THE OPPORTUNITIES AND CHALLENGES OF EMPIRICAL WORK: HOUSING POSSESSION IN THEORY AND IN PRACTICE

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This chapter explains how empirical enquiry of the kind unburdened by the pursuit of a particular hypothesis or strict adherence to scientific methods, has much to offer in terms of developing our understanding of law and, in particular, the traditionally doctrinal field of property law, providing insights into the operation of law that cannot be learned from books alone. The argument is discussed in the context of an ongoing research project by the authors that investigates whether 'non-financial' considerations are taken into account during the process of housing possession, looking at both owner-occupied and rented housing. The project is a broad enquiry exploring the extent to which issues other than property rights and the ability to pay are considered when it comes to losing a home, that is, matters such as the welfare of children, health problems, community networks, attachment and so on. The study is not confined to the ultimate decision making stage, when the judge decides whether or not to order possession, but looks also at how non-financial factors inform decisions made earlier on, such as whether a mortgagee thinks that the time has come to issue possession proceedings. Although the study is of possession proceedings in England, and is based around the English legal system, the purpose of this chapter is not to report on the research findings but to make a point of broader significance in relation to the role of empirical research within legal scholarship.

Empirical research, as defined by Cane and Kritzer 'involves the systematic collection of information ("data") and its analysis according to some generally accepted method.'[1] Of course, data can be quantitative or qualitative but empirical legal studies tend to be most strongly associated with the scientific or positivist tradition and thus quantitative work tends to dominate.[2] Our housing possession study is 'mixed-methods' research, in the sense that is has the characteristic of 'methodological eclecticism'[3] as it uses 'more than one research technique or strategy to study one or several closely related phenomena…..'.[4] We have used interviews, observations, conversations, and surveys - explained in more detail below - for the reason that employing 'multiple tactics for observing and understanding' provides 'more reliable' information than one technique alone does.[5]

The main argument of the chapter is contained in the penultimate section, where we explain what we refer to as the existential challenge, that is, the soul searching that we have gone through in working out how our research 'fits' within the legal academy. The principal investigators, the authors of this chapter, are both legally trained and work in law schools rather than in social science or socio-legal departments. Our teaching is centred around doctrinal or 'black letter' law, that is 'the careful analysis and exposition of positive or written law'.[6] Neither of us has specific training in social science research methodology, although Lisa has previously undertaken a number of empirical studies.[7] The approach of our study has been one of fact-finding, guided by a broad research question but designed ultimately to discover what happens in the real world. Our conscious decision not to dress it in particular theoretical language or a methodological framework, however, is at risk of setting our research apart

[1] Cane & Kritzer 2010, p. 4. Their definition omits traditional analysis of formal legal documents – primarily court decisions and legislative materials (legal analysis) – although they accept that there is a spectrum and that the two methods are not mutually exclusive. Below, we include legal analysis as part of the 'reading' stage of our mixed methods research.
[2] Cane & Kritzer 2010, p. 3–4.
[3] Teddlie & Tashakkori 2011, p. 285.
[4] Nielson 2010, p. 953.
[5] Nielson 2010, p. 953.
[6] Campbell & Wiles 1976, p. 550.
[7] See, for example, Whitehouse 1998, Whitehouse 2006, and Whitehouse 2011.

from the flow of contemporary thought about this kind of scholarship. Darbyshire's empirical study of judges and the routines of judicial work, for example, has been criticised for its (intentional) failure to apply a particular theoretical model.[8] In effect, the final part of the chapter makes the case for the legitimacy of such heuristic or 'fact finding' empirical work.[9]

