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Empirical research in law

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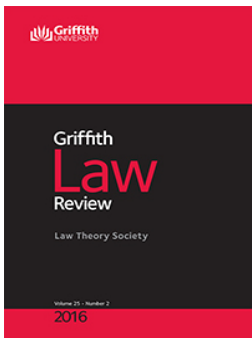
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Empirical research in law

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ABSTRACT

Undertaking empirical research in law can be a daunting task, one for which current undergraduate and postgraduate legal education does not provide a great deal of preparation. Yet the ability to undertake such research is valuable and, some suggest, in demand. Many areas of law, its operation and effects, can be usefully informed by empirical research. This article suggests that the benefits of empiricism are both pragmatic or policy-driven, and theoretical.

KEYWORDS

Legal research; empirical research; legal education

1. Introduction

Increasingly, higher degree research (HDR) students are encouraged to undertake empirical research in pursuit of a doctorate or research master's degree in law. However, they may frequently have little or no training or experience in undertaking social research, and generally, there is a lack of education and training in empirical research methods for undergraduate and postgraduate students in law. This leads to a corresponding dearth of academics qualified to undertake or supervise such projects. Yet empirical methodologies also hold many attractions for legal scholars and for the practice of law – whether in relation to understanding evidence, basing policy decisions on sound research, or having a deep and critical understanding of law's impact on the world. With the current trend toward interdisciplinarity, it is more important than ever that undergraduate and particularly HDR students be provided with opportunities to train in, and undertake, empirical legal research.

Empirical research in law has a long history. The Legal Realists were thinking about law's social implications in the early 1900s.¹ Today, it is possible to find a multitude of examples of empirical methods in law. While criminal law and family law are perhaps the most abundant sources,² in Australia empirical legal research has been conducted in areas as diverse as bankruptcy,³ consumer law,⁴ and law and popular culture.⁵ While it may not always be explicitly labelled or taught, Mohr and Manderson observed in

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¹Pound (1910). Note that Posner (1987) identifies John Austin as the forerunner of the Legal Realists.

²Bradney (2010), p 1025; Fehlberg (1997); Lovric and Millbank (2004).

³Ali, O'Brien and Ramsay (2015).

⁴Snijders and Webb (2014).

⁵Leiboff (2013); Sharp (2012).

2002 that more critical, interdisciplinary and empirical research was taking place in Australian universities than perhaps was commonly realised.⁶ They noted that ‘research understood as a genuine and far reaching inquiry into the nature and experience of law *is* taking place in our universities, and it is increasing’.⁷ Bradney made a similar point in the late 1990s when he suggested that the ‘doctrinal project’ was in its ‘death throes’.⁸

Still, even in the face of the ‘extraordinarily confined approach’⁹ of doctrinal method, there seems a general reluctance on the part of legal academics to engage with diverse methodologies. Empirical research is ‘largely absent from law school curricula’.¹⁰ Thus, students’ and even early career academics’ encounters with various methodologies are likely to be ad hoc, unstructured or involve learning on the job. Even with access to training and supervisors experienced in conducting empirical research, embarking on such a project can be a daunting task as empirical legal research throws up various unique hurdles.¹¹

This article considers why it is that use of empirical method remains relatively absent from law schools. It goes on to suggest that empiricism in law holds out many possibilities, both practically and policy-oriented, and theoretical, for legal academics and HDR students in law.

2. What is empirical research in law?

Empiricism refers to a basis in experience or experiment; ‘[t]he word “empirical” denotes evidence about the world based on observation or experience’.¹² Harrington and Merry explain: ‘Empirical legal scholars approach what is taken to be “the law” ... as a social construction to be explained by empirically testing causal and non-causal hypotheses’.¹³ Yet what is meant by empirical legal research is not always clearly described or understood, or agreed upon. Many different strands of empiricism in law can be discerned; Cane and Kritzer refer to a ‘healthy pluralism’ of approaches.¹⁴ In a legal research context empiricism is frequently contrasted with ‘doctrinal’ work – research based on analysis of legal texts and doctrine.¹⁵

As Economides has observed, though legal scholars themselves may not explicitly label their work as empirical or ‘socio-legal’, it is unlikely to be only ‘esoteric theory or pure doctrinal analysis’.¹⁶ Fifteen years ago Manderson reported that only 20 per cent of Australian HDR students in law self-reported undertaking ‘doctrinal’ research, while 17 per cent described their work as ‘theoretical’.¹⁷ Another 20 per cent were engaged in ‘law reform’ studies,¹⁸ which may be assumed to have at least some empirical component. Hutchinson

⁶Manderson and Mohr (2002).

⁷Manderson and Mohr (2002), p 164 (emphasis added). See also Cane and Kritzer (2010), p 2.

⁸Bradney (1998), p 71. On the parasitism of law, see further Murphy and Roberts (1987), p 680.

⁹Manderson and Mohr (2002), p 163.

¹⁰Bradney (2010), p 1028. See also Burns and Hutchinson (2009).

¹¹See, eg, Burns and Hutchinson (2009), pp 167–168.

¹²Epstein and King (2002).

¹³Harrington and Merry (2010), p 1045.

¹⁴Cane and Kritzer (2010), p 1.

¹⁵See generally Vick’s discussion of doctrinalism: Vick (2004), pp 177–180.

¹⁶Economides (2014).

¹⁷Manderson (2002), p 152; reporting on the General Information Survey for the Academy of the Social Sciences in Australia. Note that Hutchinson and Duncan (2012) comment that ‘doctrinal’ was not defined in this study: p 99.

¹⁸Manderson (2002).

and Duncan report that a small study of law theses in the period 2004–09 found that just over half were ‘unlikely to require ethics clearance’,¹⁹ suggesting that the remaining 44 per cent had some empirical aspect.

