

# **The Impact of ‘Empirical Facts’ on Legal Scholarship and Legal Research Training**

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## Abstract

Lawyers have traditionally viewed law as a closed system, and doctrinal research has been the research methodology used most widely in the profession. This reflects traditional concepts of legal reasoning. There is a wealth of reliable and valid social science data available to lawyers and judges. Judges in fact often refer to general facts about the world, society, institutions and human behaviour (‘empirical facts’). Legal education needs to prepare our students for this broader legal context. This paper examines how ‘empirical facts’ are used in Australian and other common law courts. Specifically, the paper argues that there is a need for enhanced training in non-doctrinal research methodologies across the law school curriculum. This should encompass a broad introduction to social science methods, with more attention being paid to a cross-section of methodologies such as content analysis, comparative law and surveys that are best applied to law.

## INTRODUCTION

There is a vast array of valid social science research available to the modern lawyer. Research of current Australian, United States and United Kingdom judicial decisions demonstrates judges do refer to empirical facts and sometimes refer to social science research as part of judicial reasoning.<sup>1</sup> In this article we define empirical facts as ‘general facts about the world, society, institutions and human behaviour’. Traditionally lawyers have been trained within a ‘doctrinal’ research methodology framework. There are existing rules of evidence in all jurisdictions allowing for a formal use of empirical data within the doctrinal framework.<sup>2</sup> However these existing rules of evidence do not appear to adequately cater for the wide variety of ways in which empirical facts are utilised in judicial decisions.<sup>3</sup> Increasingly, empirical fact assumptions and sometimes social science material is being subsumed within judgments. The way this material finds its way into judges’ decisions appears to primarily rest upon judicial discretion.<sup>4</sup> Social science material relevant to empirical fact assumptions is not always (or even often) adequately acknowledged by judges.<sup>5</sup> The recognition of the judicial use of empirical facts as part of judicial reasoning raises the need for new approaches to legal research and legal research training based in the social sciences. It suggests that lawyers need better training in non-

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<sup>1</sup> See for example *Cattanach v Melchior* (2003) 199 ALR 131 (wrongful birth); *Woods v Multi-Sport Holdings* (2002) 208 CLR 460 (extra record social scientific material); *St Helens Borough Council v Derbyshire and others* [2007] 3 All ER 81 (working lives of women); *Stack v Dowden* [2007] 2 All ER 929 (Cohabitation). See also K. Burns, “Its Just not Cricket: The High Court, Sport and Legislative Facts” (2002) 10 *Torts Law Journal* 234; K. Burns, “The Way the World is: Social Facts in High Court Negligence Cases” (2004) 12 *Torts Law Journal* 215; and G. Mullane, “Evidence of Social Science Research: Law, Practice, and Options in the Family Court of Australia” (1998) 72 *Australian Law Journal* 434.

<sup>2</sup> This includes through the doctrine of judicial notice and through relevant provisions of evidence legislation. See Burns (2004), *ibid* 221-4; Mullane, *ibid* 441-52.

<sup>3</sup> Burns (2004), *ibid* 224. There have been suggestions that the rules of evidence in relation to the admission of empirical facts needs to be reviewed. See discussion at 221-4. The way in which Australian courts deal with empirical facts was discussed by both the 2000 Australian Law Reform Commission (ALRC) Report *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, 1999, recommendations 108-9 and the Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, 2005, 17.3-17.27 in relation to judicial notice and the operation of s 144 of the *Evidence Acts*. The Commission recommended against any change to the legislation in relation to judicial notice to reflect the use of ‘social facts’ [17.27]. There have been no changes either to Australian evidence law or practice in recent years that respond to the judicial use of empirical facts, or attempts to better equip judges to make reliable findings about empirical facts.

<sup>4</sup> *Ibid*.

doctrinal methodologies. In this article we will consider how judges use empirical facts in their judicial decisions and the implications of this for traditional concepts of legal research and legal research training. In Part I of the article we will define the concept of ‘empirical facts’ and briefly discuss how judges utilise empirical facts in their judgments. In Part II we will discuss the implications of this judicial use of empirical facts for traditional models of legal research. In Part III we will discuss how legal research training in the future should respond to the use of empirical facts in judicial decision-making. This article will argue that traditional models of legal research, and traditional doctrinal approaches to legal research training, fail to respond to the use of empirical facts by judges. New approaches must be considered.

## **I DEFINING EMPIRICAL FACTS AND JUDICIAL USE OF EMPIRICAL FACTS**

Various commentators have attempted to categorise the facts judges use in their judicial reasoning. In 1942, Kenneth Culp Davis argued that there were two types of facts used by judges – ‘legislative facts’ and ‘adjudicative facts’.<sup>6</sup> Adjudicative facts are ‘case-specific facts’, including instances where social science research is submitted as evidence regarding a matter of specific contention between the parties.<sup>7</sup> Adjudicative facts are not included within the definition of empirical facts in this article. Adjudicative facts are facts found by judges as part of litigation. They tend to be limited to the litigants in the specific dispute and are normally subject to the usual rules of evidence.

Where a ‘court or an agency develops law or policy it is acting legislatively’ and Kenneth Davis called the use of facts in this context ‘legislative facts’.<sup>8</sup> Legislative facts aim to define legal contexts and relationships in society as a whole.<sup>9</sup> This category is similar to

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<sup>5</sup> Burns (2004), *ibid* 229.

<sup>6</sup> K. C. Davis, “An Approach to Problems of Evidence in the Administrative process” (1942) 55 *Harvard Law Review* 364. See also K. C. Davis, “Judicial Notice” (1955) 55 *Columbia Law Review* 945.

<sup>7</sup> A. Smith, *Law, Social Science and the Criminal Courts* (Durham, Carolina Academic Press 2004), 24.

<sup>8</sup> Davis (1955), *supra* n. 6, 952.

<sup>9</sup> L. Etlinger, “Social science research in domestic violence law: A proposal to focus on evidentiary use” (1995) *Albany Law Review* 1259, 1263, from C. Bleil, “Evidence of Syndromes” (1990) 32 *South Texas Law Review* 37. This categorisation is accepted in the Federal Rules of Evidence in the United States.

what John Monahan and Laurens Walker have called the use of social science as ‘social authority’.<sup>10</sup> Monahan and Walker have also noted that courts may use social science to ‘construct a frame of reference or background context for deciding a factual issue crucial to the resolution of a specific case’.<sup>11</sup> They refer to this as ‘social framework’.<sup>12</sup> For example, when a judge draws on material in relation to ‘battered wives syndrome’ to allow an interpretation of the adjudicative facts regarding a particular spouse in a case, the judge is using that material as social framework.<sup>13</sup>

Justice Graham Mullane, in a study of 1990 Australian Family Court cases, discussed the use of assumptions by judges ‘concerning human behaviour’, which he called ‘social facts’.<sup>14</sup> He indicated the basis for ‘social facts’ may be ‘revealed’ by social scientific disciplines such as ‘history, psychology, sociology, anthropology, political science and related fields’.<sup>15</sup> Kylie Burns has defined the term ‘social facts’ more widely as including the ‘continuum of assumptions judges make about society, the world and human behaviour’ in their reasoning.<sup>16</sup> It is apparent from both Burns’ and Mullane’s study that judges may sometimes refer to empirical evidence in support of these kinds of assumptions, but far more commonly there is no evidence provided or referred to in the judgment.<sup>17</sup>

We define ‘empirical facts’ in this article as assertions of facts about society, the world and human behaviour which are hypothetically able to be proved by social science or empirical methodologies.<sup>18</sup> This category includes Davis’ legislative facts, Burns’ and

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<sup>10</sup> J. Monahan & L. Walker, “Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law” (1986) 134 *University of Pennsylvania Law Review* 477.

<sup>11</sup> *Supra* n. 7; see also L. Walker & J. Monahan, “Social Frameworks: A New Use of Social Science in Law” (1987) 73 *Virginia Law Review* 559.

<sup>12</sup> *Ibid.*

<sup>13</sup> See for example the evidence presented on battered wife’s syndrome in *R v Lavallee* [1990] 1 S.C.R. 852.

<sup>14</sup> Mullane, *supra* n. 1.

<sup>15</sup> *Ibid* 450.

<sup>16</sup> Burns (2004), *supra* n. 1, 219.

<sup>17</sup> Burns (2004), *supra* n. 1; Mullane *supra* n. 1.

