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Criticism levelled at contemporary law research practices: Can our law teachers learn any lessons?

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1 Introduction

From a cursory examination of some of the most prominent and reputable South African law journals and unpublished LLM and LLD theses, the bulk of the research generated by law scholars is black-letter desktop studies that follow the mainstream doctrinal approach, with some encapsulating a theoretical approach. The doctrinal research often focuses on a doctrinal rendition of the law.[1] Schuck[2] describes this research best in the following terms:

> It parses judicial opinions, lines up the cases, and then evaluates the doctrine according to generally accepted logical or functional criteria, often proposing specific legal reforms.

These academic journals and theses additionally reveal that when the research conducted by scholars and their students is not primarily doctrinal, as described by Schuck, it often adopts a theoretical narrative (which is also deemed doctrinal research, albeit not in the primary sense).[3] Qualitative-empirical law research, which entails scholars collecting and analysing input data, is found, but it is few and far between.[4]

1 Hutchinson & Duncan 'Defining and describing what we do: Doctrinal legal research' 2012 *Deakin Law Review* 84.
2 Schuck 'Why don't law professors do more empirical research?' 1989 *Journal of Legal Education* 326.
3 Chynoweth 'Legal Research' in Knight & Ruddock (eds) *Advanced research methods in the built environment* (2008) 31 says that 'some element of doctrinal analysis will be found in all but the most radical forms of legal research'.
4 Schuck (n 2) 326.

Irrespective of whether a scholar employs the primary doctrinal or more theoretical study methodology, both considered black-letter desktop methodologies, contemporary scholars are the subject of ongoing criticism among international learning and teaching scholars.[5] Although this criticism relates to different jurisdictions, and does not necessarily apply to South African scholars, South African law scholars must assess and evaluate this criticism to learn valuable lessons from it, which may lead to improvements in their academic practices, mainly because the research that academics do will ultimately inform and enrich their teaching and learning.[6] The criticism, set out in more detail below, includes:

(a) First, scholars conduct research that is of no benefit to legal practitioners and the judiciary.

(b) Secondly, scholars conduct research in a vacuum and do not conduct any empirical research, leaving the research divorced from the real-life factual scenarios.

(c) Thirdly, the research is too theoretical, placing too much emphasis on doctrine.

Although further criticisms could be explored,[7] this work is limited to examining the three outlined above.

2 Relevance to legal practice

The first criticism levelled at contemporary academics is that scholars do not embark on *engaged* scholarship, that is, research that benefits legal practitioners and/or the judiciary.[8] For Edwards, legal scholars who

5 For example, see generally Hricik & Salzmann 'Why there should be fewer articles like this one: Law professors should write more for legal decision-makers and less for themselves' 2004-2005 *Suffolk University Law Review* 763.

6 Schuck (n 2) 325.

7 For example, academic articles are too long, see Friedman 'Law review and legal scholarship: Some comments' 1998 *Denver University Law Review* 663 and Saks 'Is there a growing gap among law, law practice and legal scholarship: A systematic comparison of law review articles one generation apart' 1996 *Suffolk University Law Review* 363-364.

8 McClintock 'The declining use of legal scholarship by courts: An empirical study' 1998 *Oklahoma Law Review* 659; Edwards 'The growing disjunction between legal education and the legal profession' 1993 *Michigan Law Review* 34; Schuwerk 'The law professor as fiduciary: What duties do we owe to our students' 2004 *South Texas Law Review* 763; Daly 'What the MDP debate can teach us about law

embark on disengaged research 'with their abstract theories' are on a planet different from the rest of the legal fraternity.[9] The merits of this criticism are, however, the subject of an ongoing and heated debate that invokes strong emotions and divides academics.[10] To this end, Hricik and Salzmann[11] point out that:

> Some say that law professors should impart less knowledge about doctrine and more about policy and broader social issues, while others decry the declining place that doctrine and issues of importance to the profession hold in law schools.

There is an ever-growing gap between American academia and practice, as revealed by several empirical studies looking at how often the judiciary cites academic work, which is rarely the case.[12] Of course, the judiciary may read journal articles without citing them, but the more accurate explanation is that courts resort to primary binding sources rather than secondary non-binding law journals.[13] Another reason for the lack of journal-referencing in law reports is that legal practitioners may not read academic work, and when they are oblivious to case-relevant existing academic work, they may not draw the court's attention to it, despite it being highly relevant and on-point.[14]

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practice in the new millenium and the need for curricular reform' 2000 *Journal of Legal Education* 543; Postlewaite 'Publish or perish: The paradox' 2000 *Journal of Legal Education* 158; Harnsberger 'Reflections about law reviews and american legal scholarship' 1997 *Nebraska Law Review* 693-694; Posner 'Legal scholarship today' 2002 *Harvard Law Review* 1314-1316; Edwards 'Symposium on the 21st century lawyer: Another 'postscript' to 'the growing disjunction between legal education and the legal profession'' 1994 *Washington Law Review* 562; Posner 'The deprofessionalization of legal teaching and scholarship' 1992-1993 *Michigan Law Review* 1928; Friedman 'The silent LLC revolution – the social cost of academic neglect' 2004 *Creighton Law Review* 44-49.

9 Kronman 'Living the law' 1987 *University of Chicago Law Review* 870; Leiter 'The law school observer' 2001 *Green Bag* 101; Gordon 'A response from the visitor from another planet' 1993 *Michigan Law Review* 1968; Gregory 'The assault on scholarship' 1991 *William and Mary Law Review* 999; Redding 'How common-sense psychology can inform law and psycho-legal research' 1998 *University of Chicago Law School Roundtable* 116.

