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## Property Law Review Submission

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## Socio-legal Approaches to Property Law Research

This contribution to the special issue addresses the "what, how, what to be wary of, and why" questions about socio-legal approaches to researching property law. As will become clear, it is not possible to talk about "the" socio-legal approach; this article starts with these definitional difficulties and then discusses the range of research which can be labelled as socio-legal. Following an overview of the challenges faced by the socio-legal researcher, the article concludes by assessing the unique perspective provided by this research approach.

### Definitional difficulties and development

It seems widely accepted that there is no agreed definition of the socio-legal research approach.<sup>1</sup> Indeed, the meanings of both the 'socio' and the 'legal' components of this hyphenated composite are the subject of continuing debates.<sup>2</sup> These definitional difficulties may be partly due to the different starting points and divergent histories of socio-legal research in the US, the UK, Europe, and elsewhere. In North America, Roscoe Pound set socio-legal researchers in the early twentieth century the task of investigating the measurable and observable effects of law, using social science empirical methods.<sup>3</sup> These so-called "gap studies" typically focus on the aims of legislation or the impact of a court decision, to evaluate whether the aims have been achieved and "to discover whether patterns can be identified after collecting and organizing facts based on observation".<sup>4</sup> In Europe, the socio-legal research is usually considered to originate with the work of Eugen Ehrlich who advocated researching real-life experiences, and the legal and social norms which are developed by people in association with each other.<sup>5</sup> However, we should perhaps not make too much of this apparent divergence as socio-legal scholars at the time in the US and in Europe, as well as Pound and Ehrlich themselves, were well aware

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<sup>1</sup> Harris D R, "The development of socio-legal studies in the United Kingdom" (1983) 3 *Legal Studies* 315; Cownie F, *Legal Academics: Culture and Identities* (Hart, Oxford, 2004); Cownie C and Bradney A, "Socio-legal studies: A challenge to the doctrinal approach" in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge, Abingdon, 2011) p 34.

<sup>2</sup> See two recent conferences held by the Socio-Legal Studies Association in London: "Exploring the socio in socio-legal studies" (2010), papers now collected in Feenan D (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan, Basingstoke, 2013); and "Exploring the legal in socio-legal studies" (2012) at <http://www.slsa.ac.uk/content/view/166/139/#exploring> viewed 6 March 2014.

<sup>3</sup> Pound R, "Law in Books and Law in Action" (1910) 44 *American Law Review* 12.

<sup>4</sup> McCrudden C, "Legal Research and the Social Sciences" (2006) 122 *Law Quarterly Review* 632 at 637.

<sup>5</sup> Ehrlich E (trans. W. Moll), *Fundamental Principles of the Sociology of Law* (Harvard University Press, Cambridge MA, 1936; first published in German 1913); Hertogh M (ed), *Living Law: Reconsidering Eugen Ehrlich* (Hart, Oxford, 2009).

of each others' work.<sup>6</sup> During the twentieth century, the development of the socio-legal research approach was geographically uneven, demonstrating different strengths at different times. In North America a wide range of disciplines including economics, psychology, political science, social history and anthropology have enhanced non-doctrinal legal research.<sup>7</sup> There is no doubt that the law and economics approach to researching property law [see *Cole's article in this issue*; Eds] has taken much stronger hold in the US than in other regions of the globe where socio-legal research is carried out. Early socio-legal scholars in the UK turned first to sociology, social policy and social administration for the interdisciplinary context in which to pursue non-doctrinal legal research, although by the 1980s Harris considered that the US and UK paths were beginning to converge.<sup>8</sup> Harris was then Director of the Oxford Centre for Socio-Legal Studies, set up in 1962 "to study law *in* society, encompassing both empirical and theoretical research on law, and its place and role within society".<sup>9</sup>

It is instructive to look at the definitions provided by the various learned societies established to promote socio-legal research. The UK's Socio-Legal Studies Association rather sidesteps the issue by stating on their website merely that socio-legal research is "where law meets the social sciences and humanities".<sup>10</sup> The Canadian Association for Law and Society is made up of "scholars from many disciplines who are interested in the place of law in social, political, economic and cultural life",<sup>11</sup> while the Law and Society Association of Australia and New Zealand aims "to promote and foster scholarship broadly focusing on the interactions and intersections between law and society".<sup>12</sup> A longer exposition is found on the USA's Law and Society Association website, which describes its aims as:

Analyzing legal practice, envisioning social justice ... through developing theoretical and empirical understandings of law [which might include consideration of] the place of law in relation to other social institutions and [of] law in the context of broad social theories; [or understanding] legal decision-making; [or the systematic study of] the impact of specific reforms, legal processes and systems ... and the many roles played by various types of lawyers; [or seeking to] identify and explain patterns of behavior; [or

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<sup>6</sup> Tamanaha B Z, "A Vision of Socio-Legal Change: Rescuing Ehrlich From Living Law" (2011) 36 *Law and Social Inquiry* 297.

<sup>7</sup> Kennedy D and Fisher W W (eds), *The Canon of American Legal Thought* (Princeton University Press, Princeton NJ, 2006).

<sup>8</sup> Harris, n1 at 315.

<sup>9</sup> See <http://www.cslls.ox.ac.uk/40thAnniversaryEvent.php> viewed 20 January 2014; original emphasis.

