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## **Producing the Product: A Case Study of Law and Its Absence**

HELEN CARR,\* DAVE COWAN,\*\* AND ALISON WALLACE\*\*\*

In this article, we seek to develop socio-legal studies through a rupturing of the ideas behind the social and the legal, ideas that are most often presumed to exist and are used to explain that which is already there. The ubiquity of law and the omniscience of society have become givens. We use a product called shared ownership as a case study, arguing that the product was given life by a legal document (the lease) which itself represented the translation of a range of different perspectives and audiences (albeit not the consumer), and which, itself, has been translated, most notably in a 2008 High Court decision. That decision counterintuitively found that the lease had created an assured shorthold tenancy (albeit a long one) but, despite its threat to the product, has been largely ignored. We discuss the processes of and reasons for, the translation through which that ignorance has been induced.

\* Kent Law School, University of Kent, Canterbury, Kent CT2 7NZ, England H.P.  
Carr@kent.ac.uk

\*\* University of Bristol Law School, Wills Memorial Building, Queens Road, Bristol BS8 1RJ, England d. s. cowan@bristol.ac.uk

\*\*\* Centre for Housing Policy, University of York, Heslington, York YO10 5DD, England alison.wallace@york.ac.uk

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There are two fundamentally problematic, almost paradoxical, presumptions at the heart of much socio-legal (or, in its American formulation, law and society) research: the socio- and the legal.<sup>1</sup> The presumptions, sometimes elevated to assumptions, are problematic because they serve to explain that which is already there.<sup>2</sup> They assume one before, or separate from, the other; from these foundational problems, we were struck by the critique by this volume's editor that:

Despite the current methodological and theoretical diversity, law and society scholarship appears to continue using a critique of black-letter law as its hallmark and starting point of explorations of law's 'actual societal operations behind the mask of legal formalism'.<sup>3</sup>

The ubiquity of law and the omniscience of society have become givens. Even the sleight of hand by which 'Law and society' becomes 'Law in society' to highlight their mutually constitutive effects falls at the assumption of lives in/outside the law.<sup>4</sup> In his elegant critique, Fitzpatrick argued that

... whilst society depends on law for its possibility, law has to remain apart from it, resisting reduction in terms of society. Law then also marks a point at which society fails in its universal sweep and becomes impossible. So, despite all the incantations about law being the product of society, about its having to change when society changes, and so on, law retains in its relation to society a resolute, 'positive' autonomy that has at least the virtue of maintaining academic efforts to reduce it to something social.<sup>5</sup>

Even in some more enlightened and self-aware scholarship, legality is everywhere such that it loses its essence and, again paradoxically, it is

- 1 See, for example, the interesting and diverse takes on the label in D. Feenan (ed.), *Exploring the Socio-* (2013) and D. Cowan and D. Wincott, *Exploring the Legal* (2015). The separation of socio- and legal between these texts, with its suggestive difference, only served to highlight the implausibility of their separation.
- 2 See, for example, B. Latour, *Reassembling the Social: An Introduction to Actor- Network Theory* (2005) ch. 1. By contrast, ' "society" has to be composed, made up, constructed, established, maintained, and assembled. It is no longer to be taken as the hidden source of causality which could be mobilized so as to account for the existence and stability of some other action or behaviour': B. Latour, 'When things strike back: A possible contribution of "science studies" to the social sciences' (2000) 51 *Brit. J. of Sociology* 107, at 113.
- 3 J. Přibáň, 'The Conference's outline', paper announcing the Centre of Law and Society's conference, 9-10 June 2016.
- 4 This is the point made by Kay Levene and Virginia Mellema, in their critique of P. Ewick and S. Silbey's *The Common Place of Law* (1998), who point out that legal consciousness work '... prioritize[s] law above other forces and institutions in interpreting legal consciousness' so that, paradoxically, they adopt the same law-first approach as they seek to critique: K. Levene and V. Mellema, 'Strategizing the street: How law matters in the lives of women in the street-level drug economy' (2001) 26 *Law & Social Inquiry* 169, at 171.
- 5 P. Fitzpatrick, 'Being social in socio-legal studies' (1995) 22 *J. of Law and Society* 105, at 110-11.

nowhere.<sup>6</sup> Trapped by our label, we seek ways out only to be caught up again in its self-referential web; or, we accept its limitations.

We find solace in the label that was once commonly ascribed to socio-legal scholars, that they are 'basket-weavers'. Although, perhaps, meant as a term of abuse, we think that the analogy accurately describes our appreciation of the socio-legal project. A basket-weaver has a craft, and it is one which painstakingly produces something which may or may not be proper, in the sense that it is crafted. It is constantly being remade, and is for multiple uses. It involves the interweaving of a variety of different strands, which are themselves produced perhaps for different purposes. The basket is the product but certainly not an *à la carte*-product.

In our work on shared ownership, a rather odd tenure form of property, we are working through these issues about the socio-legal project. In this article, we take a slice from them, and want to work through how the social produces legality, which, in turn, produces the social. Our case study is the formation of a very legal document - the lease - to support this thing - shared ownership - which was previously unknown. Our argument is that it did not just 'support' the thing: it produced it, and made it into a product. At particular moments in time, shared ownership has gained a particular hold because it offers the apparent prospect of 'ownership' (whatever that means) to a class of people who would not otherwise be able to afford it;<sup>7</sup> in the housing studies tradition, it is referred to either as a 'low-cost home ownership' product or an 'intermediate tenure'.<sup>8</sup>

That document, which in and of itself represented the hopes, anxieties, and fears of a legion of politicians, policy-makers, and practitioners (of law and housing) was a translation into legal form of those hopes, fears, and

6 As Naomi Mezey puts it in her critique of Ewick and Silbey (op. cit., n. 4), the status of law in this brand of legal consciousness is 'the law is everywhere, so much so that it is nowhere'; and 'once legal consciousness is reconceptualised as all forms of power and authority, legal consciousness is no longer meaningfully legal': N. Mezey, *Out of the ordinary: Law, power, culture and commonplace* (2001) 26 *Law & Social Inquiry* 145, at 153, 165.

