

'HOW IT ACTUALLY WAS'? A HISTORIAN RESPONDS TO 'ON HISTORICAL CONTEXTUALISATION'

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I found Lorie Charlesworth's article welcome, perceptive, impressively researched and, insofar as it is a manifesto, worthy of support. Here, I am singling out a small (though significant) part to comment on, largely because I find so little to disagree with in the rest of it. Her argument seems familiar, with good reason. In many ways the socio-legal project's relationship with black-letter law appears analogous to that between the study of social history and of political history. One half of each pair is a traditional preserve of the academy, while the other is often a provincial upstart, demanding that academic work can legitimately be focussed on everybody and everything, not merely the internal concerns of a ruling or cultural elite. The usual sites of such turf wars are the issues of methodology and personnel. Yet as well as the contestation between, there is a contradiction within, as Charlesworth (pp.11, 12) appreciates. For both social history and political history (and it appears also for socio-legal history and black-letter legal history) there is a tension within the proper relationship between the past and present. This tension is about the extent to which we allow the pre-occupations of the present to influence the study of the past, and it affects not merely our choice of topics of interest, but also our epistemology.

Charlesworth is rightly keen that the contemporary social, economic, cultural and political context of legal events must be studied if they are to be understood. This connects with the widespread view among many historians (of both tendencies) that the past must be seen in its own terms, rescued - in Thompson's justly famous phrase - from the 'enormous condescension of posterity'.² In the words of von Ranke, who laid the foundations of the modern profession of history in the nineteenth century, the aim of history was to communicate 'wie es eigentlich gewesen' – 'how things actually were.' In order to understand the past, it is necessary to avoid reading

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² E.P. Thompson, *The Making of the English Working Class*, (Pelican, 1968), p. 13.

(in Thompson's words) 'history in the light of subsequent preoccupations, and not as in fact it occurred.'³

Ranke's attitude stood in contrast to an older idea, that history was 'philosophy teaching by example', and its main aim was to educate and edify the population (with an emphasis on the literate ruling class), in order that they could better fulfil their social roles in the present. Ranke did not banish this view: it was memorably expressed in the twentieth century by Croce, who claimed that 'All history is contemporary history'.⁴ In this view, the pre-occupations of the present could not fail to write themselves onto our views of the past. More recently, the work of Hayden White has asserted that even if we want to judge the past in its own terms the act of writing its history necessarily locks us into the present, unable ever to represent the past fully.⁵

These two positions are extremes, and most commentators claim (with varying degrees of accuracy) to occupy some middle position between them. An excellent summary of the attitudes that the historian can take to this issue is provided by Hobsbawm, in his essay 'Partisanship'.⁶ One of his conclusions is that our present-day standpoints are legitimately harnessed when they benefit political and ideological causes through the exercise of scholarly exploration.⁷ Present-centred history can be very good history indeed. Loader and Mulcahy have demonstrated that history is too important to leave to historians with their recent *Policing and the Condition of England*. This is a history of the present, using oral interviews to describe the subjective views of policing in the UK within living memory, and to make sense of these views into an overall picture, which links these views to broader concerns about society, and the potential that it might hold. Among their conclusions is recognition of:

'the presence of public mentalities and sensibilities that cleave to the idea – and promise- of a particular reconstructed vision of English policing. . . [which] . . . retain[s] a contemporary presence and potential political force'.⁸

³ Thompson, *Making*, p. 13.

⁴ R.J. Evans, *In Defence of History* (Granta, 1997), p. 31.

⁵ G. Iggers, 'Rationality and History' in H. Kozicki (ed) *Developments in modern historiography* (Macmillan, 1993), 19-39, p. 28.

⁶ E. Hobsbawm, 'Partisanship' in *On History* (Weidenfeld & Nicholson, 1997), 124-140.

⁷ Hobsbawm, 'Partisanship', p. 133.

⁸ I. Loader and A. Mulcahy *Policing and the condition of England: memory, politics and culture* (Oxford University Press, 2003), p. 311.

