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Phronetic legal inquiry An effective design for law and society research?

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Phronetic legal inquiry An effective design for law and society research?

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Legal research has traditionally involved a technique commonly known as doctrinal method. This practice evolved over centuries of judicial and legal practice. It is directed at the identification, interpretation and application of relevant legal rules to practical human experience, and is broadly characterised by an exhaustive literature review and close reading of case law and legislation. As a practice, doctrinal method has largely not been expressly articulated by those who employ it. Consequently, legal research is often viewed as something lawyers do, rather than explain. Over time, legal scholars have expanded their research designs to incorporate methods and theories drawn from outside law – especially the social sciences – to augment doctrinal work. However, when lawyers engage in such 'socio-legal research' they are often criticised for failing to properly articulate the doctrinal component of their research design. We argue that Flyvbjerg's 'phronetic social inquiry' can offer a useful conceptual link between doctrinal method and social science methodology. Phronetic social inquiry involves a case-based, in-depth analytic applied to specific problems, which is sensitive to value choices and power relationships, and directed to finding pragmatic solutions. We argue Phronetic social inquiry has important parallels with legal scholarship and offers a useful way of conceptualising links between doctrinal and qualitative social research. In this way, legal research may be articulated as a phronetic, transdisciplinary process directed at pragmatic problem solving.

Introduction

Legal scholarship has entered an age where the need to articulate its research methods and practices is becoming increasingly important. The primary driver for that articulation is the economic imperative of competition for public research funds. Historically, competitive research funding for legal research was low in comparison to the natural and health sciences, a fact that is augmented by increasing expectations on legal scholars to secure funding as a measure of research 'excellence'.[1] Institutional pressure is being exerted for law to be 'treated the same as other disciplines' in that legal scholars be required to secure external competitive funding for research. Of no less importance is a larger evolution in human

[1]Thornton (2011).

knowledge that is increasingly interdisciplinary in complexion.[2] This development has particular implications for law as field of knowledge. As a body of knowledge, legal scholarship is arguably straddled across the spectrum of the humanities and social sciences. This dynamic, in turn, routinely exposes legal scholarship and grant applications to the scrutiny, evaluation and deployment by academics from disciplines other than law. Public funds sourced from the Australian Research Council (ARC), for example, requires the careful articultion of research design as a central part of a panel application process.[3] ARC funding applications are routinely scrutinised by panel composed of a body of scholars from a diverse range of disciplines. In that environment, legal researchers simply proposing to undertake doctrinal research by 'going to a library, finding primary legal materials and reading' necessarily invites scepticism, if not scorn, from grant application reviewers coming from disciplines with more explicitly scientific research designs.[4]

The problem in this context is the need for the clearer articulation of legal research design. The method of research is usually simply described as 'doctrinal research'. The immediate difficulty here is twofold. First, the term is not generally understood by non-lawyers. And second, the term itself is a reference to a broad array of practices within law, and consequently is not something easily explained. It is a term that is largely intuitively, rather than rationally, understood amongst lawyers and legal researchers. The problem for legal scholars is that the exact nature of doctrinal research is by no means clear and therefore difficult to explain and hence justify to the non-lawyer. Historically, legal scholarship has deployed two broad approaches to research. The first is concerned primarily with the explication and application of rules found in formal legal sources such as legislation, case law and treaties. This approach is widely referred to as 'doctrinal research'. It is widely used in the profession of legal practice and judicial reasoning, and has traditionally had pride of place in the legal academy. The second approach to research is a more modern hybrid design. Broadly, this approach adopts a research design that draws upon a range of methods primarily sourced from the humanities and/or social sciences. The deployment of those methods is also variable – ranging from data collection and analysis through to interviews and surveys, documentary examination of historical and sociological material, and even to a focus on pure theory in order to explain legal phenomena. This second approach is potentially vast in scope, ranging from empirical quantitative methods, through to pure philosophical inquiry. In this second approach, legal research tends to involve combining doctrinal method with methods and knowledge drawn from other disciplines, particularly the social sciences. This creates its own problem, because social science is a vast field of knowledge, with a varying array of research designs, methodologies, methods and

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[2]Moran (2010); Weingart (2010); Averill (2010); Vick (2004).

[3]E.g., the Australian Research Council *Discovery Project: Instructions for Applicants for funding commencing in 2015* requires the applicant(s) to '[o]utline the conceptual framework, design and methods and demonstrate that these are adequately developed, well integrated and appropriate to the aims of the Proposal. Include research plans and proposed timelines'. (p. 14). See http://www.arc.gov.au/pdf/DP15/DP15_ITA.pdf

[4]By way of anecdote, the authors attended a frank and open discussion of this very issue at one of Sydney's Law Schools, where a respected professor of law expressed his concern in roughly these terms.

controversies.[5] Generally, legal scholarship of this character tends to draw on the social sciences for information and explanation for phenomenon that doctrinal research cannot otherwise explain.

Legal researchers using research designs outside of doctrinal scholarship are faced with the same problem of any form of research: how? What methodology and method should be used to conduct the research? This is actually a significant problem for legal researchers, many of whom fail, at the outset, to distinguish between the *research design, theoretical framework, methodology* and *method* underlying a research project. *Research design* is a descriptor to refer to the overall approach to a research project including the relationship or connection between research questions, theoretical framework, methodology and methods. A *methodology* is the design and process, with its attendant assumptions, theories and pre-existent knowledge formations guiding action. The methodology imports theory and knowledge that guides the method used to obtain and systematise data. A *method* is simply the technique or procedures used to collect and analyse data. The following Figure 1 shows these various elements of a research project:

Research Design

⬇

Theoretical Framework

⬇

Methodology

⬇

Method
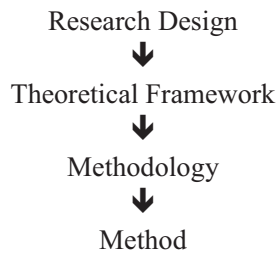
Figure 1. Elements of a research project.

In most legal research projects a threshold question is whether the task is concerned with the explication of rule-sets in a particular context. If the main focus of a project is simply the explication of existing legal rules,[6] then doctrinal method will be necessary and perhaps sufficient. If the main focus of the project is the impact or effectiveness of legal rules, then additional methods are required. Whatever focus is pursued; the distinguishing feature of legal research is that the data and conclusions are usually synthesised with legal doctrine. In effect, legal research manifests a distinct tendency for hybrid approaches. This tendency to incorporate other methodologies, combined with the apparent inability to clearly articulate what doctrinal research actually involves (apart from spending hours searching legal databases, perusing libraries, reading and providing written explication of rules), generates an environment where legal scholars routinely experience 'methodological anxiety syndrome'.[7] Perhaps more importantly, this invites criticism from other disciplines and funding bodies about the apparent rigour of legal research. There is a problem at the heart of

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[5]Trigg (2001).

[6]It is worth stating that the explication and interpretation of existing rule systems is not necessarily a 'simple' undertaking. The complexity involved in legal analytics can be significant.

[7]Halliday and Schmidt (2009).

legal scholarship, grounded in its apparent inability to adequately articulate its own research design. Therefore, legal research, at least for those looking from outside the discipline of law, appears to be something lawyers *do*, rather than explain.

