

## Law Text Culture

---

Volume 12 *The Protection of Law*

Article 8

---

2008

### Protecting Law from Morality's Stalking Horse: The 'socio' in much socio-legal studies

G. Wickham  
*Murdoch University*

Follow this and additional works at: <https://ro.uow.edu.au/ltc>

---

#### Recommended Citation

Wickham, G., Protecting Law from Morality's Stalking Horse: The 'socio' in much socio-legal studies, *Law Text Culture*, 12, 2008.

Available at: <https://ro.uow.edu.au/ltc/vol12/iss1/8>

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: [research-pubs@uow.edu.au](mailto:research-pubs@uow.edu.au)

---

## Protecting Law from Morality's Stalking Horse: The 'socio' in much socio-legal studies

### Abstract

Invited a few years ago by one of the field's leading journals 'to stimulate discussion about the nature, role and future of socio-legal studies' ( JLS Editors 2002: 632), Roger Cotterrell (2002) and Paddy Hillyard (2002), two leading socio-legal scholars, stress the connection between the legal and the moral. Morality, they believe, is the heart and soul of the law. For them, only when socio-legal studies allows the law-morality connection to be its guiding light is it at its strongest. To list five of their examples, this type of morality-to-the-fore socio-legal studies is open to many influences, is flexible in how it interprets these influences, produces a rich diversity of intellectual outcomes, expands the boundaries of what counts as 'law', and, in doing so, is a leader in the utilisation of the work of Michel Foucault (Cotterrell 2002: 632–9, Hillyard 2002: 646–50). The field would be lost, they suggest, without the law–morality connection. This high regard for morality – as the driving force of law, as the very *raison d'être* of socio-legal studies – is hardly unusual: it is the common currency of the highly influential brand of socio-legal scholarship that is consistent with the individual reason-based tradition (exemplified by John Rawls, esp. 1971) or the communitarian tradition (exemplified by Alisdair MacIntyre, esp. 1988). Yet I contend it is very dangerous, threatening the role of the law as a vital cog in modern Western countries.

# Protecting Law from Morality's Stalking Horse: The 'socio' in much socio-legal studies

Gary Wickham

## Introduction

Invited a few years ago by one of the field's leading journals 'to stimulate discussion about the nature, role and future of socio-legal studies' (JLS Editors 2002: 632), Roger Cotterrell (2002) and Paddy Hillyard (2002), two leading socio-legal scholars, stress the connection between the legal and the moral. Morality, they believe, is the heart and soul of the law. For them, only when socio-legal studies allows the law-morality connection to be its guiding light is it at its strongest. To list five of their examples, this type of morality-to-the-fore socio-legal studies is open to many influences, is flexible in how it interprets these influences, produces a rich diversity of intellectual outcomes, expands the boundaries of what counts as 'law', and, in doing so, is a leader in the utilisation of the work of Michel Foucault (Cotterrell 2002: 632–9, Hillyard 2002: 646–50). The field would be lost, they suggest, without the law-morality connection. This high regard for morality — as the driving force of law, as the very *raison d'être* of socio-legal studies — is hardly unusual: it is the common currency of the highly influential brand of socio-legal scholarship that is consistent with the individual reason-based tradition (exemplified by John Rawls, esp. 1971) or the communitarian tradition (exemplified by Alisdair MacIntyre, esp. 1988). Yet I contend it is very dangerous, threatening the role of the law as a vital cog in modern Western countries.

On the back of some critical remarks about Cotterrell's and Hillyard's thinking, this article argues that the 'society' component in this type of 'law and society' thinking — the 'socio' of this type of socio-legal studies — is far too readily allowed to serve morality against the law, sometimes threatening to displace the law altogether.

(From now on I will use the acronym SLS in referring to the ‘type of socio-legal studies’ that is my target here — that is, the type that relies on either the individual reason-based tradition or the communitarian tradition.) Privileged as the fundamental locus of human interaction, ‘the social’ in this formulation serves as a higher ground, a place from which to view and condemn the instrumentalism of the law, as well as of politics and the state. In this manner, for SLS, the social is the stalking horse of a universal morality of reason and community that is never clearly specified — one that can be used, and is used often, to buttress ‘critical’ arguments against instrumentalism — against, that is, treating the law as an instrument that works independently of morality, reason and community. Drawing on some research in intellectual history, the article argues that SLS needs to be clear about which ‘social’, and associated morality, is being employed in its name and, at the same time, that it should be wary of the potential of this ‘social’ to minimise the role of law. Law, this is to argue, has to be protected from morality.

In terms of the governance of society — with society being understood as a distinct domain of relative liberty and security for individual subjects (see Wickham 2007) — law is an instrument operating alongside politics. In arguing this, I shall be highlighting the paradox that lurks in the oft-repeated exhortation that SLS engage in social ‘critique’ — the paradox that such ‘critique’ is actually directed against the very instruments that serve to create and protect the space in which it operates.

In the first section I offer a critical commentary on what I see as the weaknesses in Cotterrell’s and Hillyard’s arguments. Then, arguing for a more clearly focused SLS which will overcome these weaknesses, I address five overlapping questions in five other sections:

1. How should SLS better understand the contraband morality of the social?
2. How should it deal with the current dominance of a notion of morality as the universal morality of reason?
3. How should it better understand the social?

## Wickham

4. How should it deal it with the current dominance of a notion of the social based on the idea of *rational communio*?
5. How should it understand instrumentalism?

I conclude with a summary statement of the course I am proposing for SLS.

