an internal perspective, interpretivist social science researchers who study law and legal institutions lack legal academics' defining aim of influencing legal doctrine.[38] It follows that, within the multi-disciplinary field of socio-legal studies, much of the research that legal academics do is best thought of as a particular kind of socio-legal research that is bounded, on the one hand, by traditional doctrinal research, and on the other by pure (in the sense of non-doctrinal) social science or humanities research. Its characteristic feature is not just its interdisciplinarity (for that is a feature of much socio-legal research)[39] but its pursuit of a particular kind of interdisciplinarity, one that attempts to synthesise the participatory-insider perspective of doctrinal research with the conceptual frameworks and methods of at least one social science or humanities discipline.

Defined in this way, the main risk to the quality of socio-legal research conducted by legal academics is that, by attempting to synthesise methods and conceptual frameworks from different disciplines, the research ends up doing justice to none of the disciplines on which it is drawing.[40] The added problem in this instance is that legal academics may not be trained in the social science research methods they are using.[41] There is thus a real danger that socio-legal research conducted by legal academics will fall between two stools: of no use to practising lawyers because it is framed in a form that cannot be taken up in doctrinal argument, and of no use to scholars in other disciplines because the methods used by those disciplines have not been properly understood or applied. At its worst, socio-legal research conducted by legal academics combines the highly rhetorical style of doctrinal research with shoddy empirical methods, more than justifying the sorts of criticisms that have been levelled against this sort of legal research in recent years.

The way to mitigate this risk is plain enough: legal academics should not undertake socio-legal research lightly, but should pay rigorous attention to the conceptual frameworks and methods of all the disciplines on which they are drawing. This means that socio-

37 See Moore, above n 19.
38 See the text accompanying notes 5-9 above.
39 See the literature cited in note 33 above.
40 This is a risk faced by all interdisciplinary research, of course.
41 This is, for example, the complaint made by Epstein and King, above n 2.

legal research is in fact the converse of what it is sometimes taken to be: an easy option for legal academics who feel constrained by the limits of traditional doctrinal scholarship but who cannot be bothered to become expert in another field. On the contrary, socio-legal research is an exacting form of research that needs to be separately theorised and in which both current and aspirant legal academics ought to receive specialist research training. Fortunately, an increasing number of law schools are attempting to do exactly this,[42] and the quality of the socio-legal research produced by legal academics has shown a marked improvement since its awkward beginnings in the 1960s. Today, legal academics who engage in socio-legal research may well have completed a PhD that included training in socio-legal research methods. There is also now a sufficiently large group of legal academics engaged in socio-legal research to ensure that research standards are maintained and that criticisms from scholars in the social sciences and humanities are responded to non-defensively, in a way that enhances the overall quality of this form of research.[43]

B *'Law and __' Research*

Over the last 40 years, a number of areas of research have emerged that are identified by the combination of the word 'law' with the name of an established social science or humanities discipline. Thus: law and economics, law and literature, law and psychology, law and anthropology, and so on. Collectively known as 'law and __' research, these forms of research are commonly thought of as being interdisciplinary in nature in as much as they combine an interest in law and legal institutions with an interest in

[42] On developments at New York University Law School, see Christine B Harrington and Sally Engle Merry, 'Empirical Legal Training in the US Academy' in Peter Cane and Herbert M Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 1044. In the United Kingdom, the Oxford Centre for Socio-Legal Studies and the University of Bristol are among several institutions that offer comprehensive postgraduate training in socio-legal research methods. In Australia, the Socio-Legal Research Centre at Griffith University provides training for PhD students doing socio-legal research.

[43] Recent books addressing research standards in this field include Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009); Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005).

one or more social science or humanities discipline.[44] As others have pointed out, however, the use of the term 'interdisciplinary' in this context is suspect: the mere fact that legal phenomena are the object of study from within a particular social science or humanities discipline does not mean that the research being conducted is aimed at synthesising the conceptual frameworks and methods of that discipline with the participatory-insider perspective of doctrinal research.[45] On the contrary, 'law and __' research may adopt either a wholly external perspective on law and legal institutions or the sort of internal-but-not-participating perspective associated with interpretive approaches in the social sciences.[46] The same is true of the sociology of law, political science research on judicial decision-making and legal history, none of which is properly described as interdisciplinary where the intention is to contribute to a body of social science or humanities knowledge about law and legal institutions.[47]

