

RESEARCH ARTICLE

Legal research and the public good: the current landscape

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Abstract

This paper is a revised version of a plenary lecture delivered at the SLS Annual Conference held at Oxford Brookes University in June 2023. It adopts an auto-ethnographic approach, drawing on the author's long experience of participating in the UK Research Excellence Framework (REF), to assess the current state of legal research in the UK and consider the implications of the increasing importance in the research landscape of engaging in research that serves the public good. The paper explores what falls within the scope of 'legal research', particularly for REF purposes, and reflects on how REF-focused research sits within the broader scope of legal scholarly activities. Ideas of the public good are examined and their relation to measures of research impact probed. The paper concludes by painting a broad-brush picture of the current research landscape, identifying key elements and engines of change, and speculating on the direction in which things are going and what should most concern legal scholars going forward. Although primarily focused on legal research in the UK, the paper should be of interest to legal scholars beyond the UK, particularly those in jurisdictions where research assessment exercises are a feature of academic life.

Keywords: law; Research Excellence Framework; law schools

Introduction

I was delighted to be asked to deliver a lecture at the Annual Conference of the Society of Legal Scholars (SLS) on the topic of 'Legal Research and the Public Good' at Oxford Brookes University in June 2023. The invitation came at the end of my service as Chair of the Research Excellence Framework (REF)2021 law sub-panel, although my experience of state-sponsored research assessment goes back almost 20 years. In 2005, I joined the law sub-panel of the 2008 Research Assessment Exercise (RAE) (chaired by Celia Wells); I served as Deputy Chair of the sub-panel in REF2014 (under Gillian Douglas) and, in 2017, I was appointed Chair of the REF2021 law sub-panel, the results of which were announced in March 2022.¹

Over the course of these three assessment cycles, I have garnered a more than usually expansive grasp of law as a field of study. I have gained a sense of how it looks at present, and of how it has changed and evolved over the last two decades. That said, the thoughts I offer here are not the product of any systematic or data-driven analysis. They are, rather, personal insights gleaned largely from my RAE/REF experience. In this sense I am engaging in a form of auto-ethnography, bringing my

[†]Sincere thanks to the anonymous reviewer for their valuable feedback and to the editors of *Legal Studies* for giving me this opportunity to share my views and experiences.

¹Full details of REF2021, including submissions and results, are available at <https://www.ref.ac.uk> (last accessed 9 October 2023).

personal experience to bear on wider debates and contentions within my field. I am also tapping into a body of literature characterised by Susan Bartie as ‘meta-scholarship’ – ‘scholarship about scholarship’² – of which, in the sphere of law, there is now a significant corpus.³

The paper proceeds as follows. First, I offer a brief outline of the UK Research Excellence Framework. Then I consider what we mean by ‘legal research’. I reflect upon what falls within the scope of legal research, its relationship to legal ‘scholarship’, and whether the categories of research and scholarship are distinguishable. I turn then to the idea of the public good. Intuitively, this is an easy value to endorse but how far does and should the public good inform our research? Why has it emerged as an important feature of the research landscape at this time? Finally, and in the light of what these reflections have produced, I offer some thoughts on the present state and future direction of legal research. I paint a broad-brush picture of the current research landscape, identify key elements and engines of change, and speculate on where legal scholarship is going and what should most concern us going forward. Ultimately, my enquiry here is driven by concerns that I hope are widely shared. I have spent a lifetime immersed in the law, in thinking, learning, and writing about it. I am genuinely committed to ensuring that legal academics are enabled and inspired to achieve and maintain the highest standards of research and scholarly excellence. I believe this is important, not just because legal research can serve purposes which advance the public good, but also because maintaining the epistemic integrity of law as a field of knowledge is an important activity in and of itself, particularly when what passes for knowledge is often fiercely contested and mediated by relations of power.

1. The UK Research Excellence Framework

It may seem otiose to begin by explaining what the REF actually is and does, but, aside from the fact that many readers of this journal are from outside the UK, I am aware that, even within the UK, some academics prefer to adopt a stance of wilful ignorance when it comes to REF matters. In brief then, the REF is a government-sponsored research assessment exercise which, in some shape or form, has been a feature of UK academia since the mid-1980s. Occurring cyclically, usually over a five- to seven-year period, the REF seeks to measure the quality of academic research in UK higher institutions with a view to informing the allocation of public research funding, providing accountability for such funding, and supporting the benchmarking of institutional measures of performance.⁴

As it stood in REF2021, the REF comprises three elements of assessment: outputs; impact; and environment. These elements are variously weighted, with the greatest weight traditionally being accorded to outputs (scholarly publications). Until 2014, research impact (understood as impact beyond rather than within the academy) was not a measure of research excellence. In RAE2008, for example, outputs counted for the bulk of the score awarded to individual submissions (70%). With the advent of impact, the relative weight of the output element of the assessment has declined. In REF2021, outputs counted for 60% of the total grade profile and in the next anticipated exercise (REF2028), it is proposed to reduce the weight of outputs even more.⁵

The actual assessment process is conducted by academics and, since the introduction of research impact, there has also been input from research users. Disciplines are variously configured around sub-panels, the work of which is overseen by four main panels. The primary role of the main panels is to ensure quality and consistency of assessment. Sub-panel members are appointed through a nomination process led by subject associations, including, in the case of law, the SLS. Law has benefited

²S Bartie ‘The lingering core of legal scholarship’ (2010) 30 *Legal Studies* 345 at 346.

³On the field of legal meta-scholarship, see Bartie, above n 2; S Bartie ‘Histories of legal scholars: the power and possibility’ (2014) 34 *Legal Studies* 305.

⁴See further REF2021 ‘Guidance on submissions’ (2019) para 15, available at https://www.ref.ac.uk/media/1447/ref-2019_01-guidance-on-submissions.pdf (last accessed 9 October 2023).

