

2007-03

# On Historical Contextualisation: Some Critical Socio-Legal Reflections

Charlesworth, Lorie

Charlesworth, L. (2007) 'On Historical Contextualisation: Some Critical Socio-Legal Reflections', *Crimes and Misdemeanours: Deviance and the Law in Historical Perspective*, 1(1), pp.1-40. Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/8820>  
<http://hdl.handle.net/10026.1/8820>

---

SOLON Crimes and Misdemeanours  
University of Plymouth

---

*All content in PEARL is protected by copyright law. Author manuscripts are made available in accordance with publisher policies. Please cite only the published version using the details provided on the item record or document. In the absence of an open licence (e.g. Creative Commons), permissions for further reuse of content should be sought from the publisher or author.*

## ON HISTORICAL CONTEXTUALISATION: SOME CRITICAL SOCIO-LEGAL REFLECTIONS

*Lorie Charlesworth<sup>1</sup>*  
*School of Law*  
*Liverpool John Moore's University*

### Abstract

This article examines the relationship of historico-legal studies to the wider context of socio-legal studies. It issues a challenge to rethink the nature and role of legal history in the light of socio-legal theory and the extent to which it ought to be used by legal scholars. The discussion explores the benefits to socio-legal studies of interdisciplinarity. It suggests that historical reconstructions that contextualise the law should be properly acknowledged as a subgenre at least of the socio-legal movement, not simply perceived as an add-on methodology.

**Key Words:** Socio-legal, Law in Context, Legal History, Criminal Justice

Scholarship

### Introduction

The current state of socio-legal research and publishing in Britain at first glance raises doubts as to whether institutionally oriented forms of legal history, including specifically multidisciplinary and interdisciplinary variants, belong inside, at the margins of, or entirely outside the parameters of current definitions of socio-legal research. However, a closer examination reveals a different picture. In this context, this article reflects upon socio-legal historical reconstructions of law's pervasiveness and this writer's own perceptions of current trends and developments in legal history, both within and without socio-legal reconstructions. It will offer both examples and suggestions for future developments.

It must be noted however, that within the disciplines of professional history and

---

<sup>1</sup> Dr Lorie Charlesworth PhD, LLB, BA, is Senior Lecturer at the Law School, LJMU. The writer would like to thank the following for their comments and advice in developing the work: the unknown referees, Judith Rowbotham, Kim Stevenson, Rebecca Probert, Maureen Spencer, Andrea Loux and Belinda Crothers.

An early version of this article was developed with Professor Michael Salter. This early version has subsequently appeared in Salter and Mason, *Writing Law Dissertations* (Pearsons, 2007) but without acknowledgment of the joint genesis, though her substantive input has subsequently been acknowledged in correspondence to Dr Charlesworth from Professor Salter during autumn 2007. Dr Charlesworth adds that the piece in the Debate Forum responds to comments made by reviewers of the early joint article, and also contains her own more mature reflections on a variety of issues, and that this version, rather than the one in Salter and Mason, is the version over which she wishes to assert her sole intellectual rights.

criminology (and other related social sciences) there is an increasing awareness of how far it is necessary to consider the implications of the law for social conduct and belief, particularly in studies which depend (either explicitly or implicitly) on the development and operation of criminal law.<sup>2</sup> Many researchers engaged in reconstructing law's past, either historians or criminologists essentially, have been influenced by the work of E.P. Thompson. They have, consequently, followed and developed his approach to 'history from below', taking account of the reactions of 'ordinary' people or the general public to the impositions of authority including the criminal justice process.<sup>3</sup> As a result, this has produced an extensive body of work which touches upon 'law' without actually entering into the issues important to lawyers. Although this writer acknowledges their significance and influence and accepts that such scholarship should not be excluded or marginalized, that work does not form part of this study: it is a challenge aimed primarily at lawyers, though the implications for other subjects looking to be informed by law are clear.

As such, the chief purpose of this article is specifically to examine socio-legal historical reconstructions fashioned by 'legal' scholarship and to reflect upon the issues generated by that examination. In order to answer some of the questions thus raised, it is also necessary to critically evaluate the research produced within the establishment sub-discipline of black letter *legal history* (of which more below).<sup>4</sup> In summary, this article extends Smith and McLaren's fulsome and reflective historiography of legal histories.<sup>5</sup> To this must be added Stramignoni's article in *Legal Studies*, which includes a narrow historiography of *legal history* as a chronological narrative description.<sup>6</sup> As such, his characterisation of *legal history* is itself a meta-narrative, which overviews the past and current status of legal historical writing that he

---

<sup>2</sup> For example see: C. Conley, *The Unwritten Law, Criminal Justice in Victorian Kent* (Oxford: OUP, 1991); Shani D'Cruze (ed) *Everyday Violence in Britain, c1850-1950* (Routledge, 2000); Clive Emsley, *Crime and Society in England 1750-1914* (Longmans, 2004); Michael Kimmel, Robert W Connell, and Jeff Hearn (eds) *Handbook of Studies on Men and Masculinities* (Sage, 2004); Merry Morash *Understanding Gender, Crime, and Justice* (Sage, 2005); Martin J Wiener, *Men of Blood, Violence Manliness and Criminal Justice in Victorian England* (Cambridge University Press, Cambridge, 2004)

<sup>3</sup> For example see; E.P.Thompson, *The Making of the English Working Class* (Penguin Books, Harmondsworth,1968); *Customs in Common* (Penguin Books, Harmondsworth, 1993); J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England* (Cambridge University Press, Cambridge, 1993); Peter Linebaugh, *The London Hanged; Crime and Society in the Eighteenth Century* (Allen Lane, 1992); Douglas Hay *et al*, *Albion's Fatal Tree* (Allen Lane, London,1975); Markus Rediker, *The Many-Headed Hydra* (Verso, 2000).

<sup>4</sup> The italicised term *legal history* is used throughout this book to refer exclusively to the establishment sub discipline.

<sup>5</sup> For this see; J. M. Smith and J. P. S. McLaren, 'History's living legacy: an outline of 'modern' historiography of the common law', *Legal Studies* 21, (2001), 251-324, p.267. These writers also consider socio-legal histories;

<sup>6</sup> Igor Stramignoni, 'At the margins of the history of English law; the institutional, the socio-political and the 'blotted out', *Legal Studies*, 22, 2(2002), 420-447. This article focuses mainly upon the historiography of 'black letter' legal history.

describes as 'institutional legal history'. Stramignoni calls for a history of the 'blotted out' which includes, amongst others, the poor. In order to achieve this end, he looks to a different strand of the sub-disciplines of socio-legal scholarship for a solution, proposing an investigation of the 'other'. Unfortunately, his perspective excludes mention of current or past research on those 'blotted out' produced in both socio-legal and 'pure' historical reconstructions.

In contrast with Stramignoni's perspective, this article suggests that the historical reconstructions that contextualise 'law' within socio-legal studies are an on going and developing project that requires specific focused examination. Many engaged in that project inherently recognise that law's emergence; development and transformation over time must not be ignored through a 'parochialism of the present'. Thus it appears timely to review the current situation and consider if socio-legal historical reconstructions may not of themselves constitute at the very least a sub genre of the socio-legal movement, rather than simply an 'add on' methodology to be used as part of the law in action programme. At this point, it would be useful to provide a definition of what constitutes that sub-discipline of socio-legal studies. Unfortunately this fluid, changing, open movement defies such a fixed descriptor, as its membership depends upon types of activity carried out by those who identify themselves as contributors to this movement, and whose work is published in book series and academic journals that specialise and promote its application to different areas of law. Phil Thomas has summed up a key belief that underpins the commitment to socio-legal studies as a fully-fledged 'law in context' approach in his claim that:

'Empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context.'<sup>7</sup>

The focus and promotion of the movement in the UK is found in the membership and purposes of the Socio-Legal Studies Association (SLSA); 'dedicated to improving the quality of and facilities for socio-legal research.'<sup>8</sup> In the past the SLSA has recognised three strands to its constituent scholarship; higher-level social theories of law disconnected from empirical studies, theories developed in the middle-range that

---

<sup>7</sup> Philip Thomas, 'Curriculum Development in Legal Studies' *Law Teacher* 1986, 20, pp.110; 112.

<sup>8</sup> The organisation itself claims: 'The SLSA is a forum for socio-legal scholars in the UK and elsewhere to come together and share interests and exchange ideas. We do this in a number of ways including the following: Through the Annual Conference. ... we publish a Directory of members ... maintain an email network and website. (<http://www.ukc.ac.uk/slsa/index.htm> ). We publish and distribute a Newsletter ... support postgraduate/student events and hold conferences for postgraduates/students, as well as provide bursaries for SLSA student members. We host a series of one-day conferences / workshops on particular topics. We respond to consultation exercises on behalf of our members.'  
<http://www.kent.ac.uk/slsa/download/response3.rtf> August [February 2007].

are 'grounded' in the findings of empirical research (and which, in turn, aim to prompt further empirical studies to test the validity of their theoretical claims); and, thirdly, policy-driven projects that are entirely empirical and have little explicit relationship with prior or current theoretical reflections:

What binds the socio-legal community is an approach to the study of legal phenomena which is multi or inter-disciplinary in its approach. Our theoretical perspectives and methodologies are informed by research undertaken in many other disciplines. Traditionally socio-legal scholars have bridged the divide between law and sociology, social policy, and economics. But there is increasing interest in law and disciplines within the field of humanities.<sup>9</sup>

It is noteworthy that, historical reconstructions are not privileged within this definition and as discussed below, it appears that much of law's history within this movement has appeared as introductory chapters to works concerned with contemporary legal issues. Thus, it has largely been left to professional historians to mine those records generated by the operation of law to recreate the lived experience of the past. This lends support to the idea that such contextualisations do not necessarily belong within socio-legal studies. Furthermore, this raises the question, why then should those legal academics interested in applying an interdisciplinary analysis of the historical context of the emergence, development and change of 'law in context' identify - in a positive way - with the socio-legal movement within the UK? Alternatively, should such individuals consider their research as belonging more closely to the mainstream of the discipline of history, or even perhaps as contributing to the somewhat legalistic and antiquarian sub-discipline of *legal history*, which historically has been notoriously fixated upon the feudal period?<sup>10</sup> Such a narrow perspective as this has not remained unchallenged. For example Horwitz has referred to the unhistorical orthodoxy of black letter scholarship:

It is history that comes to challenge this approach by showing that the rationalising principles of mainstream scholarship are historically contingent. Consequently, analytical scholarship is anti-historical: it regards history as subversive because it exposes the rationalising enterprise.<sup>11</sup>

It is also of note, that currently Canadian and American scholars of *legal history* take a broader contextual view than is the case of the British establishment. In summary,

---

<sup>9</sup> [Http:// www.kent.ac.uk/slsa/](http://www.kent.ac.uk/slsa/) [August 2005]

<sup>10</sup> Smith and McLaren's survey concluded that: 'the bedrock of English legal history scholarship over the first six or seven decades of the twentieth century was medievalist.' K.J. M. Smith and J.P. S. McLaren, 'History's Living Legacy: an outline of modern historiography of the common law', *Legal Studies*, 21(2), 2001, 251-324, p. 267.

<sup>11</sup> Morton J. Horwitz, 'The Historical Contingency of the Role of History', *Yale Law Journal*, 90, (1981), p. 1057.

their project is to consider both law's past and 'law mindedness' both within the lived experience, including the geographical context, of settlers and native populations (where possible), in order to contextualise that research to reflect both continuity, discontinuity and the: 'pervasive elements in North American legal culture'.<sup>12</sup> Furthermore, some of this research has adopted a socio-legal methodology in considering the contemporary lessons to be learnt from such studies.<sup>13</sup> Hutchinson, writing from Canada in *Legal Studies*, has extended the critique of the narrowness of some legal scholarship to the study of jurisprudence which privileges black letter lawyers' efforts to understand law in its own terms as: 'a viable internal operation...entitled to theoretical priority'.<sup>14</sup> Thus, Hutchinson views 'black-letterism' as a 'convenient mode of denial' of law's 'historical circumstances' allowing its practitioners to concentrate upon the logical; 'and when it does see the *expedient* it seeks to avert its eyes or obliterate it'.<sup>15</sup> His critique supports what this socio-legal historian has come to understand as the basis of her work; the rejection of that internal legal 'logic' with its continuing dominance of much legal study which ignores:

The connections between legal doctrine and material interests [that] are often as causal and contingent as they are necessary, it is not that legal doctrine is without any rhythm or reason at all, but that any efforts to go beyond either the most general or the most detailed account are confounded by the doctrinal and social facts.<sup>16</sup>

In short, in response to these and other influences, this article reflects upon a series of questions, issues and problems arising from the place and status of historical contextualisation within the British socio-legal movement. It addresses the question of what, to date, has been the main role and contribution of historical investigation within this movement, including research presented at annual SLSA conferences? Does the imperative of the socio-legal studies movement to reinterpret legal topics in a distinctly 'law in context' manner, potentially include, and maybe even require, a distinctly historical form of contextualisation? Even if this question can be answered in the affirmative, does it follow that the commitment of socio-legal studies to a distinctly *interdisciplinary* analysis of law as a social phenomenon rule out the type of analysis found within institutional *legal history*?

