Reflections on Britain's Research Assessment Exercise

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Imagine, if you will, a process by which a law faculty’s scholarly output for the last four years is assessed by peer reviewers compensated by the government. The results are published on the Internet, and each law school’s “grade” forms the basis for a substantial percentage of the school’s funding for the next four years. Faculties with poor scholarship rankings receive no research funding. Those receiving top scores receive a substantial bonus in their annual budget, at least until the process resumes four years later.

This process—known as “research assessment”—is in fact quite real and has been a routine practice in Britain, Scotland, Wales, and Northern Ireland since the Thatcher government inaugurated it in 1986. This article describes the research assessment process and the remarkable degree of acceptance it has achieved among the members of the law teaching profession in the United Kingdom. It also considers the ways in which the most recent research assessment exercise, completed in late 1996—and the lessons that were learned from earlier, less-well-developed RAES—might inform the faculty peer review process now in use in the United States.

The article also raises a bigger, and scarier, issue. Looking critically at research assessment is not just a matter of idle curiosity about another country’s system of educational administration. Rather, thinking about research assessment—and, specifically, about how a government allocates scarce resources for the support of legal scholarship and determines which scholarship is worthy of public funding—is timely in light of recent developments in many American law schools. Political leaders are becoming increasingly critical of university professors and less deferential to their expertise.1 In some states, legislators are setting specific “performance targets” and issuing directives on

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class size, hours in the classroom, frequency of sabbaticals, and the specifics of posttenure review. Some states are employing a "benchmarking" system or "performance-based funding" to determine how much money to provide to their public universities. And in many states legislators and members of university governing bodies are questioning the resources devoted to faculty scholarship, dismissing many projects as self-indulgent and socially useless.

Compounding these developments is the increasing unrest of the organized bar, some of whose leaders wish to seize more control of law school curricula and to downgrade many forms of scholarly activity. In addition, some critics from within the academy are speaking out against the "scholarship subsidy" paid to mainstream law faculty which otherwise could be used to support clinical training. Recently the director of the American Law Institute dismissed "much of what passes" for legal scholarship as "undisciplined ragpicking of bright snippets from the higher disciplines." And even the *Harvard Law Review* has published an essay likening contemporary legal scholarship to phrenology and other "pseudoscience[s]."

In this atmosphere of increasing hostility toward faculty scholarship generally and toward legal scholarship and law school funding practices in particular, there may be some useful lessons to be learned from the U.K.'s experiment with research assessment. So we will begin by looking carefully at how the most recent research assessment exercise was conducted—and at some of the criticisms that have since emerged. We will then consider whether there are any features of the research assessment process that might be useful in American law schools.

**An Overview of the Research Assessment Process**

Any discussion of research assessment must begin with the Higher Education Funding Council for England, which was established by John Major's government in 1992. HEFCE's main function is to distribute government

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2. In Florida, for example, faculty at state universities are required to be in the classroom or otherwise working with students at least 12 hours a week. See Grace Frank, Higher—and Highest—Learning, Tampa Trib., June 14, 1998, at 1.
9. HEFCE is the successor to the University Grants Committee and the Universities Funding Council, which conducted the 1986 and 1989 RAES, respectively.
funds to the 136 universities and higher-education colleges in England. Its counterpart agencies are the Scottish Higher Education Funding Council, the Higher Education Funding Council for Wales, and the Department of Education for Northern Ireland.

Approximately 65 percent of HEFCE's budget goes to support teaching. That is to say, the council gives block grants to colleges and universities based exclusively on student enrollment. (An additional premium is paid to Oxford and Cambridge to support their labor-intensive tutorial systems.) Teaching quality plays no role in determining a university's teaching budget. In 1997–98 HEFCE funding for teaching totaled £2.38 billion (about $3.9 billion as of June 1, 1998). In 1998–99 the teaching allocation will be £2.69 billion ($4.4 billion).

HEFCE also provides funding to support faculty research, including funding for (some) academic salaries, improvements to infrastructure, indirect support for graduate education, and direct support for “new young researchers who may not yet be in a position to secure research grants.” In 1997–98 HEFCE's funding for academic research totaled £704 million ($1.15 billion). The allocation for 1998–99 will be £829 million ($1.4 billion).

In both 1997–98 and 1998–99, 97 percent of the academic research money awarded to universities and colleges was allocated by HEFCE “selectively, according to quality, as judged by the [1996] research assessment exercise.”

The 1996 RAE, which I describe in more detail below, was carried out jointly by the four national funding bodies, which depended on the work of sixty specialist peer review panels. Generally, the members of the panels were selected not only from the academic world but also from commerce and commerce.

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12. This supplement, totaling £35 million, has come under scrutiny from the Labor government. See John Kampfner & Simon Targett, Extra Funding of £35m for Oxbridge May Be Scrapped, Fin. Times, Sept. 25, 1997, at 1.
13. A Quality Assurance Agency was established in March 1997 to conduct an assessment of university teaching quality. See Quality Assessment of Teaching (updated Oct. 5, 1998) <www.hefce.ac.uk/Docs/WHATDO/qateach.htm>. To date, however, teaching quality—as opposed to student headcount—has had virtually no impact on university funding.
17. Press Release, supra note 15. These totals do not include research funding from other governmental agencies (which is awarded to individual investigators, not to universities or their academic departments). Only about one-third of governmental support for academic research comes through the higher education funding councils. See Roderick Floud, Time for a Rethink on Funding, Times (London), Sept. 6, 1996.
industry. In the case of law faculty assessments, though, the panel members all came from university law departments. The results of the peer review process were published on the Internet and in the British press. Each department’s “grades” on the RAE (ranging from 1 to 5, with 5* representing performance at an “international” level of excellence) then were transposed into specific funding grants to the sponsoring universities and colleges. Faculties graded 1 or 2 received no research funding. Faculties with higher scores received a corresponding research grant. The 1996 RAE rankings, and the funding levels that result from them, are now expected to stay in place at least through the 2001–02 academic year.

The creation of HEFCE and the use of RAE rankings to determine departmental funding levels are a function, in part, of dramatically declining resources. From 1989 to 1995, student enrollment in U.K. universities rose by almost 70 percent while public funding per student fell by 25 percent. Only recently, since the election of the Labor government in 1997, has there been any sign that public funding for higher education may significantly increase in the coming years.

The Research Assessment Exercise in Detail

The 1996 RAE was not the first research assessment exercise. Earlier assessments were conducted in 1986, 1989, and 1992. After extensive comments on the 1992 format, and some consequent revisions, the procedures for the 1996 RAE were announced in June 1994. Each academic department wishing to participate in the RAE would be asked to identify its faculty as of the “census date,” March 31, 1996. Then for each faculty member actively

20. RAE 2/97, Research Assessment: Consultation <www.niss.ac.uk/education/hefc/rae/2_97.html>.
21. Not all academic departments, of course, received the same level of funding, even where the quality of their research output was comparable. The amount of funding provided to each discipline was designed to reflect both the volume and the quality of a department’s work and also the relative cost of research in the field. HEFCE Circular 4/97 <www.niss.ac.uk/education/hefce/pub97/c4_97.html>.
25. For a description of the first three exercises, see Derrick F. Ball, Quality Measurement as a Basis for Resource Allocation: Research Assessment Exercises in United Kingdom Universities, 27 R & D Mgmt. 281 (1997).
27. Id. ¶ 7. Departments choosing not to participate in the research assessment exercise would be disqualified from receiving governmental research funding.
engaged in research as of the census date ("research-active faculty"), the department would be asked to list up to four works completed and published during the preceding four years.\textsuperscript{28} Materials accepted for publication but not yet published could not be included in the list.\textsuperscript{29} No distinction was to be made between basic and applied research.\textsuperscript{30}

If a faculty member had moved from another institution during the four-year assessment period, credit for her work would go to the institution with which she was affiliated on the census date.\textsuperscript{31} (This is said to have resulted in the development of a transfer market for top producers and widespread poaching among faculties, a subject about which I will have more to say shortly. It also meant that those departments who were net exporters of research talent were penalized, especially when a top producer moved to a new institution on the eve of the census date.)

