GRIFFITH UNIVERSITY

Socio-legal Studies in the Ages of Empire and Businessman Bottles: An Historical and Political Account

Author

Duncanson, Ian

Published

2013

Journal Title

Law in Context

Version

Version of Record (VoR)

Downloaded from

http://hdl.handle.net/10072/165353

Link to published version

https://search.informit.com.au/documentSummary;dn=655417320022061;res=IELHSS

Griffith Research Online

https://research-repository.griffith.edu.au

Socio-legal Studies in the Ages of Empire and Businessman Bottles: An Historical and Political Account

Ian Duncanson

This article draws attention to the historical dimension of what we now term socio-legal studies because it has been neglected and because it allows us to recognise socio-legal studies' distinctive and multidisciplinary character. It is not the sociology or history of law, since both rely on an a priori assumption about the nature and existence of something called law, its teleology, or evolution, or its policy use and implications. This assumption most clearly emerges from Bentham's view that law is the sign of sovereign will, a doctrine enthusiastically adopted by East India Company servants in late 18th and early 19th century India and popularised for 19th and 20th century students of law by John Austin. It owes something, too, to the Hegelian separation of civil and political society, but the article does not have space to address this. England emerged from its 17th century struggles with a very different practical and theoretical trajectory from the Westphalian ideas of discrete sovereignties. In the writings of Locke and Shaftesbury and of the Scottish Enlightenment down to Adam Smith, the sovereign origins of law varied from the dangerous to the secondary. Politics, religion and law for them required a stable civil society so the primary questions were the social nature of human subjectivity and how this could be cultivated to accomplish harmony, the agreeable forms of disagreement they considered necessary for inquiry and progress. After the American war of 1776, imperial and domestic governments became more authoritarian, more under the control of figures like Matthew Arnold's philistine middle class of my title, 'Businessman Bottles', focused on short-term commercial gain and suspicious of theoretical endeavour. Cultural understandings of law were increasingly mediated by the technicians of law, at the Bar and elsewhere. Legal Studies at La Trobe, however brief its career and however uncertain but hopeful about its future we may be, as well as the opposition to its existence, can usefully be seen in this longer context.

> 'The three magistrates in that inn', said I, 'are not three government functionaries all cut out of one block; they embody our whole national life; the land, religion, commerce are all represented by them. Lord Lumpington is a peer of old family and great estate; Esau Hittall is a clergyman; Mr Bottles is one of our self-made businessmen'.[1]

To most Victorian understandings, teaching had to be *protected* from untrammeled liberty. The traditional High Churchman, HJ Rose, had

1 Matthew Arnold, *Friendship's Garland* (1871), quoted in Herbert Paul, *Matthew Arnold* (Macmillan, 1902) 126.

> written, 'We are going on no voyage of discovery. We know exactly the extent of the shore. There is a creek here and a bay there – all laid down in our charts … we know all this beforehand … and do not feel any uncertainty where we are going or feel it necessary or advisable to spread our sails and take our chance of finding a new Atlantis'.[2]

I Introduction

Emblematic of unadventurous rationality, a quality especially evident in the quotation from HJ Rose, a conservative Victorian clergyman, the relevance to my argument of the above remarks will become clear as the article progresses, observing the roller-coaster career of some aspects of socio-legal studies. For Euro-Americans of the 19th and well into the 20th century, discovery, a popular trope, was no longer a spreading of sails, a preparedness for the possible confrontation with the unknown. Categories – especially social categories – were settled, templates for the assimilation of greater detail were established. What could be known would expand, but how it could be known or thought about was subject to a good deal of control.

So, *as* certain modes of thought were recognised to be alternative perspectives about legality as a social phenomenon, unauthorised from a traditional perspective, protection from them has been deemed necessary by the conservative convention which has dominated Anglo-Australian conceptualising of law for two centuries. The possibilities opened by the Enlightenment for conceiving, not the substance, but the very idea of law, has largely been overlooked.

II Socio-legal Studies and the Enlightenment

Conserving is not inherently bad, radicalism is not inherently good, especially when the terms become substitutes for evaluations of outcomes, making choices. The Enlightenment, the most comprehensive revision of traditional thought in relatively recent times, and to which the humanities and social sciences are heirs, carrying with them what we now think of as socio-legal studies, was certainly radical. But if it left us with new choices, they are still choices. Luckily, no doubt, we are armed, if not armoured against the foreclosures represented by new Utopias. We know – do we not? – how to detect zeal and how to deflect its worst consequences. But, after a century of Leninism, Nazism, McCarthyism, perhaps we do not.