7 Those particular moments in time have occurred when, for example, traditional ownership is unaffordable, either as a result of capital values and/or the lack of availability of mortgage finance, and the only alternative is either social or private renting: J. Stanley, *Shared Purchase: A New Route to Home-Ownership* (1974); Campbell Working Group, *New Forms of Social Ownership and Tenure* (1976). The focus on shared ownership in the 2017 Housing White Paper and in affordable housing plan are also indicative: Homes and Communities Agency (HCA), *Shared Ownership and Affordable Homes Programme 2016-21: Prospectus* (2016); Department for Communities and Local Government (DCLG), *Fixing our broken housing market* (2017; Cm. 9352).

8 See, for example, R. Forrest, S. Lansley, and A. Murie, *A Foot, on the Ladder? An Evaluation of Low Cost Home Ownership Initiatives* (1984); S. Monk and C. Whitehead (eds.), *Making Housing More Affordable: The Role of Intermediate Tenures* (2010).

anxieties, and which then went through a series of translations. We demonstrate how the idea of shared ownership as ownership produced action, and how the lease, as a manipulable device, became weighted away from the consumer. The idea of ownership was itself translated into the clauses of the lease. The audience for the lease was certainly not the parties to the transaction, but mortgage lenders; indeed, one might say that the existence of the parties to the transaction was entirely incidental. The transaction would not have existed but for the mortgage lenders, and we demonstrate how their financial interests came to be protected.

We then fast forward the discussion to a particular moment - a crisis moment - for shared ownership with the High Court decision in *Midland Heart v. Richardson*.<sup>9</sup> We demonstrate how this case significantly rocked the boat, because its outcome was that shared owners are not owners, but tenants (albeit with a long lease). We pose the question, how is it that, despite that decision, shared ownership has remained such a significant device and been enhanced by the Coalition and Tory governments. Our answer is that there was a further translation, by policy makers and others, which cast that decision as being anomalous and cast those arguing for its significance to be regarded as outliers.

This article is based on archival material from a range of sources and a set of interviews with key stakeholders involved in, or thinking about, shared ownership. The archival material is drawn from 1973-83, around the time that shared ownership was being formed, and overtaking the possible alternatives as the most significant of the brand of low-cost home ownership initiatives.<sup>10</sup> The key stakeholder interviews (n=19) were conducted in 2014-5.<sup>11</sup> We conducted interviews (mostly by telephone) with representatives of building societies, banks, pressure groups, policy makers, local authorities, housing associations, and all their interlocutors. We conducted a focus group in person with a shared ownership buyers' organization, and observed one of their meetings. Although we asked certain specific questions depending on the interviewee's experience and profession, we were also interested to find out responses to some generic questions, such as what is shared ownership?

However, before we discuss this data, there is a certain amount of ground clearing that needs to be done. In the opening section, we set out our theoretical frame, and develop that by reference to 'ownership'.

9 *Midland Heart v. Richardson* [2008] L. & T.R. 31; S. Brigiit and N. Hopkins, 'Low Cost Home Ownership: legal issues of the shared ownership lease' (2009) 73 *Conveyancer* 337.

10 See H. Carr, D. Cowan, and A. Wallace, '“Thank heavens for the lease”: Histories of shared ownership', paper on file with the authors.

11 Conducted as part of a Leverhulme Trust research project grant, 'Shared Ownership: Crisis Moments'.

## RETHINKING OWNERSHIP

Although there are elegant and scholarly discussions of the meaning of ownership, in which scholars have invested certain usually legal attributes,<sup>12</sup> we see ownership as a ‘material semiotic’ in tune with actor-network theorists.<sup>13</sup> By that label, we mean that ownership is produced by actors, whether human or non-human, working together, folding their understandings around each other. As a result, it is both complex and contradictory, situational, and cultural. It is performed and in process; indeed, it is a process in its own right.<sup>14</sup> Ownership, like its bedfellow, legality, works ‘... as both an interpretive framework and a set of resources with which and through which the social world (including that part known as the law) is constituted.’<sup>15</sup>

Circulating ideas about property and ownership then become part and parcel of this material semiotic, as does the idea of an ownership ‘product’. There is a rich literature which demonstrates the significance of ownership in language.<sup>16</sup> So, for example, Rowland Atkinson and Sarah Blandy talk about tessellated neoliberalism, in which ideas about the private home, political life, and the economy expand outwards from the micro-scale of a multitude of owned homes.<sup>17</sup> These ideas resonate with work that has begun to question the objectification of the market in the home and regard emotions as things which both shape the market and the home.<sup>18</sup> Emotion is also about the production of ‘home’ in alliance with ‘ownership’. This affective dimension is commonly said to depend on the control one has over where one lives. In this sense, rather than focus on the exclusivity of possession, that is, against outsiders, the affective dimension of property commonly relates to

12 Perhaps the best known of these is A. Honore, ‘Ownership’ in *Oxford Essays in Jurisprudence*, ed. A. Guest (1961); see, also, M. Davies, *Property: Meanings, Histories, Theories* (2007).

13 J. Law and A. Mol, ‘Notes on materiality and sociality’ (1995) 43 *Sociologica! Rev.* 274, at 280-1.

14 See, in particular, C. Rose, *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994); N. Blomley, ‘The boundaries of property: Complexity, relationality, and spatiality’ (2016) 50 *Law & Society Rev.* 224.