By demarcating the role of an objective past and its relationship to an imagined one, they have immensely broadened our possible understandings of the present, and also showcased concepts and hypotheses which will undoubtedly help us to study the past. 'Present-centeredness' has here produced a fine interdisciplinary mix of sociology and history. As I will make clear below, though, it has its limits. Charlesworth's article champions the discipline of history, yet it also locates itself in a present-centred discipline: the study of the law. The moment where I part philosophical company from her is the very point where the polemic thrust of 'On Historical Contextualisation' reaches its climax: the condemnation of the closed-off and source-centred work of the traditional legal historians, who consider that the law has a very high (possibly even infinite) degree of relative autonomy. Black-letter law historians are working within a coherent intellectual framework of source criticism, and their methodology does allow them to understand aspects of the past. It is a narrow and circumscribed vision, to be sure, and it will not explain much on its own - but it nevertheless traditional legal history has an intellectual validity, and cannot be criticised for what it does. It is still possible criticise it for what it does not do, of course, though this is far less reasonable.

As Charlesworth points out (p.14) by her use of ESRC definitions, academic demarcation lines matter. And it is probably because I identify with the disciplinary norms that characterise the study of history; I am slightly concerned that she is opposed to (p.30) 'scholarship engaged within the framework of a black letter doctrinal legal analysis of that material, with a minimal contextual input.' Unlike Charlesworth (p.32), I agree with Lobban that historians, even legal historians, do not just exist to 'provide raw material for sociological theories': while that is *one* role that we can play, it is not the only one, and we should not need to refer to it to justify our activity. This might sound rather hypocritical given that I've spent an appreciable fraction of my own research career using historical methods to test sociological theories, but nevertheless it is often useful to know who did what to whom and when, so we can then think more clearly about the 'what'.⁹

More to the point, the contemporary study that does not make some implicit reliance upon historical knowledge is rare indeed: but for too many of these studies, what is being relied upon is received wisdom, common assumptions, or other notions about the past which rest on very weak foundations. In these circumstances, there is an

⁹ See C.A. Williams, 'Constables for hire: the history of private 'public' policing in the UK', forthcoming in *Policing and Society*, 2008.

honourable role for mere 'background' research, if it can therefore correct false premises about the past. Lobban resents any role for history as a mere 'provider' discipline, and Charlesworth is keen to integrate the history and the theory: along with many other social historians, I am in practice less proud than the former and less ambitious than the latter. Also in practice, whatever its aim, any successful historical research project is not a two-stage process, whereby the 'facts' are first gathered together and then analysed, but a constantly iterating one.

To some extent the community of interest between the socio-legal project, as defined by Charlesworth, and the social history one is worryingly total. Is there much, in this view that separates the two disciplines? Little or no social history entirely lacks a potential legal aspect; as is demonstrated in 'On Historical Contextualisation', no definition of the legal can explain much unless it goes beyond the black letter of statute and precedent to include *inter alia* relevant material considerations, the idea of equity, the concept of rights, and the public perceptions of the law: a list which defines almost all of the terrain of social history. Is there thus a danger that any definition of socio-legal studies which becomes sufficiently suffused with history will become as all-embracing as to be meaningless? Do we still need a line of demarcation, and if so, what should it be? To take a very instrumentalist position, I suppose that we social historians expect the socio-legalists to know about the law *per se*, as well as the wider context, and it will be this that is their distinctive ongoing contribution to understanding. Paradoxically, therefore, the value of the socio-legal-history project relies on the very black-letter skills – *but not just those skills* – which characterise those black-letter historians who would disdain the socio-legal approach.

I would like to end on a positive note. Charlesworth (p.36) offers a rather pessimistic, highly materialist view, that '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.' Perhaps, but insofar as academic sub-disciplines ever evolve, they tend to do so because some of their practitioners realise, however grudgingly, that the inclusion of new perspectives offers better explanations of reality. The new perspectives generally emerge from those who are inspired to turn to scholarship to answer questions posed by present circumstances. As Hobsbawm put it:

political partisanship can serve to counteract the increasing tendency to look inwards, in extreme instances the scholiasm, the tendency to develop intellectual ingenuity for its own sake, the self-insulation of the academy.¹⁰

The socio-legal approach, therefore, has the potential to benefit the entire legal studies project, including the practitioners of black-letter law. Despite the caveats registered above, insofar as 'sides' are a useful way to describe politico-academic arguments, Lorie and I are on the same one.

¹⁰ Hobsbawm, 'Partisanship', p. 140.