<sup>10</sup> <http://www.slsa.ac.uk/> viewed 10 February 2014.

<sup>11</sup> [www.acds-clsa.org/](http://www.acds-clsa.org/) viewed 10 February 2014.

<sup>12</sup> [www.lsaanz.org/](http://www.lsaanz.org/) viewed 10 February 2014.

researching] the operations of law as a perspective for understanding ideology, culture, identity, and social life.<sup>13</sup>

These descriptions make it clear that current socio-legal research includes both theoretical and empirical work. Further, socio-legal research may be interdisciplinary, and it may combine doctrinal with non-doctrinal analysis, for example to justify recommendations for reform or development of existing doctrine or practice. The methods adopted by a property law scholar interested in a socio-legal perspective will therefore depend on what aspect of the broad range of questions covered by the label "socio-legal" the researcher is interested in. The common thread is that socio-legal researchers consider law as a field or aspect of social experience which can be examined and theorized using methods and tools drawn from a range of social science disciplines.

Interdisciplinarity is clearly a component of much socio-legal research, although not synonymous with it. Many "Law and ..." approaches were once included in the label "socio-legal", but over time several of these sub-disciplinary fields come to be seen as separate approaches in their own right [see *Blomley on Law and Geography*; *Murray on Law and History*; and *Young on Law and Anthropology in this issue*; Eds]. Had I been writing this article ten years or so ago there would have been more to cover, and perhaps some of the rich interdisciplinarity once associated with socio-legal studies has been lost in this process of development. Another way of describing the socio-legal research approach is encapsulated in the phrase "Law in Context"<sup>14</sup>, although it is by no means the only contemporary legal research approach to explicitly acknowledge the context within which the law operates. For example, in his philosophical approach to property law Harris states that any given property institution is "inseparably affected by the social setting" in which it exists.<sup>15</sup> In the UK, the University of Warwick's Law School<sup>16</sup> was responsible for establishing the Cambridge University Press's Law in Context series, aimed at students rather than researchers, which "involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under

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<sup>13</sup> [www.lawandsociety.org/](http://www.lawandsociety.org/) viewed 10 February 2014.

<sup>14</sup> See, for example, Bright S, *Landlord and Tenant Law in Context* (Hart, Oxford, 2007) which shows how the law has been shaped by commercial, social, economic and policy considerations.

<sup>15</sup> Harris J W, *Property and Justice* (Clarendon Press, Oxford, 1996) p 365.

<sup>16</sup> Geoffrey Wilson explains that the Law School was set up in the 1960s with the aim of placing the law in its sociological, economic, political and historical context and to focus upon its societal impact: Wilson G, *Frontiers of legal scholarship : twenty-five years of Warwick Law School* (Wiley, Chichester, 1995).

discussion".<sup>17</sup> The publishers express the hope that "that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules".<sup>18</sup> The assumption behind this statement is that doctrinal scholarship, with its focus on legal rules, is both dull and difficult to relate to the real world.

### **If not doctrinal, then what exactly *is* socio-legal research?**

Socio-legal research is commonly defined against the conventional doctrinal or black-letter approach to legal scholarship [on which, see Dixon's article in this special issue; Eds]. Wick caricatured the antagonism between these two approaches when he wrote that many socio-legal researchers consider the doctrinal approach to be "intellectually rigid, inflexible and inward-looking", while many doctrinal scholars regard interdisciplinary research as "amateurish dabbling with theories and methods the researchers do not fully understand".<sup>19</sup> McCrudden considered the socio-legal, the Critical Legal Studies [see Bhandhar's article on CLS in this issue; Eds], and the law and economics approaches to be antagonistic to each other, but united in their critique of both doctrinal and philosophical legal analyses as being not "up to the task of explaining law in all its richness".<sup>20</sup> In her study of UK legal academics, Cownie suggested that socio-legal studies, feminism and CLS each constitute "alternative paradigms" to the traditional doctrinal approach.<sup>21</sup> However, McCrudden has observed that researchers on both sides of the traditional divide between doctrinal and socio-legal scholarship are now developing a greater understanding of what the alternative approach can bring, leading to some fruitful collaborations and scholarship across the apparent boundary.<sup>22</sup>

Unsurprisingly, given the discussion above, a wide range of socio-legal scholarship is to be found in the leading journals in this field which include *Law & Social Inquiry*, *Law and Society Review*, *the Journal of Law and Society*, *Social & Legal Studies*, and the *Canadian Journal of Law and Society*. A quick scan of recent issues supports McCrudden's observation that three distinct developments within the social sciences are now also evident in socio-legal scholarship: the empirical, theory-based and

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<sup>17</sup> See <http://www.cambridge.org/aus/series/sSeries.asp?code=LIC> viewed 9 March 2014. Over one hundred books have been published in this series, with recent property titles being Moffat G, Bean G and Probert R, *Trusts Law: Text and Materials* (Cambridge University Press, Cambridge, 2009); and Cowan D, *Housing Law and Policy* (Cambridge University Press, Cambridge, 2011).

<sup>18</sup> <http://www.cambridge.org/aus/series/sSeries.asp?code=LIC> viewed 9 March 2014.