<sup>18</sup> We take social sciences to include such disciplines as political science, sociology, psychology, history, economics, statistics, anthropology and behavioural science. For a discussion of the impact of social science on legal research in the legal academy see C Madden, “Legal Research and the Social Sciences” (2006) *Law Quarterly Review* 632. We take empirical methodologies to include social science research methods such as surveys, interviews, content analysis, and case studies. For a discussion of these methods

Mullane's social facts and Monahan and Walker's social authority and social framework.<sup>19</sup> Similar to these categories, empirical facts are not statements of legal principle or adjudicative facts. They are assertions used as part of the judicial reasoning process. They may be used in a wide variety of ways by judges in their reasoning. They may be used to set background context, in a rhetorical way to support arguments of legal principle, to assist in the determination or interpretation of adjudicative facts, or as arguments of policy or consequence used in the development of law.<sup>20</sup> Statements of empirical fact sometimes merge into statement of legal or social values, for example statements that refer to enduring community values such as the value of human life.

As Paddy Hillyard has pointed out, 'Parliament, government, businesses and NGOs' all appreciate the importance of 'evidence-based research to inform the development of law, the administration of justice, and the practice of law'.<sup>21</sup> It is therefore not surprising that a close textual examination of a variety of court judgments demonstrates that judges use empirical facts when they encounter gaps in knowledge. Justice Mullane, in a study of 302 final custody judgments from the Family Court of Australia in 1992, found 82 social fact statements.<sup>22</sup> Sixty-five percent of these had no source stated or the source was stated as undefined research.<sup>23</sup> A relatively high proportion of social fact statements (32%) had expert evidence stated as a source, however this most likely reflects the nature of the Family Court which has frequent recourse to expert witnesses on issues such as the best interests of children.<sup>24</sup> Only 1% of social fact statements were found to be supported by research nominated and specified by the judge.<sup>25</sup>

The Burns study considered 11 negligence cases handed by the High Court of Australia

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in the legal context see T.Hutchinson, *Researching and Writing in Law* (2<sup>nd</sup> ed, Sydney, Lawbook Co., 2006), Chapter 5.

<sup>19</sup> It may however be narrower than Burns' definition which also includes matters that could not be technically proven empirically.

<sup>20</sup> Burns (2004), *supra* n. 1, 219-21.

<sup>21</sup> P. Hillyard, "Law's Empire: Socio-Legal Empirical Research in the Twenty-first Century" (2007) 34(2) *Journal of Law and Society* 266, 268.

<sup>22</sup> Mullane, *supra* n. 1, 453, Schedule 2.

<sup>23</sup> *Ibid* 453.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

in 2003.<sup>26</sup> Burns found 325 statements of social facts in the relevant judgments.<sup>27</sup> The social fact statements made by judges of the High Court of Australia were made in a wide range of ways. They were used to interpret adjudicative facts, as general context statements, as statements of consequence of liability and as mixed statements of social fact and value (for example the social value of human life).<sup>28</sup> The vast majority of social fact statements made by judges were unsourced<sup>29</sup> and only three social fact statements were sourced to a form of social science or empirical evidence.<sup>30</sup> The social fact statements made in the cases were made by both judges considered ‘activist’ in judicial approach and judges considered ‘conservative’ in judicial approach. One of the most prolific ‘social fact’ cases analysed in the study, *Cattanach v Melchior*<sup>31</sup> (the leading Australian case on wrongful birth) featured a multitude of social fact statements made by Heydon J who is considered to be more conservative in judicial approach.<sup>32</sup> Many of these social fact statements were highly contentious, for example the psychological effects of litigation on children.<sup>33</sup> No social science evidence was referred to by Heydon J in support of these social fact statements.<sup>34</sup> Similarly, Bradley Selway, in a 2001 study, identified many examples of the use of history and other facts in the judicial reasoning within High Court of Australia judgments.<sup>35</sup> He also came to the conclusion that ‘There are scientific, cultural, social and economic facts (to say nothing of the broad category of experience encompassed in the phrase ‘common sense’) that are used as a matter of course in legal argument and in legal reasoning and that are not strictly proved in evidence’.<sup>36</sup> The use of this form of empirical fact material in judgments in the United States has also been well documented.<sup>37</sup> Many empirical fact statements are made by

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<sup>26</sup> Burns (2004), supra n. 1.

<sup>27</sup> Ibid 225.

<sup>28</sup> Ibid 226-9.

<sup>29</sup> Ibid 229. Only 81 statements were referenced in any way at all.

<sup>30</sup> Ibid.

<sup>31</sup> (2003) 215 CLR 1.

<sup>32</sup> Burns (2004), supra n. 1, 231-6.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> B. Selway, “The Use of History and Other Facts in the Reasoning of the High Court of Australia” (2001) 20(2) *University of Tasmania Law Review* 129.

<sup>36</sup> Ibid 156.

<sup>37</sup> For example see P. C. Davis, “‘There is a Book Out There’ An Analysis of Judicial Absorption of Legislative Facts” (1987) 100 *Harvard Law Review* 1539. See also the discussion of the use of content

judges implicitly and without any empirical support. However, judges do sometimes explicitly reference empirical or social science material in their judgments. It is less common in the United Kingdom and Australia nevertheless there are examples of the use of social science material in judgments.<sup>38</sup>

## II IMPLICATIONS FOR LEGAL RESEARCH SCHOLARSHIP

What are the implications for legal research scholarship of this expanding body of social science literature? It is important that these methodologies and information are integrated into legal discourse. Doctrinal research has been the dominant influence in legal scholarship during the nineteenth and twentieth centuries.<sup>39</sup> However, limiting legal scholarship and research training to traditional doctrinal analysis has obvious limitations when lawyers (and judges) are being confronted with the need for and the relevance of results of empirical and interdisciplinary scholarship. This section examines the parameters of traditional legal research in Australia. It discusses the separate strand of socio-legal research that has developed in particular in the US, Canada and the United Kingdom, and speculates briefly as to why there have not been such extensive moves towards these methodologies in Australia.

### *A Historical View*

Traditionally law has been viewed as a closed system. What do we mean by this? In terms of legal research scholarship and research methodologies it has meant that lawyers have looked at

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analysis to study judicial use of social science material in the United States M A Hall and R F Wright "Systematic Content Analysis of Judicial Opinions" (2008) 96 *California Law Review* 63.

<sup>38</sup> For example in the Australian High Court negligence case of *Woods v Multi Sport Holdings* Justice McHugh referred to social science evidence on the rate of accidents and eye injuries during his discussion of whether an indoor cricket centre should be responsible for an eye injury to a player ((2002) 208 CLR 460 at [62]). In the House of Lords in *St Helens Borough Council v. Derbyshire and others*[2007] 3 All ER 81,] (a case concerning equal pay and sex discrimination claims), Baroness Hale of Richmond discussed the working lives of women and in particular the evidence of injustice women had historically suffered in the workplace in the United Kingdom ([30]-[31]). This included both general statements of empirical facts and the use of statistical material in relation to gender pay gaps. In *Stack v. Dowden* [2007] 2 All ER 929(a case concerning property interests of co-habiting couples) Baroness Hale of Richmond extensively discussed the nature of cohabitation between couples in the United Kingdom (at [45]). Again this included general empirical fact statements about the nature of cohabitation before and instead of marriage. The statements also draw on a range of social science material including published research papers, law commission reports, and research reports on British social attitudes.

the law in isolation. Legal researchers have adopted an ‘internal approach’ and have analysed the legal rules and principles ‘taking the perspective of an insider in the system’.<sup>40</sup> The sources of law have been the primary materials, the doctrine of the law – the case law and legislation. The research carried out has largely been confined to an analysis of legal doctrine. Thus doctrinal research is the established traditional territory of the lawyer-researcher. As a result, where legal research has been taught in the law schools the methodology taught has been doctrinal research. In some cases doctrinal legal research has not even been taught explicitly. Law schools have relied on the ‘osmosis effect’ for research training. We can define doctrinal research as -

‘Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.’<sup>41</sup>

What is evident from this study on the use of empirical facts in the courts is that lawyers need to look at the law from a much broader angle than has been done previously. This is a quite concrete example of how the law does not work within a vacuum. Therefore, as researchers, lawyers need to be totally cognisant of the parameters of empirically-based knowledge and research methodologies.

More extensive training needs to be offered in Fundamental Research. This is ‘Research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law’.<sup>42</sup> This very important category was highlighted in the Canadian Arthurs Report on legal research in 1983<sup>43</sup> but totally overlooked by the Australian Pearce Committee review in 1987,<sup>44</sup> and it is this category which is becoming more

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<sup>40</sup> C.McCruden, *supra* n. 18 at 633.