THE IMPORTANCE OF UNDERSTANDING THE PAST: A CRIMINOLOGIST'S RESPONSE TO 'ON HISTORICAL CONTEXTUALISATION'

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Charlesworth argues persuasively that legal history, especially that which contextualises law and behaviour, is a core component of socio-legal research. As a criminologist, I recognised many of the arguments detailed by Charlesworth, although in criminology the distinction is perhaps more between those who see history as crucial and those who treat it with indifference. As a researcher interested in comparative analysis, I would argue that historical comparisons are as important as cross-national ones, and that the two together provide additional insight into the form and function of legal institutions today.

The lack of a greater emphasis on comparative dimensions is surprising. The social sciences, and sociology in particular, were developed by a number of theorists - among them Marx, Durkheim and Weber - who used social conditions in different societies and/or at different points in time as the starting point from which to explain the nature of core social institutions and processes like capitalism and religion. What these writers were doing, in essence, was to identify variations in social conditions and social institutions and use the comparative method as a means of explanation. Much the same advantages can be attributed to a comparative perspective on crime, disorder and societal responses. Additionally, a comparative insight might allow us to improve structures and systems of criminal justice in the present.

In fact, some of the most insightful cross-national analyses in criminology build on an historical perspective. For example Wilbur Miller's ² early comparison of the emergence of formal police systems in New York and London proves invaluable to understanding contemporary police systems in the USA and England and Wales.

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² W. R. Miller, *Cops and Bobbies: Police Authority in New York and London, 1830-1870* (University of Chicago Press, 1970).

Following Charlesworth, this demonstrates how the police systems that emerged in the USA were not merely a case of policy transfer ³ from England and Wales, but incorporated the specific political, environmental and social conditions pertaining to nineteenth century America, including American concerns not to introduce an institution of control that directly replicated that of the colonial administration. More recently, Aldous' ⁴ critique of policing US occupied Japan tells us much about both the pre-war police system and the way Japanese reaction to US reforms fashioned the system that exists today, contrasting vividly with the more positive earlier assessment of the Japanese system by Bayley, ⁵ where it was offered as a panacea for many of the US's crime and disorder problems.

This raises the question of when, how and why legal institutions change, and in what circumstances resistance to change is evidenced. To discuss this, I want to focus on the police as a legal institution, and take two examples of change to illustrate how it is impossible to understand contemporary police systems without an awareness of the past. The two case studies I shall use are, respectively, those of British colonial and communist societies.

While the differences are often exaggerated, ⁶ it is generally accepted that the police system that the British government considered necessary across the Empire differed from that which was accepted in England and Wales. In the former case, it created a police system that was appropriate for the control of a subjugated population where the needs of economic imperialism required a politically controlled paramilitary force prioritising public order. ⁷ The model it used was the one first established for Ireland where the police could not rely on public consent. Colonial police systems can be characterised as: centralised and militaristic (for example armed and living as units in barracks); prioritising public order tasks; and deriving their legitimacy from their colonial masters rather than the indigenous population. Additionally, given the difficulties occupying powers had in recruiting loyal and reliable police officers, a

³ T. Jones, T. and T. Newburn, *Policy Transfer and Criminal Justice* (Open University Press, 2006).

⁴ C. Aldous, *The Police in Occupation Japan* (London: Routledge, 1997).

⁵ D.H. Bayley, *Forces of Order: Policing Modern Japan* (Berkeley, University of California Press 1991).

⁶ M. Brogden, 'The emergence of the police: the colonial dimension', *British Journal of Criminology*, 27, (1987) 4-14.

⁷ D.M Anderson and D. Killingray, (eds), *Policing the Empire* (Manchester University Press, 1991); D.M Anderson and D. Killingray (eds), *Policing and Decolonisation* (Manchester University Press, 1992); B. Cole 'Post -colonial systems', pp 88-108 in R.I. Mawby, (ed) *Policing Across the World: issues for the twenty-first century* (London: UCL Press, 1999).

common tactic was to recruit from either indigenous minorities or from other colonies, on the basis that such groups would be less likely to form allegiances with local people against the interests of the occupying power.