10 Hricik & Salzmann (n 5) 762.

11 Hricik & Salzmann (n 5) 761.

12 Sirico Jr & Nargulies 'The citing of law reviews by the Supreme Court: An empirical study' 1986 *University of California Law Review* 134; Sirico Jr & Drew 'The citing of law reviews by the United States Court of Appeals: An empirical analysis' 1991 *University of Miami Law Review* 1051.

13 Solviter 'In praise of law reviews' 2002 *Temple Law Review* 9-10.

14 Solviter (n 13*)* 9-10.

Law scholars often embark on research that identifies and considers *lacunas* in the law, focusing on what the law ought to be by suggesting law reform.[15] This type of research, albeit significantly beneficial and necessary, offers limited practical value to legal practitioners and the judiciary, who grapple with existing and present-day law and its interpretation.[16]

Currently at the University of Pretoria's Law Faculty, there is a collaboration between the judiciary, the Law Faculty and the Pretoria Bar Association. This initiative is expected to foster greater engagement with academic literature among legal practitioners and assist in guiding academics toward producing research that is both practical and impactful. Informal collaborations with the judiciary and the advocate's profession suggest a shared concern that academic work does not consistently meet the practical needs of the legal profession and the judiciary.

The *De Rebus*, a practitioner's journal, features a column called 'Recent Articles and Research,' which lists recent publications in mainstream journal articles. However, there are no summaries or abstracts of the published academic articles. To bridge the gap between academia and legal practice, perhaps, with the necessary permission, the extracts or summaries of the academic articles can be reproduced to increase the journal-reading prevalence. Hricik and Salzman,[17] in an American context, argue that:

> The demise of law reviews as a voice in judicial-doctrinal development of the law is significant. The loss of an engaged academic voice has negative consequences for the proper development of the law because judges and lawyers lack the time, skill and neutrality to assure its proper development themselves.

It is not suggested that all research outputs must have the primary aim of serving the judiciary or legal practitioners, but engaged scholarship, helpful to the legal fraternity, clearly offers meaningful benefits to all the role players. Accordingly, academics become better lecturers and serve students better (who ultimately desire to practice the law), whilst legal practitioners and the judiciary benefit from competent guidance and input from those best placed to do so.[18] It also benefits the public,

15 Solviter (n 13*)* 9-10.
16 Solviter (n 13*)* 9-10.
17 Hricik & Salzmann (n 5) 778-779.
18 Hricik & Salzmann (n 5) 773.

in their capacity as litigants going through the justice system, when their complex issues in everyday common litigation receive academic input and guidance.[19] The public often faces increasingly complex legal questions owing to increased international engagements,[20] the increasing need to comprehend interdisciplinary issues, and the rich and potentially intricate questions of law and practice.[21] The consequence of law scholars who disregard practical issues is that judges and legal practitioners don't have the benefit of objective research, synthesised and articulated by high-end competent scholars.[22]

There may be many reasons why scholars do not embark on engaged research. Scholars are not always aware of pressing practical issues because most universities do not appoint practicing lawyers,[23] resulting in an academic focus shift from practice to theory.[24] Those academics with practical experience bring value to the lecture rooms.[25] Academics often have no practical experience and have been taught by academics with no or slight/insignificant practical experience.[26] They either do not have an in-depth appreciation for these practical problems or they may not prioritise them.[27] Human nature dictates that academics only write about familiar topics and stick to abstract discussion rather than misapplying their ideas to on-the-ground legal issues based primarily on the scholar's uncertainty or discomfort with unfamiliar territory.[28]

19 Hricik & Salzmann (n 5) 763.
20 Hricik & Salzmann (n 5) 777.
21 Hricik & Salzmann (n 5) 763.
22 Douglas 'Law reviews and full disclosure' 1965 *Washington Law Review* 227.
23 Lilly 'Law schools without lawyers? Winds of change in legal education' 1995 *Virginia Law Review* 1428-1429; Redding 'Where did you go to law school? Gatekeeping for the professoriate and its implications for legal education' 2003 *Journal of Legal Education* 594; Resnik 'Ambivalence: The resiliency of legal culture in the United States' 1993 *Stanford Law Review* 1525; Hayden 'Professional conflicts of interest and "good practice" in legal education' 2000 *Journal of Legal Education* 367; Cohen 'The dangers of the ivory tower: The obligation of law professors to engage in the practice of law' 2004 *Loyola Law Review* 623. Also see *United States v Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in United States Currency* 955 F2d (DC Cir 1992) 712 at 722: '... law reviews ... dominated by rather exotic offerings of increasingly out-of-touch faculty members'.
24 Saks (n 7) 370-371; Rhode 'Legal scholarship' 2002 *Harvard Law Review* 1328.
25 Leiter (n 9) 101.
26 Hricik & Salzmann (n 5) 769.
27 Hricik & Salzmann (n 5) 769.
28 Lilly (n 23*)* 1434-1435; Kronman (n 9) 870.