---

<sup>12</sup> H. Foster and J. McLaren, 'Law for the Elephant, Law for the Beaver. Tracking the Beasts', in J. McLaren, H. Foster and C. Orloff (eds), *Law for the Elephant, Law for the Beaver*, (Ninth Judicial Circuit Historical Society, California, 1992), p.2.

<sup>13</sup> See for example: David R. Percy, 'Water Law of the Canadian West: influences from the Western States', in McLaren *et al* (eds) *Law for the Elephant*.

<sup>14</sup> Allan C. Hutchinson, 'Casaubon's ghosts: the haunting of legal scholarship', *Legal Studies*, 21(1) (2001), 65-98, p.72

<sup>15</sup> *Ibid.*, pp.85-6.

<sup>16</sup> *Ibid.*

The article opens by discussing a series of arguments exploring the compatibility of historical contextualisation with the main tenets of the socio-legal movement. These arguments are supplemented by an empirical study of some of the relevant literature produced, largely but not exclusively, within the UK. This is a necessary task to substantiate this writer's analysis although she is also aware of the dangers of descending entirely into what Reid characterises as; 'that most wretched of all historiological exercises, the survey of current literature'.<sup>17</sup> On the contrary, this survey serves to illustrate the presence of various types of historical analysis within a number of the core areas addressed by the British socio-legal studies movement and assesses their overall contributions to these fields. The final section discusses and explains why one particular type of *legal history* on the surface remains starkly incompatible with contemporary self-interpretations of the nature, purpose and commitments of the socio-legal studies movement, although as will become clear, this is no longer exclusively the case. Hence, this writer's methodology combines elements of theoretical argumentation with empirical illustration, the combination of which allows her to draw specific conclusions, hopefully in ways that offset the one-sided quality of each.

### **On the Importance of Historical Knowledge**

#### *Presuppositions of knowledge of the past*

A theoretical case can be made for the inclusion of historical contextualisation as part of the interdisciplinary mix that is one of the distinctive features of socio-legal studies of law in action. A key argument here is that many, if not all, examples of socio-legal research inevitably presuppose at least certain aspects of knowledge of the past. This remains true even where this is assumed, rather than subjected to detailed investigation and empirical reconstruction. Take, for instance, the theme of law and discrimination. One variant on policy-relevant socio-legal research is those studies that are prompted by supposedly progressive judicial decisions and legislative interventions that have enlarged the rights of historically disadvantaged groups and/or groups subject to continuing forms of legal and social discrimination.<sup>18</sup> This type of research will typically welcome judicial or legislative innovations as an overdue, if not necessarily sufficient, corrective to past discriminatory policies enshrined in legally sanctioned or enabled practices. Such policy-oriented research

---

<sup>17</sup> John Philip Reid, 'The Layers of Western Legal History', in McLaren *et al* (eds), *Law for the Elephant*, p.22.

<sup>18</sup> Jennifer Brown, 'Discriminatory experiences of women police: a comparison of officers serving in England and Wales, Scotland, Northern Ireland and the Republic of Ireland', *International Journal Sociology and Law*. 28(2), (2000) 91-111.

also emphasises its contextual limitations - and hence the perceived need for further legislative extension and entrenching of the right in question.<sup>19</sup> Most is rarely informed by original historical reconstruction of events and patterns of change based on primary historical sources. Yet it nevertheless presupposes the truth of such discriminatory policies in order to identify the ways in which specific groups have, in fact, been historically disadvantaged, and the continuing legacy of such disadvantage.

### *The contingency of the present*

It is necessary to address the argument that historical research is, by definition, not specifically socio-legal, and vice-versa. One argument suggests that the escalating instabilities and rapidity of contemporary social, cultural and technological changes disrupt all continuities with the past and therefore render historical studies obsolescent (but see later for other perspectives).<sup>20</sup> Against this view the following counter-arguments may be advanced. First, both generally and certainly with respect to many themes addressed by socio-legal research, it is rarely possible to draw a clear-cut distinction between the past and present. This is because the present state of the research topic remains encrusted with the legacy of all that it is perceived as having become over a sustained period of time. This writer suggests that this may be an inherent feature of legal research undertaken within a nine hundred year old common law legal system. Furthermore, that this explains why many of those contributions to the socio-legal studies movement, which are not exclusively historical in their approach, nevertheless reconstruct, at least in an outline fashion, recent developments within their research topics.<sup>21</sup> Moreover, even within the materials studied by black letter scholarship, it is important to recognise that a trial process will typically involve a degree of historical reconstruction. The trial lawyers who are engaged in this partial reconstruction will inevitably contest both the facts and their legal implications.

A further example can be found within research conducted concerning contemporary war crimes trials. They are, for example, repeatedly defined as partial continuations and reactivation of the 'Nuremberg legacy'. The history of these trials is now being rewritten to reflect how recent developments, such as the creation of the *ad hoc*

---

<sup>19</sup> Lisa Glennon, 'Fitzpatrick v Sterling Housing Association Ltd - An Endorsement of The Functional Family?' *International Journal of Law, Policy and the Family* 14, (2000) 226.

<sup>20</sup> See John Tosh, *The Pursuit of History* (Longmans, 1991) Chap 1. This proposition is advanced by that writer to serve primarily as a focus for many counter-arguments.

<sup>21</sup> Maureen O'Sullivan, 'Making copyright ambidextrous: an expose of copyleft' *Journal of Information Law and Technology* (2002), 3.

Rwandan and former-Yugoslavia tribunals, the emergence of a permanent International Criminal Court and recent cases at the International Court of Justice, have recognised, extended and also challenged this increasingly 'contemporary' legacy.<sup>22</sup> A similar point applies to social welfare legislation that extends the legacy of the pioneering reforms creating the modern welfare state whilst incorporating principles derived from the supposedly abolished poor law.

### *Law as history*

There is another cluster of arguments suggesting that the very process of studying law in action cannot forsake a historical form of analysis. The idea of taking a particular event or topic as the object of socio-legal (or any other type of) research necessarily requires scholars to enter into historical enquiries. This is needed in order to appreciate the extent to which the guiding ideas, beliefs and values contained within, or otherwise attributed to or associated with, the research topic, have come to be constituted in their present but still developing form. The impact of changing contexts, and the resulting lessons of the power of contingency, provisionality and openness to transformation are positively enhanced by historical contextualisation in ways that can call in question established socio-legal accounts and other interpretations of legal topics.<sup>23</sup> Gordon has recognised that legal histories are capable of contributing to the wider tasks of critiquing ideologies supportive of the status quo:

[anything] that produces disturbances in the field - that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such as those of the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present - in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalise the present.<sup>24</sup>

It would be impossible to seriously conduct research into legal aspects of genocide, for example, without considering how this legal category first developed in response to a series of specific historical events and processes, and then became refined through a succession of measures within international and domestic law, such as the

---

<sup>22</sup> Michael Salter and Lorie Charlesworth: 'Prosecuting and defending diplomats as war criminals: Ribbentrop at the Nuremberg Trial,' *Liverpool Law Review: Genocide and War Crimes Trials Vol. II*, 27(1) (2006), 67-96, pp.67-77.

<sup>23</sup> Leslie Sheinman, 'Ethical practice or practical ethics? The case of the vendor-purchaser rule', *Legal Ethics* 3(1) (2000), 27-49; Shane Kilcommins, 'Context and contingency in the historical penal process: the revision of revisionist analysis using the twelve judges' notebooks as one tool of analysis', *Hold. L.R.* 19(1) (1998), 1-54.

<sup>24</sup> R. Gordon, 'Foreword: The Arrival of Critical Historicism' *Stanford Law Review* 49, (1997), 1023, 1024, with this writer's proviso that the extreme extension of this suggestion, counter-factual histories, are rarely more than *jeux d'esprit*.

1948 Genocide Convention. This legal response can only be properly understood through a close reconstruction of the factors underlying and explaining such changes.

In a very different subject area, but for similar reasons, there appears to be growing recognition amongst some socio-legal writers that a similar point demonstrably applies to the need to understand the recent history of aspects of contemporary housing law and policies, including how different interest groups have deployed key concepts within different ideological discourses concerning leasehold reform.<sup>25</sup> Furthermore, for socio-legal research, it is impossible to study the operation of law without becoming conscious of, and working on, source materials and institutional settings, language patterns and protocols that clearly stem from the past. The very intelligibility of these require scholars to expand their temporal horizons by interpreting such materials as the most recent phases of a longstanding, but still developing, process of historical evolution.

In short, the importance of historical contextualisation for the law in action project of socio-legal scholarship, is that it allows the significance of recent legal and policy reforms to be considered in a wider and more subtle manner. As such, these reforms can be better understood by a form of socio-legal analysis which locates such reforms within the context of a series of transformations whose patterns and trajectory have unfolded over many decades.<sup>26</sup> Such contextualisation interprets the past not for its own sake but rather to allow the significance and implications of current events to be more adequately understood than would otherwise be the case. Even where the period of contextualisation does not extend to the present, a similar enhancement of our knowledge of present day phenomena is still possible. Furthermore, the interpretation of the meaning and implications of even currently emerging events still remain determined, to a greater or lesser extent, by a certain understanding of the past. For example, they are influenced by whether they are perceived as being completely unprecedented, ('a radical departure'), or as modifications of earlier situations combining elements of novelty with more familiar features. In each case, the interpretation of the meaning of an evolving topic within socio-legal studies necessarily draws in part upon a certain understanding of earlier developments, and hence historical knowledge. Consider, for example, the analysis of the implications for policing and criminal justice systems of the British handover of

---

<sup>25</sup> Sarah Blandy and David Robinson, 'Reforming leasehold: discursive events and outcomes 1984-2000'. *Journal of Law and Society* 28(3) (2001), 384-408.

<sup>26</sup> Claude Martin and Irene Thery, 'The PACS and marriage and cohabitation in France', *International Journal of Law Public Policy and the Family* 15(1) (2001), 135-158.

Hong Kong to China in 1997. A viable form of socio-legal analysis would surely need to consider the tension between long-standing traditions of colonial and other forms of policing in a manner that included some measure of historical understanding of this relationship both generally and in the specific case of this particular colony. Clearly, any attempts to justify one or more of these interpretations of such events are only possible by drawing upon reliable and pre-existing historical knowledge.

Indeed, one of the claimed advantages of historical reconstruction within socio-legal themes is the discovery that many reforms or supposedly 'new' approaches to the understanding of legal developments re-enact aspects of long forgotten initiatives from past centuries. One example concerns supposedly 'novel' and groundbreaking theories of the 'risk society' formulated by criminal justice specialists and criminologists deploying statistical analysis to classify and order criminal activity, which can be shown to recapitulate the analysis of certain seventeenth century economists.<sup>27</sup> In a similar manner, the rationale and operation of the Child Support Agency demonstrates, in part, a continuation of four hundred year old poor law principles. Moreover, this perspective has relevance for the wider issue of legal education itself. Such a view has been articulated within the following response to one account of the Legal System whose authors, Cownie and Bradney, have contributed to the development of the socio-legal approach within legal education and research. The reviewer notes:

that the history of British legal education has over the last three decades been "replete" with those who have "rejected the black-letter tradition" from a range of critical/ideological perspectives. Cownie and Bradney recognise, quite rightly I think, that the ideological effects of "traditional" legal education have been more complex than is sometimes made out; that "... there is nothing new in the suggestion that the study of legal doctrine is insufficient on its own" (p 134). The widening of the nature of legal scholarship that has taken place is thus interpreted in a broadly positive light. Indeed, it is in drawing on this diverse material that the authors frame their "pluralist", "integrated theory" approach.<sup>28</sup>

Indeed within that context, of British legal education, a number of socio-legal writers have noted a related justificatory and rationalisation strategy at play within aspects of the black letter textbook tradition.<sup>29</sup> In part, history is continually in the process of

---

<sup>27</sup> George S. Rigakos and Richard W. Hadden, 'Crime, capitalism and the "risk society": towards the same old modernity?' *Theoretical Criminology* 5(1) (2001), 61-84; Pat O'Malley, 'Discontinuity, government and risk: a response to Rigakos and Hadden', *Theoretical Criminology* 5(1), (2000), 85-92.

<sup>28</sup> R. Collier, 'Book Review': <http://webjcli.ncl.ac.uk/1998/issue1/collier1.html> [January 2007]

<sup>29</sup> Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, (Butterworths, 1993), pp. 7-9; Michael Doupe and Michael Salter, 'The Cheshire World-view', *Kings College Law Journal*,

being re-written and contested within present scholarship and beyond and, for socio-legal scholars as for members of the Centre for Contemporary History (CCBH) at the Institute for Historical Research (IHR) at the University of London, this contestation takes place with a view to its implications for the immediate future. This presence of competing interpretations and reinterpretations of the significance and implications of historical events remains a perennial feature of the contemporary manifestation of many if not all socio-legal themes. As such, it cannot be bracketed out without impoverishing our understanding of such topics.