1. Why Empirical Work?

A doctrinal approach to the law relating to housing possession in England reveals a lot of variance in the extent to which legal rules permit judicial consideration of non-financial matters or personal stories. So, for example, in the case of tenancies some grounds for possession are mandatory and give the judge no discretion if the facts supporting that ground are proven (which may, simply involve proving that the correct process has been used for ending the tenancy). In other instances, the judge may have full discretion to do 'what is reasonable'. Indeed, when refusing to order possession in *Bracknell Forest BC v Green* where possession was sought on the grounds that the tenant occupied a property bigger than required for his needs, the judge referred to the defendant's 'genuine emotional attachment' to the property 'as part of the family', the fact that 'decades of family memories which they hold dear' were located in this home, and that the property provided a 'profound sense of security – connected as it is with their family memories – which sustains them.'[10] Likewise, in finding it not reasonable to order possession in *Whitehouse v Lee*, the Court of Appeal made the importance of home clear: the couple had lived in the home for 45 years, the home was 'one which they loved, where they had brought up their family and in which they had established themselves as valuable, popular and respected members of a local community.'[11] By contrast, personal circumstances are not relevant in the context of first mortgages save in so far as they relate to the ability to pay the mortgage and arrears: the mortgagee has a 'right to possession' and where the property is a dwelling the judge has a power to postpone or suspend possession only if the mortgagor is able to demonstrate an ability to pay arrears within a reasonable time.[12] Personal stories of mortgagors are not legally relevant.

Arching across these legal rules is Article 8 of the European Convention on Human Rights which concerns the right to respect for the home.[13] Although the extent of its application remains uncertain in English law, it is at least the case that where a public authority seeks possession of a person's home, 'the court must have the power to assess the proportionality of making the order'.[14]

Doctrinal analysis explains when non-financial factors are a legitimate, in the sense of a lawful, issue for a judge to take into account. It does not, however, tell us anything about *how* judges take these matters into consideration (how they learn about them, what weight they attach to them) or whether a judge always operates within the framework of the law. Housing possession cases are a matter of routine in the county courts (a hearing typically takes 5–10 minutes) and as they do not get reported there is no public record of the detailed factors that a judge takes into account. As Hunter and others observe, the absence of a written record of the reasoned judgment in possession cases makes it difficult

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[8] Hunter 2012a.

[9] Terms used by Darbyshire in relation to her own work, see Darbyshire 2011, p. 14.

[10] [2009] EWCA Civ 238, paras [15–17]. See also *Battlespring v Gates* (1984) 11 HLR 6 (CA).

[11] [2009] EWCA Civ 375, para [33].

[12] Section 36 Administration of Justice Act 1970.

[13] Article 8 – Right to respect for private and family life:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[14] See *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 and *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186. It remains unclear whether this also applies to private landowners recovering possession.

to research the decision making process.[15] Nor does doctrinal analysis have anything to say about whether, and how, non-financial factors come into play prior to a case reaching court. In an attempt to halt the rising tide of repossession, the UK government has used various regulatory interventions to steer lenders and landlords to use possession as a last resort. Previous studies show that the likelihood of losing your home may be affected by a number of factors including the approach and social conscience (mission?) of lenders and landlords.[16] Some lenders may be more forbearing and 'compassionate' than others and slower to take possession,[17] some landlords may likewise be quicker than others to rush to possession.[18] Commenting on the need for greater understanding of the repossession practices of mortgage lenders and how 'discretion works "on the ground"', Cowan refers specifically to one of the (as yet) unanswered research questions within the scope of our study, that is, an investigation of the 'interactive processes which take place sometimes over considerable periods of time' between lenders and borrowers apart from the court hearing.[19] In exploring these issues, both prior to and at the court hearing, our study aims to discover to what extent decision makers – judges, lenders, landlords – have information about the personal, non-financial stories of the occupier, and how these are taken into account. This, in outline, is our research question.

In designing our research project we used different methods to examine the opportunities that defendants have to 'tell their stories' (including personal and social circumstances) to decision makers (prior to and during court action), to receive advice, and the extent to which non-financial information is taken into account by decision makers. Our research builds on earlier studies that uncovered some information that relates to these issues,[20] but it has a different focus as it is specifically directed to the role of personal and social circumstances across all tenures and also uses different research methods (which are discussed in the next section). The timing of our research also enabled us to ask questions about specific developments that have occurred in recent years: the evolution of human rights law in the form of Article 8, procedural changes that have been made to enable possession proceedings to be made on line in the majority of cases (using PCOL – Possession Claims on Line), as well as the introduction of protocols designed to encourage greater collaboration between lenders/landlords and occupiers (the Pre-action Rent Arrears Protocol (PRAP) and the Mortgage Pre-action Protocol (MPAP)).

2. How: the Research Methods

The project began as a pilot project, using mainly qualitative research methods based around semi-structured interviews of elite actors (county court judges, lenders, housing advisors, and letting agents) and observation of possession lists in courts and of court-based duty advice schemes. The detail of the questions asked differed according to the interviewee category but they were designed to elicit information about how the relevant actor obtains information about the occupier's circumstances, whether the level of the occupier's engagement with the process impacts upon decision making, what kind of circumstances influence the way decisions are made, whether legal representation makes a difference, how decisions are taken, the impact of MPAP and PRAP, and the role of human rights.

