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Introduction

> She's writing a little anthropology—a study of judges in their habitat

explained one High Court judge to another.

> Anyone at any time could undertake observation of judicial behaviour. It is just rarely done.
>
> Professor Dame Hazel Genn, 2008[1]

I WANTED TO find out what judges did, in and out of court, and what they were really like. It seemed to me there was a mismatch between the comedic and media folk-devil: the eccentric, sometimes malign, buffer, out-of-touch with the real world, and the senior judges I had met. They seemed unpretentious, quick-witted, perceptive, and encouragingly kind to my students. Far from clocking-off at four, they worked at weekends and evenings. I had spent time casually work-shadowing and interviewing circuit and district judges for eight years and watched judges since 1971. They seemed like lawyers in general. I resolved to work-shadow every type of judge in different aspects of their work, throughout the six court circuits of England and Wales. After three pilot studies, with district, circuit and High Court judges, I shadowed 40 judges for at least four days each and interviewed them and 37 others. I met hundreds of others.

The public know very little about judges. Most people never appear in court and, while old assize courts like Chester and Lincoln can accommodate hundreds of spectators, modern folk find *Judge John Deed* more entertaining. Academics have produced a sizeable literature on judges but almost all of it is on judgments, which form only part of judging. Genn, in 2009, said the concentration on appellate decisions reflects academics' preoccupation with the law, yet everyday judging is a much more reliable indicator of judicial attitudes. Very little research has been conducted in the UK, especially in the lower courts.[2] Even in the US, the eminent academic, Judge Richard A Posner, in *How Judges Think* said 'I am struck by how unrealistic are the conceptions of the judge held by most people, including practicing lawyers and eminent law professors … and even by some

[1] H Genn, *Judging Civil Justice* (Cambridge, Cambridge University Press, 2009) 137.

[2] ibid 131–36. As R Moorhead and D Cowan also said, introducing their collection, *Legal Studies*: 'Judgecraft: An Introduction' (2007) 16 (3) *Social and Legal Studies* 315–20. Posner's book is on *judgments.*

judges'.[3] My aim is to paint a portrait of all types of judge and judicial work, including the routine.[4] This book gives judges a voice, through extensive interviews and commentary on their working world. As Posner said, judges are not intellectual giants, oracles or calculating machines, they are human workers, responding to the conditions around them.[5] No-one had researched judges before by using this method of work-shadowing and no-one had researched such a variety of judges.[6]

AIMS

These were outlined in the research design and have not changed.

> To describe, by observational research, a sample of forty contemporary judges in their working lives . . .The following will be examined: career backgrounds and aspirations, relationships with other judges and other court actors; day to day work and workload and its effects; the job of judging; adequacy of support and training; opportunities to meet and observe other judges; membership of and attitudes towards judicial organisations; attitudes towards recent and proposed changes in procedure and how this has affected or will affect their lives; attitudes towards proposed changes to the trial structure and the judge's relationship with the jury.

The details are contained in the successful Nuffield Foundation funding application.[7]

METHOD

I repeated a method used in studying magistrates' clerks,[8] sitting beside the judge in and out of court, asking them to reflect aloud on their work and those they encountered. The pilot studies, in London, were funded by Kingston University. They were essential in formulating the detailed research design, interview schedules and Nuffield application.

Access and Funding

In 2003, a Court of Appeal judge told me a worrying story. In the 1990s, he had asked the Lord Chief Justice (LCJ) for permission to write a book about the judiciary, whilst on sabbatical leave and funded by a charity. The Judges' Council

[3] RA Posner, *How Judges Think* (Cambridge, Mass, Harvard University Press, 2008) 2.
[4] Not including tribunal judges.
[5] Posner, above n 3 at 7.
[6] This research was designed in 2002–03.
[7] An abridged version is on the author's web page at Kingston University.
[8] P Darbyshire, *The Magistrates' Clerk* (Winchester, Barry Rose, 1984).

refused. It was well known to UK academics[9] that judges had generally kept researchers away.[10] Malleson, the leading UK writer on judges, noted in her 1999 book[11] how little research there was, compared with other jurisdictions, especially the US.[12] This was *partly* caused by judicial hostility, noted by Harlow in 1986[13] and Abel-Smith and Stevens in 1968.[14] Harlow said that, by comparison, jurimetrics—the analysis of judicial decision-making—was well-established in the US by 1966.[15] Paterson, in his 1982 classic on the Law Lords,[16] noted five UK projects which were aborted because the judiciary or Bar withdrew co-operation. The 1970s story of the Bar's endeavours to block Baldwin and McConville's book on plea bargaining is infamous.[17] Ashworth's work on sentencing was terminated in 1981 by Lord Chief Justice Lane, despite its being funded by the Home Office. Judges were apparently offended by questions on membership of local organisations and travel to work. Lord Lane even gave a press conference.[18] Malleson listed two more: Hood's study on race and sentencing was stopped because although individual judges consented, managing judges instructed them to

[9] It has become textbook knowledge: J Baldwin, 'Research on the Criminal Courts' in RD King and E Wincup, *Doing Research on Crime and Justice*, 2nd edn (Oxford, Oxford University Press, 2008).