### The social on the loose

Neither Cotterrell nor Hillyard make clear what they mean by the social, or by morality. In singing the praises of the legal pluralist approach by which SLS may ‘specify a realm of the legal but not necessarily in categorical fashion’, Cotterrell (2002) says this approach helps situate ‘law’s ultimate authority’ by assessing ‘how far it corresponds with, or meets, felt needs for regulation of social relations’. Is this to suggest that law is related to the social in the name of some ultimate, universal morality of reason? There is not enough evidence in this one snippet to answer this question, but later, when Cotterrell pointedly rejects the idea of law as an instrument ‘acting on society’, a ‘Yes’ answer looks likely. And when he takes this point further, to reject law as a force ‘external to social life’ in favour of ‘law as normative ideas embedded in social practices’, a ‘Yes’ answer is certain (Cotterrell 2002: 637–8). For Cotterrell, I suggest, the social functions as both an ontology and a universal morality of reason. He confirms this when he urges that more attention be paid to Durkheimian investigations into the ‘moral foundations of law’. He goes so far as to say that this approach can be the ‘basis for a powerful moral critique of law’ (Cotterrell 2002: 640–1).

In Cotterrell’s conception, the social rules law and politics, not the other way around. Law and politics are to be measured against (and found wanting in terms of) the social, which is representative of a universal morality of reason somehow floating above us or within us. The fact that in the Durkheimian account this morality is said to be a collective human product makes little difference. The Durkheimian account gives the collective conscience the same ultimate universality granted in the accounts of the metaphysicians to the power of reason,

sometimes via the mysteries of God. The social appears to be this universal morality's servant on earth. Law and politics are rendered social, to be assessed in terms of an ultimate, universal sociality of reason. In other words, Durkheim ends up providing a sociological equivalent for Kantian morality. He takes Kant's idea that morality be thought of in terms of the collective willing of a community of rational beings (the 'kingdom of ends') and transforms it by finding 'sociological' equivalents for the willing in the ritual consciousness of mythic societies.

On a slightly different matter, I cannot see why we should follow Cotterrell's advice and have SLS 'help to redraw the legal map, emphasizing how and why the changing character of the social in transnational and intranational contexts forces changes in structures of regulation' (Cotterrell 2002: 642).

'The law', for the argument I am presenting here, refers to an ensemble of juridical institutions operating inside the security envelope of the state and, while perfectly concrete, this ensemble should not be thought of as 'part of' some organic social whole. More than this, it is an instrument that is used to help rule the social. Changes in the historical disposition of concrete forms of living may well be said to lead to changes in the nature of law, or be said to be governed by such changes, but not in a way that suggests a leading role for SLS. SLS should seek to describe such shifts as carefully as possible, but should certainly not seek to lead them, as if it has access to a privileged domain of the social that gives it some kind of moral or intellectual privilege in legal and political arenas. It hardly needs adding that I do not think SLS should be searching out 'sources of moral authority' for 'new transnational legal forms' or, more generally, that it needs to 'reassert links between law and morality, viewing morality as the varied conditions of solidarity necessary to the diverse kinds of relations of community that comprise the social' (Cotterrell 2002: 642–3). The law's authority is, rather, a contingent historical artefact of its contingent historical development — this is all it needs and all it can expect. In all this, as one of my anonymous referees pointed out to me,

## Wickham

the law is not distinct from its practice, where it deals with ‘social’ and ‘moral’ questions all the time. My point is that the law deals with these questions by, quite literally, ruling on them. In this sense, I should stress that my argument is particularly focused on public law, as captured historically by Martin Loughlin’s detailed study (Loughlin 2003) and politically by, for example, Jeremy Webber’s defence of public law as a component of democratic rule (Webber 2006). I will later say a little more about the importance of public law to my argument.

With this understanding of law, the search for ‘higher’ moral authority in the name of the social, and in the name of reason, is not necessary. Indeed, as I said earlier, it is dangerous. Both the social and the relations of community that comprise it are objects of government by the state, not realms which somehow provide a moral haven from such government. With Hillyard, we can see the conversion of the putative intellectual and moral privilege into the advocacy of moral indignation. Hillyard is even more explicit than Cotterrell about the centrality of an ultimate, universal morality of reason that supposedly underpins the social: ‘the future direction of sociolegal research should be informed by less theory and more moral indignation’ (2002: 646). The role of theory may need to be recast, but the field needs more moral indignation like a hole in the head. Hillyard is a very good social scientist and very good socio-legal thinker. As such, he should be aware that moral indignation runs in many directions. It was precisely to overcome the effects of the excesses involved in clashes of rival moral indignations that modern public law was developed (Loughlin 2003: 134–52). I think Hillyard is also mistaken in attempting to tie the empirical study of ‘the material realities of everyday life’ to a supposedly universal ‘social’ morality of the law; in attempting to make ‘social inequality’ not only the main focus of SLS but also the proof of law’s ‘immorality’; and in attempting, as part of this, to equate the notion of justice to a supposedly universal morality — a universal justice (Hillyard 2002: 651–6). To talk of ‘everyday life and its material realities’ should not be code for ‘a necessarily special space’, as it seems to be for Hillyard. Everyday life and its realities are most certainly important objects of law’s rule, but they are not important

because they contain a moral pattern for the way law operates or should operate. 'Everyday life' is just a name for that which we have not yet begun to think about or deal with. Attempting to alleviate social inequality is a vital part of the government of modern states. It might be argued that in some or all of these states this process is not going as well as it should be, or that it is being stalled by governments taking the wrong direction. But this is certainly not to say that law is immoral. To say so strikes me as a far-fetched argument which is far too reliant on an ultimate, universal social morality of reason against which law's performance as a device of government can be judged (and found wanting). Justice is important, but if it is stripped of its empirical centre in law and politics as they have historically developed in modern states it will be weakened to the point of fantasy or, worse, strengthened to the point of fanaticism.

