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PARADIGMS OF LEGAL RESEARCH CONNECTING THEORIES, METHODS AND PHENOMENA: DOCTRINAL, REALIST AND NON-LAW FOCUSED RESEARCH

Dr. Benedict Sheehy

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ABSTRACT

Legal research is important because the stakes are high for society as a whole, as well as for individuals' whose rights and duties are under analysis. The research is contentious, however, because there are deep philosophical disagreements about three main issues: what is law? what is "good"? and what is a desirable social order? In answer to the first question, although most legal scholars agree that law includes the texts of legislation and cases, there is intense disagreement beyond that basic phenomena. Debate about "good" and social order are matters of political philosophy and these are hotly contested as the visions of society offered by politically conservative and progressive scholars are markedly different. Desirable social order too is highly contested and reflects political philosophy. These three questions and their answers provide the often hidden foundations of the vigorous debate about appropriate topics and legal research methods. This article approaches the problem by engaging the disciplinary concepts of "theory," "method" and "phenomena" and applying them to legal scholarship. To do so, it develops three paradigms of legal research: Law as Text, Law as Social Phenomena and Law as Data, which provide distinct theoretical justifications and methods for approaching phenomena in legal research.

INTRODUCTION

Legal research is a topic of great importance both within and without of the legal academy.[1] As William Twinning observed, however, "law as a discipline has much to contribute to understanding of many topics and issues, both practical and theoretical, [but]… that important legal dimensions are often overlooked or ignored."[2] Effective, impactful research relies on clear disciplinary fundamentals, the theory-method-phenomena connection, which when combined, create a Kuhnian paradigm of research, necessary for knowledge creation.[3] This article argues that legal scholars' potential to make powerful contributions to the development of society through law reform, as well as simply communicate among themselves, is significantly diminished by insufficient attention to these disciplinary foundations.[4]

Every theory implies and is limited to certain phenomena, which in turn are best investigated using a particular method. Ignoring this connection is anathema in most disciplines and unsurprisingly, is grounds for rejecting work as pseudo-science. Addressing this issue of connections allows the article to achieve its three distinct but overlapping aims: 1) improving legal research by a sharpened focus on the theory-method-phenomena connection, 2) improving intra-disciplinary communication, and 3) better articulation of legal researchers' findings both internally and to society more broadly.

In law, the lack of attention to the theory-method-phenomena connection is fundamentally problematic, because it exacerbates the lack of interaction and effective communication between the different schools and traditions within legal thought. Two main schools dominate this intellectual landscape: the traditional positivists or formalists (particularly those associated with analytical jurisprudence)[5] who rely on doctrinal methods on the one hand,[6] and on the other, the wide array of realists.[7] These schools, as will be argued below, struggle to communicate to one another. As Professor Brian Bix notes, doctrinal positivists and realists may see each other "not as wrong, but simply

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[1] Legal research is clearly a topic of interest. A recent Google Scholar search for 'legal research' in the search parameter 'title' returned 4,600 results.
[2] William Twining, *The SLS Centenary Lecture Punching our weight? Legal scholarship and public understanding*, 29 LEGAL STUDIES (2009).
[3] THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, (Chicago. 1970).
[4] See Peter Ziegler, *A General Theory of Law as a Paradigm for Legal Research*, 51 MODERN LAW RW (1988), p. 574 for an example of this argument.
[5] BRIAN H. BIX, RESEARCH HANDBOOK ON MODERN LEGAL REALISM (Edward Elgar Publishing. 2021)., p. 486. These philosophies of law are identified as "liberal" and "social-welfare" by Jurgen Habermas, *Paradigms of Law* 17 CARDOZO LAW REV (1996), p. 771.
[6] These are contested terms within themselves, of course. For example, Hart notes at least five distinct meanings to the term "positivist" in HLA Hart, Positivism and the Separation of Law and Morals 71 HARV LR, 593, p. 601, n. 25.
[7]Bix, supra at p. 486.

as irrelevant to the concerns of their … work".[8] This divide, while understandable within the different streams of legal research, ought not be ramparts for some internecine war, nor ignored when planning or publishing research. A clear understanding of the underlying connections between theory, method and phenomena will facilitate communication and respect necessary for discussion and possibly even collaboration between the schools, strengthening law's voice, its contribution to justice and the development of society as a whole.

The article addresses this issue relationship between theory, method and phenomena through three further sections. The next section, the second, briefly reviews the disciplinary problems of law. The third section explains the nature, structure and functions of disciplines generally and applies them to law specifically. This section divided into three theory-based paradigms. These follow theories of law as: text, as social phenomena, and as data. Each of these sub-sections describe the theory-method-phenomena nexus in each of the three paradigms. The conclusion summarises and provides implications for researchers seeking to strengthen the contribution of legal scholarship to democratic debate, social progress and law reform.

I. THE PROBLEMATICS OF LAW

Legal scholarship is important because the stakes are high for society as a whole at a macro level, as well as at a micro level, for individuals' whose rights and duties are under analysis. Legal scholarship, however, is not a singular phenomenon: a significant proportion of legal scholarship today is interdisciplinary.[9] Legal research includes investigation of the myriad manifestations of rules, their justifications and societal implications. It includes considerations of the successes and failures of law in social ordering as well as the description, analysis and evaluation[10] of the implications of law for the legal system and more broadly, society generally. Further, it encompasses narratives, counter-narratives and arguments for reform.

Within the legal academy there is sharp disagreement about all aspects of legal scholarship. There is little agreement about law's foundational theories, phenomena of study, and related methods. Indeed, there is disagreement about whether law is an autonomous discipline at all.[11] As

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[8] Id. at. p. 480.

[9] If one accepts the idea that realism is fundamentally a sociological investigation of law. See Bix's discussion of Hart and Tamanaha in id. at. pp. 481-83. And Brian Bix, *Conceptual Jurisprudence and Socio-Legal Studies*, 32 RUTGERS LJ (2000).

[10] Benedict Sheehy, *Writing to Get Published: The Necessary Elements of Scholarly Journal Articles*, 10 THE INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE (2022).

[11] For a variety of views see: Susan Bartie, *Towards a history of law as an academic discipline*, 38 MELB. UL REV. (2014);Richard A Posner, *The decline of law as an autonomous discipline: 1962-1987*, 100 HARV. L. REV. (1986);Thomas S Ulen, *A nobel Prize in legal science: theory,*

Twining observes: "among academic lawyers there is a wide spectrum of assumptions and articulated views about the significance of law in social, political and economic life." [12] More profoundly, there is no agreement about the three disciplinary fundamentals of law: what is law? what is the "good" or "social vision"[13] law seeks to achieve? What is the social order or structure aimed at by law?

In answer to the first question, although most legal scholars agree that law includes the texts of legislation and cases, there is strong disagreement beyond. Debate about both the "good" and the preferred social order are matters of political philosophy and one would have to be living under a rock not to realise that there are markedly different visions of society offered by politically conservative and progressive scholars. This article provides an approach to communicating across these differences by engaging the disciplinary concepts of "theory," "method" and "phenomena"[14] and applying them to legal scholarship.

I argue that law's diverse conceptual theories, related multiplicity of methods and phenomena create a significant potential for legal scholars to make a rich contribution not only to disciplinary knowledge but to collaborate more constructively on the larger project of law, namely the improvement of social ordering through law reform. I argue further that a major obstacle to legal scholarship providing better answers and having a greater impact, results from a failure to explicitly identify and take sufficient account of the implications of theoretical frameworks, related methodological issues and selection of phenomena. Indeed, as Professor Nicola Lacey observes, legal scholars "puzzle about the relationship between conceptual and empirical, philosophical and social-scientific approaches to law".[15] Identifying and deciphering these puzzles is a first, important step to understanding how best to improve those contributions and it is to this that the article now turns.

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empirical Work, and the scientific method in the study of law, U. ILL. L. REV. (2002). Christopher Tomlins, *How autonomous is law?*, 3 ANNU. REV. LAW SOC. SCI. (2007);Posner, HARV. L. REV., (1986);Brian H Bix, *Law as an autonomous discipline*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES (Peter Cane & Mark V Tushnet eds., 2005);Pauline Westerman, *Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law*, *in* METHODOLOGIES OF LEGAL RESARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? (Mark Van Hoecke ed. 2011). Regardless of the position one takes on that issue, Bix identifies "the general trend in both England and the United States … *away from* legal autonomy, towards a more interdisciplinary approach." Bix. 2005. P. 976. Italics in original.

[12] Twining, LEGAL STUDIES, (2009). p. 530.

[13] Habermas, *Paradigms of Law* 17 CARDOZO LAW REV (1996), p. 771.

[14] MARIO BUNGE, METHOD, MODEL AND MATTER § 44 (Springer Science & Business Media. 2012).

[15] Nicola Lacey, *Philosophical foundations of the common law: Social not metaphysical*, OXFORD ESSAYS IN JURISPRUDENCE (OUP, 4TH SERIES 2000), OXFORD LEGAL STUDIES RESEARCH PAPER (2000)., p. 8.

II. A DISCIPLINARY APPROACH TO KNOWLEDGE IN LAW: CONNECTING THEORY, METHOD AND PHENOMENA

All disciplines have a tripartite foundation: 1) a theory which identifies, delimits and explains its phenomena and generates the problems it seeks to investigate, 2) an epistemology to determine what counts as knowledge, and 3) accepted methods for creating disciplinary knowledge. [16] Like every other discipline,[17] law has theories that create the boundaries that limit the scope of its domain, has a range of methods for creating that knowledge, and some agreement about what counts as knowledge.[18] What is notable about law, however, is the scope and depth of disagreement about all three of these disciplinary foundations—the isolated and at times hostile schools—as well as the paucity of attention and debate about these foundations and conflict. This section explores and describes the theory and schools. As a starting point, a discussion of the broader concept of theory is necessary to ground the later law specific discussion.

A. Theory

Theories can be divided usefully into conceptual and non-conceptual theories.[19] Conceptual theories –one's overall concept of the phenomena—provide boundaries and frameworks for a discipline or areas of investigation. They posit original, discipline specific categories and provide foundational explanations. By way of contrast, non-conceptual theories focus on relationships among the phenomena within the boundary set by the conceptual theory, and include theories about relationships of causation and correlation.[20] This conceptual landscape is described by Professor Thomas Ulen who states that theory provides: "a widespread and commonly accepted … core or paradigm."[21] Ulen goes on to note: "science seeks to articulate a

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[16] Stathis Psillos, *Having science in view*, THE OXFORD HANDBOOK OF PHILOSOPHY OF SCIENCE (2016). The account offered in the current article is certainly a simplified account, skipping over the many fundamental debates in the philosophy of science.
[17] This is not to argue that the disciplines are stable or have complete consensus. Tony Becher & Sharon Parry, *The Endurance of the Disciplines*, *in* GOVERNING KNOWLEDGE: A STUDY OF CONTINUITY AND CHANGE IN HIGHER EDUCATION A FESTSCHRIFT IN HONOUR OF MAURICE KOGAN (Ivar Bleiklie & Mary Henkel eds., 2005).
[18] A good review of these as well as a broader consideration of law as a discipline is available in Ulen, U. ILL. L. REV., (2002).
[19] BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (Sweet & Maxwell 6th ed. 2012). P. 12-14.
[20] Id. at. P. 12-14.
[21] Ulen, U. ILL. L. REV., (2002).6) p. 893 This view feeds into a larger debate as to whether or not law is a science Tracey E George, *An empirical study of empirical legal scholarship: the top law schools*, 81 IND. LJ (2006);Mark Van Hoeke, Methodologies of Legal Research: What Kind of Discipline for What Kind of Method? (Hart Publishing 2013).

logically consistent theory about a class of phenomena and then to subject that theory to systematic investigation to see if the theory accurately describes and predicts that class of phenomena."[22]

Such theory, however, is not an end in itself. Rather, as Westerman explains it: "The function of a theory [is]… to provide a heuristic perspective from which the object can be described in a meaningful way"[23]. Without a theory, all observations, analysis and efforts at evaluation fail in terms of producing credible knowledge. Scholars without a clear theory result in the situation described by Ronald Coase: "Lacking a theory, they accumulated nothing but a mass of data that was waiting for a theory or a fire."[24]

To conduct research, one must have a theory or conception of the class of phenomenon being studied. This collectively determined theoretical understanding of phenomena and related knowledge creation encounters a significant difficulty when applied to law. The reason it does is because it requires an answer to the fundamental question: what is law? This is both a conceptual theoretical issue and a phenomenological question: what is the appropriate object of study for legal researchers?

Law lacks an overarching theory. There is no big bang, or $E=MC^2$ underpinning and guiding legal research. Instead, the legal scholar either fumbles with a hodgepodge of ideas, ideologies and hopes, or works within the abstract, intellectual construct, a normative system comprising positivist legal theory's self-referential system.[25] The hodgepodge of ideas includes conceptions of law itself, justice, fairness and public good, the ideologies pursued include individualism, collectivism, freedom and control, and its hopes are for a better society, however that may be defined. The self-referential system of law can be analogised to the theological concern of medieval clerics who debated the number of angels that could be placed on the head of a pin—more about that later.

This theory problem in law is so fundamental and so widely acknowledged, if only implicitly, that by the 1990's Farber and Frickey could write:

> "For the past decade, legal scholarship has been dominated by the search for grand theory. In their search for the magic key that will unlock all the secrets of the legal system, scholars have turned

[22] Ulen, U. ILL. L. REV., (2002). 6) p. 882

[23] PAULINE WESTERMAN, OUTSOURCING THE LAW: A PHILOSOPHICAL PERSPECTIVE ON REGULATION (Edward Elgar Publishing. 2018).3) p. 122.

[24] Cited in Robert Cooter, *The Two Enterprises of Law and Economics: An Introduction to Its History and Philosophy*, UNIVERSITY OF BERKELEY LAW SCHOOL WORKING PAPER, WWW. LAW. BERKELEY. EDU/WPCONTENT/UPLOADS/2015/04/THE-TWO-ENTERPRISES-OF-LAW-AND-ECONOMICS. PDF (2015).

[25] NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Fatima Kastner, et al. eds. Klaus A. Ziegert trans., Oxford University Press. 2004).

> to sources like public choice theory, French literary theory, feminism, and microeconomics. This quest for abstract theory has taken many scholars increasingly far from the careful attention to particular cases which used to be the hallmark of legal scholarship."[26]

There has been no advance in the intervening years which would allow any significant amendment to that statement. At a theoretical level, Murphy and Roberts write: "legal theory has failed to provide any significant explanation or justification of what academic lawyers do (as is normally demanded of the theoretical component of a discipline) and thus of what academic law is or might be."[27]

Given the lack of consensus on the nature of the discipline and the fruitless search for theory, in addition to law's recursive method, it is unsurprising that legal scholars tend to avoid theory altogether. Much legal research reflects this issue: it is described as 'atheoretical',[28] or adopts a theory external to law as, for example, economics.