<sup>41</sup> D. Pearce, E. Campbell & D. Harding, “Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, A Summary” (1987), 6.

<sup>42</sup> Information Division of the Social Sciences and Humanities Research Council of Canada, *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983), 66.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra* n. 41.



prevalent in current research agendas. Fundamental research, which can include empirical and social science models, needs to be part of the graduating lawyers' research skills and attributes. Fundamental research encourages an interdisciplinary perspective and use of methodologies borrowed from the social sciences to study the law in operation. It expands legal research from a purely doctrinal isolated 'box' and encourages a broader view of the way law is actually working in society.

### B *The History of the Use of Empirical Methodologies in Law*

There is a growing empirical law movement in the United States at present. Empirical work and the interface of law and social science is a continuing tradition in the United States, dating back to the Realist movement in the 1930s and 1940s.<sup>45</sup> That movement was keen to highlight the differences between 'law on the books' and 'law in action'.<sup>46</sup> These issues were taken up by the law and society movements in the 1960s. As Tracey George has noted, the Association of American Law Schools (AALS) has had a section devoted to 'social science technique' since 1982, when it established the Law and the Social Sciences Section.<sup>47</sup> The terms of reference for this interest group were 'to promote communication among those persons who are interested in using the empirical techniques of the social sciences to study legal problems and institutions'.<sup>48</sup> The AALS is cognizant of the current interest in Empirical Legal Scholarship (ELS). An example of this focus is AALS President N. William Hines' choice of 'Empirical scholarship: what should we study and how should we study it?' as the theme for the 2006 AALS annual meeting.

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<sup>45</sup> M. Davies *Asking the Law Question* (Rozelle NSW, Lawbook Co, 1994), 120-128.

<sup>46</sup> P. Ewick, R. Kagan & A. Sarat (eds) *Social Science, Social Policy, and the Law* (New York, Russell Sage Foundation, 1999), 2.

<sup>47</sup> T. E. George, "An Empirical Study of Empirical Legal Scholarship: The Top Law Schools" (2006) 81 *Indiana Law Journal* 141 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=775864](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775864)> at 30 September 2008.

<sup>48</sup> Ibid; T. E. George, "An Empirical Study of Empirical Legal Scholarship: The Top Law Schools," Vanderbilt University Law School, Working Paper 05-20, 8 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=775864](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775864)> at 30 September 2008.

Robert Ellickson, in a recent citation analysis of trends in US legal scholarship, found that ‘number crunching’ is also rising in law journals.<sup>49</sup> Thomas Miles and Cass Sunstein are calling this a new intellectual movement:

‘We are in the midst of a flowering of “large-scale quantitative studies of facts and outcome,” with numerous published results. The relevant studies have produced a New Legal Realism movement - an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.’<sup>50</sup>

They note the alignment of this work with that of the political scientists.<sup>51</sup> They also note the possible reasons for this groundswell being ‘the decline in the costs of computing and data-gathering, the increasing presence on law faculties of people with post-graduate training in both law and social sciences, and the prevailing sense in certain interdisciplinary fields, particularly economic analysis of law, that empirical work rather than abstract theory now presents the greatest opportunities for contributions’.<sup>52</sup> The New Realists are aware that the movement has ‘jurisprudential implications’, but this is certainly not the focus of their work.<sup>53</sup> Much of their research focuses on links between judicial behaviour, gender, and politics.<sup>54</sup>

The New Legal Realism project jointly sponsored by the Institute for Legal Studies and the American Bar Foundation, is an example of the new movement. It is a network of scholars who are developing an interdisciplinary paradigm for empirical research on law. This paradigm is said to combine ‘sophisticated consideration of legal issues, empirical research and social policy -- much as did the old legal realists, but with the benefit of

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<sup>49</sup> R. Ellickson, “Trends in Legal Scholarship” (2000) 29(51) *The Journal of Legal Studies* 517, 528-30 <<http://www.journals.uchicago.edu/doi/abs/10.1086/468084>> at 30 September 2008. See also Gregory C Sisk “The quantitative moment and the qualitative opportunity: Legal studies of judicial decision-making (2008) 93 *Cornell Law Review* 873; and Edward K. Cheng, “Will the Quants rule the (Legal) World (2009) 107 *Michigan Law Review* 967.

<sup>50</sup> T. J. Miles & C. R. Sunstein, “The New Legal Realism” *University of Chicago Law Review*, forthcoming, available at Social Science Research Network <<http://ssrn.com/abstract=1070283>> at 30 September 2008.

<sup>51</sup> *Ibid* 3.

<sup>52</sup> *Ibid* 13; see also P. Schuck, “Why Don’t Law Professors Do More Empirical Research?” (1989) 39 *Journal of Legal Education* 323, 331-33.

<sup>53</sup> Miles & Sunstein, *Ibid* 11.

<sup>54</sup> *Ibid* 3.

several generations of new thinking in all of these areas'.<sup>55</sup> The New Legal Realism is 'Seeking to develop a rigorous, genuinely interdisciplinary approach to the empirical study of law.'<sup>56</sup> The website sets out the aims of the group:

'We hope to encourage a conversation about the use of social science to inform legal practices, in order to build a more rigorous and informed framework for the interdisciplinary study of law.'<sup>57</sup>

This is a dynamic movement in US legal scholarship. Apart from the established forums provided by the Association of Law and Society, recent examples include the recently formed Society for Empirical Legal Studies (SELS), and the *Journal of Empirical Legal Studies* (JELS) established in 2004.<sup>58</sup> The first Annual Conference on Empirical Legal Studies (CELS) was held at the University of Texas in 2006, and there is a popular ELS blog.<sup>59</sup> Cornell University Faculty of Law hosted the 3<sup>rd</sup> CELS in 2008 and New York University in 2007. More recently, Elizabeth Chambliss reports on the establishment of Empirical Research Centres in several American law schools including the Center for Empirical Research in Law at Washington University, the Empirical Research Group at the University of California, and the Empirical Legal Colloquium Series at Northwestern University School of Law.<sup>60</sup> Law schools have been ranked on this basis.<sup>61</sup>

ELS's contributing disciplines include psychology, economics, sociology, anthropology, political science as well as law. The methodologies appear to be 'more quantitative than qualitative and more contemporary than historical'.<sup>62</sup> Certainly many of the scholars

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<sup>55</sup> University of Wisconsin Law School <<http://law.wisc.edu/ils/newlegal.htm>> at 30 September 2008.

<sup>56</sup> New Legal Realism <<http://www.newlegalrealism.org/>> at 30 September 2008.

<sup>57</sup> New Legal Realism: About <<http://newlegalrealism.org/about>> at 30 September 2008.

<sup>58</sup> US Law and Society Association <<http://www.lawandsociety.org/>> at 30 September 2008; *Journal of Empirical Legal Studies* <<http://www.blackwellpublishing.com/society.asp?ref=1740-1453>> at 30 September 2008.

<sup>59</sup> ELS Blog <<http://www.elsblog.org/>> at 30 September 2008.

<sup>60</sup> E. Chambliss, "When do Thoughts persuade? Some thoughts on the Market for 'Empirical Legal Studies'" <<http://ssrn.com/abstract=1263369>> at 30 September 2008.

<sup>61</sup> *Supra* n. 47.

<sup>62</sup> M. Suchman, "Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?" Summer 2006 (13)1 *Amici: Newsletter of the Sociology of Law Section of the American Sociological Association* 1 <[http://www.departments.bucknell.edu/soc\\_anthro/soclaw/textfiles/AMICI\\_summer06.pdf](http://www.departments.bucknell.edu/soc_anthro/soclaw/textfiles/AMICI_summer06.pdf)> at 30 September 2008.

seem more intent on examining the US legal process rather than in addressing the issue of infusion of the results of empirical work into the legal process itself, that is, into the determination of the law. They examine, for example, the political biases of the judges, how the gender of the judges and the make-up of the bench can affect case outcomes, legal process statistics, and factors affecting legal outcomes – focusing on US jurisdictions primarily.<sup>63</sup>

In Canada, Roderick Macdonald writing in 2003 states that ‘Published research by law teachers is still overwhelmingly doctrinal and oriented to the professional tasks of planning, dispute avoidance and dispute resolution’.<sup>64</sup> However, Shanahan’s 2006 survey of legal academics demonstrates that legal academic researchers are using non-doctrinal methodologies to some extent. They do want to use empirical methodologies rather than undertaking purely doctrinal research methodologies.<sup>65</sup> Shanahan comments that:

It is apparent from both the survey data and interview findings that interdisciplinary research has increased in the past 20 years, as have the range of subject areas, and the geographic, ideological and theoretical orientation of legal research. However it appears as if law professors are still methodologically limited in their range of approaches, and especially in their use of empirical research. . . . . The findings from the interviews in this study suggest that doctrinal analysis is decreasing, disfavoured and even denigrated in the academy.<sup>66</sup>

This issue is being discussed in the United Kingdom. Anthony Bradney stated in 1998:

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<sup>63</sup> J. H. Blume, T. Eisenberg, S. L. Johnson & V. P. Hans, “The Death Penalty in Delaware: An Empirical Study” *Cornell Legal Studies Research Paper No. 08-025, 3rd Annual Conference on Empirical Legal Studies Papers* <[http://papers.ssrn.com/sol3/JELJOUR\\_Results.cfm?form\\_name=journalbrowse&journal\\_id=1032734](http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=1032734)> at 30 September 2008; M. M. Feeley & H. Aviram, “Where Have All the Women Gone? The Decline of Women in the Criminal Justice Process” *3rd Annual Conference on Empirical Legal Studies Papers* <[http://papers.ssrn.com/sol3/JELJOUR\\_Results.cfm?form\\_name=journalbrowse&journal\\_id=1032734](http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=1032734)> at 30 September 2008.