⁵Research Excellence Framework 2028 ‘Initial decisions and issues for further consultation’, available at <https://beta.jisc.ac.uk/future-research-assessment-programme/initial-decisions> (last accessed 9 October 2023).

from being a discrete sub-panel since the inception of the research assessment process. This has allowed the legal community, through the input of sub-panel members and subject associations, to shape, so far as is consistent with the wider aims and operation of the assessment process, the norms and conventions informing the assessment of research excellence in law. Of course, just as legal researchers have influenced the REF, so also has the REF affected the conduct of legal research. This is a point to which I will return.

I am not here to champion the REF. At best it has its pros and cons; at worst, it has become the bane of our professional lives. That is not my concern. My object here is to share what I have learned from participating in the REF process – from reading and assessing large volumes of outputs, impact case studies, and environment statements, and from interacting with dozens of legal scholars spanning the length and breadth of British legal academia. The institutionalisation of research assessment in British higher education coincides almost exactly with my lifetime in academia and, in that time, I have observed it to have mixed effects. One early positive of the RAE/REF – from which I probably benefited – was that it encouraged more transparent norms of internal promotion, based on research performance rather than, as was often the case, whether one fitted within the institutional ethos and culture. Part of the reason I chose to invest time and effort in the REF was to encourage the academic values I espoused, particularly in relation to research quality and diversity, to secure a strong foothold in the assessment process. I also felt a strong responsibility – shared by my fellow sub-panelists – to ensure that the assessment process worked to enhance rather than undermine academic autonomy and collective governance. I would be the first to admit, however, that, in this respect, the REF, in conjunction with other external drivers of higher education policy and decision-making in the UK, has probably helped to erode the independence of researchers and research communities.⁶

2. Legal research

Turning directly to the question of what we mean by legal research, the REF has a generic definition of research which goes as follows: ‘Research is a process of investigation leading to new insights, effectively shared’.⁷ Investigation. New Insights. Shared. The last of these requirements – the need to publish or otherwise publicly disseminate one’s work – is perhaps the most REF-specific. As has often been remarked, Wittgenstein published very little while he lived and, in the higher education world of today, would have been the despair of his line manager. But let us focus on the other elements of the definition – a *process of investigation* leading to *new insights*. To what extent does academic work constitute an investigation? When we craft student lectures, are we investigating? What about commenting on new cases or statutes to enable non-academics to keep up with relevant developments? In the ordinary run of things, it is unlikely that this kind of work will produce much by way of new insights. This is not to say, of course, that it cannot, particularly where the task of legal exposition demands an investigative stance. Nor is it to suggest that the kind of work that legal academics perform for law ‘users’ is not nevertheless of value and importance.

To investigate is to search or enquire into something, to examine it with particular care and accuracy. Detectives investigate crimes and, sometimes, the process of research feels a bit like detection – as when we experience the excitement of following up clues in the texts. Of course, the worth of an investigation is ultimately determined by results. The detective catches her criminal; the researcher generates insights that enhance our collective knowledge.

Clearly not all scholarly activities fall within the scope of research, so defined. The role of legal scholars often includes disseminating existing knowledge of law, tailored to the needs and interests of a particular readership – students, practitioners, NGOs, government bodies, and so on. It could be said that legal academics are charged with *providing for law*. Part of the job is surely to nurture

⁶On the changing status of legal academics, see A Bradney and F Cownie ‘The changing position of legal academics in the United Kingdom: professionalization or proletarianization?’ (2020) *Journal of Law and Society* S227.

⁷REF2021 ‘Guidance on submissions’, above n 4, Annex C, para [1].

and cultivate law as a productive mode of being and doing. This kind of work is captured collectively in the term ‘legal scholarship’. Etymologically, scholarship derives from *scolere* (in old English) and *scholaris* (medieval Latin), meaning ‘student’ or ‘pupil’. ‘Scholarship’ and ‘school’ are also, obviously, etymologically related. In modern English, we apply the term ‘scholar’ broadly to encompass not just those who study but also those who educate. A scholar often denotes a learned person, someone extremely knowledgeable in their field. Much of what legal academics do – outside the ever-encroaching sphere of academic administration – is scholarship, but only some kinds of scholarly activity will count as research. Again, this is not to denigrate those activities in any way. Perhaps one of the unfortunate byproducts of the REF has been to encourage us to overlook the importance of scholarly work not directly concerned with producing new insights.⁸

Arguably another unfortunate consequence of the contemporary emphasis on research rather than scholarship is that it has fostered a belief, which I sometimes encounter in my interactions with legal academics, that doctrinal scholarship is not valued by the REF; that it has been sidelined in favour of more ‘fashionable’ ways of engaging with law. This suspicion that doctrinal scholarship has fallen in legal academic esteem has recently been voiced by Alan Bogg, who comments:

Doctrinal scholarship is sometimes derided as ‘black letter’, perhaps implying that it is dull, descriptive, unimaginative, lacking in rigour and scholarly ambition. An obscure theoretical flourish is sometimes mistaken for cleverness, and clarity and simplicity for the mundane. Worse still, fussing about legal coherence, and a concern with the rules making sense in their own terms and in relation to each other, is seen as a distraction from the important business of social justice activism.⁹

Bogg does not address these remarks directly to the REF process, but it is an easy enough leap for others to make. Even judges have been known to express concern that the research assessment exercise does not properly value doctrinal scholarship.¹⁰

That the REF does not value doctrinal research is a misperception I am keen to correct. My sub-panel colleagues will attest to the presence of a rich vein of excellent doctrinal research in the contemporary legal research landscape. This research co-exists with and often complements other approaches. Moreover, in so far as doctrinal work influences the work of judges and legal practitioners (which, judges tell us, it increasingly does)¹¹ it is also impactful. In shaping the development, application and interpretation of law, doctrinal research can and does effect changes that extend well beyond the academy – impacting, in some cases, on the lives of large groups of the population. Of course, the connection between cause and effect, when it comes to demonstrating the influence of academic research, is not always easy to make, but this is a general difficulty that claims to research impact confront.

In understanding how doctrinal scholarship fits within the framework of research assessment exercises, it is helpful to distinguish between doctrinal method, scholarship, and research. Doctrinal

⁸The recent announcement by the Research Excellence Framework Programme, that the next REF will include some measure of the work which goes into ‘support[ing] the broad development of disciplinary knowledge’, may go some way to mitigating this tendency. See *Initial Decisions*, above n 5, para [34].

