The empirical approach to research in property law

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This article offers an account of the unique characteristics, challenges and benefits of empirical legal research. The authors explain that empirical legal research involves the collection and observation of data through a variety of research techniques, such as interviews, observation and surveys, and how it difers from some of its close neighbours, in particular socio-legal research. While the challenges posed by empirical legal research are acknowledged, this article argues that it enriches property law scholarship by enabling researchers to weave together the law learned in books with the law understood and applied in practice.

INTRODUCTION

Empirical legal research has much to offer to those undertaking research into the fascinating topic of property law.[1] First and foremost, it has the potential to generate unique insights into law. It is only through empirical work, for example, that we know how housing possession cases operate in practice,[2] how occupiers deal with justiciable housing problems,[3] whether green clauses are used in commercial leases,[4] and how individuals conceive of "home".[5] In addition to the excitement engendered by gathering data to discover something new about law, burgeoning researchers (particularly at the doctoral research stage), can take advantage of the fact that the relative lack of empirical legal research "creates far greater opportunities for making an original contribution to legal scholarship".[6]

Cane and Kritzer observe that there has been a "lively interest in empirical legal research"[7] over the last 20 years, particularly in the United States. Yet, despite the clear benefits that empirical work offers to legal scholarship, there are serious doubts as to whether this "lively interest" can be sustained. The 2006 Nuffield Foundation report on *Law in the Real World* stated that empirical legal researchers are rare in the United Kingdom, particularly within the field of civil justice, and on the verge of becoming an endangered species.[8] It is incumbent upon established empirical legal scholars,

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[1] For the history of empirical legal research see Genn H, Partington M and Wheeler S, *Law in the Real World: Improving Our Understanding of How Law Works. Final Report and Recommendations of the Nuffield Inquiry on Empirical Legal Research* (Nuffield Foundation, London, November 2006) Ch 2. On empirical studies of property law, see Cowan D, "Housing and Property" in Cane P and Kritzer HM (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2010), pp 331-352.

[2] For example, Hunter C, Blandy S, Cowan D, Nixon J, Hitchings E, Pantazis C and Parr S, *The Exercise of Judicial Discretion in Rent Arrears Cases*, Research Series 6/05 (Department for Constitutional Affairs, London, October 2005); Ford J, Kempson E and Wilson M, *Mortgage Arrears and Possessions; Perspectives from Borrowers, Lenders and the Courts* (HMSO, London, 1995); and Whitehouse L, "A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform" in Bright S (ed), *Modern Studies in Property Law* (Hart Publishing, Oxford, 2011) pp 151-174.

[3] Genn H, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford, 1999).

[4] Bright SJ and Dixie H, "Evidence of Green Leases in England and Wales" (2013) 6 *International Journal of Law in the Built Environment* 6.

[5] Gurney CM, "Pride and Prejudice: Discourses of Normalisation in Public and Private Accounts of Home Ownership" (1999) 14 *Housing Studies* 163 and Gurney CM, "Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Home-Ownership" (1999) 36 *Urban Studies* 1705.

[6] Heise M, "The Importance of Being Empirical" (1998-99) 26 *Pepperdine Law Review* 807 at 821-822.

[7] Cane P and Kritzer HM, "Introduction" in Cane and Kritzer (eds), n 1, p 2.

[8] Genn, Partington and Wheeler, n 1 at [140].

therefore, to mentor less experienced colleagues in the ways of empirical legal research.[9] As a small contribution to that effort, this article explains the unique characteristics of the empirical approach to research in property law and promotes its benefits in the hope of encouraging nascent researchers to carry the torch of empirical legal research.

Empirical legal research also poses unique challenges. It is not a feature common to undergraduate law degree programs.[10] Lack of training, the need to obtain funding, and the very long design and planning stages all have the potential to deter researchers. In this article the authors explain what empirical legal research is, the value it adds, how it differs from other approaches to research within property law, and the methods typically employed in empirical legal research. While acknowledging the challenges that empirical legal research poses to researchers, discussed in the penultimate section, the authors argue that property law scholarship is much richer for empirical work that enables us to weave together the law learned in books with the law understood and applied in practice.