<sup>64</sup> R. Macdonald ‘Still “Law” and Still “Learning”?’ (2003) 18 (1) *Canadian Journal of Law and Society* 5, 10; And see generally T. Hwang ‘Does Quantitative Analysis of Judicial Decision Making Contribute to Legal Knowledge?’ Law Forum, University of Manitoba, 2 June 2004.

<sup>65</sup> T. Shanahan ‘Legal Scholarship in Ontario’s English-Speaking Common Law Schools’ (2006) 21 (2) *Canadian Journal of Law and Society* 25.

<sup>66</sup> *Ibid* 36.

The academic doctrinal project which has dominated United Kingdom university law schools for most of their history ... is now entering its final death throes'.<sup>67</sup> Bradney does acknowledge there are contrary views.<sup>68</sup> However, he believes there has been an 'abandonment of the doctrinal project' because it 'is incapable of producing satisfactory answers to any intellectually compelling questions, or, as frequently, infusing doctrinal method with other techniques'.<sup>69</sup> Bradney suggests this is 'a new stage in an evolutionary process'.<sup>70</sup> The 2006 Nuffield Inquiry on Empirical Legal Research concluded that there was an unmet need for empirical research stemming from a lack of capacity to undertake this type of research in the research institutes.<sup>71</sup> This report demonstrates a movement within the UK to further the connection between law and social science methodologies, and so deepen expertise in the legal academy. The Report notes that 'Empirical legal research is increasingly important to and valued by policy makers, law reformers, the judiciary, academics and practitioners' but also that there is 'clear evidence of a developing crisis in the capacity of UK universities to undertake empirical legal research'.<sup>72</sup> The study cited the following factors as all being partly to blame for the predicament:

- 'The traditions and culture of legal scholarship and its relative insularity from social science.
- The impact of professional practice training requirements on the undergraduate law curriculum
- The absence of engagement with law - either legal issues or law as an empirical site - in social science disciplines like political science or sociology or psychology, other than in criminology.

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<sup>67</sup> A. Bradney, "Law as a Parasitic Discipline" (1998) 25(1) *Journal of Law and Society* 71.

<sup>68</sup> See G. Jones, "Traditional Legal Scholarship: A Personal View in 'What are Law Schools For?'" ed P. Birks (1996) 14.

<sup>69</sup> Ibid 73.

<sup>70</sup> Ibid 72.

<sup>71</sup> Hillyard, *Supra* n. 21, 269.

<sup>72</sup> H. Genn, M. Partington & S. Wheeler, *Law in the Real World: Improving our Understanding of How Law Works: The Nuffield Inquiry on Empirical Legal Research*, November 2006, 39 <<http://www.ucl.ac.uk/laws/socio-legal/empirical/>> at 30 September 2008.

- The breadth and variety and relative lack of clear definition in ‘civil law’ spanning as it does family law, administrative law, mental health law, and civil and commercial law.
- The absence of sustained and predictable funding streams for empirical work in non-criminal law.
- The absence of research training tailored to the needs of new recruits who wish to do empirical legal research, coming as they do, from disparate routes, which needs to be recognised.
- The fact that in most institutions there is no ‘critical mass’ of empirical legal researchers who can provide training for postgraduates and provide encouragement and support to colleagues.
- University structures and other reward structures that may inhibit cross-disciplinary collaboration.<sup>73</sup>

These points are equally applicable in Australia. The report examined strategies to address the situation including changes to the curriculum and incentives and training for legal researchers.<sup>74</sup> However, Paddy Hillyard has suggested that even with such enthusiastic solutions, ‘the development of a critical mass of socio-legal research is likely to be difficult to achieve’.<sup>75</sup> Hillyard’s opinion is based on two reasons – the ‘entrenched’ culture of existing doctrinal legal scholarship, and the implications of the ‘changing political economy of higher education’<sup>76</sup> in the UK which include managerialism and are antithetical to risk taking or ‘critical socio-legal scholarship’.<sup>77</sup>

The empirical studies movement is not as strong in Australia. The Australasian Law Teachers Association (ALTA) has no empirical legal studies interest group. There is a Law and Social Justice Interest Group and a Legal Research Communications Group which has a focus on research methodologies including the promotion of empirical

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid 5.

<sup>75</sup> Supra n. 21, 274.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 279.

approaches.<sup>78</sup> However, the Law and Society Association of Australia and New Zealand which aims ‘to promote and foster scholarship broadly focusing on the interactions and intersections between law and society’ has a growing profile and maintains links with national and international socio-legal associations.<sup>79</sup>

It is timely to consider how we as legal educators might inculcate these skills in our graduates – and especially in our academic track higher degree research students. At present, greater use is being made by legal scholars of empirical methods. Academics need to ensure that the methods they are using results in ‘good’ empirical research.<sup>80</sup> They need to ensure that the standards are high. There is an onus on legal academics to lead by example – to demonstrate academic leadership by joining interdisciplinary groups and demonstrating an openness to learning and working with empirical methodologies.

### *C A Review of Legal Research Methodologies*

Over the past decade there has been recognition that the law cannot be confined to a ‘black letter’ box. There has also been a move towards some relatively ‘safe’ research methods extensions including research into the philosophy underlying legal rules (theoretical research), research into the reform of legal rules (law reform research), and research into the policy behind legal rules (policy research). These extended research methods along with some more fashionable extensions such as comparative research, the

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<sup>78</sup> ALTA Interest Group Notice Board <<http://www.alta.edu.au/noticeboard.html>> at 30 September 2008.

<sup>79</sup> The Law and Society Organisation of Australia and New Zealand Inc <<http://www.lsaanz.org/aboutus.html>> at 30 September 2008. See also The Centre for Media and Communication Law, University of Melbourne <<http://www.law.unimelb.edu.au/cmcl/>> at 30 September 2008; The Legal Intersections Research Centre, University of Wollongong <<http://www.uow.edu.au/law/LIRC/>> at 30 September 2008; The Socio-Legal Research Centre, Griffith University <<http://www.griffith.edu.au/centre/slrc/>> at 30 September 2008; Centre for New Zealand Jurisprudence, The University of Waikato <<http://www.waikato.ac.nz/law/research/cnzj/>> at 30 September 2008; The Julius Stone Institute of Jurisprudence <<http://www.law.usyd.edu.au/jurisprudence/>> at 30 September 2008; Justice Policy Research Centre <<http://www.newcastle.edu.au/school/law/jprc.html>> at 30 September 2008; International Socio-Legal Studies Association <<http://www.kent.ac.uk/nslsa/>> at 30 September 2008; US Law and Society Association <<http://www.lawandsociety.org/>> at 30 September 2008; and Canadian Law and Society Association <<http://www.acds-clsa.org/en/>> at 30 September 2008.