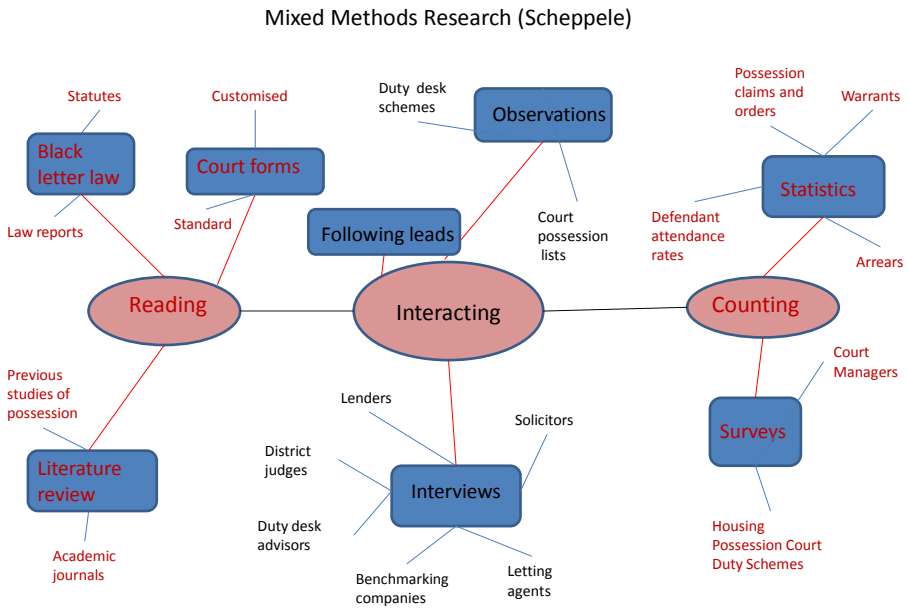
Over time, our project has expanded. As the research got under way we appreciated how central the

[15] Hunter, Nixon and Blandy 2008, p. 77.
[16] See, for example, Ford & Wallace 2009; and Hunter et al. 2005.
[17] Citizens Advice, for example, provides evidence of disparity in the approach adopted by 'prime' and 'sub-prime' lenders, see Citizens Advice 2007. Shelter also offers evidence of sub-prime lenders flouting current rules by imposing disproportionate charges upon mortgagors in arrears, see, Rashleigh & Marshall 2010, p. 24.
[18] For an account of the approach taken by some social landlords in relation to rent arrears cases see Cowan 2011, pp. 340–344; and Hunter et al. 2005.
[19] Cowan 2010, p. 337.
[20] Such sources included Cowan et al. 2006; Citizens Advice 2007; Wallace & Ford 2010; Nixon et al. 1996; Ford, Kempson & Wilson 1995; and Blandy et al. 2002.

role of information was to our research question: what opportunities does an occupier have to tell his or her story to decision makers? This led to two major expansions of our project in the form of surveys. The first is a questionnaire sent to the managers of courts so that we can learn more about listing practices (how are cases grouped together, how much time is allocated to cases), how many defence forms are filed, what help is available to defendants who turn up at court without representation, and what challenges arise when defendants are 'self-represented' (formerly called litigants in person). The second is a questionnaire to advisers who are available to provide legal advice on the day in court (housing possession court duty schemes). This survey asks about the funding and support available to such schemes, what proportion of defendants attend court (and what explains non-attendance), what impact PRAP and MPAP have had, whether the involvement of housing advisers affects the outcome of a case, whether the particular judge hearing a case makes a difference, whether non-financial information is taken into account, and how human rights arguments are dealt with.

In the end, our research project has used a greater range of methods than originally envisaged, and the findings are much richer for this. A summary of our research methods is given in Figure 1. In preference to the conventional language of qualitative and quantitative research methods, we have adopted the terminology of reading, interacting, and counting used by Scheppelle,[21] language that we think more clearly explains the processes that have been involved in our research.