American authors further explain, with regard to the lack of engaged research, that practical research may not be interesting[29] or popular and may not be 'cutting edge' and are often disvalued.[30] Some even suggest that engaged scholarship is to be reserved for the lesser legal mind[31] or is an unworthy cause that is inappropriate for a law professor's focus.[32] Some law academics disdain practicing professionals and may view them proverbially as several cuts below plumbers in both intellect and morality.[33]

As for the more mundane reasons for the absence of engaged scholarship,[34] academics may be oblivious to the need to conduct research that assists the profession.[35] This may be so because of the 'academification' of law scholars, where academics write for other academics, and there is an audience for the more esoteric and theoretical work that they publish, despite it being of little practical value.[36] Less practical academic research is most certainly being consumed. Given the growth in academic publications and the financial reward and funding that accompany the publication of such work, scholars may be oblivious to the concern with the lack of practical utility and value of their work among the judiciary and legal practitioners.[37]

Disregarding engaged scholarship is viewed by some as a breach of the duty of academics who have a responsibility to serve students[38] and to engage in community development (particularly the judiciary, the broader legal fraternity and the clients or public they serve).[39] Commentators such as Torke argue that engaged scholarship makes

29 Burnham 'Separating constitutional and common law torts: A critique and a proposed constitutional theory of duty' 1989 *Minnesota Law Review* 541.
30 Posner (n 8) 1321.
31 Edwards (n 8)54.
32 Hricik & Salzmann (n 5) 763.
33 Ayer 'Stewardship' 1993 *Michigan Law Review* 2150-2151.
34 Hricik & Salzmann (n 5) 772.
35 Hricik & Salzmann (n 5) 772.
36 Posner 'Against constitutional theory' 1998 *New York University Law Review* 4.
37 Saks (n 7) 363-364.
38 Gregory (n 9) 999.
39 Grisso and Melton 'Getting child development research to legal practitioners: Which way to the trenches?' in Melton (ed) *Reforming the law: The impact of child development research* (1987) 146 & 159-161; Streib 'Academic research and advocacy research' 1988 *Cleveland State Law Review* 256; Redding(n 9) 116.

for better law educators[40] and benefit students.[41] One way to engage in community development is to conduct research that is meaningfully helpful to the public and the legal profession at large.[42] The unfamiliarity of engaged scholarship may also adversely impact on how law faculties are seen in the eyes of the judiciary and the legal profession.[43]

Academics may also be of the view that the profession already meets the demand for engaged scholarship.[44] This is ironic for Hricik and Salzmann, who argue that the profession should consume engaged scholarship, not be the author thereof.[45] Hricik and Salzmann argue that law schools (and not legal practitioners or the judiciary) ought to be 'the keepers and the pioneers of legal doctrine',[46] the 'ambassadors between high legal theory and those actually practicing law'[47] and 'the bridge between the legal theory and reality'.[48]

But why should academics (and, by extension, their postgraduate students), instead of the judiciary or legal practitioners, embark on engaged research and deal with contentious practical issues that matter for the profession?[49]

Hricik and Salzmann argue that academics have a unique capacity and an obligation to address issues that matter in the profession.[50] Unlike legal practitioners, academics operate independently of client obligations, which gives them impartial academic freedom.[51] They are not burdened by law firm politics and the constraints of sustaining a profitable practice, which may result in an inhibition to conduct comprehensive, engaged research on what the law can and should provide.[52] Apart from having

40 Torke argues that law teachers are better when they comprehend law practice and consider it in their teaching. Students go into practice with an understanding of how the law is practically applied.
41 Torke 'What is this thing called the rule of law?' 2001 *Indiana Law Review* 1455.
42 Postlewaite (n 8) 158.
43 Friedman (n 7) 661. At 665, Friedman says the problem is the subject matter covered in the law reviews.
44 Rubin 'The practice and discourse of legal scholarship' 1987 *Michigan Law Review* 1889.
45 Hricik & Salzmann (n 5) 772.
46 Hricik & Salzmann (n 5) 773.
47 Hricik & Salzmann (n 5) 777.
48 Hricik & Salzmann (n 5) 779.
49 Hricik & Salzmann (n 5) 761.
50 Hricik & Salzmann (n 5) 761.
51 Streib (n 39)257.
52 Saks (n 7) 365; Farber & Sherry *Beyond all reason: The radical assault on truth in American law* (1997) 6; Schuwerk (n 8) 753.

the intellectual ability and the time, academics have the resources (access to funding, libraries and support staff) and must be the bridge between practice and theory, failing which 'society will be the worse for it'.[53]

Academics are, moreover, experts in their respective fields, possessing deeper and more specialised knowledge than the average legal practitioner or judicial officer, whose expertise tends to be broader but less detailed.[54] They may consider nuanced factors unknown to judicial officers and legal practitioners.

Legal practitioners, on the other hand (like judicial officers), have too much on their plates and do not have the time and resources to embark on engaged scholarship.[55] If left to their own devices, the gap between academia and practice will widen, with each group conducting research only for itself.[56]

Practical research cannot be left to legal practitioners. Unlike academics, whose curiosity trumps utility and who may elect any research topic (their imagination has no limits), legal practitioners are instructed on issues confronted by their instructing clients, which may not always be captivating and intriguing.[57]

Time-constrained legal practitioners often resort to 'quick and dirty' research where expeditious research outweighs meticulous detail.[58] When they do write, they pay limited attention to controversial issues, because commenting academically on these issues may be adverse to an existing or future client.[59] For these reasons, they are not objective.[60] They serve the interests of existing and future potential clients and lack academic freedom.[61] Hricik and Zalmann says it best:[62] 'Woe is the lawyer who has

53 Edwards (n 8) 41; Streib (n 39)257.
54 Schuwerk (n 8) 758-759.
55 Hricik & Salzmann (n 5) 772.
56 Hricik & Salzmann (n 5) 772.
57 Hricik & Salzmann (n 5) 781.
58 Streib (n 39)257; Torke (n 41) 1455.
59 Hricik & Salzmann (n 5) 781.
60 See Cohan 'Psychiatric ethics and the emerging issues of psychopharmacology in the treatment of depression' 2003 *Journal of Contemporary Health Law and Policy* 160-162, discussing ethical issues facing pharmaceutical companies or other outside entities that fund scientific studies. Also see Anderson et al 'Daubert's backwash: Litigation-generated science' 2001 *University of Michigan Journal of Law Reform* 619.
61 Hricik & Salzmann (n 5) 781.
62 Hricik & Salzmann (n 5) 781.

his own scholarly writing cited as a source against his client's interest in litigation'.

