Legal Originality

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Abstract: In legal academia it is highly controversial how to 'be original' in legal research. This article will try to maintain an attitude of tolerance in not promoting or discrediting one particular methodology. Instead, it will identify four different ways of 'being original'. Perhaps the most common approach is to deal with 'micro-legal questions'. Many legal academics also pursue research in 'macro-legal questions'. Less common but growing is the importance of 'scientific legal research' and research in 'non-legal topics'.

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It is better to fail in originality, than to succeed in imitation

(Herman Melville)[1]

1. Introduction

For outsiders it is often difficult to understand what the role of academic lawyers is. This is different from other academic fields. It is easier to imagine the tasks of academic physicians, archaeologists or philosophers, namely, finding cures for diseases, excavating ancient artefacts, and answering the question of the meaning of life. With academic lawyers the problem is not, however, that outsiders do not understand exactly what 'the law' is, because people usually can imagine what judges and solicitors are doing. Rather it is not obvious how to pursue a specific academic approach to law. So, what exactly are the tasks of law professors and lecturers?

On the one hand, they have to prepare students for legal practice. This involves teaching them to find answers to problems posed by future clients. On the other hand, legal academics have to pursue academic legal research. This research has to go beyond the mere solving of practical legal problems. A practical problem can be the starting point for academic legal research. However, for a truly academic piece there has to be some original idea how law is to be understood or applied. Still, this may make the outsider question how exactly this kind of 'legal originality' can be achieved?

In legal academia this issue is, of course, highly controversial. In particular, the discussion between 'traditionalists', who are mainly interested in a thorough under-

[1] H. Melville, 'Hawthorne and His Mosses', *The Literary World*, August 17 and 24, 1850, also available at http://www.ibiblio.org/eldritch/nh/hahm.html.

standing of the law, and 'contextualists', who think that is not enough, can stir many emotions.[2] This is hardly surprising, since this debate concerns the very nature of how the research of legal academics is assessed. This is still the case today. Although an empirical study on British legal academics has found that there is a move away from traditional doctrinal analysis towards a more contextual, interdisciplinary approach,[3] the same study also states that the engagement in socio-legal studies is often rather limited and that law is not yet strongly interdisciplinary.[4]

This article is part of this discussion. It identifies four ways of 'being original' in legal research. Perhaps the most common approach is to deal with 'micro-legal questions'. Many legal academics also pursue research in 'macro-legal questions'. Less common but growing is the importance of 'scientific legal research' and research in 'non-legal topics'.

Despite the ambition of this article to identify 'good research' its attitude is one of tolerance. It does not try to promote a particular way or method of legal research. The four different approaches (and their various sub-cases) cover both traditional and contextual research. They also address both positive and normative aspect of legal research. Thus, this article advocates that legal academics have choice and that ranking

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[2] Similar D. L. Rhode, 'Legal Scholarship' (2002) 115 *Harv. L. Rev*. 1327-1361 at 1327 ('Most legal academics should approach scholarship on legal scholarship with considerable wariness. It is difficult to engage in serious criticism without offending at least some valued colleagues, and appearing arrogant, hypocritical, or both.').

[3] F Cownie, *Legal Academics* (Oxford: Hart, 2004) at 72, 197.

[4] Cownie, above n 3 at 56-57, 198. See also Dame H. Genn, M. Partington and S. Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works: Final Report and Recommendation* (London: Nuffield Foundation, 2006) at 26 (UK law schools dominated by theoretical and text-based research).

different methodologies[5] should be avoided. Academics can also be 'foxes' or 'hedgehogs'. A fox is said to know many things but a hedgehog knows one big thing.[6] Therefore, it is equally valuable either to employ a variety of methods or to focus on one of them.

2. 'Micro-legal questions'

The term 'micro-legal questions' describes research that analyses a specific legal problem, such as a specific provision of a statute or code, or a specific case or line of cases. However, in order to achieve originality there has to be more than a mere summary of the statutory provisions or the line of cases. It is also not enough that the way in which legal information is presented is particularly skilful.[7] Rather it is necessary that something new is suggested. Examples may include a new solution to a particular legal problem, a new way to interpret a particular statutory provision or court decision or a new way to evaluate a particular legal rule.

The initial step to achieve this is to examine the micro-legal question in some detail. An analysis of a particular statutory provision would discuss its wording and leg-

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[5] See e.g. J. B. Ruhl, 'The Hierarchy of Legal Scholarship', September 21, 2006, available at http://jurisdynamics.blogspot.com/2006/09/hierarchy-of-legal-scholarship.html: 0 points: Blog posts; 1 point: Publication of what are essentially blog posts with footnotes; 2 points: Doctrinal review of the state of the law; 3 points: Doctrinal study of interesting questions of law; 4 points: Doctrinal synthesis of developments in law; 5 points: Normative policy analysis of law; 6 points: Normative policy analysis of law with substantial reform proposals; 7 points: Legal theory; 8 points: 'Law and' interdisciplinary studies; 9 points: Empirical study of legal institutions; 10 points: Empirical study of law's impact on society.

[6] Sir I. Berlin, *The Hedgehog and the Fox* (New York: Simon & Schuster, 1953) quoting Archilochus.

[7] For a different view see P. C. Kissam, 'The Evaluation of Legal Scholarship' (1998) 63 *Wash. L. Rev*. 221-255 at 228 (original dissemination of existing knowledge can satisfy 'a broadly conceived standard of originality').

islative purpose. An analysis of a particular court decision may distinguish between the facts, ruling and obiter dicta as well as discussing the decision's relationship to previous case law. Given the complexity of law these analyses may not be easy. However, they are usually not particularly 'original'. Something more is necessary.

First, this 'something more' can derive from the aim for coherence and integrity of the law. Thus, at least for hermeneutic purposes, many academics adopt an internal point of view in order to see how different elements of the law fit together.[8] Different terms are used for this approach. Some call this an 'interpretive legal theory' which aims at 'identifying connections between features of the law' and 'illuminating the law's fundamental structure'.[9] A similar term is 'legal synthesis' which attempts 'to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules'.[10] Civil-law traditions regard it as a challenging academic task to examine whether different rules which display common characteristics form an 'inner system'.[11]

The theoretical background of this reasoning is that law is not simply the accumulation of data. For instance, Neil MacCormick emphasises the role that consistency and coherence play in legal reasoning. Consistency just means non-contradiction, whereas coherence refers to 'a set of propositions which, taken together, "makes

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[8] See C. McCrudden, 'Legal Research and Social Sciences', (2006) 122 *LQR* 632-650 at 634.

[9] See A. Beever and C. Rickett, 'Interpretive Legal Theory and the Academic Lawyer, Review of Waddams, Dimensions of Private Law' (2005) 68 *MLR* 320-337.