Three other weaknesses should be highlighted. The first concerns the role of theory. Here the two authors ostensibly diverge. Where, as we saw, Hillyard wants less theory in SLS (to make room for more moral indignation), Cotterrell (2002: 636) wants more — 'to address the nature of contemporary law', to help it 'to map and organize the sociolegal realm'. While this looks at first glance like a potentially interesting argument between our authors, their joint reliance on an ultimate, universal social morality of reason strips the argument of its potential. Their ostensible disagreement actually dissolves as their reliance on a social morality of reason leads them to avoid the historical work needed to explore that disagreement. Anyone seeking a balance between theory and empirical work must at least acknowledge the historical circumstances in which the separation between theory and fact was formed, and neither Cotterrell nor Hillyard does this. There is not the room in this piece for me to discuss either the ancient or modern history of this core dualism in Western thought (for a stimulating account of the rise and rise of 'theory' as a separate sphere of intellectual endeavour, see Hunter 2006). However, there is room for me to say why an awareness of the history of the dualism between theory and empirical work is needed in this debate. To take a position without it, one way or the other, risks falling into one of the two



## Wickham

arms of this particular trap of social critique — the trap of making ‘theory’ a space in which sage-like figures (‘theorists’) can somehow rise above empirical necessity (Cotterrell), or the trap of endorsing an almost anti-intellectual veneration of ‘the facts’, as if they can speak for themselves (Hillyard).

Finally we come to the role in SLS of the considerable body of work by and around Foucault. Our authors are here, too, ostensibly at loggerheads. While, as noted, Hillyard (2002: 648–51) finds some aspects of Foucault’s work appealing, he does not like the pervasive influence Foucault has had on SLS, and not just because it is yet another example of a theorist pushing too much theory. He is particularly concerned about the dominance of the Foucaultian account of power. While he does not want to dispense with this account altogether, he thinks it is ultimately flawed in that it does not allow SLS ‘to differentiate between forms and strengths of power’. Cotterrell (2002: 637–9), by comparison, is a big fan of Foucault. He sees much to admire in the Foucaultian literature, including the work on power: ‘As Foucault revolutionized views of power, sociolegal scholarship should revolutionize views of law’. Cotterrell is especially taken with the possibilities for SLS contained in the literature around Foucault’s neologism ‘governmentality’. He thinks this is a positive way to deal with ‘the complex inter-relations between, on the one hand, actions of state agencies at many levels and “private” disciplinary strategies and normalizing practices that pervade social life’.

I think both authors overestimate Foucault. In light of Ian Hunter’s (1998) critical comments, Foucault and his followers’ ‘governmentality’ work looks too much like the ‘over-sociological’ theories these followers are keen to reject. By this I mean that the ‘governmentality’ body of work, like ‘over-sociological’ work more generally, allows the social to dominate the political and the legal, not allowing the space for these other categories to operate independently (I have developed these arguments against Foucault’s treatment of law elsewhere: Wickham 2006a).

I turn now to the task of answering the five questions I posed in the introduction. My answers, I reiterate, amount to an argument about the need for SLS to rethink its approach to the social (or society) and its associated morality, and in so doing to revive the autonomy of law and politics — in sum, to ‘make law central’ in ways Cotterrell’s subtitle (‘Making Law Central’) promises but does not deliver. In line with this, my answers add up to a need for SLS to more fully appreciate the importance of instrumentalism.

### **A strategy for SLS to deal with the contraband morality of the social**

SLS should thoroughly historicise morality in order to separate it from the sphere of the social, and when it does so it will discover that society does not provide the kind of moral-ontological bedrock assumed for it. Of great interest here is Blandine Kriegel’s *The State and the Rule of Law* (1995), an investigation of some early modern statist thinking, particularly in France and Britain (she is referring especially to Bodin and Hobbes; I will shortly add to this list two early modern German thinkers, Pufendorf and Thomasius). She borrows from Nietzsche the insight that when ‘the Greco-Roman heritage lost its early appeal ... it was Judeo-Christianity that became the moral tutor of the West’ (Kriegel 1995: 53), but not before she strips it of its romantic anti-statism by insisting that Judeo-Christianity be considered only in terms of its use by the early modern statist theorists.

Kriegel (1995: 33–4) takes us first through the history of a particular understanding of human rights, or individual rights, as the early moderns called them. The idea of human rights, she argues, did not spring suddenly from the loins of the eighteenth-century reformers and revolutionaries; we should not think of such rights as the product of the democratic and liberal thinking of this later period. Rather, we should focus on some early modern French and English theorists, who developed ‘a doctrine of individual right’ that is not individualistic in the liberal sense or populist in the democratic sense; it is not social, but statist. It is concerned with ‘the relationship between, and the limits

## Wickham

of, the rights of authorities and the rights of individuals'. For Kriegel, it was the breakthroughs made by these early moderns that made the eighteenth-century thinking possible.

Kriegel (1995: 34) also argues that the idea of the human being entailed in the notion of human rights is biblical. The Old Testament understood humans to be joined to God in a covenant. The New Testament added the idea that each individual has 'inalienable value', an idea not found, Kriegel emphasises, among the ancient Greeks or Romans. The early modern jurists, she tells us, took the idea of 'the supreme dignity of the human being' and developed it into 'the process by which slavery became indefensible'. They 'obstinately and patiently established the foundations for personal security and liberty, those fundamental rights that enabled us to emancipate ourselves from the state of war and servitude, and which we today take for granted'. The Jewish component, Kriegel adds, is very much a legal component. The Jews developed law as a 'path to securing their future ... The law, in sum, transcends territory and defeat and the ephemeral lives of individuals; it assures, so long as it is safeguarded and transmitted, the perpetuation of an identity' (Kriegel 1995: 37).