<sup>80</sup> L. Epstein, “The Rules of Inference” (2002) 69(1) *University of Chicago Law Review* 1.

use of case studies, and citation analysis are all helpful in arming lawyers with more extensive information on what is going on in court cases.<sup>81</sup>

Internationalisation and the advent of transnational legal contexts (especially in the number of international students entering the Australian law faculties) has popularised the comparative law methodology. Citation analysis is being used to measure how many times a particular researcher is cited, and which journals tend to be most influential judged by the number of times articles published in the journals are cited, and to evaluate 'the influence of other disciplines (such as economics) on legal scholarship, the sources which influence judges when they draft judgments and the influence of particular articles, scholars and legal journals'.<sup>82</sup> Much of the empirical work has involved the 'systematic and quantitative analysis of judicial decision making'.<sup>83</sup> This has taken the form of analyses of High Court judgments examining variously the incident of dissent,<sup>84</sup> the use of American precedent,<sup>85</sup> the use of social fact evidence<sup>86</sup> and the use of published journal articles.<sup>87</sup> These are all examples of research that has moved beyond a basic

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<sup>81</sup> Refer in particular to C. Althaus, P. Bridgman & G. Davis, *The Australian Policy Handbook* (2<sup>nd</sup> ed, St Leonards, Allen & Unwin, 2007).

<sup>82</sup> I. Ramsay & G. P. Stapledon, "A Citation Analysis of Australian Law Journals" (1997) 21 *Melbourne University Law Review* 677; D. Warren, "Australian Law Journals: An Analysis of Citation Patterns" (1996) *Dec Australian Academic and Research Libraries* 261; I. Ramsay & G. Stapledon, "The Influence of Commercial Law Journals: Citation Analysis" (1998) 26 *Australian Business Law Review* 298.

<sup>83</sup> R. De Mulder & K. Van Noortwijk, "More Science than Art: Law in the 21<sup>st</sup> Century" (12th BILETA Conference The Future of Legal Education and Practice March 24th & 25th, 1997 Collingwood College, University of Durham <<http://www.bileta.ac.uk/97papers/97-7.html>> at 30 September 2008).

<sup>84</sup> A. Lynch, "Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia" (2002) 24 *Sydney Law Review* 470; see also the literature review, *supra* n. 5.

<sup>85</sup> P. Von Nessen, "The Use of American Precedents by the High Court of Australia, 1901–1987" (1992) 14 *Adelaide Law Review* 181; P. Von Nessen, *The use of comparative law in Australia* (Rozelle: NSW: Lawbook, 2006); P. Keyzer, "The Americanness of the Australian Constitution: The Influence of American Constitutional Jurisprudence on Australian Constitutional Jurisprudence: 1988 to 1994" (2000) 19 *Australasian Journal of American Studies* 25.

<sup>86</sup> R. Haigh, "'It is Trite and Ancient Law': The High Court and the Use of the Obvious" (2000) 28 *Federal Law Review* 87.

<sup>87</sup> R. Smyth, "Academic writing and the courts: A Quantitative Study of the Influence of Legal and non-Legal Periodicals in the High Court" (1999) 17(2) *University of Tasmania Law Review* 164; R. Smyth, "What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts" (1999) 21 *Adelaide Law Review* 51; R. Smyth, "What do Judges Cite? An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria" (1999) 25(1) *Monash University Law Review* 29; R. Smyth, "Other than 'Accepted Sources of Law'? A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22(1) *UNSW Law Journal* 19. Smyth counted all citations to legal and non-legal periodicals in the sample cases and was thus able to identify five of the most-cited journals. This was followed by a more general study on the state Supreme Courts' citing practices, covering both caselaw and secondary authority, and further studies on the High Court.



doctrinal approach to the law.

Content analysis has been used to reveal the role of empirical facts in judicial reasoning.<sup>88</sup> Cases are read and particular features (for example categories of comment) are coded. The process involves a method of ensuring reliability and validity in the coding be established, before the data is analysed.<sup>89</sup> Hall and Wright, proponents of the method, contend that ‘content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research. The method combines a disciplined focus on legal subject matter with an assumption that other researchers should be able to replicate the results of the research. Put another way, the results of the research matter more than the authority of the researcher.’<sup>90</sup>

Content analysis is used to evaluate ‘the influence of other disciplines (such as economics) on legal scholarship, the sources which influence judges when they draft judgments and the influence of particular articles, scholars and legal journals’.<sup>91</sup> Content analysis is a rapidly developing methodology in the United States to study the content of judicial decisions.<sup>92</sup> However, the methodology has been rarely utilised in Australia.<sup>93</sup> This discovery of the impact and use of empirical data in the courts is further evidence of the need to educate future lawyers (and academics) in broader research methodologies.

#### *D Advantages and Disadvantages of using Non-doctrinal Research Methods*

Speaking in the 1970s, William Twining pointed out that the central weakness of the expository tradition, ‘is that typically it takes as its starting point and its main focus of attention rules of law, without systematic or regular reference to the context of problems they are supposed to resolve, the purposes they were intended to serve or the effects they

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<sup>88</sup> M. A Hall and R.F. Wright, supra n. 37; Burns (2004), supra n. 1; Mullane, supra n. 1.

<sup>89</sup> Hall, *ibid.*

<sup>90</sup> *Ibid.* 2.

<sup>91</sup> I. Ramsay & G. Stapledon, “A Citation Analysis of Australian Law Journals” (1997) 21 *Melbourne University Law Review* 677.

<sup>92</sup> Hall, supra n. 37.

<sup>93</sup> Mullane, supra n. 1; K. Burns, “The High Court and Social Facts” in Bryan (ed) *Private Law in Theory and Practice* (Routledge, Cavendish, 2007); Burns (2004), supra n. 1, 215. See also Selway supra n. 35.

in fact have.’<sup>94</sup> When we look at the law more widely and when we look at how the law actually works, it is obvious that law teachers need to revise and widen their views on what they are teaching their students in terms of research methods. Training in traditional doctrinal analysis methodologies does not equip students to deal well with empirical facts. In 1992, Twining noted that the ‘use of statistical arguments in court and in other contexts is developing fast in the United States and is likely to spread to other parts of the common law world well before the year 2000’.<sup>95</sup> He termed this the ‘new evidence scholarship’.<sup>96</sup> Twining also made the point that ‘in my experience most lawyers are innumerate and most law students are terrified of figures’.<sup>97</sup> He noted that Oliver Wendell Holmes had argued a century ago that lawyers need to master economics and statistics.<sup>98</sup> However, his predictions that ‘Holmes’ dictum will be incorporated in standard conceptions of competence by the year 2000’ has not eventuated.<sup>99</sup> It is worthwhile noting too that Twining thought it ‘extremely unlikely’ that competence in empirical research could be developed by ‘quick fixes of CLE’.<sup>100</sup>

Empirical research enhances lawyers’ ability to understand the implications and effects of the law on society. Legal researchers can use social science methodologies themselves to investigate issues, or they can collaborate with skilled researchers from other disciplines. They are able to use statistics freely available and gathered by governmental organisations to enhance their views on the law’s operational aspects.<sup>101</sup> This strategy has very definite advantages for unskilled lawyers as it saves time and ensures accuracy and public verification of the data has already occurred.

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<sup>94</sup> W. Twining, *Taylor Lectures 1975 Academic Law and Legal Development* (Lagos: University of Lagos Faculty of Law, 1976), 20.

<sup>95</sup> W. Twining, “Preparing Lawyers for the 21<sup>st</sup> Century” (1992) 3 *Legal Education Review* 1, 13-14.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.* 14.

<sup>98</sup> *Ibid.*; see also O. W. Holmes, “The Path of the Law” (1897) 10 *Harvard Law Review* 457.

<sup>99</sup> Twining, *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> See for example the Australian Social Science Data Archive <<http://assda.anu.edu.au/catalog.html>> at 30 September 2008.

It is easy to speculate on the reasons for reluctance to move beyond the familiar doctrinal methods.<sup>102</sup> Legal researchers still need to know how to integrate the information effectively. There are often constraints in that the data collected may be too general and not necessarily that required to critique a legal or social issue effectively. Often lawyers do not have the skills to use publicly available data sets effectively. There is a lack of training in the undergraduate degree for non-doctrinal methods of research. Lawyers perceive they have insufficient expertise in order to judge empirical studies. It requires more time to undertake empirical work than doctrinal work. It costs more. Twenty years ago, Keith Hawkins and Donald Harris discussed the various models of funding of socio-legal research and noted the constraints placed on research by the inherent need for customers willing to fund studies.<sup>103</sup> The situation remains very much the same.

Empirical research is more inconvenient. The results are often uncertain and certainly not predetermined. Elementary errors can be fatal to the outcomes. Even a simple survey entails precision in sampling, wording of the questions, coding of the questionnaire for easy entry of returned data, conduct of speedy ethical consent processes, provision for privacy with returned forms and follow-up communication with those being surveyed. In addition, there is often a requirement to work as part of a group – and often an interdisciplinary team. This requires extra time and commitment. And once the research is completed and the reports written, there can be uncertainty in regard to where to publish – whether in a legal journal or an interdisciplinary one. The method and citation style for writing up the research will be different for each. The level and depth of analysis will be different. In all, therefore, using non-doctrinal methodologies equates to less control over the process and outcomes than doctrinal work.