⁹AL Bogg ‘Can we trust the courts in labour law? Stranded between frivolity and despair’ (2022) 38 *International Journal of Comparative Labour Law* 103 at 133–134.

¹⁰See the remarks of Mr Justice Beatson (as he then was) in a lecture delivered at the Inner Temple in 2012: ‘If academic lawyers or academic legal administrators have allowed the Research Assessment Exercise to ...[undervalue doctrinal research] ... it is to be deeply regretted’: ‘Legal academics: forgotten players or interlopers’, available at https://www.innertemple.org.uk/wp-content/uploads/2017/08/lecture_beatson.pdf (last accessed 9 October 2023), also published under the same title in in A Burrows et al (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: Oxford University Press, 2013).

¹¹Beatson, above n 10. See also Lord Burrows, noting the importance and increasing influence of academic work on judicial decision-making, in ‘Judges and academics and the endless road to unattainable perfection’, The Lionel Cohen Lecture 2021, available at <https://www.supremecourt.uk/docs/lionel-cohen-lecture-2021-lord-burrows.pdf> (last accessed 9 October 2023), also published under the same title in (2022) 55(1) *Israel Law Review* 50.

method is a core feature of how and what we teach our students: it is the application of a distinct set of practical reasoning techniques, to legal dilemmas.¹² Doctrinal *scholarship* captures the work performed by academics to hone and develop doctrinal techniques and applications. Doctrinal scholarship goes beyond the deployment of doctrinal method for advocacy or dispute resolution purposes (although such scholarship is often of value in these contexts). The primary concern of the doctrinal scholar is to support, develop, rationalise, and, when necessary, reconstruct, the normative and conceptual infrastructure that sustains legal doctrine as a discursive practice. Academics can do a lot of different things with legal doctrine but the thread which holds such work together under the ‘doctrinal’ umbrella is the commitment to taking seriously the norms and conventions, techniques, and practices of legal reasoning, preferably with due attention to the temporal and spatial contexts in which such discursive practices have evolved and continue to operate.

Turning now to doctrinal *research* – this is a particular kind of doctrinal scholarship, involving the application of doctrinal method to processes of investigation generating new insights. In other words, doctrinal research applies doctrinal method to knowledge-producing ends. We might view doctrinal research as a subset of doctrinal scholarship: while doctrinal research is scholarship, not all doctrinal scholarship is research. The same may be said to apply to academic work more generally: the concept of scholarship is more capacious than that of research when it comes to capturing academic engagement.

My point is this: doctrinal scholarship is a necessary, indeed fundamental, part of the legal academic portfolio. This is partly because it maps onto core aspects of legal practice but also because, as I have suggested, it provides the conceptual and normative infrastructure that supports legal reasoning and, often, legal debate. Regardless of the view legal researchers take on law as an object of study – whether as a repository of autonomous norms, a tool to be deployed to diverse social and political ends, an expression of class, race, or gender hierarchy, or a regulatory field to be studied alongside other modes of regulation – they benefit from acquiring a sound grasp of law’s architectural features and discursive practices. At the same time, doctrinal research – that is, the distinct application of doctrinal method to investigative and knowledge-producing ends – must take its place alongside the range of ways in which legal researchers investigate law and legal phenomena.

What then are these range of ways? Again, it is useful to turn to the REF guidance, specifically to the unit description of the law sub-panel, a text which has been carefully crafted and fine-tuned over the course of the three REF exercises in which I have participated:

[Legal research] includes all doctrinal, theoretical, empirical, comparative, critical, historical or other *studies of law and legal phenomena* including criminology, and socio-legal studies. The sub-panel would also expect research on legal education to be submitted All areas of law as described above fall within the boundaries of the UOA. ***Law is a hybrid, multi-disciplinary subject which draws on disciplines in both the social sciences and the humanities.*** Research in law may intersect with or draw upon a variety of disciplines and methodologies.¹³ (emphasis added)

I want to draw particular attention to the emboldened sections of this broad descriptor. If I were to time-travel back to a British law school in the 1960s, I would encounter a legal academic world which was overwhelmingly doctrinally focused.¹⁴ In the mid-twentieth century, virtually the entire corpus of the law curriculum was doctrinal, with doctrinal articles making up most of the content

¹²On the continued relevance of doctrinal scholarship to legal education, notwithstanding growing diversity in legal research see Bartie, above n 2.

¹³REF2021 ‘Panel criteria and working methods’ (2019) para [104], available at <https://www.ref.ac.uk/publications-and-reports/panel-criteria-and-working-methods-201902> (last accessed 9 October 2023).

¹⁴... a world in which the exposition and analysis of legal doctrine remained the principal function of legal education and scholarship in England’: D Sugarman ‘Beyond ignorance and complacency: Robert Stevens’ journey through *Lawyers and the Courts*’ (2009) 16 *International Journal of the Legal Profession* 1 at 8.

of law journals. Even the *Modern Law Review* – which styled itself as the cool kid in legal academia back then – was predominantly doctrinal in content and focus. To engage in legal research at that time was to engage directly with *the law*, its content, complexities, confusions, and contradictions. Victorian pioneers of the textbook tradition conceived the primary task of legal scholarship to be to subject law to scientific scrutiny, to order and systematise the ‘data’ of law (primarily judgments) so that it presented as a ‘coherent whole’.¹⁵

The REF reference to ‘law and legal phenomena’ envisages a much wider and more diverse research terrain. This is a deliberately so, reflecting the scope of the field as it has been apprehended by successive law sub-panels. Legal scholars have moved beyond researching the law to researching the broader topography of the legal. This shift is also reflected in the content of law curricula which is no longer limited to ‘learning the law’, as Glanville Williams famously put it,¹⁶ but involves the study of law and legal phenomena at multiple sites and scales of operation.¹⁷

These changes have taken place over a considerable time period. In the UK, they can be traced back to at least the late 1960s when legal scholars started to engage with ‘law in context’ approaches.¹⁸ The rise of socio-legal and critical perspectives has also had an influence, bringing empirical and interdisciplinary insights to bear on the sphere of the legal.¹⁹

This brings us to the second emboldened feature of the descriptor: ‘Law is a hybrid, multi-disciplinary subject which draws on disciplines both in the social sciences and the humanities’. The hybridity of law as a field of study has always proved a challenge for the organising schemes of universities. Some kinds of legal research, for example socio-legal empirical work, fit comfortably within the social sciences. Other kinds, for example, historical or jurisprudential research, are more humanities-inclined. This Janus-like feature of law as an academic discipline is one reason why legal academics often resist being located within a social sciences or a humanities faculty, why we cleave to the idea of law as a faculty of its own.