Thinking is, in this context, a good place to begin. It is a term that Hannah Arendt uses in relation to the interrogation and trial of Eichmann

2 RJ Helmstadter, 'The Reverend Andrew Reed (1787–1862): Evangelical pastor as entrepreneur' in RW Davis and RJ Helmstadter (eds), *Religion and Irreligion in Victorian Society* (Routledge, 1992).

in Jerusalem,[3] one which Conklin makes clear, she derives from Hegel.[4] That Eichmann does not, or cannot, after the Wannsee conference of Nazi officials which decided on the Holocaust, *think*, does not mean, for Arendt, that he was stupid or incapable of reason. At Wannsee, the 'Final Solution' to the Jewish 'problem' in central Europe was decided, adding to the liquidation of Roma peoples, homosexuals, the disabled and other 'undesirable elements', some six or more million Jews. The inability to *think* here means that, the rules having been decided upon, Eichmann's task as the assigned man of logistics was to carry out his orders, according not only to the legal rules, but according to the morality of the regime of which he had decided to become part. The policy goal of '*Judenfrei*' extended geographically beyond Germany and more deeply into the post-Great War German psyche than once believed,[5] and renders 'thinking' more crucial in Arendt's Hegelian sense to the task of learning.

'Business Studies' and commercial law as paradigms for arranging or dominating modes of thinking may not be a good beginning for thinking in the way that socio-legal studies has shown an inclination to do. Thus in 1781, in an enlightened age, some 60-odd slaves were thrown into the ocean from the British slave ship *Zong*.[6] Subsequent litigation about the incident 'was not a criminal prosecution, but a civil case in which underwriters argued about property'. It was a commercial case. If the slaves were jettisoned, the underwriters were liable for the loss, whilst if they died aboard the ship-owners would have to bear the loss … (the case) is about goods … whether right or wrong we have nothing to do with it'.[7]

The parents of Businessman Bottles, whom we shall encounter again, secured for him an education in what we would probably now recognise as business studies of some kind, one 'perfectly suited for his future avocation', none of your antiquated rubbish … mind constantly excited … lights of all colors – Fizz! fizz! Bang! bang!'[8] Have things changed in two and a half centuries? It may be worth adding another prescient quotation from Arnold's *Culture and Anarchy:*

> Right reason would suggest that to have a sheer school for Licensed victuallers' children, or a sheer school for commercial travellers' children and

3 H Arendt, *Eichmann in Jerusalem: A Study in the Banality of Evil* (Penguin, 1964).

4 W Conklin, *Hegel's Laws* (Stanford University Press, 2008). In J Derrida, *The Gift of Death* (University of Chicago Press, 1995), the distinction is drawn between morality, following or applying a code of moral rules, and ethics, taking responsibility for one's decisions without dependence on pre-existing rules.

5 T Snyder, *Bloodlands: Europe Between Hitler and Stalin* (Bodley Head, 2010); D Blatman, *The Death Marches: The Final Phase of Nazi Genocide* (Harvard University Press, 2011).

6 The practice was neither unusual nor confined to British slave traders.

7 J Paxman, *Empire: What Ruling the World Did to the British* (BBC, 2011) 28.

8 Arnold, above n 1, 128-129.

> to bring them up, not only at home, but at school, too, in a kind of odor of licensed victualism or bagmanism is not a wise training to give these children.[9]

Students afflicted by English philistinism failed two tests, so far as Arnold was concerned. As instrumentalists, practical men of affairs, as they were trained to become, their attachment to 'fizz fizz, bang bang' omitted consideration of long-term consequences. And, relatedly, as working class political power loomed, the middle class absented itself from any mentoring role. Some time ago, Ian Reid remarked upon the ethical shallowness and lack of humane or intellectual rigour that characterise much of the discourse of business and management writing.[10] The abdication from ethical commitments and from any consciousness of the need for education in critical thinking leaves, still, a breach that the media too readily fills; a gap with which unprepared recipients are unable to deal critically. The Anglophone business press was transfixed by the miraculous success of the deregulated United States economy inspired by Alan Greenspan, Chairman of the United States Federal Reserve, with scarcely any dissent. Adam Smith, his philosophy disinterred and deformed, became a new hero. How many of Smith's admirers have read and understood his entire *oevre*? One suspects, few.