The absence of theory, whether over-arching or simply explicated, does not avoid the disciplinary issues of phenomena and scope. These are fundamental and cannot be avoided. Consider, for example, the three following critical, disciplinary questions: what is law? What is good? What is order (what is a preferred social order—whether libertarian anarchy, liberal democracy, or some sort of authoritarian organised society)? These are questions about law's conceptual theories, questions about the phenomena and scope of the discipline of law—all questions stemming from and answered by theory.

At a basic level, the majority of legal scholars share an abstract theory of law. The theory is this: law is a rule system that favours coherence, [29] and secondarily, it concerns the pronouncements of legal authorities.[30] As Professor Edward Rubin puts it, "Legal scholars approach law as a set of significant normative statements that are intended to comprise a meaningful

[26] DANIEL A FARBER & PHILIP P FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (University of Chicago Press. 1991). Pp. 5-6

[27] W.T. Murphy & S. Roberts, *Introduction (to the Special Issue on Legal Scholarship)*, 50 MODERN LAW REVIEW (1987). P 682 cited in Paul Chynoweth, *Legal research*, ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT (2008).

[28] WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (Cambridge University Press. 2009). p. 36.

[29] Rubin argues that a commitment to law as a rule system tending toward coherence forms the basis for a critical boundary in legal scholarship—the boundary between insiders and outsiders. Rubin continues with the view that researcher which takes an outsider perspective is not legal scholarship. Edward L Rubin, *Legal scholarship*, A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (2010).

[30] Conklin refers to this in both natural law and positivist traditions as the *arche*. WILLIAM E CONKLIN, THE INVISIBLE ORIGINS OF LEGAL POSITIVISM: A RE-READING OF A TRADITION § 52 (Springer Science & Business Media. 2001). p. 3

system".[31] Beyond these abstractions, however, there is no agreement. Rather, investigating these differences provides insight into a foundational divide in law's conceptual theories. It allows one to identify two distinct theoretical trajectories: first, the pronouncements as meaningful normative statements as the conceptual theory and second conceptual theory of law as a social institution. Both of these conceptual theories find expression in implicit and explicit non-conceptual theories about the relationship of those pronouncements to other social. These two conceptual theories and related non-conceptual theories in turn lead to fundamental divides among legal theories and related research paradigms.

In broad terms, two main theories that contribute to overall research paradigms concerning the phenomenon and scope of law are readily identified.[32] On one side of the theoretical divide are those who examines the normative statements and connections between texts, and their principles, doctrines or rules. These doctrinal positivists whose phenomena and scope is limited exclusively to the study of legal texts[33] and legal doctrines and the related group of analytic theorists who ask questions about "legal concepts (e.g. the nature of legal rights, legal powers, etc").[34] These legal doctrinal scholars (closely associated with analytical philosophy)[35] rely on a combination of textual interpretation and doctrinal extrapolation, all lumped into what is referred to as "doctrinal method"[36] and answer that law is a set of general rules promulgated by recognized authorities and found in the text of legislation and cases.[37] For purposes of convenience and as discussed further below, this group will be referred to as "doctrinal scholars" or "doctrinal positivists".

Problematically, however, none of the three disciplinary questions—what is law? what is good? what is order?—can be answered definitively or exclusively by reference to cases, legislation nor legal doctrines. Although the core of the theory "law as a rule-based order for social good"—found in variety of expressions in constitutions around the globe—is clearly within law, the

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[31] Rubin, A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, (2010). p. 562.

[32] The interest among legal scholars is broad and of course, there is considerable contest within and at the peripheries of groups, or in Hart's language, "penumbra", of these two broad theoretical schools, positivist and realist, but for purposes of this article, the descriptors are useful. Susan Bartie, *The lingering core of legal scholarship*, 30 LEGAL STUDIES (2010). Tamanaha's Herbert LA Hart, The Concept of Law, with a postscript edited by Penelope A. Bulloch and Joseph Raz (Oxford: Clarendon Press 1994). P. 615. And for an accessible overview, see BIX, Jurisprudence: theory and context. 2012.

[33] Andrei Marmor, *Exclusive legal positivism*, (2004).

[34] BIX. 2021. P. 480

[35] Id. at.p. 479

[36] Terry Hutchinson & Nigel Duncan, *Defining and describing what we do: Doctrinal legal research*, 17 DEAKIN LAW REVIEW (2012).

[37] Id. at. P. 97.

broader theory and related hypotheses are sociological, philosophical, and political theories beyond text. In other words, the basic answers to the disciplinary questions are all beyond the scope of the positivist theory of "Law as Text" and its related method of doctrinal research. This limitation severely limits law's ability to say anything beyond the meaning of the text and its relationships with other texts. As will be discussed, this theory has significant implications for what legal scholars can offer in terms of law reform: they can say nothing about law's effects.

On the other trajectory, scholars' whose conceptual theories theorise law as social phenomena posit as more than merely normative pronouncements and go on to investigate how law works and how society orders itself according to law and accordingly offer prescriptions for law reform based on social effects. Such conceptual theories of law assume that law is both causal of social ordering and a reflection of that ordering, and in turn, that law reflects a society, its culture,[38] its norms and the accepted justifications of its society. This group, both culturalist norm scholars and instrumental pragmatists,[39] the Realists for purposes of this article, identify the phenomena and scope of law in terms of social institutions and are interested in a broad range of phenomena beyond text. As Twining lists them, legal phenomena so classified have a broad scope: "socio-legal concepts such as function, facts, dispute process, institution, and even judge, lawyer, and court, even though describing, interpreting comparing, generalizing about, and explaining legal phenomena."[40]

These scholars have a theory of "law as a rule-based order for social good" and explore the disciplinary questions beyond the pronouncements in the text. Indeed, Lacey correctly describes much legal research as expressing a "vision of law as the sort of spatially and historically specific phenomenon which is susceptible of social-scientific inquiry. [These] values and ideals of a political society change over time; conceptions of conduct, agency and responsibility shift; geo-political and economic circumstances."[41] As a result, this broader conceptual theory of law acknowledges the changes of social context as driving the need for on-going law reform and as justification for consideration of non-black letter law phenomena. Following on from this conceptual theory, law reform is not solely a response to interpretation problems or matters internal to the normative frameworks, law's doctrines, as found in the texts of the cases and legislation.

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[38] See, for example, David Nelken, *Using the concept of legal culture*, 29 AUSTL. J. LEG. PHIL. (2004).
[39] Annelise Riles, *A new agenda for the cultural study of law: Taking on the technicalities*, 53 BUFF. L. REV. (2005).
[40] William Twining, *Legal R/realism and Jurisprudence: Ten theses*, (2016). P. 136
[41] Lacey, OXFORD ESSAYS IN JURISPRUDENCE (OUP, 4TH SERIES 2000), OXFORD LEGAL STUDIES RESEARCH PAPER, (2000).

On the one hand, these problems in law's theoretical foundations have been exacerbated in the last half-century by law's difficulty in dealing with the challenges associated with postmodernity. The challenges posed by post-modernity, of course, extend to social inquiry more broadly. As Norman Blaikie writes "Social enquiry has lost its innocence…. For the past fifty years, the social sciences have been plagued by theoretical and methodological controversies …. followed by a period of dispute between a variety of theoretical perspectives and approaches to social enquiry." [42] Law has not escaped this controversy untouched. Feminist, critical race and broader institutional studies bear witness to this impact of postmodernity on legal research.

On the other hand, the divide in law's conceptual theory has been driven by professional necessity—a judge has yet to say: "a Foucauldian discourse analysis leads me to decide in favour of the plaintiff!". Lawyers are asked to solve problems by placing and evaluating them in relation to the authoritative normative statements. These differences are described sharply by McConville and "scholarly legal research is comprehensive and directed towards conclusions whereas practising lawyers are accountable to their clients who seek their professional advice and knowledge on legal rules, authorities and procedures."[43] Accordingly, law schools and legal researchers must teach a version of modernity, and it may be that this professional imperative is reflected in the turn back to formalism or "new textualism".[44] As the locale where the genesis of the next generation of legal scholars occurs, legal researchers produced in a professionally oriented school are set on a positivist path early on and may find it difficult to escape from it as they develop.

In sum, the discipline of is at odds with itself in terms of its conceptual theory, simultaneously adopting a theory of Law as Text pursing modernist textual interpretation and a theory of law as a social institution pursuing social justice and postmodernity. As scholars Douzinas et al note: "Contemporary legal theory is committed both to the major truth telling Enlightenment claims of clarity, logic, impartiality and analytical rigour, and to the normative demands of liberal equality, fairness and justice."[45] Further and problematically, Deborah Jones Merritt, observes, "Most scholars view justice from a normative perspective. They ask what the law should be or what

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[42] NORMAN BLAIKIE, APPROACHES TO SOCIAL ENQUIRY: ADVANCING KNOWLEDGE (Polity. 2007). P1

[43] WING HONG CHUI & MIKE MCCONVILLE, RESEARCH METHODS FOR LAW § 104 (Edinburgh University Press Edinburgh. 2007)., p. 2.

[44] See discussion in Jim Chen, *Law as a species of language acquisition*, 73 WASH. ULQ (1995)., pp. 1267

[45] COSTAS DOUZINAS, et al., POSTMODERN JURISPRUDENCE: THE LAW OF THE TEXT IN THE TEXT OF THE LAW (Routledge. 1993).

principles inform a fair society."[46] These questions and their answers are not within the scope of text. This lack of consensus on a conceptual theory of law—the divide on the nature and scope of law—leads to legal research of lesser strength and power. Understanding this issue draws attention to the critical need for legal scholars to attend to the nature and role of the theory-method-phenomena connection.

B. Implications and Consequences of the Failure of Disciplinary Theory

In practical terms, there is a real impact on legal research as a result of lack of clarity on the three questions of law's conceptual theory—what is law? what is good? what is order?—and related answers. The result is that many legal researchers default to the professional paradigm, starting with a problem loosely defined as a 'legal issue' and an immediate turn to the text of cases and legislation—with some idea of doctrinal method floating in the back of their minds. The result is that legal scholars fail in their research due to lack of theory in one of three ways.

First, they fail to identify a conceptual theory of law—phenomena and scope—and so find themselves inadequately framing and contextualising their work and unable to connect their work with the broader scholarly community.[47] They fall into this error as a result of not explicating their prior philosophical commitments and underlying assumptions. These commitments and assumptions are critical, for as Collier put it "the alternative to philosophy is not no philosophy, but bad philosophy. The 'unphilosophical' person has an unconscious philosophy, which they apply in their practice—whether of science or politics or daily life."[48] And so it is for the law scholar as well: the alternative to an articulated theory of law informing research is not an atheoretical research but inadequately theorized research.

A second error that follows from the lack of a clear theory of law is methodological. Without a clear theory, it is practically impossible to work through methodological implications and limitations inherent in the theory and consequently, in the research. So, for example, a scholar may commit to a positivist theory of law and then claim social, behavioural insights. Consider, for example, proposals of law reform concerning the "reasonable person". If the proposal is to align cases coherently, such a reform may well be done exclusively through doctrinal analysis within the case law of the jurisdiction;

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[46] Deborah Jones Merritt, *Cognition and justice: New ways to think like a lawyer*, 69 ARK. L. REV. (2016). p. 47.
[47] Hutchinson & Duncan, DEAKIN LAW REVIEW, (2012). P. 97.
[48] Andrew Collier, Critical realism: An introduction to the philosophy of Roy Bhaskar (London: Verso 1994). P. 17.

however, that approach is unlikely to be a sufficiently significant reform. If, however, the reform purports to reflect community understanding as opposed to legal understanding of the concept, then a theory of law as mere cases and legislation is obviously, woefully inadequate. A similar and related third error that follows from unarticulated theory is a failure to follow through with the implications of the theory that leads to predictable errors in logic. For example, a scholar could adopt an implicit theory of law as social institution, engage in doctrinal analysis and fail to clearly articulate implications for society. This result eventuates because of a failure to articulate a vision for a just society—the imagined beneficiary of the proposed reform.

The failure to identify theoretical positions and related assumptions has resulted in among other things, legal scholars talking past each other. As Eidlin notes: “what questions people ask always depend heavily on their background knowledge and on what they are interested in.”[49] It reflects what Kelsen has described as legal scholars interested a different sets of questions.[50] These critical, foundational theoretical issues cannot be ignored if legal scholars are to speak to each other and make an impactful contribution to broader societal discourse. After all, as Maehle states: “Legal research aspires for improved understanding of law, an understanding that is richer, deeper or more comprehensive. Concerning what represents improved understanding, most legal researchers share some overarching research ideals.”[51] Understanding and identifying the conceptual theories and the overarching research ideals about law’s three basic questions is critical to effective, impactful legal research as well as communication among one’s disciplinary fellows.

The article turns from the theoretical to the methodological implications next.

C. Method

Theory and method are intimately connected—the latter must be derived from and follow the former. The theoretical foundations inform the methodological question: how, or by what steps or method, should the questions raised by the theory be answered? Put differently, the methodological question is: What method is most likely to generate answers that actually and best answer the question? As argued, obviously there is no consensus on theory of law and hence what type of discipline law is—whether some type of expository, explanatory, descriptive science (as Hart and others

[49] Fred Eidlin, *The method of problems versus the method of topics*, 44 PS: POLITICAL SCIENCE & POLITICS (2011). p. 759
[50] See also BIX. 2021. p. 480-81.
[51] Synne Sæther Maehle, *Pursuing Legal Research*, (2017). p. 144 (References omitted).

purport) or a normative, hermeneutical discipline (as advanced by Dworkin and others): it is theoretically ambiguous.[52]

To some degree, it is unsurprising to see this avoidance of theory and related methodological discourse as the bulk of legal scholarship is doctrinal.[53] The dominance of doctrinal positivism and doctrinal method can be illustrated by consideration the definition of the term “legal theory” found in Butterworths Australian Legal Dictionary. In that tome legal theory refers "to any academic analysis of the law which requires a degree of abstraction from the principles stated in case and statute-based law".[54] There is simply no mention of non-textual phenomena nor clear statement of method. In terms of methodology, doctrinal positivist legal scholars have determined that the logic of language, combined with doctrinal analysis, is the preferred (only?) method for revealing law’s truths.[55]

Problematically, likely because doctrinal positivism is so pervasive and uncritically adopted, some scholars have come to confuse theory and method. In their review of higher degree research students, Hutchinson and Duncan observed that, unlike the sciences which are expected to devote explicit consideration to matters of method, “doctrinal method is so often implicit and so tacit that many working within the legal paradigm consider that the process is unnecessary to verbalise.”[56] Yet it is critical to note that doctrinal research is not a theoretical paradigm. As Cambridge Professor of Law, Brian Cheffins, explains “Scholarship characterised as "doctrinal" or "descriptive" does not qualify as theory; rather, it is mere method.” [57] Cheffins goes on to describe this approach: “With legal research of this nature, the author typically seeks to organise and categorise legal rules ("doctrine") in a systematic fashion…. [and] involves an "internal" account of the legal rules that govern particular subject matter and tends to reflect a general preference for the coherence of law.”[58] Thus, it provides no theory nor justification of method—that is, it has not addressed methodological concerns.