Explicitly linking this to later Christian thinking on the necessity of faith, Kriegel argues further that faith was the other vital piece of historical machinery that the early moderns inherited and fashioned into building blocks for the modern state. This is not to say, of course, that they took on the notion of faith exactly as they found it, simply tacking it onto the law. Instead they allowed faith to have a vital role alongside law precisely by privatising religion: 'The modern state ... left to the individual and to the church the task of salvation and concerned itself with justice alone' (Kriegel 1995: 37). On the back of this, the 'juridical sphere ... enjoyed considerable expansion: collective law had been extended to areas where only fragmentary rights had been acknowledged; a general system had taken the place of piecemeal rules with limited application; political right, in sum, had emerged to overtake civil law' (Kriegel 1995: 61).

## **A strategy for SLS to deal with the current dominance of a notion of morality as the universal morality of reason**

Here I make considerable use of Hunter's *Rival Enlightenment* (2001) to help make clear the current dominance of universalist (sociological and metaphysical) conceptions of reason. Citing Kriegel, Hunter (2001: 12) criticises the continuing, combined effects of metaphysical philosophy and dialectical historiography. He concentrates on seventeenth-century Germany after the Treaty of Westphalia, especially on the efforts of Pufendorf and Thomasius to build a civil philosophy. This civil philosophy, he argues, was developed as a rival to the then-dominant metaphysical philosophy. This is no stroll through the past, despite its erudition. While much of the furniture of modern law and politics appears to be firmly of this world, Hunter argues that the gains of the early modern statist thinkers have been whittled away by an ongoing metaphysical 'fightback' beginning with Leibniz and Wolff, immediately in the wake of the civil philosophers' work, but pushed along most forcefully by Kant and his followers from the middle of the eighteenth century onwards. Hunter argues that this fightback is still having its pernicious effects, both through dialectical historiography and through those forms of social theory that perpetuate metaphysical conceptions of reason. For example, in posing a criticism that is not difficult to apply to SLS, Hunter (2001: ix-x) says that 'the all-assimilating, all-unifying mill of dialectical philosophical history ... gives shape not just to history, but also to the [analyst of history] ... Under these intellectual conditions, the [analyst] views the past in terms of the unreconciled oppositions — between rationalism and voluntarism, intellectualism and empiricism — and finds his or her own ethical impulse in the need to repeat the moment of their Kantian reconciliation'.

In adopting this approach, Hunter is concerned to combat modern moral philosophy. Much of this branch of modern philosophy, he argues, was initiated as a direct challenge to the early modern civil philosophers. It was directed particularly at what Hunter sees as the

greatest achievement of these early moderns: substituting a worldly pragmatic political end — the preservation of social peace — for the suffocating morality of human reason (2001: 12). By Hunter's way of thinking, the state 'was not born to combat human sinfulness', and the goal of politics is not to attain 'general moral and economic well-being' or true community, but rather to attain 'political order', leading to social peace. Hunter (2001: 252–3) is adamant that it is this instrumentalist achievement that modern moral philosophy seeks to overturn, by demanding for itself the sole carriage of all matters of 'reason', insisting that 'reason' cannot be separated from morality and that morality cannot be separated from sociality. For Hunter, in other words, modern moral philosophy and social theory are the continuation of traditional metaphysical philosophy by other means. As noted above, most of his fire is directed at Kant and the Kantians. This is a long and fascinating argument, and one which we cannot follow too far; I borrow from it only what is necessary for my purposes — the formulation of a means to productively restrict the scope of the social as it is relevant to SLS, especially to restrict its reliance on the idea of a universal morality of reason (the following argument, unless otherwise specified, is drawn from Hunter 2001: 20, 271–304, 312–29, 340, Hunter: 2003).

Hunter wants us to understand the impact of those of Kant's arguments that take human reason as the model for God, as opposed to taking God as the model for human reason. For Hunter this is something of a conjuring trick as Kant actually takes his conception of human reason from the traditional metaphysical conception of God — God the divine intellect, creator of the intelligible forms (or noumena) that it itself intuits. But more than a simple conjuring trick, it is the basis of a move whereby modern scholars, including modern SLS scholars, attempt to elevate their own normative adoption of Kantian moral philosophy. By this argument Hunter means to challenge all those who elevate the norms they have inherited from Kant, whether wittingly or unwittingly, over any empirical description of the actual step they are taking in making the Kantian move. Hunter thus targets those who are keen to steer well clear of the idea that in taking this step they are the

children of a particular form of north German religious rationalism, one with its own political project — to overturn the achievements of the civil philosophers. In other words, the problem Hunter is dealing with is not that a Kantian morality is a competitor to a morality gathered together by the early moderns; this is not sour grapes over a big loss in some war of moralities. Rather the problem is that Kantian moral philosophy seeks to overturn the early moderns' strict separation of law and politics on the one hand from morality on the other (see also Wickham 2006b). To adopt David Saunders's (Saunders 2002: 2179) delightful turn of phrase, in a piece that seeks to reinvigorate the idea of the law's autonomy, where Pufendorf and other early moderns had worked tirelessly to combat the idea that law and politics are part of 'a stairway to salvation', Kant rebuilt the stairway but moved it to a different part of the house (see also Saunders 1997).