Many have seen the destruction of the Twin Towers on 11 September 2001 in terms of insider trading,[11] since shortly before the events a number of traders made significant gold purchases and 'put' options on certain airline shares. After a catastrophe, the price of gold is likely to rise, and profits from subsequent sales are commensurately large. An anonymous Wall Street banker commented in the aftermath of the destruction of the Twin Towers in 2001, 'My first thought was, what does this mean for the price of gold?'[12] A put option enables one to buy shares in futuro, depressed, as the hi-jacked airlines' shares were likely to be, to sell when they rebounded.

From my necessarily restricted discourse of socio-legal studies in a short article, two questions and tactics suggest themselves. One obvious question, supposing Schall's and Poteshman's well-documented and shocking pieces to be correct, is how foreknowledge of a possible atrocity can be perceived as merely a source of profit – back to the *Zong*. A second question is how, amid the justifiably fevered emotional reaction to the

---

9 Matthew Arnold, *Culture and Anarchy* (Samuel Lipman ed, Yale University Press, first published 1869, 1994 ed) 72.

10 I Reid, *Higher Education or Education for Hire* (University of Queensland Press, 1996) see especially chs 3, 5, 6.

11 L Schall, 'Insider Trading 9/11: The Facts Laid Bare', *Asia Times Online*, 1995 <http//:www.atimes.com/Global_Economy/NC21Dj05.HTML>; AM Poteshman, 'Unusual Market Action Activity and the Terrorist Attacks of September 11 2001' (2006) 79 *Journal of Business Law* 1703.

12 Quoted in Poteshman, above n 11.

event of 2001, the cynical responses Schall finds are largely unremarked. One part of the law discipline produces people, as in the *Zong* case, for whom human death and suffering are simply units of business calculation. The aim of socio-legal studies is not to urge bleeding hearts further to bleed, but to ask how violations of the human sociability so central to Smith's thinking, can be so unremarked.

III The Origins of Socio-legal Studies

Historically, where does socio-legal studies begin? Its political possibility originates with the irascible Edward Coke. Intellectually, the Dutch, the north Germans and the French sketched the scene for broad political enlightenment. But Coke's challenge to the newly arrived Stuart dynasty provided a new muscle. For James I of England, VI of Scotland, royal courts were his courts, the judges his delegates. Parliament was his servant, to provide him with supply. The denial of Stuart claims, in the name of common law and parliamentary balance, fought over eight decades, provided the environment in which enlightened and ultimately some degree of popular government, could emerge.

Coke raised the issue, to be taken up by the Civil War radicals and the Convention of 1688 – what and for whom is government? In what context does it make laws, and how should we address their legitimacy? Universities in England could not grasp even the question. Locke, who began his consideration of the issue in, we cannot be certain, 1675, could write as he did because his patron, the Earl of Shaftesbury, shared his political views, was exiled with him for opposing the impending Catholic Absolutism of James II/VII, and because the earl wanted a gifted tutor for his grandson. Hutchison and Adam Smith were academics at Scottish universities in the early 18th century, but they were, as academic entrepreneurs in possibly the best educated population in Europe, able to craft their courses, charging modest fees amid a consensus that inquiry and learning were inherently desirable. Hume, disappointed by the poor response to his earliest writing, later earned a living from his essays and from intermittent and congenial employment – le bon David as he became known in France.

To an extent Edmund Burke, not a wealthy man, but an independent one, and Macaulay, who earned an independent fortune from his position as legal adviser to the Supreme Council of the East India Company in Calcutta, were free intellectually to roam, often to disturb conventional beliefs publicly. The courage to occupy this free space is not to be undervalued. A private scholar is, as Galileo discovered,[13] immensely vulnerable

13 He was compelled by the church to recant empirical findings which appeared to contradict Catholic cosmology.

to vested interests, a problem to an extent until recently alleviated by the institutional protection offered by a commitment to academic freedom within universities. Jonathan Israel has attributed the possible disintegration of humane values, the betrayal of the Enlightenment,[14] to the failure of universities, the main though not the sole modern custodians of scholarship, to transmit those values. Acrimony in university politics, the denial that knowledge itself has a politics, is not new. What is new, the betrayal of the humane values of enlightened thinking to which Israel points, is diagnosed with devastating acuity by Margaret Thornton.[15] The university, never the ivory tower so portrayed by enemies for whom critical observation and commentary were unwelcome, is rapidly becoming assimilated to the corporate world whose script is business studies with its short term and constantly changing certainties.