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[52] See the outstanding essay Westerman, Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law. 2011.18). For an evaluation of the competing claims of law as descriptive versus law as normative, see Jules Coleman, “Methodology” in JULES L COLEMAN, et al., THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Oxford University Press Oxford. 2002). pp. 311-351

[53] See for an Australian example, Benedict Sheehy & John Dumay, *Examining Legal Scholarship in Australia: A Case Study*, 49 INTERNATIONAL JOURNAL OF LEGAL INFORMATION (2021). and Minow’s note concerning the quantity of her Type 1 in Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 J. LEGAL EDUC. (2013).

[54] Butterworths, (Peter E. Nygh & Peter Butt eds., 1997).

[55] Lacey, OXFORD ESSAYS IN JURISPRUDENCE (OUP, 4TH SERIES 2000), OXFORD LEGAL STUDIES RESEARCH PAPER, (2000).

[56] Hutchinson & Duncan, DEAKIN LAW REVIEW, (2012). P. 18

[57] Brian R Cheffins, *Using theory to study law: a company law perspective*, 58 THE CAMBRIDGE LAW JOURNAL (1999)., 198-99

[58] Id. at., 198-99

As an internally focused method it fails to provide a theoretical account of its phenomena and offers no conceptual theoretical account of its scope. Unlike most every other discipline in the contemporary university, law as a discipline is insular and self-referential. Its theory, method and phenomena are all within and internal to itself.[59] That is, law contains its own self-justifying theoretical framework, which means not only that it works in isolation from other theories (which in other disciplines set the constraints of scope and method[60]), but also that its theory forms part of its subject matter and method. As the philosopher Pauline Westerman describes it: "the theoretical framework commonly used by scholars who engage in doctrinal analysis is made up from the legal system itself. The legal system is not only the subject of inquiry, but its categories and concepts form, are at the same time, the conceptual framework of legal doctrinal research." [61]

Thus, doctrinal research relies on an implicit theory, namely, that law is, in Cheffins' words, "rules that govern particular subject matter and tend to reflect a general preference for the coherence of law". [62] As Hutchinson describes doctrinal method, it is "simply what 'legal puzzle solvers do'"[63] – simply legal puzzle solving with no explicit theory of the overall phenomenon. From a disciplinary perspective, however, method does not inform the nature or direction of research: theory does.

The main methodological challenge for any legal scholar whose theory of law extends beyond text is the challenge of determining and developing a method to answer the research question. Without a clearly articulated theory of law and related account of methodological considerations, the effectiveness and impact of legal research within and beyond the discipline, to articulate its knowledge is diminished. As Hutchinson notes: "lawyers are not conforming to the formalities of describing methodology in the same way that occurs in other disciplines."[64]

D. Phenomena

The nature of the phenomena available for investigation are determined by a discipline's conceptual theory. For example, geological theories about the processes involved in the creation of metamorphic rock are useful and appropriate for geological investigation; however, they are

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[59] Westerman, Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law. 2011.
[60] Pp. 88-90.
[61] Westerman, Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law. 2011.87.
[62] Cheffins, THE CAMBRIDGE LAW JOURNAL, (1999)., 198-99
[63] Hutchinson & Duncan, DEAKIN LAW REVIEW, (2012). p. 18
[64] Id. at. P. 97.

inappropriate and inapplicable for the problems studied by scholars of biological phenomena. So too, the problems appropriate for research within the discipline of law are determined by the conceptual theories of law in play. These theories range from textual and literary theories, to political philosophies, to economic theories on all manner of things from the structure of society, the economy and public good to individual responsibility and motivation in marriage, murder and a myriad of other activities. Further, like other disciplines aiming to expand knowledge of phenomena within their boundaries by using methods developed for those purposes, legal research seeks to understand its broad range of phenomena of text and beyond.

Unlike social or natural sciences, law, like any pure intellectual discipline whether mathematics, philosophy or theology, has a particular focus on coherent systems of thought. It is not that the sciences do not value coherence in thought: they do; however, coherence is as against other known phenomena with adjustment to theory rather than vice-versa—i.e. some 'legislative reform' or equivalent.

A challenge for law academics arises from their training in a professional school studying what is often conceived to be an applied discipline—a discipline which is focused on predicting what judges are likely to decide. This training requires a focus on the phenomena of the text of cases and legislation. This default phenomena, as it were, leads legal researchers to start with the assumption that the phenomena is text, and hence, the problem they are investigating is an issue of interpretation of a text. This default leads them to ignore methodological questions and simply take up the tools of doctrinal research. The consequence is that phenomena beyond the text, the phenomena under examination, are incorrectly or inadequately theorised, the method applied is inappropriate and hence the conclusions incorrect and/or unsupported.

This overview sets the stage for consideration of a framework for identifying and establishing the connections between the theories, methods and phenomena of legal scholarship, addressed next.

III. THREE PARADIGMS OF LEGAL SCHOLARSHIP: A THEORETICALLY INFORMED APPROACH

In this section, the three-paradigm framework theorising Law as Text, Law as Social Phenomena and Law as Data, is introduced and argued. My claim is not that it is a unique and universal framework. Indeed, there are other useful categorisations and schemas of legal research,[65] some with a

[65] Minow, J. LEGAL EDUC., (2013). Caprice L Roberts, *Unpopular Opinions on Legal Scholarship*, 50 LOY. U. CHI. LJ (2018). Mathias M Siems & Daithí Mac Síthigh, *Mapping legal research*, 71 THE CAMBRIDGE LAW JOURNAL (2012);Richard A Posner, *The Judiciary and the Academy: A Fraught Relationship*, 29 U. QUEENSLAND LJ (2010). In Canada, for example, see Harry W Arthurs, *Law*

methodological focus[66] and others developed on the basis of published topics or "archetypes".[67]

None of these prior classifications or schemas, however, identify the core problem of conceptual theory and related nexus between theory-method-phenomena. It is to focus on that issue that this article proposes the three categories or paradigms as providing a coherent approach to the theory-method-phenomena problem. That is, they follow consistent theoretical positions, provide interesting research questions about certain types of problems, provide appropriate methods to develop knowledge by answering those questions and solving those problems, and provide knowledge for the discipline of law and beyond.

The three broad categories and related theoretical positions are as introduced above: "Law as Text", "Law as Social Phenomena" and "Law as Data".[68] Each of these paradigms is based on different conceptual theories of law, addresses different types of phenomena, engages different methods to investigate different types of problems generating different types of knowledge.

The first paradigm is based on a conceptual theory of law in which law is text containing abstract, intellectual phenomena, authoritative pronouncements, creating a self-contained, internally focused normative system. In this theorisation, law's internal theories and methods have no need of connection to the rest of the academy or society. The second paradigm's conceptual theory of law is as social phenomena, part of the larger social system of a society, a systematized rule system and social institutions which express certain values and have social impacts within and beyond the legal system and its texts.

The third paradigm holds a conceptual theory outside of law, usually a social science, in which legal phenomena broadly construed provide data for other disciplinary investigations. In this paradigm which may or may not engage legal scholars, law is non-normative data to be collected and used for

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and learning: report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA (1983). In Australia, see Dennis Pearce, Enid Campbell and Don Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, Canberra, 1987). Siems & Mac Síthigh, THE CAMBRIDGE LAW JOURNAL, (2012). "law as a practical discipline", "law as humanities" and "law as social sciences"

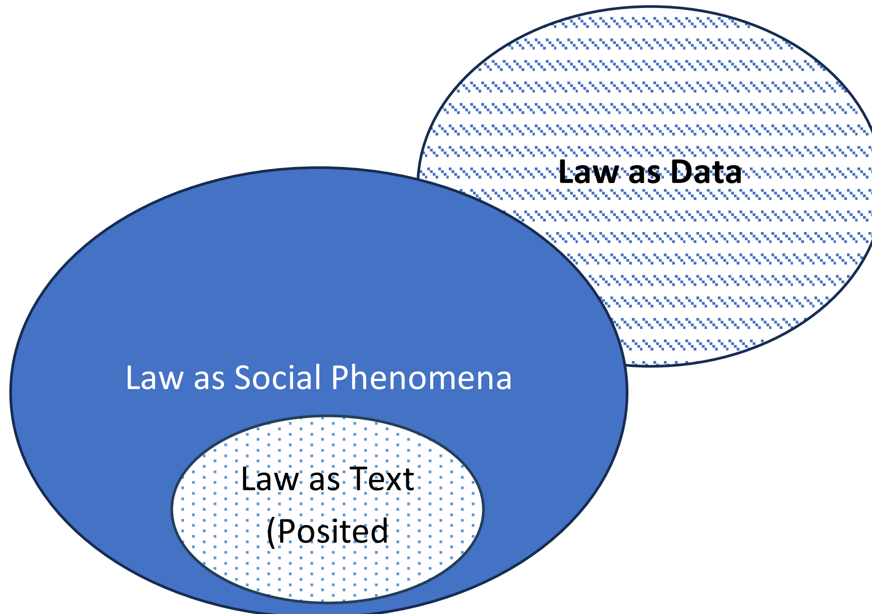
[66] Daly, Paul and Tomlinson, Joe, Introduction: The Importance of Methodology in Public Law Research (June 23, 2022). Forthcoming in Daly & Tomlinson eds., Researching Public Law in Common Law Systems (Edward Elgar, 2023), Ottawa Faculty of Law Working Paper No. 2022-21, Available at SSRN: https://ssrn.com/abstract=4144983

[67] Minow, J. LEGAL EDUC., (2013).26) Roberts, LOY. U. CHI. LJ, (2018).26)

[68] These categories are somewhat similar to Posner's Doctrinal, Non-doctrinal (social science) and theoretical which he describes as "jurisprudence crossed with politics". Posner, U. QUEENSLAND LJ, (2010).27) pp. 13-14.

other purposes. The relationship between these conceptual theories and related paradigms can be illustrated as per Figure 2 below.

Figure 2: Relationship between the Three Conceptual Theories



Although presented as three theories with distinct paradigms of scholarship, they overlap to some degree. They all deal with different aspects of law broadly conceived: the first and second theorising law as text and law as social phenomena—share questions about the normative content of posited law. The second and third, in turn, share both theories and methods and some questions about ramifications on social ordering, social critique, reform and social thought. As Chynoweth observes: 'some element of doctrinal analysis will be found in all but the most radical forms of legal research'.[69] Taking this view, some may argue that the Law as Text is not a form of legal research.

As is evident from the diagram above, the conceptual theory of Law as Text is co-terminus with the realm of posited law. Its theory, method and phenomena are prescribed by and limited to positive law. By way of contrast, Law as Social Phenomena paradigm's concerns overlap with positive law but extend beyond it in terms of theory, method and phenomena. Finally, the Law as Data paradigm all but ignores posited law at least in terms of normative content, but has some overlap with Law as Social Phenomena, but with the focus of attention elsewhere.

These conceptual theories and related research paradigms do not to categorise legal scholars. Scholars may well belong to various schools of thought and research, adopt different conceptual theories and use different

[69] Chynoweth, ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT, (2008).p. 31.

paradigms, switch between them and even be in opposing schools in different projects. As Bix observed, this switching or simultaneous practice poses a challenge for those who demand purist theoretical commitments[70]--although a level of clarity, if not purity, is often required for specific research projects. Rather, these paradigms are presented as conceptually coherent, valid alternative approaches to legal research. As Kelsen noted over half a century ago it is important to see "sociological jurisprudence [as] stand[ing] side by side with normative jurisprudence: neither is able to replace the other because each deals with different problems."[71] Understanding these paradigms co-existing and even co-extensive in some cases is critical to understanding legal research as a whole.

A. Law as Text: Abstract, Intellectual Phenomena employing Doctrinal Method

The first paradigm, "Law as Text", is positivist doctrinal scholarship. As illustrated in Figure 3, it focuses on the immediate problems of the posited, black letter law within the legal system of a particular jurisdiction. It is focused exclusively within the self-referential discipline of law in terms of conceptual theory and method and, like a mathematical model, has no existence external to or beyond itself. It has no theory of law as social phenomena.[72]

Thus, the theoretical stance of law in the doctrinal positivist paradigm is of law as a closed system of abstract phenomena, norms and rules (as

[70] BIX. 2021. p. 479

[71] What is Justice? (1971) p.269-70;

[72] Lacey writes: "On closer inspection, the internal/external distinction appears highly problematic. Sociological legal theorists accept that they are bound to attend to the distinctive qualities of law as a social practice – its doctrinal system, its institutional structure, its methods of reasoning and so on. Hence the sociological approach clearly takes seriously the 'internal' logic of law. What distinguishes the sociological approach is not so much a strict sociological methodology but rather a general commitment to theorising law as a social phenomenon. This commitment brings with it a focus upon the historical development of legal orders and their interaction with their social, cultural, political and economic context. Hence it is argued that analytical or normative jurisprudence can itself not dispense with these insights: that it makes no sense, to put it in Kelsen's terms, to try to 'discover the specific principles of a sphere of meaning' independently of the socio-historical context in which that sphere exists. Hence, as Cotterrell puts it, 'the enterprise of sociological interpretation of legal ideas is not a desirable supplement but an essential means of legal understanding.' Lacey Lacey, OXFORD ESSAYS IN JURISPRUDENCE (OUP, 4TH SERIES 2000), OXFORD LEGAL STUDIES RESEARCH PAPER, (2000)..

posited by humans)—with possibly some metaphysical[73] point of reference.[74] It is Austin's "laws (properly so called)" emanating from a proper authority, his "sovereign".[75] It needs no input from outside the domain of positive law (other than the sovereign), no non-law phenomena (e.g. social facts not admitted into evidence where they become legal facts), and as such ignores all but law's internal knowledge. It is, as noted, a theory of law closely associated with analytical legal philosophy[76] and associated with the view of law as an autonomous discipline.[77]

This view of law has been institutionalised for centuries as is evident from and nicely illustrated by Coke's rebuke of King James I. Coke declared that cases "are not to be decided by natural Reason but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and experience, before that a Man can attain to the Cognizance of it".[78] Although somewhat less popular in contemporary US scholarship today,[79] much of the UK and Australian legal scholarship remains within this paradigm.[80]

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[73] Lacey describes the consequence of analytic jurisprudence as "law is implicitly represented as founded – actually or ideally - on a metaphysics: a moral or conceptual structure whose validity transcends space and time." Id. at. p. 10.

[74] For example of the medieval origins of law's metaphysics, see Question 90, First Article, Reply to Objection 2, St. Thomas Aquinas, The Division and Methods of the Sciences: Questions V and VI of His Commentary on the De Trinitate of Boethius. Trans. Armand Maurer. Toronto: Pontifical Institute of Mediaeval Studies, 1986., published 2000 Hackett Publishing Indiana. For an example of the realist critique, see Felix Cohen Felix S Cohen, *Transcendental nonsense and the functional approach*, 35 COLUMBIA LAW REVIEW (1935).

[75] J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (W.E. Rumble ed., Cambridge University Press. 1995 ed. 1832).