### **III IMPLICATIONS FOR LEGAL RESEARCH TRAINING**

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<sup>102</sup> T.Hutchinson, *supra* n. 18, 89-91.

<sup>103</sup> K. Hawkins & D. Harris, “Policy, Research, and Funding: Socio-Legal Studies in a Changed Political Climate” (1988) 10 (2&3) *Law & Policy* 267, 268.

It is now more than ever important to acknowledge that empirical research methodologies are relevant to the practice and research of law in the 21<sup>st</sup> century. As Jeremy Webber commented in 2004,<sup>104</sup>

‘Legal sociologists should seek ways of incorporating practitioners’ deliberation into their analyses ... And those making legal arguments — professionals, judges and academics alike — should similarly reflect on how the two modes of explanation intersect. This may mean exploring how sociological studies might contribute to the construction of legal argument.

... the law schools’ role extends to the systematic investigation of law’s effects, consideration of law’s function in society, and reflection on law’s nature and foundational principles. Those are essential tasks of law schools.

... And the more we know about the empirical effectiveness of the law, the better our students will be able to advise their clients on courses of conduct that are reasonable, not chimerical.’

Research training must include a broader non-doctrinal methodology component. There is a wealth of general social data that is used to some extent by the legislature but that also impinges on legal decision-making. 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. Law schools need to introduce a wider range of research methodologies into their research training particularly those based in the social sciences. Students must be aware of the basic principles of social investigation, where to source publicly available information, and how to critique empirical research from the perspective of validity and reliability. They must be able to distinguish valid empirical research from anecdotal evidence. This means that empirical methodologies must be introduced into the law curriculum so that law students can deal with empirical facts in a knowledgeable fashion.

In doing this, legal academics have a role in ensuring that students are aware that there are various components in the judicial reasoning process – including the evidence and legal principle, but also facts based in the judge’s views and information based in the social sciences. Legal reasoning is more than simply applying law to the adjudicative facts. Other facts form part of the context.

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<sup>104</sup> T. J. Webber “Legal Research, the Law Schools and the Profession” [2004] *Sydney Law Review* 39.

*A What are the Existing Opportunities for Lawyers to be Trained in Empirical Methodologies*

A number of Australian law faculties conducted curriculum reviews during 2007 and 2008, so there is constant flux in the degree offerings nationally. Legal education has embraced skills in the last decade under the rubric of graduate attributes.<sup>105</sup> However, each Australian law school curriculum must include the subject areas identified by the Priestley Committee in 1992.<sup>106</sup> There are strong views from many legal educators that the Priestley 11, which is skewed towards substantive rather than skills-based instruction, is ‘a significant constraint on re-formulating Australian legal education in ways that are modern and relevant’.<sup>107</sup> However the answer to this issue is not simply to take substantive material out of the degree and replace it with additional methodologies training. This is more a matter of practical exposure and appropriate treatment of empirical methodologies and evidence within the degree.

Educational theory suggests two approaches that are relevant to any attempt to enhance non-doctrinal research training. In the first place, legal educators are advocating Cognitive Apprenticeship as espoused in the 2007 US Carnegie Report as a better educational framework than the Socratic Method or ‘case-dialogue teaching’.<sup>108</sup> The Cognitive Apprenticeship approach to teaching advocates embedding ‘learning in activity’ and making ‘deliberate use of the social and physical context’.<sup>109</sup> Secondly, current educational theory suggests the embedding of generic skills (which includes research methods) into the law curricula as a better framework to simply adding elective

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<sup>105</sup> S. Christensen & S. Kift, “Graduate Attributes and Legal Skills: Integration or Disintegration?” (2000) 11(2) *Legal Education Review* 207, 213; R. Johnstone & S. Vignaendra, *Learning Outcomes and Curriculum Development in Law: A report commissioned by the Australian Universities Teaching Committee (AUTC)* (2003); Australian Technology Network (ATN), *Generic Capabilities of University Graduates* (2000); National Centre for Vocational Education Research (NCVER), *Generic Skills for the New Economy: Review of Research* (2001). W. M. Sullivan, A. Colby, J. W. Wegner, L. Bond & L. S. Shulman, *Educating Lawyers* (2007) 76, 194-7; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999), [2.21].

<sup>106</sup> Consultative Committee of State and Territory Law Admitting Authorities (the ‘Priestley Committee’).

<sup>107</sup> S. Kift, Australian Academy of Law Launch Government House, Brisbane, 17 July 2007 <<http://www.alrc.gov.au/aal/events/skift.pdf>> at 30 September 2008.

<sup>108</sup> Sullivan, *supra* n. 105.

units at the end of the degree.<sup>110</sup> Where could empirical research methods fit within the overall framework? What prior learning could be used as a basis for training? It would involve a whole of curriculum approach but especially centring skills training in the legal research units.

At present there are a variety of opportunities for a law student to participate in empirical methodology training. This includes prior training whether at school or in a prior degree to law, combined degree offerings, electives offered within the law degree, components of core units, or the opportunity to participate in an elective from another discipline as part of the law degree. A 2002 survey of Australasian law schools regarding research skills training inquired whether social science or empirical methodologies were covered in the research units. Only five responses indicated that empirical research was included in the undergraduate degree units. Three respondents stated that there were separate elective units covering these issues, and another two responses indicated that the material was covered in the postgraduate research units being offered.<sup>111</sup>

In a March 2008 survey of the curriculum from 29 law schools websites in Australia, it was evident that very few courses explicitly included empirical training in their law degrees. Those that did exist could be placed in three categories – Law and Psychology units, Law and criminology or policing and law and sociology units.

Unit name and Code	University	URL	Law and Psychology	Law and Socio Legal Research	Justice and criminology units
Law and Psychology 4064LAW	Griffith University	<a href="http://www.griffith.edu.au/courses/outlines/OLD/law/2008/s1/4064LAW_3081_CO.pdf">http://www.griffith.edu.au/courses/outlines/OLD/law/2008/s1/4064LAW_3081_CO.pdf</a>	✓		
Lawyers, Clients and Legal Services		<a href="http://www.griffith.edu.au/courses/outlines/OLD/law/2008/s3/512">http://www.griffith.edu.au/courses/outlines/OLD/law/2008/s3/512</a>		✓	

<sup>109</sup> J. S. Brown, A. Collins & P. Duguid, “Situated Cognition and the Culture of Learning” (1989) 32 *Educational Researcher* 32.

<sup>110</sup> M. Keyes & R. Johnstone, “Changing Legal Education: Rhetoric, Reality, and Prospects for the Future” (2004) 26 *Sydney Law Review* 537, 559.

<sup>111</sup> T. Hutchinson, “Where to Now? The 2002 Australasian Research Skills Training Survey” (2004) 14(2) *Legal Education Review* 63, 80.