Attempts to clarify the nature of doctrinal research have therefore been gaining traction in legal scholarship in recent years. In Australia, Hutchinson has been a leader in this undertaking.[8] In a review of legal scholarship in Australia and the UK, Hutchinson and Duncan[9] found that a great deal of legal scholarship does not explain its methods, arguing that legal scholars need to begin clarifying and explaining what they do and how they do it. In Europe a similar dialogue is underway, where Aarnio, in particular, has taken the analysis of doctrinal research to the point where he argues that the doctrinal study of law constitutes a 'science', in which the study of law is a systematic evidence-based approach to interpretation and application of norms and rules, based on posited data located in statutory and judicial statements of law. On this view, legal research is a unique paradigm of scholarship, falling within a positivist tradition.[10]

Legal research is not confined to the articulation of rules. It also extends to a variety of contexts outside of 'pure analysis' and application of rules, notably policy and broader social inquiry.[11] It is here that legal research encounters an additional problem: to what extent can lawyers apply the methods indigenous to law to other bodies of knowledge, or draw on theory, methodologies and methods devised in other disciplines? Undoubtedly a great deal of legal research draws on empirical social science methods. However, once legal scholars begin to draw on knowledge and practices from social sciences, they invite criticism for lack of methodological/ scientific rigour. The present demand for legal scholars is not only to begin clarifying and articulating doctrinal research, but also explaining its intersection with theory, methodologies and methods employed in other disciplines.

This article aims to build on the work of Hutchinson and Duncan,[12] by taking up the challenge of contributing to the better articulation of legal research design. We expand on this work by considering one of the problems at the core of law. Law is, above all things, an applied problem-oriented discipline. It necessarily involves application or praxis. A fluid and dextrous dynamic lies at the heart of legal research and practice. It is also this aspect of law that makes it so difficult to explain to others, partly because law exhibits characteristics of a science, as Aarnio suggests,[13] but also traits that align law with art, as Posner suggests.[14]

As it happens, the kind of problems that Australian legal research is currently facing is not unlike the situation confronted by social researchers in the 1990s, when the so-called 'Science Wars' erupted in the United States.[15] At its core was a dispute

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[8]Hutchinson (2008); Hutchinson (2010); Hutchinson and Duncan (2012); Hutchinson (2013).
[9]Hutchinson and Duncan (2012).
[10]Aarnio (1997); Aarnio (2011).
[11]Pearce et al (1987); Council of Australian Law Deans (CALD) (2005).
[12]Hutchinson and Duncan (2012).
[13]Aarnio (1997); Aarnio (2011).
[14]Posner (1987).
[15]Two editions of the journal *Social Text* (No. 46, Spring, 1996 and No. 47 Summer 1996) were devoted to explaining the 'Science Wars'. For a summary see Flyvbjerg (2001).

between a number of natural science and social science scholars, in the context of major reductions in public funding for research, which manifested in a war of words directed at the intellectual integrity of the disciplines. The stakes were high: the availability of public research funds for research. The debate clustered around what are now familiar lines of argument concerning epistemology within the social and natural sciences; the extent to which knowledge claims were verifiable, the distinction between subjective and objective knowledge, the role of interpretation, and whether or not the respective actors actually understood the paradigm they were working within.[16] In this context a Danish planning academic, Bent Flyvbjerg, began publishing papers on research designs suitable for social research as a remedy for the claims arising during the 'science wars'. In particular, Flyvbjerg was strongly in favour of case-study and ethnographic approaches,[17] emphasising a distinctive mode of social inquiry in *Making Social Science Matter*.[18] Flyvbjerg recognised that part of the problem was an underdeveloped sense of the epistemological foundations of the social sciences, or at least an apparent weakness in a shared understanding of it among researchers. Flyvbjerg returned to the epistemological core of social science, and reconceived social science as a *phronetic* process of social inquiry that largely abandons the positivist and scientist element in researching social phenomena. In this article, we draw on Flyvbjerg's phronetic approach and apply it to legal research and its connection with social inquiry. We argue that legal research shares a great deal with the conception of phronetic social inquiry advanced by Flyvbjerg.

However, we develop the idea of *legal phronesis* and argue that much of the current anxiety within the legal academy about legal research design arises from a particular form of rationality common to legal reasoning – a tendency to systemically categorise and separate objects for the purpose of attributing contextual meaning. The result is a conception of legal scholarship as discrete, independent segments. Legal research is routinely conceptualised as something like a tool-box, in which the scholar employs one set of tools for one problem, and different tools for another.[19] This compartmentalisation of disciplinary methods results in law, as a discipline, having a hybrid character as a knowledge formation, possessing doctrinal, multidisciplinary, interdisciplinary and even transdisciplinary characteristics.[20] It is this hybrid character that makes law unique, and at the same time here is the root of the problem of why lawyers struggle to articulate method. Our aim is to make a contribution to understanding the inherent pluralism of legal research by identifying how phronetic reasoning might help explain doctrinal method and also build links to social inquiry found in other disciplines.

The following article is divided into four Parts. Part I describes the broad nature of the field of legal research. In this part, we argue that legal research has two major

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[16]A good example is the special edition of (1996) 46/47 *Social Text* esp. Andrew Ross 'Introduction' pp. 1–13.

[17]Flyvbjerg et al. (2003); Flyvbjerg (2006); Flyvbjerg (2011); Flyvbjerg et al. (2012).

[18]Flyvbjerg (2001).

[19]It is interesting to note that Foucault advocated the use of a variety of analytical tools as a conceptual 'toolbox' when faced with attempts to understand complex knowledge systems and power relationships. See Foucault (1980).

[20]Averill (2010).

but related branches. One branch is concerned with judicial or practice-based analysis, closely aligned with doctrinal method. This mode of research is primarily case-based, and rests upon a set of variables conditioned by intersecting rule systems. The second branch is concerned with context-based analysis or what has become known as socio-legal research. This mode of thinking is 'contextual', in the sense that it is concerned with the surrounding social and historical variables that condition and qualify legal rule systems. Fundamentally, both branches of legal research may be distinguished from other disciplines through a disciplinary norm centred on the law and its consequences as the primary focus of analysis. In this part, we argue that legal reasoning is a hybrid that may be conceptualised as interdisciplinary or transdisciplinary in nature. It is this aspect of legal reasoning and research that is the source of the apparent difficulty in articulating what doctrinal method is. In Part II, we argue that although the discipline of law possesses unique characteristics, there is an overlap with Flyvbjerg's conception of *phronetic social inquiry.* This link, we contend, can provide a useful framework for explaining legal research to scholars outside of the discipline of law. Part III then turns to considering the major characteristics of phronetic reasoning, and how this links and corresponds with legal reasoning. In Part IV, we suggest that legal scholars might better articulate contextual research by consciously engaging with Flyvbjerg's work where their purpose is to articulate a broad, pragmatic research design that can incorporate the analysis of legal doctrine, values, power and normative prescription. We conclude by advancing the argument that doctrinal method might also be viewed as drawing on some important elements of phronetic inquiry that possesses a sophisticated analytic highly suited to evidence-based, textual analysis.

I. Legal research and the problems of contemporary scholarship

The problem of defining legal research

The critique of law and legal reasoning as being either too simple or inadequately explicable is not new. Indeed, it is widely assumed that the interpretation and study of law is something that any literate and rational person may undertake. All it requires, apparently, is that one can read, access a database, and apply common sense to a given set of facts. The error of that assumption was famously illustrated in 1607 when King James I challenged the interpretation of law with then Chief Justice of the King's Bench, Sir Edward Coke. Coke's response was recorded in *Prohibitions Del Roy* (1607) 77 ER 1342:

> A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did not belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, 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: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debed esse sub homine, sed

sub Deo et lege [That the King ought not to be under any man but under God and the law.].