This is not to say, however, that 'law and __' research may not be combined with doctrinal research to become properly interdisciplinary. Much law and economics research, for example, is of this kind, i.e. it has both a legal-doctrinal dimension in so far as it seeks set out the law in a particular area, and a social science dimension in so far as it seeks to analyse the law thus set out from an economic perspective.[48] In this way, law and economics research typically attempts to do one of two things: either to suggest that a particular body of law already conforms to economic efficiency principles (as in research on the underlying economic logic of tort law, say) or that it should be reformed along these lines.[49] Both these types of law and economics research are concerned with understanding and contributing to legal doctrine. Neither is purely doctrinal, however, because an external economic perspective is brought to bear on the legal materials. In the first case, this perspective is used to analyse legal doctrine for

[44] See, for example, Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook on Law and Politics* (Oxford University Press, 2008), which includes chapters on 'Law and Society', 'The Analysis of Courts in the Economic Analysis of Law', 'Psychology and the Law', and 'Law and History' in Part IX on 'Interdisciplinary Approaches to Law and Politics'.

[45] See Wendy Martinek, 'Interdisciplinarity in Legal Scholarship' (2009) 19(1) *Law & Courts* 16, 16 ('scholarship that examines law through the lens of only one discipline – no matter how finely crafted and insightful – cannot be properly understood as interdisciplinary'). For a contrary view, see Timothy J Berard, 'The Relevance of the Social Sciences for Legal Education' (2009) 19 *Legal Education Review* 189, 189.

[46] The leading example of the wholly external approach is Donald Black, *The Behavior of Law* (Academic Press, 1976).

[47] These forms of research may be interdisciplinary in another sense, of course, where they combine two or more external social science or humanities perspectives.

[48] See Richard A Posner, *Economic Analysis of Law* (Little, Brown, 4th ed, 1992).

[49] Ibid.

its conformance to principles of economic efficiency that are either not suggested by the legal materials at all or, if present in the legal materials, are in competition with other legally immanent principles, such as justice and fairness. In the second case, the researcher uses an external economic perspective to recommend changes to legal doctrine, but once again in a way that prioritises principles of economic efficiency over other principles that, in pure doctrinal analysis, would be given more weight.[50]

Where there is no doctrinal dimension to the research being conducted, the question arises whether 'law and __' research should be classified as legal research. On one view, the term 'legal research' should be reserved for research that at least has some doctrinal element, failing which the research should be classified according to the social science or humanities discipline from which it emanates. On another, legal research includes any research on law and legal institutions. As a matter of usage, the broader definition seems to be preferred, and employment in a law school, particularly in the United States, no longer depends on a claim to specific doctrinal knowledge or to doing doctrinal legal research.[51]

Apart from employment in a law school, the other potential significance attaching to this issue concerns the location of PhD dissertations that have no doctrinal element. On the narrow interpretation of legal research as requiring at least some element of doctrinal research, such dissertations should be housed in the relevant social science or humanities school. Once again, however, this sort of disciplinary dogmatism has been overtaken by events. Given the increasing number of legal academics with social science backgrounds, or who have extended their research in this direction, there is no reason in principle why PhD dissertations that contain no doctrinal element could not be competently supervised in a law school. The pertinent question is not where the proposed supervisors of this kind of PhD dissertation are located, but whether they have the skills to supervise the research project in question.

[50] Ibid.

[51] There are several well-known and highly regarded law professors, including Bruce Ackerman at Yale and Tom Ginsburg at Chicago Law School, for example, who do little doctrinal legal research.

C *Comparative Legal Research*

Reference to foreign law as a form of non-binding, persuasive legal authority has long been a feature of doctrinal argument in the West.[52] In the last forty years, particularly after the advent of easily accessible electronic legal information databases, this practice has increased, so that knowledge of relevant foreign legal materials is today an essential part of every competent legal professional's toolkit. As with the growing number of references to 'social facts' in legal argument, this trend does not signal the end of doctrinal research as a separate academic discipline, but simply a change in the reasoning methods endorsed by the legal systems concerned. It follows that comparative legal research that observes the boundaries set by these changing methods is best understood as a form of doctrinal research — one that focuses on drawing out the lessons that foreign legal systems have to teach, but which is still recognisably doctrinal in so far as it is targeted at the construction of legal doctrine in a particular legal system.

Not all comparative legal research takes this form, however. The recent surge of interest in comparative constitutional law,[53] for example, is not restricted to scholars whose primary interest lies in contributing to the construction of constitutional law doctrine. Rather, much of this scholarship is aimed at contributing to a self-standing body of social science knowledge about the role of liberal-democratic constitutions, and particularly constitutional courts, in such processes as the consolidation of democracy and the promotion of human rights.[54] Although some of this work is indirectly relevant to doctrinal research, the contributors to this body of scholarship are interested in understanding these issues for their own sake. Their primary aim is not to use comparative-law learning instrumentally to throw light on doctrinal developments in a particular legal system, but to understand general patterns and themes across a range of legal systems.