Figure 1:



Reading: This includes work that is at the centre of most legal research – studying law reports and statutes – but we have also collated court forms and reviewed processes to understand how information is collected and presented to decision makers. In addition, we have read widely around the topics we are researching, looking at articles and previous studies. Again, this is familiar territory for legal scholars, although what is less usual is for lawyers to describe this as a 'literature review' and for law journal articles to demonstrate or expressly articulate that it has been conducted.[22] Legal scholars tend not to refer to commentators and the like in a systematic manner, as if to establish their credentials, but instead mention only those writers whose views they wish to adopt or critique. In

[21] Scheppele 2009.

[22] As lawyers engage increasingly in interdisciplinary work, and apply to funding bodes, the language and ideas of literature reviews will become more common.

most other disciplines it is accepted practice that outputs, that is, publications, must demonstrate engagement with the scholarly literature as part of the art of persuasion[23] in order to show that researchers are up on the 'state of the art'[24] and to identify a gap or problem in the literature that explains the research question being addressed.

Interacting: This is a useful way of referring to the qualitative[25] empirical research that we are doing. The aim is to gather an in-depth understanding of the possession process and of decision making, to understand the way in which the various actors behave, and how processes impact on this. The primary methods that we are using include semi-structured interviews of elite actors (23 in total), which have been recorded and transcribed, and observing possession lists and duty schemes. These are familiar techniques for qualitative work. But the language of 'interacting' neatly encompasses the broader, less organised ways of learning, through emails, serendipitous conversations and following up on contacts made.

Counting: This includes quantitative[26] empirical research, that is, information that is gathered in a systematic way that enables us to present data in a measured way. Part of this involves analysis of published statistics, but we have also been seeking out more hidden statistics and have found a number of gaps (for example, there is no record of the number of defendants who attend court). But our main quantitative research tools are Survey Monkey questionnaires to court managers,[27] and duty advice schemes.

3. Practical Research Challenges

The following table, Figure 2, sets out some of the key challenges that the research has involved. Many of the problems are practical ones. The 'chicken and egg' problem is frequently mentioned, which refers to the fact that many formative questions are interdependent: which task comes first, how can you do one until the outcome of another is known? This has been a problem throughout the research. It is best illustrated by giving an example. Empirical research cannot be done without funding because, in addition to the research time of the principal investigators, there are real costs involved (for travel, database subscription, transcription, employing a research assistant, etc). Two referees in the feedback from one of the (unsuccessful) funding applications commented on the lack of guaranteed access to the courts and the 'considerable time' that was likely to be taken by the Judicial Office to process an application for consent to interview judges (which brought into question our projected timetable). But here we have a chicken and egg problem; the research methods are inevitably framed by the extent of funding available, yet the methods have to be reported to the Judicial Office in the application for consent to interview judges. Which should come first? If funding is unobtainable prior to Judicial Office consent then the methods have to be designed without knowing what level of funding might be possible. Given the difficulties in obtaining funding it is necessary to retain flexibility about methods to enable multiple sequential applications to be made depending on the funding body's preferences and resources. Further, the referees were quite right: it took ten months to get Judicial Office consent;[28] and an additional six months of discussions with Her Majesty's Courts

[23] Gilbert 1977.

[24] Epstein & King 2002, p. 56. Indeed, this is symptomatic of a far wider issue found in social science research: that there are accepted (and expected) ways of presenting research in publications that follow an articulated approach, explaining the research by reference to some broader theoretical investigation that is being approached by adopting an accepted 'methodology'. Lawyers seldom openly discuss the methods of research.

[25] That is, non-numerical.

[26] That is, numerical.

[27] But now called Delivery Managers. The research has not been helped by this being a time of upheaval in court administration; with court closures, and amalgamation of court management systems.

[28] We were delighted to receive consent. Hunter et al. note that interviews with judges do not often appear central to many studies, perhaps because of a (past?) reluctance to authorize such research: Hunter, Nixon & Blandy 2008, p. 81.

and Tribunal Service (HMCTS) in relation to the survey to delivery managers (responsible for court administration). Waiting for consent prior to applying for funding introduces unacceptable delay.