THE MEANING AND VALUE OF EMPIRICAL LEGAL RESEARCH

While there is no universally accepted definition of "empirical legal research", there is a degree of consensus within the relevant literature in respect of its essential characteristics. These include the use of observable and verifiable data – whether quantitative (numerical) or qualitative (non-numerical) – in order to generate knowledge about law. Focusing upon the data obtained, Kritzer, for example, claims that the distinctive feature of empirical legal research is "the use of systematically collected data, either qualitative or quantitative, to describe or otherwise analyze some legal phenomenon".[11] Burton focuses instead on the methods by which such data may be obtained, describing it as "the study of law, legal processes and legal phenomena using social research methods, such as interviews, observations or questionnaires".[12]

While the systematic collection of data through the application of certain research methods constitutes a fundamental characteristic of empirical legal research, focusing on these aspects alone can lead to the view that empirical legal research is "a method of research rather than an end in itself".[13] Empirical legal research, however, serves one ultimate and unified end which is to generate knowledge about law by offering a representative account of how it operates in practice. As the Nuffield report suggests, "empirical research helps us to understand the law better and an empirical understanding of the law in action helps us to understand society better".[14] The authors would argue, therefore, that empirical legal research is best defined as the use of observable and verifiable primary data (whether quantitative or qualitative) in order to generate knowledge about law by offering a representative account of how it operates in practice. That account may be purely descriptive, shining a light on a hitherto unknown area of legal implementation. Alternatively, the researcher may wish to use the data obtained to test a particular hypothesis, to support a particular theory or to offer a contextual account of the law. What is significant, however, is that empirical legal research "provides information of a

different character from that which can be obtained through other methods of

[9] Empirical legal scholars have noted the influence that a, sometimes chance, relationship with an established scholar had on their decision to conduct empirical legal research, see Genn, Partington and Wheeler, n 1 at [74]. See also Hillyard P, "Law's Empire: Socio-Legal Empirical Research in the Twenty-first Century" (2007) 34.2 *Journal of Law and Society* 266 at 268. [10] Calls for the integration in undergraduate degree programs of training in social science methodologies and empirical legal research have been made by, among others, Cowan, n 1 and Hunter C, "Introduction: Themes, Challenges and Overcoming Barriers" in Hunter C (ed), *Integrating Socio-Legal Studies into the Law Curriculum* (Palgrave Macmillan, Basingstoke, 2012)

pp 1-16.

[11] Kritzer HM, "The (Nearly) Forgotten Early Empirical Legal Research" in Cane and Kritzer (eds), n 1, p 883.

[12] Burton M, "Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries" in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge, Abingdon, 2013) p 55.

[13] Galligan DJ, "Legal Theory and Empirical Research" in Cane and Kritzer (eds), n 1, p 979.

[14] Genn, Partington and Wheeler, n 1 at [4].

research. It answers questions about law that cannot be answered in any other way".[15] In support of this claim, the following section of this article distinguishes empirical legal research from other approaches common in the field of property law.

Black letter v empirical approaches

McCrudden distinguishes between two approaches to science which have been applied to the study of law. The first, "older", approach involves the application of "logic, reason and argument to a body of material considered legal".[16] The second concerns "the generation of knowledge by empirical investigation".[17] The first of these approaches perhaps best describes the traditional method of researching law, particularly prevalent within property law, known as the "black letter" or "doctrinal" approach. This involves the close analysis of primary legal sources so as to offer a reasoned and coherent account of law that is directed at those internal to the legal system.[18] Put more simply, it offers an account of "law in books" rather than "law in action".[19]

Applying a simple definition of empirical legal research, such as "the systematic collection of information ('data') and its analysis according to some generally accepted method",[20] it becomes apparent that certain forms of the doctrinal approach could be described as empirical. The tradition in the United States of coding judicial opinions, for example, offers substantial quantitative data in the form of thousands of judgments. Traditional legal textbooks may also be described as empirical given that they tend to draw on primary data in the form of case law and statute. While the authors accept that the use and ordering of doctrinal material may be considered empirical, the focus it gives to material internal to lawyers means that it does not fall within the authors' conception of empirical legal research. For this reason it is argued that the doctrinal approach is more appropriately described as "legal analysis",[21] and that the term "empirical legal research" should be reserved for a different kind of empirical approach to the study of property law.

The authors' preferred conception of empirical legal research is more akin to McCrudden's second scientific approach which offers a more "external" view of law.[22] Within this approach, law is not seen as a separate, self-contained field of study, but as a social institution, capable of influencing and being influenced by other social phenomena. McCrudden identifies three schools of thought that have arisen out of this social scientific approach: socio-legal studies, critical legal studies, and law and economics. It is the first of these that concerns us here for the reason that socio-legal research is related closely and, at times, seen as equivalent to empirical legal research.