A department could choose to withhold a member's research from the peer review panel (designating that person as a non-research-active member of the faculty), but ultimate funding awards would be based on the department's overall quality grade multiplied by the number of research-active members.\textsuperscript{32} This feature of the RAE thus required a calculated guess as to whether a marginally productive member would be more profitable to the department as a low-scoring research-active professor or as a non-research-active professor—in essence, for this exercise, a nonperson. Needless to say, the resulting gamesmanship caused much consternation among both the decision-makers and the marginal producers whose status was in question.

HEFCE set out a general definition of research in its guidelines for the 1996 RAE,\textsuperscript{33} but left the detailed articulation of the standards of assessment to each individual peer review panel. HEFCE did take pains to note that the preparation of teaching materials, although constituting "scholarship," did not constitute "research," so teaching materials (with some limited exceptions) would be excluded from the RAE process.\textsuperscript{34} And, in an interesting departure from the procedures observed in the 1992 and earlier RAEs, HEFCE expressly declined to receive a summary count of research activities above and beyond the four selected samples of each active researcher's work. "In deciding to discontinue the publication count," HEFCE stated, "the funding bodies wish to signal clearly that the RAE is concerned with research quality, and that the number of publications and other forms of assessable output is not considered necessarily to be an indicator of research quality."\textsuperscript{35}

\begin{enumerate}
\item\textsuperscript{28} Id. ¶ 9.
\item\textsuperscript{29} Id. ¶ 25(c).
\item\textsuperscript{30} Id. ¶ 11.
\item\textsuperscript{31} Id. ¶ 25(c).
\item\textsuperscript{32} Id. Annex C, ¶ 17.
\item\textsuperscript{33} Id. Annex A ("Research for the purpose of the RAE is to be understood as original investigation undertaken in order to gain knowledge and understanding.").
\item\textsuperscript{34} Id.
\item\textsuperscript{35} Id. ¶ 24.
\end{enumerate}
Some months later, HEFCE added a couple of qualifiers to its otherwise straightforward (and restrictive) reporting requirements. "Indicators of peer esteem," in the form of editorships of prestigious journals or participation in key conferences, could be included in a department’s submission to amplify the information provided in the individual lists of active researchers’ output. And an explanation could be provided as to why individual researchers’ output did not in some cases extend to four items. The idea was that the peer review panels could take into account “particular professional circumstances likely to lead to a reduced publication rate.” These circumstances could include long-term projects, faculty members’ active involvement during the assessment period in important non-research-related work (such as participation in the government-funded Teaching and Learning Technology Program), or the presence of entry-level researchers. No other explanatory factors (such as family obligations, illness, or disability) were invited.

The peer review panel of legal scholars, a group of eleven academics selected by HEFCE and its counterparts from nominations by learned societies and professional associations, assembled in 1995 and set out the criteria to be applied in the assessment exercise. The panel’s guidelines were in some respects quite specific. Book reviews (as distinguished from review articles) would not be considered as research, “[n]or [would] editing a book or journal without making an identifiable scholarly contribution.” Treatises and books written for practitioners would not be considered as research unless they “exhibit[ed] significant scholarly material.” Casebooks might be considered research, but only if they provided “a significant amount of scholarly commentary” or “demonstrate[d] a novel approach” to the subject.

Several specific items of the panel’s directive seem to reflect a good deal of care and high principle in designing the assessment process.

- The Panel has not established a list of the relative standing of journals. Like other types of publication, articles or notes in journals will be assessed solely on the basis of their own merits.
- The Panel will assess the quality of a publication, and not its quantity, since length is not necessarily an indicator of its quality. The Panel will take note of the influence of a work as well as its scholarly content.
- The Panel considers that, interpreted literally, “international excellence” would be difficult or impossible to achieve in the context of some

36. RAE96 3/95, Research Assessment Exercise: Criteria for Assessment and Working Methods of Panels § 9 <www.niss.ac.uk/education/hefc/rae96/general.html>.
37. Id. ¶ 12.
38. Id. ¶ 12(b)–(c).
40. Id. ¶ 5.
41. Id. ¶ 8.
42. Id.
43. Id. ¶ 10.
44. Id. ¶ 11.
areas of work. Consequently, the Panel has decided that it will assess international excellence on the basis that work can be regarded of international excellence if it is a primary reference point in its field (in the sense that it is recognised as amongst the best in its field).

- It is recognised that less established members of staff (for example those new to academic careers within the research assessment period) may well have an output which does not equate with what would reasonably be expected of a more experienced researcher. The Panel will take this into account. It will evaluate the quality of such work in terms of what is reasonably attainable by an active researcher in the early stage of his or her career, and it will set this research activity in the context of the research culture demonstrated in the department as a whole. Departments should not feel inhibited from including staff new to research since 1 January 1992 simply because their output is not comparable to that of a more experienced member of staff.

The reference to "research culture" in the preceding paragraph is not incidental. The peer review panel of legal scholars indicated from the beginning that, in assessing the research quality of an entire department, it intended to place great emphasis on "the extent to which the department has developed a research culture." In assessing a department’s research culture, it would review with particular care the departmental research plan that had been submitted in connection with the 1992 RAE, the research plan submitted in connection with the 1996 RAE, and the department’s own "statement of general observations" about the status of its research activities.

The panel developed a very specific grading scale against which it would measure every department. This scale purported to distinguish between work that met an "attainable level of international excellence" from work that met (or failed to meet) an "attainable level of national excellence." Each item of research submitted would be read by at least two members of the panel. Experts not on the panel might be consulted in some cases but would play no role in "grading" any specific piece of work. The panel’s final product would be a single grade for the work of the department as a whole. Individual

45. Id. ¶ 12.
46. Id. ¶ 14.
47. Id. ¶ 2.
48. HEFCE provided that departments “should supply written details of their current... and future research... plans. The mechanisms that exist to promote, manage and monitor the department’s research should be identified in current research plans. Future research plans should outline the direction in which the research in the department is intended to move during the next five years...” RAE96 1/94, supra note 26, Annex C, ¶ 70.
49. See id. ¶ 72. HEFCE also provided that departments could supply “evidence of specific circumstances they wish panels to take into account in assessing the submission. Significant instances of external recognition, collaboration with outside bodies and overseas academics, provision of research facilities and academic visitors to the department, for example, may be mentioned.” Id.
50. Id. Annex B.
52. Id. ¶ 18.
53. RAE96 3/95, Research Assessment Exercise: Criteria for Assessment and Working Methods of Panels ¶ 17 <www.niiss.ac.uk/education/hefc/rae96/general.htm>. 
faculty members would receive no written comments; the grades on their publications would remain known only to the peer review panel.

In the end, sixty-four law faculties participated in the 1996 RAE. As one might have predicted, only Oxford and Cambridge secured the prized 5* ranking for "research quality that equates to attainable levels of international excellence in a majority of subareas of activity and attainable levels of national excellence in all others." Eleven others secured the plain 5 ranking (including seven whose 5 was at least one point higher than their rank in the 1992 RAE). Five law departments that had received a 1 rating in the 1992 RAE did not participate in the 1996 exercise, and eleven law departments that had not participated in 1992 elected to participate in 1996. Of these newcomers, six received a 1 rating, four received a 2, and one received a 5.

General Criticisms of the RAE

It was inevitable that there would be dissatisfaction with the RAE—both with the general process of the research assessment and with some specific outcomes. Recurring criticisms included the claims that the RAE was costly and intrusive; that it interfered with academic freedom and would lead to the homogenization of research activities; that the process rewarded already successful institutions without providing adequate incentives to lesser institutions to improve their research performance; that it punished "incubator" institutions by failing to give them credit for scholars whom they had nurtured only to see them depart as the census date approached; and that the assessment project reflected a governmental "agenda" by which public resources for academic research could be reduced and ultimately shifted to the private sector.