On a broad approach, case studies, case analysis and arguments for law reform are all empirical methods, as they refer to ‘the real world’.²⁰ These methods may, however, be limited in terms of the empirical insights they can provide into the law’s operations. Moreover, Bradney notes that ‘most definitions of empirical legal research are much more restricted’.²¹

The starting point for a discussion of legal empiricism is often the United States’ Legal Realism of the early part of the twentieth century.²² Dow has described this movement as a challenge to the dominance of ‘legal science’ and reliance on the case study method in the late nineteenth century.²³ Perhaps the most obvious goal of empirical research in law is to contrast the ‘law in books’ with the ‘law in action’²⁴ in the legal realist tradition.²⁵ Kruse has explained the necessity for this type of project as follows:

Missing from the law in books are the myriad ways the meaning of law shifts as it filters down from appellate opinions to lower court cases; as it spreads from lower court cases to local practices; as local practices influence the information and advice about the law transmitted by lawyers, court clerks, social workers, probation officers, friends, neighbors, employers, and others; and as it ultimately shapes the lives of people who receive information or advice from these multiple sources of legal authority.²⁶

This variance between legal doctrine and its enactment in everyday life led to early empirical studies such as Moore and Callahan’s 1940s examination of parking fines²⁷ and Kalven and Zeisel’s study of jury decision-making in the 1960s.²⁸ Hutchinson explains that ‘[s]ocial science research is looking at the context in which the law operates with an aim to providing reasonably reliable data regarding human behaviour’.²⁹ ‘Testing’ the effect of law in an empirical fashion allows its impact to be measured against its purpose, thus, studies may be motivated by the desire to understand how the law *actually* functions.³⁰ Kalven and Zeisel’s study involved sending questionnaires to judges, asking them to describe ‘how the jury decided the case, and how they would have decided it ... without a jury’.³¹ From these data, the authors were able to examine how frequently disagreements occurred, and the basis of these disagreements.³² They described their

¹⁹Hutchinson and Duncan (2012), pp 99–100, referring to an audit of theses then available digitally, undertaken by Felicity Deane and Terry Hutchinson.

²⁰George (2006), p 146. See also Epstein and King (2002) and Hutchinson and Duncan (2012), p 114. Cf. Nard’s assertion that the ‘vast majority’ of legal research is theoretical in nature: Nard (1995), pp 348–349.

²¹Bradney (2010), p 1026.

²²For example, Leeuw (2015), p 20. Though note Sarat and Silbey’s (1988) discussion of differing ‘strands’ of legal realism: at pp 104–105; see also Trubek and Esser (1989), pp 8–10.

²³Dow (2011), pp 526–534. See also Vick (2004), pp 182–183.

²⁴For example, Pound (1910).

²⁵See, eg, Ginsburg and Shaffer (2012).

²⁶Kruse (2011–2012), p 660.

²⁷Moore and Callahan (1943).

²⁸Kalven and Zeisel (1971), p 11. See generally Kritzer (2009a).

²⁹Hutchinson (2010), p 97.

³⁰See, eg, Mnookin and Kornhauser (1979), p 987.

³¹Kalven and Zeisel (1971), p 45.

³²See further Gastwirth and Sinclair (2004).

research as one of a number of ‘contribution[s] to ... realist jurisprudence’, noting other contemporary empirical studies.³³

The law and economics movement is also often described as an early foray into empiricism in law;³⁴ Cane and Kritzer identify studies of ‘judicial behavior/politics’ and ‘socio-legal/law and society’ as additional strands.³⁵ In the 2000s references started to be made to ‘empirical legal studies’ or ELS, and there is now a *Journal of Empirical Legal Studies* and annual conferences around the world.³⁶ Heise described ‘traditional’ ELS as that which ‘uses statistical techniques and analyses ... studies that employ data ... to describe or support inferences to a larger sample or population’.³⁷ The amount of ELS work produced has grown immensely in recent years, supporting claims that it is variously ‘booming’, ‘blossoming’ and ‘a revolution’.³⁸ However, the focus of ELS on quantitative research and replicability has led to it being cast as narrower than its antecedents.³⁹

Perhaps the strongest continuing influence, however, comes from the law and society movement responsible for a great deal of socio-legal empirical scholarship since the 1960s.⁴⁰ In 1983, Harris wrote:

There is no agreed definition of socio-legal studies: some use the term broadly to cover the study of law in its social context, but I prefer to use it to refer to the study of the law and legal institutions from the perspectives of the social sciences.⁴¹

Collier has observed that the term is ‘notoriously ill-defined and contested’.⁴² Citing Feeley, Economides refers to three branches of socio-legal studies, ‘policy science ... social science, and a distinctive socio-legal voice ...’.⁴³ Hunter describes a continuum of approaches,⁴⁴ contrasting empiricism in pursuit of the ‘neo-liberal project of efficiency’ with more critical and theoretical socio-legal perspectives.⁴⁵ The former refers to the idea that empiricism in law can be too ‘instrumental’ or focused on a cost–benefit analysis – putting social science to work for ‘narrow utilitarian’ ends.⁴⁶

³³Kalven and Zeisel (1971), p 11 n 10, citing Conard et al (1964); La Fave (1965); Rosenberg (1964).

³⁴Economides (2014), p 269; Cooter (2011). See also Posner (1987), pp 764–765; and the *Journal of Law and Economics*, published by the University of Chicago Press.

³⁵Cane and Kritzer (2010), p 1.

³⁶See <http://www.lawschool.cornell.edu/SELS/conferences.cfm>; Chambliss (2008); Eisenberg (2011), pp 1713–1714; Ho and Kramer (2013). The first European conference on ELS was held in June 2016.

³⁷Heise (2011), p 1740 n 2. Note that Cane and Kritzer (2010) eschewed use of the term in the *Oxford Handbook of Empirical Legal Research*: p 1.

³⁸Ho and Kramer (2013), pp 1195–1196; Leeuw (2015), p 21, citing Seidman Diamond and Mueller (2010); van Dijk (2011); Heise (2011); Eisenberg (2011).

³⁹See Lawless (2015) on the strengths of ELS.