[10] Kissam, above n 7 at 232-3.

[11] For the term 'inner system' see, e.g., C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (Berlin: Duncker & Humblot, 1983) at 19; F. Bydlinski, *System und Prinzipien des Privatrechts* (Wien: Springer, 1996) at 4; P. Heck, *Begriffsbildung und Interessenjurisprudenz* (Tübingen: Mohr, 1932) at 139-43. For a summary in English see G. A. Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 *Yale J. Int'l L*. 435-532 at 464.

sense" in its entirety',[12] and which may justify arguments by analogy. According to Ronald Dworkin we should 'treat our system of public standards as expressing and respecting a coherent set of principles',[13] possibly even leading to the law as a 'seamless web'.[14] Based on this interpretive ideal of integrity legal solutions have to be constructed in a way that best fits and justifies the law as a whole. Law must be coherent with pre-existing cases and statutes, and it must also aim for the best justification for the solution to a particular legal problem.[15]

Despite this overall aim for consistency this 'interpretative', 'synthetic' or 'systemic' approach can lead to a positive or negative result. Examples would be legion. A simple example of a positive result may be establishing common principles of consumer protection, if – as in most countries – consumer protection is not codified in a single statute or code.[16] Alternatively, one may also demonstrate that there is internal incoherence because of conflicting legal norms. Thus, there may be a negative result where it is, for instance, shown that a particular behaviour is encouraged by company law but discouraged by tax law.[17]

Secondly, legal history can be valuable. Yet, for modern laws some historical considerations may also often be taken into account by legal practitioners. Practising

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[12] N. MacCormick, *Rhetoric and The Rule of Law* (Oxford: OUP, 2005) at 189, 190, 206; N. MacCormick, *Legal Reasoning* (Oxford: Clarendon: 1978) at 152, 195.

[13] R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap, 1986) at 217.

[14] R. Dworkin, 'No Right Answer?' in *Law, Morality and Society* (M. S. Hacker and J. Raz eds, Oxford: OUP, 1977), at 84.

[15] For more details see Dworkin, above n 13. See also S. W. Ball, 'Dworkin and His Critics: The Relevance of Ethical Theory in Philosophy of Law' (1990) 3 *Ratio Juris* 340-384 at 369-372 (with reference to Quine's view of science).

[16] But see, e.g., the French Code de la Consommation 1978 (as amended).

[17] For instance, there is some discussion whether the use of the European Company (SE) may be hindered by tax reasons; see, e.g., European Federation of Accountants (FEE), *Position Paper on Tax Treatment of the European Company (Societas Europaea)*, November 2003.

business lawyers who advise on financial markets may very well consider the recent development of the law – first the Financial Services Act 1986, then the Financial Services and Markets Act 2000 – when they advise clients. However, in other cases legal history is far more demanding because it may involve the examination of old records, knowledge of ancient languages and the history of a particular time, as well as the ability to draw conclusions from various sources. It may also be challenging to discuss whether insights of legal history have persisted and can still be applied to today's legal system.[18] Thus, legal history can be a means of understanding, criticising, and assessing the state of the law,[19] leading to original results.

Thirdly, one can add 'macro-legal topics' to a 'micro-legal analysis' and, in doing so, make it original. Macro-legal topics are concerned with general concepts, problems, and principles of the law, such as, legal philosophy and legal theory.[20] An example of the link between a particular micro-legal and a macro-legal question is the principle *nullum crimen sine lege*. This principle of constitutional and criminal law means that a person can only be criminally responsible if at the time the conduct in question takes place it constitutes a crime within the jurisdiction of the court .[21] Of course, it is also a topic of legal philosophy what exactly 'law' is.[22] Thus, it can be

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[18] See e.g. F. G. Kempen, *Legal History: Law and Social Change* (Englewoods Cliffs: Prentice-Hall, 1963) at 5; R. A. Posner, *Frontiers in Legal Theory* (Cambridge, Mass.: Harvard University Press, 2001) at 145-221.

[19] Kempen, above n 18 at vii.

[20] See Part 2 below.

[21] See e.g. European Convention on Human Rights, art. 7; Statute of the International Criminal Court, arts. 22, 23; S. Pomorski, *American Common Law and the Principle Nullum Crimen Sine Lege* (The Hague: Mouton, 2nd edn, 1975).

[22] See e.g. H. L. A. Hart, *The Concept of Law* (Oxford: OUP, 2nd revised edn, 1997); see also J. Raz, *The Authority of Law* (Oxford, OUP, 1979) at 213-4 on the principle *nullum crimen sine lege*.

fruitful to discuss to what extent these philosophical arguments may matter for an application of the *nullum crimen sine lege* principle.[23]

Fourthly, comparative law can make a micro-legal question original. When the laws of two or more legal systems are compared, the question often suggests itself why these legal systems are different and whether there is a need for harmonisation or convergence. Yet, one is not practising comparative law if two or more different legal systems are just described. Rather comparative law is about making a comparison and, possibly, also a policy recommendation for one or more of the countries involved.[24] Thus, comparative law can lead to original ideas because it helps lawyers to ask questions they would not otherwise ask about their own law.[25]

Fifthly, other academic disciplines can enrich a micro-legal analysis. Prevalent other disciplines for this (limited) 'law & analysis'[26] are economics, finance, sociology, psychology, and literature.[27] Examples would be legion. For instance, in law and economics there are extensive discussions about the appropriate remedies for breach of contract. The predominant view is that only expectation damages should be awarded but not specific performance and disgorgement of profits, since the latter

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[23] See e.g. T. Mertens, 'Nazism, legal positivism and Radbruch's thesis on statutory injustice' (2003) 14 *Law and Critique* 277-295.

[24] See K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford: Clarendon, 3rd edn, 1998) at 44-7.

[25] E B. Rock, 'America's Fascination with German Corporate Governance' (1994) *Aktiengesellschaft* 291-299 at 299. On the functions of comparative law see generally, e.g., P de Cruz, *Comparative Law in a Changing World* (London: Cavendish, 3nd edn, 2007) 18-25; Zweigert and Kötz, above n 24 at 13-31.

[26] For other forms of interdisciplinary research see text to notes 52-121 below.