15 Ewick and Silbey, *op. cit.*, n. 4, p. 23.

16 Ownership is talked of in housing policy in England and Wales, and beyond, as a ‘natural desire’, and we talk about getting on ‘the housing ladder’, a phrase that is particularly used in relation to shared ownership: see C. Gurney, ‘Lowering the drawbridge: A case study of analogy and metaphor in the social construction of home-ownership’ (1999) 36 *Urban Studies* 1705; and Theresa May’s introduction to the 2017 housing White Paper.

17 R. Atkinson and S. Blandy, *Domestic Fortress: Fear and the New Home Front* (2016) 9.

18 See, in particular, H. Christie, S. Smith, and M. Mimro, ‘The emotional economy of housing’ (2008) 40 *Environment and Planning A* 2296; N. Cook, S. Smith, and B. Searle, ‘Debted objects: Homemaking in an era of mortgage-enabled consumption’ (2013) 30 *Housing, Theory and Society* 293.

control over the interior of the property. Drawing on a Bourdieusian sociology, Daniel Miller argues that objects make people: 'the whole system of things, with their internal order, makes us the people we are. And they are exemplary in their humility, never really drawing attention to what we owe them.'<sup>19</sup> They are powerful precisely because they are invisible but yet visible.

Documents also produce, are produced by, and become property. In our study, alchemically, they turn a verb (to produce) into a noun (the product).<sup>20</sup> Consider this comment from a government lawyer in 1978:

I am up against the difficulty, which I am afraid I have already reiterated rather tiresomely, that I do not know what an 'equity sharing' scheme is ... I am afraid all this will seem unhelpful, but it is really impossible to advise on what can safely and accurately be said or implied, in terms of legal concepts such as options and leases, in relation to a concept ('equity sharing') which has not been formulated.<sup>21</sup>

'Equity sharing' is what became shared ownership.<sup>22</sup> But what was being said by this lawyer was that, without the founding document, he was unable to advise the government.<sup>23</sup> It was the document which produced shared ownership.<sup>24</sup> This almost goes without saying to lawyers, but it is precisely because of that comment that it needs to be said. But it is not only legal documents which produce this kind of knowledge. Reports of meetings operate as translations: a tick in a box; a strikethrough; all of these are the kinds of inscriptions which matter and to which we should be paying attention.<sup>25</sup> As Richard Freeman puts it, 'once people no longer sit round a table ... it is the text which mediates between them.'<sup>26</sup> Freeman and Maybin argue that inscription into a document '... is a practised thing ... a conduit or corridor, something through which other things (power, meaning) flow.'<sup>27</sup> A

19 D. Miller, *Stuff* (2010).

20 This alchemy is a form of enactment - see S. Woolgar and J. Lezaun, 'The wrong bin bag: A turn to ontology in science and technology studies?' (2013) 43 *Social Studies of Science* 321, at 323-7.

21 R. Gunning, 'Legal A', 3 May 1978: HLG118/3059.

22 The long and complicated history is discussed in Carr et al., *op. cit.*, n. 10.

23 Shared ownership, unlike other property in land, has no statutory backing beyond a rather loose definition, which only came into being in s. 70, Housing and Regeneration Act 2008, some 33 years after the first shared ownership property was sold!

24 And came to be owned in itself by the regulator, and copyrighted, of course, by the lawyer draftspersons, Hamlin & Grammar.

25 See, for example, R. Freeman, 'Learning by meeting' (2008) 2 *Critical Policy Studies* 1; D. Cowan, K. Morgan, and M. McDennont, 'Nomination: An actor-network approach' (2009) 24 *Housing Studies* 281; M.-A. Jacob, 'The strikethrough: An approach to regulatory writing and professional discipline' (2017) 37 *Legal Studies* 137.

26 Freeman, *id.*, p. 15.

27 R. Freeman and J. Maybin, 'Documents, practices and policy' (2011) 7 *Evidence and Policy* 155.

document can be an artefact that functions as ‘a technique for inter-esting’;<sup>28</sup> they ‘anticipate and enable certain actions by others - extensions, amplifications, and modifications of both content and form.’<sup>29</sup> Further,

... the document is a translation that also translates. It is intrinsic to those communicative processes in which actors inhabiting different social worlds first enter into relations with each other and then begin to recast or reconstruct themselves, their interests and their worlds. This means simply that the document connects actors and coordinates their actions.<sup>30</sup>

The standardization of things, in particular, makes possible an array of new techniques.<sup>31</sup> And the standardization of legal documents is a crucial technology in private legal infrastructures as ‘... devices through which particular technical, institutional, political, legal, and economic arrangements gain solidity and durability.’<sup>32</sup> They are powerful by their absence and by the fact that their standardization can lead to what Margaret Radin describes as normative and democratic degradation, particularly because they are excluding legislatively granted rights.<sup>33</sup>

#### PRODUCING THE PRODUCT

There is no known definition of ‘equity sharing’ in law, in the sense demanded by the present schemes ... there has been no conscious standardisation of the terms of the so-called ‘equity sharing’ leases, nor has any model lease for such schemes been drawn up.<sup>4</sup>

Shared ownership was a peculiar invention of the local authority and housing association movement in the 1970s.<sup>35</sup> It has a relatively simple and abbreviated description, ‘part buy, part rent’, which itself has been elevated to a slogan. In this sense, it is a liminal tenure, neither one nor the other. What follows in this section is a story about how it became in- and transcribed as ownership, how it became legible, the consequences of such legibility, and how apparently neutral (and usual) clauses in a lease are

28 *id.*, p. 160; see, also, B. Latour and S. Woolgar, *Laboratory Life: The Construction of Scientific Facts* (1986) 45-50.