As with empirical legal scholarship, comparative constitutional lawyers' intrusion in this way into terrain that has traditionally been the preserve of scholars from other disciplines has not gone

[52] See Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *Law Quarterly Review* 40; Max Rheinstein, 'Comparative Law: Its Functions, Methods and Usages' (1968) 22 *Arkansas Law Review* 415; Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006); K Zweigert and H Kötz, *Introduction to Comparative Law* (Tony Weir trans, Clarendon Press, 3rd ed, 1998); Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 *American Journal of Comparative Law* 671.

[53] See Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012); Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

[54] See, for example, Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

unremarked. Political scientists, in particular, have been quite dismissive of what they take to be legal academics' dilettantish attempts to contribute to the established field of comparative judicial politics.[55] The thrust of these criticisms has been much the same as the thrust of the criticisms directed at other forms of empirical legal scholarship. Comparative constitutional lawyers have thus been accused of knowing very little about the 'rules of inference' that determine how empirical facts about one legal system may be applied to another, and of cherry-picking examples that appear to support their argument.[56] As before, the recommended medicine is for legal academics to undergo intensive training in the relevant social science research methods, although the tenor of the remarks is such that this suggestion comes across as a prescription for avoiding embarrassment rather than an invitation to join a common research enterprise.[57]

Where the intention behind comparative law scholarship is to participate in the construction of legal doctrine, these critiques are obviously misplaced. Just as legal academics often do not understand empirical social science methods, so social scientists often fail to see the purpose of doctrinally-oriented comparative law research. The fact that there may be conventions of legal reasoning, for example, that authorise and legitimise reference to foreign legal materials in a particular way, may be completely lost on social scientists. As with other forms of legal research, however, social scientists do have legitimate cause for complaint where comparative legal research becomes more ambitious, and seeks to contribute to a self-standing body of social science knowledge about law and legal processes. In that case, even where their research retains some doctrinal element, comparative lawyers need to be sensitive to the conceptual frameworks and methods of the disciplines on which they are drawing, and familiarise themselves with the relevant social science literature.

D *Legal Philosophy, Jurisprudence and Legal Theory*

The Council of Australian Law Deans' *Statement on the Nature of Legal Research* mentions 'legal philosophy', 'jurisprudence' and 'legal theory' as forms of legal research that are 'more easily identified with the humanities' than the social

[55] See Ran Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007) 39.

[56] Ibid. See also Ran Hirschl, 'Editorial' (2013) 11 *International Journal of Constitutional Law* 1.

[57] See Hirschl, above n 55 (chastising comparative constitutional lawyers for their lack of attention to social science 'rules of inference').

sciences.[58] The Statement does not go on to distinguish these three terms from each other, and indeed they tend to be used interchangeably in the literature. If there is a disciplinary fault-line running through this area of legal research, it concerns whether legal philosophy should properly be seen as a sub-discipline of philosophy, or whether there is still a place for the sort of professionally-oriented theorising about the nature of law, and particularly adjudication, that drove the development of the field in the early part of the last century. Karl Llewellyn, for example, was a legal academic with no formal training in philosophy who nevertheless had profound things to say about the nature of legal education and federal-court judicial practice in the United States.[59] It is not certain that this sort of scholarship would still find a place in legal philosophy today.

Whatever one's view of this issue at a conceptual level, the practical reality is that most legal philosophers in the US, the UK, Canada and Australia are nowadays trained in philosophy.[60] The competition for academic positions is such that some sort of grounding in the broader discipline has become a prerequisite for appointment at most institutions. Equally, the increased specialisation of legal philosophy as an academic discipline means that legal academics who have no training in philosophy but who are interested in theorising about the law must do so largely from within their chosen area of doctrinal or socio-legal research. It is thus doubtful that contemporary practice would allow for the emergence of someone like Llewellyn. On the other hand, there is probably still space for someone like Tony Honoré, who came to legal philosophy through his joint inquiry (with H.L.A. Hart) into the role of causation in law.[61]

Of the three terms — legal philosophy, jurisprudence and legal theory — the last is perhaps amenable to a slightly broader interpretation encompassing all forms of theoretical inquiry into the nature of law and legal institutions. Thus, the term 'legal theory' conceivably encompasses theoretical work (in legal sociology, say) that is aimed at providing a framework for empirical research.[62] Some of the critical approaches discussed in the next section, which tend to draw on the continental European

58 See CALD Statement 4.

59 See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, 1960).

60 Chicago Law Professor, Brian Leiter's blog (<leiterreports.typepad.com>) is a useful source of information on hiring trends in legal philosophy in the United States.