[27] For a general overview see R. A. Posner, *Frontiers of Legal Theory* (Cambridge, Mass.: Harvard University Press, 2001).

remedies would deter 'efficient breaches of contract'.[28] Even scholars who do not belong to the law and economics community consider these views.[29] Indeed, one does not need to be an expert or an enthusiast of interdisciplinary research to use some 'law &' arguments in a micro-legal analysis.[30]

Sixthly, it is possible to gain a deeper level of understanding by 'connecting law to life'. In some cases this type of 'clinical scholarship'[31] is obvious. For instance, a comparative analysis of UK and Chinese company law may find that some legal rules are relatively similar. However, the economic and political setting of both countries is, of course, quite different. Thus, one can make the point that, for instance, the law on fiduciary duties of directors works differently in both countries due to the differences in shareholder structure, legal enforcement, the financial press, legal advice etc.[32] In other cases a consideration of the 'law in action' can also be interesting. Therefore, it may be shown that judges do not actually follow a particular rule despite constantly

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[28] See e.g. R. A. Posner, *Economic Analysis of Law* (New York: Aspen, 6th edn, 2003) at 118-26. See also T. S. Ulen, 'The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies' (1984) 83 *Mich. L. Rev.* 341-403; D. Friedmann, 'The Efficient Breach Fallacy' (1989) 18 *J. Leg. Stud.* 1-24; M. Eisenberg, 'Actual and Virtual Specific Performance, The Theory of Efficient Breach and the Indifference Principle in Contract Law' (2005) 93 *Cal. L. Rev.* 975-1050; S. Shavell, 'Specific Performance versus Damages for Breach of Contract: An Economic Analysis' (2006) 84 *Tex. L. Rev*. 831-876.

[29] Cf. A. Ogus, *Costs and Cautionary Tales – Economic Insights for the Law* (Oxford: Hart, 2006) at 205-6; M. M. Siems, 'Disgorgement of Profits for Breach of Contract – A Comparative Analysis' (2003) 7 *Edinburgh Law Review* 27-59 at 51-4.

[30] But see text to notes 52-121 below.

[31] Term by Kissam, above n 7 at 234 ('…by this I mean writing that analyzes, reflects upon, and interprets legal practices as opposed to legal doctrine.'). See also T. S. Ulen, 'A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method of the Study of Law' (2002) *U. Ill. L. Rev.* 875-920 at 900-9.

[32] See generally M. M. Siems, *Convergence in Shareholder Law* (Cambridge: CUP, 2007) at 191-3, 228.

reciting it.[33] An empirical analysis of business behaviour may lead to the conclusion that contractual remedies are not very important in practice because businessmen prefer alternative forms of dispute settlement[34] or because they are not even aware of the law in the first place.[35] It can also be examined how public law is implemented in practice. For instance, research has been undertaken on the relevance of law on the organisational structure of prisons and special hospitals.[36] Whilst it is true that empirical work requires more effort than conventional research,[37] if these efforts are undertaken it is easier to produce something original because new information is brought into the discussion of a particular legal problem.

3. 'Macro-legal questions'

A macro-legal analysis is concerned with general concepts, problems and principles of the law. It is not primarily about a specific micro-legal problem, such as a specific

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[33] See D. Laycock, *The Death of the Irreparable Injury Rule* (Oxford: OUP, 1991) who examined 1400 cases in order to find out whether courts had followed the 'irreparable injury rule' of remedies.

[34] The first and most influential piece is S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 1-19. See also D. Charny, 'Nonlegal Sanctions in Commercial Relationships' (1990) 104 *Harv. L. Rev*. 375-467; R. W. Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' (1985) *Wis. L. Rev*. 561-579 at 575 ('contract law and commentaries inhabit academic museums of quaint curiosities bearing but slight resemblance to the law-in-action known to contracting parties and their lawyers.').

[35] R. C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991). See also R. C. Ellickson, 'Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County' (1986) 38 *Stan. L. Rev*. 623-687.

[36] G. Richardson, *Law, Process and Custody: Prisoners and Patients* (London: Weidenfeld and Nicholson, 1993).

[37] See Rhode, above n 2 at 1354 ('Why bother with fieldwork when you can leap instantly into print by reading some prominent cases and commentary in the comfort of your office and saying what you think?').

provision or case. Nevertheless, it is useful to include micro-examples in these macro-legal analyses lest it gets too abstract (*verba docent exempla trahunt*[38]). Furthermore, the distinction between micro- and macro-analysis is not a strict one because it may also be possible to try to achieve both, which may be called 'meso-legal analysis'.

Once again, by asking macro-legal questions legal originality can be achieved through a number of possibilities. First, this *may* be the case for books about an entire area of law (such as contract law, company law etc.). To be sure, not all of these books are original because sometimes they are merely compilations of cases or summaries of the relevant statutory law. However, it is also possible that an author develops overriding principles and constructs an area of law in a new and coherent way. This type of macro-legal research is therefore an extension of the first variant of micro-legal research.[39] The importance of such constructions which show that 'the whole is greater than the sum of its parts'[40] is beyond doubt. Despite his extensive interdisciplinary writings even Richard Posner recently stated:

> 'The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also *Sitzfleisch*) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically aca-

[38] Which means 'Words instruct, illustrations lead'. The origins of this saying are not entirely clear but it is probably a modification of 'longum iter est per praecepta, breve et efficax per exempla' (Seneca the Younger, *Epistulae morales ad Lucilium*, Liber 1, Epistula 6 para. 5).

[39] See text to notes 8-17 above.

[40] E. J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at 13.

demic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship'.[41]

Secondly, the main interest can be about the basic terms which categorise the legal system such as 'law', 'justice', and 'rights'. These are the main topics of legal philosophy and legal theory.[42] Here, on the one hand, being original may be easier than in a micro-legal analysis because the academic does not face the danger that he or she is just doing the same – useful but unoriginal – task of a legal practitioner. On the other hand, an article on legal philosophy is not always original. Given the extensive existing literature the danger is here that one primarily describes other people's views. This review of literature can be useful. However, for legal originality some new ideas have to be developed.

Thirdly, one can look at legal methods in a wide sense, which includes methods of interpretation, legal research and education. It can also be discussed on a general level whether and how insights from other academic fields can (or should) be taken into account in legal reasoning.[43] An obvious example is this article itself. Furthermore, there are already intensive discussions about, for instance, the role of contextual and empirical research in legal studies[44] and the question whether Europe should follow the path of the US where law and economics (still) dominates the academic land-

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[41] R. A. Posner, 'In Memoriam: Bernard D. Meltzer (1914–2007)' (2007) 74 *U. Chi. L. Rev.* 435-438 at 437.

[42] For instance on 'law' see Hart, above n 22 above; on 'justice' see J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); on 'rights' see R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978).

[43] See also text to notes 26-30 above and 52-121 below on applied interdisciplinary research.