The judiciary is hindered by structural impediments which preclude presiding officers from embarking on in-depth research that goes to practical contentious grey areas.[63] The judiciary is time-constrained and overburdened.[64] They carry too heavy a burden to engage in academic research and writing.[65] The court is, moreover, bound by the case as formulated by the parties and has no business raising a claim or a defence not raised by the parties.[66] The judiciary may either not appreciate interdisciplinary issues or nuances associated with a legal dispute,[67] but even if they do, they may not raise it *mero motu*.[68] Although many academics believe that courts are well placed and not in need of practical engaged scholarship,[69] courts cannot be the source of engaged scholarship.[70] While courts may not exhibit the same biases as legal practitioners, they are nonetheless presented with arguments from parties who have a vested interest in the outcome of the case. As a result, and due to time constraints, courts may not be able to thoroughly explore all aspects of the law. The presiding officer may similarly be limited in expertise in a given field, unlike academics.[71]The demise of practical academic research written for the legal practitioners and the judiciary is significant in the context of judicial doctrinal development and hampers the proper development of the law.[72] For Farber and Sherry, universities must 'be treasured as enclaves of reason in an unreasoning world'.[73]

It is by now an accepted contention that legal academics and their postgraduate students focus on abstract theory and disregard practical

63 Hricik & Salzmann (n 5) 763.
64 *South African Human Rights Commission v Standard Bank of South Africa* 2023 (3) SA 36 (CC) paras 13 & 37.
65 Hricik & Salzmann (n 5) 783.
66 *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 898. The parties are bound by the pleadings, see *Trope v South African Reserve Bank* 1992 3 SA 208 (T) 210; *Imprefed v National Transport Co* 1993 3 SA 94 (A) 10; *Minister of Agriculture and Land Affairs v De Klerk* 2014 1 All SA 158 (SCA) para 39*; Gusha v RAF* 2 SA 371 (SCA) para 7; *Robinson v Randfontein Estates GM* 1925 AD 173 198.
67 Hricik & Salzmann (n 5) 785.
68 Hricik & Salzmann (n 5) 785.
69 Rubin (n 44) 1889.
70 Hricik & Salzmann (n 5) 772.
71 Hricik & Salzmann (n 5) 783-784.
72 Hricik & Salzmann (n 5) 778.
73 Farber & Sherry (n 52) 6.

scholarship.[74] Edwards calls these scholars 'impractical' and 'displaced scholars' who use the law to study other topics.[75] Wellington points to the lack of empirical research as another potential reason for the alarmingly wide chasm between academia and legal practice, where an unbridgeable gap is the dreaded end destination.[76] For Schuck, there is a nexus between the absence of empirical scholarship and the disjunction between academia and practice.[77] This is considered more closely in the next section.

3 Lack of empirical engagement

Empirical researchers employ empiricism as a research methodology and draw conclusions from concrete, verifiable, real-world evidence.[78] By observing a phenomenon, researchers measure reality and establish the truth about a question.[79] Research of this nature moves away from the well-embedded doctrinal methodology.[80] Researchers who employ an empirical methodology subscribe to the notion that knowledge comes from evidence and experience.[81] A significant advantage of empirical research is that it stimulates interdisciplinary research and moves away from the self-referential discourse that has become the *status quo* and that 'passes for intellectual dialogue'.[82]

Although case studies and other types of research also qualify as empirical research, in the context of this work, that considers criticism against certain research practices, empirical research means statistical and data studies.[83] Statistics and data allow the scholar to draw inferences from collected data or to discover relevant regularities or irregularities,[84] by employing methods such as interviews, focus groups, questionnaires

74 Edwards (n 8) 34; Harnsberger (n 8) 693-694; Posner (n 8) 1314-1316.
75 Edwards (n 8) 562.
76 Wellington 'Challenges to legal education: The "two cultures" phenomenon' 1987 *Journal of Legal Education* 327; Edwards 'The role of legal education in shaping the profession' 1988 *Journal of Legal Education* 285.
77 Schuck (n 2) 325.
78 Bhattacharya 'Empirical research' in Given (ed) *The SAGE Encyclopedia of Qualitative Research Methods* (2008) 254-255.
79 Bhattacharya (n 78) 254-255.
80 Hutchinson & Duncan (n 1) 83-119.
81 Psillos & Curd *The Routledge companion to philosophy of science* (2010) 129–138.
82 Schuck (n 2) 334-335.
83 Schuck (n 2) 323.
84 Schuck (n 2) 323.

and surveys. It assists the scholar in describing the world as it currently is[85] and in studying the law in practice.[86]