The 'artificial reason' referred to by Coke is, at least on one view, the essence of law as a discipline. What is so aggravating for those outside the discipline of law is that the scope and practice of legal reasoning remains exceedingly difficult to articulate and explain to others, and has been so since at least 1607. The situation becomes even more complicated when lawyers begin borrowing methodologies from other disciplines, or indeed begin conducting research into other knowledge domains by using doctrinal method. The revival of this 'problem' appears largely out of the general reduction in public funding to Universities and for the introduction of a process of competitive research grants in the United States, the United Kingdom, and Australia since the 1990s.[21] In this environment legal scholars have come under increasing pressure to explain what it is they do when they research – which presents a significant issue because the demand is to explain a practice that is context-dependent, and which has defied precise articulation for centuries. This is accepted by lawyers and others trained in legal research, but often not understood by the layperson or those from other disciplines. Hutchinson and Duncan[22] observed that a critical part in the research grant process for the legal academy is the evaluation of research proposals by interdisciplinary panels of scholars. These panels are routinely interested in the *methodology* deployed. The reason is to be assured that the researcher knows how to carry out the research and gauge some sense of the likely credibility of results. To those outside the legal discipline, a statement that the researcher will simply engage in 'doctrinal research' fails to explain how the research will be carried out. A statement that the researcher is going to the library to find, read and interpret statutes and cases is seen to lack credibility or rigour. Ironically, this is *exactly* a basic description of one of the main practices involved in doctrinal method. A major force in the demand for articulating a methodology therefore comes from outside the discipline of law, in a context where institutional demands of research funding are increasingly a measure of personal and institutional performance and success. Indeed, for many in the legal academy, the ability to 'attract grant money' is a requirement for employment and promotion.[23]

What are the features of this 'artificial reason' of law? The first observation here is that it is routinely overlooked that law evolved over centuries in the context of professional practice, rather than academic discipline. Historically, legal practitioners learned their trade in a variety of contexts, depending on whether the student was attached to the Church, the Courts or as a civilian Notary, but ordinarily learned in the shadow of an experienced practitioner. The study of law, in the English tradition, was basically an apprenticeship. This may be contrasted with our modern conception of legal education as being the province of university education and disciplinary identity. In the evolution of law as a profession, university education is a relatively recent development. One of the important consequences of this is the

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[21]Thornton (2011).
[22]Hutchinson and Duncan (2012), p 93.
[23]Thornton (2011).

relationship of the profession to knowledge. While the universities of continental Europe taught law throughout the medieval period, much of that focus was on the preservation and revival of Canon and Roman law. The legal profession in England, in contrast, was divided mainly between the study of Canon or Common law, with many of the techniques used in the study and interpretation of text drawn from theology.[24] In addition, the close association with law and public administration that emerged under the Tudors, and the shift towards absolutism in Monarchical and then Parliamentary power, meant that law as a discipline developed no real tradition of producing new knowledge, or criticising the laws it was given. Law was always reliant on an external and absolute source of knowledge.

Consequently, the English system of legal education, while undoubtedly linked to domestic and continental universities, was primarily autonomous and focussed largely on law as practice, not as the discovery of new knowledge. Law, in the sense of written laws, has a strong tradition of relying on statements of law and principle within a corpus of information produced by a limited range of authorities. Law, as a discipline, is characterised largely by a self-referential epistemology focussing on 'validity'; that is, sourcing relevant law from valid sources (e.g. Legislatures, decisions of superior courts) coupled with identifying and documenting evidence relevant to the provision of advice and dispute resolution. The sources of law vary, but are simply represented by the combination of the internal (judicial) rationality of the profession (notably decided cases), and the pronouncements of an external (legislative) rationality and power (such as Parliament), applied in the context of a precise set of circumstances and (admissible) evidence.

The significance of this is two-fold. First, legal analysis operates in a highly contextual environment that is not amenable to precise formulation or replication. This analytical method has evolved, and is inherited, from within legal professional practice and public administration. Second, law does not rely on the production of its own new knowledge as an information source through a scientific process of falsification and replication, as is the case for most 'scientific' knowledge formations. Interpretation is the essential orientation of the legal mind. While the *process* of legal analysis may be replicated, the outcome will vary depending on the facts of each case, even in cases where the same law or principles *may* be applicable. In addition, lawyers operate within an environment that is dominated by the tripartite formal division of the State. In that environment, legal reasoning is directly shaped by *external powers* that shape and determine the legal rule systems that may be applicable in a given point in time. To make life interesting, legal reasoning has to cope with a regularly evolving rule system. This operating environment is rather akin to working with a chemistry set in which the Periodic Table is subject to change without notice. These organic aspects of the substance of law as a knowledge field are often overlooked by those outside of law. The relationship between doctrine and sovereign power is a key point of distinction between law and other fields of knowledge. As Samuel argues,[25] law is characterised by an authority paradigm, rather than a spirit of inquiry. In this respect law arguably shares more with theology, than the social sciences.[26]

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[24]Baker (2002), p 155; Brundage (2008).
[25]Samuel (2009).
[26]See also Aarnio (1997).

Despite the ancient heritage and independent character of law as a discipline, there does appear to be a problem in legal scholarship when it comes to explaining legal research design, a problem that is becoming clearer as law interacts with other disciplines, whether the author is using 'doctrinal method', or a more contextual approach that draws on the methods of other disciplines. This problem is well recognised, even within legal scholarship. In a controversial article in 2002, Epstein and King[27] published a review of 231 US law articles that found methodological flaws in every paper – ranging from the complete absence of method, through to misapplied or biased use of methods borrowed from other disciplines. They suggested that this was a major problem for the epistemology of legal research, and was partly related to the way in which legal academics were trained as scholars. This is a significant point, and one that has resonance in Australia.

The practice of doctrinal research is, by and large, the outcome of years of legal education and practice, as opposed to a specific course of training. While there is no equivalent study of published legal research papers in Australia, Hutchinson and Duncan found that of 60 PhD theses reviewed in 2010, doctrinal method was rarely discussed at all, while only two-thirds (38) of these theses actually contained a research design chapter. The trend appears to be that those legal scholars using 'pure' doctrinal research rarely see the need to provide a discussion of methodology and method; while contextual legal research drawing on methods from other disciplines usually does. It appears that many legal scholars assume that doctrinal method will be understood by PhD examiners, and that elaboration on the method in a research design section will add little to the thesis itself. Drawing on Chynoweth,[28] Hutchinson and Duncan observe that part of the problem in legal scholars articulating doctrinal method is the fact that the method is largely one concerned with the rules of *analysis* as opposed to *data collection*. This aspect of doctrinal method is an important one. The 'data' used in doctrinal method is ordinarily one of two kinds: text or case-specific evidence. The method of identification and collection is of peripheral concern for a lawyer. What is important is that the material, if law, is a valid source of law. What is important is that material, if evidence, is admissible. However, since legal researchers generally assume a legally trained audience, the perceived need for an explication of methods of data collection and interpretation is minimal. For those inside the legal discipline who adopt doctrinal method, an explanation of legal methodology is often viewed as largely superfluous. Hutchinson and Duncan rightly observe, however, that the situation is different with some more contextual journal articles, interdisciplinary research and research grant applications. The legal academy sometimes forgets that it is not necessarily writing for other lawyers.[29]

Doctrinal research and the problem of methodology

What, then, are the characteristics of 'doctrinal research'? To a large extent the scholarship on the scope and nature of doctrinal method is still a work in progress.