5132LAW Inter - disciplinary Research Project 5000LAW		<a href="#">3LAW 3080 CO.pdf</a>  <a href="http://www.griffith.edu.au/courseoutlines/OLD/law/2008/s1/5000LAW_3081_CO.pdf">http://www.griffith.edu.au/courseoutlines/OLD/law/2008/s1/5000LAW_3081_CO.pdf</a>		✓	
Criminology (LEG206) Psychology and Law (LEG209)	Murdoch University	<a href="http://handbook.murdoch.edu.au/courses/detail.lasso?us=LAW4YR&amp;year=2008">http://handbook.murdoch.edu.au/courses/detail.lasso?us=LAW4YR&amp;year=2008</a>	✓		✓
Socio-Legal Research Theory and Practice LAWS5023	Newcastle University	<a href="http://webapps.newcastle.edu.au/handbook/index.cfm?event=handbookResults&amp;course_level=&amp;noSearch=true&amp;timetable=&amp;term_year=2008&amp;strm=4815,4825,4840,4845,4855,4875,4880,4885,4900&amp;subject_area=LAWS&amp;catalog_id=5023">http://webapps.newcastle.edu.au/handbook/index.cfm?event=handbookResults&amp;course_level=&amp;noSearch=true&amp;timetable=&amp;term_year=2008&amp;strm=4815,4825,4840,4845,4855,4875,4880,4885,4900&amp;subject_area=LAWS&amp;catalog_id=5023</a>		✓	
Policing Crime and Society LAWS3048  Sociological Jurisprudence JURS3001	Sydney University	<a href="http://www.law.usyd.edu.au/cstudent/undergrad/docs_pdfs/2008UG_UoS_descriptions.pdf">http://www.law.usyd.edu.au/cstudent/undergrad/docs_pdfs/2008UG_UoS_descriptions.pdf</a>		✓	✓
Criminology 1 LAWS3342  Criminology 2 LAWS3343	University of WA	<a href="http://www.crc.law.uwa.edu.au/students/undergraduate_studies/criminology_2">http://www.crc.law.uwa.edu.au/students/undergraduate_studies/criminology_2</a>			✓  ✓
Psychology and Law2PAL/LA W3PAL,	La Trobe University	<a href="http://udb-iasprd.latrobe.edu.au/udb1subprd_public/publicview\$P_subjects_queryview?P_SUBJECT_CODE=LAW2PAL&amp;P_SUBJECT_OFFER_YEAR=2008&amp;Z_CHK=6311&amp;P_SUBJECT_CODE_1=law2pal&amp;P_SUBJECT_NAME=&amp;P_SEMESTER=&amp;P_YEAR_LEVEL=&amp;P_FACULTY=&amp;P_CAMPUS=&amp;P_DISCIPLINE_CODE=&amp;P_SUBJECT_OFFE">http://udb-iasprd.latrobe.edu.au/udb1subprd_public/publicview\$P_subjects_queryview?P_SUBJECT_CODE=LAW2PAL&amp;P_SUBJECT_OFFER_YEAR=2008&amp;Z_CHK=6311&amp;P_SUBJECT_CODE_1=law2pal&amp;P_SUBJECT_NAME=&amp;P_SEMESTER=&amp;P_YEAR_LEVEL=&amp;P_FACULTY=&amp;P_CAMPUS=&amp;P_DISCIPLINE_CODE=&amp;P_SUBJECT_OFFE</a>	✓		

		<a href="#">R_YEAR_1=2008&amp;Z_START=&amp;Z_ACTION=NEXT</a>			
LAW & PSYCHOLOGY (LAWS2260)	ANU	<a href="http://law.anu.edu.au/UnitUploads/LAWS2260-8824-2007%20S2%20MOA.pdf">http://law.anu.edu.au/UnitUploads/LAWS2260-8824-2007%20S2%20MOA.pdf</a>		✓	
Sociology of Law LAW616 -	University of Tasmania	<a href="http://www.utas.edu.au/arts/pdf_docs/subject_brochures/Sociology.pdf">http://www.utas.edu.au/arts/pdf_docs/subject_brochures/Sociology.pdf</a>		✓	

In the UK, Caroline Hunter at York Law School and UKCLE are currently carrying out similar research into the use of empirical research in the undergraduate law curriculum.

This project is being funded by the Nuffield Foundation, and is seeking data on:

- i. Whether undergraduates are being taught skills that would enable them to either carry out or critique empirical work
- ii. Whether they are actually carrying out empirical projects of their own
- iii. Whether empirical work figures in other ways in teaching and assessment.<sup>112</sup>

There need to be more opportunities offered within the Law degree for these skills to be introduced. However, in terms of the overall law curriculum, research training units are now competing for space with other skills training as well as traditional substantive law content. Additional compulsory methodologies modules are therefore unlikely to find favour with administrators. At the very least, existing research modules may need to be remodelled to integrate some coverage of empirical methodologies.

<sup>112</sup> Empirical Research in the Undergraduate Curriculum  
[http://www.york.ac.uk/law/LERSNet/empirical\\_research.htm](http://www.york.ac.uk/law/LERSNet/empirical_research.htm)



*B What are the curriculum implications arising from these examples of the uses being made of empirical facts?*

Legal research skills have consistently been regarded as basic requisites for both academic and practising lawyers, and have invariably been included in any listing of desired lawyer attributes.<sup>113</sup> Certainly the Pearce Report in 1987 in Australia recognised the need for research training in a law degree.<sup>114</sup> Legal research was one of ten fundamental lawyering skills identified in the 1992 MacCrate Report in the United States.<sup>115</sup> The Australian Technology Network project<sup>116</sup> had also identified graduate attributes and generic capabilities for university graduates.<sup>117</sup>

Recently, the Centre for Learning and Professional Development at Adelaide University has developed a cross-discipline Research Skills Framework.<sup>118</sup> More focused legal

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<sup>113</sup> It is worthwhile to this discussion to be aware of the main literature in regard to the teaching of the units. For a 'potted' history pre-1993, see generally T. Hutchinson, "Legal Research in Law Firms," in William S. Hein & Co (eds) *Legal Research Guides*, (Chapter 3, Volume 19, 1994); MSJ Keys Young, *Legal Research and Information Needs of Legal Practitioners: Discussion Paper* (Sydney: Law Foundation of NSW, 1992); A. Sherr, *Solicitors and their Skills: A Study of the Viability of Different Research Methods for Collating and Categorising the Skills Solicitors Utilise in their Professional Work* (London, The Law Society, 1991); K. Economides & J. Smallcombe, *Preparatory Skills Training for Trainee Solicitors* (London, The Law Society, 1991); C. Roper, *Senior Solicitors and their reasons for Participation in Continuing Legal Education* (Centre for legal Education, 1993); D. Benthall-Nietzel, "An Empirical Investigation of the Relationship between Lawyering Skills and Legal Education" (1975) 63 *Kentucky Law Journal* 373; R. Schwartz, "The Relative Importance of Skills used by Attorneys" (1973) 3 *Golden Gate Law Review* 321; G. Nash, "How Best to Refresh Our Legal Knowledge" in *Commonwealth Law Conference Proceedings and Papers* (Hong Kong, 1983); J. de Groot, *Producing a competent Lawyer: Alternatives Available* (Centre for legal Education, 1995); J. Smillie, 'Results of a Survey of Otago Law Graduates 1971-1981 (1983) 5(3) *Otago Law Review* 442, 450; F. Zeman, & V. Rosenblum, "Preparation for the Practice of Law – the Views of the Practising Bar" (1980) 1 *American Bar Foundation Research Journal* 1, 3; L. Baird, "A Survey of the Relevance of Legal Training to Law School Graduates" (1978) 29 *Journal of Legal Education* 264, 273; The Committee on the Future of the Legal Profession ('The Marre Committee'), *A Time for change: Report of the Committee* (London, The General Council of the Bar and the Law Society's Hall, 1998), 113; J. Peden, "Professional Legal Education and Skills Training for Australian Lawyers" (1972) 46 *Australian Law Journal* 157, 167.

<sup>114</sup> D. Pearce, E. Campbell & D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, A Summary* (1987), 116-17, 132-5, 821-3.

<sup>115</sup> American Bar Association, *Legal Education and Professional Development – An Educational Continuum* (1992) (MacCrate Report).

<sup>116</sup> Bowden J. Bowden, G. Hart, B. King, K. Trigwell, & O. Watts, *Generic Capabilities of ATN University Graduates*, DETYA (2000) <<http://www.clt.uts.edu.au/ATN.grad.cap.project.index.html>> at 17 June 2006.

<sup>117</sup> S. Christensen & N. Cuffe, *Graduate Capabilities in Law: QUT Teaching and Learning Development Large Grant Project Report* (QUT Faculty of Law, January 2003), 11; see also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, 1999.

<sup>118</sup> University of Adelaide, Research Skill Development <<http://www.adelaide.edu.au/clpd/rsd/>> at 30 September 2008.

research skills frameworks have also been explored.<sup>119</sup> Using these outlines, how could training in empirical research skills be introduced incrementally into current law curriculum designs? The most efficient method would seem to be to expose students to the methodologies within compulsory undergraduate units, include further basic training within compulsory research units, and in addition to provide elective units for those seeking to augment the initial training. There would be a strong case for arguing that this additional optional training should be a cross disciplinary unit such as those offered in the Justice Studies (Police training and Criminology) areas.

At a very preliminary level, the challenge is to highlight empirical fact assumptions in first year course teaching. This can be achieved through the discussion of simple student surveys, and the thoughtful use of statistics and relevant empirical material in course content. Interdisciplinarity can be introduced through a discussion of policy considerations in tort law presentations<sup>120</sup> or empirical evidence highlighted in criminal law contexts. Critique is an important skill. Law students above all need to be able to critique arguments that include empirical research effectively. How do you determine what is 'good' research? Specific criteria are available to judge the worth of empirical research and law students need to be introduced not only to the methodologies and how to carry out such research. Lawyers need to be able to critique research that others have carried out in order to judge the reliability of empirical data whether it is discussed as evidence – or reported in the newspapers as fact.