[76] Bix observes the following differences: "legal positivism is a theory focused on the nature of law or the terms of legal validity, while analytical legal philosophy generally extends to discussions of legal concepts,… and a broader understanding of analytical legal philosophy would include competing theories about the nature of law, like natural law theory." BIX. 2021. p. 479-80 (references omitted). The paradigm leads into the law as literature of realism. Sanford Levinson, *Law as literature*, 60 TEX. L. REV. (1981).

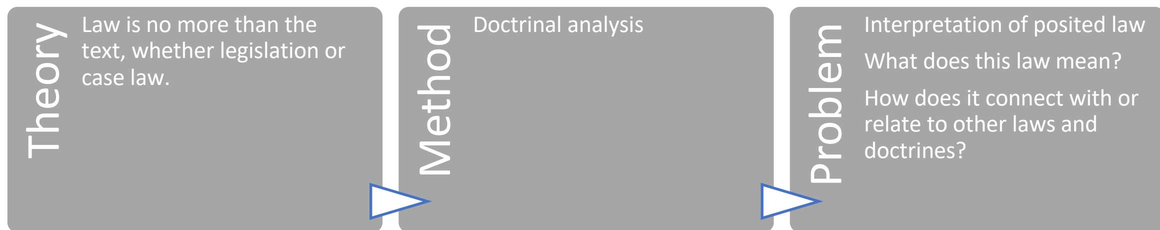
[77] See the excellent collection of essays in Van Hoeke. 2013. and in particular, Westerman, Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law. 2011.; See also Bartie, MELB. UL REV., (2014);Ulen, U. ILL. L. REV., (2002).6); Posner, HARV. L. REV., (1986).

[78] Coke 1907, 1343, quote in Bix. 2005.

[79] Id. at. p. 980. Brian Leiter, *Legal realism and legal doctrine*, 163 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2015). pp. 983 Yet as Leiter observes: "the legitimacy and viability of legal orders depend on quite a bit more than whether or not its outcomes are licensed by doctrine." P. 1983.

[80] Sheehy & Dumay, INTERNATIONAL JOURNAL OF LEGAL INFORMATION, (2021). Bartie, LEGAL STUDIES, (2010).359-363.

Figure 3. Law as Text



It works on the following conceptual theory of law: that law is and ought to be a coherent set of rules; that it is wholly and solely posited in text; that meaning is largely objective and can be determined on the basis of careful examination of words and their linguistic contexts. Following this theory, the aim of legal scholarship is a matter of interpretation and doctrinal analysis with the purpose of maintaining order norms "to create and maintain order" within the legal system.[81] Note the absence of evaluation of normative content, the ethical question of whether law x is good or desirable. As a conceptual theory which limits law to text, all such questions must necessarily fall elsewhere.

This conceptual theory holds that the printed words in question, the only non-intellectual phenomena under consideration, have either a) a plain meaning in the cases and legislation and the only relevant context is the grammatical and semantic context. Or alternatively, b) that the meaning of the words can be ascertained through 'legislative intent' or 'purposive readings' which are considered objective and available through purportedly objective doctrinal exercises. It excludes things like subjectivity problems in interpretation, analysis of doctrines and ambiguity in word meanings or grammar—questions about the words, grammar and syntax, that extend beyond 'the four corners of the document'. Law as Text is interested in the relationships between the various concepts—the principles, rules and doctrines—and phenomena internal to law. It theorises coherence and explores and analyses the texts for such. It is the theory of the professional lawyer, judicial officer and litigant. Law as Text lends itself to theorising law exclusively as jurisdiction specific rules--e.g. the Law of Canada, USA or Australia.Law as Text is interested in the relationships between the various concepts—the principles, rules and doctrines—and phenomena internal to law. It theorises coherence and explores and analyses the texts for such. It is the theory of the professional lawyer, judicial officer and litigant. Law as Text

[81] Westerman, Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law. 2011;WESTERMAN, Outsourcing the law: a philosophical perspective on regulation. 2018.3) p. 122

lends itself to theorising law exclusively as jurisdiction specific rules--e.g. the Law of Canada, USA or Australia.

In terms of methods, Law as Text research relies on doctrinal analysis for interpretation - i.e. the creation meaning from values enunciated in text—and for the analysis of related legal doctrines or principles. This paradigm relies on methods drawn from the traditions of antiquity and medieval scholarship--methods well-suited to metaphysical and philosophical concerns.[82] Today, however, beyond the two disciplines of theology and philosophy the methods of argumentation, logic, rhetoric and appeals to authority have little traction.

Further and unlike humanities which have no single canonical standard, law interprets the text and construes meaning with reference to an explicit hermeneutical framework, at least partially external to the text,[83] namely, the received canon of doctrines, principles (including interpretive principles), found in the common law. Distinguishing it even more from the humanities, which recognise the subjectivity involved in interpretation, and particularly so with the advent of postmodernism, law in this Law as Text paradigm views interpretation and doctrinal analysis as an objective exercise not tainted by human interests or biases.

The analysis next turns from theory and method to consider its application. It considers what problems are appropriate for this theory and method, makes comments on its place in legal scholarship, and finally describes its specific features and limitations.

1. Why it is useful

The doctrinal method is foundational to legal research. It has been described as: "the basis of the common law and … the core legal research method."[84] It follows the historical tradition explicated by Blackstone, going back to Bracton.[85] As Smits describes it, doctrinal research "aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law." [86] Doctrinal scholarship can be divided into descriptive

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[82] George Makdisi, *The Scholastic Method in Medieval Education: An Inquiry into Its Origins in Law and Theology*, 49 SPECULUM (1974).
[83] Consider, for example, the UK's "unwritten constitution".
[84] Hutchinson & Duncan, DEAKIN LAW REVIEW, (2012).
[85] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 1 (University of Chicago Press. 1765).
[86] Jan M Smits, *What is legal doctrine? On the aims and methods of legal-dogmatic research*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE (Rob van Gestel, et al. eds., 2017).

and prescriptive types.[87] Descriptively, it provides a systematisation of areas of law—how parts, rules and doctrines connect or interact, the limitations of those rules, and is useful for professional questions of what the law is when applied to judgements.

In its prescriptive form, doctrinal scholarship has two important functions. First, it enlivens law as a normative discipline, allowing scholars to examine and analyse the substantive principles and procedures as set out in the text and the relationships between and among them for coherence, logic and fairness all within the boundaries of the text. Second, it provides a basis for critique of judgments in terms of whether they are following prior law or failing to do so. In this role, it is able to provide recommendations to future law makers and judicial officers and direction for law reform.

The positivist researcher answers distinct internal disciplinary questions of law: 1) is this rule a valid law? 2) what rights and duties are involved? 3) to whom does the law apply? And 4) what action or restraint do those rights and duties allow, require, or prohibit? Obviously, it is the core of professional practice, the dominant approach to teaching substantive subjects in law schools[88] and addresses the necessary operational core of the legal system.[89] It is the necessary research paradigm for a professional, seeking to provide authorities and arguments for adoption by a judicial officer to justify state intervention on one side of a disagreement or another.

It is the pump, as it were, of the system interpreting, refining and revising old rules, developing new rules and doctrines, and developing new interpretations as new problems are presented to the legal system for resolution. In terms of its usefulness, it provides the building blocks for legal research of all types. For the practicing professional providing legal solutions to individual client problems, and providing authoritative law to judicial officers. It solves problems found within or internal to the legal system's norms without recourse to external facts or norms.

2. Example of Law as Text

Any number of law review articles could be cited as examples of doctrinal positivist research. John Hart Ely's famous article "The Wages of Crying Wolf: A Comment on Roe v Wade"[90] provides a well-known example. He sets up the article by stating: "The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a

[87] Rubin, A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, (2010). p. 564-68.
[88] Benedict Sheehy, et al., *What To Teach When Teaching Law: The Categories, Rights, Duties And Test ('CRDT') Framework*, CANBERRA LAW REVIEW (2022).
[89] Bartie, MELB. UL REV., (2014).34)
[90] John Hart Ely, *The wages of crying wolf: A comment on Roe v. Wade*, 82 YALE LJ (1972).

commissioner's regulation. On closer examination, however, the precision proves largely illusory."[91] Ely's elegant article then carefully works through the cases interpreting the 14th Amendment before coming to the conclusion that the case was improperly decided.[92]

3. Specific features and method

As a research method, doctrinal research has a number of peculiarities. It is the analysis, synthesis and evaluation of disparate doctrinal strands in an effort to develop general principles using both deductive and inductive methods of argument.[93] Hutchinson describes doctrinal as following a two-step model: first, locating the applicable legal text and second, interpreting and analysing the text.[94] This simple description, however, needs significant further description particularly in terms of its unique character differentiating it from other disciplines. Perhaps the best description along these lines is David Herring's:

> "The doctrinal scholar does not simply discover an aspect of the natural world. This scholar observes, organizes, and analyzes the law, and through this process, even if it is purportedly only descriptive in nature, participates in the human effort to construct the law and a particular society. She is not engaged only in the incremental discovery of what is. Rather, she is engaged in the incremental analysis of what is, and often the construction of what ought to be. By observing, explaining, analyzing and critiquing legal doctrine, the doctrinal scholar often attempts to channel, if not direct, the development of the law. The doctrinal scholar's participation in the process of constructing what is being studied (the law) differs markedly from the scientific scholar's process of discovery."[95]

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[91] Id. at p. 922
[92] Id.
[93] Council of Australian Law Deans, *Statement on the Nature of Research*, 3. http://cald.anu.edu.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf, cited in Hutchinson & Duncan, DEAKIN LAW REVIEW, (2012). p. 17
[94] Id. at. P. 20
[95] David J. Herring, *Legal Scholarship, Humility, and the Scientific Method*, 25 QLR 867, 873 (2007).

This method is a problem for legal scholars. The issue is that the theory-method-phenomena connection, rather than being an objective knowledge generating sequence, in doctrinal scholarship is circular. As quoted above, Westerman describes the issue thus: "The legal system is not only the subject of inquiry, but its categories and concepts form, at the same time, the conceptual framework of legal doctrinal research."[96]

A further aspect of legal research is its focus on internal coherence of the legal system—Law as Text's non-conceptual theory. In this regard, Westermann describes the peculiarity of this method with a smart metaphor. She writes:

> "The work of my legal colleagues reminded me very much of my mother, how, after having bought a new item for the household, was always busy, for hours it seemed, to find a proper place for it. It commonly brought with it a massive rearrangement of the entire household… but after all that was done our apartment looked as if nothing had happened and as if the order had never been upset."[97]

This wholly self-referential, exclusive method—sometimes described as autonomous—is foreign to all other disciplines in the academy except the pure disciplines of mathematics, philosophy and theology. Of course, where the new phenomenon, whether social practice or legal rule cannot fit into the existing order, this too is a worthy outcome of a legal scholarly project. It provides a case for changes in policy direction or law reform.[98]

A further peculiarity of this method is that, unlike social science researchers attempting to take an objective stance, it requires the researcher to be both positioned within and take an objective stance in relation to the legal texts they study. The legal researcher is expected to enter the subject matter of texts and interpretations (both scholarly and judicial), and to make fresh interpretations and connections between existing interpretations of rules and doctrines in an apparently objective manner. In short, the legal scholar is expected to be an interpreter located within the legal system and provide an objective interpretation of the system, its components and its

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[96] Westerman, Open or Autonomous? The Debate on Legal Methodlogoy as a Reflection of the Debate on Law. 2011. 18) P. 87

[97] *Id.* at 89.

[98] Benedict Sheehy & John Dumay, *Examining Legal Scholarship in Australia: A Case Study*, INTERNATIONAL JOURNAL OF LEGAL INFORMATION (Forthcoming).

outputs. This contradictory, internal-external positioning can create confusion even for the advanced scholar.[99]

Finally, as noted earlier and stated explicitly by Herring, doctrinal, positivist scholarship is normative—what law should be—as the scholar is "not engaged only in incremental discovery of what is… [but] often in the construction of what ought to be." [100] It is this normative feature that is particularly troubling when the underlying assumptions of what is 'good' and what societal ordering is preferred without acknowledgement let alone justification.

4. What are its limitations

Within the university, as Smits sees that "doctrinal work is under attack from at least three different angles: it is considered too provincial from an international perspective, too narrow from an interdisciplinary perspective and not creative enough from an academic perspective."[101] Taking Smit's critique further, broadly speaking and obviously, doctrinal positivist research does not sit well within the contemporary academy. It claims to advance knowledge using methods discredited at least a century ago in the social sciences,[102] and in many cases, it makes its claims based on methods such as logical deduction, rhetorical persuasion[103] and appeals to authority—methods rejected at least four hundred years ago as a result of the publication of Bacon's foundational exposition of scientific method in 1620.[104] Thus, methodologically it appears unsound. Beyond this first and fundamental issue, doctrinal positivism faces three significant additional challenges.

A first major limitation is its purported objectivity. In the first instance, it ignores the subjectivity of the interpreter. In a ono-conceptual theory of Law as Text, legal interpretation is viewed as an objective practice—a theoretical position that is evident through concepts such as objective tests, as for example, the reasonable person test.[105] A further and very significant

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[99] See, for example, R Brownsword, *Maps, Methodologies, and Critiques: Confessions of a Contract Lawyer*, METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE (2011).

[100] Herring, QLR, (2006).P. 873

[101] Smits. 2017. At 40

[102] BLAIKIE. 2007. At 10

[103] See for example, NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING (OUP Oxford. 2005).

[104] FRANCIS BACON, FRANCIS BACON: THE NEW ORGANON (Cambridge University Press. 2000).

[105] Alan D Miller & Ronen Perry, *The reasonable person*, 87 NYUL REV. (2012). John Gardner, *The many faces of the reasonable person*, 131 LAW QUARTERLY REVIEW (2015). Dolores A Donovan & Stephanie M Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. LAL REV. (1980). Kevin Jon Heller, *Beyond the*

implication of this paradigm's objective stance is that law operates as a system largely in the absence of human biases, politics, motivations, weaknesses and fallibility. In this paradigm, the researcher suspends questions about these matters and proceeds as if legal assumptions of objectivity were true. In this regard, similar to economists who assume humans are truly 'rational utility maximizers' knowing well that they are not"[106] Jerome Frank put it nearly a century ago, with respect to law professionals, "judges are humans".[107]

One major challenge to the purported objectivity of Law as Text comes from the well-known psychological phenomenon of motivated reasoning. [108] Put colloquially by Upton Sinclair the concept is easy to understand. Sinclair stated: 'It is difficult to get a man to understand something, when his salary depends on his not understanding it.'[109] There is clear evidence of motivated reasoning in judgments[110] and of course, by legal scholars and professionals of all stripes. Even if law is simply no more than text, its interpretation is far from an objective exercise.