Therefore, this writer would suggest that, even those subscribers to socio-legal studies whose focus remains resolutely fixed upon the present cannot ignore these elements of the presence of the past that continues to permeate their field of research. The history of those developments whose most recent manifestations are studied by socio-legal researchers can never become entirely settled. It can, and often does constitute a battleground between competing perspectives on the topic in question that reinterpret the past to consolidate, revise or subvert the perceived legitimacy of aspects of the status quo. For example, one possible topic for socio-legal research is precisely how authoritarian regimes respond to threats to their position represented by 'open' histories, for example of human rights developments and labour history. It is possible to study how such officially perceived threats are censored and combated through the production of official and self-justificatory historical accounts more supportive of 'traditional' values, recent past or status quo.<sup>30</sup> Their opponents may also mobilise a selective interpretation of the past to suggest that the present regime are trampling upon longstanding common law rights and liberties, or that an officially suppressed history of resistance exists, an underside social history, which should guide future struggles.<sup>31</sup>

#### *Assumptions about the (legal) past*

The implication of the above arguments is that, even those scholars within socio-legal studies who renounce historical enquiries at the methodological level, remain subject to a paradox. They cannot avoid being confronted by a number of aspects of their research topics that remain unintelligible unless interpreted through the lens of specific contemporary assumptions about the continuation and modification of the

---

11(1) (2000), p. 49; Michael Doupe and Michael Salter, 'Concealing the Past? Questioning Textbook Interpretations of the History of Equity and Trusts', *Liverpool Law Review*, 2-3 (2000), 253.

<sup>30</sup> See for example, 'official' histories produced in Germany, both under the Third Reich and until comparatively recently.

<sup>31</sup> The history workshop movement of socialist historians is a case in point.

past within the present. These points undermine the assertion that legal scholarship, or at least a form of scholarship which aspires to be self-conscious of the nature and limits of its own research practices, can forsake historical enquiries by concentrating on the immediate present as if this could ever be fully abstracted from the past.<sup>32</sup> Such arguments support the contention that an application of some form of historical methodology is required as an integral part of the wider interdisciplinary mix that is central to the socio-legal project.

Alternatively, professional historians are greatly concerned with the purposes of history but reject the proposition that history teaches us lessons.<sup>33</sup> Indeed, such an assertion cannot be sustained at any level of sophistication except that, for a lawyer working in the common law tradition, precedent does indeed provide 'lessons' drawn in lines from the past to today. This is not teleological history rather it is a legal technique. In this context, the socio-legal approach to historical reconstructions discussed above, which draws upon the past to inform present and future reform proposals, tends to indicate that, in this, legal histories may be somewhat different. On the other hand, Mandler has suggested that histories as such have great imaginative power that can allow us to highlight our own values and assumptions as we view the past through our own standpoint and define it more clearly.<sup>34</sup> This search for identity has characterised not only the professional study of history but also the socio-legal academic community researching in the sub-disciplines of, for example, law and literature, gender and feminist studies and law and semiotics.

In this context, Mandler connects a search for identity with philosophy, the writing of fiction and the development of a history of empathy (e-history?) through history from below. The danger, he posits, for both the writer and the reader, is that of affirmation. The historian who claims to be seeking the truth may be concealing bias. As a result, Mandler argues for a history that provides a tough intellectual context for material that interests and engages us all, a point not lost on the socio-legal researcher. This is supported by Evans who notes: 'History is becoming a more theoretically and epistemologically self-conscious discipline'.<sup>35</sup> In order to achieve his purpose, Mandler draws local and family history into the pool of knowledge that can provide a discrete role for the historian in separating the objective from the personal, the

---

<sup>32</sup> Tosh, *Pursuit of History*, p. 1, n.16.

<sup>33</sup> See for example, E.H. Carr, *What is History?* (Penguin, Harmondsworth, 1990, ed. R.W. Davies, 2<sup>nd</sup> ed.); Eric Hobsbawm, *On History*, (Abacus, 1997); Peter Mandler, *History and National Life*, (Profile Books, 2002); Richard Evans, *In Defence of History* (Granta Books, 2000).

<sup>34</sup> Evans, *Ibid.*, Mandler, *Ibid.*

<sup>35</sup> Evans, *In Defence of History*, p.257.

intellectual from the emotional and the fanciful from the primary source.<sup>36</sup> In this context, the scholarly study of history can protect society from myth making and provide an intellectual honesty and integrity in the endeavour far removed from David Irving's versions of the past.

Smith and McLaren echo these sentiments when they claim that: '...legal historiography has relevance to, and the ability to insinuate itself into, practically every region and crevice of legal study and scholarship'.<sup>37</sup> Thus, if true with respect to traditional legal and historical scholarship, this writer would suggest that this claim must also apply to interdisciplinary historical work within socio-legal studies. To that end, many leading commentators, such as Twining, have recognised this as one of the distinctive tendencies of a type of legal scholarship: 'that views almost everything through the multiple lenses of several disciplines'.<sup>38</sup> In both multi- and interdisciplinary legal scholarship, the aim is to: 'transcend disciplinary boundaries by taking as the focus the subject area of law in society'.<sup>39</sup> As such, those surveying contemporary legal history have implied that analysing historical contexts harmonises with the generally interdisciplinary and multidisciplinary character of socio-legal studies, with Smith and McLaren characterising: '...contemporary legal historiography as the quintessence of a multidisciplinary pursuit, moving within the political and social sciences, the humanities, and beneficially borrowing from and drawing on the insights of each'.<sup>40</sup>

It is arguable, that few types of academic analysis can claim to be as interdisciplinary or contextual in their approach to scholarly research as the academic study of history. This is a discipline that includes conferences, sub-fields and specialist journals that positively embrace, amongst others, economic, social, political, institutional, social policy, gender and cultural contexts, and their complex and inter-changing relationship. It is also arguable, therefore, that at least *certain types* of historical methods and analytical techniques could be included within any approach to legal research and scholarship that, like socio-legal studies, emphasises the importance of distinctly interdisciplinary forms of contextual analysis.<sup>41</sup> In short, this

---

<sup>36</sup> Professional historians too have a sense of academic hierarchies: 'Family history is often extensively antiquarian, devoid of any sense of the broader picture', David Cannadine, 'New Key in the Same Old Lock', *Times Higher Educational Supplement*, 28 June 2002.

<sup>37</sup> Smith and McLaren, 'History's living legacy,' p. 252.

<sup>38</sup> William Twining, 'Remembering 1972' in D. J. Galligan (ed), *Socio-legal Studies in Context, The Oxford Centre Past and Future*, (Blackwell, Oxford, 1995), p.43.

<sup>39</sup> Editorial, *British Journal of Legal Studies* 1, (1974), p.1.

<sup>40</sup> Smith and McLaren, 'History's living legacy,' p. 252.

<sup>41</sup> J. Weinstein, 'Coming of age: Recognising the Importance of Interdisciplinary Education in Law

reconstruction suggests that, providing socio-legal studies remain committed to an interdisciplinary approach to studying 'law in context', there is no reason either in principle or in practice why historical contextualisation must be excluded from the scope of socio-legal research. On the contrary, this writer would endorse the more positive argument that contextualisation of legal topics over extended periods of time remains one-sided and incomplete if the equally important issue of their emergence, development and transformation over time is ignored. Indeed, it is possible to identify many examples of historically oriented socio-legal research that have been generally accepted as comprising a vital part of this movement's analytical techniques. For example, a number of the early and groundbreaking works in the 'law in context' academic series, of which more later, made a specific virtue of their commitment to, and practice of, historical contextualisation.<sup>42</sup> This commitment was evident even in traditionally unpromising areas of socio-legal scholarship, such as contract and equity and trusts.<sup>43</sup>

#### *The American perspective on socio-legal historical reconstructions*

By 1994, the ESRC's review of socio-legal studies rightly acknowledged the importance of at least social scientific forms of historical analysis when it noted: 'Socio-legal Studies may also embrace a significant comparative methodology, investigating the social scientific context of law across and between legal systems, both spatially and temporally, including supra national developments.'<sup>44</sup> In 2006, the ESRC records that: 'Socio-legal staff and socio-legal studies are predominantly found in law schools', but notes: '[T]his research is particularly geared to the needs of policy-makers'.<sup>45</sup> However, these boundaries have been transcended within the American branch of the socio-legal studies movement, which in other areas have been influential upon scholarly developments within Britain. Levine, for instance, has maintained that socio-legal researchers should attempt to examine: 'data from different time periods, units of analysis, and locales; seeking explanation in specific contexts; and searching for coherent results through multiple methods, *across long time spans*, and in comparative perspective' [emphasis added].<sup>46</sup> To take two examples to stand for many, the American Law and Society Association have

---

Practice', *Washington Law Review* 74 (1999), p.353.

<sup>42</sup> R. Harris, *Introduction to Law* (Butterworths, 1983).

<sup>43</sup> Graham Moffat, *Trusts Law: Texts and Materials*, (Butterworths, 1994, 2<sup>nd</sup> ed.); Hugh Collins *The Law of Contract*, (Butterworths, 1997, 3rd ed.).

<sup>44</sup> [http://www.esrc.ac.uk/esrccontent/postgradfunding/2000\\_Guidelines\\_f15.asp](http://www.esrc.ac.uk/esrccontent/postgradfunding/2000_Guidelines_f15.asp) [closed site].

<sup>45</sup> [http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Images/Demographic\\_Review\\_tcm6-13872](http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/Images/Demographic_Review_tcm6-13872).

[June 2006].

<sup>46</sup> F. Levine, 'Presidential Address,' *Law and Society Review* (1990), 1-25, p. 24.

introduced an annual award, the Hurst Prize in Socio-Legal History.<sup>47</sup> In addition, the University of Chicago Press publishes a considerable amount of research that contextualises, even prioritises, interdisciplinary socio-legal historical reconstructions.<sup>48</sup> Thus, with respect to historical reconstructions, there is evidence that American forms of socio-legal studies have become more receptive than British models. This is particularly the case for research concerned with twentieth century historical developments.<sup>49</sup> Within American socio-legal literature, there has been an explicit inclusion of historical methods, particularly 'locally based' types, into aspects of socio-legal studies.<sup>50</sup> These include historical studies of legally sanctioned punishment in areas as diverse as intellectual property, corporate securities, the regulation of drugs, and tax fraud.<sup>51</sup>

This account of a developing tendency within American socio-legal scholarship, to increasingly recognise the value of historical studies, stands in opposition to the argument that those empirical studies that analyse legal topics, by identifying and placing them within their developing historical contexts and onward trajectory, represent contributions to the discipline of history and therefore not to law. One irony of any such rejection of historical contextualisation from those within the socio-legal movement is that one of the pioneers of sociology of law, Pound, is widely acknowledged to have derived many of his original insights from an extensive review and historical contextualisation of legal phenomena.<sup>52</sup> A similar point could be made with respect to a number of other pioneers of, and inspirations for social sciences, not least Weber and, to a lesser extent, Marx.<sup>53</sup>

### *Meanwhile in Britain ...*

If the argument that certain types of historical reconstruction, which this writer discusses below, both exist and ought to be fully assimilated into the toolkit of socio-legal studies is correct, then this claim must be substantiated by reference to a far greater range of empirical supportive evidence than the writer has discussed to date.

---

<sup>47</sup> Sally Engle Merry, *Colonizing Hawaii: The Cultural Power of Law* (Princeton University Press, Princeton, 1999), won this prize in 2002.

<sup>48</sup> For example: John Gilliom, *The Overseers of the Poor* (University of Chicago Press, Chicago, 2001).

<sup>49</sup> Don Harris, 'The Development of Socio-legal Studies in the United Kingdom', *Legal Studies*, 2, (1983), pp. 315; 332; Nicola Lacey, 'In search of the responsible subject: history, philosophy and social sciences in criminal law theory,' *Modern Law Review* 64(3), (2001), 350-371.

<sup>50</sup> For example see: Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1936-1915*, (Harvard University Press/Belknap Press, Cambridge MA, 1964).

<sup>51</sup> John Braithwaite, 'What's wrong with the sociology of punishment?' *Theoretical Criminology* 7(1), (2003), 5-28.

<sup>52</sup> Smith and McLaren, 'History's living legacy', pp.268-9.

<sup>53</sup> Cain and Hunt, *Marx and Engels on Law*, (Academic Press, 1979).

Fortunately, there are no shortages of examples of distinctly and recognisably socio-legal research that positively embrace historical reconstructions as part of their wider interdisciplinary or multidisciplinary mix. As noted above, one possible impediment to any wider recognition of historical contextualisation stems from the view that history is rooted firmly within the humanities, whereas socio-legal studies draws its inspiration from the methods and techniques of the social sciences. Thomas has, however, considered that, although the early work within socio-legal studies drew mainly on the social sciences, more recently there has been an increasing interest in the application of analytical approaches stemming from the humanities.<sup>54</sup> Thomas's point on the recent broadening of the scope of socio-legal methodologies can be supported by reference to diverse research that has drawn inspiration from various aspects of the humanities, including social philosophy, linguistics, history, law and literature<sup>55</sup> and film criticism.<sup>56</sup>

This inclusion of historical, as well as spatial contextualisation, formed one part of the earliest contributions to British socio-legal studies. The pioneering research by the Oxford Centre for Socio-legal Studies involved, as a matter of principle, close collaboration between legal academics and social historians, as well as statisticians, economists, sociologists and others.<sup>57</sup> The commitment to include a distinctly historical type of contextualisation represented one of the multidisciplinary methodologies developed throughout this centre's first two decades. In 1983, Donald Harris, a former Director of the Oxford Centre wrote:

We believe that in the immediate future, progress in socio-legal studies will best be made by building up a number of detailed studies of particular topics in the law, using as many relevant perspectives as our resources permit. If we bring together the insights of sociology, economics, psychology and history upon a particular problem area in society, we hope that the cumulative effect will be a deeper understanding than could be gained from any one discipline, given the all-pervasive nature of law in its social context.<sup>58</sup>

More recently, there are a number of examples of multi and interdisciplinary studies

---

<sup>54</sup> [Http:// www.kent.ac.uk/slsa/](http://www.kent.ac.uk/slsa/) [August 2005].