And here the Enlightenment's strength is also its weakness. If one distinguishes morality, with its normative protocols so analogous to legality, from ethics, wherein there is nothing but choice and responsibility for the outcomes of choice, this is not relativism, but an openness that leads in odd, paradoxical and often misunderstood directions. For Shaftesbury, writing in the early 18th century with a wider audience in mind than that of his contemporary, Addison, the philosophical practice of politeness and self-restraint formed the basis of a 'public', encouraging the free and constructive discussion of controversy and a vigorous culture.[16] In the writings of Hume, and to an extent, Blackstone, the irresolvable could be pragmatically resolved by resort to fiction: we agree that the sun 'rises' while being aware that it does not, and in defiance of logic, that it will 'rise' tomorrow because our experience is that it always has. In a commercial society, money is legal tender, something endowed with no value save the shared fiction of its worth. Arguing for the independence of the American colonies, Edmund Burke remarked that the constitution of Westminster sovereignty was a polite fiction akin to that of the monarch's right to veto legislation. Here we come closest to Bentham's accusation that Blackstone's fictions were in actuality lies.

But openness is open to the assertion of closure, even, one suspects, to the indulgence in closure's desirability. In Kant, enlightenment depended upon an enlightened monarch with a powerful army: upon Frederick the Great of Prussia.[17] Enlightenment was, Kant tells us, the Age of Frederick.

---

14 J Israel, *Enlightenment Contested: Philosophy, Modernity and the Emancipation of Man, 1670-1752* (Oxford University Press, 2006) 871.

15 M Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2011).

16 L Klein, *Shaftesbury and the Culture of Politeness: Moral Discourse and Cultural Politics in Early Eighteenth-Century England* (Cambridge University Press, 1992).

17 I Kant, 'An Answer to the Question, "What is Enlightenment?"' in James Schmidt (ed), *What Is Enlightenment? Eighteenth Century Answers, Twentieth Century Questions* (University of California Press, 1996).

France, too, had an authoritarian enlightenment: with the metric and legal reforms came the terror and Bonapartism down to 1870. Bentham, who came the closest to mainland continental enlightenment, curtailed open inquiry by reference to utility, ultimately to Malthusian economics, the workhouse, the Panopticon, Gradgrind and Bottles' teachers – and to Bottles himself. As an editor of Bentham's Panopticon writings, Bozovic remarks that Bentham leaned toward Romanov absolutism for the implementation of his program of penitentiaries.[18]

In the schismatic world of the Enlightenment, what defence does the subject have in the land where law is nakedly the sign of the sovereign's will? Well, free speech – obey promptly, criticise freely. But with whose permission does he or she exercise free speech? In his *Conflict*,[19] Kant casts philosophy in the role of persuasive ameliorator of any defect in the operation of the 'normative' faculties of law, theology or medicine: but suppose they do not wish to be persuaded?

IV The Legacy of the British (Whig) Enlightenment

One finds two flaws in enlightenment thinking, one is, as I suggested, in a sense necessary, its advocacy of openness, a virtue, but not without the pragmatic Whig suspicion – the requirement of remedies. Without banal remedies, what good are rights or aspirations? To proclaim openness, politically, epistemologically and, in the non-anthropological sense, culturally, is, I argue to admit the choice of closure. And with closure comes disciplinarity. It is no accident that Foucault discovers, at the apogee of enlightenment's practical implementation, discipline. Who and by what means, will disciplines be challenged? We await the answer, mindful, in Europe of the policing of legality. Elsewhere, significantly, academic freedom to criticise is curtailed.

As a precursor, not only the convict, the patient, the indigent, but the intellectual, finds boundaries, outwith which he or she has but an illegitimate ground on which to stand. And within this closure, within this openness to new ways of thinking culture, we find the origins of certain separations. As examples, the Jews find themselves welcomed, under the inscription at Dachau, *Arbeit macht frei*, by a performance of Mozart. A callow United States Secretary of State performs a classical piano sonata while senseless murders are committed in Asia. Saddam was a merciless dictator, but it was the liberators who, having installed Pinochet in Chile, destroyed sanitation, health and electricity, killed innocent civilians and massively increased morbidity and infant mortality in Iraq, while United States-armed Taliban militias destroyed progress there. Some lawyers

18 M Bozovic, 'Introduction' in M Bozovic (ed), *The Panopticon Writings/Jeremy Bentham* (Verso, 1995).

19 I Kant, *The Conflict of the Faculties* (Abaris Books, 1979).

are sensitised, if not empowered to confront these issues, but for many the Chamberlain mantra – these are faraway countries of which we know nothing – prevail. It is for this that socio-legal studies was established, and hence its temporary institutional demise, yet its scattering among other areas of study. Where these wider ethical and political concerns for 'faraway countries' have impinged upon a narrow disciplinarity of law, some institutions have closed their eyes and become myopic.