[44] See e.g. P. A. Thomas (ed), *Socio-Legal Studies* (Aldershot: Dartmouth, 1997); Posner, above n 27 at 411-40. See also the Law in Context Series (now published by Cambridge University Press; originally published by Weidenfeld).

scape.[45] These discussions can be original. However, it would be fruitless to attempt to draw up some kind of ranking since agreement on a common legal methodology is highly unrealistic.[46]

Fourthly, macro-legal research can examine the increasingly international features of the law. This does not mean that writing about these international elements makes research automatically original. However, the complex international features provide a springboard for legal originality. For example, one can discuss the question of whether legal transplants 'work' or whether they just irritate the existing legal structures.[47] It is also challenging to analyse whether the globalisation of economies and cultures leads to a convergence of legal systems or whether fundamental differences are likely to persist.[48] This can further be linked with the debate about regulatory competition as a means to put pressure on law-makers, which – possibly – leads to

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[45] For the development in the US see U. Mattei, 'The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi' (2005) 12 *Maryland Law Review* 220-249. For the European discussion see e.g. Ogus, above n 29 above; K. Dau-Schmidt and C. Brun, 'Lost in Translation: The Economic Analysis of Law in the United States and Europe' (2006) 44 *Colum. J. Transnat'l L.* 602-621; R. A. Posner, 'The Future of the Law and Economics Movement in Europe' (1997) 17 *International Review of Law and Economics* 3-14; R. Van den Bergh, 'The growth of law and economics in Europe' (1996) 40 *European Economic Review* 969-977.

[46] See text to note 2 above.

[47] See e.g. A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens-London: University of Georgia Press, 2nd edn, 1993); G. Teubner, 'Legal Irritants: Good Faith in British Law Or How Unifying Law Ends Up in New Differences' (1993) 61 *MLR* 11-32; P. Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111-124.

[48] B. S. Markesinis, *The Gradual Convergence* (Oxford: OUP, 1994); P. Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52-81; N. H. D. Foster, 'The Journal of Comparative Law: A New Scholarly Recourse' (2006) 1 *Journal of Comparative Law* 1-11. For the company-law literature see e.g. J. N. Gordon and M. J. Roe (eds) *Convergence and Persistence in Corporate Governance* (Cambridge: CUP, 2004); Siems, above n 32.

convergence.[49] Another example may be research which is based on the consideration that 'state-based law in the traditional sense becomes a component in a complex network of national, transnational and international private and public norms'.[50] Thus, it is interesting and important to understand how, in this new 'multi-level-governance', different types of regulation are interrelated.[51]

Fifthly, the relationship between law and politics can stimulate original thoughts. On a formal level, this concerns the debate about whether a particular type of law is preferable. For example, one can evaluate the advantages and disadvantages of case law and statutory law, general clauses and detailed rules, mandatory law and default rules, hard law and soft law, as well as (other) innovative regulatory philosophies.[52] With respect to legal enforcement it can furthermore be discussed whether it is more 'efficient' (however defined) to enforce law by means of private, administrative, or criminal law.[53] On a substantive level, one can examine which general policy conceptions the law should follow. Therefore, a comparative lawyer may analyse whether

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[49] See e.g. D. C. Esty and D. Geradin (eds), *Regulatory Competition and Economic Integration* (Oxford: OUP, 2001); D. D. Murphy, *The Structure of Regulatory Competition* (Oxford: OUP, 2004); Siems, above n 32 at 297-335.

[50] K. H. Ladeur, 'Methodology and European Law – Can Methodology Change so as to Cope with the Multiplicity of the Law?' (M. Van Hoecke ed., *Epistemology and Method of Comparative Law*, Oxford: Hart, 2004) 91 at 95-6.

[51] See e.g. C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart, 2006); N. Bernard, *Multi-level Governance in the European Union* (The Hague: Kluwer Law International, 2002); I. Pernice, 'Multilevel Constiutionalism in the European Union' (2002) 27 *European Law Review* 511-529.

[52] The latter are today often called 'governance'. For this term see e.g. R. Rhodes, *Understanding Governance* (Buckingham: Open University Press, 1997).

[53] See e.g. R. La Porta et al., 'What Works in Securities Laws?' (2006) 61 *Journal of Finance* 1-32. See also M. M. Siems, 'What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology' (2005) *International Company and Commercial Law Review* 300-305.

differences between legal systems confirm that there are varieties of capitalism.[54] It can also be discussed whether and how even in times of 'globalisation' the law can ensure that public goods, such as a stable, fair world financial system, a minimum of social justice and an intact environment, are respected.[55]

Sixthly, an analysis of 'law and reality' is either interested in the factual reasons why law exists or in the factual consequences of the law. The first part of this approach may discuss how judges actually decide cases. US research has often found that judges may compose their judgment in a formal way of deduction but in substance they mainly pursue policy objectives.[56] In the UK empirical research has more generally analysed the incidence of justiciable problems, the response of the public to these problems, the barriers to access to justice and the outcome of different strategies for resolving justiciable disputes.[57] The second part, about the consequences of the law, is possibly even more contentious. Here, one may come to the conclusion that in a particular society law may exist but does not play any role because moral or cultural values oppose a legalistic thinking or law enforcement is weak. But in other cases too

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[54] See e.g. I. Lynch Fannon, *Working Within Two Kinds of Capitalism* (Oxford: Hart, 2003). See also M. Albert, *Capitalism contre Capitalism* (Paris: Editions du Seuil, 1991).

[55] See e.g. D. Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) *Utah L. Rev*. 545-637; Zwischenbericht der Enquête-Kommission Globalisierung der Weltwirtschaft – Herausforderungen und Antworten (2001), BT-Drucks. 14/6910 at 7.

[56] See e.g. B. N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 98 ('The Judge as a Legislator'); Jerome Frank, 'Are Judges Human?' (1931) 80 *U. Pa. L. Rev*. 17-53; J. Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949). See also W. Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaka: Cornell University Press, 1968); Alex Kozinski, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making' (1993) 26 *Loy. L.A. L. Rev*. 993-999.

[57] Dame H. Genn, *Paths to Justice* (Oxford: Hart, 1999). See also Genn et al, above n. 4. For an international comparison see also M. Cappelletti and B. G. Garth (eds.), *Florence Access to Justice Project* (Alphen aan den Rijn: Sijthoff and Noordhoff, Volumes 1-4, 1978-1981).

law may not necessarily matter. The reason for this fact is that, if there is causality between law and reality, it can also go the other way. For instance, there are examples which show that only after the number of investors and the importance of the capital market increased was shareholder protection strengthened.[58] Finally, one can examine whether in any case there are simple causalities because a linear, causal relationship between law and reality could overlook that legal systems have their own internal dynamics of self-reproduction.[59]

4. 'Scientific legal research'

Most traditional legal scholarship is similar to hermeneutics because it attempts to understand what law-makers meant by a specific legal provision and what judges meant by a specific court decision. This can also be seen in the previous two parts of this article because examples of micro- and macro-legal research try to understand a particular or general legal phenomenon. Many other academics would regard this approach as 'unscientific', because science is said to be about constructing models and testing falsifiable hypotheses.[60] In chemistry, as an example for natural sciences, one may

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[58] B. R. Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 *J. Legal Stud*. 459-484; J. C. Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 11 *Yale L.J.* 1-82.