Other critics contended that the process devalued interdisciplinary scholarship and work by maverick researchers. The frequency of the assessments tended to stimulate "short-termism" in devising research projects. The use of the census date encouraged raiding of other faculties, inflation of salaries for academic superstars, and a consequent demoralization of faculty members at the lower end of the spectrum. Morale at many departments was said to suffer as a result of the process of distinguishing between those members who were "research-active" and those who were not. Many agreed that the RAE process itself, and the adjustments that were often made during the run-up period to facilitate completion of research projects, devalued the teaching enterprise and resulted in declines in teaching performance. The Association of University Teachers alleged that some universities were using the RAE as a tool to select candidates for layoffs.

54. RAE 1/94, supra note 26, Annex B.
55. See 1996 Research Assessment Exercise, Unit of Assessment: 36 Law <www.nist.ac.uk/education/hecf/rae96/1_96/t36.html>. On request, the author will provide a table showing the 1992 and 1996 RAE scores of all the participating British law faculties.
Some of these issues had been addressed in a very thoughtful postmortem examination of the 1992 RAE published by HEFCE in 1997. Though much of that study focused on the impact of the RAE on departments of English, the study nevertheless provided some interesting insights into the impact of the RAE process on academic faculties generally. First, those institutions that had participated in the 1992 RAE process felt that, overall, the RAE had more good effects than bad; the schools most critical of the process were the elite institutions that did less well than they had expected in the exercise and so received a decrease in their funding. Specifically, participants felt that the process had improved the management of the academic research function and had caused departments to consider their research missions more carefully.

In some cases the RAE process caused researchers to become aware of their colleagues' work for the first time. In others, departments designated “research managers” to coordinate both ongoing research activities and also the RAE submission itself.

Many [departments] subsequently focused on nurturing a “research culture.” In most, the vision for research has been linked with other areas of strategic importance—such as the relationship with industry, commerce and professional services. The overall tactic then has been to seek HEFCE funds but to seek equal funding from external research sources.

The HEFCE postmortem study also examined the so-called “transfer market” that had developed after the 1992 RAE and been characterized as “frenzied” in the run-up to the 1996 RAE. It concluded that RAE-related job transfers in the two years preceding the 1996 census date represented only about one percent of the academic workforce. The study also noted that a number of institutions had set about to retain their most successful research-active faculty members. Indeed, a quarter of the department heads surveyed said they had taken affirmative steps to retain key research-active members, including “salary enhancements, . . . relief from teaching, sabbaticals and provision of support staff.”

The study also noted that interdisciplinary research, rather than being inhibited by the presence of the RAE, was “growing fast” and may in fact have been accelerated by the RAE’s emphasis on “quality.” To the extent that

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58. Id. ¶ 4.
59. Id. ¶ 5, 50.
60. Id. ¶ 54.
61. Id. ¶ 50.
62. Id. ¶ 88.
63. See id. ¶ 88–96.
64. Id. ¶ 89.
65. Id. ¶ 91.
66. Id. ¶ 111.
academic research was being shaped by external forces, the study found, the most powerful influence came from the government's research councils, and not from the RAE. 67

Finally, the study concluded that the RAE had had a significant impact on appointments decisions at the entry and low-lateral levels. Efforts were made, for example, to identify young research candidates whose interests complemented those of the existing research staff or who had the potential to bring in independent funding. A survey of faculty members with less than one year in post indicated that 12 percent of those recently appointed believed that the RAE had been the dominant factor in their employment; 30 percent said it had been a significant factor. 68 Many department heads thought that their awareness of the RAE had made them more risk-averse in the appointments process, 69 and all agreed that the RAE had caused an increase in the demands upon and stress among their staff. 70

British academics are only now beginning to write seriously about the impact of the RAE process on the way in which they conduct their work and think about their careers. For example, Clare McGlynn of the University of Newcastle has argued that the process has had a particularly harmful impact on younger scholars, and especially on women. 71 McGlynn takes the position that the powerful influence of the RAE causes young scholars to tailor their efforts to what they think will satisfy future peer reviewers rather than developing their own research agenda. For women, the problem is compounded: feminist scholarship (like other nontraditional approaches to virtually any discipline) may be alien to the more traditional scholars who are likely to make up the review panels. This may cause feminists' work to be undervalued, or even excluded from the review process. And even if women are successful, they often are not able (because of family obligations) to take advantage of the transfer market to more prestigious institutions. 72

Most significant to McGlynn is that the four-year cycle for the assessment of recent research can easily penalize a woman who has been pregnant—possibly more than once—during this period. As I've noted, the 1996 RAE did not provide a mechanism for conveying information about family obligations.

Thus, the artificial constrictions of the RAE may indeed have an adverse affect on women academics, by measuring their performance regardless of other factors. This means that a department with a predominantly female staff may be worse off in terms of rating and therefore in terms of finances, than an all-male department, although clearly not all women wish to or can have children.

67. Id. ¶ 122.
68. Id. ¶ 93.
69. Id. ¶ 101.
70. Id. ¶ 105.
72. One legal academic pointed out that the transfer market, to the extent that one existed, was really a market in “male academics.” Joanna Gray, Letter, Times Higher Educ. Supp., Nov. 17, 1995.
and not all women are of childbearing age. Indirectly therefore, this may provide an incentive for departments to keep the numbers of their women staff low in order to avoid the potential hazards referred to above.73

The most significant criticisms of the RAE process have revolved around its fundamental approach to funding academic research.

[The RAE] process does not necessarily choose good people or projects. It certainly does not set out to pick the research which will produce best-selling books, Nobel prizes or world-beating patents; some of that certainly goes on in the elite universities, but much does not. Instead, the funding councils give large dollops of money to relatively few universities which can do with the money what they will, so long as it is spent, generally, on research. The money can go [for] libraries, computers or to reduce the teaching load or increase the salary of a favoured professor. What is more, money earned by brilliant sociologists can be given to mediocre chemists.74

Rather than funding entire departments, critics argue, the government should limit itself to funding individual research projects.75

At the conclusion of the 1996 RAE, HEFCE once again sought feedback on the research assessment process and solicited criticisms such as those enumerated here.76 A few largely cosmetic changes—such as the directive that, in order to avoid the appearance of “orthodoxy,” no more than half of a peer review panel may be carried over to a subsequent RAE cycle77—have already been announced. Other suggestions have also been accepted: the time between RAEs will increase from four to five years, and a department will be able to claim the research of a faculty member who has left for another institution within twelve months of the census date.78

Overall, however, the RAE process as it operated in 1996 seems now to be firmly established as the primary source of public funding decisions: “Most respondents to the recent consultation believed that there should be a further RAE along broadly similar lines to the last. Most also acknowledged the positive effects of the RAE to date on research quality and the management of research.”79

73. McGlynn, supra note 71, at 53. McGlynn’s comments are offered in a setting where only about five percent of the full professors in university law departments in Britain today are women.
74. Fould, supra note 17.
75. See, e.g., Lee Elliot Major, The Games Academics Play, Guardian, Mar. 31, 1998 (reporting on the statement of the British Engineering and Physical Sciences Research Council, calling for an end to the RAE, with a recommendation that HEFCE research funds be reassigned to the subject-matter research councils).
76. See RAE 2/97, supra note 20.
78. RAE:1/98, supra note 22, ¶ 11, 61.
79. Id. ¶ 10.
Commentaries on the RAE Specifically as Related to Law Departments and Legal Research

Patricia Leighton of Manchester Metropolitan University has described the impact of the 1996 RAE on departments of law; her statement is worth quoting at length.