29 A. Riles, ‘Introduction: In response’ in *Documents: Artifacts of Modern Knowledge*, ed. A. Riles (2006) 21.

30 Freeman and Maybin, *op. cit.*, n. 27, p. 165.

31 D. Mackenzie, *An Engine, Not a Camera: How Financial Models Shape Markets* (2006).

32 A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (2011) 46.

33 M. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2012).

34 H9B, ‘Consolidated Housing Bill: Instructions to Parliamentary Counsel’, August 1978: HLG 118/3038.

35 The first shared ownership scheme was developed by Binningham City Council and sold in 1975.



translations and re-translations of meaningful sets of understandings. Those sets of understandings became blackboxed following such inscription.

In a little more detail, shared ownership was constructed during this seminal period in the late 1970s. In essence, a person is said to buy a share of a property from a housing association,<sup>36</sup> usually no less than 25 per cent, and they pay rent on the part that they don't own. The buyer formally obtains a lease for their purchase of the property, which governs the relationship between the buyer and the provider. Housing association shared-ownership leases take their form or clauses from a model lease, which was promulgated by the sector regulator from 1981 and has been amended at particular intervals since.<sup>37</sup> Over time, buyers can increase their stake in the property, by buying additional capital shares up to 100 per cent, at which point they will be entitled to the entire legal interest in the property.

The story of the reasons for the production of a model lease has already been told.<sup>38</sup> However, the story of individual non-standard clauses in the lease has not. In this section, we address the reasons behind two clauses: the consumer's repairing obligations, and what is known as the 'mortgagee protection clause'. As regards the former, there is a singular question which is troubling: an occupier buys a share but, on the terms of the model lease, is responsible for the entire cost of repairs and service charges apportioned to their unit of accommodation. As regards the latter, this clause guarantees lenders the return of their capital, interest, and costs in the event of a repossession; the outstanding point is that it does so over and above any state subsidy paid to the housing association.

Our point in this section is that these clauses involve the translation of two rather different sets of ideas into the one document:

Repairing obligations

3.4.3 To pay to the Landlord on demand a fair and proper proportion (to be conclusively determined by the Landlord (who shall act reasonably)) of:

(a) the expense of cleaning, lighting, repairing, renewing, decorating, maintaining and rebuilding any Communal Facilities; and

(b) the reasonable costs, charges and expenses incurred by the Landlord in connection with the provision, maintenance and management of the Communal Facilities.<sup>39</sup>

On John Stanley's idea for the scheme, the consumer was responsible for 100 per cent of the repairs, essentially because of the administrative work

36 There are other forms: originally, they were local authority schemes but these had died out certainly by the mid-1980s, and there have been private schemes circulating since the downturn in 2007. However, this article is concerned solely with housing association schemes.

37 The original leases could be varied but the Housing Corporation advised associations not to do so without careful scrutiny: HC circulars 14/80 and 18/81, para. 3.

38 Carr et al., op. cit., n. 10.

39 Shared Ownership model house lease, cl. 3.4.3 (2013 version), at <<https://www.gov.uk/guidance/capital-funding-guide/help-to-buy-shared-ownership#section-1-1>>.

involved in apportioning the costs. Although he struggled with this element, his rationale was that responsibility for upkeep:

... represents a fair quid pro quo for the small element of subsidy in the scheme. It also provides the occupier with an incentive to buy out the institutional interest in the house; this is desirable as far as the Exchequer is concerned as it reduces the risk of a cash shortfall in the agency.<sup>40</sup>

There is something significant about Stanley's struggle here, because it is the incentive to buy the whole that provides a significant rationale. Indeed, this clause can be regarded as a totem for other clauses which appear to be weighted against the consumer. 'Buying out'<sup>41</sup> is a particular incentive for housing associations because this happens generally at periods of upturn in the market, which enables significant profits potentially to be made by the provider. Hence, this is an incentive for the charitable provider (which also obtains the benefit of the consumer's payment for repairs).<sup>42</sup>

The other central reason that was provided for this clause gives an indication of the train of thought encapsulated in this clause. Consumers were buyers and owners, not renters.<sup>43</sup> In an early draft of ministerial guidance, the following demonstrates civil servants' train of thought:

A share owner secures his property by means of a lease. He [s/c] is an owner and no longer a secure tenant... He should be regarded as far as possible as an owner occupier - he has taken on his house with a view to full home ownership at a later stage - and enjoy those rights and responsibilities ... He would be responsible for maintenance costs and keeping his property in a reasonable state of repair.<sup>44</sup>

Similarly, in a draft commentary on a draft local authority scheme, the point was starkly made:

Although a shared owner is often referred to as part tenant and part owner, he [s/c] is, in fact and in law, a lessee who has paid a substantial premium for his lease and entitled to be regarded as an owner occupier. Therefore, insofar as his lease contains covenants concerning his rights and responsibilities, these

40 Stanley, op. cit., n. 7, p. 16.

41 This process is known as 'staircasing', see A. Wallace, *Achieving Mobility in the Intermediate Housing Market: Moving Up and Moving On?* (2008).

42 This was the significance of the decision of Peter Gibson J in *Joseph Rowntree HA Ltd v. A-G* [1983] 1 Ch 159, 176, where he found that a profit incidental to a charitable service did not disentitle the organization from charitable status. Gibson J, as Treasury Counsel, had been instructed to settle the model leases.

43 There was a similar discussion about exempting shared owners from the registration of their rents under the Rent Act 1977: 'The justification for the proposal would be that shared ownership is perceived as a form of owner-occupation, not of renting, whatever the legal position may be, and ought to be treated as such': 'Promotion of Privately Financed Shared Ownership' (1986): HLG 118/4195 (our emphasis).