Socio-legal research v empirical legal research

The similarity between socio-legal research and empirical legal research is made apparent when one considers the various definitions offered in respect of the former. Although a precise definition remains "contentious",[23] the Economic and Social Research Council (UK) (ESRC) describes socio-legal research as being concerned with "the social, political and economic influences on and impact of the law and the legal system".[24] For many, the unique feature of this approach lies in the reciprocal

[15] Bradney A, "The Place of Empirical Legal Research in the Law School Curriculum" in Cane and Kritzer (eds), n 1, p 1033.

[16] McCrudden C, "Legal Research and the Social Sciences" (2006) 122 *Law Quarterly Review* 632 at 635.

[17] McCrudden, n 16 at 637.

[18] For a definition of the black letter approach see Campbell CM and Wiles P, "The Study of Law in Society in Britain" (1976) 10.4 *Law & Society Review* 547 at 550 and Hutchinson T, "Doctrinal Research: Researching the Jury" in Watkins and Burton (eds), n 12, p 9.

[19] Pound R, "Law in Books and Law in Action" (1910) 44 *American Law Review* 12.

[20] Cane and Kritzer, n 7, p 4.

[21] Cane and Kritzer, n 7, p 5.

[22] McCrudden, n 16 at 637.

[23] Cownie F and Bradney A, "Socio-legal Studies: A Challenge to the Doctrinal Approach" in Watkins and Burton (eds), n 12, p 35.

[24] Economic and Social Research Council (ESRC), *Joint AHRC ESRC Statement on Subject Coverage: Interfaces between the*

relationship between law, sociology, political science, economics and anthropology. As the Socio-Legal Studies Association's strap-line demonstrates, socio-legal research is "where law meets the social sciences and humanities".[25]

Comparing these conceptions of socio-legal research with the definition of empirical legal research adopted here,[26] it becomes apparent why so many scholars view the two approaches as intimately linked and, on occasion, use the two terms interchangeably.[27] Hunter, for example, describes the relationship between socio-legal and empirical legal research as largely a one-way process. The former does not necessarily encompass the latter but empirical legal research does require a socio-legal approach: "in order to understand what can be gained from an empirical study, students must be able to situate this in the broader theoretical frames of socio-legal studies".[28]

Empirical legal research and socio-legal research are natural bedfellows but care must be taken to distinguish the two. The Nuffield Inquiry emphasised that the lack of empirical legal research capacity did not equate to a lack of socio-legal studies, "what is missing is not text-based studies that allude to law's social context, but studies of how legal processes, outcomes or structures actually are in the 'real world'".[29] Socio-legal research does not necessarily involve empirical legal research,[30] as demonstrated by a perusal of key socio-legal journals.[31] But neither (in contrast to Hunter's view stated above) does empirical legal research necessarily constitute socio-legal research. Darbyshire's book *Sitting in Judgment: The Working Lives of Judges* is instructive in this respect.[32] In it she relies upon interview and observational data in order to offer a detailed snapshot of the work of some judges in specific courts, the result being "a rich and revealing ethnographical study that achieves that rare feat of enabling lawyers and non-lawyers alike to better understand what judges in various courts actually do".[33] Darbyshire's work is empirical legal research: by examining the everyday routine of some judges through first-hand accounts it offers more than a black letter account of judicial decision-making, and thereby offers an insight into the practical operation of law in some courts. The book does not, however, attempt to place this anthropological material within the context of broader sociological theory, nor does it adopt a critical and reflexive voice, and as such, it is left exposed to criticism.[34]

To reiterate, the interaction between law and other social phenomena or between law and the (other) social sciences is not a defining element of empirical legal research, although it is likely to be a feature of it. This distinguishes empirical legal research from the socio-legal approach. Empirical legal research

involves the systematic collection of data in order to contribute to knowledge about law

Arts and Humanities and the Social Sciences, p 3, http://www.esrc.ac.uk/ images/Joint AHRC ESRC Statement on Subject Coverage tcm8-2637.pdf viewed 9 December 2013. For an alternative definition, see Hunter, n 10, p 3.

[25] See http://www.slsa.ac.uk viewed 9 December 2013. See also Harris DR, "The Development of Socio-Legal Studies in the United Kingdom" (1983) 3.3 *Legal Studies* 315 at 315.

[26] The use of primary data in order to generate knowledge about law in practice.

[27] Hunter, for example, uses the terms "socio legal research" and "empirical legal research" interchangeably, see n 10, pp 8-9.

[28] Hunter, n 10, p 3.

[29] Genn, Partington and Wheeler, n 1 at [183].