⁴⁰See, eg, the *Law & Society Review*, the journal of the Law and Society Association (Sarat and Silbey (1988), p 112); and the *Journal of Law and Society* (formerly the *British Journal of Law and Society*, which Harris (1983) described as ‘devoted to socio-legal work’: p 316). Cane and Kritzer (2010) group ‘socio-legal studies’ and ‘law and society’ together; see also Adler and Simon (2014), p 175 (Figure 1).

⁴¹Harris (1983), p 315.

⁴²Collier (2004), p 518 n 69, citing Bradney (2003). Trubek and Esser (1989) likewise described the law and society movement as ‘a shaky coalition’: at p 47.

⁴³Economides (2014), citing Feeley (2001).

⁴⁴Hunter (2008a), p 122.

⁴⁵Hunter (2008a), pp 122–125, criticizing in particular the ‘new legal realist’ movement. See also Harrington and Merry (2010), p 1047; Goldsmith and Vermeule (2002) (critiquing Epstein and King, 2002).

⁴⁶Feeley (2007), p 758, citing Tamanaha (2006). See also Davies (2002).

3. Methods

The actual methods chosen may include quantitative or qualitative analysis of interview material, observation or survey responses. Eisenberg, like Heise, has suggested that Empirical Legal Studies projects ‘usually’ involve statistical analysis.⁴⁷ In legal research, methods might include what Harrington and Merry refer to as ‘archival’⁴⁸ such as analysis of court files or court records,⁴⁹ as well as surveys,⁵⁰ interviews⁵¹ and observation, including of lawyers interacting with their clients;⁵² a typical day in a lawyer’s practice⁵³ or courtroom proceedings.⁵⁴ A great deal of legal practice involves performativity: though court work may be only a small part of a lawyer’s practice, its symbolic impact is tremendous. Often, research will use a combination of methods in a mixed- or multi-method approach: this can, as Harrington and Merry note, ‘enrich the insights’ of a project.⁵⁵ There are many mixed method studies involving the law.⁵⁶ Feeley’s study, for example, involved observation of the courtroom, combined with quantitative analysis of court cases; McCann’s study of labour activism utilised ethnographic observation, interviews, quantitative analysis of media reporting, as well as more traditional analysis of case law. Eekelaar, Maclean and Beinart observed and interviewed family lawyers, as well as analysing Law Society and Legal Aid statistics in order to draw their sample.⁵⁷

At the other end of the scale, methods in which the researcher is more implicated in interactions with participants,⁵⁸ such as ‘naturalistic observation’⁵⁹ in the tradition of ethnography, have also been used in legal projects. Ethnography may refer both to ‘fieldwork and to writing, to a practice and a genre’:⁶⁰ Darian-Smith describes it as ‘an in-depth study of one culture involving ‘firsthand, detailed, description of a living culture based on personal observation’.⁶¹ Legal or criminological ethnographies may involve a detailed study of law on the ground, in its everyday or commonplace iterations. Valverde’s *Everyday Law on the Street* is an example of this – a study of the everyday enactment of planning law in Toronto.⁶² Such experiences may take place over lengthy periods: Bourgois’ study of the crack cocaine market, for example, was based on years of observation and interviews with his neighbours in East Harlem.⁶³

Learning about empirical research involves understanding what methodologies exist – the idea of choosing a method implies an understanding of other potential methods, their strengths and drawbacks. It is necessary to think carefully about whether the research

⁴⁷Eisenberg (2011), p 1719; see also Boyd (2015).

⁴⁸Harrington and Merry (2010), p 1052.

⁴⁹Wangmann (2009), pp 83–84.

⁵⁰Fernando (2011).

⁵¹Mather, McEwen and Maiman (2001), pp 196–197; Eekelaar, Maclean and Beinart (2000), pp 205–207; Parkinson and Cashmore (2008), pp 30–33; Parkinson, Webster and Cashmore (2010).

⁵²Cain (1979); Davis (1988); Sherr (1986); Sarat and Felstiner (1986); Sarat and Felstiner (1995).

⁵³Eekelaar, Maclean and Beinart (2000), pp 201–5.

⁵⁴Hunter (2008a); Wangmann (2012), pp 702–3.

⁵⁵Harrington and Merry (2010), p 1051. Though note Darbyshire, MacDougall and Schiller (2005), pp 423–44.

⁵⁶Harrington and Merry (2010), p 1052, citing McCann (1994), Ewick and Silbey (1998), Macaulay (1963); Feeley (1979).

⁵⁷Eekelaar, Maclean and Beinart (2000) ‘Appendix’.

⁵⁸See, eg, Hirsch (1998).

⁵⁹Adler and Adler (1998), p 79.

⁶⁰Herzfeld (2001), p 25, cited by Darian-Smith (2004), p 549.

⁶¹Darian-Smith (2004), pp 548–549, citing Miller (2002), p 5. Note the suggestion that there are different ‘models’ of ethnography: Manning (2009), cited by Chan (2013), p 507; see also Travers, Putt and Howard-Wagner (2013).

⁶²Valverde (2012).

⁶³Bourgois (2003).

questions posed are answerable by the method chosen. Kritzer has noted that '[i]t is very easy to ask questions or collect *some* data, but frequently we fail to explicitly ask ourselves what we might find in the responses or in the data that will help us answer our own question'.⁶⁴ Perhaps even more importantly, it is necessary to consider the limits and assumptions implied by the very questions framed. Trubek and Esser argued, in advocating a 'critical' approach:

[I]n the context of this epistemology, 'empiricism' does not mean the accurate description of the external world through careful observation. Rather, it means the imperative to construct new perspectives through (a) the study (if not observation and description) of meaningful activity in (b) locales that are defined as unorthodox and trivial from the point of view of the dominant perspective.⁶⁵

In other words, there must be awareness of the partiality and subjectivity of 'scientific' methods, even if the goal of empiricism remains rigor and 'reality'.