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[27]Epstein and King (2002).
[28]Chynoweth (2009).
[29]Hutchinson and Duncan (2012), p 98.

McConville and Chui,[30] Dobinson and Johns,[31] and Hutchinson and Duncan[32] provide recent reviews of the problems and features of doctrinal method, although they are by no means the only scholars who have turned their minds to this question. Most writers agree that the doctrinal method is essentially a 'two step' process of finding the relevant law in the topic area, then interpreting and analysing it, usually with the purpose of application. This conception is largely correct for legal research carried out in a judicial or practice setting. However, legal academics often do not apply the rules they unearth. Rather, legal scholars are commonly engaged in the more abstract task of the complex and at times overwhelming explication (i.e. description) of the relevant law, intricately punctuated with footnotes, interspersed with commentary, and frequently offering opinion on whether or not the case decision is correct or legislation consistent with previous valid sources. The Holy Grail for legal academics engaged in doctrinal approaches is to have that opinion accepted by a lawmaker.

Most writers also agree that legal research is not limited to the interpretation of rules. Over time, legal research has branched out to consider not only what rules *are*, but also *how they work in a particular context*, and indeed what the laws *should be*. In this way, legal research has expanded to involve not only doctrinal analysis, but also *contextual* and *normative* undertakings. Legal research has thus developed a hybrid character. Because of this hybrid character legal scholarship often overlaps with other disciplines, and has caused no end of difficulty in the task of theorising what legal research involves. The Arthur's Report,[33] the Pearce Report,[34] and the Council of Australian Law Deans (CALD)[35] have all considered the nature of legal research. All of them recognise that legal research is multi-dimensional. CALD declares that it is the doctrinal (legal) component of legal research that makes it distinct from other disciplines. However, CALD also recognised that legal research operates concurrently with other disciplines, and effectively merges with the humanities and social sciences once the focus of inquiry shifts away from pure doctrine. Similarly, Bradney refers to law as a 'parasitic discipline' in that in moving beyond doctrinal method it must by necessity engage with the existing knowledge and practices of the humanities and social sciences.[36] However, it is at this point, where legal researchers depart from distinct analysis of doctrine, that an additional problem emerges – research that treads the boundary between disciplines. Part of the difficulty for Australian legal scholars in this field appears to be the absence of a clear working model identifying the nature of legal research and the way that shapes the research methods used in that undertaking.

One clear model for theorising the nature of legal research and its relationship with the humanities and social sciences is the work of Finnish scholar, Aulis Aarnio.[37]

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[30]McConville and Chui (2007).

[31]Dobinson and Johns (2007).

[32]Hutchinson (2008); Hutchinson (2010); Hutchinson and Duncan (2012); Hutchinson (2013).

[33]Arthurs (1983).

[34]Pearce et al (1987).

[35]Council of Australian Law Deans (CALD) (2005).

[36]Bradney (1998)

[37]Aarnio (1997); Aarnio (2011).

He conceived law as a paradigm (drawing on Kuhn[38]), which he termed 'legal science'. For Aarnio, legal science involves four distinct orientations: (i) *legal dogmatics* (concerned with the explication of rules); (ii) *sociologies* (concerned with regularities within legal and social systems); (iii) *history* (concerned with the evolution of rules); and (iv) *comparative law* (concerned with comparisons) (Figure 2). For Aarnio, each orientation carries with it a different methodology which depends on the orientation of the research being used. Doctrinal method is applicable for the explication of rules; empirical methods are applicable for legal sociologies (i.e. regularities of conduct and knowledge); historiographical methods are applicable for legal histories; and comparative methods involve a fusion.

Figure 2. Aarnio's categories of legal science.

Aarnio's model is useful for the lawyer's tendency to categorise objects, but in our view it would be a mistake to regard legal method and research in a rigid manner. The difficulty in conceptualising legal research is tied to a much deeper epistemological problem, which is the distinction between approaches to law based on internal, or self-referential analysis, and external description – a divergence between law's 'practical' and 'theoretical' or 'sociological' branches. This is, in fact, an old problem in legal theory,[39] further complicated by cultural variations in the ways in which law as a discipline is both conceptualised and practised. Continental European legal scholarship, for example, tends to favour a dogmatic or 'scientific' approach based heavily on analysis of doctrine, while the English tradition tends to favour a more integrated and contextual 'socio-legal' orientation.[40] These idiosyncrasies are consistent with Bourdieu's conception of *habitus* and *doxa*,[41] which suggests that legal research, is very much governed in accordance with distinct professional and cultural practices, which vary depending in the purpose and orientation of the researcher. Consequently, the extent to which doctrine can be separated from the social is in itself problematic, particularly as scholars such as Ehrlich,[42]

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[38]Kuhn (1996).

[39]The divergence between Kelsen and Ehrlich is a paradigm case. See Kelsen (1934); Kelsen (1935); Kelsen (1941); Ehrlich (1922); Littlefield (1967); Nelken (1984); Ziegert (1998). For authoritative discussion, see Cotterrell (1992); Cotterrell (2006).

[40]Samuel (2009); Hoecke (2011).

[41]Bourdieu (1972); Bourdieu (1987).

[42]Ehrlich (1922); Ziegert (1998).

Hart,[43] Fuller[44] and Cotterrell[45] have forcefully demonstrated that normative and 'unwritten' precepts operate prior to and concurrently with formal exposition in judicial and legislative statements. Legal research must be understood as highly variable in its orientation, with the potential for multiple points of overlap in orientation, with considerable overlap between empirical and normative content. Contemporary legal research, at least in the Anglo-Australian tradition, involves not only doctrinal methods necessary to examine positive law, but also methods intended to capture the normativity and sociologies of law. This orientation to research is further complicated when the purpose has an internal or external frame of reference, or an academic or practice orientation.

The key point is that attempts to formally segregate doctrinal law from its social and normative character are problematic, which has an associated impact on research design. Ultimately, what this suggests is that legal research has a hybrid character that imports interdisciplinary or transdisciplinary characteristics. While there are certainly legal scholars who have argued that the discipline of law is no longer 'law' once it departs from the 'dogmatic' analysis of legal rules, that position is not widely shared within the Anglophone legal profession or academy.[46] As McCrudden and Samuel observe, legal scholarship in the Anglophone tradition is now characterised primarily as a 'sociolegal' composite or hybrid knowledge system that is not easily reduced to simple statements of technique or method.[47] Following the position of the CALD, we would contend that this characterisation extends to the Australian legal academy. That position is not, however, unique to law. Indeed, the disciplinary specific nature of knowledge, long representative of Enlightenment rationality, is slowly being challenged and replaced by a new epistemic paradigm.[48]

New visions of knowledge

Discussions about knowledge and methods of research are ultimately concerned with the formation of knowledge and their attendant disciplines. It is characteristic of Enlightenment thinking to conceptualise knowledge and research methods in accordance with identifiable disciplinary norms and categories. The internal organisation of Universities, internationally, tends to reflect knowledge formations and research methodologies. Over time, particularly from the last quarter of the twentieth century, there has been a proliferation in the exchange, interaction and integration of knowledge between disciplines, which is gradually transforming and challenging the traditional conceptions of disciplinary knowledge. This transformation in disciplinary knowledge is a profound event in the history of knowledge, the full extent of its impact has yet to be understood. Law is certainly subject to this development.