The opportunity to expand the project using surveys means that we now have much more useful information, but it was not without difficulties. We obtained money from the Oxford University John Fell Fund for the pilot project, with the majority of the funding being used to employ a research assistant, but we had not costed in the additional time we would need to design, prepare, distribute and analyse these surveys. We had to obtain consent from HMCTS (in addition to consent we had already obtained from the Judicial Office): this was a laborious and often frustrating experience. [29]The formal application to HMCTS required a final version of the survey, yet the final version depended on feedback that could be provided only by HMCTS: another illustration of the chicken and egg problem. For the Court Duty Scheme survey we had to create our own list of contacts as no such database exists.

Figure 2: Challenges of the Housing Possession Study

Challenges		
Research design	The Why (the aim), What (research questions) and How (methods) issues	The 'chicken and egg' problem
Collaborative work	Possible practical difficulties such as communicating at a distance as well as possible 'personality' differences.	A few meetings 'face to face' but communication mainly via email and telephone. No personality differences, fortunately!
Obtaining approvals	Ethics clearance: from University. Approvals: from Judicial Office, from Her Majesty's Court and Tribunal Service (HMCTS)	Slow, bureaucratic, the 'chicken and egg' problem, the 'false start' problem.
Funding	To employ Research Assistant, travel, accommodation, software costs	Identifying potential funders. The 'chicken and egg' problem
Learning new skills	Interview design, survey design, sampling, CAQDAS (computer aided qualitative data analysis), coding	The 'too much to do' and 'edge of my comfort zone' problems!
Recruiting interviewees	Sampling and spread	High positive response rates from district judges, prime lenders, advisers; low/no positive response rate from secondary lenders (sub-prime) and letting agents
Surveys	Content: length, open textured vs tick box; HMCTS involvement. Obtaining contact information.	Relationships between length and response rate, length and research value. The 'chicken and egg' problem (again)
Ethical concerns	The inherent 'dangers' of empirical research including data protection and security, ensuring the anonymity of respondents, personal safety, and so on.	Securing 'sensitive' data required technical knowledge and implementation such as storing data on secured networks and sending password protected documents via email.

[29] Again, we were delighted to get this additional consent, and their further assistance discussed in the text below the table.

Black holes	Obtaining information about cases relating to trusts of land Statistics about defendant attendance, filing of defence forms	Trusts of land cases do not appear as category in official (or other) statistics No records are kept as to how many defendants turn up, or how many file defence forms
Time	Sequencing; research time; getting distracted	Most aspects are very time intensive jobs: particularly compiling contact lists, obtaining consents, coding. Getting bogged down in detail; staying on track with key research questions
Existential questions	The nature of legal scholarship	Is this 'property law'? (does this matter?); where does it fit in law school (does this matter?); is time commitment appropriate in age of research assessment exercises?

The table also refers to the 'edge of my comfort zone' and 'false start' problems. These are different, but related. Commentators on empirical research refer to the fact that projects are always written up in a way that suggests everything went according to plan. In fact, there are often 'false starts' and lucky (or unlucky) breaks. We obtained (time limited) funding but the Judicial Office consent took so long to get that we re-designed the project without the judicial interviews to enable us to utilize the funding, only (thankfully) to obtain consent at the last minute. We spent some time working on an appropriate sampling method for the delivery manager questionnaire, only later (gratefully) to learn that HMCTS were willing to distribute the survey to all English courts. We came to this project with different backgrounds, but neither of us has formal training in (non-law) social science research methods. Take CAQDAS: neither of us had used software for analysis previously, so we have had to learn what the possibilities are and then choose between different products available. In the event we chose Dedoose, over the better known Nvivo, for various practical reasons, including that it is web-based and permits teams to work on a shared project simultaneously. This means that the whole project has been a learning adventure: fun, but at times a little uncomfortable.

4. Existential Research Challenges

Our research methods were designed to address the research question that intrigued us: do decision makers give any consideration to the kinds of issues that comprise the personal stories of life, and, if so, how do they find out about them and weigh these factors against the 'hard facts' of property rights and debts due? The project was intended as a pilot to enable us to test whether our methods were appropriate to the task, and to enable us to build on what we discover to design a more tailored larger scale study. As the project has evolved we have had the opportunity to expand our methods and already have a mine of rich data that can both supply material for publications and provide us with a base for developing more specific study models. We are conscious, however, of the fact that our empirical research is outside the usual property law scholarship box that tends to be heavily doctrinal (particularly in the United Kingdom), and yet our research project is neither dressed in the language and style of contemporary socio-legal work, nor has the sophistication of the scientific approach of much modern American empirical legal scholarship. This brings us to the heart of our 'existential challenge'.