61 See H L A Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985).

62 See Richard A Posner, *Frontiers of Legal Theory* (Harvard University Press, 2001) 2; D J Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 976, 977. The Australian Society of Legal Philosophy includes theoretical work in socio-legal studies within its remit.

tradition of social theory, are arguably also better classified as forms of legal theory rather than legal philosophy since the latter term carries connotations of the very different tradition of Anglo-American analytic philosophy. Finally, normative constitutional theory, while drawing on political philosophy, is more broadly theoretical in the sense that scholars in this field attempt to offer an ideal account of the institutional role of the court they are examining.[63]

These classificatory niceties do not matter for our purposes except in so far as they may affect the criteria applied to assess the quality of the work being produced. What the above discussion suggests is that, in the case of philosophical/theoretical research in law, attention to the particular tradition to which the research belongs may be more helpful than abstract labels. Thus, the quality of work being produced in analytic legal philosophy should ideally be assessed by someone working in that tradition, and so on. Having said that, there is something to be regretted about the current conversational distance between scholars working in analytical legal philosophy and critical legal theory; it is as though the two groups of scholars have retreated to their respective academic enclaves, content to snipe at each other from the confines of their own journals, but very rarely engaging in meaningful dialogue.[64] And yet, the assumptions underlying each of these traditions cannot both be true: law cannot be both a suitable subject for politically detached, conceptual inquiry and a necessarily conservative ideological discourse masking the domination of marginalised groups. Without a meaningful debate over the merits of these respective assumptions, the assessment of research quality in this area remains very much in the eye of the beholder, with those trained in analytic legal philosophy tending to regard work in critical legal theory as so much pretentious posturing, and those in critical legal theory tending to treat analytic legal philosophy as just another form of liberal apologetics.

Another pressing issue affecting the assessment of research quality in this area is the fact that, critical legal studies aside, there is very little cross-fertilisation between research in legal philosophy and doctrinal research. While some doctrinal researchers are interested in the philosophical foundations of their area of law,[65] they tend to discuss these matters independently of developments in legal philosophy. At the same time, theories of

[63] See, for example, Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 2nd ed, 1986).

[64] There is almost no overlap, for example, between the contributors to the leading analytic legal philosophy journals, *Legal Theory* and *Ratio Juris*, and Critical Legal Studies journal *Law and Critique*.

[65] Oxford University Press, for example, has recently launched a new series on the Philosophical Foundations of Law, which 'aims to develop work at the intersection of legal philosophy and doctrinal law'.

legal reasoning in analytic legal philosophy, as legal realists long ago complained, tend to work with a few standard examples. One might think here of Ronald Dworkin's use of *Riggs v. Palmer* and the almost total absence of any engagement with case law in the work of Joseph Raz.[66] It is as though analytic legal philosophers, even those who are ostensibly trying to understand the nature of legal reasoning, consider themselves to be above the humdrum business of close case analysis.[67] Doctrinal researchers, for their part, might reasonably reply that theirs is a practical discipline, with little time for philosophical reflection.

Is this something to be regretted? The causes of the phenomenon are fairly entrenched: doctrinal research *is* fundamentally a practical field of study aimed at reconciling and rendering coherent the messy output of legislatures and courts, and analytic legal philosophers are quite entitled to turn down the role of handmaiden to this enterprise, and to see themselves instead as pursuing conceptual inquiries into the fundamental nature of law. Still, the gap between the two enterprises does leave doctrinal researchers quite exposed to the charge that they are working in a purely professional discipline. Given that the charge hurts doctrinal researchers more than it does analytic legal philosophers, the initiative must come from them to give their discipline the necessary scholarly heft. Too much doctrinal research is under-theorised and ephemeral: providing dense summaries of primary legal materials without reflecting on these materials in a way that is likely to survive their currency as valid law.[68] Some engagement with the philosophical underpinnings of the area of law being studied, in a way that connects the issues being discussed to broader debates in legal philosophy, is surely the required antidote to extra-disciplinary censure here.