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[43]Hart (2012).

[44]Fuller (1964).

[45]Cotterrell (1983); Cotterrell (1998); Cotterrell (2002); Cotterrell (1992); Cotterrell (2006).

[46]Contra the position in Europe, where the conception of law as a discipline is more firmly rooted in the idea of the 'core' or *la doctrine*. See Samuel (2008); Samuel (2009).

[47]McCrudden (2006); Samuel (2009).

[48]Foucault (1972); Foucault (2005).

Postmodern theorists, particularly Foucault,[49] Deleuze and Guattari,[50] have argued that the true nature of knowledge is interdisciplinary, chaotic, discursive, amorphous and 'rhizomic'. That is, knowledge is conceived using an organic analogy; knowledge being seen as informed by and necessarily connected with a vast network of pre-existing, static and evolving conceptions and data. Here knowledge rarely exists in isolation from connections with other fields of thought. It is rarely the case that any one conception exists in isolation. What differs is the extent of connection with related fields of knowledge. Outside of the 'post-modern' schools of thought, theories of knowledge recognise an emerging tendency within the various disciplines towards collaboration, interaction and integration. This leads to the adoption and use of a range of knowledge formations and techniques in the analysis and production of new knowledge. Klein,[51] for example, argues that knowledge is increasingly applied in ways that draw upon other disciplines and knowledge formations, often referred to as 'multidisciplinary', 'interdisciplinary' and 'transdisciplinary' approaches to knowledge and research. *Multidisciplinarity* is 'encyclopedic', and involves analysing phenomena from multiple, independent (disciplinary) perspectives. It is a collaborative approach where 'the disciplines remain separate, disciplinary elements retain their original identity, and the existing structure of knowledge is not questioned'.[52] *Interdisciplinarity*, by contrast, involves the actual integration of knowledge and methods across and between disciplines, which may involve the evolution of shared concepts and methods, or the effective colonisation of one discipline by another. This is particularly the case with methodological and theoretical components. This kind of research typically involves a researcher based in one discipline borrowing techniques, methods or theories indigenous to another discipline and deploying them in their own environment.[53] *Transdisciplinarity* takes knowledge to a new stage; the integration and hybridisation of knowledge and methods. In this environment disciplinary boundaries break down, as they are often an impediment to new perspectives. In this paradigm knowledge and theory ceases to be the province of any one discipline. The focus is on the *phenomenon* as a whole, rather than on particular interpretations of it. Knowledge is fixed to phenomenon and is problem-oriented, rather than existing as a distinct and independent form.[54]

These theories about the nature of disciplinary knowledge are essentially complementary, and ultimately designed to provide analytical tools for research by broadening the scope of theory and research designs used to analyse phenomena. The orientation deployed depends upon the kind of research task, and the extent to which existing knowledge of a phenomenon is capable of providing relevant and useful explanations. The governing rationale for stepping outside of the discipline is to attempt to ascertain new insights.

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[49]Foucault (1972); Foucault (2005).

[50]Deleuze and Guattari (1987), p 3.

[51]Klein (2010).

[52]Klein (2010), p 17.

[53]Klein (2010), p 18.

[54]Klein (2010), p 24.

There are two consequences of this development of present relevance. First, it provides a useful framework to locate legal research. The dynamic in law of expanding out of its central doctrinal core into the social sciences is, in fact, part of a more general trend in the evolution of human knowledge. Legal research can be purely doctrinal, but equally it can adopt any of the multidisciplinary, interdisciplinary, or transdisciplinary orientations. Indeed, the location of law within the University system is more likely to intensify this dynamic. As Averill has observed,[55] legal knowledge is inherently problem-oriented and can adopt insular, interdisciplinary or transdisciplinary orientations as required. Second, this development in the evolution of knowledge invites us to consider further aspects of what doctrinal knowledge actually involves. And it is here, at that point where social science, epistemology and law intersect that we may consider the idea of phronetic knowledge.

The next section explains Flyvbjerg's contribution to understanding social inquiry and sets the foundation for our later explanation of how his notion of phronetic knowledge might hold promise for lawyers seeking to articulate their research design.

II. Flyvbjerg and phronesis

Flyvbjerg's phronetic social inquiry

Flyvbjerg's methodology may be conceptualised as a transdisciplinary in that it is devoted to in-depth study of cases. In this respect at least, law and Flyvbjerg's methodology have much in common. Flyvbjerg has become well established in social inquiry for the development of an approach to research that is dominated by an in-depth and flexible approach to social research, characterised by case analysis. Flyvbjerg's work is widely known by scholars from disciplines within the social sciences and humanities who adopt more interpretative (i.e. less positivistic) approaches to investigation of social phenomena (for this reason, as explained below, these scholars often prefer the term 'social inquiry' rather than 'social science' to describe their research activities). However, Flyvbjerg's work is largely unknown within Australian legal scholarship. Flyvbjerg became concerned by the various ways in which 'science' became synonymous with the techniques of the natural sciences, with the subsequent preferencing of 'hard science' method and theory as a 'superior' form of knowledge. In *Making Social Science Matter* (2001), Flyvbjerg argued that in analysing social phenomena it was impossible for the social sciences to compete with the natural sciences because the subject of inquiry was necessarily different, and the theoretical constructs within knowledge systems were also different. Arguments about validity, he suggested, were often political. Flyvbjerg returned to a much deeper issue: the nature of knowledge itself. Drawing upon the Aristotelian divisions of knowledge and practice, Flyvbjerg's aim was to develop an approach to research actually suited to social phenomena in ways that 'hard science' methods were not.

Flyvbjerg began by considering the nature of learning and reasoning, for it is in observation and practices that learning takes place. These experiences ultimately lead

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[55]Averill (2010), p 522.

to the development of knowledge through experience and theory. Phenomenological studies[56] suggest that human learning progresses through five identifiable stages: (i) Novice actions (based on context-independent rules/instruction); (ii) Advanced beginners (involving the integration of contextual variables into known knowledge); (iii) Competency (goal-directed behaviour, involving ability to navigate familiar and novel situations based on experience and theory); (iv) Proficiency (goal-directed behaviour involving a combination of intuition and analytical reflection); (v) Expertise ('intuitive, holistic and synchronic…characterised by a flowing, effortless performance, unhindered by analytical deliberations').[57] What is significant about the 'expertise' level of competency is that the operator is acting at the level where intuition and the unconscious integration of knowledge and experience are the defining features of activity. In many cases the operator is not able to articulate why or how they do what they do. Indeed, many true experts depart from the established rule-sets that govern the activity.[58] Often it is precisely *because* the operator departs from the accepted method that their genius is given expression.