The extent to which all colonial police forces conformed to this ideal type is contentious.⁸ Equally, at different times under British rule the emphases shifted.⁹ Thus, in the later stages of colonial rule, as local groups campaigned for independence, the power of the police was increased.¹⁰ As a result, at the very time that emerging nations gained their independence, the police systems they inherited from their colonial masters were paramilitary, insulated from the local population, heavily involved in high policing, and prioritising public order policing. The Knowhow Foundation, established by the Foreign Office to educate new governments in the benefits of democratic/community policing, were consequently advocating the precise opposite of what the colonial administration had deemed necessary. Additionally, as Arnold explained in the context of the Indian situation, the political unrest that frequently followed independence almost inevitably led emerging governments to use the shell of the colonial police to establish their power base:

‘(I)t is hard to see that any significant change in police methods and attitudes occurred after independence, though nationalist leaders like Nehru and Patel certainly claimed that it had, and cited the departure of European police chiefs as clear evidence for this. Faced with a series of crises that threatened the unity and viability of the new nation state...governments in New Delhi and the provinces shelved indefinitely any possibility of a radical overhaul of the police organisation they had inherited from the British...Congress ministers took over the colonial police organisation (and its colonial mentality) largely intact, promoting to vacant senior posts Indian officers habituated to colonial policing roles and attitudes. The greatest value of the police to the new regime – as to its predecessor – was as an agency of coercion and intelligence...’¹¹

Consequently, there was not the political will to transform the police from a repressive force acting on behalf of government into a vaguely idealised democratic police service. The police systems in postcolonial societies, and the obstacles to reform in countries such as South Africa,¹² cannot be understood outside the context of their colonial past.

⁸ Anderson and Killingray, *Policing the Empire* (1991).

⁹ J.M. MacKenzie, ‘General editor’s introduction’, pp. ix-x in Anderson and Killingray, *Policing the Empire*

¹⁰ Anderson and Killingray (1992) *Policing and Decolonisation*.

¹¹ D. Arnold, *Police power and colonial rule: Madras 1859-194 7* (Oxford University Press, 1986) p. 58.

¹² M. Brogden and C. Shearing, *Policing for a new South Africa* (London: Routledge, 1993).

A similar case can be made for the communist police system that was created in Russia and transported to its Eastern European 'colonies', although in this instance historical contextualisation applies at two stages: the creation of the communist state and the shift towards democracy.

The police system that preceded the Bolshevik revolution in Russia was similar to that in many other Continental European states, being centrally controlled, militaristic, with wide ranging powers and responsibilities, but essentially established to maintain the control of the tsar. Following the revolution, the Bolshevik Party reconstituted an essentially similar system within which the role of the secret police (initially the Cheka, subsequently the KGB) was pivotal.¹³ This system was, from 1945, applied to the Soviet Union's 'colonies', the Warsaw pact countries. It differed markedly from that in other, less developed communist societies, such as the PRC, where the rural base to the revolution and traditional control based around local community and kinship responsibilities, combined with experiences under Japanese occupation, resulting in a centrally controlled police, but one that was much more dependent on local party networks to maintain conformity.¹⁴

In Eastern Europe, the important part played by the police in defending the political regime against insurrection was clear. In the GDR, for example, the 1964 police decree promised to 'Guarantee public order and security in the comprehensive construction of socialism in the GDR, reinforce socialist laws, and further the progress of society by foresight and prevention of crime'.¹⁵ In this respect, the police played a key role in repressing anti-Communist protests in the 1950s and in protecting the Honiker government in the early 1980s. It is also evident that overall the police in Eastern Bloc countries were charged with a wide range of responsibilities. For example in Czechoslovakia they were responsible for citizen registration under the national identity card system, while in Hungary, 'some of the tasks regularly assigned to the police would have been regarded (as) quite

¹³D. Kowalewski, 'China and the Soviet Union: a comparative model for analysis', *Studies in Comparative Communism*, 14(4), (1981) 279-306; L. Shelley *Policing Soviet society.- the evolution of state control* (London: Routledge, 1997).

¹⁴ Kowalewski, China and the Soviet Union (1981); J.A. Cohen, 'Reflections on the Criminal Process in China', *Journal of Criminal Law and Criminology*, 68, (1977) 323-355.

¹⁵ P. Cullen, *Working Paper II: The German Police and European Co-operation* (Edinburgh: Dept of Politics, University of Edinburgh, 1992).

nonsensical in a democratic framework'¹⁶ and Ward¹⁷ lists licensing, censorship and visa and passport control as police responsibilities.