<sup>19</sup> Wick D W, "Interdisciplinarity and the Discipline of Law" (2004) 31 *Journal of Law and Society* 164 at 165.

<sup>20</sup> McCrudden, n 4, at 636-637.

<sup>21</sup> Cownie, n 1.

<sup>22</sup> McCrudden, n 4.

phenomenological approaches to research.<sup>23</sup> The empirical approach, is frequently used in and is traditionally associated with socio-legal research. However, the two approaches may now be seen as distinct [see *Whitehouse and Bright's article on Empirical Legal Research*; Eds]. The empirical methods used by socio-legal scholars include quantitative, qualitative and ethnographic methods, sometimes in combination.<sup>24</sup> Many empirical socio-legal "gap studies" research routine legal processes and the lower levels of the legal hierarchy.<sup>25</sup> McCrudden points out that this means empirical socio-legal scholars are more likely to research certain areas of law "such as public law, family law and labour law".<sup>26</sup> In relation to property law research, this leads to a research focus on housing law, neighbourhood disputes and the practices of local courts.

### **Theory-based socio-legal research**

I would suggest that socio-legal researchers use social theory in different ways: as a resource in the development of theoretical legal scholarship; as a basis for understanding the workings of the law; and to theorize from empirical findings. Regarding the first of these approaches, Banakar and Travers<sup>27</sup> trace a trajectory over time from the sociological study of law and legal institutions<sup>28</sup>, to a merging of legal and sociological theoretical scholarship.<sup>29</sup> Cotterell considers that 'an adequate understanding of legal ideas ... is impossible without adopting a sociological perspective, a perspective informed by social theory'.<sup>30</sup> He gives as one example the rule in the English law of trusts, that property cannot be held on trust for abstract non-charitable purposes: *Re Astor's Settlement Trusts* [1952] Ch 534, suggesting that without a sociological appreciation of trusts as a field of legally structured social relationships this rule seems inexplicable, and that undermines any legally coherent argument for its reform.

In relation to the second approach, socio-legal researchers seek to explain the law by using a range of social theory. The feminist approach to legal research was noted by Cownie alongside the socio-legal

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<sup>23</sup> McCrudden, n 4 at 632, following Murphy W T, "Law: History of its Relation to the Social Sciences", Inter. Encyl. Soc. Behav. (2004) 8521.

<sup>24</sup> See, for example, Lawless R M, Robbennolt J K, and Ulen T S, *Empirical Methods in Law* (Aspen, New York, 2009).

<sup>25</sup> McCrudden, n 4, at 637.

<sup>26</sup> McCrudden, n 4, at 645.

<sup>27</sup> Banakar R and Travers M, *An Introduction to Law and Social Theory* (Oxford, Hart Publishing, 2002).

<sup>28</sup> For example, Aubert V (ed) *Sociology of Law* (Penguin, Harmondsworth, 1969).

<sup>29</sup> See, for example, Cotterell R, *Law's Community: Legal Theory in Sociological Perspective* (Oxford, Oxford University Press, 1995).

<sup>30</sup> Cotterell R, *Law, Culture and Society: Legal Ideas in the Mirror of Society* (Ashgate, Aldershot, 2006) p 1.

and the CLS approaches as an alternative to the doctrinal approach. Here, legal research based on feminist theory is included within socio-legal research. However, much of the research published in the feminist legal journals *Canadian Journal of Women and the Law* and *Feminist Legal Studies* is in fact closer to CLS [see *Bhandhar's article*; Eds], and there is a strong argument that feminist socio-legal scholarship has developed as a separate research approach.<sup>31</sup> Feminist legal research has contributed a gendered understanding of property enhanced by an analysis of law as a social discourse which both creates and maintains gender norms.<sup>32</sup> This provides a valuable theoretical basis for analysis of the law applicable when family property is being divided on relationship breakdown.<sup>33</sup> In Fox's examination of the reasons why the commercial interests of creditors outweigh the interests of the (usually female) occupier of the home,<sup>34</sup> she cites feminist theoretical scholarship on the position of women in the home, theories of property and sociological studies on the meaning of home.<sup>35</sup>

Tamanaha has recently noted "the growing popularity of the notion of legal pluralism across a variety of sociolegal fields".<sup>36</sup> The theory of legal pluralism originated in research by legal sociologists and legal anthropologists into the relationship between colonialists' legal systems and pre-existing indigenous legal structures [see also *Young's article on Law and Anthropology*; *Bhandhar on CLS*; *Blomley on Law and Geography*; Eds]. Legal pluralism posits that "multiple layers of law, usually with different sources of legitimacy ... exist within a single state or society".<sup>37</sup> This theory can also be used to explore jurisdictions without a colonial past; see, for example, Margalit's historical analysis of property relations in Israeli *kibbutzim*. She combines a legal pluralism framework with legal consciousness theory (discussed below under Phenomenological research) to argue that "estrangement from state law [was

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<sup>31</sup> See for example Fletcher R, "Feminist Legal Theory" in Banakar and Travers, n 27 p 135; Levit N and Verchick R R M, *Feminist Legal Theory: A Primer* (New York University Press, New York, 2006); journals include *Feminist Legal Studies*, *Canadian Journal of Women and the Law* and the *Australian Feminist Law Review*.

<sup>32</sup> Smart C, *Feminism and the Power of Law* (Routledge, London, 1989).