It is also true that legal research is multi-disciplinary: legal scholars frequently apply the insights and techniques of other disciplines to their research, whether drawn from social theory and policy, sociology, politics, philosophy, economics, history, literature, or, as increasingly the case, the natural sciences. The breadth and complexity of the tasks which law is called upon to perform are now such that it is difficult just to ‘do law’ these days even if one’s primary research orientation is doctrinal. Think about medical or environmental law, or the burgeoning new field of law-tech. Mastering these sub-fields requires a sound understanding, not just of what the law is, but also of the terrain the law is called upon to regulate. Nor should we forget that doctrinal method itself is essentially the application of analytical philosophical techniques to legal materials/data. It is not just that we are all interdisciplinary now – in a sense, we always have been. When doctrinalism constituted the near-exclusive approach to legal scholarship, it was easy to forget that it applied a particular method, underpinned by a set of methodological premises, to the study of legal material. These premises include certain

¹⁵D Sugarman ‘Legal theory, the common law mind and the making of the textbook “tradition”’ in W Twining (ed) *Legal Theory and the Common Law* (Oxford: Oxford University Press, 1986) p 26 at p 30, citing AV Dicey ‘Can English law be taught at universities?’ (at 18).

¹⁶G Williams *Learning the Law* (London: Stevens & Sons, 1945) (now in its 17th edition).

¹⁷There is a significant contemporary literature addressing the changing nature of legal education, exploring its relation to changes in the professions, technological advances, contemporary social justice challenges, curriculum decolonisation initiatives and other matters of contemporary concern. Recent examples include C Ashford et al (eds) *Social Justice and Legal Education* (Abingdon: Routledge, 2018); E Jones and F Cownie (eds) *Key Directions in Legal Education: National and International Perspectives* (Abingdon: Routledge, 2022); and RA Dunn et al (eds) *What is Legal Education For: Reassessing the Purposes of Early Twentieth-first Century Learning and Law Schools* (Abingdon: Routledge, 2022).

¹⁸‘Law in context’ launched in the UK with the publication of Patrick Atiyah’s pioneering text, *Accidents Compensation and the Law* (London: Weidenfeld & Nicolson, 1970). On its development and influence on legal education, see W Twining *Law in Context: Enlarging a Discipline* (Oxford: Oxford University Press, 1997).

¹⁹See DS Cowan and D Wincott (eds) *Exploring the ‘Legal’ in Socio-legal Studies* (Basingstoke: Palgrave Macmillan, 2015); and on critical legal studies, see E Christodoulidis et al (eds) *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar, 2019).

assumptions about the nature and object(s) of law which are not without contention, and of which the researcher, at the very least, ought to be aware.²⁰ Yet, it is only as other methodological approaches have entered the terrain of legal research that the question of method has come to be raised in relation to doctrinal analysis.²¹

Of course, the introduction of multiple methodological approaches does render the boundaries of law as a discipline more porous and less distinct: In 2004, Fiona Cownie pronounced law to be ‘a discipline in transition’.²² However, it must be remembered that disciplinary boundaries are essentially intellectual constructs, contrived to aid the organisation and apprehension of knowledge. The systematic mapping of knowledge into the disciplinary categories we recognise today is relatively recent, the social science disciplines, for example, only assuming their modern shape and form in the nineteenth and twentieth centuries.²³ Nor are disciplinary boundaries static or fixed; they continuously shift and reconfigure as new developments in knowledge and understanding shape our perception of knowledge fields.²⁴ For many decades, it benefited the legal academy to promote law as a discrete discipline with its own province and scope. A relatively late arrival to the Anglo-American academic portfolio, it served law to style itself as an autonomous discipline because it helped to counter the view – widely held within and beyond universities – that it was not a proper academic subject, that legal education was simply ‘trade school’. This concern is evident from the earliest writings of British legal academics. In 1831, for example, Professor JJ Park of King’s College London observed:

In choosing between different systems of legal education, the first enquiry is whether the practice of law is to be considered as *a mere trade*, or the application of the principles of a great science, in the practice of a liberal profession.²⁵ (emphasis added)

Even in the twenty-first century, senior judges have felt compelled to rebut the dreaded tendency to associate law with trade, Lord Neuberger remarking in a lecture in 2012:

If we exclusively focus on ... the *development of law as a trade*, by treating the provision of legal services as *any old commodity*, we cast aside its *fundamental role and purpose*, its *raison d’être*, and we undermine the rule of law and our democracy.²⁶ (emphasis added)

One approach to dispelling the ‘trade’ stigma has been to restyle the legal academy as a liberal project, that is, to emphasise the value of legal education as an end in itself, and not simply as a means of entry to the legal profession.²⁷ The expansion and diversification of legal research along with the recent deregulation of the law degree in England and Wales have aided this re-presentation. As a mature and established field of enquiry, law no longer requires doctrinalism to profess its disciplinary

²⁰The great Neil MacCormick described doctrinal analysis as ‘an intellectual process involving a new imagining and describing of the implicit order in potential disorder, based on some principles or values ascribed to the whole or its parts’ (emphasis added): N MacCormick *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) p 29.

²¹For an interesting discussion of doctrinal method which, inter alia, draws on MacCormick’s work, see A Bogg ‘Doctrinal method in labour law: potential, problems prospects’ in A Blackham and S Cooney (eds) *Research Methods in Labour Law: A Handbook* (Cheltenham: Edward Elgar, forthcoming).