In developing a theory of social research, Flyvbjerg drew upon the Aristotelian divisions of knowledge: *techne, episteme* and *phronesis*.[59] *Techne* is a form of knowledge that is essentially learned, practical and replicable. This is typified by a 'craft', 'an activity [that] is concrete, variable and context-dependent'.[60] *Episteme* is 'scientific knowledge', based on analytical enquiry. It is a form of knowledge that is context independent, universal in character, and rational. *Phronesis* is concerned with intuitive knowledge, 'common sense' or 'wisdom'. It is a form of knowledge that is highly adaptable, context-dependent, and possesses something of an ethical character. The recognition of values as a human quality is a key factor in phronetic knowledge. It incorporates experience, theory and judgement.

All three of the Aristotelian knowledge states are necessary for human learning and action. Indeed, all disciplines will contain intersecting variations of differing forms of these knowledge types. Broadly, *techne* provides answers to *how* things get done; *episteme* provides answers to why things happen (often with a view to prediction and replication); while *phronesis* provides a framework for evaluating *what* is going on and *should* it be going on. Phronesis is a form of knowledge that is able to adjust 'epistemic' knowledge to an outcome that is in accord with what is 'right' or 'just' in a particular context. By tracing the history of knowledge through the Enlightenment, with particular reference to the post-modern thinkers such as Bourdieu and Foucault, Flyvbjerg concluded that over time thinking in the western world has come to give preference and value to *epistemic* knowledge and practice, with the result that social sciences often struggle when comparisons are made in the contest for validity. In large part this preferencing for epistemic knowledge is tied to

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[56]Flyvbjerg was here drawing on the work of Dreyfus and Dreyfus (1986).

[57]Flyvbjerg (2001), p 21.

[58]Flyvbjerg (2001), p 9.

[59]These are concepts that are largely sourced in Aristotle's *Nicomachean Ethics*. Flyvbjerg himself recognised that the Greek theory of knowledge was far more sophisticated than this simple tripartite division. He drew on the three main categories in Aristotle's thinking, but also recognised there were other categories. See Flyvbjerg (2001), pp 176–177 (fn 9, 10).

[60]Flyvbjerg (2001), p 56.

the demands of economics, which aim for replication, commodification and the standardisation of outcomes across varying contexts. Flyvbjerg's argument is not that social research based on phronesis is better or inferior; just that its objects and subjects are different to the 'natural sciences' and its suited methodologies. These are approaches to phenomena that have different purposes, subjects and techniques of investigation. The great value of phronetic research is its inherent flexibility, its sensitivity to power dynamics, its consciousness of human values, and its capacity to make sense out of exceptional and unusual cases.

Are there lessons for legal scholarship in Flyvbjerg's conception of phronetic knowledge? We contend there are. First, legal scholars need to recognise from the outset that the demands for the articulation of method and the competition for public research funding are political and ideological contests. Statements that challenge the validity of legal reasoning and research method are implicitly (if not explicitly) giving preference to a fixed and measurable commodity. It is a political and actuarial demand intended to create markets in the intellectual life of scholarship. Since law and lawyers live and breathe in the world of institutional power, we may take some comfort in the words of Coke that law is an artificial reason that is not easily learned, articulated or possessed, and, like it or not, *law is different*. It speaks through an authority paradigm[61] and carries both normative and disciplinary power that should not be overlooked. Second, the phenomenological studies identified by Flyvbjerg highlight the way in which mastery of a discipline routinely involves a complete integration of intuitive behaviours. Mastery of doctrinal research involves integration of both linear and intuitive reasoning that essentially absorb hermeneutic and rule-governed techniques, in the absolute knowledge that it is the *outliers* of human experience that do not fit into the established categories of law that provide the basis for which law can evolve internally, or provide the trigger for external intervention through legislative attention. Third, legal research can be viewed as importing all three of the Aristotelian conceptions of knowledge. It involves *technical* knowledge that is learned over time and through experience. It involves *epistemic* knowledge that is (relatively) stable and applied universally. Finally, legal research also involves *phronetic* knowledge, which imports the normativity of values, ethics and norms into reasoning. This is the capacity to depart from 'rule' analysis and examine a problem and process intuitively, unbound by the replicable procedure, based on what is right or just in the circumstances of the case.[62] Legal research is, like Flyvbjerg's conception of social inquiry generally, a flexible and adaptable approach to specific cases, sensitive to power dynamics, conscious of human values, and thrives in the context of exceptional and unusual cases. Indeed, it is often the unusual cases that provide the driving force for common law evolution and legislative change. The real issue is not so much some defect within legal epistemology; it is a flawed assumption on the part of those asking the question that law is linear in its approach.

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[61]Eg: Samuel (2009); Hart (2012); Golder and Fitzpatrick (2009).

[62]It is worth noting that the intersections between technical, phronetic and ethical reasoning was also recognised by Aristotle in the *Nichomachean Ethics* (Book VI, Ch 8) as a distinct form of 'legislative wisdom' (*nomothetike*). This kind of reasoning was something distinct, but not well developed in Aristotle's work. See Irrera (2004).

Critique of Flyvbjerg's phronetic social inquiry

Flyvbjerg has attracted a considerable amount of controversy in a short time. Since its publication in 2001, *Making Social Science Matter* has, according to Google Scholar, been cited in 3240 publications. While some of these citations have been very supportive of the phronetic approach to social research, others have been quite critical.[63] For example, there has been criticism that the foundation of the phronetic research design is based on the classical Greek aristocratic glorification of obedience, respect for experience and a privileged life. That model gives preference to aristocratic aesthetics as intrinsically better than those of the 'lesser' classes.[64] In effect, only aristocrats can afford the luxury of obfuscating the nature of thought and knowledge. Since the stated goal of phronetic social science is to 'improve society',[65] it necessarily begs the questions: better for whom, and better than what? The very idea that social science has somehow stopped 'mattering' is itself an assumption that is doubtful.[66] The theory itself makes considerable assumptions about the nature and role of scientific methods, some of which are at least outdated, if not simply wrong.[67] Another criticism is that as a proposed methodology it is 'fuzzy' and lacks apparent direction. However, the phronetic research design itself is not actually 'new'; it is very similar to the methodologies of hermeneutics and phenomenology, but it also borrows a great deal from the French post-modern thinkers, notably Bourdieu and Foucault.[68] Indeed, the shadow of Foucault looms large in Flyvbjerg's work. When the theories are compared, it is sometimes difficult to ascertain how Flyvbjerg's model is essentially different from Foucault's archaeological/genealogical method, in terms of its fluid use of qualitative sources and its concern with relationships of power.[69] Both research approaches adopt a concern with the researcher being saturated in the source materials, attuned to power and values, and acutely interested in the exceptions and departures from established practices. Whatever the criticisms of Flyvbjerg, the value of the phronetic method is its courageous assertion of those approaches to knowledge that demand flexibility because of the nature of the subject matter. The method consciously abandons being 'locked in' to a particular method or practice of information gathering and analysis. The focus is not on methodology. The focus is on 'what matters'.[70]

It is interesting that these same criticisms could be equally applied to legal research models. Law is undoubtedly a privileged knowledge system, and legal scholarship in particular. It is the purview of social elite. As a method, doctrinal research is malleable. Like Flyvbjerg's aim, the aim of legal research is normally to create improvements for the benefit of the public through changes in the rule structures – although it also begs the question about who actually benefits from

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[63]Schram (2012).

[64]Huxley (2001).

[65]Schram (2012), p 16.

[66]Adcock (2009), p 108.

[67]Fitzpatrick (2011).