[59] F. Carvalho and S. Deakin, 'System and evolution in corporate governance' in R. Rogowski and T. Wilthagen (eds) *Reflexive Labour Law* (London: Kluwer Law International, 2nd edn, 2007) (forthcoming).

[60] Sir K. Popper, *Objective Knowledge* (Oxford: OUP, 1972); Sir K. Popper, *The Logic of Scientific Discovery* (New York: Basic Books, 1959). The US Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 at 593 (1993) also referred to falsifiability as a requirement for science. For a good overview of the term 'science' see David Goodstein, 'How Science Works' in Federal Judicial Center, *Reference Manual on Scientific Evidence* (2000) at 67, available at http://air.fjc.gov/public/fjcweb.nsf/pages/16

establish the theory that the mixing of three particular substances leads to an explosion. This can be tested empirically in an experiment. If the explosion does not take place, the theory is falsified.[61]

To be sure, the concept of falsifiability is not uncontroversial. Thomas Kuhn and others have suggested that in reality the logic of science is different. Scientists do not follow a strict concept of falsifiability. Sociological factors and the use of ad-hoc hypotheses also play a (fruitful) role in modifying the 'prevailing paradigm'.[62] Paul Feyerabend goes further and suggests that 'anything goes' because science can progress best if all available methods are used.[63] Further, there are specific lines of criticism that hold that falsifiability is not a useful criterion in all scientific areas. With respect to ethics, history and possibly also some parts of economics the problem is that statements related to values as well as grand theories are by their very nature often impossible to falsify.[64] Even in natural sciences there may be situations where the entire focus is on falsification and thus the disregard of confirming evidence does not make

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[61] Other examples may be the law of falling bodies and the prediction of the density of leaves; see M. Friedman, 'The Methodology of Positive Economics' in *Essays in Positive Economics* (M. Friedman ed., Chicago: Chicago University Press, 1953) 3 at 15, 23. Falisifiability is used because universal statements are by themselves not verifiable.

[62] T. S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: Chicago University Press, 3rd edn, 1996); I. Lakatos and A. Musgrave (ed), *Criticism and the Growth of Knowledge* (Cambridge: CUP, 1970).

[63] P. K. Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London: Humanities Press, 1975).

[64] In particular there is an extensive literature on the possibility of falsification in economics; see M. Blaug, *The Methodology of Economics* (Cambridge: CUP, 2nd edn, 2006); L. A. Boland, *The Foundations of Economic Method: A Popperian Perspective* (London: Routledge, 2nd edn, 2003); L. A. Boland, 'Dealing with Popper in Economic Methodology' (2003) 33 *Philosophy of the Social Sciences* 477-498.

sense. For instance, the theory that the sun always rises in the east is indeed plausible and not just a purely unscientific regularity.[65]

Yet, even if one does not use the concept of falsifiability, there is at least the broader consensus that science is about testing hypotheses. The hypothesis may be formulated in any way. It may be falsifiable or not, and there are many different ways to test it. Scientific research is therefore possible about any system of ideas and any theory which establishes some kind of rules.[66] On the one hand, research can concern a pure or abstract theory.[67] Here an ideal type of model is not intended to be descriptive but it can still be 'tested' to determine whether it is logically sound.[68] On the other hand, the scientific model can be designed to use empirical data and to be applied to real-world problems.[69] In natural sciences experiments may often be conducted in order to test these models. In some social sciences controlled human experiments are also possible.[70] However, as this is not always the case, real world data is often used in order to test hypotheses. This can be done in a quantitative or a qualitative way. Particularly in economics quantitative research is generally accepted.[71] The econometric methodology has also had a considerable impact on other academic

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[65] See Ulen, above n 31 at 883.

[66] On the term 'theory' see L. A. Bolan, *The Methodology of Economic Model Building* (London and New York: Routledge, 1989) at 36.

[67] See Bolan, above n 66 at 2.

[68] See Friedman, above n 61 at 35.

[69] See Bolan, above n 66 at 2.

[70] For instance, in psychology and economics. See generally R. Croson, 'Why and How to Experiment: Methodologies from Experimental Economics' (2002) *U. Ill. L. Rev*. 921-945.

[71] See B. H. Baltagi, *Econometrics* (Berlin: Springer, 1998) at 3-4 in contrast to J. M. Keynes, 'On method of statistical research: comment' (1940) 50 *Economic J.* 154-156 at 156 ('not yet persuaded'). For econometrics as a method of falsification see R. J. Epstein, *A History of Econometrics* (Amsterdam: Elsevier, 1987) at 225-6; D. R. Hendry, *Dynamic Econometrics* (Oxford: OUP, 1995) at 9 et seq.

fields.[72] Qualitative research, by contrast, is about an in-depth examination of the reasons for and context of a particular phenomenon.[73] Often this may focus on a particular case.[74]

Until recently, legal academics have hardly taken part in this scientific methodology. It is no surprise that there is no Nobel Prize in 'legal science'.[75] Although the term 'legal science' was (and is) occasionally used by traditional legal academics, their definition of science only denotes the effort accurately to describe the law which can be used to solve legal cases in a deductive way.[76] This mere description of the law is not science in a genuine sense. This is also acknowledged by most academic lawyers, when it is said that 'the lawyers' capacity for scholarly work cannot be measured by reference to scientific techniques.'[77] Various reasons have been offered as explanations for this reluctance to take part in scientific discussion. First, it may be a result of

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[72] See e.g. Aman Ullah, Alan Wan, and Annop Chaturvedi (eds), *Handbook of Applied Econometrics and Statistical Inference* (New York: Marcel Dekker, 2001) (application for economics, medicine, biology, and engineering, sociology, psychology, and information technology).

[73] See e.g. S. Lamnek, *Qualitative Sozialforschung* (Basel: Beltz, 4th edn, 2005).

[74] See R. K. Yin, *Case Study Research. Design and Methods* (Newbury Park: Sage, 3rd edn, 2002); B. Flyvbjerg, 'Five Misunderstandings About Case Study Research' (2006) 12 *Qualitative Inquiry* 219-245.

[75] Ulen, above n 31.