Motivated reasoning and the failure to recognise it is particularly pernicious in law. Empirical work on judges' decision-making has demonstrated the extent and depth to which politically motivated reasoning has led to specific outcomes in legal cases.[111] Law is an exercise in wielding politically derived authority, and to pretend otherwise is both disingenuous and undermines law's credibility as an apolitical source of justice. Pronouncing a particular right or its demise as an apolitical, purely textual exercise or objective analysis of doctrines convinces few. This purported objectivity, is further challenged by the ahistorical approach taken to the

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Reasonable Man-A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases, 26 AM. J. CRIM. L. (1998).

[106] Nobel Economics Laureate Ronald Coase once said, "There is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness, and even this with incomplete success. … the argument of economists … that men work and think to get themselves out of trouble is at least half an inversion of the facts…. We spend as much ingenuity in getting into trouble as in getting out." RONALD COASE, THE FIRM, THE MARKET, AND THE LAW (University of Chicago Press. 2012). P. 4

[107] Jerome Frank, *Are judges human? Part one: The effect on legal thinking of the assumption that judges behave like human beings*, 80 UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER (1931)..

[108] Ziva Kunda, *The case for motivated reasoning*, 108 PSYCHOLOGICAL BULLETIN (1990)., Rune Slothuus & Claes H De Vreese, *Political parties, motivated reasoning, and issue framing effects*, 72 THE JOURNAL OF POLITICS (2010). Patrick W Kraft, et al., *Why people "don't trust the evidence" motivated reasoning and scientific beliefs*, 658 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (2015).

[109] Susan Ratcliffe, Oxford Essential Quotations (OUP 4th ed. 2016).

[110] Dan Kahan, et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment'(2016)*, 164 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2016).

[111] Id. at.

posited law. It assumes for the most part, that words and meaning are clearly defined that are stable across centuries.

A second challenge to law's objectivity comes from its inherent limitations as a logical discipline, an applied logic. Like legal interpretation, legal reasoning is not and cannot be simple formal application of logic leading to unambiguous conclusions. [112] Rather, logic is well understood to be contextually determined. Thus, what may be logical in the context of a family relationship, may be illogical in the context of dealing with an armed robber. Oliver Wendell Holmes recognised the problem disguised by logic. He observed:

> "The language of judicial decision is mainly the language of logic . . . [but] [b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious [political value] judgment . . . the very root and nerve of the whole proceeding. You can give any conclusion a logical form."[113]

A third issue stems from this paradigm's conceptual theory which limits phenomena to objective text and rejects a connection between law and morality. Matters of morality are not part of this paradigm of legal scholarship (despite its normative bent) and belong elsewhere. The consequence is of this exclusion of morality from the conceptual theory is that broad, underlying norms addressed in political philosophy, such as for example, justice, fairness and equity and their related programs for legislative and regulatory reform fall outside the scope of this paradigm of research when it is construed properly in terms of having a coherent theory-method-phenomena connection. Normative research agendas are available where instrumental theories of law are adopted, that is in institutional theories such as justice in social ordering or law aimed at improving social living—not law as text conceptual theory.

The constraint on normative comment is the logical consequence of the doctrinal positivist's conceptual theory of Law as Text. This theoretical stance limits the researcher to critiques of existing laws and proposing suggestions for reform only from within the posited law. Despite this commitment to the separation of law and morality, a considerable portion of doctrinal research laments the normative content of positive law's legal rights and duties—a research lapse that often goes unnoticed.

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[112] See Stone's elegant analysis in: Stone Martin Stone, *Formalism*, *in* OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY (Jules Coleman & Scott Shapiro eds., 2002). where he argues that the logician attacked by the realists was in fact a straw man.

[113] OLIVER WENDELL HOLMES JR, THE PATH OF THE LAW 8 (2009).

Fourth and finally, Law as Text's doctrinal method generates knowledge that is of limited use to outsiders. Most of the university community is engaged in a tussle between quantitative and qualitative methods[114] or some version of postmodernity.[115] As such, law's claim to contribute to the larger knowledge agenda of the university, and beyond on the basis of authority, logic and rhetoric has limited credibility and as a result, it gets less attention than warranted by the topics addressed.[116] The knowledge generated by legal researchers is largely foreign and of limited use to non-legal researchers. As such, the legal system's dominant paradigm poses significant problems for researchers pursuing interdisciplinary work[117] who look to non-doctrinal methods, scholars who have adopted realist critiques.[118]

5. Concluding remarks

The Law as Social Phenomena paradigm differs markedly from the Law as Text paradigm because as the Bodenheimer observes: "law inevitably intersects with ethics, economics, social policy and other factors considered "extraneous" by the radical positivist."[119] Moving away from that paradigm involves two critical steps. First, one needs to adopt a new conceptual theory of law, in this case, theorising law as social phenomena: law is a matter of social institutions and practices, subject to observational study. As Roscoe Pound stated pithily over a century ago, it is the difference between "law on the books or law in action".[120] Interestingly, despite Posner's bitter objections to moving beyond doctrinal research[121] (and ironically, his own commitment to economics) this type of scholarship has come of age for a second time as legal scholars, and society more broadly, come to accept law as a fundamentally value-laden exercise.

Second, adopting such a realist view, the Law as Social Phenomena paradigm requires a step away from doctrinal positivism with its theorisation

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[114] William R Shadish, *Philosophy of science and the quantitative-qualitative debates: Thirteen common errors*, 18 EVALUATION AND PROGRAM PLANNING (1995). Michael Wood & Christine Welch, *Are 'qualitative'and 'quantitative'useful terms for describing research?*, 5 METHODOLOGICAL INNOVATIONS ONLINE (2010).

[115] J. Scheurich, Research Method in the Postmodern (Routledge 1997).

[116] In the UK context, for example, see Twining, LEGAL STUDIES, (2009). 529.

[117] Hutchinson & Duncan, DEAKIN LAW REVIEW, (2012).

[118] Twining, LEGAL STUDIES, (2009);Bix. 2005.p. 980.

[119] Edgar Bodenheimer, *Modern analytical jurisprudence and the limits of its usefulness*, 104 U. PA. L. REV. (1955). P. 1083.

[120] Roscoe Pound, *Law in books and law in action*, 44 AM. L. REV. (1910). Noted also in Stephen Bottomley, *Corporate law research and the social sciences: a note of encouragement*, 3 CANBERRA L. REV. (1996).

[121] Richard A Posner, *Against the law reviews*, LEGAL AFF (2004).

of law and morality as wholly separate.[122] Scholars in this paradigm view law as intimately connected with morality, indeed they see law as a moral, normative project, a social program aimed at creating "a better society", or what Habermas refers to as "the images of society inscribed in a legal system…. Those implicit images of one's own society that guide the contemporary practices of making and applying law."[123] There is an underlying ethical vision of society which this paradigm of scholarship requires.[124]

The "Law as Social Phenomena" paradigm, also referred to as "social policy" or "public policy" scholarship, emphasises the instrumental view of law.[125] As a paradigm of legal scholarship which sees law as a purposive social institution with clear, explicit normative objectives, it may draw on theories like those of H.L.A. Hart or Ronald Dworkin. As Bix describes the two: "[Hart's] view that the primary purpose of law is to guide human behaviour, [while] Ronald Dworkin's view that the primary purpose of law is to offer a moral justification for state coercion."[126] These theories lead to interesting research problems extending beyond text, and as discussed further below, require more attention to and creativity in methodology.

As illustrated in Figure 4, it aims to describe, analyse and evaluate[127] law in terms of how it operates, often with reference to a particular political concern or political agenda more broadly. It is the scholarship of legal realism, 'law looking outward' in the sense that it is marked by the following four characteristics: 1) it takes its stance from within the legal academy, 2) is conducted by legal system specialists in the first instance, 3) usually deals with black letter law in some aspect of the research, and 4) is ultimately interested in reflecting back on law broadly conceived. As Cheffins explains "The ultimate objective of this sort of interdisciplinary exercise is to secure a deeper and broader understanding of the legal system by placing it in its proper [social] context." [128] Its research questions connect law and other disciplines. Bix describes its questions as follows: "what could sociology (or anthropology) offer to legal theory?"[129] Theories may be drawn explicitly or too often, implicitly from other legal theorists or other disciplines. The research agenda

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[122] Sir Anthony Mason, *Law and Morality*, 4 GRIFFITH LAW REVIEW (1995). P. 149.

[123] Jurgen Habermas, *Paradigms of Law* 17 CARDOZO LAW REV (1996), p. 771.

[124] Lacey, OXFORD ESSAYS IN JURISPRUDENCE (OUP, 4TH SERIES 2000), OXFORD LEGAL STUDIES RESEARCH PAPER, (2000).

[125] Stone contrasts this approach to overly rule-based decisions associated with formalism. Stone. 2002. pp 187-190.

[126] BIX, Jurisprudence: theory and context. 2012.p. 22, n. 44. For an interesting comparison of application of these theories, see E Philip Soper, *Legal theory and the obligation of a judge: The Hart/Dworkin dispute*, 75 MICHIGAN LAW REVIEW (1977).

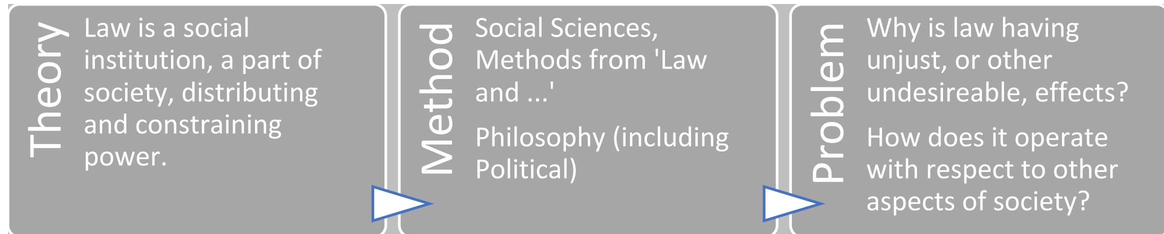
[127] The basic tasks of research. Sheehy, THE INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE, (2022).

[128] Cheffins, THE CAMBRIDGE LAW JOURNAL, (1999)., 198-99

[129] Bix, RUTGERS LJ, (2000)., p. 237

can be anything of social concern, be it privatisation and markets or, public focused concerns such as social security, government, public good and identity politics.

Figure 4. Law as Social Phenomena



Thus, conceptual theories of law in this paradigm consider law more broadly, as a system with purpose and not simply law as rules set out on a page in black ink. Scholars working in this paradigm understand law as a goal oriented social institution and as a political force in its own right. Riles describes these groups of scholars as "tribes."[130] She observes:

> "[G]enerally treat law as the embodiment of norms, the outcome of political compromise, and the repository of social meanings. For them, the task of legal scholarship should be to provide an account of the content of legal norms, the meaning of legal texts, or the place of law in culture. The instrumentalists, in contrast, view law in judged by its successes or failures in achieving stated ends. For them, just as law is a means to an end, scholarship about the law should be evaluated as a means to an end: it should declare its uses and effects in the very design of its questions, and it should be evaluated according to its usefulness in solving actual legal problems."[131]

In sum, they examine law's design in terms of its impacts on society. For example, in broad brush strokes, law and economics scholars theorise law as an institution aimed at increasing efficiency in a society. They study how

[130] Riles Riles, BUFF. L. REV., (2005). p. 973-4

[131] Riles describes the two as "The culturalists generally treat law as the embodiment of norms, the outcome of political compromise, and the repository of social meanings. For them, the task of legal scholarship should be to provide an account of the content of legal norms, the meaning of legal texts, or the place of law in culture. The instrumentalists, in contrast, view law in judged by its successes or failures in achieving stated ends. For them, just as law is a means to an end, scholarship about the law should be evaluated as a means to an end: it should declare its uses and effects in the very design of its questions, and it should be evaluated according to its usefulness in solving actual legal problems."

laws and legal institutions improve or fail to improve efficiency. By way of contrast, law and society scholars view law as an institution aimed at increasing justice and fairness in a society. They study law and legal institutions as tools for improving fairness or inequality. The methods adopted reflect a view of law as integral part, if not the centre, of broader social organisation as explained in detail below.

This paradigm of scholarship is built upon an understanding of law as a powerful institution. It conceptualises law as a powerful, systemic expression of values which is used to shape and order society.[132] Recognising law as a social system provides many points of entry for scholars and reformers, as well as an locales for analysis of law and its interface with society. [133] It provides a wide range of valid and interesting areas of research.[134] Research in this paradigm explores the nature of law, the character of laws and legal institutions as normative projects. Further, it theorizes law as an aspirationally coherent, value laden institutional system for either social stability or social reform, depending on the project. It is a type of 'insiders looking out' scholarship, looking at law as a social institution and how it interacts with other aspects and institutions of society. It makes a variety of arguments positively about what law is doing and normatively about what law should be doing in terms of: value selection, value ordering, the related substantive and procedural aspects, and examines law's impacts.[135] It is critical in this paradigm of legal scholarship, however, that it reflect back onto law as both text and social institution. As Roger Cotterell explains it: "Legal theory with this orientation does not dissolve into general sociological inquires. Its task is to develop systematic explanations of the general nature of legal phenomena. Its focus remains clearly on law as a special field."[136]

The intellectual heritage of this type of scholarship can be traced back to the legal realist movement on the one hand, and prior to that on the other, to historical natural law theories in which adherents believed law reflected some underlying morality in the universe, some universal normativity existing

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[132] This article makes a different claim than that put forward by the Critical Legal Studies scholars who argued that the distinction between law and politics is non-existent. See discussion in MICHAEL D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (Sweet & Maxwell 8th ed. 2008). P. 1209-10. CLS scholars, although progeny of Realism have, as Leiter states "[have] almost nothing to do with Legal Realism, which, at its core was providing lawyers practical in understanding the reasoning behind appellate court decisions." Leiter p. 981.

[133] Benedict Sheehy & Donald Feaver, *A Normative Theory of Effective Regulation*, 35 UNSW LAW JOURNAL (2015).

[134] Benedict Sheehy & Donald Feaver, *A Normative Theory of Effective Regulation*, 35 UNSW LAW JOURNAL (2015).

[135] See for example, Farber's argument that a pragmatic approach to constitutional interpretation is better than foundationalism of positivist law scholars Daniel A Farber, *Legal pragmatism and the constitution*, 72 MINN. L. REV. (1987). p. 1343

[136] ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE (Oxford University Press. 1995). p. 3.

prior to human made law.[137] In terms of intellectual history, legal realism seriously undermined the doctrinal positivist theory, the theory that law is a purely objective intellectual endeavor, using for its method no more than a combination of the application of logic and traditional methods of interpretation to largely unambiguous text.