<sup>55</sup> Vincenzo Ruggiero, 'Daniel Defoe and business crime', *Social and Legal Studies* 6(3), (1997), 323-342; Maria Arisodemou, *From Her to Eternity* (Oxford University Press, Oxford, 2000); Melanie Williams, *Secrets And Laws* (UCL Press, 2005); Lorie Charlesworth, 'The poet and the poor law. Reflections upon John Clare's *The Parish*', *Liverpool Law Review*, 2/3 (2002), 167-178

<sup>56</sup> Nicole Rafter, 'American criminal trial films: an overview of their development, 1930-2000', *Journal of Law and Society*. 28(1), (2001), 9-24; Michael Bohnke, 'Myth and law in the films of John Ford', 28(1), (2001), 47-63.

<sup>57</sup> K. Hawkins (ed.) *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford University Press, Oxford, 1997), prologue, 4; Douglas Vicks, 'Interdisciplinarity and the Discipline of Law', *Journal of Law and Society* 31, (2004), 163-93, pp.192-93.

<sup>58</sup> Harris, *Introduction to Law*, p.319.

that can be classified as illustrations of the benefits that can flow from that inclusion of historical contextualisation within the scope of socio-legal studies (see below). In addition, recognition of the importance of historical contextualisation as part of the wider tool kit of socio-legal studies has, if anything strengthened during the last decade. By 2000, the ESRC suggested that:

Research training may include material such as the following: ... different theoretical perspectives on deviance, crime and criminal justice (e.g. sociological, psychological, legal, historical, cultural and anthropological) [and] the social history of the discipline of criminology and/or socio-legal studies.<sup>59</sup>

As a further positive indication, initial impressions of the lack of legal history scholarship within socio-legal studies are deceptive. For example, in the 2005 SLSA *Directory*, only seven members listed legal history as a particular research interest, indeed not all of these researchers have published specifically on legal history. Of those who have, two are well known for their contributions to other socio-legal subjects. Bibbings has published on conscientious objectors in the Great War,<sup>60</sup> as well as on gender, rights and the body, whilst Probert, a convenor for Family Law and Policy at Society of Legal Scholars' (SLS) conferences, has been a regular contributor to the legal history stream. She has widely published on the Marriage Act of 1753, including within a mainstream history journal.<sup>61</sup> On the other hand, there are numerous examples of conference papers which contextualise history within socio-legal studies presented by scholars who do not list legal history as a particular interest, as this writer will illustrate below.

Certainly, historical research has been increasingly included amongst the examples of papers presented at annual SLSA conferences. For instance, at the SLSA conference held at Nottingham Trent University in 2003, seven sessions were dedicated to 'law and history'.<sup>62</sup> At the SLSA Conference held at the University of Liverpool in 2005, there were four legal history sessions,<sup>63</sup> with a further distinct stream of four sessions the University of Stirling in 2006. In fact, many regular speakers at the SLSA include an historical dimension to their papers utilising a

---

<sup>59</sup> [Http://www.esrc.ac.uk/esrccontent/postgradfunding/2000\\_Guidelines\\_f15.asp](http://www.esrc.ac.uk/esrccontent/postgradfunding/2000_Guidelines_f15.asp) [Now closed].

<sup>60</sup> L. S. Bibbings, 'Conscientious Objectors in the Great War: The Consequences of rejecting Military Masculinities,' in Paul Higate (ed.), *Military Masculinities: Identity and the State* (Greenwood Press, 2003); 'Images of Manliness: The Portrayal of Soldiers and Conscientious Objectors in the Great War,' *Social and Legal Studies* 12(3) (2003), 335-358; 'State reaction to conscientious objection', in I. Loveland (ed.), *Frontiers of Criminality* (Sweet and Maxwell, 1995).

<sup>61</sup> Rebecca Probert, 'The Impact of the Marriage Act of 1753: Was it Really "A Most Cruel Law for the Fair Sex"?' *Eighteenth Century Studies*, 38(2) (2005), 47-62; 'The Judicial Interpretation of Lord Hardwicke's Act of 1753', *Journal of Legal History*, 23 (2002), 129-151.

<sup>62</sup> *Conference Brochure* (SLSA, Nottingham, 2003).

<sup>63</sup> *Conference Brochure* (SLSA, Liverpool, 2005).

reconstruction of past events and processes as an integral part of their wider interdisciplinary methodology. These papers have appeared in an assortment of conference streams that reflect the subject matter researched, such as housing law and policy, rather than the particular methodological approach taken to the topic in question. These streams have included, amongst others, environmental law,<sup>64</sup> legal education,<sup>65</sup> tax,<sup>66</sup> and 'law and the question of identity'.<sup>67</sup> In short, it is clear that legal history, understood broadly as a reconstruction of the processes of emergence, consolidation and change over time, has exhibited a consistent, if partially concealed, presence within recent SLSA conferences. Such analytical techniques of reconstruction have provided an important methodological tool for contextualising a wide range of otherwise disparate socio-legal themes. At the same time, more overtly historical reconstructions are emerging as an important theme for socio-legal studies scholarship in their own right.<sup>68</sup> The following subsections will provide further evidence of the role that different forms of historical reconstruction have played within the development of socio-legal studies to date in Britain, starting with the largest area where this is the case: studies of the criminal justice system.

## **An Overview of British Socio-Legal Histories**

### *Criminal justice*

Much of the existing contribution to legal history within socio-legal studies can be found concentrated in the field of criminal justice. These have included, amongst many other topics, studies of the overlap between criminalisation and other areas, such as the legal regulation of medicine in the field of the emergence of a defence to infanticide,<sup>69</sup> and the identification and regulation of the 'dangerous' offender within the penal system.<sup>70</sup> In addition, as noted in the introduction, much work since the 1970's bears direct or indirect testimony to influential works from social historians; these stimulated an interest in the potential for critical historical work on the role of the state, ideology and criminal law. Particularly prominent works in this area include,

---

<sup>64</sup> Ben Pontin, 'Law and Science: An historical environmental perspective', examining the role of the Alkali Acts 1863-1881 in leading scientific developments': *Conference Brochure* (Bristol: SLSA, 2001).

<sup>65</sup> Lorie Charlesworth and Andrea Loux, 'Gentlemen and Scholars in White Cotton Gloves: "Legal Education and the Reproduction of Hierarchy" in Legal History': *Conference Brochure* (SLSA, Bristol, 2001).

<sup>66</sup> Margaret Lamb, 'Defining "profits" for British income tax purposes: a contextual study of the depreciation cases, 1875-1897', *Conference Brochure* (SLSA, Bristol, 2001)..

<sup>67</sup> Austin Chinhengo, 'Sons of the Soil- land, law and the colonial reconstruction of indigenous identities in sub-Saharan Africa', *Conference Brochure* (SLSA, Bristol, 2001).

<sup>68</sup> Rosemary Kruttschnitt, 'A Brief History of Doing Time: The California Institution for Women in the 1960s and the 1990s', *Law and Society*, 38 (2) (2004), p.267.

<sup>69</sup> Tony Ward, 'The sad subject of infanticide: law, medicine and child murder, 1860-1938', *Social and Legal Studies* 8(2), (1999), 163-180.

<sup>70</sup> John Pratt, 'Governing the dangerous: an historical overview of dangerous offender legislation', *Social and Legal Studies* 5(1), (1996), 21-36.

Thompson's *Whigs and Hunters*,<sup>71</sup> which contextualised the eighteenth century Black Act, and has influenced Norrie's work:

This is Thompson's point when he writes that the law entails "a logic of equity", a tendency to seek "to transcend the inequalities of class power which, instrumentally, it is harnessed to serve." Criminal law protects particular social interests but it does through a language that is universal and general, and cast in terms of respect for the individual before it.<sup>72</sup>

Equally important is the companion work, *Albion's Fatal Tree*.<sup>73</sup> Hay's own chapter in this book: 'Property, Authority and the Criminal Law', characterises England's eighteenth century criminal justice system as an: 'instrument of social hegemony, coercion and manipulation, exercised by the ruling class through legislative and sentencing practices.'<sup>74</sup>

Currently within British socio-legal scholarship, it is possible to find research developing these and other themes. Thus for example, Lacey contextualises the process of criminalisation and punishment by reference to wider patterns of social and economic change.<sup>75</sup> Other studies have reconstructed the social factors explaining the historical emergence and transformation of the legal regulation of blackmail within England and Wales.<sup>76</sup> There have also been attempts to re-examine nineteenth century data to develop a specifically 'ecological analysis' of crime in early Victorian England.<sup>77</sup> One example within criminal justice scholarship merits particular discussion: Ballinger's *Dead Women Walking: Executed Women in England and Wales 1900–1955*.<sup>78</sup> This work was recognised as an outstanding contribution to socio-legal studies by its award of the Hart SLSA prize. It is a major critical and interdisciplinary study, in effect a social history of the power of law and related institutions to subject women to capital punishment. It combines an account of biographical details contextualised by reference to an analysis of previously unpublished archival material, and existing feminist theories of law. Her work

---

<sup>71</sup> E. P. Thompson, *Whigs and Hunters*, (Allen Lane, 1975).

<sup>72</sup> Alan Norrie, *Crime, Reason and History*, (Butterworths, 2001), p. 23. This writer utterly refutes, however, his swingeing denunciation of the Poor Law, see pp. 25, 29, 235.

<sup>73</sup> Hay *et al*, *Albion's Fatal Tree*. See also Robert Fine, *Capitalism and the Rule of Law* (Hutchinson, 1979).

<sup>74</sup> Smith and McLaren, 'History's living legacy', p.283

<sup>75</sup> Nicola Lacey, 'In search of the responsible subject: history, philosophy and social sciences in criminal law theory,' *Modern Law Review*. 64(3), (2001), 350-371; N. Lacey and C. Wells, *Reconstructing Criminal Law*, (Butterworths, 1998, 2<sup>nd</sup> ed).

<sup>76</sup> Peter Aldridge, "'Attempted murder of the soul": blackmail, privacy and secrets', *Oxford Journal of Legal Studies*. 13(3), (1993), 368-387.

<sup>77</sup> Paul S. Maxim, 'An ecological analysis of crime in early Victorian England', *Howard Journal*, 28(1), (1989), 37-50.

<sup>78</sup> Anette Ballinger, *Dead Women Walking: Executed Women in England and Wales 1900–1955*, (Ashgate, Aldershot, 2000).

represents an interesting example of empirical historical analysis that has also been recognised as contributing to socio-legal studies of the institutional operation of the criminal justice system. In addition, aspects of Foucault's work, which stresses the causal role played by modernisation, and the associated drive for greater efficiencies in institutional practices and strategies of control, have influenced a number of broadly socio-legal histories of criminal justice.<sup>79</sup> Such historical reconstructions offer a rewarding methodology for illuminating law's 'past'.

#### *International and comparative socio-legal histories*

In addition, there have been a number of comparative historical projects.<sup>80</sup> For example, De Vries's study addresses the issue of the Dutch campaign against trafficking in women for sexual exploitation within brothels and elsewhere.<sup>81</sup> Another such comparative historical study has reconstructed the processes through which the prohibition of alcohol was first introduced into nineteenth century Hawaii.<sup>82</sup> The wider literature on socio-legal approaches to criminal justice includes other comparative histories of the youth justice systems in Scotland and England and Wales. For example, McAra focused on the reasons why the two legal systems diverged during the 1970s until the late 1990s, and how the Scottish system developed techniques of punishment that had been established but then abandoned decades earlier in England and Wales.<sup>83</sup> A further socio-legal project has identified five stages in the history of crime regulation within common law regimes through a comparative analysis of differences between US and Australian penal histories.<sup>84</sup>

Other socio-legal comparative accounts have considered early dispute resolution,<sup>85</sup>

---

<sup>79</sup> See Martin Weiner, *Reconstructing the Criminal – Culture, Common Law and policy in England 1830-1914* (Cambridge University Press, Cambridge, 1990); David Garland, *Punishment and Welfare: A History of Penal Strategies* (Dartmouth Press, Aldershot, 1985).

<sup>80</sup> Leon Radzinowicz, *A History of the English Criminal Law and its Administration from 1750*, (Stevens, 1948); William Cornish *et al*, *Crime and Law in Nineteenth Century Britain* (Government Publications, Dublin, 1978); Victor Bailey, *Policing and Punishment in Nineteenth Century Britain*, (Croom Helm, Beckenham, 1981). For one significant exception, see A. Harding, *A Social History of English Law*, (Penguin, Harmondsworth, 1966).

<sup>81</sup> Petra de Vries, "White slaves" in a colonial nation: the Dutch campaign against the traffic in women in the early twentieth century', *Social and Legal Studies*, 14(1) (2005), 39-60.

<sup>82</sup> Marilyn Brown, 'Aina under the influence: the criminalization of alcohol in nineteenth-century Hawai'i', *Theoretical Criminology* 7(1), (2003), 89-110.

<sup>83</sup> Lesley McAra, 'The cultural and institutional dynamics of transformation: youth justice in Scotland, England and Wales', *Cambrian Law Review*, (2004), 23-54.

<sup>84</sup> John Braithwaite, 'Crime in a convict republic', *Modern Law Review* 64(1), (2001), 11-50.