One aspect of police functions that found expression in police structure is the crucial role played by the secret police. In East Germany, for example, the *stasi* was formed in 1950 - one year after the foundation of the new state - under the control of the Ministry of State Security. Its role was to consolidate communist control using a network of informants and it was responsible for the arrest of huge numbers of anti-Communists in the early 1950s.¹⁸ The *stasi* could conduct cases independently of the uniformed police,¹⁹ but in other cases was able maintain control through its infiltration of the *volkspolizie*.²⁰ Alongside the secret police stood the uniformed police: the People's Police Force, or *volkspolizie*, in the GDR, the National Security Corps in Czechoslovakia, the Civic Militia in Poland, and the Hungarian National Police. These forces, also highly centralised but under the direction of the Ministry of Interior, were extremely militaristic.

These systems provided minimal local or civilian accountability: secret police were accountable to the party and ministry, not even - in many cases - to parliament, and the emphasis placed on political functions meant that those recruited to both police and citizens' groups were chosen on the basis of party loyalty rather than other qualities and came under direct political control.

It is also notable that during the mid 1980s, as these regimes faced more overt public opposition, the repressive political role of the police became *more* pronounced. In Czechoslovakia, Zapletal and Tomin²¹ noted that the police were associated with brutality in the period leading up to 1989. Similarly Jasinski²² described the role of the police in attempting to repress *Solidarity* in Poland in the 1980s.

¹⁶ V. Dános, and I. Tauber, 'Relationship between the Hungarian police and society', pp 118-125 in L. Shelley and J. Vigh (eds) *Social Changes, Crime and the Police* (Chur, Switzerland; Harwood Academic Publishers, 1995) p. 119.

¹⁷ R. H. Ward, 'Police and criminal justice in Hungary', *Police Studies*, 6, (1984) 31-34.

¹⁸ Cullen, *The German Police and European Co-operation* (1992).

¹⁹ B.Cooper, 'The fall of the wall and the East German police', pp 239-252 in Pagon, M. (ed) *Policing in Central and Eastern Europe: comparing firsthand knowledge with experience from the West*. (Ljubljana, Slovenia: College of Police and Security Studies, 1996).

²⁰ Cullen, *The German Police and European Co-operation* (1992).

²¹ J. Zapletal and M. Tomin, 'Attitudes of the Czechoslovak public towards the police after 1989 in light of empirical investigation', pp. 190-194 in Shelley and Vigh (eds) *Social changes, crime and the police*. (Chur, Switzerland; Harwood Academic Publishers, 1995).

²² J. Jasinski, 'Crime Control in Poland: an overview', pp 6-10 in Jasinski and Siemaszko (eds), *Crime Control in Poland* (Warsaw: Oficyna Naukowa, 1995).

In the early 1990s, in the early days of the new regimes, changes to both police and penal systems were considered crucial. Jasinski²³ for example claimed that in Poland, 'It was generally accepted that one of the most important elements of the socio-political transformation was the far-reaching modification of the criminal justice system'. These commitments to new, democratic forms of policing were further encouraged by western societies keen to allow their new partners to benefit from their policy successes! For example, Britain provided partnership projects using a modified Knowhow Foundation structure, while the USA established a police college in Budapest to help train senior officers from former post-communist societies.²⁴

However, with the exception of Germany, where the police of the former GDR were absorbed into the lander structure, change has been less extensive than was promised. True, lustration - the reassessment of personnel and the weeding out of unsuitable officers – was a common option,²⁵ and changes were made to the police rank structures, uniforms etc. However, social and economic conditions in the wake of political reform led to an increase in crime and disorder, and a new, liberated media meant that insecurity issues featured more prominently in the press and on television, resulting in an increase in fear of crime and public pressure to ensure a strong police presence, with former 'repressive' police systems sometimes viewed with nostalgia. As a result, public opinion has shifted away from demands for liberal reforms towards concern that the police lack the powers to tackle crime effectively, with the former 'repressive' police even sometimes viewed with nostalgia.²⁶

Again, the importance of understanding the history of the police is crucial. The nature of the communist police system that was formed in Russia in 1917 owed more to the Tsarist police system that preceded it than to the principles of communism on which it was justified, as evidenced by the very different system that Mao created in the PRC. And without any prior democratic police model to re-establish, the new governments

²³ Ibid. p.7.

²⁴ O. Marenin, 'United States police assistance to emerging democracies', *Policing and Society*, 8, (1998) 153-167.

²⁵ I R. Dzialuk, 'National police profile, Poland', appendix V pp 102-115 in D. Fogel, *Policing in Central and Eastern Europe* (Helsinki: HEUNI, 1994).

L. Matei, 'National police profile, Hungary', appendix 1X pp 130-150 in Fogel, *Policing in Central and Eastern Europe* (1994); S. Pintér, 'The effect of social changes on the police', pp 109-117 in Shelley and Vigh (1995).