The second criticism against contemporary scholars, ventilated in American law journals, is that scholars ignore facts and real-life situations and omit to engage in empirical research. American law faculties do not make empirical research their business or incentivise empirical research.[87] Under the university culture, there is a a 'publish or perish' culture, where legal scholars are incentivised to publish in peer-reviewed accredited journals (where academics are the audience for the most part),[88] which is generally much less of a hassle than embarking on empirical research. In the exceptional cases, where qualitative empirical research is done in legal disciplines,[89] it may be criticised for disregarding the rules of inferential reasoning and its lack of quality and growth, but this criticism is beyond the scope of this work.[90]

In the past, researchers used empirical research to test theories and to premise their conclusions on verified facts, but this evolved to test 'conventional concepts of evidence and truth', or put differently, to understand a problem and secure more information about a problem.[91]

In the law discipline, a content-analytical legal research approach (or the so-called doctrinal black-letter methodology) is mostly adopted: This approach involves critical thinking and writing by evaluating facts and information pertaining to the research and for the most part, it is deemed qualitative in nature, but some argue that it is neither a qualitative or quantitative inquiry.[92] Black letter research is aimed to:[93]

> 'systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis of authoritative texts that consist of primary and secondary

85 Schuck (n 2) 323.
86 Lucy 'Abstraction and the rule of law' 2009 *Oxford Journal of Legal Studies* 481; Hutchinson *Researching and writing in law* (2018) 36.
87 Schuck (n 2) 331.
88 Hutchinson & Duncan (n 1) 86.
89 Schuck (n 2) 324.
90 Eisenberg 'The origins, nature and promise of empirical legal studies and a response to concerns' 2011 *University of Illinois Law Review* 1713.
91 Powner *Empirical research and writing: A political science student's practical guide* (2015) 1-19.
92 Hutchinson & Duncan (n 1) 116.
93 McConville & Chui (eds) *Research methods for law* (2003) 4; Rubin 'Law and the methodology of law' (1997) *Wisconsin Law Review* 525.

> sources. One of its assumptions is that the character of legal scholarship is derived from law itself'.

Although black-letter desktop research has qualitative characteristics, no new information is solicited from other sources, and the research refrains from addressing the factual impact and effect of the application of the law and instead studies the law as a written body of knowledge that can both be discerned and analysed using only legal sources.[94] It relies mainly on secondary research or data collected and published by others and on sources such as case law, statutes and other primary law sources.

Black letter desktop studies are often disconnected from reality and focus on internal discrepancies and omit to question how the law is applied in practice and have been criticised 'for its intellectually rigid, inflexible and inward-looking approach of understanding law and the operation of the legal system'.[95]

For the critics, there is a clear dichotomy between the study of legal doctrine and legal behaviour.[96] William Lucy calls doctrinal research 'internal' research, but once the researcher employs empirical methodologies that involve extra-legal disciplines, he calls it 'external' research.[97] The 'internal method' employs logic, reason and argument (critical reasoning) premised on authoritative sources.[98]

For Schuck, speaking about American Law schools, law teachers fail their students by paying no regard to facts, specifically the finding, interpreting, proving and rebutting of facts.[99] Schuck[100] says of facts that:

> '...their messiness, their contingency, their controversiality, the difficulty of proving them, their uneasy relationship with the theories about law that we deploy- are soft spots in contemporary legal education'.

94 McConville & Chui (n 93) 4. Interdisciplinary work with social legal research is encouraged, see Gordon 'Lawyers, Scholars and the Middle Ground' 1993 *Michigan Law Review* 2075. For a general discussion, see Banakar and Travers (eds) *Theory and Method in Socio-legal Research* (2005).

95 Vick 'Interdisciplinary and the discipline of law' 2004 *Journal of Law and Society* 164.

96 McClintock (n 8) 659; Clark 'Legal education and professional development: An educational continuum report of the task force on law schools and the profession: Narrowing the gap' (1992) *Legal Education Review* 4-5; Schuwerk (n 8) 763.

97 Lucy (n 86) 481.

98 McCrudden 'Legal research and the social sciences' 2006 *Law Quarterly Review* 648.

99 Schuck (n 2) 325.

100 Schuck (n 2) 325.

Schuck goes on to complain that, more recently, law teaching in the classroom has advanced a law canon by 'offering a set of assumptions that are derived from theory, not demonstrated facts.'[101]

In 1982, what has become known as the 'Arthur study' culminated in a scathing report that found the general legal research conducted in Canada wanting for lack of empirical research and the effect it has on society at large and reported:[102]

> 'We conclude that law in Canada is made administered and evaluated in what often amounts to a scientific vacuum. Without overstraining analogies to the 'hard' sciences, the state of the art of all types of legal research is poorly developed. Clients are advised, litigants represented and judged, statutes enacted and implemented in important areas of community life on the basis of 'knowledge' which, if it were medical, would place us as contemporaries of Pasteur, if it related to aeronautics, as contemporaries of the Wright Brothers'.

This criticism, of ignoring the facts on the ground and instead relying on assumptions, is best illustrated by the following example. A scholar conducts research on the root causes of confirmation bias among expert witnesses and the potential responses thereto. The scholar will not have any empirical evidence of the extent of the confirmation bias in South Africa nor of what causes the bias in the South African environment, which plays an important role in making recommendations for law reform. The research will thus be premised on assumptions and will be conducted in a vacuum and not grounded in any supporting empirical facts.

Although a researcher may deem the answer to the above questions relating to confirmation bias as obvious, Christopher McCrudden reminds scholars that 'if legal academic work shows anything, it shows that an applicable legal norm on anything but the most banal question is likely to be complex, nuanced and contested'.[103] The law has many examples where *prima facie* open-and-shut cases are thwarted, unanswerable charges answered and inexplicable conduct explained.[104]

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101 Schuck (n 2) 326.