<sup>85</sup> See Robert Palmer, 'The common law and the French connection', *Anglo-Norman Studies*, 4 (1982) 77-92; Paul Hyman, 'Norms and Legal Disputes Before 1150' in *Current Legal Issues* 6, (2004), 41-62; W. Davies and P. Fouracre, *The Settlement of Disputes in Early Medieval Europe*, (Cambridge University Press, Cambridge, 1996); Thomas N. Bisson, (ed) *Cultures of Power: Lordship, Status and Process in Twelfth Century Europe*, (University of Pennsylvania Press, Philadelphia, 1995).

and same sex adult relationships.<sup>86</sup> Socio-legal studies that have focused on nineteenth century developments include Brown's research into aspects of the deployment of ideological doctrines and strategies of both orthodox and authoritarian liberalism through which Britain governed its empire partly by means of specific legislative measures, taking the governance of the Mina tribe as a case study.<sup>87</sup> The established socio-legal theme of legal pluralism, which discusses the relationship between formal law and unofficial or lay understandings of law and justice, has also been subjected to historical reconstruction. For example, one such study investigates the development of legal system under autocratic rule of a national governor in the British colony of New South Wales from 1788.<sup>88</sup>

#### *Legal regulation of property and housing*

One of the most strikingly consistent areas of socio-legal research where writers have undertaken some measure of historical contextualisation is within the area of housing studies, including its human rights aspects. As such, it has become almost *de rigueur* to locate any discussion of current themes concerning housing law and policy within the context of historical changes that have taken place over the last 20 years, and - in some cases - over a much longer period.<sup>89</sup> Within empirical research investigating the legal regulation of property relations more generally, one explicitly socio-legal history has analysed perceptions by dominant elites of legal measures of enclosure and other restrictions on access to land, particularly with reference to their impact upon working class leisure activities.<sup>90</sup> Another piece of research in this area deals with questions concerning the relationship between eighteenth century property settlements and issues concerning the social status and recognition for those aristocratic families who deployed this legal device to protect family capital.<sup>91</sup> A rather differing example has studied both the influence of national and local politics upon solicitor's traditional conveyancing monopoly.<sup>92</sup> These few examples serve to illustrate the breadth of possibilities open to socio-legal researchers within this subject area.

---

<sup>86</sup> Mary Welstead, 'Case Commentary: financial Support in same-sex relationships – a Canadian constitutional solution,' *Canadian Family Law* 12 (2000), p.73.

<sup>87</sup> Mark Brown, 'Crime, liberalism and empire: governing the Mina tribe of Northern India', *Social and Legal Studies* 13(2), (2004), 191-218.

<sup>88</sup> Bruce Kerche, 'Resistance to law under autocracy', *M.L.R.* 60(6), (1997), 779-797.

<sup>89</sup> Since 1925 in the case of Emma Laurie's study, 'The enduring appeal of "reasonable preference" in housing allocations': *Conference Brochure* (SLSA, Bristol, 2001).

<sup>90</sup> David McCardle, "'A ruling class conspiracy,'" Law, enclosure and the politics of leisure', *Nottingham Law Journal*. 8(2), (1999), 69-78.

<sup>91</sup> Alain Pottage, 'Proprietary strategies: the legal fabric of aristocratic settlements', *Modern Law Review* 61(2) (1998), 162-187.

<sup>92</sup> Avrom Offer, *Property and Politics 1870-1914* (Cambridge University Press, Cambridge, 1981).

### *Public law, civil liberties and human rights*

There have only been a small number of socio-legal histories that could be classified under even an elastic definition of this heading. Under the broad heading of studies of the emergence of public regulation, MacDonah's work conceptualises and contextualises the historical development of English local and central governance.<sup>93</sup> More recently, Stebbings' research examines the growth of 'officialdom' in the nineteenth century, the compulsory administration of private affairs by state officials.<sup>94</sup> Within the domestic realm, explicitly socio-legal forms of historical reconstruction have addressed changing patterns of extra-legal and legal recognition of freedom of speech by reference, for example, to the regulation of Speakers' Corner in London's Hyde Park.<sup>95</sup> Socio-legal writers have also contextualised civil liberty issues arising from the controversial emergence in Northern Ireland of special control units within those prisons containing republican paramilitary prisoners.<sup>96</sup> There have also been distinctly socio-legal historical contextualisations of changing patterns of twentieth century constitutional interaction, and in particular the emergence and development of institutional conflicts between the judges and different governments.<sup>97</sup> As a supplement to domestic studies, within the field of human rights scholarship there is also a distinctly comparative form of historical contextualisation, including studies of the influence of particular national traditions upon the reception of newly incorporated European human rights measures.<sup>98</sup>

### *Social welfare, family and gender*

More positively, there have been a considerable number of explicitly socio-legal histories under these headings. These include a series of studies into nineteenth century occupational-health legislation, which have found outlets in both history and law publishing.<sup>99</sup> The field of governmental regulation of factory conditions is one

---

<sup>93</sup> Oliver MacDonagh, *Early Victorian Government 1830-1870*, (Weidenfeld and Nicolson, 1977) and *A Pattern of Government Growth: 1800-1860. The Passenger Acts and their Enforcement*, (MacGibbon and Key, 1961).

<sup>94</sup> Chantal Stebbings, "'Officialism": law, bureaucracy, and ideology in late Victorian England', *Current Legal Issues*, 6 (2004), 316-342.

<sup>95</sup> John Michael Roberts, 'The enigma of free speech: Speakers' Corner, the geography of governance and a crisis of rationality', *Social and Legal Studies*. 9(2), (2000), 271-292.

<sup>96</sup> Jason M. Schone, 'Legacy of a conflict: special secure units, penal policy, and the law', *International Journal of the Sociology of Law*. 27(2), (1999), 207-228.

<sup>97</sup> See: Robert Steven, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfeld and Nicolson, 1983); *The Independence of the Judiciary: The View from the Lord Chancellors' Office*, (Clarendon Press, Oxford, 1993); 'Judges, Politics, Politicians, and the Confusing Role of the Judiciary' in Keith Hawkins (ed.), *The Human Face of Law*, (Clarendon Press, Oxford, 1997), pp.245-289.

<sup>98</sup> M. B. Dembour and m. Krzyzanowska-Mierzewska, 'Ten years on: the popularity of the Convention in Poland', *European Human Rights Law Review* 4 (2004), 400-423.

<sup>99</sup> Nob Doran, 'From embodied "health" to official "accidents": class, codification and British factory

area where the historical work of Carson broke new ground.<sup>100</sup> More specifically, Dunn has conducted historical research addressing the social, economic and political policy factors underpinning the 'regulation' of charities created to relieve poverty.<sup>101</sup> The work of Bartlett on the history of lunatic asylums during mid-nineteenth century England, which builds upon a broadly Foucaultian analysis, is another noteworthy example of critical accounts of social welfare provisions for those at the bottom of the social hierarchy.<sup>102</sup> In addition, this writer has published socio-legal historical reconstructions of the poor law.<sup>103</sup> The narrower field of family law and policy continues to attract high quality forms of historical contextualisation by Eekelaar and various collaborators.<sup>104</sup>

Another, explicitly socio-legal collection of essays explores the question 'what is a parent?' from the disciplinary orientation of history, as well as those of sociology, psychology, biology, and criminology.<sup>105</sup> A similar point applies to certain studies within the overlap between studies of social welfare policy and the legal regulation of familial relations,<sup>106</sup> and to comparative studies of the legal responses to

---

legislation 1831-1844', *S. & L.S.* 5(4) (1996), 523-546; P. W. J. Bartrip, 'Safety at Work: The Factory Inspectorate in the Fencing Controversy 1833-57' (Centre for Socio-legal Studies, Oxford 1979); P. W. J. Bartrip, 'British Government Inspection 1932-1875', *Review of Social History* 77 (1980); P. W. J. Bartrip, 'The Conventionalization of Factory Crime: A Re-assessment', *International Journal of the Sociology of Law*, (1980), 8, p. 175; P. W. J. Bartrip, 'British Government Inspection, 1832-1875', *Historical Journal*, (1982) 25, 605; P. W. J. Bartrip and S. Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy 1833-97*, (Clarendon Press, Oxford 1983); P. W. J. Bartrip, 'Petticoat Pestering: The Women's Trade Union League and Lead Poisoning in the Staffordshire Potteries, 1890-1914', *Historical Studies in Industrial Relations*, 2, (1996), 3-25; P. W. J. Bartrip and P. Fenn, 'Factory Fatalities and Regulation in Great Britain, 1878-1913', *Explorations in Economic History*, (1980) 25, 60-74; P. W. J. Bartrip and R. Hartwell, 'Profit and Virtue: Economic Theory and the Regulation of Occupational Health in Nineteenth and Early Twentieth Century Britain', in Hawkins (ed), *The Human Face of Law*, 45-64.

<sup>100</sup> W. G. Carson, 'Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation,' *Modern Law Review*. 33, (1970), pp. 396.

<sup>101</sup> Alison Dunn, 'As "cold as charity"? poverty, equity and the charitable trust.' *Legal Studies*. 20(2) (2000), 222-240.

<sup>102</sup> Peter Bartlett, *The Poor Law of Lunacy*, (Leicester University Press, Leicester, 1999).

<sup>103</sup> See for example: Lorie Charlesworth, 'Dickens and the Poor Law: the novels of Charles Dickens as a source for socio-legal historical reconstructions,' *International Journal of the Book*. (forthcoming); Lorie Charlesworth, 'Poor Law in the City: A comparative legal analysis of the effect of the 1834 Poor Law Amendment Act upon the Administration of Poor Relief in the Ports of Liverpool and Chester,' in Andrew Lewis (ed), *Proceedings of the Seventeenth British Legal History Conference 2005*, (Four Courts Press Dublin, forthcoming); 'Readings of begging: the legal response to begging considered in its modern and historical context,' Lorie Charlesworth, *Nottingham Law Journal*, 15 (1) (2006), 1-12. See also Lorie Charlesworth, 'How poor law rights were lost but Victorian values survived: a reconsideration of some of the hidden aspects of welfare provision,' in Alastair Hudson (ed), *New Perspectives in Property Law, Human Rights and the Home*, (Cavendish, 2003), 271-294; Lorie Charlesworth, 'The Poor Law: A modern legal analysis,' *Journal of Social Security Law*, 2 (1999), 79-92.

<sup>104</sup> John Eekelaar, *Family Law and Social Policy*, 2nd ed (London: Weidenfeld and Nicolson, 1984); *Regulating Divorce* (Oxford University Press, Oxford, 1991).

<sup>105</sup> Andrew Bainham, et al, 'What is a Parent? A Socio-legal Analysis', (Hart Publishing, Oxford, 1999).

<sup>106</sup> Julia Twigg, 'Carers, families, relatives: socio-legal conceptions of care giving relationships', *Journal of Social Welfare and Family Law*. 3, (1994), 279-298; Josephine Reeves, 'The deviant mother and child: the development of adoption as an instrument of social control', *Journal of Law and Society* 20(4), (1993), 412-26.

unconventional family relations within broadly analogous common law regimes, such as Canada.<sup>107</sup> Historical dimensions are most fully integrated in O'Donovan's innovative, *Sexual Divisions in Law*,<sup>108</sup> which treats historical analysis as a pre-eminent way of explaining the:

legal differentiation between women and men were sought in the structure for pre-industrial English society, in the material facts of biological reproduction, and in the organisation of home and work in modern industrialised society .... The enquiry undertaken by the book is directed partly at social change. The model that underpins this analysis is a model of social change in which there is a movement from a community-based society...to an individualistic society.<sup>109</sup>

Her aim is to explain how the patriarchal family form, which flourished in medieval and early modern European culture, survives today in another guise, and she accounts for this by the emergence of an unregulated private realm. In addition, there are, for example, a number of published discussions of the legal regulation of lesbian sexual relations including arguments for and against parity with heterosexual relationships concerning the age of consent, and the appropriateness of a universal, gender-neutral legal framework. One socio-legal study addresses this issue through a historical reconstruction of the first criminal codification of the age of consent by the Offences Against the Person Act 1861, its subsequent interpretation by a cluster of evolving case law, through to more recent debate over sex between women, including the impact of lesbian feminist perspectives in the 1970s and contemporary policy debates regarding the limits of anti-discrimination measures.<sup>110</sup>

Some might argue that, 'history for its own sake' is not an acceptable project for socio-legal historians; even so, this type of historical reconstruction can hardly be dismissed as falling outside the scope of socio-legal studies. This is because it draws lessons from the historical trajectory which culminates in a critical discussion of the policy dimensions of the Sex Offenders Act 1997 in the context of the relative advantages and costs to young lesbian women of campaigning for a standardised age of consent law, including a possible increase in the number of prosecutions for lesbian acts.<sup>111</sup> Moreover, other socio-legal themes relating to law's definition and regulation of gender identities have benefited from historical scholarship, including

---

<sup>107</sup> Dorothy E. Chunn, 'Rehabilitating deviant families through family courts: the birth of "socialized" justice in Ontario, 1920-1940', *International Journal of the Sociology of Law* 16(2), (1988), 137-158.

<sup>108</sup> Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985).

<sup>109</sup> *Ibid*, preface, p. x.

<sup>110</sup> Matthew Waites, 'Inventing a "lesbian age of consent"'? The history of the minimum age for sex between women in the UK.'. *Social and Legal Studies* 11(3), (2002), 323-42.