To return to the instructive 18th century, what the Whigs had managed to achieve, despite or because of the venality observed by Hume – members of the Commons sought Crown patronage and generally but not always, provided some stability for the executive branch of government – was an environment in which scholars like Hutchison, Hume, Smith, Burke and others could survey and evaluate the constitution, government and legality. The work of Adam Smith perhaps sums up their work, seeking a defeasible, dialogic, but rounded explanation of human society.

Smith, like Locke, began by attempting to explain the technology of human sociability, how people were able to socialise and why. For Smith it was important to identify what kinds of regulation were appropriate by those subject to them, from gatherer-hunters, through nomads, agrarians, to the commercial society with which he was familiar. Without an appreciation of societies at their various stages, by no means, for Smith, driven by an evolutionary teleology – they could go back and forth as their environment drove them – what underlay the regulation of their social orders was incomprehensible.

In a later essay on astronomy, published posthumously, Smith explained that, because of the nature of our language and the temptations to which it draws us, we write as if the laws we use to discern the universe are actually laws of the universe,[20] whereas they are the temporary language in which we try to grapple with the mysteries of the universe, including the place of ourselves within it. With new discoveries, inevitably these laws will change and we should be alert and sensitive to the controversies associated with those changes.

This is what, for me, summarises the legacy of socio-legal studies, and perhaps explains what has frightened the traditionalists, the untalented and, in Arendt's terms, the 'crackpots'. In Hannah Arendt's era, Jews and others were consigned to death camps. Today, and we should not shrink from recognising our complicity, we in Australia consign refugees, often victims of Western foreign policy, to concentration – not death – camps, although as the suicide, self-harm and ill-health rate increases on Pacific Islands it makes them seem that way.[21]

20 A Smith, *Lectures on Jurisprudence* (Liberty Press, 1982).

21 Guantanamo, Abu Ghraib and the secret kidnapping of foreign citizens to regimes that condone torture render the 'war on terror' indistinguishable from the policies which the regimes (often possessing oil) visit on their own subjects. 'Human

Like cultural, feminist and gender studies in the modern period, socio-legal studies exhibit a critique in a different Kantian sense: what are the ways in which we can say that we claim knowledge? What are the politics and political effects of opening those various ways to scrutiny? Without abandoning a concern with inequality between men and women in many fields, over the last decades feminism has produced nuanced approaches toward what equality means and how and in what circumstances sex is gendered. Cultural studies has extended the idea of culture beyond anthropology and class-oriented beliefs about what aspects of a culture are worthy of detailed attention. In some cases it follows FR Leavis' invitation to see English, in the Anglophone world, as a preparation for critical thinking more generally.[22]

The tradition of socio-legal studies, as I see it, does not assume an a priori nature of law properly so-called – in John Austin's phrase – to be teased out by reference to ordinary or official usage of the term – Hart's confusing and confused method. Still less useful is Dworkin's somewhat Jesuitical conviction that it defines a terrain upon which 'right answers' are to be sought (which invokes an image of children on a quest for hidden eggs on Easter Sunday). At least since Locke, the tradition explores how different social orders in which various kinds of normative regimes are possible, in what circumstances, and how they may be and when they should be maintained. Inquiry here takes us well beyond the phenomenon of official rule making and extends to the problem of how to identify officials and the proper limits on the claims made to exercise official power. Socio-legal inquiry, then, precludes the lazy route to identifying 'sources of law' adopted explicitly in many elementary textbooks and implicitly in the tradition of black-letter law syllabi, which are, one hopes, now seen as obsolescent.

Questions of the kind I have been suggesting are bound to be unsettling not least insofar as they suggest that 'traditional' disciplines, like, for example, in a different register, 'traditional' Scottish highland dress, are inventions of possibly dangerous intrusions made safe for complacency.[23] Areas of scholarship such as classics, theology, philosophy, history, economics from the 19th century, anthropology – and we must not forget our preoccupation of the present, law – have until recently, all been able

---

rights' then becomes a cynical gesture inadequately cloaking imperialism and exploitation. But see *The Age*, 5 January 2013 on the fate of refugees interned in uninhabitable tents on Manus Islands, PNG, an area infested with malaria. Australians, for the most part do not care, preferring (*The Age*, 4 January 2013) to be the first to own the latest iPhone. The Weimar Republic provides an unedifying precedent.