102 For a general discussion of this report, see Trakman 'Law and learning: Report of the Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council of Canada' 1983 *Osgoode Hall Law Journal* 554-560.

103 McCrudden (n 98) 648.

104 *John v Rees*; *Martin v Davis* [1969] 2 All ER 274 309.

Empirical research also brings to the fore nuances that may not be obvious. To this end, the phrase 'nothing about us without us' is widely used by organisations representing people living with disabilities[105] and underscores the notion of participation.[106] This phrase advocates that when reform plans, strategies and policies are proposed, which involve the lives of people living with disabilities, they should have agency therein[107] because they appreciate and comprehend the not-so-obvious nuances, experiences and insight that must inform any reform plan, decision, strategy or policy.[108] The involvement of directly affected people in decision-making illuminates factual circumstances that may be elusive or contingent[109] and that may be missed in conventional desktop studies, so that scholars remain oblivious thereto.[110]

There is no obligation on scholars and students to embark on empirical research and there may be many contemplated scenarios where empirical research is contra-indicated. Still, where empirical research is indicated, it will surely help legal scholars and their students to engage better with the legal problem and comprehend and appreciate how the impugned legal problem is experienced by those it affects, which in turn may inform their law reform recommendations or the proposed response to a legal problem. Research informed by empirical evidence will have depth and credibility associated with it and make it more beneficial for

105 Charlton *Nothing about us without us: Disability oppression and empowerment* (1998) 1.

106 S 195(1)(e) of the Constitution of the Republic of South Africa provides that public administrators must ensure that the public participates in policy making.

107 Franits 'The issue is-nothing about us without us: Searching for the narrative of disability' 2005 *American Journal of Occupational Therapy* 577.

108 Smart, Beagan & Landry 'Disability, society and the individual' 2002 *Teaching Sociology* 120.

109 Schuck (n 2) 323. Also see Rottleuthner 'Sociology of law and legal practice' in Arnaud (ed) *Legal culture and everyday life* (1989) 79-82:
'Sociological research can ... help us to look beyond our daily routines ... As sociologists of law we go beyond the individual field of experience ... we transcend the individual perspective ... we establish correlations systematically instead of relying on unproved everyday theories. And by using a different frame of reference we point out new aspects to which inadequate attention has been given in your legal practice ... we offer a cognitive background for your daily work'.

110 They disregard their duty to do research that matters for practice, see Hricik & Salzmann (n 5) 761.

other academics and practitioners when it captures and categorises social phenomena.[111]

It is equally important to remember that law is inherently practical and for that reason, legal education ought to equip students for real-world application, and for that, legal scholarship should strive to uncover truths about society, most effectively revealed through empirical research (observing and measuring how people and institutions behave within a legal setting/environment),[112] yet this is hardly ever done.[113] To this end, Schuck[114] said that:

> 'The neglect of empirical work is a bad, increasingly worrisome thing for our scholarship and teaching, and the reasons for its persistence are so deeply embedded in the incentive structure and professional norms of the law schools that they are exceedingly resistant to change'.

The custom of embarking on 'internal' black-letter desktop research as the elected research methodology does not sit well with other disciplines, who find it hard to comprehend that a legal doctrinal scholar does not test a hypothesis and some even view doctrinal research as scholarship but not as a competent stand-alone research methodology.[115]

Duncan and Hutchinson take a different view and argue that law has a paradigm, it is a distinct scholarship and will invariably adopt a unique research methodology.[116] They argue that legal research requires high-end analysis and criticism, which differs from social science research.[117] It may

111 Bauer 'Classical content analysis: A review' in Bauer, Gaskell & Allum (eds) *Qualitative researching with text, image and sound: A practical handbook*' (2000) 22.

112 Which is a social phenomenon, see Walter (ed) *Social Research Methods* (2010) 18.

113 Schuck (n 2) 323.

114 Schuck (n 2) 323.

115 Hutchinson & Duncan (n 1) 83 summarize with reference to Posner 'Conventionalism: The key to law as an autonomous discipline' 1988 *University of Toronto Law Journal* 345, quoted in Schwartz 'Internal and external method in the study of law' 1992 *Law and Philosophy* 185 where the following is said:
'Some commentators are of the view that the doctrinal method is simply scholarship rather than a separate research methodology. Richard Posner even suggests that law is 'not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions'.

116 Hutchinson & Duncan (n 1) 85; Campbell 'Legal thought and juristic values' 1974 *British Journal of Law and Society* 15.

117 Hutchinson & Duncan (n 1) 116 relying on Campbell (n 11*6)* 15. Also see Aubert 'The structure of legal thinking' in Castberg (ed) *Legal essays* (1963) 41.

invoke the particular rather than the general, as in other sciences.[118] For Olivier, a scholar has the ability to set out the law, to work it from within and to arrange it logically or to distribute it 'from its stemmum genus to its infima species' and because legal scholarship can be systematically approached in stages that one can document, it is sufficient and may be considered a distinct doctrinal methodology.[119]

It must be accepted that the law doctrinal methodology is a competent and sound one but the criticism that doctrinal research must be elaborated on with reference to sociological or other perspectives remains.[120]

It may be time to explore how legal education might be reorganised to facilitate competent empirical or qualitative research without eroding essential objectives.[121]

There are numerous reasons why legal scholars do not embark on empirical research. Much of it has to do with law school traditions and old habits that die hard. Law schools fear a change in mission, where high costs and much time (such as for ethical approvals) are required for empirical research.[122] Empirical research may increase internal validity and confidence in the research outputs, but it is inconvenient and amounts to grunt work that often requires scholars to leave their comfortable workstations.[123]