<sup>111</sup> *Ibid*.

studies of the British state's reaction to injuries caused by stereotypically masculine activities within the sixteenth and seventeenth centuries, such as duelling,<sup>112</sup> and reconstructions of early twentieth century attempts to censure the early suffragette movement.<sup>113</sup> A similar point applies to those studies by historians of the changing historical treatment of women within, and by, the English criminal justice system.<sup>114</sup>

#### *The legal regulation of professions*

Studies of the work and orientation of different branches of professions that are involved in the legal process, or which are regulated by legislative provisions are common within socio-legal studies.<sup>115</sup> An example of distinctly socio-legal historical work is Smith's reconstruction of the self-regulation of the professional conduct of doctors by the General Medical Council since its inception in 1858.<sup>116</sup> A further group of studies, in this case addressing policing, include Wall's impressive work on the social history of the chief constables between 1836 and 1996;<sup>117</sup> it suggests that it is possible to identify recurring tendencies within the historical development of the police.

This necessarily brief survey of some of the many socio-legal historical reconstructions produced from within the socio-legal movement presents a more positive picture than that painted at the beginning of this article. In spite of this, there is no clear evidence within the literature of a self-aware or acknowledged discrete group of historians within the socio-legal movement. However, such a 'cluster' has formed and has arranged a series of conferences at the Institute of Advanced Legal Studies (IALS) in collaboration with the CCBH and IHR, under the title: '*Socio-legal historical reconstructions: the lived experience of the law*'.<sup>118</sup> The first took place in December 2006 and the next in December 2007. Thus, as will be discussed in more detail below, there are some positive signs that researchers producing socio-legal

---

<sup>112</sup> A. Mark Liddle, 'State, masculinities and law: some comments on gender and English state-formation', *British Journal of Criminology*, 36(3), (1996), 361-80.

<sup>113</sup> Alison Young "'Wild women": the censure of the suffragette movement', *International Journal of Sociology and the Law* 16(3), (1988), 279-93.

<sup>114</sup> Lucia Zedner, *Women, Crime and Custody in Victorian England* (Oxford University Press, Oxford, 1991); Jenny Kermode and Garthine Walker (eds), *Women, Crime and the Courts in Early Modern England*, (UCL Press, 1994).

<sup>115</sup> B. Abel-Smith and R. Stevens, *Lawyers and the Courts: A sociological study of the English Legal System 1750-1965*, (Heinemann, 1967).

<sup>116</sup> *Medical Discipline: The Professional Conduct Jurisdiction of the General Medical Council, 1858-1990* (Oxford University Press, Oxford, 1994).

<sup>117</sup> David Wall, *The Chief Constables of England And Wales. The Socio-legal History Of A Criminal Justice Elite*, (Dartmouth Press, Aldershot, 1998).

<sup>118</sup> These include the author, Judith Rowbotham, Kim Stevenson and other members of SOLON, the Centre for Contemporary British History (CCBH), the Institute of Historical Research (IHR) and the Institute for Advanced Legal Studies (IALS).

historical reconstructions are beginning to affirm a discrete identity within the socio-legal movement. Meanwhile, however, the descriptor *legal history* still creates a resonance within socio-legal scholars that is not appealing to members of the socio-legal movement. The following sections will consider how and why this situation arose and continues.

### **The Negative Side of the Balance Sheet**

In contrast to the dynamic position across the Atlantic, and despite the important work discussed above, much British socio-legal research still suffers from the 'parochialism of the present'; that is an excessive focus on novel developments within the immediate present and upon 'unprecedented' changes in the circumstances in which law is applied. This has led to widespread ignorance of the potentially instructive fate of analogous past reforms.<sup>119</sup> Harris notes that, in comparison with research into nineteenth century developments, 'Surprisingly little research has been conducted into twentieth century history of law', and that we are therefore largely dependent upon the work of social historians for our knowledge of this period.<sup>120</sup> Furthermore, it has to be accepted that, in spite of some hopeful signs, the potential for historical analysis within socio-legal studies still remains, to some extent, an underdeveloped aspect of this movement. Although it is strong in certain areas such as criminal justice and family law, it remains far weaker in most of the other fields that regularly attract streams in SLSA conferences. Within the 'law in context' series of publications for example, there is varied treatment of the historical context. This ranges from the full-blown historical reconstruction by O'Donovan (above)<sup>121</sup> at one end of the spectrum, to a number of other studies where the 'context' is entirely contemporary.<sup>122</sup> Between these extremes sit studies where there is a patchy and arguably *ad hoc* use of historical contextualisation and materials, lacking any clear account of why some, but not other, topics merit such contextualisation.<sup>123</sup> In many cases, it exists rather as an 'add on' to socio-legal research, enriching the project with a contextual history that serves to frame the work, rather than constituting its main purpose. One exception is Cranston's *Legal Foundations of the Welfare State*, where an extended historical section, spread over

---

<sup>119</sup> Harris, *Introduction to Law*, 332.

<sup>120</sup> *Ibid.*

<sup>121</sup> O'Donovan, *Sexual Divisions*.

<sup>122</sup> For example, Andrew Ashworth, *Sentencing and Criminal Justice* (Weidenfeld and Nicolson, 1992); Iain Ramsay, *Consumer Protection Texts and Materials* (Weidenfeld and Nicolson, 1989); Colin Turpin, *British Government and the Constitution: Texts, Cases and Materials*. (Butterworths, 1999, 4<sup>th</sup> ed); M. J. Detmold, *Courts and Administrators: A Study in Jurisprudence* (Weidenfeld and Nicolson, 1989).

<sup>123</sup> Carol Harlow and Richard Rawlings *Law and Administration* (Weidenfeld and Nicolson, 1984); Jane Stapleton *Product Liability* (Butterworths, 1994).

two chapters, contextualises the later discussion of the social welfare law and policy.<sup>124</sup>

As a result, there has been a real shortage of studies within this branch of legal scholarship addressing how the implementation of substantive and procedural legal rules either changed or, for interesting reasons, remained static. Moreover, such types of project have become increasingly difficult to realise, especially given the dominance of academic research by the 'short-termism' encouraged by the time-scales of the RAE on which law school research funding partly depends. Furthermore, the powerful connection between officially funded empirical variants of socio-legal research and immediate policy debates has meant that the focus of the majority of such studies has fallen excessively upon short-term and immediately utilitarian research questions. Such studies have tended to prevail over more theoretical, historical and comparative research.<sup>125</sup> Noteworthy exceptions have been projects such as Davis's *Partisans and Mediators*.<sup>126</sup> This included five distinct research studies and analysed the results of applying a rich variety of research methods to a broad range of sources considered over an extended period of time. As noted earlier, there is another aspect of legal history that has played a part in alienating the socio-legal studies movement from a perception of the inherent value of historical reconstructions in examining the pervasiveness of law through its lived experience, This will be considered in the following section.

### **Versions of Legal History Unattractive to Socio-Legal Studies**

It is not possible to explain the underdeveloped state of historical analysis within contemporary socio-legal studies by reference solely to the orientation of members of that movement. Instead, it is equally important to recognise that there is another, powerful, group who engage in *legal history*. Their membership comprises the Academy, that section of the legal establishment who are the successors to Maine who founded the sub-discipline of *legal history*.<sup>127</sup> Indeed, Maine's efforts were stimulated by the view held by the establishment of the day; that law was an insufficiently 'academic' subject to merit its introduction into universities. His aim was to

---

<sup>124</sup> Ross Cranston, *Legal Foundations of the Welfare State*, (Weidenfeld and Nicolson, 1985).

<sup>125</sup> The value of addressing the development of legal processes over at least a decade - 'longitudinal research' - is addressed by the various contributors to a special issue of *Law and Society Review*, 24 (1990).

<sup>126</sup> Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes*, (Clarendon Press, Oxford, 1988).

<sup>127</sup> For legal historians whose work demonstrates the view that the sub-discipline should include the study of history see: A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford University Press, Oxford, 1995); P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Clarendon Press, Oxford, 1979), p. 388; Cornish and Clarke, *Law and Society in England 1750-1850*, (Sweet and Maxwell, 1989); D. Sugarman, 'Writing "Law and Society" Histories', *Modern Law Review*, 55 (1992), 292-308.

establish a 'scientific' (with all that this term implies) basis to the study of history in law, as part of that larger project to increase the academic credibility of study of the Common Law.<sup>128</sup> However, his work, *Ancient Law* had many technical weaknesses and historical inaccuracies that led, after an initial public success, to it being attacked<sup>129</sup> and subsequently ignored;<sup>130</sup> amplified in part, due to Maine's 'failure' to produce a synthesis of law, history and philosophy (Has anyone to date?) and also perhaps to the developing anti-history influence of positivist thought. This produced a negative, dampening and stultifying effect upon legal historical scholarship, rather as if once Gibbon's writings had been superseded, historical research regressed to antiquarianism.

On the other hand, recent work has reassessed that position, notably that of Cocks and MacCormack.<sup>131</sup> These have demonstrated that Maine's chief characteristic was to show how law and legal institutions were related to specific social conditions and that this social development could be viewed as a progression. As such, Maine's legacy has produced two potential methodologies. The first is based upon the question, what is the relationship between certain kinds of society and certain kinds of law? The second method is to look at narrow topics, such as the history of contract, on a comparative basis by placing them in an historical and social context. Maine's view of a series of fixed stages in such analyses is largely discredited, but the English lawyer's chronological common law methodology lends itself to this type of historical analysis. Indeed, MacCormack has posited: '... for a modern jurist to take an interest in Maine, a strong belief in the importance of historical explanation is almost a pre-requisite.'<sup>132</sup> Within this context, as the socio-legal movement has emphasised the importance of empirical contextual research broadly defined, this writer would suggest that it could in fact be viewed as a 'truer' successor to Maine than those scholars who have chosen the current path followed within the Academy. For, as a result of that contemporary discrediting of Maine's work, the Academy returned to the mainstream, narrow doctrinal stance of much legal scholarship; undoubtedly contributing to its apparent acceptance by many academics as the 'authentic' voice speaking for law's past within the discipline of law. Moreover, membership of the Academy is largely dominated by a close-knit group of mostly (male) academics who took their law

---

<sup>128</sup> Smith and McLaren, 'History's living legacy', p. 258.

<sup>129</sup> F.W. Maitland, *Bracton and Azo*, (Selden Society, London. 1884), vol. VIII, p. xiv.

<sup>130</sup> Peter Stein, *Legal Evolution, The Story of an Idea* (Cambridge University Press, Cambridge, 1980), 116.

<sup>131</sup> R.C.J. Cocks, *Sir Henry Maine, A Study in Victorian Jurisprudence* (Cambridge University Press, Cambridge, 1988).

<sup>132</sup> Paper given by Prof. N. MacCormack of the University of Aberdeen, at the W.G.Hart Legal Workshop, July 1984, cited in Stein, *Legal Evolution*, 153.

degrees from the Universities of Cambridge, Oxford and London where they occupy prestigious law chairs, some of which have always been designated for legal historian. Moreover, this male group are strongly represented on the editorial (and honorary editorial) board of *The Journal of Legal History*, self-described as: '... the only British journal concerned solely with legal history'. Its contents, for example in 2004 and 2005, demonstrate a movement towards early modern (doctrinal) history, but there remains a considerable concentration upon doctrinal studies in Roman Law and Medieval writs. Such material is distinctly unappealing to those committed to the main tenets of socio-legal studies in its rejection of interdisciplinary research and its distinctly non-contextual methodology<sup>133</sup>

In short, the Academy has an eminent position from which it produces masterly, technical paleontological legal history, law's past examined from a resolutely black letter perspective; an 'internal' *legal history*. This is law reflecting upon itself in a mirror: doctrinal, Hegelian, Immanent Critique. Its core values are articulated by Professor Sir John Baker, in *The Cambridge Law Journal* which published the text of his inaugural lecture as Downing Professor of the Laws of England, Cambridge: 'Why the History of English Law has not been Finished'.<sup>134</sup> Baker delivered his lecture in the same room where Maitland gave his inaugural lecture 110 years earlier in 1888 when appointed to the same chair. That lecture: 'Why the History of English Law has not been Written', was echoed in Baker's response to suggestions that legal history is not an important branch of legal scholarship and less relevant to student needs:

the history of English law must also be an essential dimension in the social and intellectual history of this country, as well as being the key to understanding much of the available evidence of the past which we all now take for granted, ... [the aim of research] was to uncover as far as possible the original records that constitute the body of contemporary evidence and then to interpret them according to the social and intellectual settings in which they were produced.<sup>135</sup>

Seen in these terms, it is possible to see a potential for rapprochement between socio-legal scholarship and *legal history*. However, Baker's next words reveal the extent of the divide: 'I am concerned with the basic truth that history cannot be written in any reliable way until the best evidence has been harvested'.<sup>136</sup>

---

<sup>133</sup> Sugarman, 'Writing "law and society"'.  
<sup>134</sup> J.H. Baker, 'Why the History of English Law has not been Finished', *The Cambridge Law Journal*, 59, March (2000), 62-84.  
<sup>135</sup> *Ibid.*, pp. 63-4.  
<sup>136</sup> *Ibid.*