[The 1992 research assessment exercise] produced predictable responses in law, though it gave rise to much questioning and confusion. In theory, law departments are graded according to the extent to which their members produce quality research work which is of international reputation through to departments with a few members who produce nationally recognised work. In 1992, several law schools refused or failed to enter. Consequently, they received no higher education funding council monies.

From 1992 onwards law schools were making strategic decisions of how to prepare for 1996. A number continued to view the exercise as irrelevant and did not prepare for a 1996 entry. This was often because they felt that the exercise was, in truth, little to do with research and more to do with pure scholarship. Individuals and law schools with a focus on empirical, practical or applied research would always be at a disadvantage because such research is often client orientated and/or confidential and its findings frequently reported in non-refereed publications. The research's direct practical relevance may be the very reason for its unlikely appearance in the favoured publications.

However, many law schools which had not entered or had received a rating of 1 in the 1992 exercise did decide to enter in 1996 and developed detailed plans to improve their research output. Research clusters were identified, research student numbers upped and facilities and support offered to those likely to produce quality work. Schools which had high expectations but which had been awarded a fair 3 or 2 rating in 1992 adopted these tactics but also "bought in" proven researchers in the hope that their high salaries would be offset by increased funding following a very good research rating and enhanced prestige in the market place.

The run up to the 1996 entries generated considerable debate over who and what to submit. There was much discussion over the relative "weight" of research reports, expert studies, multi-disciplinary works, texts for legal practitioners, texts for students and the merit of entering a high proportion of school staff of varying output versus a few high profile staff.

The expectation that student texts, educational works and activities in, say, non-law publications would achieve relatively low ratings increased scepticism that the RAE could ever be part of a process of improved teaching and learning quality. Most commentators recognised the essential nature of high quality and typical academic publications but felt unease that other more immediately practical work was likely to receive fewer plaudits.

So, what was the outcome? The first point to note is that still a number of well known law schools did not enter the exercise. For a few it was a matter of principle; for others, one suspects, a doubt that entering would be worth the effort. Included in the group of non-entrants were Kingston, UCE, North London, South Bank, Robert Gordon, Hertfordshire, Napier, Middlesex, Leeds Metropolitan and Liverpool John Moores. In a few other institutions law staff entered as part of other departments.

Second, there was an overall improvement on 1992 ratings. Only a couple of institutions—Edinburgh and Ulster—slipped back and a few made dramatic improvement.
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Third, the law schools that did well tended to be those with a very high proportion of staff recorded as research-active, i.e. they entered the RAE. However, some law schools obtaining creditable 3(a) and 4s still achieved that with relatively few staff entered.

Fourth, a law performance compared fairly well with similar academic disciplines, for example, business and management studies but less well than economics and politics.

What are the implications? In purely financial terms they are as yet unclear. Many expect that even the highest rated law schools will get less than in 1992 and those with Is or 2s little or nothing. Many also expect that cash will gravitate to the high performing schools making it increasingly difficult for the schools with emerging research profiles to succeed. They may have to turn to other research income sources which are anyway becoming extremely stretched.

Aside from angry outbursts in the education press that there was bias, hidden agendas and unconvincing decisions, generally disadvantaging the new university and college sector other anxieties have surfaced. Amongst them is a concern that the system rewards “performing” schools as opposed to those nurturing young researchers and teaching research methods. This argument is not dissimilar to laments in sport about where the future Alan Shearers and Ryan Giggeses will be nurtured. Will all the top performers have to be bought in? If so, where from, in ten years’ time?80

Leighton’s views, expressed in her capacity as an editor of The Law Teacher, may underestimate some of the gravest concerns of legal academics about the impact of the RAE. One of the most significant concerns, perhaps unique to legal scholarship, is that the RAE process, as it appears to function currently, discourages legal scholars from creating materials that are aimed at practical law reform or that speak directly to practitioners. As Newcastle’s Clare McGlynn points out,

[I]t must surely be one of the roles of academics to communicate their knowledge and understanding to the wider community which they serve, and in terms of legal academics, a major part of this community must be the legal profession. The profession of the law itself will be diminished without a healthy academic community to support it.81

A number of other U.K. law teachers have expressed other concerns that may (or may not) be unique to legal scholarship. A young scholar from Scotland who recently came through the 1996 RAE process notes that the small number of law journals in the U.K. makes placement particularly difficult:

Certainly as a junior academic in the last RAE round I found it difficult to place articles in the so-called “best” journals, because they already had such a huge backlog of contributions. I cannot even say that they refused my contributions for their lack of quality because they did not even look at them!82

81. Private communication from Clare McGlynn (Apr. 8, 1998).
Another scholar notes a concern about the depth of review that each RAE submission received: "I do have some doubts about the capacity of such a small panel to read so much and be able to assess its quality objectively." 83

The Committee of Heads of University Law Schools (CHULS), one of many organizations that responded to HEFCE's 1997 consultation exercise, noted a special problem for interdisciplinary scholars: "There is a real danger that work on the boundaries between disciplines does not meet the perceptions for excellence developed in more mainstream areas and that credit is not given for the very fact that the successful blending of different disciplines is itself a significant achievement." 84 And, in a study conducted during the summer of 1998 at the University of Stirling to gauge the impact of the 1996 RAE on legal scholarship and teaching, many respondents expressed strong reservations about the legitimacy of the RAE process.

The investigators in the Stirling study surveyed 933 legal academics to determine "how the RAE rating process was perceived within law faculties and departments [and] how those perceptions have affected the working lives of those surveyed." 85 In a nutshell, the professors who responded reported a high degree of confidence in the impartiality, fairness, and consistency of the RAE, but others were much less confident of the RAE process. For example, when asked whether the RAE had created an incentive or strong incentive to research, 80 percent of the professors responding answered yes. 86 The question whether the RAE had improved the quality of legal scholarship received a much wider range of responses:

More than half of the respondents who expressed an opinion indicated that the quality of their own research had not been affected either positively or negatively by the RAE, with the remainder closely divided as to the RAE's impact, 28% saying that it was positive, and 19% rating it negatively. When asked about the effect of the RAE on the research of others, however, 41% of respondents answered that the RAE had a negative or very negative effect on the quality of legal research in general, 91% rated the effect of the RAE as neutral, and only 23% viewed the RAE's effects positively. Consistent with trends reported above, professors were twice as likely to view the RAE's effects positively compared to respondents as a whole, while non-professorial staff were twice as likely to view the RAE's effects negatively. 87

Perhaps not surprisingly, many of those surveyed emphasized the negative aspects of the RAE process. Indeed, 75 percent of the respondents reported that the RAE had exacerbated on-the-job stress. 88 But some observers empha-

84. CHULS Response to the HEFCE Consultation Paper on Research Assessment (on file with the author).
86. Id. at 14.
87. Id. at 18 (footnotes omitted).
88. Id. at 15.
size the positive aspects of the process. For example, an Oxford chairholder, recently imported from Canada, has offered this endorsement:

Until the past decade or so, English academic legal literature was criticised on the grounds that it was narrow, doctrinal and dull. In the years since, things have changed markedly. The quality of theoretical work has improved and overall I think there is greater productivity on the part of legal scholars. My view is that the RAE has played a significant role in fostering these beneficial changes.

In a general sense, the RAE has provided law faculties with incentives to reward/hire “productive” academics, which in turn has acted as a catalyst for research activity. The introduction of this sort of reward structure was important in the British context because of the nature of the university environment. Formerly, the sense of competition which influences American law schools did not exist in any meaningful form in the UK. Instead, the status of the law faculties across the country was pretty much fixed and there was no real incentive to improve.

With the RAE, the situation is now much different. Law faculties want to hire “stars” to improve their research ratings and thereby improve their bargaining position when they ask for funding from their respective universities. Even Oxbridge has been affected; the law faculties at both universities appear to be more willing to recruit academics from other institutions than they were prior to the introduction of the RAE.89

Can Any Aspect of the RAE Translate Usefully to the American Law School Market?

