

# Foreword: Socio-legal studies and the humanities

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## Abstract

*This paper introduces a symposium on socio-legal studies and the humanities, justifying the originality of a dedicated special issue on this topic. The paper identifies and critically examines themes and problems in the literature before introducing the articles in the symposium and, finally, discussing areas for future research.*

One of the defining characteristics of socio-legal studies is to locate law in context. While the nature and extent of that context varies, and such variation itself generates debate about the preferred direction of socio-legal studies (Lacey, 1998; Hillyard, 2002; Erlanger, 2005), this concern with context has often admitted a range of interdisciplinary approaches to the study of law. Thus, significant contributions have been made to socio-legal study through the insights of a range of disciplines, including sociology and anthropology (Banakar and Travers, 2005). Consideration of the relationship of the humanities to socio-legal study – which is the focus of this special issue – has emerged more recently. Indeed, it might be said that it has yet to gain widespread acceptance as a field of socio-legal studies,<sup>1</sup> relative to a more established – though not uncontested<sup>2</sup> – consideration of the relationship of the humanities to legal studies generally. This issue seeks therefore to emphasise the importance of such scholarship.

## 1 Genesis and rationale

This issue, co-edited with Professor Melanie L. Williams, has its genesis in the One-Day Conference on ‘Socio-Legal Studies and the Humanities’, London, 5 November 2008, organised on behalf of the Socio-Legal Studies Association, with the support of the Institute of Advanced Legal Studies, University of London. Four out of the five papers in this issue were presented at the conference.<sup>3</sup> The remaining essay was commissioned separately.<sup>4</sup>

The papers selected for the issue aim to provide an opportunity to explore the intersection of socio-legal studies and the humanities.<sup>5</sup> That aim arises from a number of concerns. First, is the desire to reflect upon the possibilities for social, political and economic themes within some of the ‘law and literature’ genre. Given that much socio-legal scholarship has emphasised the importance of

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1 The Socio-Legal Studies Association based in the United Kingdom adopted in 2006 a new ‘strapline’, ‘Where Law Meets the Social Sciences and Humanities’.

2 For a discussion of some of this literature, see Williams’s essay in this issue, ‘Socio-legal studies and the humanities – law, interdisciplinarity and integrity’.

3 Those by Williams; Watt; McNamee; Wachspress.

4 That by Moran.

5 The idea for the conference was also prompted by the adoption by the Socio-Legal Studies Association of its new ‘strapline’ (see fn 1), and the fact that the relationship between the two fields had hitherto not been examined in a dedicated symposium.

'law *and* society', often informed, and particularly so during its early days, by social science insights (Harris, 1983; Levine, 1990; Thomas, 1996), the opportunity to consider the socio-legal insights in law and humanities scholarship deserves to be addressed. Yet, and moving to the second concern, there also exists the actual, and potentially valuable, contribution to socio-legal scholarship from those working, often in disparate ways, at the intersections of law and the humanities which also deserved recognition and a collective platform – certainly in response to the suggested emphasis on empirical research in socio-legal studies.<sup>6</sup> Such work, for example on literature,<sup>7</sup> language,<sup>8</sup> history,<sup>9</sup> philosophy, art,<sup>10</sup> and popular culture,<sup>11</sup> has broadened the ambit of legal studies. Insights from a number of these studies are extended in more particular legal studies, for example on film,<sup>12</sup> or are seen in reinvigorated legal theoretical studies drawing upon the humanities (Gearey, 2001).

The development of law and humanities scholarship is further reflected in the proliferation of articles in traditional law periodicals and more recent socio-legal journals,<sup>13</sup> and in the publication of dedicated journals to general<sup>14</sup> or specific<sup>15</sup> aspects of law's interface with the humanities. The interest in this field can be seen, too, in a number of special issues on law and the humanities<sup>16</sup> (or aspects of the humanities, usually literature<sup>17</sup>), the creation of specific academic associations,<sup>18</sup> and the development of subject sections within broader legal associations<sup>19</sup> which often schedule specific streams at their annual conferences.<sup>20</sup>

## 2 Existing themes and problems

Existing scholarship on law and the humanities lies predominantly in the field of law and literature.<sup>21</sup> It has become commonplace to categorise this latter field as comprising either 'law *in* literature' or 'law *as* literature' (Morison and Bell, 1996), though as Ward (1995) points out 'it is not always possible to delineate the two approaches, or indeed desirable to do so' (p. 3). Moreover, this distinction is insufficient to capture a prevalent cross-cutting phenomenon which is 'literature for law', that is the

6 See e.g. Adler (2007).

7 E.g. White (1973); Weisberg (1985); Ward (1995); Posner (1998); Freeman and Lewis (1999); Aristodemou (2000); Williams (2002; 2005); Dolin (2007).