It is that subsequent failure to follow Maitland, to 'harvest' the evidence, that so exercises Baker and informs his both his lecture and his choice of title. And that harvest? It consists of vast shelves of un-transcribed medieval plea rolls and law reports, in rolls of sewn-together strips of vellum lying in cool store under the care of the National Archives, Kew. The Academy's project is the legal equivalent of Cobb's response to French Revolutionary archives:

More and more I enjoyed the excitement of research and the acquisition of material, often on quite peripheral subjects, as ends in themselves. I allowed myself to be deflected down unexpected channels, by the chance discovery of a bulky *dossier* – it might be the love letters of a *guillotine* – or intercepted correspondence from London ... or eyewitness accounts of the September Massacres or of one of the *journees*.<sup>137</sup>

For the Academy then, the project becomes a question of scholarship engaged within the framework of a black letter doctrinal legal analysis of that material, with a minimal contextual input. Such an approach stands in direct contradiction to the socio-legal project. In addition, that failure to harvest suggests that a researcher must accept that socio-legal historical reconstructions cannot be undertaken in social history, economic history, literary studies, post modernism, feminist studies, local history, family history, or any branch of the legal past, because 'all' the recorded law is not 'known'. On the contrary, this writer would point to work such as Duffy's *The Voices of Morbath*. This demonstrates that other types of records, generated in a legal context, (here churchwardens' accounts) can provide an alternative methodology for the legal historian who wishes to contextualise law's history.<sup>138</sup> The results of such research, conducted within a contextual approach to historical reconstruction of lived experience, when viewed through the reversed telescope of the Academy, can thus appear as a separate and lesser rather than companion skill. Yet, legal history can, of course, be written without using 'legal' records at all. An outstanding exemplar, particularly for socio-legal historians, is Reid's ground breaking and extremely influential (at least in the USA), *Law For the Elephant*.<sup>139</sup> Using the private diaries and documents produced by travellers along the overland trail during the California gold rush from the late 1840s to the mid 1860s, Reid has constructed a picture of how those travellers perceived contractual, partnership and other legal relationships within their contemporary historical context. However, he does not lose sight of the lived experience

---

<sup>137</sup> Richard Cobb, *A Second Identity: Essays on France or French History*, (Oxford University Press, Oxford, 1969), p.15.

<sup>138</sup> Eamon Duffy, *The Voices of Morebath. Reformation and Rebellion in an English Village*, (Yale University Press, New Haven, 2001).

<sup>139</sup> John Philip Reid, *Law for the Elephant. Property and Social Behaviour on the Overland Trail*, (Huntington Library, California, 1997).

of those individuals whilst applying his technical legal skills; moreover, his work demonstrates how legal culture determines the personal behaviour and social conduct of ordinary people not trained in law. Reid's is a very unusual example of 'quasi internal' legal history thoroughly contextualised as socio-legal history within the lived experience of those: 'seeing the elephant'. More usually, *legal history* emphasises legal skills rather than the methodologies of research historians and socio-legal scholars. Those legal skills comprise the ability to read law Latin, law French, interpret writs, and embrace the traditional black letter legal mindset. Such skills are laudable, difficult to acquire and, of necessity, create obstacles restricting entry to the upper echelons of this sub discipline.

Unsurprisingly therefore, the majority of papers presented at the bi-annual *British Legal History Conference* lack any appreciation of, and hence citations to, the main achievements of socio-legal studies, including historical contextualisations of many of the topics and themes of that movement.<sup>140</sup> Many of these papers remain rooted in the largely positivistic and black letter 'old school' approach to law as a more or less closed system of rules, principles, axioms and formal procedures, such as the writ system, whose exposition remains largely internal to the reasoning, culture and actions of lawyers.<sup>141</sup> Such a black letter approach epitomises decontextualisation.<sup>142</sup> One American socio-legal scholar has, however, turned this approach on its head to consider how: 'the despised legalisms of lawyers' may be perceived as an individual's protection against arbitrariness.<sup>143</sup> Indeed, there is a danger that the above comments may be taken too seriously; such criticisms require nuancing. Over many years there have been contextual studies presented at the Conference and others published in *Legal History*.<sup>144</sup> Professional historians working within 'legal' and other sources attend the conference regularly and present thought-provoking papers. The current editorial board of *Legal History* consists of a broader, although still exclusively male, membership than in the past, including Cocks and Lobban. There are signs of a more sympathetic view towards interdisciplinary reconstructions

---

<sup>140</sup> [http://www.ucl.ac.uk/laws/history/documents/history\\_programme.pdf](http://www.ucl.ac.uk/laws/history/documents/history_programme.pdf) and <http://www.ucd.ie/leghist/assets/downloads/papers.doc>

<sup>141</sup> Reid, 'The Layers of Western Legal Thought', in McLaren *et al*, *Law for the Elephant*, p. 26. Reid refers to this preoccupation as: 'an older school of legal history, lawyers asking how problems of peculiar interest to lawyers were solved'.

<sup>142</sup> *Ibid*; Smith and McLaren, 'History's living legacy', pp.253-264. For examples, see the collection of papers in Andrew Lewis and Michael Lobban (eds) *Current Legal Issues*, 6 (Oxford University Press, Oxford, 2003); Kaius Tuori discusses Max Weber's work in the context of his reception of Roman Law.

<sup>143</sup> David J. Langham, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846*, (University of Oklahoma Press, Norman, 1987).

<sup>144</sup> Henry Summerson, 'The criminal underworld of medieval England', *Journal of Legal History*, 17(3) (1996), 197-224.

of law's past. However, the weight of the sub discipline's past historiography and the unwillingness of some to relinquish hold of Maitland's transcription project as a primary goal, leaves these 'gentlemen and scholars in white cotton gloves' chasing a chimera.<sup>145</sup>

In summary, in spite of positive indications, much work within this tradition is still resolutely opposed to the main tenets of the socio-legal movement discussed above. There is, for example, a widespread rejection of the idea that: 'the task of historians is to provide the raw material for sociological theories, or simply to test such theories.'<sup>146</sup> In short, the intellectual pedigree of traditional *legal history* remains closer to that of black letter conceptions of the nature, scope and role of doctrinal legal analysis, than historical contextualisation. This has resulted in the past in the suggestion to writers of contextual historical reconstructions of law in action to: 'send the work to a history journal'. One pre-eminent practitioner of the genre, Ibbetson, differentiates between what he characterises as 'internal' and 'external' forms of legal history, with the latter contextualised within its wider historical past. With admirable clarity at least, he sums up this policy of how those committed to strictly 'internal' forms of analysis typically seek to exclude so-called 'external history', including various institutional dimensions:

I should begin by drawing the more or less conventional division between external legal history and internal legal history. External legal history is the history of law as embedded in its context, typically its social or economic context ... insofar as it might be said to be the history of law in action, it is the action that matters. It is the way that law operates in society, which seems to have law as the given and its operation as the thing that needs to be examined ... by no stretch of the imagination could we say that any of these constituted parts of the history of law. So far as external legal history is concerned, we could almost say that the one thing that it is *not* a history of is law.<sup>147</sup>

This passage represents more than a simple labelling exercise, it represents the fundamental purpose of those who practice the Academy's *legal history*. What is rejected as 'external' histories by proponents of strictly 'internal' histories are those contextualisations, exemplified in the works of Hurst and Friedman, in which the social function of law is revealed as central to any understanding of how legal institutions

---

<sup>145</sup> The reference is to the necessity for wearing gloves when handling the ancient vellum plea rolls.

<sup>146</sup> Michael Lobban, 'Introduction: the tools and tasks of the legal historian,' in Lewis and Lobban (eds) *Current Legal Issues*, 6, p. 23. However Lobban does suggest in a more critical and pointed way, which targets those other members of this tradition who explicitly reject interdisciplinarity, that: '... the perspectives of sociology, or anthropology or philosophy can generate questions which may help the historian to make sense of his material.' *Ibid.*, p. 24.

<sup>147</sup> David Ibbetson, 'What is legal history a history of?', in Lewis and Lobban (eds), *Current Legal Issues*, 6, pp. 33-34.

operate and are shaped by general and specific goals, ideas and events.<sup>148</sup> More worryingly for this socio-legal historian, another generally excluded type of legal contextualisation is one that analyses the operation of law in the light of actual events taking place within its fields of application, even major disasters such as plagues, famine, war, and general social unrest, and their impact upon both the creation and application of legal measures.<sup>149</sup> However, as noted earlier, there are signs that contextual work is beginning to be recognised as part of the sub discipline and socio-legal and other researchers should take note. In spite of this, there is still a perception that the Academy's preference is solely for historical reconstruction that focuses on law as an intellectually autonomous professional culture. In short that the Academy only treats this topic 'on its own terms' addressing sources thrown up mainly by the legal process itself, that is: 'law that would have been recognised by lawyers in its time'.<sup>150</sup>

Equally on the negative side, in the past those who helped create socio-legal forms of historical contextualisation within the fields of private law found their contributions subjected to strong critiques by leading figures within the traditionalist internal school. For example, Atiyah's groundbreaking *Rise and Fall of Freedom of Contract*<sup>151</sup> provoked a severe critique from Baker.<sup>152</sup> This work has, however, been applauded by others.<sup>153</sup> Such contextualisation, which violates the principle of exclusion, generates controversy precisely because it represents a contribution to socio-legal studies. Insofar as members of the black letter tradition even discuss contextual writers, such as Weber's sociology of law, they typically criticise their 'neglect' of the protocols of formal legal argument.<sup>154</sup> Furthermore, the claims of one member of this tradition that, in order to understand medieval legal devices one has to have already acquired a social theory of feudalism, has rarely been taken up and followed by other subscribers to traditional legal history.<sup>155</sup> It is significant, that the irony if not absurdity of Ibbetson's position is, that contextualisation was recognised as vital by those early

---

<sup>148</sup> Hurst, *Law and Economic Growth*; Lawrence Friedman, *A History of American Law* (Simon and Schuster, New York, 1985, 2<sup>nd</sup> ed).

<sup>149</sup> For an exception see: Robert C. Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law*, (University of North Carolina Press, Chapel Hill, 1993).

<sup>150</sup> Ibbetson, 'What is legal history', p.34. For examples of supposedly 'internal' causal account of doctrinal developments, see Alan Watson, *The Evolution of Law*, (Blackwell, Oxford, 1985); *Legal Origins and Legal Change*, (Hambleton Press, 1991).

<sup>151</sup> P.S. Atiyah, *Rise and Fall of Freedom of Contract*, (Clarendon Press, Oxford, 1979).

<sup>152</sup> J. Baker, 'Review' *MLR*, 43(1980), p. 467.

<sup>153</sup> Smith and McLaren, 'History's living legacy', p.273.

<sup>154</sup> Joshua Getzler, 'Law, History and the social sciences: Intellectual traditions of late-Nineteenth – and early Twentieth – Century Europe', in Lewis and Lobhan (eds), *Current Legal Issues*, 6, p. 215.

<sup>155</sup> S. F. C. Milsom, 'The Legal Framework of English Feudalism', (Cambridge University Press, Cambridge, 1976).

pioneers of legal history whose traditions are still revered, if not followed, by current membership of the Academy.<sup>156</sup>

A further paradox is that such rejection of external or contextual historical reconstructions is typically predicated upon a commitment to a sharp dichotomy between law and politics, the latter being one element of law's 'external' context which must not be addressed. In this context, Hutchinson comments on the: 'cramping and pervasive spirit of a black-letter mentality that encourages scholars and jurists to maintain legal study as an inward-looking and self-contained discipline'. He continues:

the textual formulation of the law is regnant and is treated as a law unto itself<sup>157</sup> ... In short, black-letterism works as a convenient mode of denial. It enables legal academics and lawyers to engage in what is a highly political and contested arena of social life – namely, law – and to pretend they are doing so on a largely non-political way.<sup>158</sup>

Equally as critical, Smith and McLaren note that examples of contextual history need to be excluded precisely because they reveal the political nature of how this very dichotomy tends to operate in practice:

that history demonstrates the inherently political nature of law and legal institutions; that the legal profession has sought to maintain a clear distinction between law and politics in order to present law as neutral and non-political; and that historical analysis reveals the ideological nature of successive structures of dominant legal thought employed by lawyers to ensure this apparent separation of law and politics.<sup>159</sup>

However, some twenty years on from Friedman, there is a sense that finally things may be beginning to change, in line with the preface to his work. Then, he was deliberately provocative to the central tenets of internal legal histories, asserting:

this book treats American law then, not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as a historical accident, nothing as autonomous, everything as relative and moulded by economy and society.<sup>160</sup>

---

<sup>156</sup> On the distinction between internal and external contextualisations of law, see Smith and McLaren, 'History's living legacy', pp. 268-9, which remarkably identifies the work of Cecil Fifoot as falling into the latter camp: *ibid*, p.272.

<sup>157</sup> Hutchinson, 'Casaubon's ghosts', pp. 65; 69.

<sup>158</sup> *Ibid.*, p.84.

<sup>159</sup> Smith and McLaren, 'History's living legacy', p.277, referring to Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Oxford University Press, Oxford, 1977); *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, Oxford, 1992). See also A. W. B. Simpson 'The Horwitz Thesis and the History of Contracts', *University of Chicago Law Review*. 46 (1979), p.533.

<sup>160</sup> Friedman, *History of American Law*, preface, p.12. See also Rubin and Sugarman, *Law Economy and Society Essays in the History of English Law 1750-1914* (Professional Books, Abingdon, 1984).