Obviously, the research assessment exercise that I have described has a number of features that make it unique.

- Every law department in the United Kingdom receives (or is eligible for) government funding for its research activities, so that all are subject to centralized, uniform regulation.
- A single funding source (in this case, HEFCE and its counterparts) is willing to incur the expense of conducting a nationwide research assessment.90
- The universe of research-active U.K. law departments is small enough that (in theory, at least) a single peer review panel can credibly evaluate the research quality of each of them in a single year.
- The range of scholarly subjects in the U.K. is narrow enough91 and the volume of writers small enough that (once again, in theory) the peer review panel can be kept to a manageable size.

90. The cost of the 1996 RAE, across all disciplines, was £27.3 million, or about one percent of all the research monies to be distributed between 1997 and 2001. See RAE 2/97, supra note 20, ¶ 12.
91. There are no shareholder derivative actions in the U.K., no corporate criminal liability, and no prohibitions against discrimination based on age, to name just three areas in which U.S. law provides opportunities for scholarly investigation. There is also, of course, no written constitution.
• There is no private assessment mechanism such as the ABA/AALS sabbatical site visitation process, or rankings such as those published in the Chicago-Kent Law Review,92 to provide the kind of "disinterested" evaluation that the RAE purports to provide.93

Even given these significant differences between the legal academic worlds in the U.K. and in the U.S., however, there are several features of the RAE from which American law schools might benefit.

I am not suggesting that there is any realistic prospect in the U.S. for some uniform nationwide assessment of law faculty research quality. The incentives to create such a program simply do not exist. Nevertheless, there are some elements of the RAE process that might usefully be adapted for the self-evaluation every law school conducts from time to time. Other elements of the RAE may give us cause to rethink some of the conventional wisdom about tenure and promotion practices, the appropriate reward structure for legal academics, and the criteria by which law schools are accredited. Let me characterize these elements as follows:

• the recognition that there may be a useful distinction to be made between unfundable scholarship and fundable research;
• the recognition that there is a value in assessing the scholarly output of a law faculty as a whole, and not focusing exclusively on the output of individuals;
• the notion that one might create a meaningful grading scale by which scholarly products can be evaluated systematically;
• the recognition, when dealing with a law school as a whole, of the singular importance of a strong research culture;


93. There are other distinctions between the U.K. and U.S. legal academic communities.

• Some law faculties in the U.K. include nonteaching members whose sole assignment is the conduct of academic research.
• Law in the U.K. is typically taught at the undergraduate level (though there are some graduate programs); the teaching load may be as much as 20 classroom hours per week.
• There is little tradition of private fundraising in U.K. universities, so alumni-funded research essentially does not exist.
• It is more common in the U.K. than in the U.S. for law teachers to be engaged in private consulting with law firms.
• The hierarchy of law departments is more obvious than in the U.S.: they include traditional elite universities, traditional not-so-elite universities, and, since 1992, "new universities," which are former polytechnic institutes devoted to "practical learning."
• The ability of U.K. law departments to expand their market share is substantially constrained by the government's funding policies. Rather than simply admitting additional students in response to student demand, universities and their departments must submit "bids" to the government to receive permission to add additional students. See CP 2/97, Funding Method for Teaching 1998-99: Allocation of Additional Student Numbers <www.miss.ac.uk/education/hefce/pub97/cp2_97.htm>.
the notion that law faculties might be required to set a collective research agenda, and then be held accountable by future evaluators and funders for its completion;

the observable fact that, with planning and coordination (and sometimes by employing an aggressive appointments strategy), a law faculty (or an American law school) can appreciably raise its scholarship profile in a cycle as short as four years; and

the idea that some law schools might quit the scholarship market altogether and devote themselves entirely to teaching.

Fundable vs. Nonfundable Scholarship and Research

An interesting feature of the 1996 research assessment exercise was the distinction that was drawn between legitimate forms of scholarship (textbooks, for example) and the more limited universe of fundable scholarship that HEFCE designated as “research.” This was not an effort to reward applied scholarship at the expense of theoretical work, as some—especially in the legal profession—might urge.94 (Quite the opposite in fact, as most observers in Britain believed that theoretical legal scholarship was far more highly valued in the RAE process than was applied legal scholarship.) Nor was it an effort to recognize that applying the tools of other disciplines, as opposed to the endless manipulation of cases and statutes, might in fact be the best way to improve the legal system.95

Rather, the distinction made in the RAE between other forms of scholarship and fundable research was an effort to channel scarce state resources towards those activities thought most likely to “add to the sum of human knowledge and understanding” and to “generate useful knowledge and inventions in support of wealth creation and an improved quality of life.”96 This was a political policy choice, and it may or may not have been the correct one, in terms of the national interest. For our purposes, however, making a distinction between nonfundable forms of scholarship and fundable forms (whether they be called “research” or something else) can often involve more prosaic considerations. It may also make a good deal of sense. Certainly many schools (including my own) with competitive programs for faculty summer research grants already make distinctions between fundable scholarship and other scholarly activities that will need to seek funding elsewhere. (Typically this means that projects not favored by the administration will, in effect, be self-funded by their authors.)

Where resources are limitless, of course, hard choices are seldom required. But where resources are finite and even inadequate (as is now the case in


96. This formulation is taken from the Dearing Committee Report, a government-funded project that set about to shape national policy for British higher education over the next 20 years. See National Committee of Inquiry into Higher Education, Higher Education in a Learning Society, Summary Report ¶ 52 (1998) <www.leeds.ac.uk/educol/ncihe/sumrep.htm>.
many law schools), the choices can be illuminated by careful thought and analysis. For example, a law school can refuse to differentiate between types of scholarship and try to fund everything equally, but poorly. It might make better sense for the school to identify which types of scholarship—doctrinal, empirical, multidisciplinary, internationally oriented, law-reform-oriented, practitioner-oriented, or whatever—it wishes to assign priority in funding. The decision can be based on a shared sense of principle or simply be a matter of strategy. (Self-interest will also inevitably come into play.)

An obvious response to a suggestion like this is to invoke concerns about academic freedom. But a decision to prioritize the types of projects a university will fund need not infringe on academic freedom. Certainly a religious school can choose the types of projects it wishes to give preference in funding. The same should hold true for a nonreligious private school. And, though the issue is not without ambiguity, state schools too should be entitled to choose what types of scholarly activities they wish to support financially, so long as the choice is not discriminatory on the basis of viewpoint or designed to suppress “dangerous ideas.” (For example, according to David M. Rabban, legislation requiring a state law school to teach “practical” courses designed to prepare lawyers for practice in the state” would likely be constitutionally

97. One critic has disparaged this approach as striving to remain a “scholastic supermarket.” George Dennis O’Brien, All the Essential Half-Truths About Higher Education 49 (Chicago, 1998).

98. I am speaking here of discrete funding for scholarship, as may be found in the payment of summer research stipends, granting of research leaves, and reduced teaching loads. This proposal does not address questions related to base salary but it might be the solution to questions raised by a limited pay raise pool.

99. For instance, a state school dependent on legislative funding might devise a very different priority list from that of a well-endowed private school.


101. Of course, an institution expressing such a preference might be said to violate the AALS guidelines on academic freedom. See Report of the AALS Special Committee on Tenure and the Tenuring Process, 42 J. Legal Educ. 477, 505 (1992) (“The school should commit itself to avoiding prejudice against any particular methodology or perspective used in teaching or scholarship.”). This position, though important in terms of academic freedom, fails to recognize that “[e]conomic stringency, severe economic stringency, will compel institutions to make critical decisions—many with harsh negative consequences for pet curricula and personal careers.” O’Brien, supra note 97, at 111–12.


Reflections on Britain's Research Assessment Exercise

acceptable. As the Supreme Court has noted, the government may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." This kind of prioritization—choosing some types of scholarship over others—is not unlike the hard choices many schools have had to make to "deselect" whole academic departments.