The Kantian position effectively serves as a defence of the universal morality of human reason precisely by denying the need for such a defence. It promotes itself as simply the expression of human reason, a force so fundamental it needs no defence. Certainly it rejects any defence that uses the realm of the empirical, for it holds that it alone commands the empirical, in the name of human reason. By this 'defence by not being a defence' (which, it is has to be said, has worked for over two hundred years), the realm of the noumenal — divine intellection and a universe of pure rational beings — is supposedly beyond human understanding. Yet it can also, it seems, serve as the standpoint from which moral judgments are undertaken, including the judgments of many of those working in SLS.

The notion of *homo duplex* is being asked to do a lot of work here. Basically, this is the Platonic anthropological premise that human beings have two natures — one a sensuous nature, which has us deal with the brute realities of life as it is experienced in time and space, the other a rational or intelligible nature, which not only has us deal with the world through the application of reason but also supposedly allows us to participate in divine reason and will. Hunter says that this Platonic anthropology was, crucially, the anthropology of German university

## **Wickham**

metaphysics in Kant's time. Kant did more than learn it, however. It became the anthropological underpinning of his moral philosophy. In particular, just as it allowed German metaphysics to perform the task of ethical self-formation, producing in its adherents a vision of themselves as pure rational beings with the capacity to overcome the weaknesses that flow from the 'other' side of human nature — the sensuous or empirical side — so it performed this task in Kant's philosophy. In this way, the notion of transcendence through reason (transcendence of the 'lower' self, but ultimately of all matters empirical) is not only passed on to others, as a sort of ethical grooming; it is also actively fostered in the self through a type of permanent dissatisfaction, a will to critique (for more on the idea of ethical grooming see also Brown 1988, Hadot 1995). We need not go into any more detail, but I note in passing that this is what seems to me to be going on with many of the moves Cotterrell and Hillyard make, and urge others to make.

### **A strategy for SLS to deal with the social?**

SLS might begin to reform its approach to the role of society, or the social, by heeding Kriegel's (1995: 5 n27) concern about what the romantic version of the social did to perceptions of the state: 'The state came to be viewed as an inert but complex mechanism dedicated to social reproduction; its motions are all reactive, parasitic on the active forces of society ... sucking the life from the social organism'. From the beginning of the nineteenth century, she continues, '[t]he word "social" would from now on cover everything', such that 'the romantic theorem of an immanent society' became the overwhelming intellectual force in social thinking (1995: 116–7). She laments the fact that, under the pervasive influence of romanticism, so many modern scholars seem unable to see that 'collectivity has been reduced to society and politics seen as nothing if it is not social ... We have forgotten that the social is not the whole' (1995: 118). In SLS this unfortunate tendency seems overwhelming.

Hunter (2001; 66 n34) thinks the most damaging effect of this problematic version of the social is its role in promoting a form of

history that ‘treat[s] civil philosophy as a defective expression of society and reason’, the form that ignores the vital ‘relation between the juridical and political dimensions of civil philosophy’. He condemns social thinking for treating the ‘political-jurisprudential character of civil philosophy’ as part of some ‘cultural–historical “failure”’, a failure to ground ‘law and politics in a democratically self-governed ... “public sphere”’. Hunter (2001: 66–7) argues further that this false social vision of seventeenth-century civil philosophy blinds us to this style of philosophy’s ‘(statist) political-jurisprudential character’ and imposes ‘a historical dynamic which is intrinsically oriented to a self-governing society or a self-governing reason’. For Hunter, as for Kriegel of course, ‘early modern politics and jurisprudence cannot be explained either in terms of a theory of ... society or in terms of a philosophy of subjectivity’. Law and politics cannot be viewed as simply epiphenomena of a social-moral ontology; they must be treated as irreducible institutional domains whose independence is itself an historical achievement arising from the desacralisation of politics in the early modern period. This is to say that SLS should not only historicise the social, it should historicise it by recovering the autonomy of law and politics.

While Hunter does not in any way dispute Kriegel’s arguments against the insidious effects of German romanticism, he heads in a different direction by investigating an underlying assumption of the romantic movement — the assumption of the Platonic anthropology of *homo duplex*, which we met earlier. His main focus is on the supposed superiority of reason — on the idea that reason can overcome the effects of our voluntaristic nature. For Hunter, Platonism has been able to continue to exert its sway largely, though not wholly, because of the way it was taken up and adapted in Christian metaphysics. He introduces the theme that a ‘Christian–Platonic pursuit of pure rational being ... drove metaphysical philosophy for Leibniz through Wolff to Kant and beyond’ (2001: x). Of especial interest to him, of course, is the way in which this package was used by the early modern metaphysical philosophers as part of their campaign to ward off the challenge from early modern civil philosophy. The ‘metaphysical anthropology of *homo*



## Wickham

*duplex*’ allowed ‘them to explicate the Christian mysteries and reveal the pure concepts of morality and justice underlying the civil order’. On this basis, ‘they claimed authority to limit the governance of the earthly city in accordance with the laws of its divine archetype, thereby advancing the interests of the academic-clerical estate’ (2001: 28). As such, he suggests, the metaphysicians encouraged an understanding of sociality based on ‘pure concepts of morality and reason’. By this way of thinking, people come together, as ‘society’, under the cover of pure reason-based morality, such that ‘disorder’ and ‘disharmony’ are sheeted home to a failure to overcome the effects of our voluntaristic nature — that is, to the failure to fully realise or exercise our capacity to reason. (I have elsewhere developed, as I hinted earlier, an extensive argument in favour of historically restricting the notion of the social, or society, as it is most commonly employed in the ‘socio’ disciplines, especially sociology: Wickham 2007.)