[30] A claim supported by others, see eg Cownie and Bradney, n 23, p 45.

[31] See, eg the *Journal of Law and Society* and *Law and Society Review*.

[32] Darbyshire P, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, Oxford, 2011).

[33] Gee G, "Book Review" (2012) 32.4 *Legal Studies* 680 at 680.

[34] In respect of specific criticism targeted at Darbyshire's methodology, Hunter makes two "socio-legal observations", which are: that too much data was collected; and that the author failed to address the issue of institutional capture. See Hunter R, "Review Essay" (2012) *Feminist Legal Studies*, published online at http://link.springer.com/article/10.1007/s10691-012-9228-3. More generally, some scholars argue that empirical research is of value only if it engages fully in theoretical exposition. Hillyard, for example, refers to a "preoccupation with theory in socio-legal studies and the consequent neglect of researching the material realities of modern life". See Hillyard P, "Invoking Indignation: Reflections on Future Directions of Socio-Legal Studies" (2002) 29 *Journal of Law and Society* 645 at 646. For more on this debate see Banakar R and Travers M, "Introduction" in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford, 2005) pp ix-xvi and McDermont M, Morgan B and Cowan D, "Socio-Legal Studies Module: The Bristol Experience" in Hunter, n 10, pp 19-36.

by offering an account of how it operates in the "real world", even where that "real world" is limited to the legal profession and how members of it interact with each other.

An example

The distinction between the various approaches to research within property law is best illustrated by reference to an example. The authors will focus here on the process of mortgage possession in England and Wales (cf, foreclosure in United States terminology). By virtue of the *Administration of Justice Act 1970* (UK), s 36, the court has discretion to adjourn or postpone the grant of an order for possession of a house if it appears to the court that the mortgagor is likely, within a reasonable period, to be able to pay any sums due. The ability of the mortgagor to do this will be dependent to a large extent on the length of suspension granted by the district judge. A mortgagor who owes, say, £2,000 will obviously find it easier to clear those arrears over five years rather than two, a fact recognised by the Court of Appeal in *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449. The Court of Appeal held that when assessing a "reasonable period", it was appropriate for the court to take account of the remaining term of the mortgage (the "*Norgan* calculation") and, accordingly, the existing practice of imposing a shorter fixed period of two or more years should then no longer be followed.

In view of the comments from the Court of Appeal in *Norgan*, a doctrinal lawyer would likely assume that district judges, when deciding whether to suspend an order for possession, will begin by asking whether the mortgagor can repay the arrears over the remaining term of the mortgage. Given that the typical length of most first acquisition mortgages is 25 years, and that the majority of cases that come before the courts are in the early stages of the mortgage,[35] it may be assumed that most mortgagors (capable of meeting their normal monthly payments) will be able to show an ability to clear their arrears over this period. As Thompson notes, "it will clearly be easier to meet the additional payments necessary to clear the arrears and meet the ongoing payment if such payments are spread out over the whole period of the loan rather than having to be made within a set, and somewhat arbitrary, period".[36] To this extent, therefore, a black letter approach would suggest that all lower courts implement the *Norgan* calculation, thereby affording the mortgagor protection against unnecessary and immediate possession.

A socio-legal lawyer may tell us that this protection is justified given the importance which attaches to "home",[37] or as a result of the pressure that many households feel to aspire to home ownership as a result of the housing policies of successive governments,[38] or the implications of losing one's home.[39] Fox, for example, draws upon a range of multidisciplinary sources, both empirical and theoretical, in order to evaluate the importance of "home" in the property law context. In relation to the *Administration of Justice Act*, s 36 in particular, Fox argues that, while it serves as an example of "a

legal context in which ... 'home considerations' are taken into account", its focus on

[35] Research suggests that repossession is more likely in the first few years of the mortgage due to the lack of equity in the home and payments tending to be at the margins of affordability, see AdviceUK, Citizens Advice and Shelter, "Turning the Tide? Evidence from the Free Advice Sector on Mortgage and Secured Loan Possession Actions in England in July 2009" (15 December 2009) p 9, http://www.citizensadvice.org.uk/index/policy/policy publications/turning the tide .htm viewed 9 December 2013.

[36] See Thompson MP, *Modern Land Law* (Oxford University Press, Oxford, 2012) p 519.

[37] See, eg Bright SJ, "Dispossession for Arrears: The Weight of Home in English Law" in Fox O'Mahony L and Sweeney JA (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate, London, 2010); Fox L, *Conceptualising Home: Theories, Law and Policies* (Hart Publishing, Oxford, 2007); and Radin MJ, "Property and Personhood" (1982) 34 *Stanford Law Review* 957.

