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British Legal History Conference July 2009, University of Exeter, 'Making Legal History: Methodologies, Sources and Substance'

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SOLON Crimes and Misdemeanours

University of Plymouth

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British Legal History Conference 2009

University of Exeter 8-11 July

Making Legal History: Methodologies, Sources and Substance

In 2009, the biennial British Legal History Conference set out to examine the topic of 'Making Legal History.' Papers were encouraged to either exemplify the 'substance' of legal history or to concentrate on the methodologies of legal history. The latter objective is rather novel and as the conference website states:

this is the first time the methodology of legal history has been an area of focus in an international conference, and it is hoped that through this pioneering collaborative venture a greater understanding and appreciation of the multi-dimensional qualities and diversity of our subject will be achieved.¹

This exciting and original aim, coupled with the abundance of distinguished speakers, certainly promised the delivery of an insightful, informative and stimulating four days.

The conference began with plenary speeches from the two principal organisers. Chantal Stebbings spoke on the subject of Victorian legal history and Anthony Musson presented an interesting paper on the use of visual sources. The utility of different source materials was a recurrent theme throughout the four days; Dawn Watkins, for example, drew on Alexander Pope's poem 'The Rape of the Lock' to investigate legal issues of dispute resolution and Anat Rosenberg examined the meaning of contract within Victorian novels. It is, perhaps, easy for legal historians to concentrate solely or largely on statutes and cases, but the demonstrated utility of using alternative sources was a reminder that useful information relating to the creation, application or understanding of law can be found in a variety of places. This is an important methodological lesson and it was perhaps fitting, therefore, that the closing plenary exemplified this point. Richard Ireland's paper on 'Sanctity, Superstition and the Death of Sarah Jacob' drew on a plethora of source materials, from oral history to press sources, in order to reconstruct a curious Victorian prosecution for manslaughter. Ireland's brief mention of information allegedly received by a spirit medium from the deceased Sarah Jacob was probably raised for comedic purposes, but the abundance of sources available to the legal historian was, nonetheless, illustrated.

¹ <http://law.exeter.ac.uk/BritishLegalHistoryConference.shtml>

Many of the papers were consistent with the conference's first objective in their dealing with the substance of legal history. Michael Bennett's paper focused on the Sophia Vantandillo Case (1815), using it to illuminate legal issues surrounding public nuisance and public health. The prosecution of vehicular offences 1896-1939 and its relationship to the development of legal governance in this emerging area of concern was explored by David Cox. Of note was Cox's iteration of the criminological point that policing and prosecution are, to a fair extent, a matter of priorities and so a rise in certain types of offences often results from a shift in police/legal attention (rather than necessarily a change in public behaviour). The importance of the 'official' reaction was also central to Julie Evans' presentation on the constitution of jurisdictional boundaries in settler societies. Evans illuminated the area of colonial expansion by identifying a relentless quest, on the part of settlers, to establish some kind of legal legitimacy, and thus official approval, for their actions. Each of these three papers thus raised important questions relating to the boundaries of law, as well as its political and moral functions.

Some of the most thought-provoking papers made the very practice of legal history their primary concern. As an inter-disciplinary area of research, legal history encompasses certain tensions within its component subjects and several papers sought to remedy these problems by delineating some disciplinary boundaries. Dirk Heirbaut argued that, when dealing with non-written historical law, the central task of the legal historian should be to restate these laws and make it comprehensible to the contemporary mindset. To Heirbaut, the wider social, economic and political context of these legal structures is of secondary concern for legal history. It is, of course, important to appreciate the wider context within which law is made and applied, but the object of study for the legal historian should first and foremost be the legal context; the law, as it was, must be explained. Marcel Senn similarly sought to distinguish legal history from the multitude of competing disciplines which sometimes stray into this research area. Senn described recent methodological debates in German legal history, many of which were provoked by the social sciences or the humanities more broadly. Senn stressed that, while it is often fruitful to listen to the questions raised by other academic subjects, legal history should not rely on the same academic subjects to supply the answers. Legal history, it was argued, must get to grips with its own methodologies and epistemologies.

These disciplinary boundaries were challenged, to an extent, by Judith Rowbotham, who began her academic career as a historian before moving sideways into the field of legal history. She described how since this shift in her field of research many of her colleagues no longer regard her as a 'historian' in the strict sense, and as a non-lawyer she proposed that many in the subject do not view her as a legal historian either. Rowbotham's pronouncement that she is considered 'neither fish nor foul nor good red herring' aptly captured the dilemma of the inter-disciplinary researcher. But the traversing of disciplinary boundaries was deemed to be a positive empirical exercise, in the sense that Rowbotham proposed that historical and socio-legal contexts are crucial to examining the way in which the law is, and has been at various points in time, understood. Lorie Charlesworth explored the same sense of inter-disciplinary awkwardness but suggested the use of a methodology that avoids some of the complications of straddling two or more academic subjects. She argued that instead of imposing a pre-determined plan of action on the subject matter, the legal historians should let the sources dictate the methodology.

Charlesworth was also keen to stress that researchers should be aware of their own position within the research process. John Baker's candid admission, in his plenary speech, that 'I'm not sure I have a methodology as such' suggested a deficit in methodological self-reflection within the discipline as a whole. Internal factors, such as personal beliefs and values, clearly have the potential to influence understandings of history as, for that matter, do external factors. Marcel Senn referred to the work of Thomas Kuhn, whose description of heuristic 'paradigm shifts', for example the rejection of Newtonian physics in favour of Einsteinian physics in the twentieth century, exposed the historical changeability of bases for knowledge.² In this sense, the broader social and cultural context is a key determinant in how aspects of legal history, and all other academic subjects, are approached. Following Kuhn, claims to knowledge always rest on certain epistemological, ontological and methodological premises. This is the case even with the claims of knowledge that form the basis of an area of academic study, for example: the assumption that the law is socially important, relevant to people's lives and therefore worthwhile as an object of study; the idea that there is a 'truth' to legal and historical events which can be uncovered by looking at the right material; the premise that empirical work leads to more rational, therefore reliable,

² See Ray Pawson, 'Methodology,' (1999), in Steve Taylor (ed.) *Sociology: Issues and Debates*, (Macmillan, 1999) pp.21-49

depictions of this truth. All of these positions may be eminently defensible, yet this does not reduce the necessity of defending them.

The Nineteenth British Legal Conference did, therefore, produce some fascinating studies of legal substance as well as raising some methodological questions that are fundamental to the nature and future of the discipline. Not all of these questions, however, were answered. Many legal historians seemed quite uncomfortable when asked to critically reflect on their own research activities, and the ontological and epistemological foundations of legal history seemed something many delegates were reluctant to discuss. This conference was certainly useful and insightful, but it struck me rather as something of a beginning. It was the first international legal history conference to concentrate on methodologies and, in this respect, was effective in promoting a focus on this crucial area of the academic subject. The ultimate success of the conference will depend, however, on whether the British Legal History Conferences and the discipline as a whole retain an ongoing interest in the processes of making legal history, or whether it moves on thematically, consigning papers on methodologies and sources to the proceedings of 2009. In my opinion, it is vital that methodological considerations, as an aspect of both critical self-reflection and research planning, become a consistent focus of thought and debate for legal historians.