The biggest problem, of course, is who decides what is in and what is out or, more accurately, which types of work will get funded first and which will get funded last? In other words, who will set the priorities? It could be university administrators or, worse, members of the state legislature. It is better by far that the process of prioritizing, if it must be done, begin with the law faculty itself. The point will be to recognize that only a handful of law schools can hope to do everything well. As for the others, strategic thinking about what (in research as in other activities) a law school can do especially well should be worth some collegial effort.

The upshot of this process may be a move toward specialization. At worst, the result will be the development of hostile factions within the faculty. Regardless, facing squarely the issue of what work should be rewarded in an environment of limited resources should not be avoided just because the discussion may become unpleasant. Those of us who are working in environments of scarcity—if we are wise—should begin considering seriously how to influence these kinds of hard choices.

Rating the Whole Organism, Not Just Its Constituent Parts

One of the most appealing features of the research assessment exercise is that it does not purport to impose a grade on individual faculty members. Though there is some sense of an individualized assessment process internally, when a department determines whose names to send forward as research-active faculty and whose to withhold, there is no mechanism in the RAE process by which individual participants receive a personal research-quality score. In theory, this group approach to assessment should lend itself to a more collegial, supportive atmosphere, where strong scholars (whose four submissions have already been accepted for publication) are available to come to the aid of younger or more tentative scholars. It also should encourage department heads to devote attention to all the members of the research-active faculty, and not only to the weakest or the superstars.

108. In fact, according to the University of Stirling study, most respondents thought the 1996 RAE neither encouraged nor discouraged departmental cohesiveness. Professors were more likely than lecturers and readers to believe the RAE encouraged teamwork, while lecturers and readers were more likely than professors to believe the RAE discouraged teamwork. See Vick et al., supra note 85, at 14-15.
How might the idea of group, as opposed to individual, assessment translate into something practical for use in American law schools? One suggestion would be that law schools, as part of the sabbatical self-study process or as a freestanding exercise, either attempt to grade themselves (perhaps using a grading scale like those I discuss in the following section or the one recently proposed by Theodore Eisenberg and Martin T. Wells\footnote{Ranking and Explaining the Scholarly Impact of Law Schools, 27 J. Legal Stud. 373 (1998).}) or enlist a group of independent outside reviewers to do it for them.

There are clear advantages to each approach. Self-evaluation (something that was proposed but rejected for the next research assessment exercise\footnote{See RAE 2/97, supra note 20, \S\S\ 32-34 (seeking input on the possibility of each department’s providing a “self-evaluation”); RAE 1/98, supra note 22 (announcing the terms of the 2001 RAE, excluding the self-evaluation concept).}) offers the advantage of proximity. One’s colleagues ought to have a greater familiarity with one’s output and modes of thinking than would be the case with strangers (though unfortunately this is often not the case). The learning curve may be less steep; the motivation to read with care should be higher. (One must also consider the interesting tensions involved when trying to make a coworker look bad, while making the law faculty as a whole look good!) Conversely, outside evaluation offers the advantage of distance. There would be fewer personal agendas to get in the way of a disinterested evaluation. True peers could be found, rather than relying on coworkers who are well intentioned but less sophisticated in the particular subject area. Either way, there would be costs involved, both in time and (in the case of outside reviewers) money. A faculty self-evaluation (probably by a team of readers) would inevitably present problems of confidentiality. An outside evaluation could minimize these problems but would also involve substantial additional costs.

The potential benefits of a group assessment are considerable, however, regardless of whether it is conducted internally or by outside readers. Conducting a group assessment can minimize feelings of intellectual isolation. Looking at the faculty as a group rather than as competitors for scarce resources is a good way of building a sense of shared mission. Conducting a group assessment can also provide a baseline against which future group performance can be measured, even as individual faculty come and go. And conducting a group assessment—especially with outside reviewers—can help to position a rising law school advantageously in a dean search process and could certainly be used in persuading central administrators and alumni that the faculty’s efforts deserve increased support.

The Use of a Common Language for Evaluating Scholarly Output

The 1996 RAE identified seven categories of attainment (1, 2, 3b, 3a, 4, 5, and 5*) to which all U.K. law faculties were to be assigned. These categories focused on whether a given department had achieved “attainable levels” of national or international excellence in a specified proportion of its work.
Frankly, I have no idea what these categories are supposed to mean, or how "international excellence" might credibly be measured. There is also no indication that HEFCE's peer reviewers were trained for their assessment work or that anyone established interrater reliability.

What kind of grading process might make better sense in evaluating faculty output? With a handful of notable exceptions, few American law teachers have spent much of their energy thinking seriously about the answer to this question. With students, educational professionals often recommend a portfolio review with a Likert-type scale of assessment. One example of this approach involves "holistic scoring" by two or more independent readers. Each reader rates each document in a student's portfolio as 4 (excellent), 3 (good), 2 (satisfactory), or 1 (deficient); each scorer has a common frame of reference in distinguishing between the scores. The final portfolio score is an average of all the readers' ratings. A similar approach might be used to evaluate faculty portfolios. (The law school's overall rating, then, would be an average of all the portfolio scores.)

The problem with this approach is that it begs the question of what features in a document would entitle it to a 4 rating. Edward Rubin has noted:

As legal academics, we are constantly engaged in the process of evaluating legal scholarship, but we have no theory of evaluation. In fact, we rarely seem to perceive the need for such a theory. We conclude that a work of scholarship is good or bad, true or false, by intuition, trusting in some undefined quality of judgment.

An alternative (and more demanding) approach, then, would be to try to identify the characteristics of excellent scholarship, and assign grades for each characteristic on a document-by-document basis. For example, as applied to a portfolio of research papers in an undergraduate social science course, this


114. Rubin, supra note 111, at 889. Rubin attempts to develop such a theory and argues that excellence in scholarship is characterized by normative clarity, persuasiveness, significance, and applicability.
approach and the resulting grading matrix would look something like the following.\textsuperscript{115}

<table>
<thead>
<tr>
<th>Knowledge of and sensitivity to underlying assumptions in this area of social science</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>N/A</th>
<th>Comments</th>
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<tbody>
<tr>
<td>Knowledge of basic ideas in this area of social science</td>
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<td>Knowledge of theories in this area of social science</td>
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<tr>
<td>Knowledge of methodologies in this area of social science</td>
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<tr>
<td>Applications of empirical methods</td>
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<tr>
<td>Analysis of social phenomena</td>
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<tr>
<td>Consideration of public policy or action implications</td>
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</table>

As applied to a portfolio of a law teacher’s most recent works, the matrix might look something like this (I call this particular matrix the plain vanilla model).\textsuperscript{116}

<table>
<thead>
<tr>
<th>Is the article well researched and documented?</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>N/A</th>
<th>Comments</th>
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<tr>
<td>Does it take a position and reach a convincing conclusion?</td>
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<td>Does the article hold the reader’s interest?</td>
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<td>Does it include an answer to the question “So what?”</td>
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<tr>
<td>Is there innovation not only in subject matter but in technique as well?</td>
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<tr>
<td>Does the author display command of relevant materials and techniques?</td>
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<tr>
<td>Are sophisticated scholarly methods and jurisprudential concepts employed?</td>
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\textsuperscript{115} This is the evaluation guide used in undergraduate social science courses at the College of William and Mary.