[76] C. C. Langdell, 'Harvard Celebration Speech", (1887) 9 *LQR* 123-125 at 124 ('law is a science' and 'all the available materials of that science are contained in printed books'); K. Larenz, *Methodenlehre der Rechtswissenschaft* (Heidelberg: Springer, 1991) at 5 ('Under legal science [Rechtswissenschaft] this book understands a science which is interested in solving legal cases on the basis of a particular historically grown legal order') (my translation); F. Gény, *Science et technique en droit privé positif* (Paris: Sirey, 1921-1927) (who was mainly concerned about a more liberal method of legal interpretation). See also N. Levit, 'Listening to Tribal Legends: An Essay on Law and Scientific Method' (1989) 58 *Fordham L. Rev.* 263-307 at 275 (for the nineteenth-century legal theorists in the US); Posner, above n 27 at 196 (for Savigny in Germany);

[77] D. Feldman, 'The Nature of Legal Scholarship' (1989) 52 *MLR* 498-517 at 498.

a lack of training, particularly in empirical methods.[78] Secondly, teaching is often very much focussed on preparing students for legal practice. This has the effect that legal academics are usually more concerned with an accurate and coherent description of the law than with scientific theories about it. Thirdly, the subject matter of legal research may also play a role. Legal research often has a reactive quality because it sees its prime purpose as being to address new legal rules or court decisions on an ad hoc basis.[79] As legal research deals with competing values, it may also regard itself unable to use the more objective scientific method.[80] Finally, in contrast to natural and many other social sciences, time and national borders matter a lot: 'Sun, moon and stars shine like centuries ago, and the rose is blossoming like in paradise. (…) However, law is different. It is like a wanderer in the desert. (…) Three words changed by the law-maker may render entire libraries useless.'[81] Therefore, 'to put the issue plainly, there is no accepted theory of law that applies to every legal system and to which legal scholars in every country can appeal in explaining the particular institutions or rules of their own systems'.[82]

However, in recent decades there has been some development. In particular, this was the result of the trend of interdisciplinary research in the US.[83] First, 'law and

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[78] See Rhode, above n 2 at 1343. For Europe see M. W. Hesselink, *The New European Legal Culture* (Deventer: Kluwer, 2001).

[79] B. R. Cheffins, 'The Trajectory of (Corporate Law) Scholarship' (2004) 63 *Cambridge Law Journal* 456-506 at 462, 465.

[80] Levit, above n 76 at 272.

[81] J. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (Heidelberg: Manutius, 1848 reprinted in 1988) at 10, 24 (my translation). See also Ulen, above n 31 at 897 (people often point to the 'historical or path-dependent nature of legal development').

[82] Ulen, above n 31 at 896.

[83] Ulen, above n 31 at 914 ('only with the rise of more comprehensive theories – such as those of law and economics, contractarianism, and critical legal studies – has empirical work in law been closely

economics' is an example of a scientific approach to law. In a nutshell, its main aim is to understand what effect particular legal rules have on overall social welfare.[84] It constructs models of the law that are in principle independent of a particular legal system. To be sure, law and economics may also make positive and normative claims. 'Positive law and economics' may find that the judges of a particular country already apply economic reasoning without expressly referring to it. 'Normative law and economics' may make policy recommendations to change the law according to the economic model.[85] But despite this link to more traditional approaches to legal research, the core innovation of law and economics is that it establishes 'abstract theories' similar to the economic (and mathematic) methodology.[86] Furthermore, law and economics has gone to further depths recently. For instance, it has incorporated behavioural

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connected, as in the sciences, with the evaluation of theoretical results'); R. Coase, Law and Economics at Chicago (1993) 36 J. *Law & Econ*. 239-254 at 254 ('Ernest Rutherford said that science is either physics or stamp collecting, by which he meant, I take it, that it is either engaged in analysis or operating a filing system. Much, perhaps most, legal scholarship has been stamp collecting. Law and economics is likely to change all that.').

[84] See Levit, above n 76 at 282 (law and economics as 'scientific utilitarianism'). However, according to the predominant view no one should be worse off; see J. L. Harrison, *Law and Economics* (St. Paul: Thomson, 3rd edn, 2003), 28-39.

[85] See e.g. R. A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1993) at 353-392; Posner, above n 27 at 4, 35, 95.

[86] See Ulen, above n 31 at 909 and above n. 67.

aspects from psychology[87] and thus, at least to some extent, responded to the criticism that its theories about the law are based on assumptions which are too strong.[88]

Secondly, experiments can make legal research scientific. This 'experimental legal research' is not widely used but there are a few examples.[89] For instance, it has been attempted to test the Coase theorem. This theorem states that if there are no transaction costs and information asymmetries, legal rules (in particular the allocation of property rights) do not matter because bargaining will lead to an efficient outcome.[90] This is difficult to test in reality because there are usually transaction costs and information asymmetries.[91] Thus, controlled experiments can be useful and such experiments have indeed confirmed the Coase theorem.[92] Other examples concern the likely impact of legal rules. It has been examined whether damage caps affect the parties' behaviour in lawsuits. In experiments it has been demonstrated that the level of the damage cap influences the probability of an out-of-court settlement.[93]

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[87] See e.g. C. R. Sunstein (ed), *Behavioral Law and Economics* (Cambridge: CUP, 2000); R. B. Korobkin and T. S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *Cal. L. Rev*. 1051-1144; C. Jolls, 'Behavioral Law and Economics' (2006), available at http://ssrn.com/abstract=959177; see also Posner, above n 31 at 252-287.

[88] For instance, the assumption that people are 'rational maximisers'. Further details about the benefits and shortcomings of law and economics are outside the scope of this paper. For a balanced view see Ogus, above n 29.

[89] See generally Croson, above n 70.

[90] R. H. Coase, 'The Problem of Social Cost' (1960) 3 *J. Law & Econ*. 1-44.

[91] But this was attempted by R. C. Ellickson, 'Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County' (1986) 38 *Stan. L. Rev*. 623-687.

[92] See E. Hoffman and M. L. Spitzer, 'The Coase Theorem: Some Experimental Tests' (1982) 25 *J. Law. & Econ.* 73-98; E. Hoffman and M. L. Spitzer, 'Experimental Tests of the Coase Theorem with Large Bargaining Groups' (1986) 15 *J. Legal Stud*. 149-171.

[93] L. Babcock and G. Pogarsky, 'Damage Caps and Settlement: A Behavioral Approach' (1999) 28 *J. Legal Stud*. 341-370; G. Pogarsky and L. Babcock, 'Damage Caps, Motivated Anchoring, and Bargaining Impasse' (2001) 30 *J. Legal Stud*. 143-159.