[10] Though S Shetreet, *Judges on Trial* (Amsterdam, North Holland, 1976) thought 'blame is not to be attached to the English judges but to the English scholars, who, unlike their American colleagues, have embarked quite late upon sociological research of the . . .machinery of justice, and instead of trying to interview judges have reiterated to themselves that judges are protected from scholarly inquiries' (at 196). Genn too blamed the lack of academic curiosity, at 135.

[11] K Malleson, *The New Judiciary: the effects of expansion and activism* (Aldershot, Dartmouth, 1999).

[12] ibid 196–97.

[13] 'Refurbishing the Judicial Service' in C Harlow (ed), *Public Law and Politics* (London, Sweet & Maxwell, 1986).

[14] B Abel-Smith and R Stevens, *In Search of Justice* (London, Penguin, 1968). See P Rock, *The Social World of an English Crown Court* (Oxford, Clarendon Press, 1993) 2–5; D Pannick, *Judges* (Oxford, Oxford University Press, 1987) 10 and J Baldwin, *Small Claims in the County Courts in England and Wales* (Oxford, Clarendon Press, 1997) 48 fn 7. See L Blom-Cooper and G Drewry, *Final Appeal* (Oxford, Clarendon Press, 1972) 3. There had been almost no attempt to analyse the functions of any British court, 'employing…methodological and statistical techniques … widely used in … other areas of social research'.

[15] Though Posner attributed the lack of understanding to the fact that most judges are 'cagey' about what they do and they deliberate in secret, 'professional mystification', Posner, above n 3 at 2–3. Literature on theories of judicial behaviour was ignored by most academics and virtually all judges, Posner, above n 3 at 7.

[16] A Paterson, *The Law Lords* (London, Macmillan, 1982).

[17] Baldwin, in King and Wincup, above n 9 at 388–90; J Baldwin and M McConville, *Negotiated Justice* (London, Martin Robertson, 1977).

[18] Information from Professor Ashworth and see A Ashworth et al, *Sentencing in the Crown Court, Report of an Exploratory Study*, Occasional Paper no 10, Oxford Centre for Criminological Research, cited by Harlow, above n 13 at 189 fn 29. The blocking of Ashworth's research stifled criminologists' court research, said P Rock, above n 14 at 4–5. The story became notorious: T Gifford, *Where's the Justice? A Manifesto for Law Reform* (London, Penguin, 1986) 31.

withdraw. Her own doctoral research in 1992–93 was affected. She resorted to interviewing retired judges, as the LCJ refused to allow sitting judges to participate.[19]

There were exceptional successes. Paterson's book is rich with frank interview material from the Law Lords, independent of any hostile LCJ. He cited three preceding studies using interviews. Indeed, as can be seen from the UK Supreme Court chapter here, we know everything about the top court. In the UK, there have been some other studies using interviews and/or observation of specific groups of judges, such as Baldwin's work on small claims,[20] Baldwin and McConville's *Jury Trials*,[21] N Fielding's *Courting Violence*,[22] research with family judges, interviews with some senior judges by Peay in *Tribunals on Trial*,[23] interviews with trial judges in Zander's Crown Court Study[24] and interviews with appeal judges in Drewry, Blom-Cooper and Blake's 2007 book, *The Court of Appeal*.[25] Shetreet, in 1976, used interviews,[26] for a detailed and penetrating book on the appointment, discipline, removal and politics of judges, though he did not ask judges about themselves. There were studies commissioned by the Lord Chancellor's Department/Department of Constitutional Affairs that were dependent on judicial co-operation. Nevertheless, this handful of empirical projects[27] contrasts strongly with the US where, as Paterson noted, by 1978, there were over 100 studies on appellate judges, using interviews or questionnaires.[28]

During the times of casually sitting with judges, I noticed they were keen to have a companion and were forthcoming on just about everything. I assumed that I could continue to approach individuals and find enough research subjects but the first proposal to The Nuffield Foundation was referred back, asking me to secure 'official' permission, from the Lord Chancellor's Department. I was reluctant. Rejection would put an end to the plans and, because I considered it a breach of judicial independence that a civil servant could grant or withhold consent, I consulted Professors Baldwin and Ashworth. One of them advised that there was an official procedure and that I should approach the Senior Presiding

[19] Malleson, above n 11 at 197 fn 13.

[20] Examined in ch 11.

[21] J Baldwin and M McConville, *Jury Trials* (Oxford, Clarendon Press, 1979).

[22] N Fielding, *Courting Violence: Offences Against the Person Cases in Court* (Oxford, Oxford University Press, 2006).

[23] J Peay, *Tribunals on Trial* (Oxford, Clarendon Press, 1989) and Genn's interviews with tribunal judges in *Tribunals for Diverse Users*, DCA, Research Series 1/06, 2006.

[24] M Zander and P Henderson, *Crown Court Study*, for the Royal Commission on Criminal Justice, Research Study No 19 (London, HMSO, 1993).

[25] G Drewry, L Blom-Cooper and C Blake, *The Court of Appeal* (Oxford, Hart Publishing, 2007).