<sup>33</sup> Amongst a wealth of feminist literature on this issue see, for example, Auchmuty R, "Unfair shares for women: the rhetoric of equality and the reality of inequality" in Lim H and Bottomley A (eds), *Feminist Perspectives on Land Law* (Routledge-Cavendish, Abingdon, 2007) p 171, an edited collection which includes contributions ranging from Muslim women's inheritance rights to public/private property issues in shopping malls.

<sup>34</sup> Fox L, *Conceptualising Home: Theories, Law and Policies* (Hart Publishing, Oxford, 2007) pp 361-407.

<sup>35</sup> For an overview of this literature, see Mallett S "Understanding home: A critical review of the literature" (2004) 52 *The Sociological Review* 62.

<sup>36</sup> Tamanaha, n 6 at 315.

<sup>37</sup> Olgiati V, "Pluralism, Legal" in Clark D (ed), *Encyclopedia of Law and Society: American and Global Perspectives* (Sage, Thousand Oaks, 2007) p 1117.

an] institutionalised component of the *kibbutzim* culture" until government policies and, significantly, property legislation changed in the 1980s.<sup>38</sup>

Other examples of social theories used by socio-legal property law researchers include governmentality<sup>39</sup> and regulation<sup>40</sup>, for instance in Cowan and McDermont's critical analysis of the interconnected histories of housing provision through various tenure sectors in the UK.<sup>41</sup> In her multi-disciplinary study of property in 'the public realm' of the city centre, Layard draws on Lefebvre's theory of the right to the city<sup>42</sup> as well as on geographical and political analytical frameworks.<sup>43</sup> Bourdieu's theories of law as a site and mechanism of power<sup>44</sup> have been applied by socio-legal researchers, for example in analyzing the property rights of freeholders and leaseholders in a study comparing practices in the UK and New Zealand.<sup>45</sup> Socio-legal scholarship has also engaged with discourse analysis and theory more widely than in the context of the feminist approach discussed above, building on Bourdieu's observation that law is a particularly powerful discourse because it "brings into existence that which it utters".<sup>46</sup> Sarat and Kearns suggested that "law shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive and coherent".<sup>47</sup> Among those categories are property and ownership, characterised by socio-legal scholars as persuasive narratives for making sense of the world.<sup>48</sup>

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<sup>38</sup> Margalit A, "Commons and Legality" in Alexander G S and Penalver E M (eds), *Property and Community* (Oxford University Press, Oxford, 2010) p 141, p 160.

<sup>39</sup> Foucault, M (trans. Braidotti R and revised by Gordon C), "Governmentality" in Burchell G, Gordon C and Miller P (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, Chicago, 1991) p 87.

<sup>40</sup> Black J, "Decentring regulation: understanding the role of regulation and 'self-regulation' in a 'post-regulatory' world" (2001) 54 *Current Legal Problems* 103.

<sup>41</sup> Cowan D and McDermont M, *Regulating Social Housing: Governing Decline* (Routledge-Cavendish, Abingdon, 2006).

<sup>42</sup> Lefebvre H, *Le Droit a la Ville* (Anthropos, Paris, 1968). See also Butler C, *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (Routledge-Cavendish, Abingdon, 2012).

<sup>43</sup> Layard A, "Shopping in the Public Realm: The Law of Place" (2010) *Journal of Law and Society* 37 412; this article is fully discussed in Cownie C and Bradney A, "Socio-legal studies: A challenge to the doctrinal approach" in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge, Abingdon, 2013) p 34, pp 38-39.

<sup>44</sup> Bourdieu P, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38 *The Hastings Law Journal* 814.

<sup>45</sup> Blandy S, Dixon J and Dupuis A, "Theorising power relationships in multi-owned residential developments: unpacking the bundle of rights" (2006) 43 *Urban Studies* 2365.

<sup>46</sup> Bourdieu P (edited and introduced by Thompson J B), *Language and Symbolic Power* (Polity Press, Cambridge, 1991) p 41.

<sup>47</sup> Sarat A and Kearns T R "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life" in Sarat A and Kearns T R (eds) *Law in everyday life* (University of Michigan Press, Ann Arbor, 1993) p 21, p 22.

<sup>48</sup> Carol M Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, Boulder, 1994).

### ***Theorising from empirical research***

Having obtained fresh data through empirical methods, the socio-legal researcher may consider whether the data might be explained by social theory; or go beyond analysing the results according to ELR principles [see *Whitehouse and Bright's article*; Eds] to build theory from the data. This approach is referred to as grounded theory, "the discovery of theory from data systematically obtained from social research"<sup>49</sup>. Recent socio-legal articles on property law in which the authors have taken this approach include a study of neighbor disputes in post-Soviet Russia which illuminates the reasons why the norms of self-help are preferred to legal remedies,<sup>50</sup> and two articles on the relationship between informal property rights and state land titling which each propose an explanatory framework drawing on theories of private property.<sup>51</sup>

This approach to theory-based research can be further illustrated by empirical studies into decision-making by courts hearing possession claims. The first, a longitudinal study of the Hawaii public-housing eviction board, compared its practices and outcomes between 1969 and 1987. The researcher used the data to produce valuable insights and develop theories of discretion.<sup>52</sup> In the UK, judicial decision-making in possession claims has been investigated in a series of studies. The data obtained from interviewing judges and a comparison of the different rates of eviction for homeowners and for tenants, enabled a convincing theory to be built that judges bring to their decision-making their own understandings of the role of housing and home and the differences between tenures.<sup>53</sup> The empirical findings from a large government-funded study into judicial discretion in possession proceedings based on rent arrears<sup>54</sup> were used to show<sup>55</sup> that the judges were operating as "street-level bureaucrats"<sup>56</sup>

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<sup>49</sup> Glaser, B G and Strauss, A L, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine de Gruyter, New York, 1967) p 2.