44 Dated 1979, annexed to note of meeting, 'Shared Ownership Model Schemes', 6 May 1980: HLG 118/3865 (original emphasis).

should not differ from the covenants that would be contained in a more conventional long lease.<sup>45</sup>

The apparently neutral but also apparently inexplicable clause by which the consumer who buys a quarter share but is nevertheless responsible for the whole of the apportioned repairs now becomes explicable. By a sleight of hand, the relationship between the lease and the shared-ownership label (a product of John Stanley himself) combined with the political priority to produce 'low-cost home ownership' produced a way of thinking about the consumer as owner, and which produced the apparent inequity of this clause:

The mortgagee protection clause

Mortgagees are given additional protection under the shared ownership lease than is offered in conventional mortgages. This gives Mortgagees the right to be able to recover a certain amount of loss from providers as Landlords. In accordance with our instructions we have altered the operation of the Mortgagee Protection Clause. The amount of the claim is now defined as the 'Mortgagee Protection Claim'.<sup>46</sup>

Inscription is rarely without purpose or meaning. The production of legibility of shared ownership was tied up with a question which provided focus and purpose: the generation of private finance. This was at both ends - capital finance to providers for its development, and capital finance for its ultimate consumer to acquire their stake. The rolling out of shared ownership as a product would have been impossible without the lending institutions. What we demonstrate here is how the audience was engaged (and intended to be engaged) by the terms of the lease, both in its drafting as well as in the selection of format. This is what Michel Gallon describes as a process of *interissement*, the attempt to catch others (lenders) through the lease.<sup>47</sup>

It was the generation of upfront capital finance (as opposed to government grant) that particularly engaged its leading proponent, John Stanley. Well before he became housing minister in the first Thatcher government, he had written a pamphlet<sup>48</sup> in which he had advocated the development of what he called 'shared purchase' in which he mooted the use of lending associations for both purposes. However, it was clearly appreciated by all concerned that shared ownership offered the opportunity to build low-cost housing with

45 N.H. Perry, 'Shared Ownership: Model Scheme', 28 July 1980, para. 21: HLG 118/2259.

46 Updated Consultation Note for Stakeholders Following Informal Consultation Process, 29 January 2010, para. 2.1.2, at <<https://www.gov.uk/guidance/capital-finding-guide/help-to-buy-shared-ownership>>.

47 M. Callón, 'Some elements of a sociology of translation: Domestication of the scallops and the fishermen of St Brieuc Bay' (1982) 32 Sociological Rev. 196.

48 Stanley, *op. cit.*, n. 7. Reg Freeson, the then housing minister, wanted to meet Stanley to discuss his ideas, but was told that it was doubtful whether there would be any advantage of involving him, particularly as the idea had been mooted in the 1977 Green Paper and was technically problematic: R.J. Dorrington, 27 February 1978: HLG 118/3059.

little, if any, state subsidy. A working group of the NFHA was formed to respond to a request from Stanley for a meeting about the use of private finance in shared ownership, and met for the first time on 25 November 1980. That resulted in a remarkably prescient private document, 'intended to stimulate debate', authored by that great defender of social housing, the National Federation of Housing Associations, which advocated the use of private finance so that:

... shared ownership schemes would have no impact at all upon public expenditure. This would free the monies currently allocated to shared ownership for use exclusively on rented housing for those who will never be able to take advantage of shared ownership or outright ownership.<sup>49</sup>

Even so, it was recognized that (with or without subsidy) the success of shared ownership would depend on the willingness of building societies to lend to consumers on its security.<sup>50</sup> The leasehold tenure format was selected for a number of reasons, but a particularly significant reason was that it was acceptable to the societies, who were engaged in its drafting:

The Housing Corporation is about to promulgate to housing association in England and Wales a new model lease for shared ownership. The draft of this model has been discussed with the Association and seven major societies over recent months and many amendments and alterations had been made at the request of the Association and those societies ... It is hoped that in the modified form ... it ought not to cause too many problems.<sup>51</sup>

Societies had refused to lend on the local authority leases.<sup>52</sup> The Housing Corporation decided to settle a model lease 'to encourage building societies to provide mortgages and prevent associations needlessly repeating one another's work.'<sup>53</sup> The NFHA working party also took it upon themselves to have oversight of the draft model lease. The Building Societies Association, the representative body, itself had set up its own working group to negotiate the community leasehold lease over the period of a year in 1977, and approved that lease in December that year.<sup>54</sup> These were the obligatory passage points, the policy makers through which all must travel.<sup>55</sup> The

49 NFHA, 'Private Finance for Housing Associations: An NFHA Paper Intended to Stimulate Debate' (1981) 6: HLG 118/3969, The document was prescient because from the mid- to late-1980s, the sector has become dominated by private finance: see M. McDermont, *Governing, Independence, and Expertise: The Business of Housing Associations* (2010).

50 For a description of the mortgage lending monopoly held by building societies in this period, see M. Boddy, *The Building Societies* (1980).

51 BSA Information letter, October 1981, para. 53: HLG 118/3969.

52 Partly, this was because there was no single, model lease: H9.d, 'Note for File, Shared Ownership - Visits to Local Authorities', 22 July 1980, para 3c: HLG 118/3865.

53 J. Bradley, *Housing Association Shared Ownership Schemes*, memo to Stanley, 18 August 1980, para. 12: HLG 118/2259.

54 NFHA, *Handbook for Community Leasehold* (1978) 2.

55 Gallon, *op. cit.*, n. 47.

significance of that lease was that it provided the basis for both the terms and negotiation of the model shared-ownership lease. The basis for the mortgagee protection clause obtained from the model provided for a similar, by then defunct, product, community leasehold.<sup>56</sup> The BSA requested the same protection in the shared ownership lease as in that lease.