8 E.g. Goodrich (1987; 1996).

9 E.g. Dale (2009).

10 E.g. Douzinas and Nead (1990); Levinson and Balkin (1991).

11 E.g. Chase (1986); Sherwin (2000); Thornton (2002); Freeman (2004).

12 E.g. Denvir (1996); Greenfield *et al.* (2009); Moran *et al.* (2004).

13 Such as *Social & Legal Studies*; *Journal of Law and Society*; *Law & Society Review*.

14 *Law and Humanities*; *Law, Culture and Humanities*; *Law, Text, Culture*; *Yale Journal of Law and the Humanities*.

15 *Law and History: American Journal of Legal History*; *Journal of Legal History*; *Journal of Southern Legal History*; *Journal of the History of International Law*; *Law & History Review*; *Legal History Review*. *Law and Religion: Journal of Church and State*, *Journal of Law and Religion*. *Law and Literature: Law and Literature*, formerly *Cardozo Studies in Law and Literature*. *Law and Philosophy: Journal of Ethics & Social Philosophy*; *Law and Philosophy*; *Legal Theory*; *Ratio Juris*. *Law and Performance: Masks: Online Journal of Law and Theatre*.

16 Smith (1976); Symposium (1994).

17 E.g. Hanafin *et al.* (2004).

18 Association for the Study of Law, Culture and the Humanities; Law and Literature Association of Australia.

19 E.g. 'Legal History', Society of Legal Scholars.

20 E.g. 'Law and Literature', Socio-Legal Studies Association, Annual Conference, De Montfort University, 2009; 'Law and the Humanities', Association of American Law Schools, San Diego, 2009.

21 For overviews of the development, see Balkin and Levinson (2006) (focusing on the USA) and Douzinas and Gearey (2005) (which contains a survey of the position also in the UK).

use of particular conceptions of literature for legal-centric analysis. Here, literature is not merely a mirror to law. This latter category includes both the use of such literature by legal scholars, and the markedly rarer use of such literature by lawyers, legislators, judges and other legal actors. It also more accurately captures literature which, while not expressly about legal institutions, courts, lawyers, etc., is interpreted with reference to legal issues, for example 'judgment' and 'justice' (for instance, Bell's (1996) analysis of Kafka's *The Fasting Artist*). Adapting these categories, therefore, we might translate their relevance to socio-legal studies and the humanities to: 'law in the humanities', 'law as one of the humanities', and 'humanities for law'. There is some evidence that the dimorphism that informs these categories is itself undergoing change, and that a new approach – 'transdisciplinarity' – involving the melding of different discourses, may be emerging. The following section explicates those categories, and identifies a number of problems with aspects of their approaches which a socio-legal approach would seek to redress, before elucidating the concept of transdisciplinarity.

### (a) Law in humanities

This approach tends to document those humanities, such as literature, which 'present themselves as telling a legal story' (Ward, 1995, p. 3). Thus, texts featuring lawyers, judges, legislators, legal institutions and legal actors fall within this category. The 'law and humanities' approach is diverse, including a range of ideologies, themes and sources too great to summarise here. However, a number of broad observations might be made. The first is that such studies tend to be based on the view that the chosen texts have 'humanistic' relevance to law. Sherwin (2000), for instance, argues that law, particularly justice, requires 'authentic enhancement' drawn from 'humanizing cultural tales' such as those of Scheherazade or Kieslowski (p. 262). A related view is that literature generates ethical sensibility, such as empathy. Dunlop (1991), for instance, argues that 'fiction stimulates the reader's capacity to imagine other people in other universes' (p. 70) (and he is not referring here to science fiction). Nussbaum (1992) has contributed extensive philosophical thought to this view.

There are a number of limitations and problems with such a 'law *in* humanities' approach. First is the danger that the chosen field, say literature, is being made to do too much in response to complex social, political and economic phenomena. A focus on text alone ignores the social origins of the constituting genre, the ideology of its authors (Eagleton, 1996), its relations with class and the political economy (Williams, 1958/1983), and the conditions for its reception (Hall, 1979). An associated concern is the absence of sociological and anthropological insight in the law and literature field. Where law-related texts are selected they tend to reify, even as they critique, state law, and therefore fail to engage with accounts of law as existing beyond the boundaries of state law (Silbey and Sarat, 1987). Overlooked are the micro-processes of regulation and attention to where rules are ignored and custom controls behaviour, as identified in key socio-legal studies (for instance, Macaulay, 1963). The focus in law and literature on the individual tends to reify the subject configuration intrinsic to liberal or neoliberal orders, so displacing any focus upon structural or corporate power. There exist also a number of problems with claims about moral improvement from the humanities. They pay insufficient attention to how morality is shaped and avoid the counter-evidence that appreciation of the humanities is no constraint on vile deeds.