[38] See, eg Cowan D, *Housing Law and Policy* (Cambridge University Press, Cambridge, 2011) p 260; Kemeny J, *The Myth of Home-Ownership* (Routledge & Kegan Paul, London, 1981); Stewart A, "Rethinking Housing Law: A Contribution to the Debate on Tenure" (1994) 9.2 *Housing Studies* 263; and Whitehouse L, "The Impact of Consumerism on the Home-Owner" in Cowan D (ed), *Housing: Participation and Exclusion* (Ashgate Publishing, Aldershot, 1998) p 126.

[39] See, eg the Joseph Rowntree Foundation, *The Social Consequences of Mortgage Repossession for Parents and Their Children* (York, 1999) and Nettleton S and Burrows R, "When a Capital Investment Becomes an Emotional Loss: The Health

Consequences of the Experience of Mortgage Possession" (2000) 15.3 *Housing Studies* 463.

the mortgagor's ability to pay tends to prioritise the financial interests of the mortgagee rather than the "non-financial claims of occupiers to the use of the property as a home".[40]

An empirical legal researcher, however, may tell quite a different story. Whitehouse's work, for example, which included interviews with a sample of district judges, revealed that, in practice, the tendency of most district judges is to suspend orders for no more than five years.[41] The reason that these judges felt unable to use the *Norgan* calculation was due to the costs imposed on mortgagors while they remained in arrears.[42] As one of the judges interviewed noted: "You can't forget that although you are making orders in respect of what has got to be paid off the arrears, you have got to think of what the incidence of interest is going to be".[43]

As this example illustrates, it is possible to view the same legal issue through very different lenses depending upon the approach adopted by the researcher. More significantly, it also indicates that the traditional doctrinal approach has the potential to offer a misrepresentative and misleading account of law. The value and significance of empirical legal research, therefore, is its ability to demonstrate that what is written in the books is not always what happens in practice.

THE METHODS OF EMPIRICAL LEGAL RESEARCH

It is not possible, within the confines of this short piece, to offer a detailed insight into the various methodological approaches and tools available to the researcher. The aim rather is to direct the reader to sources of advice and guidance taken from the vast amount of literature available in respect of research methodology. The authors also seek to highlight some of the issues that every researcher must consider when planning and designing their empirical research. The methods employed in empirical legal research are numerous and the literature relevant to them substantial,[44] but there is a degree of commonality in the process by which researchers arrive at the decision to conduct empirical legal research. It begins with a question about law that cannot be answered unequivocally by reference to primary legal data or existing secondary social science material, or at least a suspicion that existing data does not tell the whole story. Again, the example about mortgage possession illustrates this. The statutory provisions and case law tell us that the district judges have discretion to set a "reasonable period" but the *Norgan* calculation suggests that this discretion would usually be exercised by extending it over the remaining term of the mortgage. The researcher who wants to know what happens can only find this out by doing empirical work. In property law there are many other examples that could be drawn upon to illustrate this point.

Having identified a research question, it is then necessary to think about which methods can be used to answer it. Epstein and Martin summarise the researcher's tasks as being to "design their projects, collect and code data, conduct analyses, and present results".[45] This apparently simple process, however,

belies a controversial debate within empirical legal research which concerns

[40] Fox, n 37, p 277.

[41] See, eg Whitehouse L, "The Home Owner: Citizen or Consumer?" in Bright S and Dewar J (eds), *Land Law: Themes and Perspectives* (Oxford University Press, Oxford, 1998) p 19 and Whitehouse L, "Mapping the Boundaries of the Law of Mortgage: The Repossession Process in Practice" in Twigg-Flesner C and Villalta-Puig G (eds), *The Boundaries of Commercial and Trade Law* (Sellier, Munich, 2011) p 68.

[42] See, eg Whitehouse L, "Making The Case for Socio-Legal Research in Land Law: Renner and the Law of Mortgage" (2010) 37.4 *Journal of Law and Society* 545 at 565.

[43] Whitehouse, n 38, p 140.

[44] Examples include, Creswell JW, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage, Los Angeles, 2014); Devine F and Heath S (eds), *Doing Social Science: Evidence and Methods in Empirical Research* (Palgrave Macmillan, Basingstoke, 2009); McConville M and Hong Chui W (eds), *Research Methods for Law* (Edinburgh University Press, Edinburgh, 2007); Trainor AA and Graue E (eds), *Reviewing Qualitative Research in the Social Sciences* (Routledge, London, 2013); and Van Hoecke M (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart Publishing, Oxford, 2011).