### **A strategy for SLS to deal with the currently dominant understanding of the social based on the idea of rational community**

In seeking to recover the autonomy of law and politics, SLS should also seek to recover the most viable alternative to the Christian-Platonic version of sociality available to it. This is the one that was developed by the early modern thinkers as laid out above. Thomasius puts the thinking behind its development extremely clearly:

[N]othing has been more responsible for derailing man’s natural pursuit of a long and happy earthly life than the mixing and confusion of these two kinds of truth; from this have arisen shameful exercises of priestcraft with all their attendant misery of religious tyranny and conflict ... [Thomasius targets especially] those who inherited the pagan philosophical conception of nature and mixed it with the Christian doctrine of creation — that is, the metaphysicians. Ensnared by ‘Platonic fables,’ the metaphysicians not only produced a bastard philosophical-theological conception of a creation divided into visible and invisible things, they also used their alleged insight

into transcendent being as the basis for doctrine-mongering and religious oppression (Thomasius, quoted in Hunter 2001: 85).

Hunter argues that in attacking metaphysical philosophy's reliance on the Christian–Platonic package in this way, Thomasius was engaged in nothing less than the ground-clearing stage of an attempt to build a different intellectual ethos, one 'suited to the jurists and *politici* of the desacralised state' (Hunter 2001: 10 n34). This would certainly be a better focus for SLS than fostering social critique. In building this alternative account of the social, the early modern civil philosophers 'enabled its bearers to separate their own deepest religious and moral convictions from the formulation of laws aimed solely at civil security'. In this way, through the effective 'privatisation' of religion — in this case insisting that people's religious beliefs not interfere with their now separate 'desacralised' public duties — civil philosophy helped ground 'the new doctrines of territorial sovereignty and desacralised politics in a specific intellectual department' (Hunter 2001: 28).

This 'detranscendentalising' of politics and law further marks the alternative version of sociality — whereby the social must be ruled rather than fostered, governed rather than celebrated — as a vital resource for SLS, if it is to be effective in this world. At the heart of the alternative is an Epicurean 'anti-metaphysical voluntarism' by which 'Pufendorf and Thomasius denied ... the transcendent truths of man's moral nature or moral community' in favour of an understanding of 'his limitless capacity for mutual self-destruction' (Hunter 2001: 89; see also Epicurus 1993, 1994, Joy 1987, Osler 1991). Pufendorf, Hunter says, in acknowledging him as the principal thinker behind the alternative,

characterises natural man as a creature whose weakness ... necessitates sociality for survival but whose 'vices render dealing with him risky and make great caution necessary to avoid receiving evil from him instead of good.' Unlike the beasts, man's appetites for sex and food are limitless and impossible to satisfy. Moreover: 'Many other passions and desires are found in the human race unknown to the beasts, as, greed for unnecessary possessions, avarice, desire of glory and surpassing others, envy, rivalry

## Wickham

and intellectual strife. It is indicative that many of the wars by which the human race is broken and bruised are waged for reasons unknown to the beasts' ... Man's petulance, his capacity for giving and receiving offence, combined with his extraordinary capacity for violence, makes his natural condition a very dangerous one, particularly when one takes into account the great divisions in human beliefs and ways of life. In short: 'Man, then, is an animal with an intense concern for his own preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits. Equally, however, he is at the same time malicious, aggressive, easily provoked and as willing as he is able to inflict harm on others' ... Man's life in the state of nature would thus indeed be miserable, unadorned, and short. It would not, however, be ungoverned by natural law or bereft of friendship as a primitive form of sociality. This is because man is indeed equipped by nature to know the natural law, even if he is not equipped to govern himself in accordance with it (Hunter 2001: 171–2; see also Hunter 2003, 2004, Hunter and Saunders 2003a, 2003b).

SLS would do well to see that Pufendorf is thereby offering to it a complex account of the social as simultaneously the outcome of human desire for companionship, the site of the worst excesses of human passions, and the site of the governance of those passions, by a combination of law and politics. By this account, humans are drawn into a realm of sociality and have, at one and the same time, and at all times, the urge to destroy the benefits of this sociality *and* the capacity to effectively govern this urge.

### **A strategy for SLS to deal with instrumentalism**

I have already indicated the way in which SLS might better understand instrumentalism — by treating law and politics as autonomous instruments used in building the type of state that fosters and protects individual liberty — but to fully outline a strategy for SLS to deal with instrumentalism I need to emphasise seven further points.

The first is Hunter's attempt to counter the bad press instrumentalism has received since the end of the seventeenth century. He says that we should, 'through a protracted exercise in intellectual reconstruction',

not think of the early modern instrumentalism as an unfortunate lapse, but rather as a ‘difficult achievement’ (Hunter 2001: 68).

Second is Kriegel’s summary of the careful distinction the early moderns drew between law and right, such that a right cannot possibly be an instrument without the operation of law; it is law that is the crucial instrument (Kriegel 1995: 62 n27).

A third and closely related point is that ‘desacralisation assumed a specific and limited form — that of ‘juridification’ — as a result of the fact that Protestant political jurists were forced to deal with the staggering problems of confessional politics and religious civil war in the only way they could, by juridifying them’. This use of law as an instrument, Hunter (2001: 82 n34) tells us, was not born of ‘secular-rational philosophy’, or ‘Roman law as such’, but of the ‘unique set of intellectual and historical circumstances’ whereby, ‘once it became abundantly clear that the religious wars were incapable of theological adjudication or military-political termination, Protestant jurists developed a series of measures designed to end the conflicts by securing the coexistence of the confessions within the legal framework of the Empire’. These developments, we should be clear, ‘were not the result of transcendent philosophical reflection whose culmination would come in the democratic natural law theories of the *Aufklärung*’. Rather, ‘they arose as unplanned consequences of a whole series of juridical improvisations undertaken by anonymous political jurists seeking the political-legal bases of social peace’ (Hunter 2001: 84). In other words, the type of law I am discussing in this article is made up of a set of mechanisms of rule, forged in extremely difficult circumstances, to operate alongside political mechanisms — albeit often in great tension with them, a point to be taken up in more detail shortly — to help restrain human violence and deliver greater security and liberty to a greater number of subjects. In this way, in criticising SLS, I am not criticising law *per se*.