22 FR Leavis, *Nor Shall My Sword Sleep in My Hand: Discourses on Pluralism, Compassion and Social Hope* (Chatto and Windus, 1972).

23 E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (Cambridge University Press, 1992).

to disguise the politics of their epistemologies. It is difficult to know when the academic coyness beneath which political decisions about knowledge was concealed began, or where it will end. A gloomy guess about the latter would be when universities are finally reduced to the supermarkets predicted in Reid's 1996 text,[24] in which subliminally guided customer choice will reign, and customers will emerge bearing degrees in ice cream making and real estate sales.[25] All are worthy skills, but perhaps not what the university was first conceived to be for. Truffaut's 1966 film *Fahrenheit 451* is a whimsy, blending both pessimism and optimism in which traditional learning, suppressed as subversive in mainstream society, is preserved in remote locations, the preservators reciting their texts by rote for, presumably, future assessment. It is too early to tell what practically lies in between these University beginnings and what the sponsors will decide universities are, indeed, *for*, because therein lies a clue as to how in the future we are likely to think about law. Are we to see it, like Wells' time traveller, cycling substantially unchanged through history, an unproblematic object of knowledge, toward a teleologically if inscrutably defined end, as some legal historians have done?[26] Are we, as philosophers, like traditional art historians, to see our role as merely describing the qualities of the unproblematically existing great work?[27]

V The Socio-legal Tradition

The first of the opening quotations in my article is from Matthew Arnold's fictitious exchange between a Prussian scholar educated in the Humboldtian tradition beloved of Arnold – and of course, deserted in the pre-Nazi and Nazi era – in which universities are places of learning and inquiry – and a garrulous Englishman. The Englishman is ingenuously lost in admiration for both unthinking tradition and the unreflective 'practicality' of Businessman Bottles. The HJ Rose of my prefatory quotation embodies the philistinism which Arnold fears will doom Great Britain by reinforcing Bottles in teaching the rising working class not to speculate, not to think creatively, to become the prey of demagogic populists, and not to be effective citizens. Excessive thinking, indeed, in Rose's world, is to be avoided, leading, as it does, to uncertainty, disorder and unauthorised doubt. Rose's is a theological stare decisis, a confinement to

24 Reid, above n 10.

25 Jacques Barzun's nightmare; J Barzun, *The American University: How it Runs, Where Is it Going?* (University of Chicago Press, 1993) 217.

26 F Pollock and FW Maitland, *A History of English Law Before the Time of Edward I* (Cambridge University Press, 1895); SFC Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981).

27 See the criticism in W Conklin, *The Invisible Origins of Legal Positivism: A Re-Reading of Tradition* (Kluwer, 2001).

which students of law were subject during the years of British imperial dominance, persisting in many law 'schools' and journals until today. And here, perhaps, we have a clue: as the postcolonialists have told us, empire gave the rulers of Britain and the white colonies the illusion of authority. Question the Truth effectively and it bursts.[28] Disestablish the legal balloon, the notion that the legitimacy of law depends solely on its pedigree[29] and we have, as Hegel and Arendt put it, to take responsibility, to *think*.[30]

Legal education has varied in Great Britain over the centuries and subsequently in Australia, New Zealand and elsewhere. Where it has focused on training in techniques as *the* knowledge of law, it has, as Burke put it, 'placed too much emphasis on forms and procedures, taught the student little about the principles … and produced only narrow and contracted notions'.

Missing what Burke called 'the grandeur of law', jurisprudence was rendered 'coarse' and 'barbarous'.[31] The approach so condemned by Burke has obscured for us in the present the study of law in broad cultural terms, which today we would call the socio-legal. Elsewhere,[32] I have suggested that the plausibility of Bentham's claim that law represents the sovereign's will[33] derives from the expansion of British rule in India after Clive's conquests in the 1750s. A governor, subsequently a governor-general, so far from the East India Company's headquarters in Leadenhall Street, and from the British Board of Control, established in 1784, felt the need of sovereign authority over the millions subject to his control.