Whatever the proposed method, undertaking an empirical legal research project (particularly as part of a higher research degree) is not a choice made lightly. Empirical research can be expensive, frustrating, time-consuming and demanding. Whitehouse and Bright identify four key challenges for the empirical legal researcher: lack of training, funding constraints, accessing data and respondents, and ethics.⁶⁶ Atop of these practical constraints come more pervasive and unavoidable theoretical challenges – related to interpretation, generalisation, subjectivity and situatedness. Differing conceptions of what is meant by empiricism and 'validity' of results, and a multitude of disciplinary and analytical frameworks, contribute to the arduousness of any project. Moore and Maher, discussing ethnography in drug research, have suggested that it is not possible to cleanly separate a method from a theoretical origin:

[F]or the nature of one's relationship to research subjects, one's intersubjective engagement, fundamentally determines what is possible analytically, through the production of certain kinds of data.⁶⁷

Thus, the disciplinary context or origins of the method chosen remain important. Research without such a context lays itself open to the criticism described above, the assumption that it is possible for a 'pure' form of data to be collected. This is essentially the criticism that Hunter (2014) makes of Darbyshire's study of judges, when suggesting the raw data had been only partially 'digested':⁶⁸

Often, what is presented is only semi-digested: strings of quotations, minimally edited observation notes and collections of anecdotes grouped under broad headings. [Darbyshire] explains at the outset that 'I have not used any theoretical model', but one rather wishes she had.⁶⁹

Rather than the absence of a theoretical model permitting greater objectivity and distance, it in fact dampens the rigor of the work, due to the researcher's inability to identify and reflect upon her own position and influence in the research process. Without the

⁶⁴Kritzer (2009b), p 270 (emphasis in original).

⁶⁵Trubek and Esser (1989), p 43.

⁶⁶Whitehouse and Bright (2014), pp 183–185.

⁶⁷Moore and Maher (2002), p 246.

⁶⁸Hunter (2014), citing Darbyshire (2011).

⁶⁹Hunter (2014), p 91.

researcher's own analysis, the imposition of a critical position, the work seems no more than journalistic: the consumer is left to draw his or her own conclusions. Janet Chan has discussed the tension, particularly in criminological research, between rejecting an overly 'scientistic' approach to evaluating or quantifying 'rigor' in qualitative research, and acknowledging the need for validity.⁷⁰ This need is heightened when a study has clear policy ends. Lempert has cautioned against 'overselling' the findings of research studies in a policy arena.⁷¹

The complexity of research design and implementation perhaps go toward explaining why, despite a long history and many current examples of empiricism in law, empirical legal research seems to still be seen as uncommon in Australia. The following section turns to consider one possible reason for this: the absence of training in empiricism or empirical methods at law schools.

4. Training in empirical methods for legal scholars

In Britain, the Nuffield Foundation commissioned a review of empirical research in law, titled *Law in the Real World* and published in 2006.⁷² The review was prompted by fears about the country's future ability to conduct this type of research.⁷³ As one author of the report later explained, there was concern that 'the numbers of researchers able and willing to do empirical research in law are not growing sufficiently to meet ... demand'.⁷⁴ In the same year, George noted that, in contradistinction to humanities departments, law schools in the United States 'generally do not teach courses in survey methodology, statistical analysis, or research design'.⁷⁵ As discussed below, the greater the emphasis on interdisciplinary research, the more apparent this deficiency in empirical methods is likely to become.

Importantly, *Law in the Real World* found that poor capability in conducting skilled socio-legal empirical research begins at law school where the imperatives of professional practice constrain both curriculum and the qualities considered desirable in law teachers.⁷⁶ Hillyard explained that this can create a self-fulfilling prophecy:⁷⁷

[T]here is little or no room for research training courses similar to those in other social sciences and rarely are law undergraduates required to complete a dissertation. Even if they do one, it is unlikely to involve empirical research. There is, therefore, an absence of scholars who are competent to supervise empirical work ...⁷⁸

In other words, if undergraduate students are not exposed to empirical research in law, this has a flow on effect to HDR students, and ultimately legal academics. Vick commented in 2004 that 'most present-day legal academics received their undergraduate education in law departments concerned primarily with training their students to be solicitors, barristers, advocates, and judges, not academic lawyers'.⁷⁹

⁷⁰Chan (2013), p 503.

⁷¹Lempert (2008).

⁷²Genn, Partington and Wheeler (2006).

⁷³Witherspoon (2002), cited by Vick (2004), p 189.

⁷⁴Partington (2008), p 1.

⁷⁵George (2006).

⁷⁶Genn, Partington and Wheeler (2006), p 29.

⁷⁷Hillyard (2007), p 269.

⁷⁸Hillyard (2007), p 270. See also Hunter (2012), pp 1–16.

⁷⁹Vick (2004), p 188.

Hillyard suggested that undergraduate law students emerge with a corresponding tendency toward ‘theoretical and textual analysis’,⁸⁰ or what Burns and Hutchinson describe as the ‘established traditional territory’ of doctrinal research.⁸¹ Loughnan and Shackel made a similar point about Australian law HDR students, who may not even consider empirical methods:

[F]or some law students, methodology may appear to be uncontroversial or even non-negotiable, as a student may automatically turn to case law, legislation, legal codes, treaties and government materials such as parliamentary papers, and then subsequently to secondary sources such as academic commentary.⁸²

The lack of opportunity for undergraduate students to engage in empirical legal research is, Hillyard suggests, also an effect of the neo-liberal university and the job market to which law students are often seeking entry.⁸³ That is, the sights of many undergraduate students are firmly focused on attaining gainful employment as legal practitioners.⁸⁴ In Australia, the curriculum’s consequent focus on technical legal skills and doctrine, at the expense of critical, interdisciplinary and socio-legal analyses has previously been noted.⁸⁵ Burns and Hutchinson noted that few undergraduate law courses included any training in empirical methods.⁸⁶ Yet, given the large number of law graduates who will not actually enter legal practice, and may well end up in fields where training in empirical methods *is* valued, such a focus may be misplaced.⁸⁷ Of course, students may already have a background in research methods gained from earlier degrees or work. The increasing availability of post-graduate law degrees – predominantly the Juris Doctor – in Australia,⁸⁸ may also herald a positive change, as greater numbers of law students have other degrees and training to draw upon. Nevertheless, despite having already completed another degree, not all students would have extensive experience in empirical methods or conducting a research project.