[68]Notably Bourdieu's *Outline of a Theory of Practice* (1977) and Foucault's genealogies.

[69]Foucault (1972); Foucault (2005); Foucault (1998); Gutting (1989); Scheurich and McKenzie (2005).

[70]Schram (2012).

proposed rule changes. But like Flyvbjerg's phronetic approach, the genius of legal research lies in its powerful analytic as an applied practice, and its capacity to offer remedies for 'what matters' outside of the use of force. Evidently, there is a space for exploring the intersections between doctrinal research, reasoning and the characteristics of applied phronesis.

Characteristics of applied phronesis

The research implications for this distinction in knowledge types are numerous. The most important for present purposes is the vehicle for research: the case study. In positivistic social science quantitative research of large data sets the 'outlier' or exception is often ignored or discounted in search of regularities that give rise to generalisable research conclusions. In contrast, Flyvbjerg argues that because human expertise requires immersion in context in order to free itself from the limits of context-independent rules, the case study (or small number of case studies) is the location where social inquiry excels. The presence of a body of 'case exemplars' provides the foundations from which a host of ideas and knowledge systems about a range of behaviours and contexts may be inferred and tested.[71] The case method, for Flyvbjerg, requires the identification of *critical* cases. Case selection is important, because typical cases will often not yield much information, while an *extreme case* of its type might be useful for illustrating a concept, but not for generalising any wider knowledge claims. Case selection is something that requires the researcher to have experience and significant knowledge of the subject matter. Fundamentally, the case method requires purposeful selection of appropriate exemplars.

Once a suitable case has been identified, the phronetic method requires immersion in the context and source materials. *Location*, and *access to primary sources* are central to the undertaking. Flyvbjerg advocates *a focus on the practices and roles played* by the various participants within and connected to the particular case under study. Only then can the relevant discourses and the context in which the case is located be fully understood. In analysing practices and roles, specific attention is directed towards identifying the *values* operating within the materials, and the ways in which *power* is exercised by relevant participants. The researcher is mindful not only of the 'big picture' presented by the case, but also the *minutiae* operating within the case. Apparently minor and overlooked details can reveal important exceptions within case studies, and be indicators of the value systems operating within it. Phronetic research is primarily oriented to the broad questions 'what is going on?' and 'should this be happening?' questions. The major goal in this orientation is a detailed understanding and explanation of the case, rather than the exposition of general covering laws applicable to all cases. Finally, phronetic researchers are interested in mapping the complex relationships within the case, which necessarily involves a focussed attention to all the various individual and institutional actors internal and external to the case being examined.[72]

In the next section we ask the question: To what extent, then, can Flyvbjerg's principles of phronetic research be usefully applied in legal research?

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[71]Flyvbjerg (2001), p 66.
[72]Flyvbjerg (2001), p 129.

III. Legal scholarship as applied phronesis

We contend that legal scholars can learn important lessons from the phronetic approach. The first is the importance of confidence in the veracity and integrity of the doctrinal method. The doctrinal method has evolved over centuries of application. It is a rigorous and powerful form of reasoning that is routinely used in the legal profession throughout the world, and has been applied in cases from the most mundane through to the highest questions of public importance. Doctrinal methods are necessary and superbly suited to the kind of applied text-based reasoning that is the essence of the core of legal scholarship. As Cotterrell has rightly observed, law does not exist in a vacuum, and needs to be understood sociologically, culturally and increasingly, internationally.[73] When legal scholars begin to touch on contextual issues about law, or are applying for research funding, they are necessarily faced with questions of methodological exposition, and the choice between an 'insider's perspective' on the 'core business' of law (rule structures and application), and the 'outsider's perspective' of attending to how law overlaps with other knowledge formations. Legal scholars wishing to apply for research funding (often assessed by academics from other disciplines) thus need to engage with the 'outsider perspective' and are drawn into similar kinds of dilemmas as the social sciences – particularly where questions of methodology and epistemology are concerned.

Can applied phronesis act as a useful link between legal scholarship and other disciplines within the social sciences and humanities? We suggest the answer to this question is a qualified 'yes'. There are a number of important commonalities with phronetic inquiry. First, like social inquiry, legal research is also commonly concerned with case analysis, usually grounded in some kind of problem or dispute that contains a degree of common form with another similar dispute, but often with a degree of unique variation. In other words, legal research is typically based on an 'exemplar'. The greater the degree of variation from existing legal principle, the greater the chance the case will wind up in a court for resolution, or invite the attention of the legislator. Legal research is strongly based on case analysis. Second, legal research is also strongly grounded in the primary materials relevant to that case – particularly the evidence, law and narratives of the respective parties. Secondary materials are a routine part of the analysis. Saturation in context and primary source materials is an inherent part of the legal approach. Legal scholars are rarely governed by a linear, systematic approach to collection of evidence and source materials – rather, the approach to scholarship is more commonly fluid, 'fuzzy', and tending to move backwards and forwards between a variety of sources and materials as the need arises.

Legal research is also typically 'problem' or 'needs' oriented. As legal reasoning is typically grounded in human experiences, legal researchers are keenly aware of the parties and institutional actors involved in the case, and commonly deploy chronologies and ecological maps in the process of making sense of the practices, discourses and context of a particular case. As law is a profession with an explicit code of ethics and expectations of human behaviour, legal researchers are at least

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[73]Cotterrell (1998); Cotterrell (2006).

implicitly attuned to values and the collective sense of the limits and desirability of human behaviour. The more positivist views of legal research associated with doctrinal method (i.e. what is the law?) marginalise the role of values in the formation and operation of law (i.e. what the law ought to be?).[74] However, the phronetic focus on the human choices around values has significant compatibility with the contextual approaches to legal research found in legal policy and socio-legal analysis. Where lawyers can learn from a phronetic approach is to elevate questions of power as an ordinary part of their analysis, rather than focussing on policy and rule structures. The explicit attention to values and power thus provides a potentially strong link between the phronetic approach and legal scholarship.

An applied legal phronesis research design

Flyvbjerg's study on decision-making and democracy in the Danish city of Aalborg provides an example of an applied phronesis research design in public policy analysis. Broadly, Flyvbjerg was interested in the question of how public decision-making for the design of transport systems in the city were grounded in local power dynamics. In that undertaking, he based his research around four questions: (1) What is happening with democratic process within public decision making in Aalborg?; (2) Who is gaining, and who is losing; and by which mechanism of power?; (3) Is this situation desirable?; and (4) What should now be done?[75] As a design for a social inquiry, these questions are a useful framework to structure the analysis. However, as a *legal* inquiry, these questions, without adaptation, are less suitable. The Aalborg project undoubtedly intersected with legalities at multiple levels. The project, for example, involved decision making on transport within the city government, the granting of development consent by government for the construction of transport infrastructure, the acquisition of inner city land by government for development purposes, and also the intervention and collaboration of local police in the regulation of traffic in the city centre. Arguably, legal structures are fundamental to questions (1), (2), and (4) – for legal frameworks are central to understanding of the present state of affairs, the exercise of power and in visions of possible futures. However, a strict doctrinal study of the Aalborg project would likely have avoided the normative character of questions (3) and (4), and would have provided an incomplete picture of (1) and (2).