In the United Kingdom, there has been recent concern that there is simply not enough empirical

research being done in law.[30] It is interesting that in the United Kingdom, empirical legal research has been subsumed within the 'discipline' of socio-legal studies,[31] albeit that defining what is meant by 'socio-legal' is difficult.[32] Socio-legal work started out in the early 1970s as heavily empiricist,[33] using social science research methods to produce research that was, predominantly, descriptive. Much early socio-legal work was critiqued as 'atheoretical'.[34] In 1976 Campbell and Wiles warned that the pragmatism involved in this empiricist approach to 'finding out' about the operation of law in fact was also a major weakness; 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'.[35]As if heeding to this warning, there has since been a movement away from stand-alone empiricism so that contemporary socio-legal research appears to have two concerns: a broad empirical enquiry coupled with a more abstract social-theoretic framework which is informed by theories emerging from the broader social sciences.[36] For some, the 'socio' component represents not the sociological perspective but 'an interface with a context within which law exists'. [37]

Engagement with wider social sciences appears to have impacted on socio-legal scholarship in two ways. First, at the risk of over-generalisation, theoretical perspectives now appear to be dominant.[38] As McCrudden observes, there has been a 'turn to supplementing empirical work with more theoretical approaches.'[39] This is the theme of much modern commentary on socio-legal research; Banaker and Travers argue not only that empirical legal work must take into 'consideration the debates on the relationship between social scientific methodology and theory' but they cannot 'see how empirical research, which helps us to understand legal institutions and legal behavior in relation to broader social interests and factors, can be conducted without full theoretical engagement and commitment to advancing social scientifically aware socio-legal research.' [40] The second impact of engagement with wider social science, is that, mirroring models of research within the wider social sciences, good empirical work is seen as being designed to test theories through methods that can be replicated in order to produce verifiable results.[41] This creates challenges for studies such as ours. We have consciously and deliberately eschewed a research design that is centred around testing a theory. We have sought to discover 'what happens': how the possession process works, how much is known by the various actors about non-financial matters, and how much impact this information has on decision-making. But this choice had led to an existential disturbance. Can our research be seen as

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[30] See the Nuffield Inquiry on Empirical Legal Research: Genn, Partington & Wheeler 2006. In the United States the last decade has seen a period of growth of interest, and work, in empirical legal studies.

[31] Interestingly, the book resulting from a seminar on teaching empirical legal research is entitled 'Integrating Socio-Legal Studies into the Law Curriculum' and the introduction argues, in line with what we refer to below as the dominance of theory, that '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': Hunter 2012b, p. 3.

[32] See Thomas 1997.

[33] Campbell & Wiles 1976.

[34] See discussion in Wheeler & Thomas 2002, pp. 272–273.

[35] Campbell & Wiles 1976, p. 572.

[36] For further references to the movement from being highly empirical through to a more theoretically grounded movement see McDermont, Morgan & Cowan 2012, p. 21–22 and references.

[37] Wheeler & Thomas 2002. Cf Lacey who says one of the concerns of socio-legal scholarship is to locate 'legal practices within the context of other social practices which constitute their immediate environment': Lacey 1996, p. 132.

[38] Hillyard, writing in 2002, refers to a 'preoccupation with theory in socio-legal studies and the consequent neglect of researching the material realities of modern life': Hillyard 2002, p. 646.

[39] McCrudden 2006, p 643.

[40] Banakar & Travers 2005, p. 24. Later in the book they do, however, accept that socio-legal research can include empirical research that addresses the questions asked about law by black-letter lawyers and practitioners (279), although they still appear uncomfortable and suggest a theoretical framework may be needed to make sense of the data (281).

[41] Epstein & King 2002.

'good' socio-legal research if it is 'atheoretical' and 'pragmatic', labels that were used critically of past socio-legal scholarship?