²²F Cownie *Legal Academics: Culture and Identities* (Oxford: Hart Publishing, 2004) p 197.

²³P Wagner *A History and Theory of the Social Sciences* (London: Sage, 2001).

²⁴A Krishnan ‘What are academic disciplines? Some observations on the disciplinarity vs interdisciplinarity debate’ (2009) ESRC National Centre for Research Methods NCRM Working Paper Series 03/09, available at https://eprints.ncrm.ac.uk/id/eprint/783/1/what_are_academic_disciplines.pdf (last accessed 9 October 2023).

²⁵JJ Park *An Introductory Lecture delivered at King’s College London* (London: B Fellows, 1831).

²⁶Lord Neuberger ‘Reforming legal education’, Lord Upjohn Lecture, Association of Law Teachers, 15 November 2012 para 20, available at <https://www.supremecourt.uk/docs/lord-neuberger-121115-speech.pdf> (last accessed 9 October 2023).

²⁷A Bradney *Conversations, Choices and Chances: The Liberal Law School in the Twenty-first Century* (Oxford: Hart Publishing, 2003).

credentials, but this does not mean that doctrinal research should be considered of less value and importance than other modes of legal enquiry.

Indeed, there is some irony in the fact that just as law as a discipline loosens its links with professional training, universities as a whole have become recast as training grounds for employment. In the neoliberal university of twenty-first century Britain in which education is increasingly viewed as a means not an end,²⁸ the whole project of university education has arguably been reduced to a trade. Higher education, once a precious, highly valued public good is now a mere ‘tradeable commodity’ operating in a competitive and volatile market in which academics are tasked to provide a ‘service’ to their customer-students.

3. The public good

This (somewhat disturbing) thought provides a neat segue into consideration of the public good. Until now I have sought to elaborate the nature and scope of legal research and to emphasise that its increasing breadth and diversity is to be welcomed. The maturity and sophistication of law as an academic discipline no longer requires us to police and contain what passes for legal research. The sheer pervasiveness of law, the fact that it penetrates virtually every aspect of human existence, makes it neither possible nor desirable to constrict our investigations into law and legal phenomena. But are or ought such investigations to be in pursuit of the public good?

The term ‘public good’ means different things in different contexts. In economics it is deployed quite technically to denote non-excludable and non-rivalrous goods or resources.²⁹ In philosophy it is closely associated with Aristotle’s concept of the common good and is the focus of considerable debate and contention.³⁰ In law, we don’t tend to use ‘public good’ as a term of art, although versions of it feature in some jurisprudential scholarship. Finnis, for example, talks about ‘human’ or ‘basic goods’ in his classic work on *Natural Law and Natural Rights*,³¹ although, here again, he uses the terms in quite a specific sense, and not one with which all are likely to agree.

The ‘public interest’ is a concept with which lawyers are much more comfortable. Judges sometimes invoke the public interest when deciding cases, and the concept is built into the fabric of certain legal rules and principles. For example, in whistleblowing law, ‘public interest’ informs the definition of protected (‘qualifying’) disclosures.³² We often use the terms ‘public interest’ and ‘public good’ interchangeably but are they really the same? There is a moral or ethical quality to ‘good’ – think of its etymological associations with ‘god’. By contrast, ‘interest’ is a morally neutral word; it signals importance but is more likely to be used in relation to earthly rather than heavenly benefits.

Does the REF, through its inclusion of impact as a measure of research performance, compel legal researchers to engage with the public good? Currently, research impact is defined as ‘an effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life, beyond academia’.³³ While such changes, effects or benefits are generally expected to produce ‘positive’³⁴ outcomes, technically REF impact is not confined to impact that serves the public good. The REF takes a consciously neutral view of what counts as impact as well as an inclusive

²⁸While the idea of the university as a community of scholars engaged in the dispassionate pursuit of truth may never have accorded precisely with the reality, any semblance of the idea now seems to have gone forever as the market assumes centre-stage and governments seek to deploy universities for instrumental ends’: M Thornton *Privatising the Public University: The Case of Law* (Abingdon: Routledge, 2012) p 2.

²⁹Goods or resources are non-excludable when others cannot be prevented from enjoying them; they are non-rivalrous when one person’s consumption does not reduce their benefit for somebody else.

³⁰M Jaede ‘The concept of the common good’ *British Academy Working Paper*, available at <https://www.thebritishacademy.ac.uk/documents/1851/Jaede.pdf> (last accessed 9 October 2023).

³¹J Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

³²Employment Rights Act 1996, s 43B(1).

³³REF2021 ‘Guidance on submissions’, above n 4, Annex C, para [4].

³⁴REF2021 ‘Panel criteria and working methods’, above n 13, Annex A, para [1].

approach as to who may enjoy its benefits, namely any: ‘audience, beneficiary, community, constituency, organisation or individuals... in any geographic location whether locally, regionally, nationally or internationally’.³⁵ For example, benefiting a business may be impact without the need to assess whether the business acts in the public good. In other words, there is nothing in the REF rules that formally mandates research to promote public good.

Is it perhaps that engagement with law compels a drift in the direction of the public good? One could certainly argue that, in setting the rules of engagement for social intercourse, law itself is a public good. This tells us nothing, however, about the ethicality or justice of such rules of engagement. It is true that the idea of the common good – returning to Aristotle – is sometimes invoked to prompt legal thinking about the right and the virtuous. The common or public good here functions as a space in which to connect notions of law with the conditions required for people to pursue ‘good’ lives (broadly understood in moral or ethical terms). It is this concern which drives debate in natural law jurisprudence³⁶ and it is also evident in theorisations of the rule of law.³⁷ Increasingly too, in legal and political discourse, the common good is becoming aligned with ideas of citizen security and wellbeing. The pursuit of welfare goals, such as access to education and health, or wealth redistribution fall within this concept of the common good, which, by relying on ideas of (social) justice often bears directly (and in quite complex ways) on questions of law and legal arrangements.³⁸