\textsuperscript{116} These questions, among others, are said to be those that American law review editors use in considering whether to publish a professional article. See Jordan H. Leibman & James P. White, How the Student-Edited Law Journals Make Their Publication Decisions, 39 J. Legal Educ. 387, 415 (1989).
Or this (the at-the-cutting-edge model):

<table>
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<tr>
<th></th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>N/A</th>
<th>Comments</th>
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<tbody>
<tr>
<td>Makes good use of empirical data</td>
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<tr>
<td>Makes good use of narrative and personal experience</td>
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<tr>
<td>Makes good use of comparative or international references</td>
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<tr>
<td>Applies not only traditional legal thinking but also the tools of a complementary discipline</td>
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<tr>
<td>Provides a genuinely new insight</td>
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Or this (the Harry Edwards model):\textsuperscript{117}

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<tr>
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<th>0</th>
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<th>3</th>
<th>N/A</th>
<th>Comments</th>
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<tr>
<td>Gives due weight to cases, statutes, and other texts</td>
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<td>Integrates doctrine with theory</td>
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<tr>
<td>Has direct utility for judges, administrators, legislators, or practitioners (e.g., it prescribes a solution to a specific problem)</td>
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<tr>
<td>Where applicable, discusses ethical considerations</td>
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Or this (the Farber-Sherry model):\textsuperscript{118}

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<th></th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>N/A</th>
<th>Comments</th>
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<tbody>
<tr>
<td>Demonstrates familiarity with the relevant literature</td>
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<tr>
<td>Says something new about the topic</td>
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<tr>
<td>Is comprehensible to the reader</td>
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<tr>
<td>Demonstrates reason and analysis</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>&quot;Invites reply&quot;</td>
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<tr>
<td>Is significant; will stand the test of time</td>
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</table>

The possibilities, of course, are endless and present a challenging opportunity for faculty discussion.\textsuperscript{119}

\textsuperscript{117} This matrix is derived from Edwards, supra note 94.

\textsuperscript{118} This matrix is derived from Farber & Sherry, supra note 111.

\textsuperscript{119} It is fair to note that the Farber-Sherry model has generated a torrent of commentary. See, e.g., Reginald Leamon Robinson, Race, Myth and Narrative in the Social Construction of the Black Self, 40 How. L.J. 1 (1996); Richard Delgado, Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence, 68 S. Cal. L. Rev. 545 (1995); Robert L. Hayman, Jr. & Nancy Levit, The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality, 84 Cal. L. Rev. 377 (1996); William N. Eskridge, Jr., Gaylegal Narratives, 46 Stan. L. Rev. 607 (1994); Alex M. Johnson, Jr., Defending the Use
It may be that reaching a consensus on the components of high-quality scholarship will be more divisive within a faculty than any benefit of group assessment could warrant. Alternatively, the effort to define high-quality scholarship might discourage some of the most original and inventive forms of scholarship, thus defeating the purpose of trying to agree on a definition of "quality." The exercise is not without its peril. The effort, nevertheless, may help focus a faculty on what it values as a group (and why), and may assist in moving marginal producers to higher levels of aspiration and achievement.

Whatever approach a faculty embraces, establishing criteria (or setting "standards") may one of these days become essential. As I’ve noted, many law school funding sources—both public and private—are increasingly skeptical about the value of scholarly research. In this environment, it is fair to predict that legal (and other) scholars will increasingly need to defend the validity of our scholarly activities, and “objectively” demonstrate their quality. (And by the way, claims that the use of such a process would be inherently racist, or


120. Some discussions of the norms by which scholarship should be judged have led to allegations of unintentional—and even intentional—racism. See, e.g., Daniel Farber & Suzanna Sherry, Is the Radical Critique of Merit Anti-Semitic? 83 Cal. L. Rev. 853 (1995) (citing instances). Much of the discussion has been intemperate and sometimes quite personal.

121. The imposition of standards, after all, is an exercise of power. See Richard Delgado, The Inward Turn in Outsider Jurisprudence, 34 Wm. & Mary L. Rev. 741, 757 (1993). When standards take hold in the academy, the result may be “to legitimize an unfair and biased system.” Id. at 765.

122. A simple approach would be to apply a market standard. That is, one could measure the quality of an academic article by the number of times it is cited or by the prestige of the journal in which it is published. But neither approach is an appropriate means of measuring quality. Besides being subject to manipulation, citation counts perpetuate social and political biases. See Nancy Levi, Defining Cutting Edge Scholarship: Feminism and Criteria of Rationality, 71 Chi.-Kent L. Rev. 947, 950 (1996); Arthur Austin, The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status, 35 Ariz. L. Rev. 829 (1993); John M. Braxton & Alan E. Bayer, Assessing Faculty Scholarly Performance, in Measuring Faculty Research Performance, ed. John Creswell, 25, 32–37 (San Francisco, 1986).

123. As for relying on the prestige of the journal in which an article has been published, the market for law review articles is so replete with imperfections that this approach is inappropriate for any serious effort at quality assessment. See Stephen R. Heifetz, Efficient Matching: Reforming the Market for Law Review Articles, 5 Geo. Mason L. Rev. 629 (1997).

would reward “a specifically male approach to knowledge” are not likely to cut much ice with most state legislators.)

At some point, it may no longer be enough to say that legal scholarship lacks consensual standards of excellence. Those of us in state-supported law schools—and those of us in many private institutions—ought to begin exploring now what those standards, however imperfect, might look like in, say, five to ten years.

Creation of an Institutional Research Culture

Perhaps the most significant feature of the RAE, at least insofar as British legal scholars were concerned, was the emphasis on creating and maintaining a departmental “research culture.” This idea, of course, is an element of both the current membership standards of the AALS and the accreditation requirements of the ABA. Typically, however, the reaccreditation process does not address the finer points of establishing a research culture, and faculties are often left to their own devices in trying to determine how to improve their scholarship profile. This need not be the case. Recently, a wonderful article by James Lindgren entitled “Fifty Ways to Promote Scholarship” was circulated (in samizdat form) among law deans in the United States. This is a practical checklist, and for a school concerned about improving its scholarship profile, it would be a very useful exercise to see which of the article’s suggestions have already been embraced by the faculty, which could be implemented easily and at little cost, and which are simply not feasible. The question of whether a research culture exists, and if so how robust it is, could also be a specific finding in any ABA/AALS reaccreditation report.

The Idea of Accountability in Fulfilling a Research Agenda

Almost every American law school dean employs some form of annual reporting process. Typically (and most often in connection with pending pay raises), all members of the faculty are asked to provide information on what they accomplished during the preceding year. An alternative approach is a forward-looking, anticipatory process. That is what was intended by the RAE’s requirement that each law department prepare a “research plan,” a document

125. See Johnson, supra note 119, at 814.
126. See Association of American Law Schools Bylaws, Section 6-8 (Faculty Development); American Bar Association, Section of Legal Education and Admissions to the Bar, Standards for Approval of Law Schools, Standard 405 (Professional Environment).
129. Indicia of a robust research culture might include a regular faculty colloquium program; active exchange of article drafts; coauthorship among faculty colleagues; adequate resources for student research assistants; importation of visiting professors and guest lecturers representing a variety of points of view; sponsorship of research-related travel; support for attendance at conferences; and a recognized reward structure for successful completion of scholarly projects.
setting forth in outline form its research agenda for the following four years. At the end of that period, the RAE peer review panel attempts to measure each department’s success (in part) by comparing the department’s output with the specific objectives the department had set for itself.

What might this approach mean in practice if it were to be adopted in the United States? First, in addition to the traditional annual report, each faculty member could periodically be asked to set forth a research agenda for the next four years. The idea would be to require each person to assess realistically what she or he is likely to produce in this period, given maximum flexibility and a continuation of available resources; to try and prioritize the projects of greatest importance; and to set specific individualized goals against which success or failure might be measured. The idea would not be to create a straitjacket, deviation from which would require explanation or excuse. Rather, the idea would be to create a framework that is subject to amendment as new ideas arise, opportunities present themselves, or inspirations strike.

If I were a law school dean, I’d want to see such a plan, and I would refer to it regularly in making decisions about teaching assignments, research leaves, and pay raises. A document like this would permit a dean to better understand each faculty member’s level of aspiration, the kinds of resources that would facilitate the faculty’s research, and the kinds of intellectual activities—colloquia, guest scholars, etc.—that could stimulate (or showcase) the faculty’s best work. In addition, if circulated among colleagues, a document like this could encourage better internal communications, cross-fertilization of ideas, exchange of research notes and citations to obscure materials, friendly peer pressure to complete promised work and—more broadly—an enhanced intellectual atmosphere.