That protection was never in doubt, the principle/precedent having been previously agreed. The only consideration was whether the BSA should be given that protection, which caused a risk to government subsidy, or should be given an indemnity from the Housing Corporation under s. 111, Housing Act 1980, which would come from public money.<sup>57</sup> Having been granted the former, a problem emerged at a seminar run by the Chartered Building Societies Institute on 23 September 1981:

I was taken to task by representatives of a number of different societies, including the Halifax, about the reluctance of the Housing Corporation to provide guarantees to building societies under s. 111 ...

If the Corporation's views have been accurately represented, it does appear unreasonable that they should set aside sufficient funds to meet the unlikely contingency that all guarantees would be called, and all in the same year. Nor do I believe that the provision in the model lease for shared ownership whereby a building society lender would have first charge on the whole of the equity is an adequate substitute for s. 111. It does not give the society the assurance that it will be saved the delay, expense and opprobrium of having to take action for possession.<sup>58</sup>

Individual building societies advocated for this guarantee in individual correspondence with the Minister - indeed, the Abbey wrote that it was standard practice to require such a guarantee,<sup>59</sup> and the Halifax that it was a difficulty.<sup>60</sup> The DoE and Corporation stayed firm, however; the principal concern appears to have been that, in fact, building societies were willing to lend on shared ownership leases and, once an indemnity had been offered, 'they would become a general building society requirement, for no good reason.'<sup>61</sup> The lenders, in other words, did not get their own way all the time, but this was a minor skirmish that was lost - the principle had been won,

56 J. Hill, 'Shared Ownership with Staircasing: Draft Model Lease', 9 July 1980, para. 8: HLG 118/2259.

57 The latter would have to be scored against their guarantee limit and would have resulted in less public money for housing association development.

58 P. Fletcher, 'Housing Corporation and Section 111 Indemnities', Chartered Building Societies Institute seminar, 24 September 1981.

59 C. Thornton, Chief General Manager, letter to Stanley, 16 November 1981: HLG 118/4123.

60 J. Spalding, Deputy Chief General Manager, to Stanley, 18 November 1981: HLG 118/3865.

61 I. Jordan, Memo, 'Shared-ownership and mortgage indemnities', 24 November 1981: HLG 118/3865.

and, as we have noted elsewhere, the audience for the lease is not the parties to the transaction but the lending institution.<sup>62</sup>

#### THE MYSTERY OF THE LEASE UNCOVERED?

In those early days, particular issues had emerged about the lease and its relationship with the Rent Acts. It was certainly assumed that the lease created a Rent Act tenancy and, 'as a result fair rents are now registered for housing association shared ownership leases as a matter of course.'<sup>63</sup> Over time, as the rent officer role became disconnected from rents and more engaged with housing benefit valuations, this knowledge appears to have been lost. The changes to security of tenure in the Housing Act 1988 passed by, and it seems to have become assumed that, as a long leaseholder, shared owners were outside security of tenure legislation; indeed, they had been found to have the same rights as other long leaseholders.<sup>64</sup> That would make sense because they were owners not renters.

However, in *Midland Heart v. Richardson*, Jonathan Gaunt QC, sitting as a Deputy High Court Judge, found that the lease produced an assured shorthold tenancy. This was significant because Ms Richardson, who owned a 50 per cent stake in the property, had run up arrears of the rental element, which gave Midland Heart a mandatory possession claim against her. Indeed, this achieved the same result as a forfeiture, in that Ms Richardson lost her capital stake in the property. Ms Richardson's arrears had arisen following her husband's imprisonment; his criminal associates threatened her and she had to leave the property. She lived for a while in a refuge, but housing benefit would only pay for two properties for a certain period, after which the arrears arose. In her absence, it is recorded that the property had been vandalized. Ms Richardson asked Midland Heart to market the property but it did not sell. At the date of hearing, the arrears were £3,009 and a possession order was made. The Judge dismissed the appeal against that order. He went on:

That all said, I have found this case troubling. Miss Richardson has had a rough ride in life and has now lost what is probably her only capital asset. Moreover, she lost it in proceedings brought at a time when, to the knowledge of the housing association, she was actively seeking to sell the house to pay off her debts and the housing association was itself involved in that process. I must say that I find the stance taken by the housing association strange in the circumstances and I have not received any adequate explanation. There may,

62 D. Cowan, A. Wallace, and H. Carr, *Exploring experiences of shared ownership housing: Reconciling owning and renting* (2015).

63 HLG 118/4195, *op. cit.*, n. 43, para. 4. Indeed, there is evidence that the rent officers themselves were in conflict about this process because of valuation difficulties: letter received 21 May 1981 from Institute of Rent Officers: HLG 118/2259.

64 *Corscombe Close Block 8 RTM Co. Ltd v. Roseleb Ltd* [2013] UKUT 81 (LC).

of course, be many facts and matters in the background that I know not of and so I do not intend to be unduly critical. I simply comment on the timing.<sup>65</sup>

He then was 'pleased to record' that Midland Heart had offered *ex gratia* to repay the original capital stake, less rent arrears, costs, and the cost of

<sup>66</sup>  
repairs.

There has been plenty of writing about this case by academics and in the blogosphere.<sup>67</sup> Much of this writing questions the ideals of shared ownership, critiques the lease, and, as Susan Bright and Nick Hopkins have put it, the product is akin to the Emperor's New Clothes.<sup>68</sup> However, that critique of the label is to miss the point. The label shared ownership has particular power precisely because it conveys the idea that the buyer 'owns' their share and that the buyer is on the ladder not to home ownership but of home ownership.