It is a reaction to Law as Text and the problem posed by that older model, [138] of which perhaps no better description can be found than Oliver Wendell Holmes' oft quoted complaint: "It is revolting to have no better reason for a rule of law than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."[139] Although finding its genesis in America, legal realism has had a wide reaching and profound effect on the development of legal scholarship around the globe.[140]

As an approach to legal scholarship that started in the late nineteenth century, legal realism was part of a broader turn toward philosophical pragmatism in American thought. The driving idea behind philosophical pragmatism is that there are no great, eternal, universal truths to be discovered.[141] In this vein, it is part of a wider postmodern rejection of the modernist Enlightenment project of discovery of truth and knowledge. Brian Leiter states that the realists, rather than searching for eternal truths, "settled for observations".[142] Citing Max Radin, Leiter describes these observations as being basic observations of "'the standard transactions with their regulatory incidents [which] are familiar ones … because of his experience as a citizen and a lawyer.'"[143] In this sense, the early realists are described as concerned with predictions of judicial behavior, judicial decisions and fact patterns.[144]

A second related idea that followed from the abandonment of doctrinal positivist theory was that no particular method could discover such truths, even if they existed. Neither rationalism, nor empiricism, nor revelation from the gods, and indeed, not even scientific method could uncover incontrovertible fundamental truths. Rules are never 'self-executing'. [145]

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[137] See, for example, Aristotle's *Nicomachean Ethics* Bk 5.
[138] See Stone. 2002.
[139] O.W. Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457(1897). At 469.
[140] For the impact of American Realism on conservative English legal thought in Australia, as an example of its wide influence, see Susan Bartie, *A full day's work: a study of Australia's first legal scholarly community*, 29 UNIVERSITY OF QUEENSLAND LAW JOURNAL (2010). Still, Leiter, providing an interesting anecdote about late Professor Birks of Oxford, notes that its spread as a theory to the UK is severely limited regardless of how the judiciary may decide in practice. Leiter, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (2015). P. 1982
[141] RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE (Penguin UK. 1999).
[142] Leiter, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (2015). At 1979. Citing Max Radin.
[143] Id. at. At 1979. Citing Max Radin.
[144] Id. at.
[145] See Stone, n. 132 above, Stone. 2002.. Pp. 167-170.

Rather, all that could be known or claimed as "truth" according to the pragmatists, would be those things that provided plausible explanations, explanations that worked for the problem at hand.[146]

Since Law as Social Phenomena is not limited to text, it attends to a wide variety of legal phenomena from text, through judicial reasoning, to court outcomes, professional education and practices (the role, mission and normative projects of the law schools), and beyond to wider social effects. Brian Tamanaha provides an example of this type of theory of law. He writes: "state law involves a loosely co-ordinated complex of activities comprising one aspect of the state apparatus-that aspect identified as the 'legal' system."[147] It theorizes law as "activities", as a powerful influence on ideas, institutions and on matters of justice, fairness and equity in society. Another example of this view can be taken from Jeremy Webber who wrote: "Law is grounded, fundamentally, in the practices of particular societies. All law, even legislation, finds its meaning in interpretive relationship to those practices. To understand law is to understand norms' relationship to the web of human interaction in a given society."[148] Perhaps the most comprehensive contemporary statement of the legal realist view of law finds expression in a forthcoming article, "Law-and-Political-Economy", an approach to law that connects it with the other major social institutions that order contemporary society.[149] Law as Social Phenomena is a type of research performed by researchers whose primary training is in law and who are interested in some type of law reform. The theorizing is based on Law as Text-plus-something additional, whether political philosophy or some social institution or other moving impetus.

This inclusion of political philosophy in conceptual theorising about law leads to some of the communication problems within the discipline. Conservatives see one thing while progressives see another. This issue, of course, is not limited to law. Describing a similar phenomenon in political science, Eidlin observed: "Marxists, liberals, and conservatives often give different and inconsistent accounts of related because of their differing theoretical assumptions and background knowledge. However, sometimes, despite such differences, they may give differing accounts that are true and consistent with each other. Their differing accounts may rather than being incommensurable, may just be different perspectives on the same reality. ...

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[146] RORTY. 1999., Especially, the essay "The World without Substances or Essences" 47-71

[147] BRIAN Z TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW (Oxford university press. 1997). P. 130.

[148] Jeremy Webber, *The Grammar of Customary Law*, 54 MCGILL LAW JOURNAL / REVUE DE DROIT DE MCGILL (2009).

[149] Jedediah S. Britton-Purdy, et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, YALE LAW JOURNAL, (Forthcoming).

background assumptions are frequently at the roots of problems."[150] This insightful comment is worth keeping in mind as one conducts and evaluates research of those colleagues who are of different political philosophies.

Other statements expressing a realist theory of law by leading scholars are insightful. Karl Llewellyn theorized law to be a useful institution focused on the continuation of an orderly society.[151] Sally Falk Moore's theorizes law and defines its scope as follows: "[law is] a short term for a very complex aggregation of principles, norms, ideas, rules, practices, and the activities of agencies of legislation, administration, adjudication and enforcement, backed by political power."[152] More contemporary theorizing and scope extends further. John Griffiths, for example, theorizes law as "an unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation, morally and aesthetically offensive to the eye of the liberal idealist, and almost incomprehensible in its complexity to the would-be empirical student."[153] The theories in the Law as Social Phenomena paradigm provide an almost limitless list of problems suitable for legal research.

Despite the realists' larger rejection of postmodernism, to a significant degree it follows a stream of postmodern concern. For example, Bourdieu among other postmodernists was concerned with power relations. As described by one scholar "Bourdieu claims that the specific codes of the juridical field—the shaping influence of the social, economic, psychological, and linguistic practices which, while never being explicitly recorded or acknowledged, underlie the law's explicit functioning—have a determining power that must be considered if we are to comprehend how the law really functions in society."[154] It accepts that law's own relationship with political power may be ambiguous or even contradictory. Consider, for example, the statement "to Bourdieu, the juridical field is not simply a cat's paw of State power, as instrumentalist theory at times tends to suggest. Neither is the law just a reflection of these other modalities of state control. On the contrary, the law has its own complex, specific, and often antagonistic relation to the exercise of such power."[155] It identifies laws contradictory, bi-directional and multi-valent character.

Thus, this paradigm of legal scholarship, among other things, sets aside the doctrinal positivist's pseudo-objective interpretation as well as the hard,

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[150] Eidlin, PS: POLITICAL SCIENCE & POLITICS, (2011). p. 759

[151] WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (Cambridge University Press. 2012).

[152] Sally Falk Moore, *Law and social change: the semi-autonomous social field as an appropriate subject of study*, 7 LAW & SOCIETY REVIEW (1973). 719.

[153] John Griffiths, *What is legal pluralism?*, 18 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW (1986).

[154] Pierre Bourdieu, *The force of law: Toward a sociology of the juridical field*, 38 HASTINGS LJ (1986).

[155] Id. at 75, 808

objective conclusions doctrinal positivist scholarship provides. Instead, it examines social, institutional, organizational and psychological phenomena from a macro systemic level down to the micro level of individual psychological processes. As a result of this different theory of law, Law as Social Phenomena, readily employs empirical methods: indeed, the fight about empirical studies in law—although cast as a quarrel about method—is in fact, a disagreement about theories of law.[156]

Although legal realism suffered a temporary demise in the mid-twentieth century, it is seeing a resurgence as legal scholarship emerges from the thrall of economic analysis.[157] In its current incarnation, referred to as the New Realism, is distinctive because, as Andrew Lang offers, it takes advantage of a "productive tension between empiricist and pragmatist theories of knowledge."[158] Suchman and Mertz locate the new legal realism and its relationship to empirical legal studies within the broader socio-legal studies.[159] This version of realism produces a veritable torrent of issues and problems for legal researchers to tackle with as many methods to match. A wide range of legal scholarship falls within this paradigm.

B. Law as Social Phenomena: Legal Realism and its Interdisciplinary Successors on the Progressive and Conservative Sides

1. Why it is useful

Law as Social Phenomena scholarship draws attention to law's impacts and its implications for particular political philosophies and in turn exposes, explores and illustrates the political agendas with their preferred laws for enactment, reform or revocation as well as the related institutional reforms. These political agendas range from expressing values such as the humane treatment of animals and creation of animal rights to the maximization of individual liberty and wealth accumulation through a focus on efficiency. Rahman, for example, describes the utility and aim of legal realist scholarship as follows: "[legal realism is] more than just a critique of judicial formalism, and instead … [is] part of a larger effort to imagine a more egalitarian and

[156] Indeed, a recent doctoral dissertation examines the issue precisely as a disagreement in theories. Paul Jeffrey Baumgardner, Retrenchment Rivals: Critical Legal Studies, Law-and-Economics, and the Legal Academy of the Long 1980s (2020) Princeton University).
[157] Certainly, economics is not the cause of the demise of legal realism which started on that path after failing the formidable challenge of Hart. 1994.
[158] Andrew Lang, *New Legal Realism, empiricism, and scientism: the relative objectivity of law and social science*, 28 LEIDEN JOURNAL OF INTERNATIONAL LAW (2015). p. 231.
[159] Mark C Suchman & Elizabeth Mertz, *Toward a new legal empiricism: empirical legal studies and new legal realism*, 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE (2010).

democratic political economy"[160]—assuming of course, that the agenda is egalitarian and democratic as opposed to other values, such as wealth creation and efficiency.

These political agendas are found on both the progressive left and conservative right sides of politics and provide fruitful areas for normative and empirical research—the broad domain of scholarship encompassed by the term "Law and …". As Cheffins notes: "[it is] the study of law from the "outside". This implies the use of intellectual disciplines, external to law, to carry out research on its economic, social or political implications." [161] From the perspective of the 'insider' doctrinal positivist, the realist is an outsider. This disagreement about conceptual theories of law—text versus social phenomena—is an important point to note. It is a source of friction among legal scholars who fail to understand this difference and as a result at times disparage one another's research as 'not true legal scholarship'. Thus, the Law as Social Phenomena paradigm places the researcher in a different position from the positivist vis-à-vis the law.

2. Examples of Law as Social Phenomena

Two examples readily illustrate this paradigm. One classic piece of scholarship in this paradigm is the theoretical framework developed by Calebresi and Melamad.[162] In their famous work, Calebresi and Melamad examined legal rules by constructing three categories: property rules, liability rules and rules around alienability. They identified and examined moral and economic reasons for the different categories, how the rules worked in society and the legal system with reference to economic efficiency and moral standards. The framework provided a foundation for law reform, providing rationales for and against different approaches to social problems that have drawn legislators' and reformers' attention.

A second interesting example is Jill Quadagno's analysis of the American *Affordable Care Act*.[163] She set out her project clearly in the title "Right-Wing Conspiracy? Socialist Plot? The Origins of the Patient Protection and Affordable Care Act."[164] Quadagno, a sociologist, identifies the political interpretation of a piece of legislation by the marked divide between proponents of opposing political philosophies. Her careful analysis of the

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[160] K Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 TEXAS LAW REVIEW (2015). P. 1338

[161] Cheffins, THE CAMBRIDGE LAW JOURNAL, (1999)., 198-99

[162] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW (1972).

[163] Jill Quadagno, *Right-Wing Conspiracy? Socialist Plot? The Origins of the Patient Protection and Affordable Care Act*, 39 JOURNAL OF HEALTH POLITICS, POLICY AND LAW (2014).

[164] Id. at.

provenance of the legislation provides insight into the legislation as a bi-partisan achievement as well as insight into law and its reform as a long-term, evolving institution. As this contribution illustrates, the Law as Social Phenomena paradigm need not follow any particular partisan political agenda. Rather it is open to both.

Yet another example drawing a link between strong legal institutions and law teaching comes form Sheehy's work on law as language.[165] Theorising law as cognitive phenomenon which forms the building blocks of social phenomena, Sheehy conceptualises law as a language used to build an ordering social institution--a socially constructed legal reality. The implications of this theory are wide reaching and foundational: without proper understanding of law's language, the institutions of law cannot survive. [166] Without teaching law using some of the linguists' toolkit, law teaching is doomed to marginal success.

3. Specific features and method

As opposed to the narrow "what text" and "what meaning" questions of positive doctrinal scholarship, Law as Social Phenomena scholarship investigates the broader questions of "how", "what", "when", "where" and "why". It aims, for example, to ask and answer questions of how judges make decisions, what actions and institutions are included in the term "law", when certain parties are more successful in litigation[167] where certain laws may work and why certain parties have rights and duties while others do not. It investigates these questions in relation to specific social ends which reflect underlying philosophies of the individual, society, of social welfare and of public good. In terms of law reform, it begins with an "organising problem"--a problem that drew attention and around which parties organise people and resources, marshalling political power, to make a change or reify some aspect of a society. [168]

As an example of the "why" in the Law as Social Phenomena paradigm, distinguishing realist conceptions of adjudication from doctrinal positivist understandings, Oliver Wendell Holmes wrote:

> "You always can imply a condition in a contract.
> *But why do you imply it? It is because of some belief*

[165] Benedict Sheehy, *Law, Language and the Social Construction of Legal Reality*, 11 INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE (2023)
[166] Benedict Sheehy, *Law, Language and the Social Construction of Legal Reality*, 11 INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE (2023)
[167] Marc Galanter, *Why the" haves" come out ahead: Speculations on the limits of legal change*, 9 LAW & SOCIETY REVIEW (1974).
[168] Benedict Sheehy & Donald Feaver, *A Normative Theory of Effective Regulation*, 35 UNSW LAW JOURNAL (2015).

> *as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours* upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions."[169]

Thus, as noted, the Law as Social Phenomena researcher engages, explicitly or implicitly, in a two-step process: first, envisioning a particular society and then second, describing, analysing and evaluating[170] how "law" widely construed and socially conceived contributes to or leads away from a realisation of that particular vision. The legal scholar may wish to argue that efficiency is an ultimate legal norm[171]--despite a clear recognition that efficiency is not a legal principle.[172] Or, the scholar may wish to argue that government regulation is a poor substitute for regulation by markets, or any number of other views.

4. Methodological Challenge of Law as Social Phenomena

In terms of method, this paradigm of legal research has a vast array available. As Argyrou explains it:

> "capturing what is called the 'law's truth' or the 'essence of law', such as the inner motives and meanings of legal phenomena… [requires] auxiliary use of methods and inspiration drawn from the social sciences [which] can be used when the response to the problem defined in the research question 'is not predicated solely on the concrete body of legal rules' and does not concern a hermeneutical quest for a legal meaning and/or interpretation."[173]

As a result, a core challenge for the scholar working in this paradigm is methodological. Methodology, that is the consideration, selection and development of an appropriate way of answering a research question is agnostic.[174] So, for example, if the *research question* is "What is the most efficient way to reduce tax evasion?", the *methodological question* is "What is

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[169] HOLMES, *supra* note 107, at 8-9 (emphasis added).
[170] Sheehy, THE INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE, (2022).
[171] Richard A Posner, *The ethical and political basis of the efficiency norm in common law adjudication*, 8 HOFSTRA L. REV. (1979).
[172] Leiter, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (2015). p. 1975.
[173] Aikaterini Argyrou, *Making the Case for Case Studies in Empirical Legal Research*, 13 UTRECHT L. REV., no. 3, 2017, at 96 (2017).
[174] Sheehy, THE INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE, (2022).

the best way to answer the research question?". The answer to the methodological question is that doing a cost-benefit analysis of alternative methods of tax evasion reduction is appropriate, as efficiency is a matter of lowest costs. But the research question in law need not be economic.