Although the researcher's control may be high and the researcher is in a good position to control the variables, the outcome of the research remains uncertain, which results in a lack of control and uncertainty.[124] Academics have a tendency to be activists and reformists, and for them, empirical work poses threats, not only to the research output that may be adverse to the desired policy outcome, but the research outcome may

118 Campbell (n 11*6)* 20.
119 Holmes Jr *The Common Law- The Project Gutenberg* (2000) 219.
120 Cotterrell 'Why must legal ideas be interpreted sociologically?' 1998 *Journal of Law and Society* 171; Kelsen 'The pure theory of law and analytical jurisprudence' in Kelsen (ed) *What is justice? Justice, law and politics in the mirror of science* (1957) 270; Kelsen *General theory of law and state* (1945) 174; Teubner 'How the law thinks: Toward a constructivist epistemology of law' 1989 *Law and Society Review* 747.
121 See generally Lee and King 'Exchange: Empirical research and the goals of legal scholarship' 2002 *University of Chicago Law Review* 191-209.
122 Trubek 'A strategy for legal studies: Getting bok to work' 1983 *Journal of Legal Education* 589.
123 Schuck (n 2) 331.
124 Schuck (n 2) 331.

also undermine the researcher's reform endeavours and even delegitimise the researcher.[125]

For career advancement, it is more justifiable to avoid uncertain empirical research, because there is a risk that the research may be incomplete or inconclusive.[126] Legal scholars are not formally equipped with the necessary training in empirical research or analytical skills because data must be interpreted and made comprehensible, and knowledge and paradigms outside legal disciplines are required.[127] Law academics often face challenges in dedicating the time and effort needed to cultivate these skills.[128]

Another key criticism that is considered next focuses on the tendency of legal research to lean too heavily on theoretical constructs.

4 Overemphasis on theory

Doctrine, in the context of legal studies, is defined as:[129]

> 'a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding or nonbinding'.

Doctrinal research[130] examines the synthesis of policies, judgments and doctrines via a 'scientific, reasonable and efficient methodology', and it

125 Schuck (n 2) 332.
126 Schuck (n 2) 333.
127 Schuck (n 2) 333.
128 Schuck (n 2) 333.
129 Mann (ed) *Australian law dictionary* (2010) 197.
130 Council of Australian Law Deans 'Statement on the Nature of Research' https://cald.asn.au/wp-content/uploads/2023/11/cald-statement-on-the-nature-of-legal-research-20051.pdf (accessed 26 January 2025) at page 3:
'To a large extent, it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognised parallel to 'discovery' in the physical sciences. Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials. The very notion of 'legal reasoning' is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system's simultaneous achievement of constancy and change, especially in the growth and development of the common law. Yet this only underlines that doctrinal research can scarcely be quarantined from broader theoretical and institutional questions. If doctrinal research is a distinctive part of legal research, that distinctiveness permeates every other aspect of legal research for which the

encapsulates research of the law and general concepts.[131] For Simmonds, doctrinal research represents 'the heart of the legal system' and describes it as 'the corpus of rules, principles, doctrines and concepts as a basis for legal reasoning and justification'.[132] For Simmonds, doctrinal research is a practice that can be comprehended only by having regard to its own self-conception.[133]

Doctrinal scholars do not test their hypothesis[134] and their research often contains a comparative study to enhance the investigation into the legal problem that scholars grapple with.[135] Doctrinal research encapsulates, among others, the following objectives:[136]

(a) To create a new theory, principles or doctrines which will add to the body of knowledge in the legal discipline.[137]

(b) Analyse the authority of the law, judgments, policies and doctrines.

(c) Assist the legal profession in interpreting and applying the law correctly by pointing to errors and wrong interpretations with reference to authoritative evidence.[138]

(d) Develop theories to set out the implication of the law (both substantive and procedural) on the society at large, to improve the law.

(e) Search for and investigate the correlation between different legal concepts.

For many law scholars, it has become practice to resort to a desktop, black-letter doctrinal research because, historically, legal professionals depended on this method to derive logical legal conclusions.[139]

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identification, analysis and evaluation of legal doctrine is a basis, starting point, platform or underpinning'.

131 Hutchinson & Duncan (n 1) 85.

132 Simmonds *The decline of juridical reason: Doctrine and theory in the legal order* (1984) 1.

133 Simmonds (n 132) 30.

134 Yaqin *Legal Research and Writing Methods* (2008) 29.

135 Reitz 'How to do comparative law?' 1998 *American Journal of Comparative Law* 625-626.

136 Pradeep 'Legal research- descriptive analysis on doctrinal methodology' 2019 *International Journal of Management, Technology and Social Sciences* 97-98.

137 Van Hoecke (ed) *Methodologies of legal research which kind of method for what kind of discipline?* (2011) vi.

138 Schuck (n 2) 337.

139 Pradeep(n 136) 97; Chynoweth 'Legal research' in Knight & Ruddock (eds) *Advanced research methods in the built environment* (2008) 31; Bartie 'The lingering core of legal scholarship' 2010 *Legal Studies* 346, 359 & 362; Hutchinson & Duncan (n 1) 85.