Supervisors and legal academics can model the use of empirical methodologies for students.<sup>121</sup> There are any numbers of ways this can be done. Substantive areas of the law can include an introduction placing the area in context. This can be accomplished through

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<sup>119</sup> N. Cuffe, *Legal Information Literacy – student experiences and the implications for legal education curriculum development* (Master of Information Technology (Research) Thesis, Queensland University of Technology, 2003).

<sup>120</sup> See the discussion of this form of assessment in M. Keyes & K. Burns, "Group Learning in Law" (2008) 17(1) *Griffith Law Review* 357.

<sup>121</sup> For example this is done by Associate Professor Mike Robertson in his course at the Griffith Law School: Lawyers, Client and Legal Services <[http://www.griffith.edu.au/courseoutlines/OLD/law/2008/s3/5123LAW\\_3080\\_CO.pdf](http://www.griffith.edu.au/courseoutlines/OLD/law/2008/s3/5123LAW_3080_CO.pdf)> at 30 September 2008. Semi-structured interviews with lawyers are modelled for students. Students are required to collect and analyse data from these modelled interviews, and must also conduct and analyse their own interviews with lawyers. This work is assessable.

the use of relevant statistics, for example on the numbers charged with drink driving in the jurisdiction or the numbers charged with dangerous driving. Students might be encouraged to undertake short informal surveys for group exercises, undertake interviews or access interdisciplinary material as part of the criteria of their assessment.<sup>122</sup> Social science evidence can be highlighted within substantive areas as being used in evidence for example in criminal law. Enhanced treatment in Evidence Law units is also warranted.

There is more opportunity for students to achieve a depth of knowledge within the later year Honours units, undergraduate elective offerings and in the Masters, SJD and PhD research training units if the students come to higher studies armed with a basic understanding from their undergraduate courses. A postgraduate group of students may include some of the following:

- International students trained overseas, often in civil law jurisdictions with varying degrees of English language expertise,
- Postgraduate practitioners who may have been trained in the old Solicitors Board Examination era and who have little or no university experience,
- Graduates who do not have an undergraduate law qualification, but are qualified in other areas such as engineering, town planning or business,
- Practitioners who have been in private practice for up to 30 years but who have no computer skills,
- Academics who are endeavouring to polish their research and academic writing skills, and
- PhD and Professional Doctorate students (SJD).

Postgraduate students need exposure to the range of research methodologies possible for their projects. This requires an introduction to methodologies to augment the doctrinal

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<sup>122</sup> This is required as part of a final year Interdisciplinary Research Project for students who are honours eligible at the Griffith Law School. See 5000LAW Interdisciplinary Research Project <[http://www.griffith.edu.au/courseoutlines/OLD/law/2008/s1/5000LAW\\_3081\\_CO.pdf](http://www.griffith.edu.au/courseoutlines/OLD/law/2008/s1/5000LAW_3081_CO.pdf)> at 30 September 2008.

work with which they are familiar. Some students might embark on extensive empirical methodologies. Others may consider a simple survey. Postgraduates therefore also need information on the process of requesting ethics approval from the relevant university committees.<sup>123</sup>

To effectively introduce empirical facts recognition and awareness the material has to be introduced as part of assessment in units. This is more difficult to accomplish. One reason is that even for those units where students are at liberty to choose their own topics and their own research methods, there are time limitations involved. In Australian universities, there are often only 13 weeks in a semester. Even providing the students have their topic clearly defined at the beginning of the semester, there is still a lagtime required for the ethics approval procedure and a simple survey can take time to set up. For this reason students may be dissuaded from doing more than a doctrinal study within the timeframe. Only those who are engaged in longer projects can organise their work sufficiently to undertake a more extensive research program. Even then, they may encounter difficulties finding a suitable supervisor within the law faculty. Small numbers of postgraduate law students are taking up the challenge of empirical non-doctrinal studies because of the obstacles being encountered. Where then will future researchers gain the training required to apply for large research grants and undertake meaningful research?

Central to this discussion is the cost of teaching research to large student bodies. In the current context in Australia, the overall numbers of students entering law schools have increased dramatically. Legal research requires academics with specific expertise. It is time consuming to teach. The levels of marking tend to be higher than a normal substantive unit. In this context, it would seem that the ability to include additional non-doctrinal research training is less likely without a positive recognition of need.

However, given a commitment by the universities and government to the need for change, advances are possible. The UK Nuffield Report recommended a system of

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<sup>123</sup> See T.Hutchinson 'Taking up the Discourse: theory or practice' (1995) 11 *Queensland University of*

bursaries, grants and fellowships to encourage academic training in empirical research skills from undergraduate to post-doctoral level.<sup>124</sup> These included academics being awarded bursaries ‘for the preparation of course materials and modules that would support undergraduate, post-graduate and mid-career training in empirical legal research skills’.<sup>125</sup> There were also recommendations that the universities and law schools ‘should consider enhancing the undergraduate curriculum by offering an option on law in society, or offering options with a significant empirical content’ (for example family law, dispute resolution, some aspects of public law).<sup>126</sup> Michael Adler in his 2007 report for the University of Edinburgh, noted that in the UK ‘For a very long time, the Nuffield Foundation and the Economic and Social Research Council (ESRC) have been concerned with the lack of capacity to undertake rigorous empirical research on the law. As long ago as 1971, the Nuffield Foundation set up its own Legal Advice Research Unit and launched a scheme of Social Science Fellowships for Law Teachers. One year later, in an attempt to give an institutional impetus to socio-legal studies, the Social Science Research Council (the predecessor of the ESRC) established the Oxford Centre for Socio-Legal Studies’.<sup>127</sup> However as with the Nuffield Inquiry’s Final Report, Adler concludes that the problem is ‘a structural one which reflects the relatively weak position of socio-legal researchers and, in particular of those who conduct empirical research in law schools, and the absence of any real incentives that would encourage law schools to take postgraduate training in socio-legal studies seriously.’<sup>128</sup> The situation in Australian law schools is by and large similar.

#### IV IN CONCLUSION

This article argues that empirical facts are an established part of the judicial reasoning process. However, lawyers have not been trained sufficiently well to deal with this information or to use it effectively. In addition, the evidential rules and legal process are

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*Technology Law Journal* 33 which discusses postgraduate research training units.

<sup>124</sup> *Supra*, n. 72.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid* 6, 7.

<sup>127</sup> M. Adler, “Recognising the Problem: Socio-Legal Research Training in the UK” January 2007, *University of Edinburgh*, 1.

<sup>128</sup> *Ibid* 2.

not sufficiently open to the effective use of this data in the courts. It is time that we as lawyers recognise all the aspects of the process necessary to deal with the modern factual context. Having done so, this will have quite far-ranging effects on the way law and indeed legal reasoning is taught.

Traditional doctrinal models of legal research need to be supplemented by methodologies based on an awareness of the methods used in other disciplines particularly social research methods. This is already happening to some extent, especially within research work being carried out by law academics as part of competitive research grants, as part of interdisciplinary research teams, and by higher degree research students particularly PhD students. However, we need to begin training students from the undergraduate level effectively in the critical use of these methods.

New models of legal education and law curricula need to incorporate empirical material and empirical methodologies. New curriculums being developed in the law schools need to recognise the changes occurring within society and research based social data being made available. This means that we should have not only basic empirical training incorporated within the various research skills units in the degree, more extensive elective offerings available, empirical experts available as supervisors and advisors for higher degree research students, but a recognition of the importance of empirical facts in legal reasoning within the substantive courses. This latter aspect is less achievable in some ways than the former because of the limited expertise demonstrated by substantive lawyers in recognising the importance of the use of this information in legal reasoning and even within the judicial process itself. However, small steps can be taken when there is some commitment.

Law is not a closed system. It is intrinsically embedded in its specific legal context and community. The availability of empirical facts and the implicit use of this data is an indicator that we as lawyers need to change. Legal education naturally follows practice. Despite what is said about the law being a closed system, the examples of the use of empirical facts in this article demonstrate that law is being pressured to recognise the

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existence of the work of other disciplines and its relevance to decision making in the courts, and therefore legal educators need to better equip the profession to deal with the contextual research that they encounter.

Empirical methodologies give lawyers an opportunity to use forward planning by being cognizant of the context for change and the possibilities for constant evaluation of the way law is working in society in order to improve its effectiveness. At this point we need to better inform our profession – our judges, our law students, and academics on the wealth of data available to them and to encourage and to make provision for the proficient use of this data in the legal process.