Our fourth point is Kriegel’s extensive treatment of sovereignty (1995: 15–32), a vital part of her defence of the state. She rescues an instrumentalist understanding of sovereignty in criticising the anti-

statist tendency to confuse it with absolutism. She pays special attention to the early moderns' argument that 'public offices belong neither to lords nor to a prince, nor to a state, for they *are* the state itself' (1995: 26–7). Warming to her theme, Kriegel (1995: 27) compares what the early moderns achieved, with their understanding of sovereignty as a mix of law and politics, to what the later, nineteenth-century 'social' philosophers achieved by linking 'politics formally to economics':

This rejection of the doctrine of the independence ... of politics ... is the point of departure for later 'social' theory. The notion of the 'power of property,' of the spirit of the laws as the spirit of property, has in the wake of Marx been applied to all forms of society. The jurists had applied it only to feudalism. It is no exaggeration to say that social theory exercises a return to the seignorial doctrine; having shed its commitment to the independence of the legal and political realm, it winds up holding that the social is all there is (Kriegel 1995: 27).

Fifth on our list is the idea of law and politics operating together, an idea taken up by Kriegel and Hunter in quite different ways. For Kriegel (1995: 58–9), the early moderns, in seeking 'to juridify the political sphere', transformed 'the essence of politics', eschewing a return to classical models in favour of 'entirely original objectives': 'to discern ... the proper ... amount and distribution of power itself'. To be more precise, the early moderns, as 'doctrinarians of sovereignty and defenders of the rule of law, kept the link between power and law that was forged by feudalism, but they inverted the relationship between the two. Instead of trying to balance laws with powers, they subjected power to law and in so doing civilized the law'. By Hunter's arguments (and mine), the relationship between law and politics is tenser than this. For him, inasmuch as 'the relation between political and jurisprudential conceptions of the desacralisation of civil governance ... holds the key to understanding what is meant by "civil" in civil philosophy' (2001: 74 n34), attempts to juridify politics should be understood as always being matched by, or countered by, attempts to politicise law, and vice versa. In furthering this line of argument, Hunter (2001: 83–4) talks of the development of German public or political law, *Staatsrecht*, as a 'specifically juridical autonomising of political governance'. In this way,

he sees the coming together of law and politics as the union of two 'independent strategies ... each drawing on the intellectual resources at its disposal in order to forge instruments capable of meeting the challenge to governance posed by religious civil war'.

Our sixth point is Hunter's debt to the work of Carl Schmitt. He sees Schmitt as an ally in 'the "intellectual civil war" between civil and metaphysical philosophy', inasmuch as Schmitt 'deliberately targets post-Kantian "political Romanticism" for its treatment of historical politics as the manifestation of transcendental-subjective categories, thereby reducing the contestation between political enemies to an a-political debate over the good life' (Hunter 2001: 11, see also Schmitt 1976, 1986). Of course, Hunter is not taking on board Schmitt's unfortunate tendency to push his arguments towards their totalitarian extreme. For Hunter, as for Kriegel and for me, arguments such as those being put here are much more useful for promoting a style of political centrism — one that respects the need for authority and sees in its careful exercise the greatest likelihood of delivering widespread security and liberty for individual subjects — than for promoting totalitarianism.

Finally, we have Hunter's (2001: 77–9) argument that the 'desacralisation of politics' was 'not the reflex expression of an epochal philosophical breakthrough or general rationalisation of society'. He draws especially on the work of Horst Dreitzel, who seeks to resuscitate the thinking of the seventeenth-century political theorist Henning Arnisaeus: 'Arnisaeus conceives of political order as the historical form of rule or domination characteristic of a particular kind of society ... not as a constitutional order imposing normative limits on the prince's conduct, but as an empirical reality whose maintenance constitutes the "scientific" end of the prince's political action'. Hunter concludes that this secularisation of politics was the result of a pointedly instrumentalist move:

In reconstructing politics in terms of the instrumental maintenance of any historically existing form of rule, Arnisaeus sought to render it autonomous of scholastic moral philosophy in general. In particular he

## Wickham

sought to free politics from its Aristotelian conception as the form of rule required to realise man's moral nature or his moral *communio* ... to make the concept of the state independent of all moral-philosophical and religious foundations ... to autonomise politics by expelling the church from the state, seizing that eternal ecclesiological stalking-horse — the moral community — and transforming it from the source of sovereign power into the latter's main target (Hunter 2001: 78).

Taken together, these seven points help further our understanding of what SLS might achieve by ditching its reliance on the idea of a universal social backed by a universal morality of reason.