A similar question arises in relation to the fit of our research with 'good empirical research'. In 1995 Schlegel inquired why law had not become 'a scientific study, in the twentieth-century sense of science as an empirical inquiry into a world "out there"…'.[42] But much of the modern American literature does now adopt both the language and methods normally associated with scientific enquiry.[43]

The implicit assumption, therefore, is that good socio-legal/empirical work must be either theoretically driven or strongly positivist as 'collecting statistics or developing hypotheses are the only way of doing social science.'[44] Our own empirical investigation builds on our more doctrinally based work in which we examine what the law is and describe the contexts in which judges are enabled, required, or disabled from taking account of non-financial considerations. In effect, our current research comprises two interlocking limbs, both voyages of discovery. The first, largely the stuff of conventional legal scholarship is a descriptive legal science that aims to 'present the law…in a way that is as neutral and consistent as possible'.[45] To adopt the language used by Roscoe Pound,[46] this is the 'law in books', and the methods are illustrated in the 'reading' stage of our research in Figure 1. The second limb of our research draws on the data from the 'interacting' and 'counting' stages of the research to discover what happens in practice. This is not necessarily '*law* in action' – if that expression implicitly presumes an acceptance that the law has a distinctive role to play in the decisions – as it is a broader investigation into how decision makers behave, whether or not they do so by reference to legal frameworks. To take an extreme illustration: if a mortgagor with significant arrears and no prospect of payment has a terminal illness our research suggests that a mortgagee may decide not to commence possession proceedings even though it is only ability to pay that is a relevant consideration within the legal rules.

Both the 'law in books' and 'decision making in practice' limbs are essentially empirical processes. Although legal scholars tend not to think of the former as empirical it is nonetheless data that is being collected, as Epstein and King point out, (although the data being collected and analysed comes from statutes, decided cases and the like rather than surveys or interviews).[47] In our research both limbs are intended to be neutral, value-free descriptive accounts so far as we can achieve this. The way we then choose to present and evaluate the collected material will be the stage at which we test theories, explore hypotheses etc, but the gathering stage has had an intentionally descriptive goal.

This existential question is, we think, important in relation to the future of empirical legal research. It is not simply that researchers need to have the confidence to pursue these kinds of studies without fear of how it will be accepted within the academy of scholarship, but there are some very real practical implications. This is the kind of research that needs funding and, as Wheeler and Thomas write, potential researcher funders 'have voiced their consternation at the level of engagement or indeed lack of it with methodology that is sometimes revealed in socio-legal funding applications.'[48]

It is clear that methodology must be robust to ensure the veracity of the data obtained, but we would argue that research within the social sciences and particularly within law, should not be rejected solely for the reason that it does not apply the language or methodology of scientific enquiries. Provided the researcher acknowledges any weaknesses in the methodology and the implications this may have for

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[42] Schlegel (1995), p. 1.
[43] See, for example, Huang 2008; and Fagan, Davies & Carlis 2012.
[44] Darbyshire 2011, p. 13.
[45] Smits 2012, p. 13.
[46] Pound 1910.
[47] See also Ulen who writes: '…the first doctrinalists, such as Christopher Columbus Langdell, believed that their method of reading judicial opinions so as to discern the doctrinal core within a field of law and particular jurisdiction was an empirical inquiry along scientific lines': Ulen 2002, p. 915.
[48] Wheeler & Thomas 2002, p. 277.

any claims made within the work, then such 'unscientific' empirical research can still offer interesting and valuable insights into how law operates in practice. Darbyshire's book *Sitting in Judgment: The Working Lives of Judges* is instructive in this respect. Upon any objective assessment, her methodology could be considered ad hoc and arbitrary with some respondents having been chosen by senior members of the judiciary (leading to the explicit acknowledgment that this resulted in her being diverted away from the 'nutters'),[49] 'out of curiosity'[50] or 'opportunistically'.[51]

Darbyshire admits that her methodology is 'not "scientific"'[52] and that she does not apply any particular theoretical model[53] which leaves her work open to the criticism that it is purely anecdotal.[54] In defence of her approach, however, she argues that her work is more closely related to socio-legal ethnographical studies and might best be described as 'observational research' that reveals 'the practical character of everyday activities'.[55] Despite these apparent flaws, her work has been welcomed on two fronts. The first avoids the difficulties associated with its methodological deficiencies by viewing the work as a source of data useful for other researchers who 'will be able to mine the book for valuable raw material'.[56] The second acknowledges those flaws but accepts the work for what it is, namely 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...'.[57] The argument therefore, is that even where empirical research is not founded upon a particular theory, does not employ scientific methods and its findings cannot be verified as being representative of the way law works in practice in every region, it still has the potential (to steal a well known phrase) to inform, educate and entertain.