One might be forgiven, though, for thinking that the whole idea was shot. After thirty years, policy makers would appreciate the error of their ways, and ditch it. Yet, quite the reverse has occurred; one might remark that never has shared ownership been more highly promoted (and financed) than it has been since that decision, and more particularly under the Coalition and May governments. Indeed, in 2009, the regulator took the opportunity to update the leases to put them into plain English with a plain English explanatory cover sheet (they were unsuccessful in obtaining a plain English stamp of approval). The purpose of that rendering, we were told, had absolutely nothing to do with Richardson (which did not enter the frame of these discussions), but everything to do with the primary audience for the lease:

I mean it's primarily about just helping to shore up lending on shared ownership. I mean I think we recognize that you know in its form at that time the [mortgagee protection clause] wasn't doing enough to, you know, encourage lenders to lend, or it wasn't giving them enough security for them to, you know, get them through their sort of audit and risk committees or whatever. So, we obviously recognize that, you know, there were things that we could do, and it was a bit of a kind of tripartite negotiation between [the regulator], the Council for Mortgage Lenders, and the National Housing Federation as to what [they] could all settle on. (KS14)

Our' lender partners wanted a standardized lease which protected them through the mortgage protection clause; from the consumer angle, wanted to take out the old-fashioned language. The former was achieved, the later nowhere near. It still is a mind-boggling [document]. (KS3)

65 Midland Heart., *op. cit.*, n. 9, para. 23.

66 'But that still means that Miss Richardson will have lost any capital appreciation between 1995 and now, worth about £45,000, which will represent, in turn, a windfall for the housing association': *id.*, para. 24.

67 See the work of the prolific blogger, 'Nearly Legal', and G. Peaker, 'The hidden dangers of shared ownership' *Guardian*, 3 September 2013.

68 S. Bright and N. Hopkins, 'Home, meaning and identity: Learning from the English model of shared ownership' (2011) 28 *Housing, Theory and Society* 377.

This was business as usual.

In 2016, the government allocated £4.7 billion for social housing in the Affordable Homes Programme 2016-21,<sup>69</sup> and, in the November 2016 Autumn Statement allocated a further £1.4 billion to the programme.<sup>70</sup> Rather than allocate most of this money to programmes of social and affordable rent, this programme ‘marks a decisive shift towards support for home ownership’;<sup>71</sup> 88 per cent was destined for shared ownership with the aim of building 135,000 new shared-ownership properties over this period. In his Ministerial Foreword to the programme, Greg Clark, the Secretary of State, wrote that ‘... we are providing the help that aspiring home owners need right now ... For many people, [shared ownership] is a chance they didn’t have before to get on to the housing ladder ..’<sup>72</sup>

This kind of framing of shared ownership reflected Prime Minister Cameron’s own framing in a speech delivered in December 2015, where he announced a major expansion to shared ownership, in which he promised:

... plans to radically re-invent the shared ownership scheme - opening the door to an extra 175,000 aspiring homeowners and helping to deliver [the Conservative manifesto] commitment to create 1 million more homeowners over the next five years ...

For years, we’ve had Shared Ownership, where you part-buy, part-rent a property. So many people are attracted to this idea, especially those who thought they’d never have a chance of owning a home ... Yet again, a government that delivers, building a nation of homeowners.<sup>73</sup>

The 2017 housing White Paper made clear that the May government continued the love affair with shared ownership, alongside other so-called ‘affordable rent’ initiatives:

... we have made changes to simplify the product in response to concerns from lenders, developers and prospective buyers. Alongside funding, this will enable the tenure to expand and help more households get a foot on the ladder where they would otherwise have been unable to.<sup>74</sup>

Furthermore, spying an opportunity, the White Paper expressed itself to be supportive of institutional investment in shared ownership (whether or not provided by housing associations),<sup>75</sup> suggesting its expansion beyond the social housing sector into a more commercial arena. Even Shelter, an

69 HCA, *op. cit.*, n. 7.

70 HCA, *Shared Ownership and Affordable Homes Programme 2016-21: Addendum to the Prospectus (2017)*.

71 HCA, *op. cit.*, n. 7, p. 4.

72 *id.*, p. 3.

73 D. Cameron, ‘This is a government that delivers’, press release, 7 December 2015, at <<https://www.gov.uk/government/news/prime-minister-this-is-a-government-that-delivers>>.

74 DCLG, *op. cit.*, n. 7, para. 4.27.

75 *id.*, para. 3.19.



institution not known for its support of such initiatives, has touted it as a solution to the housing problems.<sup>76</sup>

How can this be? There has been no change in the law as a result of Richardson; to our knowledge, nobody has said that the decision itself is wrong (alternative propositions of law have been advanced that might have saved Ms Richardson). One answer to this question is that Richardson has become law that is not law, in the sense that it has been written off as irrelevant (if it was known about). It is an anomaly that does not require a fix. In thinking this through, we have become engaged by the division that Bruno Latour draws between intermediaries and mediators. The former, in his account, are passive and predictable; the latter are active and ‘suddenly make it bifurcate in unexpected ways’.<sup>77</sup>

Richardson,<sup>78</sup> in its immediate aftermath, might have been a mediator in its text and effects, but its effects were ignored. It still sits there (on our computer), as a file, waiting to be opened. It was opened, for the purposes of this article, but it was noticeable that it hadn’t been opened for 18 months previously. It is a passive actor, one around which a certain mystique has developed amongst a certain group of people. What is particularly telling about it is that, even among many groups advocating shared ownership at the time of our fieldwork, knowledge about Richardson was sketchy at best. Where there was some knowledge, the case was written off as being anomalous; the occupier was problematic; or a fuss had been made about it by a particular person.