[45] Epstein L and Martin AD, "Quantitative Approaches to Empirical Legal Research" in Cane and Kritzer (eds), n 1, p 904.

whether empirical legal research is only of value if it is underpinned by a theoretical framework.[46] As the authors have argued elsewhere and above,[47] empirical legal research is of value for the reason that it can shine light on areas of the law in relation to which precious little knowledge exists. It is possible, therefore, for empirical legal research to add to knowledge regardless of whether the researcher is engaging fully in theoretical analysis, as demonstrated by the example provided above in respect of how judges define the "reasonable period" in the *Administration of Justice Act*, s 36.

Regardless of whether the research begins by positing a hypothesis, seeks to draw one out during the collection of data, or omits theory entirely, empirical legal research must employ robust research methodology. As Epstein and King make clear, "regardless of the purpose, effect, or intended audience of the research, academics have an obligation to produce work that is reliable".[48] For empirical legal researchers, primary data forms the clay with which they work in order to create a coherent structure. The methods used will depend both on the research question and also on whether the data already exists but needs to be collected (perhaps by examining court files), or whether new data has to be generated (perhaps by conducting surveys or interviews). Further, methods are likely to evolve as the research progresses with the discovery of new ideas or the presentation of unexpected obstacles or hurdles with the original research design. When quantitative data[49] is used, empirical legal research becomes closely associated with scientific research.[50] Even though many legal, and other social science, researchers "do not have the luxury of analyzing data they developed in an experiment" and have to rely instead on data generated in the real world,[51] this does not mean that the methodology should not be robust. Indeed, much of the modern American literature on empirical legal research, in relation to both quantitative and qualitative data, adopts the language and methods normally associated with scientific enquiry and rejects as flawed any research that does not adopt rigorous scientific methodology.[52]

Alternative to the wide measuring approach of quantitative work, the researcher may wish to dig deep or to discover more of the "experience" of a particular legal phenomenon. This is likely to involve the use of qualitative research methods such as interviews and observations.[53] Webley explains the value of in-depth qualitative studies, noting that they "are designed to go beyond description to find meaning ... In-depth research affords the researcher the opportunity to learn how research participants understand the world and interact with each other".[54] As with quantitative studies, such in-depth projects must be well designed and executed.

The distinction between quantitative and qualitative studies seems clear but they are not mutually exclusive and there is a growing trend in empirical legal research for the researcher to use "mixed methods" research.[55] The use of "more than one research technique or strategy to study one or several

[46] Campbell and Wiles were scathing in their assessment of early empirical legal research, warning that its impact would remain piecemeal and ad hoc unless it was part of an "attempt to develop a more general theory of social order and law", Campbell and Wiles, n 18 at 572.

[47] See Bright S and Whitehouse L, "The Opportunities and Challenges of Empirical Work: Housing Possession in Theory and Practice" in Akkermans B, Marais E and Ramaekers E (eds), *Property Law Perspective II* (Intersentia, Antwerp, 2013) pp 63-82.

[48] Epstein L and King G, "The Rules of Inference" (2002) 69.1 *Chicago Law Review* 1 at 9.

[49] For a definition see Webley L, "Qualitative Approaches to Empirical Legal Research" in Cane and Kritzer (eds), n 1, pp 926-950.

[50] Epstein and King, n 48 at 24.

[51] Epstein and Martin, n 45, p 904.

[52] See, eg Huang K, "How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan" (2008) 5.2 *Journal of Empirical Legal Studies* 197 and Fagan J, Davies G and Carlis A, "Race and Selective Enforcement in Public Housing" (2012) 9.4 *Journal of Empirical Legal Studies* 697.

[53] See n 44 for more information on qualitative research methods.

[54] Webley, n 49, p 934.

[55] Nielsen LB, "The Need for Multi-Method Approaches in Empirical Legal Research" in Cane and Kritzer (eds), n 1,

pp 951-975.

closely related phenomena"[56] is beneficial for the reason that it provides "more reliable" information than one technique alone does.[57] As Nielsen points out, however, "methodological eclecticism"[58] can create its own issues, including higher costs (both time and financial), the amount of data produced (too much) and what to do with it.[59] Indeed, the "messiness" of data is a well-recognised challenge within empirical legal research.[60]

It is clear that research design and the manner in which data is obtained will determine the extent to which the research and its findings will be considered valid and dependable.[61] The authors would argue, however, that research within the social sciences and particularly within law, should not be rejected *solely* for the reason that it is "atheoretical" or does not apply the language or methodology of scientific enquiry. Provided the researcher acknowledges any weaknesses in the methodology and the implications this may have for any claims made within the work, then such "unscientific" empirical research can still offer interesting and valuable insights into how law operates in practice. What must be emphasised, however, is that the methodology must be robust to ensure the veracity of the data obtained. It is these aspects that pose unique and not inconsiderable challenges to the empirical legal researcher.