The individual faculty research agendas then could be aggregated to form the basis of a schoolwide four-year research plan. If I were a university provost or president, I’d certainly want to review such a plan. A document like this would permit a central administrator to measure a department’s collective ambition, identify its weakest and strongest links, get a sense of the quality of its decanal leadership, and compare it with other departments. By establishing a baseline, a document like this could also support administrative efforts to engage in performance-based assessment and budgeting.

One might argue that requiring forward planning is just an invitation to bureaucratic intermeddling. But it is not. Looking forward realistically, then having to answer if one fails to meet one’s goals, is a fundamental principle in the business world. Increasingly, for good or for ill, it is likely to become a principle in the academic world as well, especially in the state-supported schools.

Many of us are already halfway there. For example, some universities pay out summer research grants as “progress payments” to ensure that the project is completed. Other universities withhold semester-end paychecks until students’ grades are submitted. Less onerous forms of academic accountability

include a requirement that any research funded by the university be presented to the faculty in a colloquium or brown-bag session. Or a requirement that a teacher attract a minimum number of students if he wishes to offer a vanity course.

The point, in short, is that law schools, like all academic units, should begin to get comfortable with setting specific goals and then meeting them. The idea that such accountability should be demanded of politicians, heart surgeons, sixth-grade math teachers, and corporate executives, but not of university professors, is an unrealistic idea whose time is passing quickly.

A Quick and Measurable Improvement in a Law School's Scholarly Output

In the 1996 research assessment exercise, 37 out of 64 participating law departments improved their research-quality scores by at least one point over their 1992 RAE scores. Twelve schools pulled their scores up by at least two points. Similarly, in the most recent Chicago-Kent Law Review study of the most productive American law school faculties, the authors took pains to point out that several of the law schools evaluated had made big moves in a five-year period from markedly lower rankings into the top 10. Some of these schools had appointed associate deans for research, “which may have facilitated a quick turnaround in their pattern of publishing.” Others had engaged in strategic lateral hiring.

What do these experiences mean for a law faculty seeking improvement in its research profile? First, that collegial improvement in scholarship can be approached as a task, with stated objectives, specific assignments, disciplined followup, and periodic self-evaluation. Second, that improvement is possible, for both big law schools and small, and for public schools as well as private ones. Third, that financial resources can make a difference but may not be essential in achieving some measurable improvement. And fourth, that the presence of a single highly productive scholar on a faculty can raise a faculty’s scholarly profile nationally and also raise the standard to which colleagues within the law school aspire. (The presence of two or more top scholars, 131. See James Lindgren & Daniel Seltzer, The Most Prolific Law Professors and Faculties, 71 Chi.-Kent L. Rev. 781 (1996).

132. These included Texas (23rd to 6th); Pennsylvania (26th to 7th); Georgetown (33rd to 9th); and Colorado (49th to 5th). Id. at 795.

133. Id.

134. Nineteen of the 25 most prolific individual publishers were lateral appointments. Id. at 783.

135. This last point may be debatable: One startling finding in John W. Creswell’s 1985 ASHE-ERIC Higher Education Report on faculty research performance was that five years after a high producing faculty member was hired by a low producing program, either that faculty member had moved on to another institution or had lowered their productivity to be at the same level as her or his colleagues. While it may be true that proven past non-performers will be future non-performers, the reverse is not true. Like water seeking its own level, the productivity of faculty is greatly influenced by the productivity support processes or systems of their academic program.

especially in complementary fields, can have a further synergistic effect: a critical mass of successful scholars may be necessary to attract still others.)

Recognizing the Value of a Teaching-Only Law School

Finally, there may be something to be learned from the experience of those law departments that chose not to participate in the research assessment exercise. Most of those nonparticipants were departments housed in what, until 1992, were called polytechnic institutes and are now known as "new" or "modern" universities. As "polys," these universities offered "practical training" in law as in other disciplines. The student/teacher ratio was high; faculty research was rare. The change in nomenclature was intended to upgrade the polys' status, to permit them to compete for research money if they wished to, and to satisfy consumer demand.\textsuperscript{136}

Little has changed for most of the former polys since their change in title in 1992. Most "new" universities continue to provide an admirable educational service, yet they receive very few resources (if any) with which to pursue a research agenda. They continue to teach a large number of law students (typically at lower cost to the government than the traditional universities) without ever making a claim to elite intellectual status. The question is whether a similar approach might not be appropriate in the U.S.

This question has been raised before, albeit intemperately, by the Massachusetts School of Law.\textsuperscript{137} It has also been considered by the U.S. Department of Justice\textsuperscript{138} and others who see merit in encouraging a wider variety of law school models. I will not recite all their arguments here. I will note, however, that there already is significant stratification among American law schools; some schools are high-volume producers of legal scholarship, and others produce very little of scholarly value. Most seem legitimate as educational institutions. Some, though, are in constant hot water with the ABA or the AALS, as not sufficiently "academic" in tone.

Perhaps, as in Britain, we should be considering more seriously the idea of "superversities" and "subversities\textsuperscript{139}" and their counterparts at the law school level. A number of states, including Ohio, Florida, California, and Michigan, already use differing funding formulas based on their universities' research capabilities.\textsuperscript{140} It might make sense to extend the reasoning by which research-active institutions in these states (and others) receive more money per student than those that are not research-active, to the funding of law school faculties—regardless of the institutions to which they are attached. In a nutshell this

\textsuperscript{136} A parallel phenomenon may be found in the decision of many American colleges to redenominate themselves "universities."

\textsuperscript{137} See The Deeply Unsatisfactory Nature of Legal Education Today: A Self Study Report on the Problems of Legal Education and on the Steps the Massachusetts School of Law Has Taken to Overcome Them 185–203 (Andover, 1992) (criticizing the "research paradigm").


\textsuperscript{140} See Frank, supra note 2.
would mean that those law schools with research-active faculties would receive a higher level of funding (and higher individual compensation) than those with a teaching-only faculty. As a consequence, the tuition differential that now separates in-state from out-of-state students might be matched by a similar differential for research-active versus teaching-only law schools.

At the very least, the legal profession should consider the possibility of accrediting law schools even though their faculties do not engage in extensive research, do not seek research funding from their universities, and do not claim any special research expertise. With adequate public disclosure of what these schools have to offer, and where they fall short of the traditional university model, prospective students can make an informed decision as to whether they wish to attend.

* * * * *

Many law teachers—especially, but not exclusively, those employed by state-funded institutions—are living in a time of significantly reduced resources. In this environment, the need for "objective" measures of faculty excellence—especially in black box areas such as research and scholarship—is likely to receive increased attention. So are related questions more broadly encompassing the idea of merit. What should be funded? Who should be rewarded? Is ongoing faculty scholarship—even conventional scholarship—an essential prerequisite to providing a useful legal education?

The British experience with research assessment leaves much to be desired as a model for considering these questions. But if law teachers (and faculty in other disciplines) do not begin asking themselves some of these questions, and soon, they may find it being done for them by others.

141. One might argue that such institutions, by minimizing faculty scholarship, would be more likely than research institutions to provide a satisfying learning experience. See Carnegie Foundation for the Advancement of Teaching, Reinventing Undergraduate Education: A Blueprint for America's Research University (Stony Brook, 1998); Alexander W. Astin, What Matters in College? Four Critical Years Revisited (San Francisco, 1993). One might also argue that emphasizing teaching, at the expense of scholarship, would result in less effective learning. A full examination of these issues goes well beyond the scope of this article, but a provocative discussion of them appears in Symposium on the Relation Between Scholarship and Teaching, 73 Chi.-Kent L. Rev. 747 (1998).