The legacy of Bentham's attempt to soften the apparent harshness of law as the will of the sovereign has been the creation of two normative regimes, one – morality – subordinate to the other, namely, the law. One is soft and diffuse, the other hard and defined. The gendered overtones could scarcely be clearer; we hardly need the blunt remarks of James Fitzjames Stephen and his hierarchies of sex, race and class to illuminate the mindset more fully.[34]

---

28 R Young, *Postcolonialism* (Blackwell, 2001); S Chakravarty, *The Raj Syndrome: A Study in Imperial Perception* (Rupa, 2007).

29 HLA Hart, *The Concept of Law* (Oxford University Press, 1961); J Raz, *The Authority of Law* (Oxford University Press, 1979).

30 Conklin, above n 27; Conklin, above n 4, chs 1, 9 and Conclusion; Arendt, above n 3, ch III; also B Simpson, *Reflections on the Concept of Law* (Oxford University Press, 2011).

31 Burke quoted in C Cone, *Burke and the Nature of Politics: The Age of the American Revolution* (University of Kentucky Press, 1957) 16.

32 I Duncanson, *Historiography, Empire and the Rule of Law: Imagined Constitutions, Remembered Legalities* (Routledge, 2012) 168 and following.

33 J Bentham, *Of Laws in General* (HLA Hart ed, Athlone Press, 1970) ch 1.

34 RCJ Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge University Press, 1988) 87; KJM Smith, *Sir James Fitzjames Stephen* (Cambridge University Press, 1988) 173; JF Stephen, *Liberty, Equality, Fraternity* (Cambridge

Obviously adepts in, say, law or medicine, require a grasp of whatever technical procedures are currently deemed appropriate. The question for socio-legal studies is why the study of legality should be entirely dominated and characterised by this requirement. I have suggested one explanation. The government of empire, in Great Britain's case, was the constitution of an illusion, an illusion of strength, unity, firmness and clarity of purpose. If India, as the major component of empire after the secession of the 13 colonies, could be portrayed as lacking these qualities, the appearance of imperial coherence and strength, then its possession by the British could be justified. There was no room here for the study of Indian cultures and the myriad customary norms proceeding from them, still less for the admiration or even adoption of those customs, languages and histories.[35] India was simply a degenerate host to superstition and irrationality[36] whose deficiencies could be supplied by the European rationality embodied in the Raj. And what better exemplification of that rationality could there be than the Benthamite sovereign origin of law? By extension, the gift of imperial government to its centre, the middle-class British male, physically stronger and intellectually more vigorous than the female or the labourer, must rule, or risk disorder.

VI Disciplines

Relatedly, other changes were occurring during the 19th century. Readers of some of the earlier English translations of Foucault will recall his concern with disciplinarity.[37] Social ordering through the medium of the prison, the school, the factory and the hospital increased surveillance, differentiation and the importance of boundaries, both physical and intellectual.

I shall suggest below that there was, beginning in the 17th century, prompted perhaps by the English radicals,[38] later by Locke,[39] a tradition of thought about forms of government and the basis of legal study in which

University Press, first published 1873, 1967) ch 5; R Krishnaswamy, *Effeminism: The Economy of Colonial Desire* (University of Michigan Press, 1998); A McLintock, *Imperial Leather: Race, Gender and Sexuality in the Imperial Contest* (Routledge, 1995).

35 W Dalrymple, *White Mughals: Love and Betrayal in Eighteenth-Century India* (Harper Collins, 2002).

36 TB Macaulay, 'Speech to the House of Commons on India' in TF Ellis (ed), *Miscellaneous Speeches of TB Macaulay* (Longmans, 1889).

37 M Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Tavistock, 1973); M Foucault, *Discipline and Punish: The Birth of the Prison* (Allen Lane, 1977).

38 HN Brailsford, *The Levelers and the English Revolution* (Spokesman Books, 1961).

39 J Locke, *Two Treatise of Government* (P Laslett ed, Oxford University Press, first published c 1675, 1961).

we can find the origins of contemporary socio-legal studies. There were particular reasons for the success of Locke and the enlightened Scots. They *were* able to draw on the work of the 17th century English radicals, if not directly, then because they had an audience made familiar with the radicals' work and the political problems they had faced. Locke's patron, the Earl of Shaftesbury, was an opponent of the Stuart dynasty and its slide toward Catholicism and Absolutism. Locke's writing, as we shall see, comprises a rounded account of the reasons people form government and why of one kind rather than another, of how they form an understanding of the world and of how they can best be instructed to exercise that understanding in the responsible formation of moderate and tolerant government. In a more obviously material way, he and the luminaries who followed, Hutchison, Hume and Smith, wrote for an audience who had the leisure and the education – and the inclination – to constitute a mannered society, and the wealth, to read the works produced. Hutchison and Smith certainly worked in universities for some part of their lives, but almost as intellectual entrepreneurs. Not relying on university bureaucracies or disciplinary boundaries, they were paid for their lectures by the products of a Scottish education. Burke, and one is tempted to add Macaulay, aroused economic interest in their legislative work, with which they gained the fame that would sell their work, and one of Macaulay's motives in serving as legal officer on the Supreme Council of India – which he served extremely assiduously in its own colonial terms – was to earn the wealth to become a writer and a legislator.