THE KEY CHALLENGES FACING THE EMPIRICAL LEGAL RESEARCHER

Returning to the issue raised at the beginning of this article, empirical legal research has never enjoyed the popularity associated with other approaches to research in property law and, it seems, is a dwindling art. When one considers the challenges facing the empirical legal researcher, this "(relative) dearth of empirical legal scholarship"[62] becomes explicable. The nature of these challenges are expressed by Friedman in the following quote:

> To begin with, empirical research is hard work, and lots of it; it is also non-library research, and many law teachers are afraid of it; it calls for skills that most law teachers do not have; if it is at all elaborate, it is team research, and law teachers are not used to this kind of effort; often it requires hustling grant money from foundations or government agencies, and law teachers simply do not know how to do that. The whole thrust of legal education goes against the grain of law and society. Law school tries to empty the mind of all "extraneous" matter, the better to develop legal skills. The finest products of this process, of course, end up as teachers. Once they have emptied themselves of the extraneous, it is hard to reverse the process; and mostly they never try.[63]

As Heise explains, Friedman's point is not to suggest that non-empirical research is easy but that "empirical research projects typically force legal scholars to confront a unique set of obstacles, many of which stem from law schools' general and traditional orientation away from empirical research".[64] The following sections explore some of these challenges in more detail.

Lack of training

Many legal scholars have received no, or relatively little, training in research methodology, unlike students in other social sciences.[65] Legal academics embarking on empirical legal research for the first

time either have to learn these techniques or work with others who are trained or experienced in them.

[56] Nielsen, n 55, p 953

[57] Nielsen, n 55, p 953.

[58] Teddlie C and Tashakkori A, "Mixed Methods Research: Contemporary Issues in an Emerging Field" in Denzin NK and Lincoln YS (eds), *The SAGE Handbook of Qualitative Research* (Sage Publications: London, 2011) pp 285-299 at 285.

[59] Nielsen, n 55, pp 970-971.

[60] Halliday S and Schmidt P, *Beyond Methods – Law & Society in Action* (Cambridge University Press, Cambridge, 2009) p 270.

[61] A term preferred by Webley in respect of qualitative studies, see n 49, p 935.

[62] Heise, n 6 at 810.

[63] Friedman LM, "The Law and Society Movement" (1986) 38 *Stanford Law Review* 763 at 774.

[64] Heise, n 6 at 816.

[65] See, eg Genn, Partington and Wheeler, n 1, Ch 4.

This lack of formal training can give rise to what Schmidt and Halliday coin as Methodological Anxiety Syndrome (MAS) which is "a pervasive and sometimes debilitating doubt about whether one has the necessary methodological skills to embark on empirical socio-legal work in the first place".[66] The extent to which legal academics are justified in exhibiting symptoms of MAS can be demonstrated by reference to an example taken from the United States. Hull, then Associate Professor at Rutger's University, published a less than flattering review[67] of Mann's research into 5,317 civil cases involving debt in Connecticut.[68] Hull begins by noting that empirical research is "the most pressing item on the agenda of legal scholarship"[69] and hence Mann's research should be welcomed; however, she goes on to pick holes in Mann's methodology to such an extent that she concludes that Mann's quantitative arguments are flawed.[70] This only goes to reinforce the point made earlier about the importance of following a robust methodology. The problem is that recognition of this need feeds MAS!

While it is easy for legal scholars to be intimidated by a lack of formal training, Schmidt and Halliday do not think that formal training, although advisable, is a prerequisite of sound methodological technique.[71] They concede that even "naive fieldwork"[72] has value, not in and of itself as such, but as a starting point from which the researcher can move forward, improving their skills and developing more sophisticated methods. They encourage researchers to offer a "warts and all"[73] account of their projects, to admit the mistakes made and to give due credit to the often serendipitous nature of empirical research so that it might "relieve many of the worries that plague students and scholars".[74] Some suggest that a lack of training can be compensated for by working collaboratively with colleagues who do have the necessary expertise.[75] This will require lawyers to break away from the "lone scholar" model of scholarship which is dominant in law schools,[76] and embrace collaborative and multidisciplinary research. Universities are also nowadays generally better at providing support and training for those seeking to adopt new methods, particularly with the development of online tools.