While a lack of exposure to empirical methods in the undergraduate curriculum may be explicable, the absence of training for higher degree research students is perhaps more surprising. It has been suggested that this lack of training is the primary barrier to HDR students embarking on an empirical research project:⁸⁹ this has been observed, for example, of the USA⁹⁰ and New Zealand,⁹¹ as well as Australia.⁹² Noting the prevalence of double degrees (combined law and other disciplines), Economides argued that with a relatively

⁸⁰Hillyard (2007), p 269.

⁸¹Burns and Hutchinson (2009), p 158.

⁸²Loughnan and Shackel (2009), p 107.

⁸³Hillyard (2007), p 270.

⁸⁴Though noting that many do not end up in legal practice: see, eg, ‘Graduates Shun Legal Profession’, *The Age* (Melbourne), 20 May 2012; Graduate Careers Australia, GradStats (December 2014), p 6.

⁸⁵Thornton (2007).

⁸⁶Burns and Hutchinson (2009), pp 170–171.

⁸⁷Further, understanding of social science methods is also relevant to the practice of law: see Burns and Hutchinson (2009).

⁸⁸See Loughnan and Shackel (2009), pp 99–101; Legal Profession Admission Board of NSW list of accredited law courses, <http://www.lpab.justice.nsw.gov.au/Pages/lpab/Accredite-Law-Courses.aspx>.

⁸⁹See Harrington and Merry (2010), p 1047.

⁹⁰Dow (2011), p 526. Kelly and Kaczynski note that many American graduate students have had limited exposure to doing qualitative research: (2007), pp 31–32, citing Eakin and Mykhalovskiy (2005); Kerlin (2000); Sells, Smith and Newfield (1997).

⁹¹Economides (2014), pp 261–266.

⁹²Carney (1993); Genn, Partington and Wheeler (2006), pp 26–27; Hutchinson (2013), pp 60–62.

small injection of resources, socio-legal research could be better supported in the curriculum:

[W]ith relatively modest investment in interdisciplinary modules to act as ‘bridges’ spanning disciplinary divides, not only could the full potential of the double degree be realized but, more importantly, stronger foundations could be laid for the research skills and working collaborations needed for socio-legal projects in higher degrees and beyond.⁹³

Similarly, providing students with exposure to empirical methods in the undergraduate law curriculum could provide a ‘foundation’ through encouraging some students to consider empirical work as part of postgraduate study, and at the very least, exposing students to the idea of empirical research in law and providing some understanding of methodology. However, a historical dearth of opportunities has perhaps naturally impacted, in turn, on the number of legal academics able to undertake (and supervise) these type of projects.

In 1993, Carney noted the absence of ‘systematic training in research methods or theory’⁹⁴ in Australian postgraduate research programs in law, while in 2004, Hutchinson found that only two universities offered training in empirical methodologies for law HDR students.⁹⁵ Burns and Hutchinson subsequently commented on the importance of such training for research students:

Research training must include a broader non-doctrinal methodology component ... There is a need to introduce students to the existence and nature of interdisciplinary research – the extensive work of anthropologists, sociologists, criminologists, economists and sociologists that impinge on the law.⁹⁶

The University of Sydney Law School currently offers a program of compulsory research seminars for its HDR students, though only one session covers methodologies.⁹⁷ It seems that few other Australian law schools offer an equivalent,⁹⁸ though Griffith Law School would appear to be a notable exception, offering various courses. Generic methods courses may be offered centrally, outside of faculties or schools, but of course by their nature these are not specific to law. The discipline of criminology is more likely to offer such courses to undergraduates and coursework masters students: for example, the University of Sydney course includes a subject titled *Crime Research and Policy*, in which students design a hypothetical empirical research project. Within the discipline of law, HDR students may thus have to pursue their own training and education via conferences, workshops and formal training sessions, which may be external to the faculty. Funding such training can be costly, particularly courses in using computer software or advanced statistics. This may come on top of costs incurred in actually conducting research, such as travel and accommodation, transcription or data entry. University ethics committees have obligations to consider the safety of researchers as well as research subjects, but precautions

⁹³Economides (2014), p 277.

⁹⁴Carney (1993), p 165.

⁹⁵Hutchinson (2004), p 80.

⁹⁶Burns and Hutchinson (2009), p 168; see also Hutchinson (2013).

⁹⁷See Manderson (2002), p 155; Loughnan and Shackel (2009).

⁹⁸Noting, however, that this is based on the information available on university websites, which may not include all available options such as ‘auditing’ subjects from other courses or degrees.

may impose an additional financial burden.⁹⁹ Even where available, Zeiler has sounded a note of caution about short training courses, suggesting these ‘are problematic in that they attempt to teach material generally covered over at least three semesterlong courses’ in unrealistically short timeframes.¹⁰⁰

4.1. Empirical work by legal academics

In addition to difficulties in obtaining formal training in empirical methods, a lack of exposure to academics using such methods and opportunities to be appropriately supervised in empirical work must also be significant for HDR students. Concerns about a lack of training in empirical methods for North American legal academics were voiced in the 1990s.¹⁰¹ As George noted in 2006, this heightened the importance of collaborating with scholars who have such training and experience. Observing that collaborations did appear to be increasing (though legal academics were less likely than their social science equivalents to publish with co-authors), she explained:

Non-social scientists benefit from the presence of social scientists for informal interactions, such as advice on how to undertake an empirical project or what method would be appropriate, and for formal collaborations, such as co-authorship.¹⁰²

More recently, however, Heise has identified that ‘an ever-increasing number of [US] law professors possess either formal training in an array of social science fields (including, but not limited to, economics) or a substantial appreciation for social scientific methodologies’.¹⁰³ He connects this to the continuing growth of empirical legal scholarship.¹⁰⁴ Hersch and Viscusi reported that a significant proportion (one-fifth) of academics at the 26 highest ranked law schools had a doctorate in a social science field.¹⁰⁵ LoPucki found that ‘62% of PhD holders on top-twenty-six law school faculties have their PhDs in fields where Statistics is likely required’,¹⁰⁶ with a greater proportion of PhDs in economics and political science, than history or philosophy. Law professors with PhDs in law comprised only 3 per cent.¹⁰⁷ LoPucki has argued that though American law schools employ faculty members with PhDs in order to promote empirical research, it is not an effective means of doing so.¹⁰⁸ It is not clear that the hiring practices of Australian law schools are following a similar trend, though there seems to be greater emphasis placed on attaining a PhD than previously.