Thirdly, more common is the testing of legal theories in a quantitative way. The most prominent example is 'law and finance'. This interdisciplinary area of research looks at the quantifiable effect that legal rules and their enforcement have on financial development, and the resulting effect on economic development. Thus, it asks whether specific legal features, such as a particular legal rule or the effectiveness of courts, correlate with financial data, such as a country's stock market capitalisation.[94] Law and finance is particularly important because the World Bank takes it into account in order to assess the quality of law and legal institutions.[95] Methodologically, it is line with other disciplines which also use quantitative methods in order to test hypotheses.[96]

This testing by way of calculations in law is not limited to 'law and finance'. It is also possible to try to establish whether there is a relationship between legal rules and other data. Thus, one may use statistical methods to examine whether: the strength of employee protection is a result of differences in politics, economics, or legal origins;[97]

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[94] This can either be done by way of comparing the laws of different countries or by analysing time series. For an overview of the former studies see M. M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' (2007) 52 *McGill L. J.* 55-81. For the latter see S. Bhagat and R. Romano, Empirical Studies of Corporate Law, available at http://ssrn.com/abstract=728103 and forthcoming in A. M. Polinsky and S. Shavell, *Handbook of Law and Economics* (Amsterdam: Elsevier, 2007).

[95] See http://www.doingbusiness.org/. For critical comments see C. Ménard and . du Marais 'Can We Rank Legal Systems According to Their Economic Efficiency?' in *New Frontiers of Law and Economics* (P. Nobel ed., Zürich: Schulthess, 2006); Association Henri Capitant des Amis de la Culture Juridique Francaise, *Les Droits de Tradition Civiliste en Question, À propos des Rapports Doing Business de la Banque Mondiale* (2006) available at http://www.henricapitant.org/article.php3?id_article=46.

[96] See above n 72.

[97] J. Botero et al., 'The Regulation of Labor' (2004) 119 *Q. J. Econ*. 1339-1382.

legal formalism influences the duration of law enforcement;[98] there is a relationship between the length of statutes and the number of lawyers;[99] the death penalty or abortion laws have an effect on the crime rate.[100]

Yet, in social sciences one also has to face the limitations of this quantitative approach. For instance, in economics a narrow data-driven approach can be superficial, because 'the economy is a complicated, dynamic, non-linear, high-dimensional, and evolving entity',[101] the whole of economics is contaminated by value judgments,[102] and uncontrollable factors affect economic data.[103] The reception of quantitative research in law has sometimes been critical too. One can have general doubts whether it is possible to reduce the complexity of legal rules to numbers.[104] More specifically, there have been various studies which have challenged some of the numerical descriptions of the law, which are necessary to make statistical calculations work.[105]

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[98] S. Djankov et al., 'Courts' (2003) 118 *Q. J. Econ*. 453-517.

[99] R. D. Cooter and T. Ginsburg, 'Leximetrics: Why the Same Laws are Longer in Some Countries than Others' (Research Paper 2003), available at http://ssrn.com/abstract=456520.

[100] See e.g. J. J. Donohue III and J. Wolfers, 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate' (2006) 58 *Stan. L. Rev.* 791-846; J. J. Donohue III and S. D. Levitt, 'The Impact of Legalized Abortion on Crime' (2001) 116 *Q. J. Econ*. 379-420.

[101] Hendry, above n 71 at 5-6.

[102] Cf. A. Aznar Grasa, *Econometric Model Selection: A New Approach* (Dordrecht: Kluwer, 1989) at 21

[103] Cf. M. Dutta, *Econometric Methods* (Cincinnati: South West, 1975) at 7.

[104] See M. M. Siems, 'Numerical Comparative Law – Do We Need Statistical Evidence in Order to Reduce Complexity?' (2005) 13 *Cardozo J. Int. Comp. L.* 521-540.

[105] See e.g. P. P. Lele and M. M. Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7 *Journal of Corporate Law Studies* 17-50; U. C. Braendle, 'Shareholder Protection in the USA and Germany – 'Law and Finance' Revisited' (2006) 7 *German Law Journal* 257-278; S. Cools, 'The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers' (2005) 36 *Delaware Journal of Corporate Law* 697-766.

Fourthly, one may therefore prefer an alternative methodology, namely the use of case studies, which primarily rely on a qualitative methodology.[106] There is no uniform method how these case studies are conducted. However, structured interviews are usually a common element. In his famous study on the role of contract law Stewart Macaulay interviewed more than 100 businessmen and lawyers and found, 'that (1) many business exchanges reflect a high degree of planning about the four categories – description, contingencies, defective performance and legal sanction – but (2) many, if not most, exchanges reflect no planning, or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances'.[107] Similarly, Simon Deakin et al carried out 60 in-depth interviews in firms in the UK, Germany, and Italy. They found considerable diversity in the form, duration and substance of contracts, and linked this empirical data to differences in the extent of contractual default rules in these three countries.[108]

The result of all this is that there are now at least four different ways of engaging in 'scientific legal research': first, law and economics constructs models of how the law behaves. Secondly, experimental legal research can be used to test these and other models. Thirdly and fourthly, it is possible to use quantitative methods and case studies in order to verify or falsify legal theories. Despite this variety of approaches this does not mean that all legal questions can be addressed in this 'scientific way'. In particular, other methods may be preferable for legal interpretation and construction. For

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[106] See text to notes 73, 74.

[107] S. Macaulay, above n 34. See also see D. Campbell, Socio-Analysis of Contract, in *Socio-Legal Studies* (P. A. Thomas ed., Aldershot: Dartmouth, 1997).

[108] See S. Deakin, 'Learning about Contracts: Trust, Cooperation and Contract Law' in *Handbook of Trust Research* (R. Bachmann and Akbar Zaheer eds., Cheltenham: Edward Elgar, 2006), Ch. 12; S. Deakin, and J. Michie (eds), *Contracts, Cooperation and Competition: Studies in Economics, Management and Law* (Oxford: OUP, 1997).

instance, it can be argued that the question whether the law should recognise the foetus as a 'legal person' (and thus prohibit abortion) is purely ethical, and thus not testable. Here too, however, 'scientific legal research' can play a role. For example, the impact of legalising abortion has indeed been examined empirically.[109] Such impact assessment can at least supplement more traditional approaches to legal interpretation.

5. 'Non-legal topics'

The approaches which have been outlined in the previous parts have in common that they use legal questions as a starting point. This is even the case for 'scientific legal research' since it 'only' incorporates the scientific methodology into legal thinking. However, this does not always have to be case. In particular in US law journals one can find plenty of articles that start with a general question which is not about the law as such.[110] Law is also considered but it is only one of several elements which are brought forward in order to explain a particular extra-legal phenomenon. As a starting point law is therefore addressed from an external point of view because the researcher is primarily interested in its effects. However, in a second step she may apply an internal point of view in order to understand the pattern and logic of these legal rules.[111]

The 'non-legal approach' has recently become increasingly popular in commercial law. For example, it is nowadays quite common that academic company lawyers use

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[109] See Donohue and Levitt, above n 100.