[26] Shetreet, above n 10 at xix. The book is mostly from published material. At 195, he said all contacted judges gave time generously and answered most questions.

[27] Moorhead and Cowan, above n 2 repeat a plea for 'a more serious research agenda on judges'.

[28] Paterson, above n 16 at 5 fn 26. But see Tamanaha, below n 56. US judges may not be as accessible as British researchers believe.

Judge. I sent the research design and draft questionnaire to Sir Igor Judge, who asked 'What procedure?' but after 45 minutes' cross-examination he offered to do all he could to help. This project owes its success to him and to all the other judges who gave days of their time. It was serendipitous that immediately prior to my commencing this project, I had done some work for Sir Robin Auld, on his *Criminal Courts Review 2001*. He had given that paper to various senior judges, including Judge LJ. I was in the right place at the right time.

This research also owes its success to the generosity of the Nuffield Foundation and the patient encouragement of Sharon Witherspoon. Past experience had taught me to seek non-governmental funding. In the 1970s, I showed my interview schedule for magistrates' clerks to a Home Office researcher, engaged in researching magistrates. Her interview schedule had contained some near-identical questions that had been removed by C2 Division of the Home Office and she envied my academic freedom. I also knew about academic research that had been blocked because the funding department or agency did not like the results. Most strikingly, this had just happened to my work.[29] During the fieldwork, I was repeatedly grateful to be funded by a charity, when the research judges had to explain to their fellows that I was not a 'departmental inspector'.

Sample

Observation over decades in different courts had indicated that each had a distinct culture. Clientele, case load and case speed differed according to size, culture, location and management[30] so the courts were selected to span as great a variety as possible. Nevertheless, this research found that, thanks to centralised training and management and electronic communications, courts and judges differ much less from each other nowadays.

The problem with previous writing, especially statistical surveys, is that it has concentrated on the senior judiciary and sees judges as homogeneous.[31] The core sample of 40 judges were selected to represent as broad a selection of experience, seniority and jurisdiction as possible. They comprised: six county court district

[29] The 2001 jury research paper was funded by the Criminal Courts Review. The Review team praised the work but explained that the department would not publish it 'because Government considers your findings sensitive'. I had exposed how easy it was to avoid jury service in London, because there was no budget for chasing non-attenders and I quoted a circuit judge who encouraged friends to evade service if they were reluctant. However, the team wanted to see it published so suggested it was uploaded onto the Kingston University website, adding a link from the Review site.

[30] In researching *The Magistrates' Clerk*, n 8 above. See RB Flemming, PF Nardulli and J Eisenstein, *The Craft of Justice* (Philadelphia, University of Pennsylvania Press, 1993) 1, 'State trial courts in America are highly diverse … even courtrooms in the same courthouse may differ'.

[31] Explored later.

judges; three district judges (magistrates' courts); one High Court district judge,[32] 16 circuit judges (family, crime and civil), some of whom were managers, eight High Court judges, including one each from the Commercial Court, the Employment Appeal Tribunal, the Chancery and Family Divisions and some from the Administrative Court (some were circuit Presiding Judges, or equivalent), four Lords Justices of Appeal, with backgrounds in family, commercial and administrative law (some were managers), and two Law Lords/Supreme Court Justices.

I drew up a provisional grid of courts. Circuit judges were selected with the help of the Senior Presider and Judge Shaun Lyons, then Secretary of the Council of Circuit Judges, as they had access to background information on judges' career histories, responsibilities and courts. District Judge Michael Walker, then Secretary of the Association of District Judges,[33] helped in selecting the county court district judges. He added courts that were experimenting with new case management software. District judges (magistrates' courts) were selected with the help of Tim Workman, then Senior District Judge (Magistrates' Courts), though I included one who had been a court clerk in my PhD research sample 30 years earlier. I included one overtly gay judge, because he had written about this, more women and more solicitor circuit judges than were representative of the judicial population as a whole, and a High Court judge who had been a circuit judge, because I was interested in their experiences. Welsh judges were over-represented in the core sample: I selected one district, one High Court and two circuit judges, three of whom were Welsh speakers. Sometimes I chose judges out of curiosity, such as a High Court judge born two days after me.

Sir Igor Judge drafted a strongly supportive letter to district and circuit judges and he contacted my chosen High Court and Court of Appeal judges. The response rate was overwhelming. All but one district judge accepted. This meant the sample was bigger than intended. For example, I wrote to 16 circuit judges, in the hope of finding 12, but all 16 accepted.

I selected a supplementary sample of 37 interviewees, generally chosen opportunistically but again to provide variety. With district and circuit judges, I often approached the judge in the next room, provided they were sufficiently different from the core sample judge. If I were shadowing a young female, I would approach an experienced male. If I were shadowing the resident circuit judge, I would seek out the most newly appointed. These interviewees were given no notice of the request and did not have the benefit of examining the research design, just a verbal description and the interview schedule. Happily, at courts with only two judges, the second one always consented. Only one district judge and two circuit judges declined. The senior judge interviewees were again selected, with the help of Sir Igor, to provide a span of seniority, experience and

[32] Added when I realised county court district judges did not know what High Court district judges did.