Despite the apparently greater emphasis being given to interdisciplinarity, a more pessimistic view identifies ‘significant impediments’ to collaboration, including lack of understanding of other disciplines, poor collaborative skills and the individualistic and competitive atmosphere of law schools.¹⁰⁹ There may also be structural and institutional

⁹⁹For example, requiring a researcher to catch taxis rather than use public transport when conducting research at night, which may impose a prohibitive expense on a student. See Maher (2001); van den Eynde and Veno (2013).

¹⁰⁰Zeiler (2016), p 87.

¹⁰¹Schuck (1989), pp 331–333; Nard (1995), p 362; see also Macdonald (2003).

¹⁰²George (2006), p 150, citing George and Guthrie (2002).

¹⁰³Heise (2011), p 1746.

¹⁰⁴Heise (2011), pp 1746–1749.

¹⁰⁵Fischman (2013), p 120 n 18, citing Hersch and Viscusi (2012). Note, however, Chemerinsky (2009), p 39.

¹⁰⁶LoPucki (2015b), p 538.

¹⁰⁷LoPucki (2015b), p 538; see also McCrary, Milligan and Phillips (2016).

¹⁰⁸LoPucki (2015a); see also George and Yoon (2014).

¹⁰⁹Vick (2004), pp 192–193, citing Weinstein (1999), pp 327–328.

barriers: Baron suggested that law faculties traditionally encouraged ‘lone wolf researchers’.¹¹⁰ Burns and Hutchinson quote Adler who, describing the UK, commented on ‘the weak position of socio-legal researchers’ and lack of incentives to ‘encourage law schools to take postgraduate training in socio-legal studies seriously’.¹¹¹ They suggest that the Australian topography is much the same.¹¹² Nevertheless, it is claimed that there is a ‘shift’ away from the doctrinal, toward the use of empirically based methodologies¹¹³ with the importance of interdisciplinary collaboration emphasised particularly through the allocation of funding.¹¹⁴

Such collaboration still takes time and energy, as relationships must be developed and negotiated. Moreover, postgraduate students and even early career researchers may not have sufficient academic connections or experience to readily find advice and guidance from others. Thus, when it comes to rigorous training in empirical methodologies, there likely remains a dependence on supervisors, as Carney and later Burns and Hutchinson identified,¹¹⁵ or fortuitous encounters with more senior scholars.¹¹⁶

The importance of supervision is further emphasised by a school of thought suggesting that empirical research, particularly the use of qualitative techniques such as interviewing and ethnographic methods, can only be learned by doing.¹¹⁷ The experience of undertaking an empirical project has been called a ‘rite of passage’ which must be undertaken by the researcher, as it is learned ‘[o]nly through the fieldwork experience’.¹¹⁸ This has implications for supervision and the degree to which an HDR student is restricted to utilising those methods or theoretical perspectives with which his or her supervisor is familiar.

5. Why use empirical methods?

This section considers why legal academics or HDR students might wish to venture into using empirical methods. These reasons can perhaps be described generally as falling into two types of category or rationale: the practical or policy-oriented; and the theoretical or critical. Nevertheless, *both* are valid and indeed necessary aspects of empirical legal research.

Hutchinson has explained that ‘[l]awyers tend not to use empirical methods and results because they are untrained in the discipline, but in order to put time into learning methodology, lawyers need to be able to understand the *need* for empirical knowledge’.¹¹⁹ Often it is tempting to refer to this need or value in pragmatic terms – focusing on the instrumental,¹²⁰ such as how it can make one a ‘better lawyer’ or more employable. Of course, familiarity with empirical methods can have practical benefits for lawyers. On the links between social research methodology and law, Kalven and Zeisel commented:

¹¹⁰Baron (2007), p 48.

¹¹¹Burns and Hutchinson (2009), p 176, citing Adler (2007).

¹¹²See also Burns and Hutchinson (2009), p 164; Hutchinson (2013), pp 54–55.

¹¹³Hutchinson and Duncan (2012).

¹¹⁴Hutchinson and Duncan (2012), p 85; Hutchinson (2013), p 60.

¹¹⁵Carney (1993), p 166; Burns and Hutchinson (2009), p 175.

¹¹⁶Hillyard (2007), p 268.

¹¹⁷See generally Harrington and Merry (2010), pp 1054–1055; Hurworth (2004).

¹¹⁸Parry, Atkinson and Delamont (1994), p 46; see also Hill (2007), p 27.

¹¹⁹Hutchinson (2010), p 100.

¹²⁰See n 38 and 40.

Social science more than natural science is forced to operate at a remove from the reality it studies. It must work, therefore, through a chain of inferences. In a formulation which should carry familiar overtones for the lawyer, social science works with quantified circumstantial evidence.¹²¹

In other words, they suggest congruence in the logical reasoning processes underpinning both research method and building a case based in evidence. In addition, litigation across many areas of law often requires the use of evidence gained from empirical data, and hence requires lawyers to have an understanding of how such data is produced.¹²² Corbin and Dow suggest that this includes

knowing when scientific data are useful in resolving legal issues, knowing what sorts of data are useful, knowing how to interpret and evaluate such data and how to draw conclusions from them, and, for lawyers in particular, knowing how to make effective use of scientific data in litigation.¹²³

Burns and Hutchinson have similarly emphasised the importance of social science research training by reference to the importance of ‘empirical facts’ in legal proceedings and judicial decision-making.¹²⁴