<sup>50</sup> Hendley K "Resolving Problems among Neighbours in Post-Soviet Russia: Uncovering the Norms of the Pod"ezd" (2011) 36 *Law & Social Inquiry* 388.

<sup>51</sup> Ward P M, de Souza F, Giusti C and Larson J E, "El Titulo en la Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias" (2013) 47 *Law and Society Review* 1; and van Gelder J-L "Paradoxes of Urban Housing Informality in the Developing World" (2013) 47 *Law and Society Review* 493.

<sup>52</sup> Lempert R, "Discretion in a behavioural perspective: The case of a public housing eviction board" in Hawkins K (ed) *The Uses of Discretion* (Oxford University Press, Oxford, 1992) p 185.

<sup>53</sup> Hunter C and Nixon J (1998) "Better a public tenant than a private borrower be: The possession process and the threat of eviction" in Cowan D (ed) *Housing: Participation and Exclusion* (Dartmouth, Aldershot, 1998) p 84.

<sup>54</sup> Hunter C, Blandy S, Cowan D, Nixon J, Hitchings E, Pantazis C and Parr S, *The Exercise of Judicial Discretion in Rent Arrears Cases*, Research Series 6/05 (Department for Constitutional Affairs, London, 2005).

<sup>55</sup> In Cowan D and Hitchings E, "'Pretty boring stuff': District judges and housing possession proceedings" (2007) 16 *Social and Legal Studies* 363.

<sup>56</sup> Lipsky M, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage Foundation, New York, 1980).

while the same data formed the basis for theorizing about judges' varied attitudes to the property rights of landlord and tenant.<sup>57</sup>

### Phenomenological research

This is the third distinct research social science approach which McCrudden noted as evident in recent socio-legal scholarship.<sup>58</sup> The idea of law as a powerful discourse has been discussed previously, but the phenomenological research approach uncovers how the law is also shaped by everyday practices. The phenomenological method is essentially qualitative and ethnographic, aiming to capture and understand subjective experience and thus to avoid normative assumptions.<sup>59</sup> In this approach, rather than the researcher shaping interviews with questions about the law, it is the research subjects who raise legal issues and express them in their own words. For example, Cooper's focus on everyday property practices and relations between people enabled her to look beyond forms of property recognised by state law, and conceptualise the work that property does in the context of a school<sup>60</sup> [see also Bhandhar's comments on Cooper's work from the CLS perspective; Eds]. Property emerges as a lived and evolving process rather than as embodied in static legal relationships.

The phenomenological approach has particular resonance for socio-legal property research. As Gray and Gray have noted, at least in respect of land, the concept of property "connotes, ultimately, a deeply instinctive self-affirming sense of belonging and control" and this understanding is deeply embedded in many aspects of property law.<sup>61</sup> Empirical observations emphasise and confirm that property is both an attitude of mind and a process based on continual enactment on the ground, demonstrated for example in the informal property-based norms governing on-street car parking<sup>62</sup> and queuing.<sup>63</sup> Thus, the meaning of property is seen as not simply externally imposed and enforced through law but as continuously recreated and maintained by social interactions.

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<sup>57</sup> Cowan D, Bland S, Hunter C, Nixon J, Hitchings E, and Parr S (2006) "District judges and possession proceedings" (2006) 33 *Journal of Law and Society* 547.

<sup>58</sup> McCrudden n 4.

<sup>59</sup> Moustakas C, *Phenomenological research methods* (Sage, London, 1994).

<sup>60</sup> Cooper D "Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property" (2007) 32 *Law and Social Inquiry* 625.

<sup>61</sup> Gray K and Gray SF, "The Idea of Property in Land", in Bright S (ed), *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1998) p 19.

<sup>62</sup> Epstein R, "The Allocation of the Commons: Parking on Public Roads" (2002) 31 *Journal of Legal Studies* S515.

<sup>63</sup> Gray K, "Property in a Queue" in Alexander G S and Penalver G S (eds), *Property and Community* (Oxford, Oxford University Press, 2010) p 165.

Cotterell expresses this as the theory that law is "an aspect or field of social experience, not some mysteriously external force acting on it. They are mutually constituting".<sup>64</sup> In socio-legal research, an approach informed by this social constructionist theory<sup>65</sup> has produced the concept of legal consciousness. Most legal consciousness studies have been concerned with the traditional subjects of socio-legal research: for example, the "welfare poor",<sup>66</sup> working-class people using the small claims court to resolve neighbourhood disputes,<sup>67</sup> and the homeless.<sup>68</sup> Originally researched through quantitative surveys designed to establish the degree of legal knowledge in particular population groups, the contemporary legal consciousness approach specifically rejects a methodology of asking direct questions about experiences of the law. This research focuses on how law's language, authority, and procedures are used to organise lives and manage relationships, and thus how people participate in the construction of legal meanings and practices.