Thus, those IALS socio-legal conferences mentioned above constitute one positive sign. In addition, there is evidence that writers within mainstream *legal history* have become more receptive to the need for their supplementation by the type of external contextual historical reconstruction that form a key element of socio-legal studies. For example, Getzler's, *History of Water Rights at Common Law* combines doctrinal black letter scholarship contextualised within both the contexts of both economic analysis and industrial history.<sup>161</sup> In addition, in a recent work Lobban, develops a cautious, if somewhat 'coded', critique of the purported self-sufficiency of traditional internal legal history:

The legal historian who focuses only upon the superior courts may be led to assume that the rules emanating from these courts were the most important manifestation of law in the society, since they had the highest status, or the finest pedigree. But their wider importance cannot simply be presumed. These concerns which seek to place an 'external' history alongside the 'internal' history of the law are particularly pressing for the legal historian of the early modern era.<sup>162</sup>

Lobban's introductory editorial review of Schneider's study of Victorian perjury law further develops and illustrates this critique by endorsing what is effectively a socio-legal view position, that legal materials remain unintelligible when interpreted in a non-contextual manner which excludes their social, political and policy dimension; concluding: 'It is only with the aid of the 'external' perspective that we can make sense of the 'internal' developments.'<sup>163</sup> In other words, there is a pressing need to open the closed doors and windows of this particular palace, to let in sufficient light from the world outside to illuminate what has actually taken place within and its implications for non-lawyers. However, Lobban does not follow through the clear implications of this position by claiming that the writers of mainstream legal history, which his co-edited collection has selected for publication, lack intelligibility.

This writer would endorse a wider and more radical view of the centrality of contextualisation, which recognises that even those materials which mainstream *legal history* recognises as 'law' cannot be understood unless their social and other impact is also grasped. Contextualisation of these dimensions of law also requires contextualisation of the impact of law upon society, and its pervasiveness as

---

<sup>161</sup> Joshua Getzler *History of Water Rights at Common Law* (Oxford University Press, Oxford, 2004), winner in 2005 of the Peter Birks Prize for 'Outstanding Legal Scholarship'.

<sup>162</sup> Lobban claims that: 'the legal historians' task "is not that of the antiquarian, gathering and recording all the data that can be recovered from the past ..."', in Lewis and Lobban (eds), *Current Legal Issues*, 6, p.26

<sup>163</sup> *Ibid*, pp.27-28.

a social phenomenon. Unfortunately, few, if any, of the leading writers of *legal history* attend, or otherwise contribute to, socio-legal conferences, or publish their work within associated publications. Hence, as discussed above, whilst socio-legal and other contextual law journals have published a considerable number of both implicitly and explicitly historical studies of law in action, few if any of the establishment legal historians have published their research in these outlets. Instead, their attachment to the orthodox positivist project means that they find publishing in more mainstream and conservative journals, such as *The Law Quarterly Review* and *Cambridge Law Journal*, far more attractive than distinctly socio-legal outlets. This, combined with their preference for internal histories, emphasises that this genre is far more closely aligned with conventional legal scholarship than with either history or socio-legal studies.

This issue of publishing is perhaps the most problematic barrier to a potential rapport between socio-legal scholars and the sub discipline of *legal history*. But, as noted above, there are signs of a subtle change. This in spite of the fact that, from its earliest manifestation in the nineteenth century at Cambridge University, the exponents of *legal history* have developed their own niche outlets for publication and designated routes for appointment and promotion within the heart of the Academy. To establish this, this writer has looked closely through the journals where socio-legal historical reconstructions have found a receptive home. Rarely do the six 'establishment' *legal history* journals appear.<sup>164</sup> The exception is the American *Law and History Review*, which publishes a wide spread of legal history, ranging from medieval studies to socio-legal and comparative legal history. It also includes a 'comments' section, which sometimes engages in debate concerning historical topics of interest to socio-legal scholarship.

Thus, with ready-made publishing outlets, there appears little material impetus for legal historians of the traditional kind to enter into, and contribute to, the socio-legal movement. Nor would the predominantly medieval and Roman law oriented themes of *legal history* offer much inspiration to members of the socio-legal movement, particularly the majority who firmly reject supposedly strictly 'internal' analysis of legal doctrine and procedures. It is not surprising, therefore, that this rather self-referential and relatively closed branch of traditional legal scholarship has failed to attract

---

<sup>164</sup> These journals are *The Journal of Legal History*; *The American Journal of Legal History*, USA (founded in 1957); the *Law and History Review*; and to a lesser extent the *Law Quarterly Review* and the *Cambridge Law Journal*. The oldest established legal history journal is *The Legal History Review*, founded in 1918 in the Netherlands, which publishes a wide range of international legal history.

widespread admiration from, or gained noticeable influence within, socio-legal circles. Perhaps more serious for the survival of this sub discipline, is its failure to recruit a significant following amongst young scholars to take the place of the current membership, many of whom will retire within the next decade. It is arguable that this form of historical reconstruction, rooted in the analytical framework of legal positivism, has become anachronistic in the wake of the rise of socio-legal studies and the social history of law. Furthermore, its very survival within the legal academy has almost become an historical curiosity in its own right.

More positively however, there are a number of signs that research focussed upon historical reconstructions of 'law in context' are experiencing a renewal in other areas of legal scholarship. Thus providing further evidence that the existing insulation of *legal history* from the interdisciplinary methodologies characteristic of socio-legal studies is beginning to break down, at least at the margins. Certainly in recent years, some researchers have developed a number of different approaches that transcend the traditional agenda by formulating research agendas that are distinctly contextual.<sup>165</sup> The beginnings of a new movement for a more distinctly historical, comparatively 'deviant', and thus controversial, type of historical contextualisation can be discerned. Thus, legal historians, both drawn from law, criminal justice and history, are increasingly writing on many aspects of life in the past, ranging from the lives of women written from a feminist perspective, to law and literature. More significantly, SOLON, the Inter-Institutional-Museum of Law Partnership Promoting Interdisciplinary Studies in Bad Behaviour and Socially Visible Crime, holds an annual conference around the theme of 'behaving badly', in 2007, this will take place in collaboration with the IALS and CCBH and IHR. In addition, SOLON is responsible for the publication of the journal in which this position paper appears.<sup>166</sup> This group has published themed collections of articles and the conference has created an environment where legal scholars, criminal justice researchers and professional historians meet to develop truly interdisciplinary and contextual historical reconstructions.

---

<sup>165</sup> Smith and McLaren, 'History's living legacy'.

<sup>166</sup> SOLON is a partnership between various academic departments at Nottingham Trent University, Oxford Brookes University, University of Plymouth, Manchester Metropolitan University, Liverpool John Moores University and the Nottingham Museum of Law (known popularly as the Galleries of Justice) promoting Interdisciplinary Studies in Bad behaviour and Crime. The next conference is 'War Crimes' October 2007, IALS. Publications include: Judith Rowbotham and Kim Stevenson (eds) *Behaving Badly. Visible crime, Social panics, and Legal Responses* (Ashgate, Aldershot, 2003); Judith Rowbotham and Kim Stevenson (eds), *Criminal Conversations: Social Panic, Moral Outrage and the Victorians* (Ohio State University Press, 2005).

## Conclusion

This writer was partly inspired to write this piece by an impression that *legal history* appeared to have little place in the 'law in context' concerns of the socio-legal movement. In addition, her initial perception of the sub discipline of *legal history* were that its black letter concerns, antiquarian interests and concentration upon 'internal' histories generally, and its specific rejection of interdisciplinary scholarship, precluded the history of law being assimilated within the socio-legal canon. However, this writer has noted growing evidence of support for the historical socio-legal project at both conferences and in publications, initially in the USA, more recently in the UK. Significantly, from the earliest days of the socio-legal movement there is also evidence of a considerable engagement with an historical contextualisation of law's past. This article has, moreover, argued that some areas of socio-legal enquiry, particularly that of law reform, cannot be undertaken by excluding reconstructions of the past that 'required' reform.

In summary, there have been a number of publications within the genre that are specifically intended as historical reconstructions of the emergence and transformation of law in action. However, an SLSA version of 'legal history', insofar as one can be identified, has more usually taken the form of a methodology for social-legal research embedded within the larger concerns of specific research questions. An historical perspective can be adopted, for example, to illuminate the development and changes in legal institutions over time, or to reconstruct the relationship between legal change and developing, stultifying or collapsing social structures. As such, even if remaining secondary to the main research purposes, historical contextualisation performs a valuable service to the socio-legal project and, perhaps, deserves more recognition and critical discussion than it has received to date. More damningly for such an argument, Reid has considered that, within the North American experience, their concentration upon methodology has: 'distracted us from the narrative component of legal history'.<sup>167</sup> However, a closer examination of the current place of historical reconstruction in laws' history in the UK reveals a more positive picture. Recent developments within the sub discipline of *legal history* seem to indicate that the resistance to contextualisation is beginning to weaken at the margins. Equally, there is a great deal more interest in historical reconstruction within the socio-legal movement than is apparent at first glance. In this context, this writer

---

<sup>167</sup> John Philip Reid, 'The Layers of Western Legal History, in ed McLaren *et al*, *Law for the Elephant*, p.23.

would suggest that it is time for all legal scholars involved in the project of historical reconstruction to acknowledge the common elements and openly debate the differences.

More personally, this writer, in using archival records, literature and legal and other primary sources for historical reconstructions, must acknowledge that the work by scholars from other disciplines has enriched her projects. This has led to her arriving at a number of conclusions drawn from her own and fellow researchers' experience. The first is that scholars are precluded from formulating an even-handed assessment by being unaware of research being produced from within other academic disciplines. This has resulted in the neglect of important source materials that, to some extent at least, other strands of scholarship have succeeded in uncovering. Acknowledgement of this truth would have the much-needed impact of counter-balancing the one-sided quality of the majority of prevailing discussions within certain branches of historical reconstruction. For example, studies of post World War II war crimes prosecutions have largely concentrated upon the major trials of the International Military Tribunal at Nuremberg, and that largely but not exclusively from either a lawyer or historian's perspective.<sup>168</sup> Thus, by returning to the work of, amongst others, archival, military, intelligence and cold war historians, and revisiting research produced from within Holocaust studies, this writer has begun a socio-legal project on the under-researched Allied 'minor' war crimes trials; using archival and legal sources to reconstruct the lived experiences of all those involved from investigation to trial: including lawyers, serving soldiers, intelligence officials, victims and accused.<sup>169</sup> The second point follows logically; that, in some areas of historical reconstruction, contextualising law and its pervasiveness with the lived experience creates a new sub genre of that discipline; or alternatively that some research requires such a level of interdisciplinarity that it in itself creates a sub discipline, combining research in law and history fully. Such a programme makes it possible to identify clusters of research projects where interdisciplinary research has the potential to reveal groundbreaking new material. Finally, as an alternative position, it could be that all these points in total indicate that legal history, comprising *legal history* and historical reconstructions in the broadest sense produced in and around a legal context, constitutes a discrete discipline in its own right.

---

<sup>168</sup> For an interdisciplinary approach to the IMT see: Michael Salter, *Nazi War Crimes*, (Cavendish-Routledge, Forthcoming).

<sup>169</sup> For a published excerpt of this reconstruction see: Lorie Charlesworth, '2 SAS Regiment, War Crimes Investigations and British Intelligence: Intelligence Officials and the *Natzweiler Trial*', *Journal of Intelligence History* 6 (Winter 2006/7), 1-48.

If any of these perspectives are adopted, singly or together, the results could contribute to the 'transcendence from within' of self-imposed disciplinary boundaries that currently restrict the vision and possibilities of both legal and socio-legal historical reconstructions. They, in turn, could allow for the fruitful expansion of the breadth of vision for many disciplines through both a process of cross-fertilisation of existing research findings and by encouraging new empirical research projects precisely in those 'overlapping' topics that mainstream contributors to these disciplines might not otherwise envisage on the grounds that they are 'too legal'.<sup>170</sup> Such interdisciplinarity hybridises and supplements aspects of all 'legal' research that gives equal weight to all sides of this evolving collaborative process. As such, this writer believes that it should be of great interest and value to those engaged in the socio-legal movement. Moreover, such hybridisations will not be sterile; to be precise, they could at the least initiate a new perspective upon the role of historical reconstructions within socio-legal studies and relocate them as a sub-genre/discipline, perhaps even a discrete discipline. In short, this writer hopes that those reconstructions could be pursued in their own right, transcending the methodological purposes to which they have so often been confined.

To this end, Cannadine suggests that the purpose of history is not merely a search for causation but also a: 'search for meaning'.<sup>171</sup> One way this could be achieved within legal studies is via a rapprochement between the socio-legal movement and traditional *legal history*. Another is, that those engaged in socio-legal historical reconstructions finally acknowledge what has become evident to this writer through this empirical study of their work. That is, those reconstructions are central to their larger project of demonstrating the pervasiveness of the lived experience of law. As such it would be timely for a much wider discussion on the nature and methodology of those studies than has been seen to date.

---

<sup>170</sup> See, for example, John Gillom, *Overseers of the Poor*, (Chicago University Press, Chicago, 2002). Gillom, a political scientist, contextualises his analysis of the lived experience of 'welfare mothers' within the legal framework and administration of the American welfare system, and frames this within the poor law histories of England and Wales and the USA.

<sup>171</sup> Cannadine, 'New Key in the Same Old Lock'.