[33] Now the Association of Her Majesty's District Judges.

jurisdiction and other than that, pin in list. In other words, this senior sub-sample was randomly selected from a stratified sample. The reason for these 'knocking on doors' and 'pin in list' methods was so that I could not be accused of allowing my judicial helpers to manipulate this sample.

At two Crown Courts, I was questioned about sampling criteria. At one, they suspected that 'Igor Judge' had 'fixed me up' with 'the softie'. They explained that 'There's a judge here who makes barristers cry in court' so I asked him for an interview and he readily consented.[34] On two circuits, I rapidly learned from the judges (and my own ex-students at the Bar) who the 'nutters' were, and noted that Sir Igor had steered me away from one of them (at a court on my provisional grid). They were indeed so notorious that they did not need me to report on them, as their homilies appeared weekly in the local press. At one London magistrates' court, the newly appointed core sample district judge said that all the district judges had discussed my work and concluded that had I shadowed one of the old judges with 'severe judgitis', I would have 'got much less out of them'. They suggested I should balance out with an interview with an older woman, so I did.

Why did Judges Want to be Researched?

Baby Boomer judges seem to understand social research and academic freedom and most trust academics not to behave like journalists. Six of the 77 had been academics (ex-academics are far more common on the bench than is generally known); several had spouses who were academics and others had postgraduate degrees (one in criminology). They had grown up with the Peter Cook/Rowan Atkinson/JAG Griffith image of the judiciary[35] and were daily bombarded with negative media coverage. They welcomed the opportunity to open up the judiciary to outside scrutiny. I entered their world at a time when judges had just equipped themselves with a press office and a website. Desperate to portray themselves as human and user-friendly, Lord Chief Justice Phillips was photographed holding a baby.[36]

As for the work-shadowing method, judges I met were familiar with the judicial work-shadowing scheme and before it, barristers accompanying them as marshals. They were used to entertaining work-experience children beside them,

[34] He appears in the Crown Court chapter: Judge EC (eats counsel).

[35] Explored in ch 2. Hammerslev said it could be useful not to see lawyers or judges as a coherent body, because they were defined by their relation to other participants in the field, 'How to Study Danish Judges' in R Banakar and M Travers, *Theory and Method in Socio-Legal Research* (Oxford, Hart Publishing, 2005).

[36] New generation judges welcome researchers. 24 attended the launch of the UCL Judicial Studies Institute in 2010.

or school groups in their courtrooms. Judging is a lonely business. Their enthusiastic replies to my letter, like these from circuit judges, usually came quickly:

> Your project sounds interesting and not a little intriguing. As one of those judges that complains bitterly about the media's misrepresentation of the judiciary in all its aspects, it would be a small opportunity to help inform and educate them as to our true role, responsibilities and capabilities.

> I would be only too pleased to help in any way I can. Your research sounds very interesting. I've always wanted to know something about judges!

The gay judge welcomed a researcher. He said it was important that people understood that the judiciary was made up of all types of people.

Reactions of Non-sample Judges

At the first court, I met a vociferous circuit judge who said he would not have permitted my research. 'You won't get co-operation from the senior judiciary.' I would find judges 'the same as anyone else' but there should be a divide between them and the rest of society, 'Just like your doctor … There's nothing wrong with judges'. He also opposed the research, as there was 'no editorial control'. I related this to a resident judge on another circuit. He said 'that would have been the majority reaction 20 years ago'. The judge in question has since retired.

I was normally given a warm reception in court dining rooms, with judges fussing over my comfort and serving me drinks and coffee. In three courts, my presence was an excuse for wine or champagne. In another, the judges repeatedly regretted that I could not stay for a retirement party. In another, the resident organised for me to be seated at lunch between a different pair of judges every day, to maximise my contact opportunities. On several occasions, though, I was given a stern warning not to report anything I heard and twice a research judge wanted to discover what I was like on the first day before deciding whether to allow me into the dining room. There was a general interest in what I was doing. I was often the main subject of discussion and routinely used as a foil for teasing other judges 'Look out! She'll put that in her book', such as a recorder, whose cases went short every day so he left early. Judges outside the research sample with a point to make sought to attract my attention, such as the Family Division High Court judges who complained of overwork and the judges who wanted to assert their non-traditional credentials, like the judge who told me three times: 'I failed the 11 plus and went to state school. Put *that* in your book'.

In the High Court, Court of Appeal and with the Law Lords, my work seemed to be instantly understood and no-one questioned my presence in deliberations. Only once was I excluded from watching a constitution of the Court of Appeal (Criminal Division). I was included in the general banter off-stage in the Royal Courts of Justice. With the Law Lords, I was a novelty. I spoke to most of them, in

addition to the two in my research sample. I could have added dozens of judges to the sample. Judges often asked when it was their turn to be interviewed or observed, including appeal judges and the Law Lords. One Lord Justice was in the interview sample because he often asked if he could participate.