In their well known recent legal consciousness study, Ewick and Silbey successfully theorized the extensive data obtained through asking their respondents to talk generally about problematic issues in their lives and neighbourhoods, avoiding a "law-first" approach.<sup>69</sup> From these interviews the authors constructed a theoretical framework which illuminates "how, where and with what effect law is produced in and through commonplace social interactions within neighbourhoods".<sup>70</sup> Ewick and Silbey's concept of "legality", meaning a set of internal schemas guiding people's decisions and conduct as they engage with, avoid, or resist the law and legal meanings, has been much debated; it has formed the basis of many subsequent legal consciousness studies but, as discussed below, none of these specifically addresses issues of property.

### **Some challenges of socio-legal research into property law**

Socio-legal research has sometimes been characterized as "just a policy evaluation tool" but I hope that the above discussions have shown that this approach consists of far more than that. A different concern

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<sup>64</sup> Cotterell R, *Law, Culture and Society: Legal Ideas in the Mirror of Society* (Ashgate, Aldershot 2006) p 25.

<sup>65</sup> Bergman P and Luckmann T, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor, New York, 1966).

<sup>66</sup> Sarat A, "'... The law is all over': Power, resistance and the legal consciousness of the welfare poor" (1990) 2 *Yale Journal of Law and the Humanities* 343.

<sup>67</sup> See an early study by the American legal anthropologist Sally Engle Merry: Merry S E, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, Chicago, 1990).

<sup>68</sup> Cowan D, "Legal Consciousness: Some Observations" (2004) 67 *Modern Law Review* 928.

<sup>69</sup> Ewick P and Silbey S, *The Common Place of Law: Stories from Everyday Life* (The University of Chicago Press, Chicago, 1998).

<sup>70</sup> Ewick and Silbey, n 69, p 20.

is that socio-legal researchers may lose their skills and identities as lawyers as they move away from doctrinal research, and instead become inadequate social scientists [see further the concern about lack of training for legal academics in social scientific methods, discussed in Whitehouse and Bright's article on *ELR*; Eds]. Socio-legal researchers carrying out theory-based research risk being dismissed as merely "more acquainted, in a haphazard way, with some ideas taken from other disciplines",<sup>71</sup> eclectic collectors of different theories whose writing is inaccessible and marred by half-digested jargon. Familiarising oneself with the relevant social theory is extremely time-consuming for the researcher.

Practical problems of access to research subjects [also discussed by Whitehouse and Bright in relation to *Empirical Legal Research*; Eds] have been noted by Mopas and Turnbull: "gaining access to state institutions appears to have become progressively more difficult... particularly [for researchers] whose research projects are perceived as 'critical' or employ methods that these researchers view as 'risky' or illegitimate".<sup>72</sup> It is hard to convince potential funders that theory-based or phenomenological research is worthwhile when the results cannot be argued to be statistically valid, in conventional terms. There are also methodological challenges to face, whether the research subjects are actors in state institutions or individuals. It is no doubt easier to obtain funding for small qualitative studies, but the ethnographic socio-legal researcher must take care not to generalize from data about the effect or presence of factors found in a few case studies. Similarly, theorizing from such data should be carried out transparently to enable interrogation and confirmation of its validity.<sup>73</sup> Conversely, when funding for large-scale research is successfully obtained, researchers may then be faced with the almost impossible task of analyzing and interpreting extensive data.<sup>74</sup>

Avoiding "law -first" research techniques is a challenge for any scholar trained in law who wishes to carry out phenomenological research. The choice of areas to research is also open to critique. Ellickson's well-known study of property disputes (boundary and cattle trespass) in Shasta County,

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<sup>71</sup> Cownie, n 1, p 69.

<sup>72</sup> Mopas M S and Turnbull S, "Negotiating a Way In: A Special Collection of Essays on Accessing Information and Socio-legal Research" (2011) 26 *Canadian Journal of Law and Society* 585 at 586; see also Hunter C, Nixon J and Blandy S "Researching the Judiciary: Exploring the Invisible in Judicial Decision Making"(2008) 35 *Journal of Law and Society*, Special Research Issue, 76.

<sup>73</sup> Hycner R H, "Some guidelines for the phenomenological analysis of interview data" (1985) 8 *Human Studies* 279.

<sup>74</sup> In the case of Ewick and Silbey's study, n 69, transcriptions of interviews with more than four hundred respondents.