Moreover, in relation to literature certain authors and texts recur, including Shakespeare (particularly *The Merchant of Venice*), Kafka (particularly *The Trial*), Melville (particularly *Billy Budd*) and Dickens (particularly *Bleak House*). This focus on the works of, mainly, dead, white, American and European males carries obvious limitations. Manji (2000) notes that little attention has been paid to portrayals of law in African literature, a theme that is further explored by Slaughter in his examination of postcolonial literature generally (Slaughter, 2007). There remains relatively little feminist or queer engagement, though exceptions exist,<sup>22</sup> and even less engagement with non-English texts.

22 For general feminist critiques see e.g. Fox, 1996; Aristodemou 2000; Williams, 2002; Lacey 2008. Sedgwick, 1990, offers one of the early queer and feminist critiques.

### (b) Law as one of the humanities

This approach, which emerged in the field of literary theory (principally with reference to deconstruction), treats law as literature (Fish, 1989).<sup>23</sup> Thus, the meaning of the text is contingent. Its meaning is not in its message, but in the experience it offers its reader (White, 1982), though, as argued by Fish, that interpretation is made within ‘interpretive communities’ rather than by singular subjectivity (Fish, 1982). While much of this work has been played out in the United States against the context of, and sometimes with specific reference to, the interpretative debate surrounding the US Constitution between ‘originalists’ – those who claim fidelity only to the text of the Constitution or its founders’ intentions – and those who deny such transparency on the basis of subsequent contingent interpretations, it clearly translates abroad. However, the deconstructive approach has been criticised for failing to acknowledge the social and political context of literature (Hutchinson, 1984; Aristodemou, 1993), and a more nuanced approach is now evident among some law and literature scholars, such as Ward’s (1995) recognition of the need for ‘knowledge of the author, his or her socio-historical situation and the audience which was “envisaged”’ (p. 42).

### (c) Humanities for law

Within this cross-cutting category can be seen the gravitational force of law. The humanities are deployed with reference to law. Literature, poetry, music, etc. are made centripetal to law’s pull. In its most pronounced form, literature is mined for its use in teaching lawyers how to write, read and teach more effectively (see Aristodemou, 1993, p. 165). However, literature’s orbit to law is seen also in legal scholarship, which privileges law as central to social relations even if it can at the same time flesh out the social and political context for its focus on law. Nor should the inspirational role of the humanities for personal choice to enter legal practice be ignored (see, for instance, Friedrichs, 1990). The concept of law deployed in much scholarship tends to be statist and positivist. Such an approach is also not only ahistorical and ethnocentric, but risks annihilating the artistic or aesthetic integrity of the work itself. In its worst form, this approach privileges literary prowess over any or significant engagement with the social, political, economic or cultural determinants of law.

### (d) Transdisciplinarity

More recently, an approach is evident which resists categorisation as inquiry driven predominantly by any one discipline and which seems to move beyond disciplines. This is evident, for instance, in Lippens’ rereading of Huizinga’s *The Waning of the Middle Ages*, a classic in historical and cultural studies which posits fifteenth-century Europe as an age of significant transition, an age of movement and hybridity (Lippens, 2004). Lippens’ rereading of the images in the book, alongside the insights provided by historical and cultural exegesis, enables him to argue for a new visibility of conceptions of justice at the dawn of modernity. His reading is not constrained or dominated by strict disciplinary perspectives. Such a transdisciplinary approach is reflected in Foucault’s archaeology of the *episteme* within which discourses (including legal discourses) might better be understood (Foucault, 1966/2002). Indeed, it may be noted at this point that historical studies appear to have ‘naturalised’ relations with other disciplines more readily – legal history scholarship, for example, is capable of wide-ranging, topically driven exploration, yet has achieved a degree of acceptance in the academy as a unifying force. As the creation of ‘disciplines’ is seen increasingly to reflect particular political interests and as interdisciplinarity is seen to represent dyadic and often compromised exchanges (Wicks, 2004) driven as much by institutional pressures as inherent value, it is arguable that a fresh concept which marks a break from those constraints and melds a wider range of discourses may be more productive. This concept might be termed ‘transdisciplinarity’.

23 An attempt has also been made to treat law as ‘art work’, with reference to opera (Bagnall, 1996).

What this symposium seeks to add to the existing literature is a socio-legal concern for context and a broadening of the resources deployed to make sense of cognisably legal themes.