The context of this intellectual flourishing gradually changed with the end of the Atlantic Empire,[40] the political federation of propertied white men which Hume, Smith and Burke believed should abandon, to the advantage of all, its imperial status. More properly, perhaps, one should say, the world was changed with the accession of George III and his ministries in Britain and the mutually reinforcing flow of ideas among Hume, Smith, Burke, Franklin and Jefferson. The Scots continued to cross the Atlantic for academic reasons – John Witherspoon signed the 1776 Declaration – and lawyers continued to engage with social and political issues in the new republic. The Declaration is a socio-legal document, as are, of course, the Constitution and its amendments. Given the institution of judicial review, by state or the federal Supreme Court, social policy or its forestalling were always on courts' and lawyers' agendas. To escape the task of social engineering, as it came to be called, and whether or not one approved the result, became difficult for the US lawyers, increasingly

40 T Burnard, 'The British Atlantic' in JP Greene and PD Morgan (eds) *Atlantic History: A Critical Appraisal* (Oxford University Press, 2009) ch 4; B Bailyn, *Atlantic History: Concepts and Contours* (Harvard University Press, 2005).

taught in universities, and increasingly with the prerequisite of learning at large.

In England and its colonies the situation was different. Increasingly through the later Victorian period, legislative social reform emerged, often much in advance of that in the United States. However the lawyers who administered some of it, sometimes helpfully, sometimes obstructed by the prejudices of class and a robotic attachment to doctrine, were unengaged and professionally unconcerned with its purpose.[41] Pue remarks that, so isolated were barristers from the social world that they believed the myth that they stood for liberty between the government and the subject whilst, through the professional disciplinary tribunal persecution of progressive barristers, they stood in exactly the opposite position.[42] In all senses of the word,[43] discipline functioned to narrow the gaze of what might have been a broadly progressive, informed and liberating profession. Until past the mid-20th century, solicitors emerged from cramped law degrees or no degrees at all, to learn legal techniques by rote, while barristers emerged from elite secondary schools, following which there was no law degree or the same limited university training as potential solicitors.

With the second industrial revolution succeeding the one presided over by Wedgewood and his anti-slavery ceramics, Businessman Bottles succeeded long before his identification by Arnold, voraciously devouring slave products – the remnants of the slave trade, sugar, tobacco and cotton – to supervise his busy day. 'Outsourcing', depriving domestic labour of employment and adequate social security, putting overseas and poverty-stricken workers into dangerous factories and inhuman conditions, all supervised by Businessman Bottles and his lawyers. In the same way we turn on a television which is made in China and laugh at the Simpsons or Southpark ersatz criticism, pretending that we are being subversives by doing so, while not jeopardising our promotion prospects. Socio-legal studies is a reason for questioning this retreat from the world.

VII Conclusion

We are, quite literally in this issue of the journal 'in Context'. In what context? It must be admitted that the journal may not always have been as courageous as it could have been, but one hopes the future to be prestigious. We are in a world bequeathed to us by Kingston Braybrooke when

41 B Abel-Smith and R Stevens, *Lawyers and the Courts* (Heinemann, 1967); WR Cornish and GN Clark, *Law and Society in England 1750–1950* (Sweet and Maxwell, 1989) ch 1.

42 WW Pue, 'Lawyers and Political Liberalism in Eighteenth- and Nineteenth-Century England' in T Halliday and L Karpik (eds), *Lawyers and the Rise of Political Liberalism* (Oxford University Press, 1998) ch 5.

43 Foucault, above n 37.

we visit the original Department of Legal Studies at La Trobe University from which the journal originated. Braybrooke, to whom I want to dedicate my article, a student of Roscoe Pound's, and someone committed to the idea that law and legality should be studied as a phenomenon in society committed, not merely to the training of technicians, who should not be ignored, but to a multidisciplinary inquiry. I celebrate his wisdom and vision in the confident hope that it may be restored.

To Kingston Braybrooke.