Sometimes the common good can appear to be on the wrong side of human rights. In the libertarian-communitarian debates of the late twentieth century, ‘private’ and ‘public’ were sometimes pitted against one another, with individual rights placed in opposition to the common or community interest.³⁹ And if we bring into consideration postmodernist disillusion with the Enlightenment project – questioning universal notions of good and problematising the idea of objective truth⁴⁰ – where does that leave the common or public good? The whole basis of the concept relies on the premise of communality, the idea that individuals in a particular community share a common vision or set of interests which the public good is tasked with promoting. In the increasingly multicultural, deeply unequal society we live in today, however, it is hard to articulate a conception of the public good which corresponds with shared or common interests. What we more commonly confront are divided interests, with law being mobilised to promote some interests over others.⁴¹

This makes it very difficult to articulate a satisfactory concept of the public good for legal purposes;⁴² indeed, it raises questions about whether the concept is, in any meaningful sense, ‘good’. What becomes clear is that the public good is a contested concept, not just in terms of what it might mean but also in terms of who or what may lay claim to it.

³⁵REF2021 ‘Guidance on submissions’, above n 4, Annex C, para [5].

³⁶See eg G Duke ‘The common good’ in G Duke and R George (eds) *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge: Cambridge University Press, 2017) p 369.

³⁷See generally J Meierhenrich and M Loughlin (eds) *Cambridge Companion to the Rule of Law* (Cambridge: Cambridge University Press, 2021).

³⁸For an example of legal scholarship in this genre, see C McCrudden *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford: Oxford University Press, 2007).

³⁹A Etzioni ‘A communitarian critique of human rights’ in T Cushman (ed) *Handbook of Human Rights* (Abingdon: Routledge, 2021) p 129. For an overview of the liberal-communitarianism debate, see D Morrice ‘The liberal-communitarian debate in contemporary political philosophy and its significance for international relations’ (2000) 26 *Review of International Studies* 233.

⁴⁰JF Lyotard *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984).

⁴¹For an analysis of law as a site for the adjudication of ideological conflicts between different interest groups, see D Kennedy *A Critique of Adjudication: Fin de Siècle* (Boston, MA: Harvard University Press, 2000).

⁴²Although see the notion of ‘public interest law’ understood as mobilising the law to advance the interests of the marginalised and disadvantaged (whether people or concerns).

4. Legal research and the public good

In the most recent research assessment exercise carried out in the UK in 2021, the law sub-panel read and assessed nearly 6,000 research outputs and 244 impact case studies. This was among the larger disciplines represented in the REF process. British law schools have been growing in size and number, particularly since the change in funding from block grants to student fees in the early 2000s and the lifting of the cap on student numbers in England and Wales in 2014. Growth has brought more jobs and opportunities for legal academics, but it has also intensified workloads and the encouraged the casualisation of academic labour. Increasing dependence on overseas student income has hastened the privatisation of higher education, rendering our interactions with students increasingly transactional. Meanwhile, the REF has encouraged the adoption by universities of an instrumentalist, funds-driven approach to research management, producing ill-favoured conditions for intellectual flourishing.

Perhaps it is these disruptions and uncertainties in the higher education sector that are prompting legal researchers to look beyond the academy, to connect, in a concrete and meaningful way, the work that they do and the world that they currently inhabit. In its recent report, the REF2021 law sub-panel made the following comments about the character of legal research submitted:

Many outputs were problem-focused, responding to the multiple challenges posed by economic, social, and political volatility, climate and ecological emergency, and rapid technological change. While much of the research assessed was jurisdictionally based, the global legal order has become an increasingly significant focus of research. Legal research continued to make a key contribution to the knowledge bases of legal practice, adjudication, government, law reform, charities, public policy, and campaign groups. Legal researchers are also engaging with other disciplines to devise regulatory solutions to complex multi-dimensional challenges. Increased range and methodological diversity remained a notable feature of contemporary legal research...⁴³

The report continues:

As with the previous assessment exercise, there were numerous examples of research contributing to understanding of the fundamental issues affecting society or responding to major topical concerns. This has encouraged the further blurring of established sub-disciplinary categories and the development of new sub-disciplinary clusters and frames ...⁴⁴

The picture presented here is of a research field which is thoroughly outward-looking – vigorously engaging with the world beyond the academy. Further evidence of this outward-looking, problem-solving approach can be gleaned from the texts of unit environment narratives. One of the consequences of requiring REF submissions to include an environment narrative has been to encourage law schools to capture the character of their research through research themes and groupings. It is interesting how many environment statements now present their research, not in terms of traditional legal demarcations – criminal law, private law and so forth – but in terms of public interest/good objectives. Legal researchers want to *protect* human rights, *promote* a sustainable environment, *fight* climate change, *support* the rule of law and *give voice* to vulnerable and marginalised groups. In my scan of environmental narratives – and this is the closest I came to any kind of systematic analysis of the REF data – I found frequent references to research which addressed *problems*, confronted *challenges*, and conferred *benefits*. Often, this was expressed in terms of the submitting unit's vision,

⁴³UoA 18: Law' in REF2021 'Main panel C overview report' (2022) pp 104, 106; and for more detail on the range of areas and methodologies represented, see pp 107–109, available at <https://www.ref.ac.uk/publications-and-reports-main-panel-overview-reports/> (last accessed 9 October 2023).

⁴⁴Ibid.

mission, or set of commitments uniting their research efforts. For example, one submission presented its research in the following terms:

... [T]he School's research seeks to promote peace, democracy, economic growth, social welfare, technological innovation, human rights, social justice, human flourishing, protection of wildlife and the natural environment, and compliance with the rule of law, in the UK and around the globe.⁴⁵

This was by far the most expansive mission statement in the environmental narratives, but many other submissions contained similar kinds of commitments to sustainable communities, equality, diversity and inclusivity, human rights and so on. Unsurprisingly 'justice' featured frequently and in multiple contexts, encompassing social justice (extremely popular), environmental justice, global justice, and, at a time when the consequences of austerity are visibly catching up with the operation of the legal system, access to justice.