California,<sup>75</sup> despite its ethnographic methods and apparently constitutive perspective, nevertheless embodies a "law-first" approach according to Sarat and Kearns.<sup>76</sup> They suggest that there can be "no 'order without law' among ranchers and farmers whose status as landowners is already inscribed within a system of law".<sup>77</sup> Sarat and Kearns advocate instead a focus "on events or practices that seem, on the face of things, removed from law, or at least not dominated by law at the outset", to genuinely illuminate the place of law in everyday life.<sup>78</sup> This mirrors the suggestion made by the eminent legal anthropologist Sally Falk Moore nearly twenty years previously, that research should start with exploring the working norms of a "semi-autonomous social field" that generates its own rules and decisions and means of enforcement, but which is also penetrated by the external legal system.<sup>79</sup>

However, such an approach risks luring the socio-legal researcher into the problematic no-mans land between law and non-law: "Where do we stop speaking of law and find ourselves simply describing social life?"<sup>80</sup> This remains a current and much-debated question,<sup>81</sup> a trap for the unwary. This may explain the dearth of phenomenological socio-legal research into property law (as opposed to housing law, dispute resolution or neighbourhood disputes) which becomes apparent from looking through edited collections<sup>82</sup> and publishers' series labeled "Socio-Legal" or equivalent.<sup>83</sup> Within socio-legal works of a general theoretical nature, illustrations are often given to support theory. Those taken from the field of property are rare in comparison with contract, tort and criminal law, and tend to be weak. For instance, the example given by Ewick and Silbey to illustrate "'property' as it is claimed, used, protected and fought over in the social spaces outside of official agencies of law" is the chair reserving the

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<sup>75</sup> Ellickson R C, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press, Cambridge MA, 1991).

<sup>76</sup> Sarat and Kearns, n 47.

<sup>77</sup> Sarat and Kearns, n 47, p 60.

<sup>78</sup> Sarat and Kearns, n 47, p 55.

<sup>79</sup> Moore S F, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719.

<sup>80</sup> Merry S E, "Legal Pluralism" (1988) 22 *Law and Society Review* 869 at 878.

<sup>81</sup> See, for example, the various contributions in Hertogh M (ed), *Living Law: Reconsidering Eugen Ehrlich* (Hart, Oxford, 2008); Tamanaha B "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 374; Cotterrell R "Does Legal Pluralism Need a Concept of Law?" (2009) 19 *Law and Politics* 774.

<sup>82</sup> Cowan D, Mulcahy L and Wheeler S, *Law and Society* (Routledge, Abingdon, 2013). This edited collection runs to 1,736 pages, but includes only two excerpts related to property: Layard, n 42; and Cowan D, Hunter C and Pawson H, "Jurisdiction and Scale: Rent Arrears, Housing Associations and Human Rights" (2012) 39 *Journal of Law and Society* 269.

<sup>83</sup> For example, Chicago University Press's Law and Society series includes Merry, n 66, and Ewick and Silbey, n 69, but no title specifically about property: <http://www.press.uchicago.edu/ucp/books/series/CSLS.html> viewed 15 March 2014.

roadside parking space shovelled free of snow;<sup>84</sup> identical to the example of informal property used by Rose.<sup>85</sup>

Finally, although Cownie's observation of "a perception [amongst UK legal academics] that being socio-legal does not do much for one's image as an academic lawyer, particularly in terms of promotion"<sup>86</sup> may have been superceded during the intervening ten years since her research was carried out, there remains the problem that the socio-legal research approach may not bear much relation to how property is taught in Law Schools.<sup>87</sup> If law students are not exposed to the benefits of this approach, they may not embrace it in their future academic careers.

### **What is the value of the socio-legal research approach into property law?**

Cotterell states confidently, if not provocatively, that "[a]ll the centuries of purely doctrinal writing on law have produced less valuable knowledge about what law is, as a social phenomenon, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies".<sup>88</sup> Certainly, this approach requires that the researcher does not take the legal for granted, thus improving our understanding of law in the real world.

Socio-legal research, although admittedly perhaps only its empirical findings, may also be of value to the judiciary. For example, Baroness Hale of Richmond, now Deputy President of the UK Supreme Court, considers it "dangerous for the common law to rely upon the experience and common sense of a comparatively narrow section of society [i.e. members of the judiciary]. One counter to this is the study of law in its wider context".<sup>89</sup> Baroness Hale noted that she had referred to two socio-legal studies relevant to property disputes between unmarried cohabitantes<sup>90</sup> in her opinion in the case of *Stack v Dowden* [2007] UKHL 17, at [45].<sup>91</sup> However, she pointed out that the judiciary "are not so well placed to

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<sup>84</sup> Ewick and Silbey, n 69 at 21.

<sup>85</sup> Rose C, "Possession as the Origin of Property" (1985) 52 University of Chicago Law Review 73.

<sup>86</sup> Cownie, n 1, at 57.

<sup>87</sup> See Auchmuty R, "Land Law and Equity and Trusts" in Hunter C (ed) Integrating Socio-Legal Studies into the Law Curriculum (Palgrave Macmillan, Basingstoke, 2012) p 69.

<sup>88</sup> Cotterell, n 29, p 59.

<sup>89</sup> Hale B (2013) "Should Judges be Socio-Legal Scholars?", paper given at the Socio-Legal Studies Association conference, University of York, March 2013, at 21; at <http://www.slsa.ac.uk/319> viewed 18 February 2014.

<sup>90</sup> Douglas, G, Pearce, J and Woodward, H, "Dealing with property issues on cohabitation breakdown" (2007) 37 Family Law 36; and Barlow A, Duncan S, James G, Park A, "Just a piece of paper? Marriage and cohabitation", in Park A, Curtice J, Thomson K, Jarvis L, Bromley C (eds), British Social Attitudes: Public policy, social ties. The 18<sup>th</sup> Report (Sage, London, 2001) p 29.