E *Critical Approaches*

As noted, critical approaches to law (including, for example, critical legal studies or 'CLS', critical race theory, feminist legal studies, Marxist legal theory and the legal-theoretical implications of Foucauldian discourse analysis) may be classified under the general rubric of legal theory.[69] But there is a need to discuss them separately because they pose a distinct challenge to the conception of doctrinal research propounded here. On the one hand, as a matter of practice, scholars working in critical legal theory, particularly CLS, can be intensely pre-occupied with legal

66 See, for example, Raz, *Ethics in the Public Domain*, above n 31.

67 One exception is Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, 2008).

68 See Terry C Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065, 1081.

69 See text accompanying note 58 above.

doctrine: they parse it, critique it, and ultimately try to collapse it from within by exposing law's claim to determinacy and with it law's claim to being an ideologically neutral medium for the control of political power. In this guise, critical approaches call into question the idea of doctrinal research as an essentially *reconstructive* enterprise. On the other hand, these approaches typically draw on postmodernist notions of the ineluctable ideological 'situatedness' of human knowledge. In this guise, critical legal theory problematises, not just the particular definition of doctrinal research propounded here, but also the very tenability of doctrinal research as an academic enterprise.

It is not possible to provide a full defence of this two-parted critique here. But there is space briefly to provide the outline of what a full defence might look like. The first dimension of the critical challenge is thus really a definitional matter, and may be dealt with accordingly. We might say, in other words, that the term 'doctrinal research' refers to the reconstructive enterprise of traditional doctrinal research. To the extent that a particular research project seeks to expose, not the indeterminacy or injustice of particular legal norms with a view to their improvement, but the thoroughgoing and ineluctable indeterminacy or injustice of law as a general matter, it should not be classified as 'doctrinal research', but as 'critical doctrinal research' or some such thing. Nothing in that response necessarily downgrades the value of critical legal research or prejudges the outcome of the still ongoing debate about law's determinacy and its inherent capacity for good/ideological obfuscation. There are simply two different enterprises, one reconstructive and the other deconstructive, derived from different traditions and deployed to different ends. As noted earlier, it is to be regretted that researchers working in these two traditions do not engage with each other more, but that is not a reason to abandon the sub-disciplinary labels if these prove useful in typifying, and ultimately assessing the quality of, the research in question.

The second dimension of the critical challenge is potentially more serious, although here doctrinal research is really in no worse a position than other traditional academic disciplines. If there is no such thing as a rationally accessible and ideologically-neutral body of doctrinal knowledge then there is no such thing as an objective body of social science or humanities knowledge about law and legal institutions either. This dimension of the challenge, operating as it does at a wide-ranging epistemological level, is not peculiar to doctrinal research and must be countered at that broader level. Pending the (unlikely) resolution of this issue, the mere existence of a postmodernist critique of the objectivity of knowledge is no reason to abandon doctrinal research, especially if the full force of the critique is not conceded and if doctrinal research can be shown to be socially beneficial. Of course, if the entire enterprise of social ordering through law is called into question, then the social

benefits of doctrinal research, as a facilitator of that enterprise, must be called into question too. But, once again, doctrinal research is not alone in being the target of this sort of critique and there is no reason, *peculiar to doctrinal research*, why the force of these arguments should be conceded.

V CONCLUSION

While the rapid growth and diversification of legal research over the last forty years has left the quality of legal research vulnerable to critique, the consequences of this development can be successfully managed. Doctrinal research, for its part, remains a distinctive form of research with its own particular rationale. While open to influence by social science conceptual frameworks and methods, there is no reason yet in Australia to conclude that this type of legal research is simply a form of applied or interpretive social science research. Doctrinal researchers could and often should do more to clarify the theoretical and philosophical foundations of their subject. Methodological standards in doctrinal research also need to be explained in a way that scholars who have not been trained in law can understand. There is, however, no obvious reason why doctrinal researchers should hand over control of these matters to others.

The same is true of the peculiarly legal-academic variant of socio-legal research. Although legal academics engaging in this form of research must respect the standards of the disciplines on which they are drawing, there is a need to defend what is distinctive about the socio-legal research that legal academics conduct, and to develop standards specific to it. Remaining questions include: What exactly does it mean for research to be both inside and outside the law at the same time? Is it really possible to share the participatory aims of doctrinal research but reject its methodological constraints? And what are the particular methodological challenges of this species of interdisciplinary research? Answering these questions will both enhance the quality of legal research and improve its integration into the intellectual projects of the humanities and social sciences. Of course, if legal academics fail to answer these questions effectively, they face the grim prospect of life on the academic margins, a barely tolerated species of professionally-oriented knowledge-worker. But there is no reason as yet to conclude that this fate is inevitable.