Not all submissions adopted this language, and it cannot be assumed that those that did not were not nevertheless producing research with societal or public benefits. Yet there is something interesting about this trend towards characterising research in terms of desirable social goals or purposes. It says something significant, I think, about the nature of the research environment in which legal academics work and to which they contribute.

There can be no doubt that the inclusion of impact as a criterion of measurement since REF2014 is having an effect on how and what legal academics research. Again, gleaned from environment narratives, it is evident that academic researchers are investing a lot more time and effort into forging links with non-academic groups and organisations – research stakeholders, users and so on. Research 'co-creation' is now a buzzword, as are terms such as 'policy-facing' and 'civic engagement'. There is every reason to welcome this outward shift in academic focus, which coincides with an unprecedented capacity for academics to get their research 'out there' by utilising social media, blog posts, and other technology-enabled modes of mass communication. However, there is also a risk, which academic commentators have highlighted,⁴⁶ that requiring or even rewarding impactful research may be having negative effects on the knowledge-producing efforts of the academy, discouraging projects without any immediate practical benefit and, more broadly, undermining academic freedom by funnelling research choices into pre-designated funding channels. These are real risks: the weight of constant measurement, the challenge of 'fitting' research enquiries into the frame of political and policy trends, the sheer volume of additional work that the impact agenda has generated. This high pressure work environment is more than enough to douse the passions of even the most dedicated researchers, not to mention endangering their health.⁴⁷ It seems to me that if research is to continue to flourish in our universities, it is incumbent on higher education institutions to do much more to support researchers in their efforts to negotiate this tension between the creative impulse necessary to produce research and its narrow instrumentalisation.

⁴⁵Unidentified Unit Environment Statement in law (REF5). All law submissions to REF2021 are available at <https://results2021.ref.ac.uk/profiles/units-of-assessment/18> (last accessed 9 October 2023).

⁴⁶See eg R Watermeyer 'Impact and the REF: issues and obstacles' (2016) 41 *Studies in Higher Education* 199; K Smith et al *The Impact Agenda: Controversies, Consequences and Challenges* (Bristol: Policy Press, 2020). For an analysis of research impact in law in REF2014, looking, in particular, at the extent to which legal researchers engaged with Government, see L McNamara 'Understanding research impact in law: the Research Excellence Framework and engagement with UK governments' (2018) 29 *King's Law Journal* 437.

⁴⁷There is a growing literature on the negative effects of growth, marketisation, and the audit culture on legal academics. See eg R Collier "'Left pessimists" in "rose coloured glasses"? Reflections on the political economy of socio-legal studies and (legal) academic well-being' (2020) 47 *Journal of Law and Society*, S244, S251–S253; G Ferris 'Undermining resilience: how the modern UK university manufactures heightened vulnerability in legal academics and what is to be done' (2021) 55 *The Law Teacher* 24; D Morrison and J Guth 'Rethinking the neoliberal university: embracing vulnerability in English law schools?' (2021) 55 *The Law Teacher* 42; C Strevens and E Jones (eds) *Wellbeing and the Legal Academy* (Springer, 2023).

Of course, factors other than the REF have played a role in widening the scope of legal research and inclining it towards the pursuit of progressive social ends. Some factors, particularly those which relate to changes in legal education and practice, have been the focus of extensive academic analysis.⁴⁸ Other factors which perhaps receive less attention include the transformation over the last half century in the demographic composition of British legal academia – we are more female, more international, less white, less middle-class, and more sexually and culturally diverse. We are no egalitarian utopia, but we are a very different from the academic cohort I joined nearly 40 years ago.⁴⁹

Diversity is a good thing to bring to a research environment. It foregrounds difference and fosters debate by bringing a variety of angles of vision to bear upon academic enquiry. Challenging and unsettling academic orthodoxies can be uncomfortable, particularly for those invested in maintaining them, but the close relation between research outlook and knowledge production – between power and knowledge validation – requires the constant application of a critical eye and the intellectual provocation provided by differences in methods, outlooks and worldviews.⁵⁰

Then there is what I call the ‘PhD-ification’ of law. When I entered the legal academy all those years ago, very few legal scholars had PhDs. Many, like me, were recruited straight from their Masters; others came to the job after a spell in legal practice. Few of us were trained in research, though most of us had been rigorously inducted, one way or another, in doctrinal analysis. Even now, the doctoral culture in British legal academia is relatively new, no doubt accelerated by the inclusion of post-graduate research awards in measures of the research environment.⁵¹ The now near universal trend requiring PhDs as a prerequisite for academic appointment has brought to law schools researchers trained in a much wider range of methodologies. It has also encouraged the entry into law schools of academics without undergraduate law degrees but who have conducted doctoral research with a legal dimension. The shift away from law faculties towards relocating legal scholars within broader multi-disciplinary academic units has exacerbated these trends. Again, disciplinary proximity in research communities can be a good thing, discouraging knowledge silos and encouraging cross-fertilisation of bodies of knowledge. Virtually every environment narrative submitted to law made some reference to interdisciplinarity, partly, it must be acknowledged, because it features in the REF guidelines as something a good research environment is expected to accommodate,⁵² but also because there is a lot of interdisciplinary and multimethodological research going on in law schools. Legal scholars are actively seeking out methodologies and bodies of knowledge beyond their discipline to address what they perceive to be the legal challenges of the day. As one environmental narrative commented: ‘new ways of approaching legal and regulatory problems ... have demanded a change in the methodological focus of our research’.⁵³

In other words, it is not just the REF, the PhD students, the more diverse academic workforce which are shaping the scope and nature of contemporary legal research; it is also the multiple ways in which law is being deployed and the complexity of the challenges it faces in so doing. The rapidity of technological change is a good example here. Can our current legal frameworks and concepts accommodate the development and deployment of AI? Or, in this strange new world peopled with

⁴⁸See W Twining *Blackstone’s Tower: The English Law School* (London: Sweet & Maxwell, 1994); Twining, above n 18; PBH Birks *Pressing Problems in the Law Volume 2: What are Law Schools for?* (Oxford: Oxford University Press, 1896); Bradney, above n 27; Cowrie, above n 22; Thornton, above n 28; Dunn et al, above n 17.