We should also not lose sight of the fact that empirical studies, such as our own, are of value for the reason that they shine a light on unreported practices and cases that impact significantly on the lives of individuals. While our project is relatively small scale and we may not be able to make grand claims, if we are able to suggest what makes good or bad practice, and opportunities to improve information channels, then it will have been worthwhile.

It appears to us that empirical legal research, in England at least, has been hi-jacked by socio-legal scholars so that it carries value (only) because of the way it interacts with and enlightens wider social theory. It appears that within the social sciences there is a similar tendency to be 'dismissive of research that has no obvious connections with theory' and that such research is 'often dismissed as naïve empiricism'.[58] But, as Byrman notes, sometimes this kind of research grows out of an interrogation of literature;[59] indeed, in our case it is the literature gap in what is known about the information available to decision makers and how this information feeds into decisions made that shaped our own enquiry. In this kind of study, the theory may be inductive, that is growing as an outcome of the research.[60] Empirical legal research can, therefore, be important not simply because of its relationship to social theory but, alternatively, because of the way in which it interacts and enlightens doctrinal law and legal theory. The legal academic community is in danger of losing sight of this.

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[49] Darbyshire 2011, p. 7.
[50] Darbyshire 2011, p. 6
[51] Darbyshire 2011, p. 6.
[52] Darbyshire 2011, p. 13.
[53] Darbyshire 2011, p. 12.
[54] Darbyshire 2011, p. 13.
[55] Darbyshire 2011, p. 14.
[56] Hunter 2012a, p. 2.
[57] Gee 2012, p. 680.
[58] Bryman 2012, p. 22.
[59] Bryman 2012, p. 22.
[60] In contrast to the more common deductive theory in which the researcher develops the hypothesis to be tested from a known theory: see Bryman 2012, pp. 24–27.

5. Concluding remarks

This research project was driven by a concern to understand more fully what the role of non-financial factors is during the process of housing possession. The analysis of our research is not yet complete but a prominent theme will focus around 'information': how non-financial factors are discovered and communicated, and the role they play in informing the exercise of discretion. This has emerged as central in all of our interviews and it links in with a number of process issues: the way forms are structured, the level of occupier engagement with the processes of possession, opportunities to obtain legal advice, the presentation of legal arguments and so on.

The law provides a framework within which decision makers may operate (not that they necessarily do) but a study of the law alone tells us very little about how decisions are actually made. Likewise, a study of the law in books reveals only when it is, and is not, permissible for a judge to take account of factors beyond property rights and financial considerations and, to the limited extent that cases are reported, how judges go about this exercise. It is only when this doctrinal approach to the study of law is supplemented by empirical research that we truly understand that, whatever legal theory says, a decision maker cannot take account of personal stories that never get told, that defendants that do get to tell their story are actually quite likely to influence the decision made, that judges do take account of non-financial factors that are known, and that there is a strong perception that the outcome of a case is affected by which judge hears it.

Although conventional 'black letter' scholarship cannot tell us how law plays out 'on the ground' it deservedly holds a prominent place in property law scholarship: property law involves hard, technical law that repays close analysis of written materials . Nonetheless, there are many areas of property law that could be enhanced by a broader approach to research methods. In English law schools (with a few exceptions) there is often a considerable distance between socio-legal scholars and property law scholars; they work in different cultures, have different traditions, and (we suspect) undervalue the work of the other. The socio-theoretical thrust of much contemporary socio-legal work may partly explain this distancing and serve to discourage those untrained in social science research methods from exploring the possibilities. It need not be this way: it is not necessary to see empirical work as a tool for the testing of social theories. The point of this chapter is to argue that stand alone descriptive empirical research has real value because of what it reveals about the way that the world works. This end should be sufficient for legal scholarship.

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List of Abbreviations/Acronyms

AC	Law Reports, Appeal Cases
CA	Court of Appeal of England and Wales
CAQDAS	Computed Aided Qualitative Data Analysis
EWCA Civ	Court of Appeal of England and Wales (Civil Division) (neutral citation)
HLR	Housing Law Reports
HMCTS	Her Majesty's Courts and Tribunals Service
MPAP	Mortgage Pre-action Protocol
PCOL	Possession Claims on Line
PRAP	Pre-action Rent Arrears Protocol
UKSC	United Kingdom Supreme Court (neutral citation)

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