I met several judges repeatedly, as I travelled the circuits, including one High Court judge on three circuits. In magistrates' courts, I met people who had read my book on clerks. This almost backfired. At one court, my core sample district judge's fellows warned him 'She'll do another hatchet job'. I met two judges who had lectured at Kingston, two Kingston graduates, a judge who had lectured me and I unwittingly selected a judge who had graduated in law alongside me.

Research Ethics

The circuit judge's attack about lack of editorial control, noted above, made me reflect on ethics. For fear of inaccuracy and in the belief that this is a fair way to proceed, in treating judges as research subjects, not objects, I emailed the draft chapters to the judges who featured in them and asked for comments. This is a very unusual technique in social research and is very time-consuming but judges are highly intelligent research subjects and I thought this would help clarify my aims to them and enable them to correct and update the work. It would enhance the work's authenticity and credibility. I emailed draft chapters to non-sample judges too. For instance, in the Court of Appeal and Law Lords chapters, where examples from deliberation are included, and I described the behaviour of outsider judges, I emailed all those judges. I also sent successive versions of all draft chapters to Sir Igor Judge. This resulted in increased accuracy. No judge tried to censor my work. They did correct technical errors and added to some of the descriptions. For instance, asking two Supreme Court Justices, in addition to the sample Justices, to comment on a draft, helped to develop a richer picture of judgment-formation in the UK Supreme Court and alerted me to differences of opinion. I allowed draft chapters to be forwarded by the core sample judges to other interested parties. For instance, some High Court judges asked if they could send that chapter to colleagues. The High Court family judge asked to forward the Family chapter to the President of the Family Division. At three Crown Courts I visited outside the core sample, I permitted the resident judges to circulate the draft Crown Court chapter so about 30 Crown Court judges had access to it, in addition to those featured. The work has benefited from countless verbal and emailed comments on early drafts. Sir Igor Judge questioned the currency of the first draft of the Crown Court chapter so I added to the fieldwork. I presented six draft chapters as conference papers at the Socio Legal Studies Association and the Society of Legal Scholars, resulting in some feedback. I have tried to write in accessible English, for the sake of transparency and

accountability to the research subjects, the charitable funders and readers. I asked judges to choose their own false names so that they could identify themselves when reading drafts.

There were three project consultants. Professor Kate Malleson and Sedley LJ (who gave his fee to charity) suggested helpful amendments to the interview schedule and made very intelligent comments on drafts. I am in their debt. I am deeply grateful for the incisive comments of the publisher's independent reader and for Emeritus Professor John Baldwin's suggested amendments.

Enviable Fieldwork

The amount of information gleaned over the years was overwhelming. I was granted unlimited access to the research judges and many others and everything that impinged on their work. There was absolute transparency. There was almost no activity from which I was debarred and no documentation denied.[37] I shadowed each core judge on sequential days or, where possible, separate days, in different courthouses, spanning anything up to three years, in a variety of their work. For example, I sat with a district judge (magistrates' courts) in three outer London courts and one in Inner London in the family proceedings court. With the High Court judges, I sat with them in the Royal Courts of Justice, in short hearings, trials and in the Court of Appeal. I accompanied each judge in and out of court (normally sitting on the bench)[38] during the full working day and I stayed in lodgings on circuit, accompanying each judge from breakfast until after dinner. Each core sample judge had read the research design and interview schedule. I encouraged them to think out loud, explaining and commenting on everything they did and that impinged on their work, such as buildings, resources, court users and workmates, including staff and fellow judges. Judges talked me through their paperwork and shared all correspondence and court documentation, such as skeleton arguments, Law Lords/UK Supreme Court printed cases, document bundles, confidential reports in sentencing and family cases, letters from defendants, witnesses and jurors, and prisoners' appeal petitions. They showed me how they wrote judgments and jury directions. The Court of Appeal and the Law Lords in the appeals committee allowed me to watch deliberations, thus giving me access to a phenomenon from which researchers are normally excluded. This is a prize beyond jewels. Apart from participant observation, a researcher could hardly have been closer to the subjects. One of the Nuffield Foundation independent referees suggested that I should select a smaller sample of judges and spend more time with them but the

[37] As Baldwin said in 2008, 'Researchers who sit in court commonly realize, with a sense of unease, that the really important decisions in most cases are being taken elsewhere', above n 9 at 383.

[38] In the CA there was no room, so I sat at the side or in the well, as with the Law Lords.

method used here did not result in any lack of trust or shortfall in information. As I said in the final Nuffield application:

> The first week of the pilot taught me that four days shadowing each judge is enough and that five days is exhausting, because the judge and I talked all the time out of court and, in court, both of us need to concentrate 100 per cent of the time … Judges … agree with me that four days should normally be adequate. I have not found judges to be at all inhibited in expressing their views to me, as soon as they meet me. Baldwin found district judges to be very candid and he shadowed them for much less than four days each.

As for the interviews, because of the sample size and the breadth of the research, questions were much more structured than those often used in elite interviewing. The schedule[39] was generated for district judges and modified as the research worked its way up the judiciary. The interview took about 1.5 hours, with a range of 42 minutes to three hours.