Funding

Empirical legal research is expensive, both in terms of time and financial costs. It is, therefore, the type of research that requires funding.[77] In an era in which universities are encouraging academic staff to obtain competitive research funding, legal academics have often struggled to see the value of this: traditional black letter research, with its focus on library/computer based sources, appears to require little in the way of additional funding. Empirical legal research, however, usually involves direct costs such as travel expenses or the employment of research assistants. It does, therefore, offer a route for making funding applications, which will be attractive to employers. The lack of formal training in research methodology, however, raises its head again as a potential hurdle. As Wheeler and Thomas

write, potential research funders "have voiced their consternation at the level of engagement or indeed

[66] Halliday and Schmidt, n 60, pp 2-3.

[67] Hull NEH, "The Perils of Empirical Legal Research" (1989) 23.5 *Law & Society Review* 915-919.

[68] Mann BH, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987).

[69] Hull, n 67 at 915.

[70] Hull, n 67 at 918.

[71] Halliday and Schmidt, n 60, p 4.

[72] Halliday and Schmidt, n 60, p 4.

[73] Halliday and Schmidt, n 60, p 2.

[74] Halliday and Schmidt, n 60, p 7.

[75] Epstein and Martin, n 45, p 924.

[76] Heise, n 6 at 817.

[77] The Nuffield Inquiry offers a number of recommendations on how to improve the funding of empirical legal research, see Genn, Partington and Wheeler, n 1, Ch 5.

lack of it with methodology that is sometimes revealed in socio-legal funding applications".[78] Empirical legal researchers seeking funding must, therefore, be careful to engage with the language and practices of social science research methodology in their applications. This will, of course, also ensure that their project is well designed and executed.

Accessing data and respondents

Given that primary data forms the core element of any empirical legal research project, gaining access to that data is a fundamental prerequisite of a successful project. The planning stages of empirical legal research are time-consuming and can be frustrating. The researcher must give careful consideration as to how access to potential respondents will be secured, and may need to enlist the help of others in opening doors. It may, for example, be necessary to gain permission before approaching potential respondents and this can take months, if not years, to obtain (and may not always be forthcoming). As Burton notes, "organisations, such as the police and courts, are often deluged with research requests and those in authority may be reluctant to grant permission for their staff to devote time to what they see as unproductive academic research activities".[79]

Ethics

Consideration of the ethical implications of the research is fundamental. There will often be both institutional and external processes to be followed in gaining ethics approval. Assistance in this respect is available through a review of the literature on research methodology and best practice guidelines such as those offered by the ESRC and SLSA.[80] The key consideration in any research which involves human participants is the avoidance of harm, but other ethical principles are also important such as ensuring that respondents participate on an informed and consensual basis, that information supplied is confidential and that the anonymity of respondents is protected. To ensure that this is achieved, careful planning is crucial and ethical issues much be considered at the earliest stage.

CONCLUSIONS

Although empirical legal research is not easy and is sometimes frustrating, it is intellectually rewarding and enjoyable to do.[81] It is incumbent upon established empirical legal scholars, particularly in the field of property law, to mentor less experienced researchers but these efforts must be supported and facilitated by an infrastructure of training, funding and collaboration.[82] There are unique benefits to be derived from exploring the practical realities of law, "boundless opportunities ... to explore uncharted territory", the chance to establish "an original voice" and "the prospect of conducting path-breaking work that is relevant, influential and socially important".[83]

[78] Wheeler S and Thomas PA, "Socio-Legal Studies" in Hayton DJ (ed), *Law's Future(s)* (Hart Publishing, Oxford, 2000), p 277.

[79] Burton, n 12, p 59.

[80] A copy of the ESRC's *Framework for Research Ethics* can be found at http://www.esrc.ac.uk/about-esrc/information/research-ethics.aspx, viewed 11 December 2013. The SLSA's *Statement of Principles of Ethical Research Practice* can be accessed at http://www.slsa.ac.uk/index.php/8-general-information/4-slsa-statement-of-principles-of-ethical-research-practice, viewed 11 December 2013.

[81] Genn, Partington and Wheeler, n 1 at [182].

[82] Genn, Partington and Wheeler, n 1, Ch 5.

[83] Genn, Partington and Wheeler, n 1 at [182].