<sup>91</sup> Hale, n 89, at 7.

assess the comparative merits of competing views of socio-legal scholars", and this may prevent research findings from being more widely used in court.<sup>92</sup>

The value of the diversity of academic backgrounds and skills within socio-legal studies can be illustrated through the example of a contemporary issue which has attracted the interest of many legal researchers: multi-owned housing (apartment blocks and other common interest developments) is an increasingly important and common urban form throughout the world. The legal arrangements vary from one jurisdiction to another, but typically provide for a legal entity which owns the site, arrangements for governance, and individual property rights in the separate dwellings. In Canada, as in the USA, the condominium is the approved legal framework. Harris' socio-legal approach supports his argument that the legal and physical form of the condominium has completely transformed Vancouver, physically and socially.<sup>93</sup> Taking an approach which combines doctrinal analysis with contextual research, Sherry's detailed examination of strata title in New South Wales enables her to put forward reasoned proposals for legislative reform.<sup>94</sup>

Other socio-legal researchers have used theories of power to explain the relationships between residents, developers and their managing agents.<sup>95</sup> The everyday life of residents in multi-owned housing can also be researched through the theoretical lens of the mutual constitution of law and the social. As Ehrlich wrote a hundred years ago, '[i]f one reads a contract of usufructuary lease ... one marvels how it is possible for the lessee to move at all within this barbed-wire fence of paragraphs. Nevertheless the lessee gets on very well'.<sup>96</sup> Empirical phenomenological research has illuminated the relationship between law and social norms in multi-owned housing sites.<sup>97</sup> In Tamanaha's view, internal governance arrangements are "quasi-legal activities" rather than an instance of legal pluralism.<sup>98</sup> Clarke argues that such developments amount to a "new *de facto* commons" which are not yet, but should be,

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<sup>92</sup> Hale, n 89, at 15.

<sup>93</sup> Harris D C, "Condominium and the City: The Rise of Property in Vancouver" (2011) 36 *Law & Social Inquiry*, 388.

<sup>94</sup> Sherry C, "Termination of strata schemes in New South Wales - proposals for reform" (2006) 13 *Australian Property Law Journal* 227.

<sup>95</sup> See the contributions from different jurisdictions in Blandy S, Dixon J and Dupuis A (eds), *Multi-owned Housing: Law, Power and Practice* (Ashgate, Aldershot, 2010).

<sup>96</sup> Ehrlich, n 5, p 493.

<sup>97</sup> Blandy S, "Collective Property: Owning and Managing Residential Space", in Hopkins N (ed) *Modern Studies in Property Law* vol. 7 (Hart, Oxford, 2013) p 151.

<sup>98</sup> Tamanaha, n 81 at 386.

recognised in property law,<sup>99</sup> drawing on the scholarship of Ostrom<sup>100</sup> and other common pool resource analysts [*see further discussion in Cole's article on law and economics*; Eds]. Their work emphasises the importance of "operational details in the real world" to test theories of property; for example, how important are the right to exclude and the alienability of property rights?<sup>101</sup>

In his theoretical approach to multi-owned housing, Heller situates common interest developments 'at the crossroads of legal theory, between commons and anticommons along the axis of property law, between private and public on the axis of governance'.<sup>102</sup> He considers this represents 'a stunning example of the power of law in action—of getting a liberal commons form right'.<sup>103</sup> However, cases coming to the lower courts suggest that many US developments are riven by disputes between residents, officers of homeowner associations and their lawyers.<sup>104</sup> The regulatory legislation introduced by many US states to protect residents is cited by McKenzie, who demonstrates that neither a theoretical nor a law and economics approach can adequately account for the problems experienced in multi-owned housing.<sup>105</sup>

A purely doctrinal approach can only describe the legal framework for multi-owned housing, and property theorists are capable of making incorrect assumptions about law in the real world. Socio-legal scholars, whether taking a contextual, empirical, constitutive, or social theory-based approach are able to make well-founded proposals for law reform. The value of this diverse approach to researching property law is that it combines an understanding of the legal rules with the ability to research how law affects and is affected by life in the real world.<sup>106</sup>

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<sup>99</sup> Clarke A C, "Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework" (2006) 59 *Current Legal Problems* 319 at 319.

<sup>100</sup> Including Ostrom E, *Governing the Commons: The Evolution of Institutions for Collective Action* (Princeton University Press, Princeton, 1990); Ostrom E, *Understanding Institutional Diversity* (Oxford University Press, Oxford, 2005).

<sup>101</sup> Fennell L A, "Ostrom's Law: Property Rights in the Commons" (2011) 5 *International Journal of the Commons* 9 at 16.

<sup>102</sup> MA Heller, 'Common Interest Developments at the Crossroads of Legal Theory' (2005) 37 *Urban Lawyer* 329 at 334.

<sup>103</sup> Heller, n 102, at 333.

<sup>104</sup> Lippert, R K, "Governing Condominiums and Renters with Legal Knowledge Flows and External Institutions" (2012) 34 *Law & Policy* 263.

<sup>105</sup> McKenzie E, *Beyond Privatopia: Rethinking Residential Private Government* (Urban Institute Press, Washington DC, 2011).

<sup>106</sup> Calavita K, *Invitation to Law and Society: An Introduction to the Study of Real Law* (University of Chicago Press, Chicago, 2010).