The depth of this study and my access to appellate deliberations is all the more remarkable, in the context of judges' previous general hostility to research. American judges Harry T Edwards and Posner, whose academic analyses of judging are enriched by their experiences, have both observed how handicapped academics are in writing about judging, because of lack of access to judicial deliberations.[40] I attended management and other meetings, such as court users' meetings and Judicial Studies Board training days. As I usually lunched with all of the judges in a courthouse, or with a judge in the Inns of Court, I met and spoke to hundreds of judges, court staff, judges' clerks and judges' friends and spouses or partners. Judges gave me lifts to courts and stations. The research judges and I sometimes took one other to social or academic events. The Law Lords/Justices invited me to the Anglo-Canadian judicial exchange and to a closed seminar on the UK Supreme Court's first anniversary in 2010. I went shopping with two women judges and to a Pilates class with another. One took me to his house for lunch and another took me home to stay with him and his wife, twice. As well as sitting with the core sample judges, I was able to sit with a number of judges in the interview sample and with some other judges in the same courthouse. For example, one judge asked me to sit with him in order to demonstrate how his approach in family cases differed from that of his workmate, in that he was far more proactive and interventionist. In the years since most of the fieldwork was completed, I have kept in touch with many of the judges and added more observation days every year with several of the core judges and with the resident judges of two London Crown Courts (outside the research sample). In establishing a rapport, it may have helped that I was in the same Baby Boomer generation as many of them. We shared not just a 1970s legal education, but by now the

[39] Available on the author's web page on the Kingston University website.

[40] Posner, n 3 above, and H Edwards in 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 *University of Pennsylvania Law Review* 1639.

agonies of persuading teenage boys to work for their GCSEs (especially by remote control) and the pride of graduations. One judge and I played 'mother of the bride' on the same day.

Fieldwork Hazards

A non-sample judge reminded me of the Hawthorne effect, that by overtly observing, I was bound to affect behaviour. All such research is prone to this defect. Interested parties can measure the typicality of the courtroom accounts here by sitting at the back of courtrooms anonymously.

Potential interference in the observed activity was a bigger hazard. From Flood's descriptions of his research in 2005, one can see that sometimes the observer is drawn into participant observation by stealth. In this case it occurred whenever a judge walked out of court and asked 'what do *you* think?' This occurred on most days but I usually turned the question back. It occurred quite spectacularly in one case, as can be seen from the Court of Appeal chapter. My comments and questions sometimes affected judges. In the Commercial Court, I asked 'How is this bankrupt country to pay the $80 million the claimant wants?' and the judge returned to the courtroom and asked the claimant the same question. In the county court, I asked 'Why is this guy defending this pollution action when he's already been convicted in the magistrates' court?' and very soon, the judge persuaded him to concede, for that reason. With a Chancery judge, I asked why two simple cases with hopeless defences had been allocated four and two High Court days respectively and the judge truncated them both. In the Crown Court chapter, I describe a disagreement I had with a resident judge about the collapse of a very expensive trial due to a witness outburst which I considered predictable and he did not.

The research affected the subjects' behaviour in other ways. Two district judges were prompted to apply for recorderships by the interview question on promotion. In Wales, parties and their solicitors were all set for a Welsh-language hearing, as Welsh was the first language for all participants, but they conducted proceedings in English for my benefit. There was another danger that affected the court users. In the High Court, when I was sitting next to an ungowned judge, counsel kept addressing me. In any hearing, it was a natural hazard that disputing parents, litigants in person and frustrated jurors tried to catch my eye, especially when the judge was head down, taking notes.

THE NATURE AND PRIOR RESEARCH CONTEXT OF THIS WORK

I have not used any theoretical model. Models are often indispensible in analysing socio-legal research, or the history or current policy of the elements of a legal

system[41] but no one model is helpful or comprehensive enough here. For example, in Posner's 2008 book he examines nine positive, descriptive models of judicial behaviour and finds them all wanting, because they fail to recognise that judges are 'all-too-human workers', a point already made by Baum, who said they all portrayed judges as Mr Spock.[42] In any event, all these models are about judgments, mainly appellate judgments, which is not what this book is about. Even Feeley and Rubin, for instance, who, in their article, 'Creating Legal Doctrine',[43] focused on phenomenology (that is, lived experiences) developed 'a theory of judicial law making'. This book is certainly phenomenological, but such a theory might help here in analysing only *part of* the Court of Appeal and UK Supreme Court chapters' findings, because those are the only law-making judges. All 'judging' models are rendered even less helpful by their context: the US, where judges' party politics are a predominant factor.