Consider the two related, but markedly different, research questions: "What is the fairest way of reducing tax evasion?" and "What is the most effective way of reducing tax evasion?" The fairness research question requires consideration of theories and concepts of fairness as applied to taxation. Such consideration may lead to further analysis of arguments for and against flat tax, graduated tax and other possible distributions. The evaluation of those arguments may include impacts on taxpayers, total amounts collected, costs of tax collection, and any other number of considerations.

By way of contrast, the second research question which focuses on effectiveness is again, a wholly different question. It would require consideration of issues such as vulnerabilities of taxpayers (at what point are they most likely to make payment) and payment systems (where in the payment system is it easiest to collect tax)[175]. Thus, method must be carefully developed to ensure that the research question is being addressed in the best way possible: the methodological question must be properly answered to ensures that the method chosen matches the theory and generates an answer to the question being posed.

As a result, it is clear that the core methodological challenge for Law as Social Phenomena researchers is considering how to develop an appropriate research question and construct the best method, the method most likely to generate a genuine, robust, reliable answer. [176] It is a matter of developing a coherent research question, then matching theory, method and phenomenon to develop an appropriate reliable answer.[177] This paradigm of legal research offers no automatic or default theory or method such as doctrinal positivism's textual theory and doctrinal method.

We turn next to consider the Law as Social Phenomena paradigm among differing political visions: the progressive, the conservative and the

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[175] A legal scholar could use research such as Eva Hofmann, et al., *Preconditions of voluntary tax compliance: Knowledge and evaluation of taxation, norms, fairness, and motivation to cooperate*, 216 ZEITSCHRIFT FÜR PSYCHOLOGIE/JOURNAL OF PSYCHOLOGY (2008). To inform the argument about regulatory structuring through allocations of rights and duties.

[176] Sheehy, THE INTERNATIONAL JOURNAL OF LAW, LANGUAGE & DISCOURSE, (2022).

[177] An outstanding survey and explanation of methods for legal scholarship can be found in Ward Farnsworth's volume "The Legal Analyst: A Toolkit for Thinking about the Law" WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW (University of Chicago Press. 2008). Farnsworth's text canvasses a range to tools and methods for answering a wide-range of problems of interest to legal scholars. It provides not only an explanation of tools, but also is useful in priming the legal scholar's imagination about questions ripe for investigation and methods for answering those questions. It is a veritable menu of "Law and …" problems, theories and methods.

center—all focused on reconceptualizing, redirecting and reforming law. It should be noted at the outset that a significant amount of legal research is devoted to some type of law reform, and indeed, it is a specific focus of certain journals.[178] Such reform proposals are the outcome of a political agenda—either personal or research group both aimed at reform.

a. Progressive project: Examining the ideology, values egalitarianism, collective, allocation of rights

Theories of law on the progressive side include ideas of justice or fairness developed by a range of theorists.[179] Theorists include classical liberal philosophers such as Rawls, sociologists such as Parsons, theorists in the Marxist tradition, heterodox economists uncommitted to neo-classical economics, political scientists and political philosophers such as Habermas, social constructionists and postmodernists generally. Their theories focus on law as a system aimed at fairness with equity being understood as some form of egalitarianism across society. For example, Ginsburg et al worry about changes in the global political climate and the "demise of liberal constitutionalism"[180] which they describe as follows: "This style of constitutionalism typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law." [181] This focus on both individual well-being and participation in society as well as the group level, aiming for a society that is well-governed in terms of allowing it to adapt to changes—is a progressive agenda.

Topics of interest to progressive leaning Law as Social Phenomena scholars may include workers' safety rights, labor bargaining rights, corporate tax or other social obligations, public good, voting rights, environmental preservation and any further contribution to a more collective view of society. More recent, and more radical versions of progressive political legal scholarship, having taken shape initially in Critical Legal Studies, have developed into such political movements as Critical Race Theory.[182]

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[178] For example, the MICHIGAN JOURNAL OF LAW REFORM.
[179] Harry J Glasbeek, *Some strategies for an unlikely task: the progressive use of law*, 21 OTTAWA L. REV. (1989).
[180] Tom Ginsburg, et al., *The coming demise of liberal constitutionalism?*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW (2018).
[181] Id. at. p. 239
[182] Critical Race Theory is a position, advocating a narrow political agenda and which sees most all issues as matters of race and politics with little else of interest or significance. It is described by one of its founders, Cornel West, as having "examined the entire edifice of contemporary legal thought and doctrine from the viewpoint of law's role in the

Progressives in the Law as Social Phenomena paradigm, use doctrinal analysis either as a starting point or as an illustration, and then for the most part draw from methods in related disciplines, whether philosophy, economics, sociology, or some form of discourse analysis or similar method as applied to the legal phenomenon under discussion, whether rights, duties, institutions or systems.

Methods are generally agnostic and so progressive scholarship ought to consider possibilities for methods more often associated with conservative scholarship such as public choice.[183] As Armour et al note: "tendentious use of economic argumentation in legal literature to support particular (generally laissez faire) policy positions, as well as the tendency in economic analysis to neglect nonpecuniary motivations or assume an unrealistic degree of rationality in human action, have also caused many scholars…to be as wary of 'economic analysis'[184] This need not be so. One can consider as an example, the work or Cass Sunstein and Richard Thaler's well-known work on libertarian paternalism.[185] This work embraces the use of behavioral economics in the development and implementation of various progressive political agendas. Eleanor Olstrom's work on community and collective action problems,[186] and broader church of institutional economists[187] are all examples of economics put to the service of progressive agendas.

Postmodernism deserves particular mention in the discussion of progressive scholarship in the Law as Social Phenomena vein. As a foundation for much social reform including the emergence of identity politics—the triumph of individual over group—postmodernism provides an explicitly skeptical approach to modernist theories of law. Although its roots on the

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construction and maintenance of social domination and subordination…. challenged the basic assumptions and presuppositions of the prevailing paradigms among mainstream liberals and conservatives in the legal academy …[and] confronted the relative silence of legal radicals—namely critical legal studies writers—who 'deconstructed' liberalism , yet seldom addressed the role of deep-seated racism in American life."Cornel West, Foreword, CORNEL WEST, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (The New Press. 1995). n.p.

[183] FARBER & FRICKEY. 1991.p. 21

[184] John Armour, et al., *The essential elements of corporate law*, (2009). P. 5

[185] Richard H Thaler & Cass R Sunstein, *Libertarian paternalism*, 93 AMERICAN ECONOMIC REVIEW (2003). and Cass R Sunstein & Richard H Thaler, *Libertarian paternalism is not an oxymoron*, THE UNIVERSITY OF CHICAGO LAW REVIEW (2003).

[186] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (Cambridge University Press. 1990);E. Ostrom, *Collective Action and the Evolution of Social Norms*, 14 JOURNAL OF ECONOMIC LITERATURE (2000).

[187] Geoffrey M. Hodgson, *Institutional Economics: Surveying the 'Old' and the 'New'*, 44 METROECONOMICA (1993);O.E. WILLIAMSON, THE MECHANICS OF GOVERNANCE (Oxford University Press. 1996).

continent are traced back to the nineteenth century,[188] its subsequent and powerful emergence in the English-speaking world particularly in the American context is interestingly explained as follows:

> Most scholars date postmodernism from Hiroshima and the Holocaust, one an instantaneous annihilation and the other a systematic one. Together, they represent the death of our civilization's dream of moral and scientific progress that had characterized the modern age. The postmodern world is much more ambiguous and uncertain. It is, however, a 'double-discourse' in that while dismissing the modern agenda still engages with it as valuable, interesting and in some way worthwhile. [189]

As this statement makes explicit, the modern and post-modern approaches are not wholly in conflict. The postmodern needs the modern if for nothing more than a foil. The modern is required if one is to have a vision for society beyond the atomistic society in which identity politics undermines any conception of the collective. Modernism needs postmoderity to temper its claims and provide nesting context for its applications. Postmodernity needs modernity for a vision: after deconstruction, reconstruction is necessary for society to exist.

Within the progressive-leaning Law as Social Phenomena scholarship, hot battles are fought. For example, progressive scholars Farber and Sherry complain about post-modernity's attack concepts of 'truth, merit, and the rule of law.'[190] They point to Catharine MacKinnon's allegation that the standards for law admissions and for jobs are no more than 'affirmative action for white males'[191]—an allegation which is itself racist and sexist (albeit of the type acceptable to the radical left). In response to Farber and Sherry's complaint, a slew of radical left scholars launched an attack.[192] While the tenor of the attack left much to be desired—not to mention the weak argument in terms of substance[193]—this to and fro in scholarly debate is to be commended as it

[188] See Lang's recitation of Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOCIETY REVIEW (2000). in Lang, LEIDEN JOURNAL OF INTERNATIONAL LAW, (2015). pp. 233-36.

[189] George J Annas, *Questioning for Grails: Duplicity, Betrayal and Self-Deception Postmodern Medical Research*, 12 J. CONTEMP. HEALTH L. & POL'Y (1995). 299.

[190] DANIEL A FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (Oxford University Press. 1997). p. 6

[191] Id. at. p. 6

[192] See listing of criticisms and responses in Daniel A Farber & Suzanna Sherry, *Beyond All Criticism*, 83 MINN. L. REV. (1998).

[193] FARBER & SHERRY, Beyond all reason: The radical assault on truth in American law. 1997.

provides an opportunity for reconsideration of social vision and scholarly projects.

b. Conservative project: Law and Economics values efficiency and individualism

In the conservative version of the Law as Social Phenomena paradigm, law is theorized as a social institution in alignment with normative neo-classical economics[194] and libertarian political philosophies.[195] Institutions such as markets, and imaginations about an earlier, golden age, in which nature and humankind was not contaminated by modern social living, reflect the conservative and libertarian social vision for this paradigm of scholarship. As informed by normative neo-classical economic theory, conservative Law as Social Phenomena scholarship views law as a social expression of economic theory in which legal doctrines are "understood as proxies for the promotion of 'efficiency' or 'wealth maximization'."[196]

Researchers in this version of the paradigm theorise law as an institution aimed at increasing and expanding private rights at the individual level, while constraining government and creating efficiency at the systemic level.[197] Given these preferences, unsurprisingly theorists of this version focus on property rights, contract law, rule of law issues. This political orientation leads them to promote particularly conservative views of constitutional interpretation "textualism"[198] and "originalism",[199] and policing promoting a "law and order" agenda. Human rights tend to be ignored except to the extent that they are considered part of the natural domain as a form of liberty and which such scholars find to be particularly convincing justifications for property rights generally and in land particularly.

An unparalleled example of effective scholarship in the conservative of Law as Social Phenomena paradigm is Richard Posner. Posner came to view the whole of the common-law as a long-term, institutionalised effort to increase efficiency.[200] Efficiency not only could be discovered in law, but to Posner's mind, was a legal norm along with wealth maximisation. Posner's

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[194] For example, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (University of Michigan Press. 1962).
[195] R. NOZICK, ANARCHY, STATE, AND UTOPIA (Basic Books. 1974).
[196] Bix. 2005. N 35) p. 984
[197] Adding some nuance to this statement is Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. (1998).
[198] See excellent discussion in Chen, WASH. ULQ, (1995).
[199] Defined as textualism, anti-intentionalism and having a semantic fixation, in Lael K. Weis, "Originalism in Australia." Ch 6, Proceedings of the Samuel Griffiths Society 28(6) 46-56, pp 46-7 (2016).
[200] RICHARD POSNER, THE ECONOMICS OF JUSTICE (Harvard University Press. 1983).

work has had a profound impact on the development of law in the US as well as abroad, favoring laws the promote efficiency often at the costs of inequality, environmental protection and other social concerns usually excluded from the calculus of the majority of neo-classical economic analysis. Studies in this version have been conducted on matters like gun-control[201], securities markets[202], division of family assets on divorce[203] and similar topics and often use empirical methods.

5. What are its limitations

Unsurprisingly, given the on-going dominance of doctrinal positivism, legal scholars of various stripes reject the Law as Social Phenomena paradigm of scholarship. In this vein, Brian Leiter narrates an insightful anecdote:

> "Peter Birks, the late Regius Professor of Civil Law at Oxford and a leading scholar of the law of restitution, was a visiting professor at the University of Texas when I taught there. Once, in the faculty lounge, while we were discussing Legal Realism, he told me that the central problem with Realism was that it was "immoral"—not false, but immoral! Of course, Birks thought it false too, but by deeming it "immoral" he meant that it encouraged the pernicious idea that legal doctrines do not significantly constrain the decisions, at least those of the appellate courts. And I take it he worried that by suggesting as much, it might lead judges to make decisions based on "policy" rather than "law" They reject outright or at least are suspicious of claims not founded upon arguments from legal norms and authorities.[204]

Scholars that reject the Law as Social Phenomena paradigm tend to be the doctrinal positivist who see themselves as purists holding the true theory of law.[205] As a consequence, they reject Law as Social Phenomena scholarship

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[201] Philip J Cook & James A Leitzel, *Perversity, Futility, Jeopardy: An Economic Analysis fo the Attack on Gun Control*, 59 LAW & CONTEMP. PROBS. (1996).
[202] Gregg A Jarrell, *The economic effects of federal regulation of the market for new security issues*, 24 THE JOURNAL OF LAW AND ECONOMICS (1981).
[203] Antony W Dnes, *Applications of economic analysis to marital law: concerning a proposal to reform the discretionary approach to the division of marital assets in England and Wales*, 19 INTERNATIONAL REVIEW OF LAW AND ECONOMICS (1999).
[204] See the anecdote related by Leiter, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (2015). p. 1982.
[205] *See, e.g.*, John Gava, *Law Reviews: Good for Judges, Bad for Law Schools*, 26 MELB. UL REV. (2002).

a priori and the related theories of law as practice and expression of political philosophy. They view this legal scholarship as founded on an incorrect conceptual theory of law.

The interdisciplinary nature of the Law as Social Phenomena paradigm draws attention to the tensions within the legal academy. As Douglas Vick notes: "interdisciplinarians perceive doctrinalists to be intellectually rigid, inflexible, and inward-looking; [while] many doctrinalists regard interdisciplinary research as amateurish".[206] This criticism feeds into Vick's more trenchant critique of Law as Social Phenomena scholarship, namely, that "current interdisciplinary legal research too rarely involves meaningful encounters with other disciplines." [207]

Venturing into interdisciplinary work is indeed a hazardous path for any scholar and law scholars are no exception. A basic challenge for scholars doing interdisciplinary work is that it requires a sophisticated understanding of two disciplines—not simply the home discipline of law. Interdisciplinary research is a concern across the legal academy as well as to those outside, not only in terms of quality, but limitations in application and findings. There are, for example, well understood limitations to economic approaches to law both in terms of its theoretical approaches[208] and its models.[209]

In sum, Law as Social Phenomena is a fruitful, if complex type of scholarship, complicated by the different political ideologies and philosophical commitments of its scholars in addition to the necessity of careful consideration of method which often requires interdisciplinarity. It has significant contributions to make in areas ranging from corporate law,[210] regulation of the legal profession[211] to criminal law and beyond.