## Conclusion

Having carefully specified the target of my remarks — the type of socio-legal studies that relies on either the individual reason-based tradition or the communitarian tradition, both of which place morality at the centre of their concerns, which I have referred to throughout as SLS — I have developed an argument towards the proposition that SLS needs to completely reinvigorate the prefix 'socio'. My argument has it that the best way to do this is to retrieve from early modern Europe the hard-won autonomy of law and politics. This autonomising was crucial for the development of the politico-legal governing arrangements that protect life and limb in modern Western countries, thereby creating and protecting the space in which SLS itself operates. No longer should SLS fear instrumentalism. Rather, it should study it carefully, for it was precisely in developing law and politics as instruments, in the manner described above, that some early modern thinkers, always under the threat that religious civil violence would become worse than it already was, were able to work towards the aforementioned set of governing arrangements. Equally, SLS should not condemn these governing arrangements for their this-worldly mix of politics and law — should not treat them as a major impediment to the process whereby human society can attain a higher moral existence and overcome the violent effects of its baser past. Rather, these arrangements too should be carefully studied. Working in tandem with lower-level restraints like

the spread of literacy, or the inculcation of good manners (see Davidson 1999, Elias 1994, Hunter 1988), the equilibrium of politics and law in question helps limit the violence of human collectivities as they operate in this world. While it would be churlish not to acknowledge that this equilibrium is far from perfect — as an achievement of this world it does not seek perfection, but it can certainly be improved — it is the best means yet developed for achieving social peace. If SLS were to study this capacity of this equilibrium in this way, it could not only value the benefits of this manner of ruling the social; it could also value the fact that the social needs to be ruled, not celebrated as a means to a higher moral existence. If SLS were to do these things, it would go a long way towards protecting law from morality's stalking horse.

## References

- Bauman R W and Kahana T eds 2006 *The Least Examined Branch: The Role of Legislatures in the Constitutional State* Cambridge University Press New York
- Brown P 1988 *Power and Persuasion in Late Antiquity: Towards a Christian Empire* University of Wisconsin Press Madison
- Cotterrell R 2002 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' *Journal of Law and Society* 29/4: 632–44
- Davidson J 1999 *Courtesans and Fishcakes: The Consuming Passions of Classical Athens* Harper Perennial New York
- Dean M and Hindess B eds 1998 *Governing Australia: Studies in Contemporary Rationalities of Government* Cambridge University Press Melbourne
- Elias N 1994 *The Civilizing Process: The History of Manners and State Formation and Civilization* Trans E Jephcott Blackwell Oxford (first published 1939)
- Epicurus 1993 *The Essential Epicurus* Trans Intro E O'Connor Prometheus Books New York
- 1994 *The Epicurus Reader* Ed Trans B Inwood and L P Gerson Intro D S Hutchinson Hacket Indianapolis
- Hadot P 1995 *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault* Trans M Chase Blackwell Oxford



## Wickham

- Hillyard P 2002 'Invoking Indignation: Reflections on Future Direction of Socio-Legal Studies' *Journal of Law and Society* 29/4: 645–56
- Hochstrasser T J and Schröder P eds 2003 *Early Modern Natural Law Theories: Contexts and Strategies* Kluwer Berlin
- Hunter I 1988 *Culture and Government: the Emergence of Literary Education* Macmillan London
- 1998 'Uncivil Society: Liberal Government and the Deconfessionalisation of Politics' in Dean and Hindess 1998: 242–64
- 2001 *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* Cambridge University Press Cambridge
- 2003 'The Love of a Sage or the Command of a Superior: The Natural Law Doctrines of Leibniz and Pufendorf' in Hochstrasser and Schröder eds 2003: 169–94
- 2004 'Conflicting Obligations: Pufendorf, Leibniz and Barbeyrac on Civil Authority' *History of Political Thought* 25/4: 670–99
- 2006 'The History of Theory' *Critical Inquiry* 33/4: 78–112
- Hunter I and D Saunders 2003a 'Bringing the State to England: Andrew Tooke's Translation of Samuel Pufendorf's *De officio hominis et civis*' *History of Political Thought* 24: 218–34
- 2003b 'Introduction' in Samuel Pufendorf *Samuel Pufendorf: The Whole Duty of Man, According to the Law of Nature. Together with two discourses and a commentary by Jean Barbeyrac* Ed Trans Notes I Hunter and D Saunders Liberty Fund Indianapolis
- JLS Editors 2002 Preface to Cotterrell's and Hillyard's contributions *Journal of Law and Society* 29/4: 632
- Joy L S 1987 *Gassendi the Atomist: Advocate of History in an Age of Science* Cambridge University Press Cambridge
- Kriegel B 1995 *The State and the Rule of Law* Trans M A LePain and J C Cohen Princeton University Press Princeton
- Loughlin M 2003 *The Idea of Public Law* Oxford University Press Oxford
- MacIntyre A 1988 *Whose Justice? Which Rationality?* University of Notre Dame Press Notre Dame
- Osler M J ed 1991 *Atoms, pneuma, and tranquility: Epicurean and Stoic themes in European thought* Cambridge University Press Cambridge
- Rawls J 1971 *A Theory of Justice* Harvard University Press Harvard

- Saunders D 1997 *Anti-lawyers: Religion and the critics of law and state* Routledge  
London
- 2002 “‘Within the Orbit of This Life’ — Samuel Pufendorf and the  
Autonomy of Law’ *Cardozo Law Review* 23/6: 2173–98
- Webber J 2006 ‘Democratic Decision Making as the First Principle of  
Contemporary Constitutionalism’ in Bauman and Kahana 2006: 411–30
- Wickham G 2006a ‘Foucault, Law and Power: A Reassessment’ *Journal of Law  
and Society* 23/4: 596–614
- 2006b ‘The Law–Morality Relation Revisited: A Challenge to Established  
Traditions by the Australian Sceptical Approach’ *Griffith Law Review*  
15/1: 27–48
- 2007 ‘Expanding the Classical in Classical Sociology’ *Journal of Classical  
Sociology* 7/3: 243–65