Judges would occasionally ask me 'What's your hypothesis?' or 'What angle are you taking?' As Flood has said, though, 'it is not always possible to set up prior theoretical frameworks in ethnography' and 'If social science had the confidence not to attempt to replicate the natural sciences, its impact on the world would be potentially greater'.[44] In its methodology (the science of method), this work is *not* 'scientific', meaning positivist. Most modern socio-legal research is, understandably, positivist, especially government-funded work designed to test piloted policy changes or to inform government consultations. Some positivists and some lawyers, apparently unfamiliar with different philosophies of social science, think collecting statistics or developing hypotheses are the *only* way of doing social science.[45] The approach taken in this book lays it open to their criticism. In chapter fifteen, I call Paterson's book a socio-legal masterpiece, yet Harlow, a lawyer, called it 'anecdotal' and 'impressionistic', in 1986. Nevertheless, by 2010, Paterson's work was widely regarded as unsurpassed, in providing an in-depth insight into the Law Lords. Harlow's remains a singular view. This book may similarly be regarded as anecdotal. It does, however, provide very wide, rich and frank insight into judges' everyday work, from a researcher privileged to have unprecedented access to a very wide sample of judges, their workplaces and the material to which only they have access. In getting so close to the judges, there is a necessary loss of objectivity but that is well-recognised in this field of phenomenological research and indeed in all anthropological research. This type of work

[41] Classics include M King, *The Framework of Criminal Justice* (London, Croom Helm, 1981), citing Packer's models and others, and P Parsloe, *Juvenile Justice in Britain and the United States* (London, Routledge and Kegan Paul, 1978).

[42] L Baum, *Judges and their audiences* (Princeton, Princeton University Press, 2006). Both focus on judicial psychology.

[43] M Feeley and E Rubin, 'Creating Legal Doctrine' 69 (1996) *Southern California Law Review* 1989.

[44] In Banakar and Travers, below, 2005, 47.

[45] See R Banakar and M Travers, *Theory and Method in Socio-Legal Research* (Oxford, Hart, 2005) 14–15.

cannot and does not pretend to be impeccably objective, scientifically pure and quantitatively rigorous, as if it were chemistry. As it happens, there are plentiful statistical studies on judges, providing simple demographic information. They normally fuel attacks on the composition of the judiciary, as too old, white and male. Such studies are invaluable, for those of us who have repeatedly criticised the pre-2006 judicial selection system and judicial composition as an international embarrassment,[46] but they are easy 'research' and have been done by journalists since the 1950s.

This research is heuristic (meaning fact-finding) and phenomenological, insofar as its primary but not exclusive focus is the study of the judges' conscious experience of their world.[47] It is nearest in execution to a socio-legal ethnography, like those described by Flood in 2005, but that is too grand a label and this study is too big. It is observational research.[48] Paterson used role analysis, in examining the Law Lords, but I have not. Courts lend themselves to cultural studies, especially because they used to have distinct cultures when I observed them in the 1970s, but differences have diminished. Nevertheless, as will be seen, different levels of the judiciary do see themselves as culturally distinct, to some extent.

There is one well-known ethnography of a single court, Rock's *The Social World of an English Crown Court*.[49] Ethnographers study every element of a social microcosm, over months, or years. This book is an examination of judges, not courts and it is on a very different scale. Although part of it examines what goes on in the courtroom, it has little in common with, say, Carlen's *Magistrates' Justice*, which is part of a school of ethnomethodological[50] and conversational-analytic portraits of the courtroom.[51]

What it *does* have in common with some of these studies is what Travers calls the 'practical character of everyday activities'. It responds to his criticism of them. He lists over a dozen ethnographies of lawyers and the courts but says they place over-reliance on interviews, or observations from the back of the courtroom,

[46] See P Darbyshire, *Darbyshire on the English Legal System*, 10th edn (London, Sweet & Maxwell, 2011).

[47] See Posner, above n 3 at 40: 'phenomonology studies first person consciousness—experience as it presents itself to the conscious mind. So we might ask what it *feels* like to make a judicial decision'.

[48] Like Baldwin's research of small claims but on a bigger scale.

[49] P Rock, *The Social World of an English Crown Court* (Oxford, Clarendon Press, 1993), referred to in ch 9.

[50] P Carlen, *Magistrates' Justice* (London, Martin Robertson, 1976). Coined by Garfinkel in the mid-1990s. See M Travers, *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* (Aldershot, Ashgate: Dartmouth, 1997) 19.

[51] See also J Maxwell Atkinson and P Drew, *Order in Court: The Organisation of Verbal Interactions in Judicial Settings* (London, Macmillan, 1979); M Lynch, 'Preliminary Notes on Judges' Work: The Judge as a Constituent of Courtroom "Hearings"' in M Travers and JF Manzo, *Law in Action—Ethnomethodological and Conversation Analytic Approaches to Law* (Aldershot, Ashgate/Dartmouth, 1997).

because 'they do not provided sufficient insight into what lawyers actually do'. Travers continues, 'even researchers who have spent weeks and months inside the courts and offices, still seem to provide little sense of what work means as a practical matter to the people doing it … [especially those with] … an unashamedly competitive stance towards common-sense knowledge, with the result that the ethnography becomes a vehicle to advance a particular theoretical view of the world'.[52] I have tried to be much more penetrating. I could hardly have got closer to the judges.[53]