It is against this backdrop that the third major criticism levelled at contemporary scholars must be considered. This third criticism entails the decline in the 'systematic and ordered exposition of legal doctrine in the works of juristic commentators'[140] which is in its stead replaced by theoretical research that resort to general propositions that draw from theories (political, social, economic, etc) as a framework for analysing and evaluating the law or judgments, which frameworks give content to discussions such as substantive justice, policy and procedural fairness.[141]

For Westerman, 'doctrinal' research focuses on certain concepts or categories of 'legal systems' as opposed to 'law studies' that has at the forefront an independent theoretical framework, such as a historical, socio-legal, philosophical, economic or political framework, comprising of concepts and categories that are 'not primarily borrowed from the legal systems'.[142] Theoretical research fosters a holistic appreciation of the conceptual premise of the legal principle and considers the broader impact that rules and procedures may have on a given area.[143]

But the theoretical research that has been the subject of criticism is research of a peculiar theory, one that engages in normative argument as opposed to what presently manifests itself, based on the scholars credo, dressed up as theory and/or assume the existence of facts (hypothetical facts) as being true as a foundation for the reasoning and argument.[144] An example is the theory on the role of the judiciary without regard to the institutional capabilities of the judiciary.[145] Edwards describes this impugned research as theory alone, divorced from practicality.[146] Hricik and Salzmann complain about the theory that is not motivated to shape the law and remind us that scholars are responsible for grounding their theories in 'real legal issues' and educating the reader on how the theory will impact the law.[147] If it is not linked to the real

140 Simmonds (n 132) 1.
141 Schuck (n 2) 327.
142 Westerman 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law' in Van Hoecke (ed) *Methodologies of legal research which kind of method for what kind of discipline?* (2011) 94.
143 Hutchinson *Researching and writing in law* (2018) 7; Barker 'The Pearce Report-Does it still influence Australian legal education?' 2014 *Journal of the Australasian Law Teachers Association* 77.
144 Schuck (n 2) 327.
145 Schuck (n 2) 327.
146 Edwards(n 8) 561-572.
147 Hricik & Salzmann (n 5) 777-778.

world, it will be impractical to legal practitioners and the judiciary.[148] Duncan and Hutchinson argue that legal research is contingent on a contextual background and requires interpretation and analysis, but more importantly, they record that synthesising the law requires the application of the law to the facts.[149] Not only is this research empirically doubtful, but moreover, it omits to set out an actual dynamic.[150]

This kind of research suffers from other deficits. Schuck finds it wanting for lack of paying adequate attention to 'the positive behavioural side of the relevant disciplines such as economics, political sciences or sociology' and adopts theories from other academic fields that do not care much for facts, such as feminism, literary and social theories.[151] It is totally divorced from having regard to the notion of theory building and theory testing and it hardly ever is linked to a testable hypothesis.[152]

Another significant criticism of theoretical research, as the kind described above, is that it is stand-alone and is self-justifying and self-referential and at times solipsistic.[153] Although, since the 1960's, legal research, in general, adopted a more socio-legal approach by including, for example, feminist and critical legal studies and new approaches to international law that effectively encourage an interdisciplinary approach,[154] the legal research of this nature is criticised by many as being unhelpful, even by defenders of post-modern scholarship, who argue that some legal scholarship devolved so excessively into post-modern jargonism that it lacks coherence[155] and that engage is battlegrounds of theories with no intention of engaging the profession or legal decision makers.[156]

148 Harnsberger (n 8) 690; Grisso and Melton (1987) 159-161.
149 Hutchinson & Duncan (n 1) 116.
150 Priest 'The new scientism in legal scholarship: A comment on Clark and Posner' 1980 *Yale Law Journal* 1290-1292.
151 Schuck (n 2) 328.
152 Schuck (n 2) 328.
153 Schuck (n 2) 328.
154 Goodrich 'Of Blackstone's Tower: Metaphors of distance and histories of the English law school' in Birks (ed) *Pressing problems in law. What are law schools for?* Vol 2 59; Schlegel *American legal realism and empirical social science* (1995); Banakar & Travers (eds) *Theory and method in socio-legal research* (2005); Vick 'Interdisciplinary and the discipline of law' 2004 *Journal of Law and Society* 164.
155 Krotoszynski Jr 'Legal scholarship at the crossroads: On farce, tragedy, and redemption' 1999 *Texas Law Review* 324.
156 Edwards (n 8)37.

5 Conclusion: The way forward

This work considered criticism against very particularly defined contemporary scholarship, albeit criticism which goes to foreign jurisdictions. Although this work draws significantly from American scholars, the criticism may similarly be relevant to South African scholars and the work that they do and there may be valuable lessons to be learned from it.

This work is in no way a comprehensive treatise of the complaints raised, and it does not have the intention to superimpose the American criticism on the South African environment and to suggest a single robust legal research methodology. This work is aimed at sparking a debate and placing the criticism raised on the agenda. The criticism itself is in no way beyond reproach or cast in stone.

Legal scholars in South Africa will ideally be persuaded by this work to consider and weigh the criticism and determine for themselves if there is room for improvement in their intellectual endeavours. It is also acknowledged that it is easy for critics to remonstrate the deficiencies in law scholarship and to recommend improvements, but the methods that are used are well embedded in our institutional, academic culture and funding models and that these are habits that will die hard.[157]

This work also does not suggest that there is no place for the type of research that is the subject of criticism, a concession made by the critics. That said, the critics do call for improvement to the research outputs and for a balance to be struck in intellectual commitments, a notion that will have to be incorporated at an institutional level.[158] The validity of the criticism will ideally be debated when legal scholars engage in teaching and learning engagements.

157 Schuck (n 2) 333.
158 Schuck (n 2) 333-334.