Simovcek, I. and Forro, P. (1994) 'National police profile, Czechoslovakia', appendix III pp 80 - 90 in Fogel, *Policing in Central and Eastern Europe*.

²⁶ R.I.Mawby, 'The changing face of policing in Central and Eastern Europe', *International Journal of Police Science and Management*, 2(3), (1999) 199-216.

of post-Warsaw pact societies came under populist pressure to retain essential features of the old system in order to maintain order in the scarcely seamless transition to capitalist democracies. Indeed, as with the move to independence after British colonialism, the Eastern European example illustrates the influence of the past and the power of resistance to change.

While I have focused on two case studies using the police as an example, the same could be said of other legal institutions. The example of the way the PRC adapted traditional mediation techniques into a communist framework is a case in point.²⁷ Countries in transition may look abroad for examples to use in constructing a new legal framework, and indeed, are rarely short of suitors attempting to seduce them with accounts of the superiority of their own systems. However, the institutions that work best in one society cannot always be transplanted to another society with a different structure and values, and, as in the police case studies, past institutional forms can be both pervasive and attractive. Political change is not, therefore, necessarily followed by dramatic changes to the legal institutions that were integral to former regimes. Criminologists, and socio-legal researchers, ignore history at their peril.

²⁷S. Lubman, 'Form and function in the Chinese criminal process', *Columbia Law Review*, 69(4), (1969) 535-575.

‘ON HISTORICAL CONTEXTUALISATION’:

A LAWYER RESPONDS

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At the core of Lorie Charlesworth’s argument is a paradox: certainly as an academic enterprise, law is intimately bound up with history; yet history as a discipline has been largely peripheral to legal and socio-legal scholarship. Her overarching argument is that it is time for this to change: historical work belongs at the core of socio-legal studies.

Both parts of the paradox seem to me entirely convincing. In defence of the first part, non-lawyers (and lawyers, for that matter) may need to be reminded how much of what legal academics do is based in history. Consider the core legal curriculum. The English constitution – the font of English law – is a set of historically situated statutes buttressed by (or buttressing, depending on your point of view) a set of conventions – shared assumptions developed in an historical context. In historical terms, EU law is very much the new kid on the block, but the perceived political nature of that subject also makes it also the subject where historical resonances are perhaps perceived most clearly by teachers and researchers. Much of the rest of the core curriculum is taught largely with reference to precedent, where cases sometimes hundreds of years old are taught as part of the fabric of the current law. This may be the case even when the historical law has ceased to be of much current relevance. For technical reasons, for example, constitution of trusts is still frequently taught with reference to Victorian marriage settlements, even though such settlements fell out of use following the Married Women’s Property Acts in the late nineteenth century. While law is of course also about the present, more than any other social science discipline, it cannot escape the past.

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If what we do as lawyers and legal academics is essentially historical, it is equally true that history has not taken a central place in socio-legal scholarship. Charlesworth chronicles some of the efforts that have been made. A good case flows from this survey that socio-legal studies in England was initially more interested in history at least in the early years than its counterpart, the Law and Society Association in the United States. Further, some historical work has entered the field through the 'back door' of legal theory. When Foucault was fashionable in the SLSA, for example, histories of the present and archaeologies of knowledge abounded. How far these constituted 'history' I will leave to others to debate; but they certainly did involve legal academics engaging with the past.

The current situation is not so encouraging. It would be difficult to claim that these often fascinating studies have created a place for history at the centre of socio-legal discourse. It is perhaps indicative that the index to members' interests in the SLSA directory does not include legal history as category. It does show up briefly under 'other interests', with only six scholars expressing an interest in the subject. Legal history streams or panels do occasionally show up at SLSA conferences, but only intermittently.

There is a particular irony to this, as social historians more generally seem to be engaging increasingly with subjects that might reasonably be termed socio-legal. In my own sub-discipline, much of the important historical work that has been done in the history of psychiatry in the last twenty years has involved the administrative aspects of the care of the insane – a topic that resonates strongly in the socio-legal realm. It is rare that this literature is cited by mental health legal academics, however.

Charlesworth makes a compelling argument for the role of history in socio-legal studies, but it is an argument that has been available since the commencement of the movement, some thirty years ago. As she notes, there have been a number of interested scholars and impressive historical studies over the years. If we are to see history move to the centre of socio-legal discourse, we need to consider why it has failed to do so over the last thirty years.