### 3 The symposium

The essays in this issue address separately a range of humanities: literature, philosophy, visual culture and history. Their authors deploy a range of theoretical and empirical methodologies. Melanie Williams's essay, based on her keynote presentation at the conference, argues in support of the relationship between law and the humanities – a relationship which she describes as one of integrity, where law's 'integrity' conveys both moral principle and cultural integration. Rejecting an engineering model of law as superior to one informed by the interdisciplinarity of law and the humanities, she applies the insights of writers J. G. Ballard in his novel *Crash* and Thomas Hardy in *Tess of the d'Urbervilles* as well as those of the philosopher Bernard Williams, to conclude that we should remain alert to the messages available from the humanities and arts to understand the integrity of law. The use of literature also informs Gary Watt's essay on connection in Dickens's *Bleak House* and its relevance to contemporary law. Through a detailed examination of the characters in Dickens's novel, Watt argues that Dickens's emphasis on connection (and disconnection) provides lessons for law's deficiencies in expressing the varieties of connections between humans – which he illustrates with reference to the legal concepts of cohabitation and unincorporated association. As Watt indicates, Dickens's commitment to the theme of law's vulnerability in the face of human interconnectedness provides a material as well as aesthetic example of the links between the socio-legal and the humanities. This concern with law's failure to attend to the human echoes in the essay by Eugene McNamee, though examined with reference to the medium of the moving image and the concept of memorialisation, which has profound political and legal implications for societies dealing with their, often violent, political pasts. In a richly evocative recalling of the details of the film *Hunger* by Steve McQueen, a vignette on the hunger strikes by Irish Republican prisoners, and their families and warders in the 1980s, McNamee contrasts the film's aesthetic sensibility about witnessing the dead to that of the recent report of *The Consultative Group on the Past* in Northern Ireland which is concerned rather with what is owed to the living. McNamee concludes that *Hunger* suggests that the living gain a measure of their own humanity by bearing in mind the dead. The relevance of the image to law informs the next paper in the issue, Les Moran's study of a series of portraits of the sixteen Chief Justices of the Supreme Court of New South Wales, Australia. Here, Moran applies insights from art history to examine the aesthetic and technological continuities and changes that shape and generate these judicial images. This examination reveals how individuals, groups and institutions fashion and make public a range of key ideas, values and virtues about law in general and the judge in particular. Moran's study is a reminder of the intimate connections between representation, audience and power, especially as we move from the static era of the formal portrait to the dynamic image-creation of the Internet. Reliance on the insights of history to legal scholarship also informs the final essay in the Issue, a study by Megan Wachspress of the concept of 'sovereignty'. Using as her starting point the concept of 'sovereignty' in issue in a recent case on the application of US law to Guantánamo Bay, Wachspress brings together the work of historians and anthropologists to argue that we cannot understand 'sovereignty' without reference to its historical contexts, and provides a timely reminder of the links between law, ideology, history and policy.

### 5 Conclusion

In its digression from, though not rejection of, the traditional and early concerns of socio-legal scholars of 'law in action', the issue also allows critical reflection upon how we understand 'law' and its relation to 'society'. Within Fitzpatrick's description of socio-legal studies as 'an applied field [...]

in which inviolate law is related to social context' (Fitzpatrick, 1997, p. 148) lies a recognition of the instrumental orientation of a type of socio-legal studies which is reliant on an unquestioned, sacrosanct concept of law which is autonomous from society. This symposium seeks instead to emphasise what Sarat has termed the 'complex interpretative and cultural phenomenon' of law (Sarat, 2005, p. 1) through its engagement with the insights of the humanities. In doing so, it makes no claim to a preferred disciplinary or methodological framework for engaging in socio-legal study.

If an understanding of law in context is to be advanced through a socio-legal relationship with the humanities, it seems that a number of directions might usefully be mapped out for further research. First would be a more critical stance about the claims made for the 'humanising' effect of the humanities. Second, research would be informed by the insights of sociology and social theory whilst striving to move beyond the constraints imposed by traditional disciplinary boundaries – moving instead towards a transdisciplinary sensibility. Third, texts would be better situated in the contexts of their creation *and* reception. Too often, interpretation is made of texts without reference to the conditions under which those texts were created, and adherence only to interpretative experience is caught in a vacuum of subjectivities. Fourth, a more radical approach could be taken to the idea of law, and which normative concepts of law underpin inquiry. This might be linked to a greater awareness about contemporary legal theoretical concerns such as legal consciousness (Cowan, 2004). Concern about which texts are chosen might inform a final objective – to ensure against selections or interpretations which reinforce exclusionary practices, such as ethnocentrism. In these ways, further developments in socio-legal studies and the humanities would make a valuable contribution to the study of law in context.

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