Crucially, this is not a study in judicial decision-making, or sentencing. There are ample sentencing studies in the UK, which interview magistrates, the primary sentencers,[54] but very few on decision-making, except Paterson's socio-legal and Robertson's multivariate analysis work, reviewed in the UK Supreme Court chapter, plus analyses of Law Lords' judgments on specific subjects.[55] A useful review of the copious US literature on judicial decision-making is by Tamanaha in 1999.[56] '[O]wing to its prominence, an inordinate number of social scientific studies have been conducted on decision-making in the US Supreme Court.'[57] Most are behaviourist, identifying decision patterns and trying to link them to independent variables like politics but all US research must be read in the knowledge that 'law is shot through with [party] politics',[58] the opposite of this jurisdiction. I comment later that, such is the difference in the UK interpretation of judicial independence, every judge I met was impeccably apolitical in out-of-court conversations and most research judges had no prior party connections, unlike their predecessors a hundred years earlier.[59] Had I wanted even to ask judges in England and Wales about their politics, it would not have been permitted. The only question the judiciary censored from my interview schedule was a question on political backgrounds. Very importantly, Tamanaha complains

[52] Travers, above n 50 at 7–8.

[53] I think I fit this description: 'driven and motivated by an unlimited curiosity about social life…a threatened species': Banaker and Travers, above n 45 at 11. Flood (same book) at 34, said 'The research process for ethnography is different…multi-textured, open-ended and discursive. It starts from a point of learning and enquiry'.

[54] Listed by Baldwin, above n 9 at 386.

[55] One reason for the establishment of the UCL Judicial Institute was the lack of such research.

[56] BZ Tamanaha, *Realistic Socio-legal Theory—Pragmatism and a Social Theory of Law* (Oxford, Oxford University Press, 1999) ch 7.

[57] ibid 205.

[58] Posner, above n 3 at 9. eg, Judge Edwards, above, was shocked to be asked 'I am a Liberal. Can I count on your vote?' when he joined the Court of Appeals. *The Craft of Justice*, above n 30, starts 'The characteristics of these relationships . . .were shaped by local political incidents'. See also L Epstein, *Courts and Judges* (Aldershot/Burlington, Ashgate, 2005), concentrating on voting behaviour in American appellate courts, and the politics of judicial selection, none of which is relevant here.

[59] In the first half of the twentieth century, appointments were routinely awarded for lawyers' party political service: JAG Griffith, *The Politics of the Judiciary* (London, Fontana, 1977).

of the defects of studies of judges, caused by the *inaccessibility of US judges*, contrary to the impression given by some British writers, above:

> Most problematic [is] … a central defect, one shared by the mass of existing studies on judicial decision-making: less than a handful have actually ever tested for the influence of judges' perceptions of their judicial role on their decision-making behaviour … one reason for this gaping omission is that judges have traditionally been inaccessible.[60]

In other words, judicial decisions are analysed only against biographical data on US judges.[61] The punch-line of Tamanaha's review is that, while attitudes have had a dominant influence on the decisions of some US Supreme Court Justices, in most other cases, in the lower federal courts, 'the background and attitudes of judges do not have a determinative influence'.[62] As for the popular idea that judges' similar backgrounds (elite, white, middle-aged males) are what produce uniform decisions, he says it fails close inspection, and is indeed 'absurd' because it cannot account for the levels of disagreement in the US Supreme Court, and studies have shown that female judges do not significantly differ from males, nor black from white. They *do* share an indoctrination and institutional context and a belief that they are bound by the law and the law largely determines their decisions. While attitudes undoubtedly influence how judges interpret the law, in most cases, says Tamanaha, this is 'not extraordinarily much'.[63] I am not denying, though, that who judges matters.[64] This is not a piece of research about whether the law is working as intended. Government departments have become increasingly keen on and good at that type of work, especially since the 1990s.[65] Nevertheless, some chapters here do document and comment on legal processes against their stated aims, such as glaring disproportionality in some civil cases and the complete failure of electronic case handling, as aspired to by the Woolf reforms to civil procedure.

Other previous publications of all types, including research material, are referred to in the appropriate chapters. There are ample books and articles about and by judges in this jurisdiction and they are referred to throughout but very few are based on empirical research.

[60] Tamanaha, above n 56 at 211.

[61] Tamanaha considers it ironic that behaviourists think they discovered that judges make law, not realising that Holmes, Cardozo and Hart recognised this in the UK and the US, in the early twentieth century, ibid 204.

[62] ibid 221.

[63] ibid 222–24. His conclusions are in striking contrast to those of Harlow, a decade earlier.

[64] And see R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments* (Oxford, Hart Publishing, 2010).

[65] Harlow deplored the absence of a government justice department with a positive attitude to research. The Ministry of Justice, and predecessors is/were keen to pilot policy changes and monitor their efficacy before 'rolling them out'. See Baldwin in King and Wincup, above n 9 at 376, referring to governmental keenness on 'evidence-led' criminal justice policy. See further, Morgan and Hough, in the same book.

ORGANISATION OF THE BOOK

Chapter two examines public image, against which the description of real judges and their work is to be contrasted. Chapters three to six examine career backgrounds: motivations, recruitment as a part-timer, then full-timer, and training. Chapter seven examines working personality and characteristics. Chapters eight to fifteen are the 'working' chapters, the real core of the book, describing different types of judges in their working world, from district judges to the Law Lords (UK Supreme Court). The last two chapters examine general issues: judges' relationship with other levels of the judiciary and judges' tools for their trade.