⁴⁹For details of the current gender and race breakdown of UK academics (not broken down by discipline), see <https://www.hesa.ac.uk/news/17-01-2023/sb264-higher-education-staff-statistics> (last accessed 9 October 2023). Even 20 years ago, when I first was appointed a professor, the academic environment was very different. In 2000, I was only one of seven women professors in my whole institution (as opposed to 88 men). For an analysis which captures the challenges of being a female legal academic at the turn of this century, see C Wells ‘Working out women in law schools’ (2001) 21 *Legal Studies* 116.

⁵⁰For just such a productive provocation, see F Adébişi *Decolonisation and Legal Knowledge* (Bristol: Bristol University Press, 2023).

⁵¹The number of doctoral degrees awarded in law in REF2021 has almost doubled from 2014, from 1,586 to 3,129 (‘UoA 18: Law’ in ‘Main panel C overview report’, above n 43, para [35]).

⁵²REF2021 ‘Guidance on submissions’, above n 4, para 359(b).

⁵³See above n 45.

the actions and decisions of non-people, do we have to invent our regulatory and normative frameworks anew? In a recent article (aptly entitled ‘the death of law’), William Lucy argues that technological invention will bring about the end of an era of modern legality, our traditional concept of justice being increasingly replaced by new regulatory forms.⁵⁴ He situates his argument within the broader field of regulatory studies, particularly that of ‘technological management’ (a term developed by Roger Brownsword).⁵⁵ The concerns expressed by Lucy and Brownsword about these anticipated changes in the sphere of the legal highlight the inextricable interlinkage of law and society. Neither stands still and nor should legal scholarship.

5. A cautionary tale

I want to offer one final but important piece of advice to the legal academic community of which I have so long been honoured to be a part. It is this. We should nurture the diversity which currently characterises our research culture and resist the temptation to privilege some approaches to legal research over others. All have their value and strengths. To attempt to cut down the parameters of what passes for legal scholarship is to do legal knowledge a disservice. Yet, I have recently come across an article which – I am quite sure inadvertently – seems to be in danger of doing exactly this. Professor Tarun Khaitan has mounted an argument against ‘scholactivism’ in the legal academy, scholactivism being a neologism which combines the terms ‘activism’ and ‘scholarship’.⁵⁶ To advance his argument, Khaitan posits a hypothetical legal scholar who advances legal arguments to support a legal outcome that aligns with his activist goals. Khaitan argues against the adoption of such a goal-driven approach, insisting that the legal scholar must analyse the legal issues without material outcomes in mind.

There are various ways in which one could attack Khaitan’s argument head-on. One could invoke the spirit of Duncan Kennedy’s *Freedom and Constraint in Adjudication*⁵⁷ to question Khaitan’s assumption that judges who work the legal materials to reach their desired outcomes are necessarily breaking faith with the norms and practices that govern the adjudicative process. One could raise questions too about the scope of Khaitan’s injunction against scholactivism. Does his critique encompass legal scholarship not rooted in the norms and conventions of adjudication, for example, an evidence-based, contextually grounded analysis making the case for a particular legislative reform?⁵⁸

Regardless of whether Khaitan’s argument holds on its own terms – an enquiry for another time perhaps – my disquiet with this piece is that it gives salience to a label which can easily be mobilised to denigrate or devalue particular kinds of legal research. It is true that Khaitan defines the concept of ‘scholactivism’ narrowly, so narrowly in fact as to pare his critique to the bone, but he cannot contain the (mis)uses to which this label might later be put.

The moral of the story is this: critique legal research on its own merits and in accordance with the norms and standards of research peers. Do not invest labels with the power to silence or diminish particular types of legal scholarship, without regard to the quality or significance of their contribution. Embrace the catholicity of this brave new world of legal research we are privileged to inhabit. And do not be afraid to put your own research to ‘good’ work.

⁵⁴W Lucy ‘The death of law: another obituary’ (2022) 81 Cambridge Law Journal 109.

⁵⁵R Brownsword ‘In the year 2061: from law to technological management’ (2015) 7 Law, Innovation and Technology 1.

⁵⁶T Khaitan ‘On scholactivism: skeptical thoughts’ (2022) 20 International Journal of Constitutional Law 547.

⁵⁷D Kennedy ‘Freedom and constraint in adjudication: a critical phenomenology’ (1986) 38 Journal of Legal Studies 518.

For a discussion and application of Kennedy’s analysis to a UK legal judgment, see J Conaghan ‘Celebrating Duncan Kennedy’s scholarship: a “crit” analysis of *DSD & NBV v Commissioner of Police for the Metropolis*’ (2014) 5 Transnational Legal Theory 601.

⁵⁸Notwithstanding that the scenarios Khaitan selects are confined to a particular legal scholarly genre, much of his argument does seem to be directed to legal scholarship in general, eg in his claim that ‘scholactivism is inherently contrary to the “role morality” of a scholar, ie the special moral obligations that attach to the role of a scholar qua one’s role as a scholar’: above n 56, at 548.

Conclusion

In this paper, I have reflected on my long experience of REF participation to make a series of observations about the field of legal studies. First, I have explained that not all scholarly activities are captured by the REF process – nor should they be. The REF is concerned with assessing research, not academic scholarship in general. This should not mean, however, that these wider scholarly activities should be of any less value, particularly in so far as they support and sustain the integrity of the discipline as a field of study. Secondly, I have noted the trend in legal research towards more practical, problem-solving research which seeks to make an impact beyond the academy. I have considered the reasons for this trend and problematised any simplistic assumption that it necessarily promotes the public good. Finally, and perhaps most importantly, I have welcomed the increased diversity of legal research and the more explicit engagement with other disciplines. This is not, I argue, a weakness but a strength of our discipline and, moreover, it is likely necessary given the nature and scale of the challenges law is currently being called upon to meet. None of this should herald the end of standards of research or scholarly excellence; nor should it entail the hierarchisation of approaches to legal research. If we learn a little more about how other researchers go about the business of investigating law and legal phenomena, so much the better.