We were told that her circumstances were unusual:

I think it’s just her circumstances were very unusual in that she had no mortgage and also she was living elsewhere so didn’t claim housing benefit. It would be quite unusual for that to be a common occurrence for people. (KS1 1) My understanding of that particular case is that it was a set of circumstances that if you dreamt up you could never replicate - it just wouldn’t happen, I mean I feel sorry for the woman in question, but you know clearly you know there was a veiy peculiar set of circumstances were at play there ... you couldn’t contrive the circumstances a second time, it just wouldn’t happen. (KS14)

In this rendering, which was common, Richardson is factually anomalous and could not be repeated - ‘a unique set of circumstances’ (KS8). It could not be repeated because there is nearly always a mortgage lender (who will generally pay off the rent arrears and capitalize them against the mortgage).

Ms Richardson, on another popular representation, had made her property unsafe:

Given that we have 137,000 [shared owners], there are very few cases when these issues ever arise. And I think that’s for two reasons, one because the landlords as

76 Shelter, *Homes for Forgotten Families: Towards a Mainstream Shared Ownership Market* (2013).

77 Latour, *op. cit.*, n. 2, p. 202.

78 The italics are, of course, important, because that is part of law’s alchemy - it turns a human into text.

registered providers see themselves as having a core focus of protecting people, and therefore they will not try and put people out on the streets. I mean this person I was reading in the papers had sort of redesigned walls ... knocked down walls, built a shed on the balcony and you know had basically made the building almost unstable. So, she had broken the terms in her lease and as a landlord you have responsibility for others who live in the building. So, by making the building unsafe I think there was an issue about. (KS12)

In this rendering, Ms Richardson is the subject of stigma in the sense drawn upon by Goffmann. The housing association is absolved from any blame; there were acting rationally and as any good landlord would. On the other hand, she deserved to be evicted because she was causing a hazard to the other residents.<sup>79</sup>

A third rendering related it to 'that NL guy' (a reference to the prolific and high-profile legal blogger, Nearly Legal). He had made it more than it was. But, this was brought back to the familiar trope about the 'good' association and the 'bad' consumer:

what that article missed was that Ms Richardson was offered a capital sum and had wrecked the property. (KS6)

#### CONCLUDING OBSERVATIONS

Our telling of a slice of the story emphasizes the problematic of socio-legal studies. If we are to assume the salience, or the hegemony, of law and legality, and society, then we are missing an array of tricks. Socio-legal studies has achieved some wonderful things, most notably questioning and disrupting the idea of legal science, but its success in so doing has raised questions about its core. Oddly, it has also produced boundaries, perhaps because success requires disciplinary boundaries to be produced. We are told that there is difference between theory and policy, and that this difference maps on to the sociology of law, on the one hand, and socio-legal studies, on the other. These are old debates and, for us, both increasingly sterile and marginal. At a meta-level, we are all engaged in thinking about projects and writing or presenting products, and these projects/products have a life of their own outside their creators. As John Law and Vicky Singleton put it, 'Stories and performances of "projectness" ... also perform work. They help to make the technological world.'<sup>80</sup>

How can we make sense of this in our work? We have aimed to show here how the apparently dry, neutral terms of a lease - which are often the starting point for a certain type of socio-legal analysis that Příbáň critiqued - must be

79 There is no mention of such matters in the case report, which refers only to vandalism at the property as a result of her absence. It is, for example, unlikely (given the size of balconies in modern properties) that Ms Richardson constructed a shed on it.

80 J. Law and V. Singleton, 'Technology's stories: On social constructivism, performance, and performativity' (2000) 41 *Technology and Culture* 765, at 770.

examined as a socio-legal object in their own right. The lease, of course, contains the translations of ancient law into a single document, but it still involves concepts, choices, and assumptions which are translated into its terms. The same is true of something like the conflict of laws. But this article has also sought to act as a corrective to the assumption of the salience of law (as well as the assumptions of lawyers and socio-/legal academics).

The Richardson case raises this as a kind of legal problematic. On the one hand, it is, of course, of huge significance as it defines the leasehold interest differently from that which its current proponents at least believed and wished. Yet, on the other hand, it is almost entirely irrelevant in many of the lives of shared ownership. There have been magnificent texts about the case, and considerable thought given to it, so one cannot say that it is entirely irrelevant. But, eight years on, we are told that it is anomalous to all but a few troublemakers; and, in telling that side of the story, we are colluding in that analysis for our purpose. The bigger point, though, is that our discussion raises the question of where one might start, look for, and finish one's analysis.

Although our case study has, on the face of it, been about law and the legal, we see it rather differently. For us, this was a study about the different actors, a mash-up of ideas (about values and ownership), humans, documents, and things. The thing about starting at the beginning is that it is difficult to make presumptions or assumptions of legality and sociality. Things can gain legibility and are formatted, in the sense that they are fitted on to a neat format which is then made to work for the thing. But it is not the legibility that matters; it is the reasons why things are made legible and the formats that are used to translate those ideas. It is the translation of the idea of ownership into the formal words of the lease that would otherwise be missed if we did not focus on the jargon of law.

We have argued that this thing called shared ownership was produced, and given life, by the lease, which was bound up in the construction of its identity as ownership. The lease was an actor in its own right because it was a carrier of all the demands of this thing. It also facilitated what we have come to term the productization of shared ownership. This ugly word is designed to sum up the processes through which something becomes a product; a product that is saleable, and which enrolls others. This is something rather more than the processes of commodification: to be sure, it involves the process of treating something as a commodity, but it also involves the translations of an idea, often over time and through associations, into a product. In this case study, that enrolment and that product were on the march because they tied in with certain values about ownership, which we regard as a material semiotic. That march could not be halted by the existence of a thing which undermined that product, which said that it was something different - to the extent that, rather than rethinking the product, that alternative thing was made anomalous so that it did not disturb the product.