Such skills are also useful in academia, including when trying to attract research funding.¹²⁵ Hutchinson and Duncan note that ‘competition for limited research funds is being more intense’, while ‘interdisciplinary work is highly valued’.¹²⁶ Changes to Australian research funding to emphasise ‘outcomes with commercial and community benefit’ may also have an impact.¹²⁷ As Vick explained:

In purely pragmatic terms, interdisciplinarity offers an opportunity for product differentiation in an increasingly competitive academic market ... Interdisciplinary research is perceived to be popular with research funding bodies, and for legal academics in particular it provides access to research grants of a magnitude not usually available for ‘pure’ legal research.¹²⁸

For law HDR students, undertaking empirical research can make it easier to produce a contribution to scholarship that meets the requirements of originality.¹²⁹ Schmidt and Halliday also suggest it may be less boring and frustrating than doctrinal work.¹³⁰

The capacity to understand and evaluate ‘law in the real world’ will be beneficial in other contexts too, such as consultancy, government, law reform and advocacy. It may form a sound basis to recommend change to law or legal policy; authors have noted the importance of ‘bridg[ing] the policy/research divide’ in law as in other disciplines.¹³¹ There are also examples of notorious misunderstandings and misuse of research findings in law. For example, the Minneapolis Domestic Violence Experiment, conducted in the 1980s, is a classic study in the real-world application of research findings, with unfortunate

¹²¹Kalven and Zeisel (1971), p 33.

¹²²Edmond (2011); Burns and Hutchinson (2009); Cashmore and Parkinson (2014), pp 240–241.

¹²³Corbin and Dow (2007), p 191.

¹²⁴Burns and Hutchinson (2009).

¹²⁵Though note Economides’ comment on this: Economides (2014), p 279.

¹²⁶Hutchinson and Duncan (2012), p 85; Hutchinson (2013), p 60.

¹²⁷See <http://www.innovation.gov.au/page/new-research-funding-arrangements-universities>

¹²⁸Vick (2004), p 171.

¹²⁹Whitehouse and Bright (2014), p 176, citing Heise (1998–99), pp 821–822.

¹³⁰Schmidt and Halliday (2009), p 3.

¹³¹Hutchinson (2013), p 55, citing Nutley (2003), p 20; Nutley, Powell and Davies (2013).

practical consequences.¹³² In a subtler example, Lacey refers to Dworkin and MacKinnon's anti-pornography ordinance¹³³ – city ordinances declaring pornography to be a violation of women's civil rights, later struck down on freedom of speech grounds – as illustrating the difficulties in translating a theoretical critique into a policy response.¹³⁴ Undertaking empirical projects may be a way of helping particular communities to have their voices heard, and can provide a sense of meaningful engagement with what *matters* about the law – such as its effect on people's lives – in contradistinction to 'ivory tower' syndrome. On the other hand, such goals, while noble, can also increase the time, difficulty and stress of doing empirical research. The researcher may feel a greater obligation to or communion with research participants, for example,¹³⁵ which may be heightened if communities or individuals are seeking, or require, legal assistance.¹³⁶ There is a particular power in empirical work that enables subjects to speak for themselves: Lacey has explained that socio-legal studies

subject[s] legal practices to a (broadly speaking) empirical inquiry which scrutinizes not merely the legal articulation of the relevant rules and processes but the meaning and effects of those rules and processes as interpreted and enforced, and *as experienced by their subjects*.¹³⁷

The way that research subjects describe and assign meaning to particular events is thus the focus of study – without any assumptions that any one perspective represents the ultimate 'truth' about legal proceedings or interactions. This focus, of course, undeniably implicates the researcher in the obtaining, interpretation and construction of 'data'. This is pertinent for law, given the 'translation' role that lawyers and legal academics occupy, and the way that lawyers are already implicated in the ascertainment of 'facts' in a legal context.¹³⁸ Seuffert has explained that, in contrast to traditional assumptions about a lawyer's neutral role in eliciting information:

Knowledge is produced in all lawyer-client interactions in countless acts of interpretation: knowledge about the client, her stories and her desires, knowledge about the lawyer and her role and knowledge about the law and the client's and the lawyer's positions in relation to the law. This knowledge production is informed by the context in which it takes place, including the perspectives and experiences of the lawyer and client.¹³⁹

Problems in communication between lawyers and clients can, as Seuffert's study identified, have serious consequences for vulnerable clients, echoing the role of the researcher vis-à-vis research subjects.¹⁴⁰

¹³²The project found that particular responses by police when called to domestic violence incidents were more effective in reducing recidivism, but later studies were unable to replicate these results. See Sherman and Cohn (1989); Sherman et al (1992). Posner (1987) also provides numerous examples of 'reforms engineered by lawyers' that have 'miscarried': at pp 769–771.

¹³³MacKinnon (1989), ch 11; see also Sandler (1984).

¹³⁴Lacey (1996), pp 141, 146.

¹³⁵See, eg, Becker (1967); MacKenzie, Christensen and Turner (2015).

¹³⁶See, eg, Wangmann (2009), p 65.

¹³⁷Lacey (1996), p 132 (emphasis added).

¹³⁸Sherr (1999).

¹³⁹Seuffert (1996), p 527.

¹⁴⁰See, eg, Oakley (1981); Jack (1999); Maher (2001); Wangmann (2009); Stanton (2014).

5.1. Policy-oriented studies

The empirical impulse to measure the ‘gap’¹⁴¹ between ‘formal law’ and ‘practical reality’¹⁴² – how the law *actually* works – can be seen as a highly important and complex shift away from the doctrinal. Many studies adopted such an approach.¹⁴³ In response, however, sociologists of law raised concerns about the influence of policy goals or a policy-focused orientation in empirical research. Sarat and Silbey explained that ‘critics of so-called “gap” research argue that policy studies are too complacent and too much influenced by official criteria and definitions of legal problems’.¹⁴⁴ Lacey has also problematised the ‘technocratic instrumentalism of “policy-oriented” studies’.¹⁴⁵ Fischman has described the failings of ‘early legal empiricists’ as deriving from ‘their inability to develop any kind of theoretical framework for making their empirical findings relevant to normative legal scholarship’.¹⁴⁶ He posits that this predicament remains to some extent, though tempered by the discipline’s increasing sophistication.