Obviously, Law as Social Phenomena cannot address all problems of interest related to law. As a result, as Bix's observes: "there may be times when sociology not only cannot aid legal theory but must part company: when sociology wants to use minimalist stipulative definitions to keep all inquiries open, but legal theory offers more robust definitions as an effort to explain or offer insights regarding the concepts we use."[212] This and similar situations

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[206] Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 JOURNAL OF LAW AND SOCIETY (2004). 191.

[207] Id. at. 192 A complaint echoed by Posner among others. Posner, LEGAL AFF, (2004).

[208] Cooter, UNIVERSITY OF BERKELEY LAW SCHOOL WORKING PAPER, WWW. LAW. BERKELEY. EDU/WPCONTENT/UPLOADS/2015/04/THE-TWO-ENTERPRISES-OF-LAW-AND-ECONOMICS. PDF, (2015).22)

[209] Russell B Korobkin & Thomas S Ulen, *Law and behavioral science: Removing the rationality assumption from law and economics*, 88 CALIF. L. REV. (2000)., 1051-1144.

[210] Bottomley, CANBERRA L. REV., (1996).

[211] Benedict Sheehy, *From Law Firm to Stock Exchange Listed Law Practices: An Examination of Institutional Reform*, 20 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION (2013).

[212] Bix, RUTGERS LJ, (2000). P. 234

leads to consideration of the third paradigm in which the focus of research shifts from law as core to one where law is one among many factors.

C. Law as Data: Non-Law Led Sciences and the Humanities Research

The third paradigm of legal scholarship based on the conceptual theory of "Law as Data," as illustrated in Figure 5. It is research which investigates broader human behaviour at any level from individual, group, or institutional to society at large with law as a variable. This type of scholarship investigates questions outside of or largely peripheral to theories of law as either text or a social institution. It is either social science with questions that look to Law as Data, or humanities research that examines narratives or searches for meaning and inspiration. Law is but one factor or variable or source.

As a paradigm of legal scholarship it tests hypotheses, for example, about the effectiveness of institutions (including law) and evaluates correlations, causation and impacts using factors in its broader investigation of humanity and society. Law as Data is truly 'outsiders looking in'.[213] For the most part, this paradigm of scholarship abjures all that is not readily reducible to data readily analysed using empirical methods or readily used to create meaning in other narratives. It ignores the substantive and procedural aspects of law as well as its categories, rights, duties and tests, except as variables or props.

Law as Data theorizes legal phenomena as mere raw data, part of societal practices or broader social direction, to be fed into data models or to inform the meaning construction projects of the humanities. Law as a normative social project has no particular importance, interest or value. Its norms of justice or fairness are irrelevant except as those values provide inputs to other narratives and norm structures. Law holds no innate value as a coherent normative ordering system, nor as an expression of a social vision.

Law as Data has no interest in the normative content of the rules contrary to the scholarship of both Law as Social Phenomena realists and Law as Text doctrinal positivists. This understanding of law as value free or non-normative data is not within any conceptual theory of law's scope and so appropriately none of law's methods, nor theories have any contribution here.[214] Nevertheless, it is precisely this non-normative approach that allows rich and interesting collaborations between law and social sciences.

Examples of research in this paradigm may include analysis of a whole range of matters and outcomes including things such as how finance markets respond to rule changes, how a multi-pronged poverty reduction policy is

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[213] Used in this way, I have drawn from William Lucy, *Abstraction and the Rule of Law*, 29 OXFORD JOURNAL OF LEGAL STUDIES (2009).
[214] Perhaps with the exception of legal biographies.

working, or an incentive program for entrepreneurship. It may equally apply in the humanities as interesting cases and approaches for language and epistemological analysis or provide characters and plot for literary works. Its theories and methods are wholly and thoroughly reliant on social sciences and humanities. It has led in certain instances to the creation of subdisciplines such as 'criminology' in which the social sciences are applied to people involved in criminal behaviour, and artistic genres such as courtroom dramas familiar in Boston Legal and John Grisham's work.

Figure 5. Law as Data: Sciences and humanities

A core question for many people within and external to the legal academy, the university more widely and beyond is whether a society is doing well—however those terms "society" and "well" are defined. The interests may range from issues like childhood obesity, which may consider city planning, education (including legal education), to matters of global migration, cryptocurrency as an asset or a threat, climate change or the extractive industries. While law academics will readily see these as topics for legal scholarship, to scholars of other disciplines, the legal aspects are hidden, considered secondary or irrelevant and so safely ignored. Despite a general lack of interest among other disciplines in the legal aspects of these problems, there is still considerable research where law plays a role and hence to which legal scholars can contribute[215] and further, participation in these research projects can lead to interesting and important law focused research projects.

This paradigm of scholarship accepts that law as social phenomena paradigm; however, unlike that paradigm in which scholars ultimately return from their research to the legal system,[216] this paradigm of research does not. It remains firmly focused on social phenomena and other disciplinary issues and interests located elsewhere within and beyond the law's institutions. It may engage with or examines law's effects but conclude without reflection on the implications for law as social phenomena or, for that matter, as an

[215] Consider, for example, Mitchell, Matthew. "Analyzing the law qualitatively." Qualitative Research Journal 23, no. 1 (2023): 102-113.

[216] Cheffins observes, "The ultimate objective of this sort of interdisciplinary exercise is to secure a deeper and broader understanding of the legal system by placing it in its proper [social] context." Cheffins, THE CAMBRIDGE LAW JOURNAL, (1999).p. 198.

intellectual construct—and without recommendations for law reform. It is wholly uninterested with legal realism's concerns, such as legal validity, legal application or underlying values-a position questioned by some.[217]

By definition, this Law as Data paradigm is interdisciplinary, often generated within the social sciences but as noted, also sounding in the humanities. Again, it is truly 'outsiders looking in'. It is a burgeoning area of legal scholarship with new journals dedicated to it. It has no law reform or "better society" vision; nevertheless, this multi- and interdisciplinary scholarship has important contributions to make to legal scholarship and law reform. As Westerman observes, it is an increasingly important area of law scholarship "amid the plurality of sources –legal, half-legal, non-legal –and levels – international, transnational, sectoral".[218]

Law as Data research is conducted by those whose primary disciplinary training is in social sciences or humanities rather than law, but they are likely to have a research interest in law whether sociologists, criminologists, educators, management scholars, legal anthropologists and the like.[219] Although certainly some legally trained scholars undertake Law as Data research, the main contribution comes from the other discipline.

1. Why it is useful

This type of legal research while useful to the social sciences in their own right, also forms the bedrock of certain types of law reform—"social engineering" as it is described in some contexts[220]--used to inform or provide a foundation for research in the Law as Social Phenomena paradigm. It informs legislators, regulators, interest groups of various political persuasions, policy advocates and others of the developments and changes in society including analysis and evaluation of inputs from the legal system, the effects of law. It can stimulate re-thinking of projects dedicated to social vision. All parties are interested in knowing whether social effects are positive, whether increased social well-being, increased market activity or efficiency, improved environmental protection. [221] The Law as Data paradigm may allow (largely) apolitical answers to emerge. In this very important aspect, Law as Data differs from the realists Law as Social Phenomena.

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[217] Lacey, OXFORD ESSAYS IN JURISPRUDENCE (OUP, 4TH SERIES 2000), OXFORD LEGAL STUDIES RESEARCH PAPER, (2000).
[218] WESTERMAN, Outsourcing the law: a philosophical perspective on regulation. 2018. p. 136.
[219] Neil C Sargent, *Labouring in the shadow of the law: A Canadian perspective on the possibilities and perils of legal studies*, 9 LAW CONTEXT: A SOCIO-LEGAL J. (1991).
[220] Moore, LAW & SOCIETY REVIEW, (1973).69)
[221] Donald Feaver & Benedict Sheehy, *A Positive Theory of Effective Regulation*, 35 UNSW LAW JOURNAL (2015);Benedict Sheehy & Donald Feaver, *A Normative Theory of Effective Regulation*, see id. at.

This paradigm of scholarship has generated inquiry into institutional choices, societal issues and failures, and a range of different, useful theories. The literature of such things as unintended consequences[222] is extensive[223] and indeed this interest has led to a whole area of scholarship known as 'public choice' and its particular concern with regulatory capture[224] and beyond of course, to the sophisticated critics who challenge the whole public choice research agenda.[225]

It is critical that Law as Data, whether in social engineering research or more broadly, be conducted. There can be no successful evaluation of the effects of proposed, existing and reformed law without Law as Data research.[226] That evaluation can provide assurance, a roadmap for reform, or a combination of both[227] in addition to answering the initial social science or humanities research questions. Healthcare outcomes, education and market reforms are all measured and evaluated in this scholarship and form a basis for law reform. This research is critical, for again as Westerman observes, with the increase of outsourced law and the problems of principles-based regulation, the need for empirical analysis increases dramatically.[228]

2. Examples of Law as Data

Three brief examples will be useful to understand this approach. One example, drawn from outside areas of general interest to the law community, is Harvard Business Professor Michael Porter's famous study of the impact of regulation in shaping the competitive environment of business.[229] Porter counted 'regulation' as a factor in his framework for the evaluation of the competitive business environment. Significant work using the Law as Data paradigm is done in political and policy sciences. For example, Professor Gerry Stoker and his colleagues have written extensively on evidence-based

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[222] Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AMERICAN SOCIOLOGICAL REVIEW (1936).
[223] Cass R Sunstein, *Political equality and unintended consequences*, 94 COLUMBIA LAW REVIEW (1994). Patrick Baert, *Unintended consequences: a typology and examples*, 6 INTERNATIONAL SOCIOLOGY (1991).
[224] DANIEL CARPENTER & DAVID A MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Cambridge University Press. 2013).
[225] E.g. FARBER & FRICKEY. 1991.21)
[226] Feaver & Sheehy, UNSW LAW JOURNAL, (2015);Sheehy & Feaver, UNSW LAW JOURNAL, (2015).113)
[227] Sheehy & Feaver, UNSW LAW JOURNAL, (2015).112)
[228] WESTERMAN, Outsourcing the law: a philosophical perspective on regulation. 2018.3) p. 137.
[229] MICHAEL E PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE (Simon and Schuster. 2008).

policy.[230] Examples of scholarship more closely related to law in this paradigm include systemic theories of law such as Luhmann's[231] and other work in the sociology of law more broadly.[232]

Beyond these specific examples, a multitude of non-legal scholars participate in this paradigm—from the economists' work on economic impacts of the interstate commerce commission, to public health researchers' study of impact of the public provision of health care. Examples of such work of interest to members of the legal community include research on educational processes and operational aspects of law schools, the precursors and causes of professional misconduct, organisational research into the business of law firms,[233] and the management of courts among other things.

3. Specific features and method

The Law as Data paradigm is practically oriented as opposed to theoretically oriented, from a legal perspective. It focuses on specific concerns of the social sciences or humanities, not law. Where social scientific, it engages in empirical investigations of the social phenomenon, and while it may note actual or proposed legal solutions, it is focused on other disciplinary concerns. Where humanities, it explores human narratives. In terms of method, it repudiates doctrinal scholarship. It depends exclusively on the research methods of social scientists, namely, the collection of data about social practice and relies on quantitative and qualitative methods, or humanities methods.

In terms of qualitative methods, these are used for establishing conceptual constructs and adding nuance to larger statistical studies. It uses quantitative methods to understand relationships between phenomena (including legal phenomena) in terms of causation or correlation. Although there is significant debate among empirical methodologists,[234] both methods are hallmarks of social sciences and conceptualise causation in a markedly different manner to law—a matter of increasing importance as courts and others look increasingly to sciences for assistance. Legal scholarship in this paradigm is collaborative with empirical researchers who not only have different interests but have advanced empirical skills.

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[230] Gerry Stoker & Mark Evans, *Evidence-based Policy Making and Social Science*, *in* EVIDENCE-BASED POLICY MAKING IN THE SOCIAL SCIENCES: METHODS THAT MATTER (Gerry Stoker & Mark Evans eds., 2017).
[231] LUHMANN. 2004.
[232] GEORGES GURVITCH, SOCIOLOGY OF LAW (Transaction publishers. 1973).
[233] Sheehy, *From Law Firm to Stock Exchange Listed Law Practices: An Examination of Institutional Reform* INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 2013, 20(1) Pages 1-29
[234] Mark A Alise & Charles Teddlie, *A continuation of the paradigm wars? Prevalence rates of methodological approaches across the social/behavioral sciences*, 4 JOURNAL OF MIXED METHODS RESEARCH (2010). Shadish, EVALUATION AND PROGRAM PLANNING, (1995). Wood & Welch, METHODOLOGICAL INNOVATIONS ONLINE, (2010).

4. What are its limitations

Law scholars who are committed to doctrinal positivism are unlikely to find this approach to legal research amenable. Law as Social Phenomena paradigm scholars may be amenable to participation in this type of scholarship, however, with its lack of interest in returning to law, the realist scholars will need to demarcate their research territory. It will be up to the legal scholar to draw the implications for legal theory, legal method and law reform. Such research, as noted is very likely to spark research interests and programs for the legal realist.

A limitation of this paradigm of research is that scholars elsewhere in the academy are largely ignorant of the nature, role and potential of law. They have their own areas of interest and the law scholar must initiate the engagement and demonstrate the value of their contribution to be included in the research teams. While challenging, participation in such research projects is important for development as a scholar, for understanding and achievement of social visions and for law as a social institution.

CONCLUSION

Critical to success in all research endeavours is a clear understanding of conceptual and non-theories and then using these theories to inform the method. It requires clear prior consideration and an explicit statement of one's conceptual theory positing the nature of the phenomena to be investigated and connecting such to method. This investment of time in theory greatly assists not only the legal scholar in the conduct and critical evaluation of their own research, but ultimately communicating it to the legal community and wider society. As Professor Nils Jansen argues, legal research "provide[s] judges and legislators with structured information about relevant options and possible solutions for a given problem and thus put them in a position to make better decisions."[235] Clearly articulated theory and method in research can do nothing but put them in such a position.

Taking careful account of theory-method-phenomena relationship strengthens legal research by a sharpened focus on law however one defines it, improves intra-disciplinary communication, and better articulates the findings of legal research to outsiders. It provides a pathway to improving law's contribution to social living, to a better society in terms of fairness, efficiency, justice and sustainability over the long term.

As Professor John Gava has observed "Law is akin to philosophy in that we are engaged in a conversation with the best of the past about problems and

[235] Nils Jansen, *Hermann Kantorowicz'Concept of Legal Science and the Social Role of Legal Scholarship Today*, 26 EDINBURGH LAW REVIEW (2022).

solutions that have been with us forever."[236] This breadth of vision and depth of history creates great opportunities for the intellectually curious law scholar of all paradigms and political philosophies to wander through the challenges, problems and solutions that both have been and could be developed and tried by societies around the globe.

[236] John Gava, *Legal scholarship today*, 40 ADEL. L. REV. (2019).