Whilst legal scholarship has been slow to expressly engage with Flyvbjerg, there are examples of socio-legal scholars adopting research designs that might broadly fall within the phronetic approach to social inquiry. In particular, within environmental law scholarship, over recent years there have been a number of successful examples of legal scholars investigating the underlying discourses that form and develop legal rules and institutions.[76] In this context, a discourse is viewed as a 'shared way of apprehending the world. Embedded in language, it enables those who subscribe to it to interpret bits of information and put them together into coherent

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[74]Bradney (1998), p 76.
[75]Flyvbjerg (2001), p 145.
[76]Jessup and Rubenstein (2012); Mickelson (2005); McGee and Taplin (2009).

stories or accounts'.[77] Drawing on interpretative traditions within social research, these legal scholars have excavated beneath the surface of doctrinal descriptions of the law to show how various actors (whether domestically or in the international sphere) use discourse to shape and change doctrinal rules and the institutions in which they are embodied. This work shows how legal doctrine is embedded within, and a product of, wider social practices of discursive contestation within society. Analysis of these discourses allows the researcher to better understand where a body of legal doctrine in environmental law 'is going' (i.e. Flyvbjerg's question 1) in the sense that the more fundamental ideas and assumptions lying beneath the doctrine are brought to light. Similarly, analysis of discursive contestation is able to shine a light on which societal actors propagate the relevant discourses that shape the formation and development of legal rules and institutions. This provides the researcher with a better understanding of the values underlying legal rules and institutions and who is benefitting from them (i.e. Flyvbjerg's question 2) and the power exercised by some actors in being able to initiate, shape and propagate discourses that shape those rules and institutions (i.e. Flyvbjerg's question 3). This leads naturally to normative questions regarding what should be done (i.e. Flyvbjerg's question 4).

We believe the sub-field of international climate change law provides an instructive example of leading scholars adopting an implicit phronetic research design. Mickelson,[78] McGee and Taplin,[79] Godden,[80] Cordes-Holland,[81] Bogojevic[82] and Stevenson and Dryzek[83] have adopted a broadly phronetic research design, combining analysis of legal rules and their underlying discourses, in investigating the institutions of global climate change governance. This work augments traditional doctrinal accounts of international climate change treaties by focussing on the way in which discourses (and the values embedded in discourses) are used by countries (and/ or coalitions of countries) to shape and/or develop the rules contained within those treaties.[84] Consistent with Flyvbjerg's approach, this body of discourse analysis of international climate law draws to the surface the values and power relationships embedded within the rules and institutions of global climate governance. This opens the space for normative consideration about how these rules and institutions ought to be developed in the future.

A turn to phronetic research design will not necessarily relieve legal scholars (particularly those adopting highly contextual approaches) of the necessity to engage with methods of data collection and analysis that are acceptable to scholars from other disciplines. The transdisciplinary character of legal research argued for in this article by necessity requires legal scholars to extend themselves beyond the relative 'comfort zone' of doctrinal method and the professional practices of law. This may

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[77]Dryzek (2005). cited in Jessup and Rubenstein (2012), p 4.

[78]Mickelson (2005).

[79]McGee and Taplin (2012).

[80]Godden (2012).

[81]Cordes-Holland (2012).

[82]Bogojevic (2012).

[83]Stevenson and Dryzek (2014).

[84]Rajamani (2008).

require legal researchers having to learn enough about methodologies and methods of relevant social sciences and humanities so as satisfy scholars from outside law of the legitimacy of the research undertaken. However, there are practical factors that help in this regard. First, the modern trend is for law graduates in Australia to be from either a combined degree (e.g. Arts/Law, Social Science/Law) or a graduate (e.g. Juris Doctor) background. Many legal researchers will therefore have some academic training in the humanities and/or social sciences. Second, there is growing acceptance within the legal academy of the benefits of research collaboration and co-publication strategies and the benefits this can have for research output.[85] This provides the opportunity for legal researchers to seek collaborations with scholars both inside and outside the legal academy who can provide disciplinary expertise and learning relevant to a phronetic research project.

Accordingly, we claim that for legal scholars it is possible to pursue a research design centred on applied legal phronesis. The phronetic approach might be used to better explain to scholars outside the discipline of law the case-based, context-specific method involved in doctrinal method. The phronetic approach might also be used by legal researchers to make links with an emerging movement within social science that is more compatible with the socio-legal analysis of values and power in the formation and operation of law. Our belief is that the kind of insights available through the phronetic research design will provide a richer understanding of the object of study than either a strict doctrinal approach, or a mainstream social science approach. Of course, the problem is that it necessarily involves a shift in thinking for traditional legal scholarship, but it has the great advantage in opening a space for collaboration and alliances with other disciplines that strict doctrinal work may not. In the absence of an extended consciousness of power and the social, doctrinal scholarship tends to take on the complexion of a lengthy, meticulously footnoted description of rules – and remains the reserve of an exclusive audience.

IV. Conclusion

Legal reasoning cannot be characterised as linear, formulaic or mechanical. It is fluid, bound only by the scope of relevant empirical strictures, and embedded in an ethical framework that is applied to particular cases. Legal reasoning is inherently phronetic in its character. Legal scholars are, it seems, being dragged into the 'science wars' that have been raging in the social sciences by the economic imperative of the increasing competition for resources among the various Universities. In this climate it is useful to explore potential connections between applied phronesis and legal research.

Having said this, it is important not to overstate the phronetic approach. The tension between social, normative and empirical research is complex, and the assumption that doctrinal method can be neatly carved out of its rich complexity and characterised by simple, replicable steps is problematic. Doctrinal scholarship is an essential part of legal studies, and remains so regardless of the rise of alternative approaches to understanding law and society. Flybjerg's analytic is only one part of a broad array of approaches available to legal scholarship, and will not answer

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[85]Smyth (2012).

all the problems associated with the internal/external, quantitative/qualitative, authority/inquiry paradigms. The approach outlined above is one of a broad range of approaches that legal researchers may deploy and articulate, and in this respect represents an ad-hoc solution to the challenges of articulating a methodology that will not necessarily end the debate or methodological anxieties of contemporary legal scholarship. Much of the problem, it seems, is simply rooted in the fact that when legal scholars are asked to articulate a methodology, it is based on the assumption there is a singular, consistent method applicable in all cases, when the reality is the scholar is being asked to succinctly describe the totality of disciplinary practice. Legal researchers should take some confidence in pointing this out.

We contend, however, that Flyvbjerg's applied phronesis offers a promising research design that might augment doctrinal analysis and provide a bridge between socio-legal analysis and the social sciences. Flyvbjerg's applied phronesis provides an approach to social inquiry that can focus upon the social practices that lie beneath the formulation of legal rules and the administration of them through institutions. Applied phronesis offers legal scholars a systematic research design that focuses on the values and ideas that are shaping legal rules and institutions. It also opens up analysis of how power is used by actors to shape societal understanding of legal rules and institutions. The bringing to light of the values and power relationships lying beneath legal rules and institutions opens the analytical space for normative critique on what should be done. Legal scholars interested in discourse analytic approaches to legal rules and institutions show some significant implicit consistency with Flyvbjerg's applied phronesis. A turn to phronetic research design may require legal scholars to rediscover and build upon disciplinary knowledge from their 'other degree' and also look for relevant collaboration opportunities with scholars in allied disciplines. However, we believe the above demonstrates there is significant value for legal scholars in engaging expressly with Flyvbjerg's applied phronesis as a research design to build a bridge between doctrinal analysis and the wider study of law in its social context.

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