Thus, some have argued that an empirical approach in law is important for reasons beyond the evaluative or the pursuit of ‘efficiency’.¹⁴⁷ Indeed, Hunter’s critique of *Law in the Real World* is that its authors focused too much on empirical methods as

a tool for policy makers ... without reference to other ‘uses’ of and frameworks for thinking about such research, and without any consideration of the relationship between empirical research and critical scholarship.¹⁴⁸

Likewise, two decades earlier, Sarat and Silbey criticised what they suggest had become a conventional ‘form’ of law and society research: ‘begin with a policy problem, locate it in a general theoretical context, present an empirical study to speak to that problem, and conclude with recommendations, suggestions or cautions’.¹⁴⁹ In their discussion of key studies of the time,¹⁵⁰ they elucidate some of their concerns about the ‘pull of the policy audience’, not least among them the legitimisation of the policy elite and their goals. A consequence of this is a tendency to ‘[emphasize] the centrality of the state in law and thus [diminish] the critical potential of sociolegal scholarship’.¹⁵¹

The unifying strand of the critiques made by Sarat and Silbey, Lacey, and Hunter, focuses on this faith in the possibility of unearthing objective ‘truths’ via empirical methods. For example, in their critique of Blumberg’s (1967) work, Sarat and Silbey wrote that:

For Blumberg the results of his inquiry involve neither an interpretation nor a social construction of reality. They are presented as if his observations provide immediate, unmediated access to the actual operations of the criminal court ... It is ... in his view, *the version, the true and accurate version*.¹⁵²

¹⁴¹Sarat and Simon (2003), p 9. See also Garth (1998), pp 4–6.

¹⁴²Ingleby (1992), pp 4–5.

¹⁴³See, eg, Mnookin and Kornhauser (1979), p 987.

¹⁴⁴Sarat and Silbey (1988), p 97, citing Feeley (1979); Abel (1980); Nelken (1981); Sarat (1985).

¹⁴⁵Lacey (1996), p 132.

¹⁴⁶Fischman (2013), pp 119–120.

¹⁴⁷Hunter (2008a).

¹⁴⁸Hunter (2008a), p 122.

¹⁴⁹Sarat and Silbey (1988), p 113.

¹⁵⁰Blumberg (1967); Macauley (1979); Weitzman (1985).

¹⁵¹Sarat and Silbey (1988), p 122.

¹⁵²Sarat and Silbey (1988), p 115 (emphasis in original).

This goes beyond a methodological concern about mode of analysis – it is the very concept that an answer exists and is discoverable or ascertainable, with which the authors take issue.

Likewise, Hunter takes issue with what she terms the ‘new legal realism’ (referring to empirical legal studies) for its avoidance of political agenda; in proclaiming neutrality, it is ‘positivist but non-normative’.¹⁵³ Echoing Vick, however, she notes that this type of policy-oriented, pragmatic empiricism has been encouraged also by institutional structures, as fiscal imperatives compel academics to seek grants and consultancies, and research outputs are measured in economic terms.¹⁵⁴ Hutchinson and Duncan wrote:

Within the universities, there is an emphasis on increasing links with industry and funded applied research, rather than on purely theoretical research. Governments are encouraging institutional specialisation and centres of excellence, by funding research infrastructure and research training.¹⁵⁵

Though there are many practical and strategic reasons for legal researchers to undertake empirical projects, the critical and theoretical potentiality of empiricism should not be overlooked. To a large extent, arguments for empiricism’s theoretical possibility resonate with claims about the value of interdisciplinarity to law.¹⁵⁶ The critical appraisal of a reductionist or instrumental approach to empiricism does not deny the importance of methodological rigour but recognises what empiricism offers by way of critique, self-reflection and deep understanding of the social impact of law. In this formulation, empiricism is more than simply an extension of scientific methods to socio-legal research. Hunter calls for an aggregation of ‘critical theoretical, progressive political, policy oriented and empirical approaches to law’.¹⁵⁷ She provides case studies of three different research projects where the original policy goals were modified, subverted or themselves interrogated in response to empirical findings and the critical stance of the researchers.¹⁵⁸

6. Conclusion

There are many reasons for legal scholars to venture into empiricism. The diversity of empirical projects in law indicates that there is no unitary or ideal approach to empiricism and no reason to take a narrow approach to what constitutes an empirical project. Regardless of the actual methods used, whether qualitative or quantitative, or the type of analysis undertaken, empiricism has a useful place in the law school. The failure of more legal scholars to engage in empirical projects speaks to both the predominance of doctrinal methods (despite some indications of change) and the absence of training and supervision. However, it also calls up a more pervasive discomfort with interdisciplinarity and absorptions of the theoretical as well as methodological lessons of other disciplines, such as sociology, anthropology and cultural studies. Lacey and Hunter, and others, have argued for a more ‘critical’ approach to empirical work in law, wherein analysis of law’s effects includes a

¹⁵³Hunter (2008a), p 123.

¹⁵⁴Hunter (2008a), p 125, citing Collier (2004).

¹⁵⁵Hutchinson and Duncan (2012), p 86.

¹⁵⁶For example, Economides (2014).

¹⁵⁷Hunter (2008a), p 126.

¹⁵⁸Hunter (2008a), citing Day Sclater and Kaganas (2003); Kaganas and Day Sclater (2004); Sommerlad and Sanderson (1998); Hunter et al (2006).

critical focus on its social consequences and a political (or rather, not apolitical) critique.¹⁵⁹ To conduct an empirical legal project of any kind requires an understanding of what the law does not know – not so that this part of the project can be hived off to someone with relevant expertise, but so that the entire aim can be re-visioned. Approaching an empirical project with a comprehensive understanding of what has gone before – whether the lens is socio-legal, policy-oriented or descriptive – promotes methodological rigor, which ultimately serves both pragmatic and theoretical ends.

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¹⁵⁹Lacey (1996); Hunter (2008a); Hillyard and Sim (1997).

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