[110] See also M. W. Hesselink, above n 78 at 26 ('The typical first reaction of the European who opens an American law journal is that it contains hardly any articles on "law"').

[111] For a related discussion in legal anthropology see W L. Twining, *Law in Context: Enlarging the Discipline* (Oxford: Clarendon, 1997) at 174; J. Hund, 'H.L.A Hart's Contribution to Legal Anthropology' (1996) 26 *Journal for the Theory of Social Behaviour* 275-292; S Falk Moore, *Law As Process: An Anthropological Approach* (Boston: Routledge and K. Paul, 1978) at 223-232.

the title 'corporate governance' and analyse many factors – the law being just one of them – which determine how a company is governed.[112] Another example concerns the question of what is necessary to create strong capital markets and dispersed shareholder ownership. Various legal and institutional preconditions for strong capital markets can be identified such as effective regulators, prosecutors, and courts, financial disclosure, reputational intermediaries, company and insider liability, market transparency, culture and other informal institutions.[113] With respect to dispersed shareholder ownership, which is often seen as an indicator for developed capital markets, the role of not only company and securities law but also politics, history, and private institutions has been intensely discussed in recent years.[114]

This approach is, however, not limited to commercial questions. For example, it can also be analysed which factors contribute to a high crime rate in a particular state or country. On the legal level one can examine the strength of law enforcement, the existence of the death penalty, the availability of child welfare, and possibly also abortion laws.[115] Outwith law one can consider the impact of education, wealth, in-

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[112] See e.g. K. J. Hopt, E. Wymeersch, H. Kanda, and H. Baum (eds), *Corporate Governance in Context* (Oxford: OUP, 2005); J. N. Gordon and M. J. Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge: CUP, 2004); Jin Zhu Yang, 'The Anatomy of Boards of Directors: An Empirical Comparison of UK and Chinese Corporate Governance Practices' (2007) 28 *Comp. Law*. 24-32.

[113] B. S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' 48 (2001) *UCLA L. Rev*. 781-855.

[114] See e.g. R. La Porta et al., 'Legal Determinants of External Finance' (1997) 52 *Journal of Finance* 1131-1150; M. J. Roe, *Political Determinants of Corporate Governance* (Oxford: OUP, 2003); Coffee, above n 58; Cheffins, above n 58. For an overview see A. Pekmezovic, 'Determinants of Corporate Ownership: The Question of Legal Origin' (2007) 18 *International Company and Commercial Law Review* 97-106 and 147-153.

[115] For the controversial debate about the role of the death penalty and of aborting law see the references above n. 100.

come inequality and the composition of the population with respect to age, sex, urbanicity, ethnicity and race.[116] Another topical 'non-legal' theme is about the measures which should be adopted to tackle climate change. With respect to the law, various national and international endeavours can be discussed such as regional planning regarding transport and housing,[117] the EU Emissions Trading Scheme and the Kyoto Protocol.[118] But climate change as a natural phenomenon can also be addressed by developing technologies that reduce CO_2 such as ocean fertilisation activities and methods to speed up the ocean carbon cycle.[119]

The attractiveness of applying these 'non-legal' approaches to legal research is that they provide a comprehensive view of a particular topic. These approaches do not fall into the trap of focusing on one piece of the jigsaw only to disregard other important and interconnected issues. As the links between law and other factors are often less researched than the 'law as such', it could also be relatively easy to achieve original results. However, there is the important hurdle that the legal academic has to acquire some knowledge about other academic fields and also needs to be willing to engage in joint work with colleagues from other disciplines. For academic lawyers who

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[116] P. J. Cook and N. Khmilevska, 'Cross-National Patterns in Crime Rate' (2004) 33 *Crime and Justice* 331-354.

[117] S. Tromans, 'Climate Change, Energy and Planning' (2007) *Journal of Planning and Environment Law* 357-365.

[118] M. Doelle, *From Hot Air to Action: Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Thomson Carswell, 2005); R. S. Abate, 'Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States' (2006) 15 *Cornell J.L. & Pub. Pol'y* 369-401.

[119] K. N. Scott, 'The Day After Tomorrow: Ocean CO2 Sequestration and the Future of Climate Change' (2005) 18 *Geo. Int. Env. L. Rev*. 57-108.

identify themselves more with the legal profession than with their colleagues in other departments[120] this would mean a significant paradigm shift.[121]

6. Conclusion

This article has identified four ways of 'being original' in legal research: research in 'micro-' and 'macro-legal questions', 'scientific legal research' and research in 'non-legal topics'. Nonetheless, it has tried to maintain an attitude of tolerance in not promoting or discrediting one particular method of legal research.

Yet, there may still be the fundamental objection that 'legal originality' should not be the major aim of legal scholars. It could be said that 'law' is primarily a practical subject. Thus, anything too deep or scientific could be dismissed because it 'produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner'.[122] Rather it could be that one should cherish the practicality of legal research which makes it attractive to judges, lawyers, and other practitioners.[123]

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[120] Cf. R. A. Posner, 'Legal Scholarship Today' (2002) 115 *Harv. L. Rev*. 1314 at 1315-1326.

[121] For the concept of paradigms see Kuhn, above n. 62.

[122] H. T. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91 *Mich. L. Rev*. 34-78 (criticising 'impractical scholars' of elite US law schools). See also Rhode, above n 2 at 1337 ('The "high theory" that carries the greatest prestige for legal scholars is of least interest to practitioners.'). For a related position see also A. T. Kronman, *The Lost Lawyer* (Cambridge, Mass.: Harvard University Press, 1993) at 165-270.

[123] For this past perception of legal scholarship in the US see Kissam, above n 7 at 221 ('Typically, we assume that scholarship should … be useful to practitioners, or at least to appellate advocates and the courts.'); Posner, above n 120 at 1314 ('judicial model of legal scholarship'; legal scholars as a 'shadow judiciary'); Ulen, above n 31 at 916 ('Twenty years ago, prestige and academic acclaim accrued to those legal scholars whose work had a discernible impact on the bench and bar'); see also Cheffins, above n 79 at 462 ('legal scholarship quite often is akin to advocacy').

This objection would, however, miss the purpose of this article. Legal originality does not mean an unworldly approach to legal scholarship. 'Nothing is more practical than a good theory'.[124] Furthermore, original research can lead to a 'breakthrough' and thus it can be more influential than research which just tries to imitate or anticipate legal practice. The conflict is therefore not between 'theoretical' and 'practical' legal scholarship. The latter may have the advantage of an immediate relevance for legal practice but the former can have a greater impact on legal practice in the medium and long- term.[125]

[124] K. Lewin, *Field Theory in Social Science: Selected Theoretical Papers* (New York: Harper & Row, 1951) at 169.

[125] For a similar point see Rhode, above n 2 at 1338-9.