Certainly, there are institutional and practical reasons. Socio-legal scholarship has been traditionally allied with sociology, and those links continue. It has also been the place where new subjects outside the realm of classical legal scholarship can be discussed, even when that discussion does not extend much beyond internalist legal scholarship. In neither of these approaches does history necessarily figure large. In the roughly thirty years since its foundation, socio-legal scholarship has arguably developed into its own institution, and as socio-legal scholars know through their own research, institutions can be difficult to break into.

The standard problems of interdisciplinarity are similarly also present. It takes a good deal of time to master a second discipline well enough to be comfortable working in it, and to produce sufficiently good work to warrant publication. Funding councils and universities all talk a good game about wishing to foster interdisciplinary work, but those of us in the field are acutely aware how difficult it is in practice to get those projects to happen, and to get such projects to produce good results. It really is more work than just sticking to ones original subject. While all that matters, it is not obvious that it is a complete explanation. Other legal disciplines have broken into socio-legal discourse successfully (a variety of theoretical approaches being obvious examples here); why not history?

The answer, perhaps, lies in part within history itself. It is, I think, not accidental that the other commentators to Charlesworth's paper cite theories and debates about history, not about law. History is itself a contested ground, and that creates difficulties for its integration into socio-legal studies. History does not make generalisable truth claims in the way that other disciplines do. Whatever one may think about the ethical issues surrounding genetics, or the large-scale empirical studies of some sorts of sociology, they make claims to truth in a very different way from history. In the end, history is largely about what happened, and it is difficult to separate the universals from the contingencies in history's factual context. If asked if something will happen again, the good historian is likely to be forced to reply 'it depends'.

There are exceptions, of course. Anyone with even a passing knowledge of Iraqi history might have been able to explain with some certainty to those in charge of the recently invading forces that re-construction after the war was likely to prove a complex task, and similarly, there will be some legal debates about which history will

clearly have a lot to say. Much of socio-legal work however focuses on subjects where a variety of social, political, and cultural forces interact in complex ways, and where specific historical lessons will prove difficult to apply. A particularly clear example flows from the recent debates on reform of the Mental Health Act. History was almost completely absent from that debate, notwithstanding that Baroness Murphy, a member of the Joint Scrutiny Committee of the House of Commons and House of Lords charged with considering the bill, has a doctorate on administration of mental health law in nineteenth-century London. Simplistic criticism here is not appropriate. The more difficult question is what exactly *does* history of administration of the insane bring to debates about modern law reform in this area?

Viewed in this light, history is about contingency, and about the complexity of the past. That not merely poses problems for the practical application of history in a socio-legal context; it also conflicts with the foundation myths of law. Law as a discipline is in part based on a set of abstract concepts that are taken as true and meaningful – things like ‘justice’ and ‘rights’. These may be relevant to some aspects of socio-legal scholarship as much as to the traditional black letter legal academy. Take them out and academic law –socio-legal or otherwise - loses a significant part of its identity. Insofar as socio-legal scholarship has been about the expansion of the curriculum of study and the scope of research into new areas – medical law, landlord and tenant law and immigration law, for example – socio-legal scholars may rely on these traditional legal principles. The message from history, however is that the ‘rights of Englishmen’ (and Scots, Welsh and Irish, and women and ... well you get my point) are in fact not transcendent at all, but contingent, flowing from political and social factors in the past. In part, this re-enforces an important lesson for lawyers, socio-legal and otherwise: the rights we have, such as they are, were won through political struggle, and they are therefore always at risk. Complacency is not an option.

At the same time, the fact that history places those values in a framework of contingency undercuts the ideological force of those core values. Law, courts, rights and justice are not about transcendence; they are about what we have ended up with, through the haphazard historical rough-and-tumble of the last few hundred years. That does not suggest that law and history are complementary discourses; rather that history poses a fundamental challenge to academic law. Such a challenge was a part of the early socio-legal interest in history noted by Charlesworth, where

scholars conversant with Marxist theory were not afraid of inquiring into the ideological meaning and effect of law. Its return might well be desirable – the questions relating to the political use of ideology and law are as relevant now as they have ever been – but it would suggest a significant shift in the focus of much socio-legal scholarship. That in turn suggests a set of much more bruising political battles than Charlesworth contemplates in her article.