

# What Once Was Old Is New Again: Reviving An Early-Modern Form Of Interdisciplinarity For Socio-Legal Studies

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Socio-legal studies are an essentially interdisciplinary enterprise. However, there is currently only one form of interdisciplinarity that most socio-legal scholars (and criminologists) recognise and work with. This form is derived from the idea that 'society itself' - and by this most scholars mean 'civil society' - drives the law. However, another, rival understanding of society, which we term the authoritarian-liberal statist understanding that slipped from view in the late seventeenth century and remained obscure from then until now, may be used to generate another form of interdisciplinarity for socio-legal studies (and for criminology). However, this rival understanding of society does not simply allow us to reconfigure our notion of 'society'; it radically changes the role society plays in relation to the law. Two crucial points emerge from this rival account: first, society can no longer be understood as separable from (even though interacting with) the law; and second, society can no longer be understood as driving the law.

## Introduction

Socio-legal studies are an interdisciplinary enterprise, an amalgam of some sections of the discipline of law and some sections of those disciplines that seek to study society, especially sociology. (Although this is also true of interdisciplinary criminology, which makes up the great majority of this discipline; for most of this paper we refer only to socio-legal studies. However, the reader should take this to include interdisciplinary criminology). This paper does not challenge this basic picture of the field. Rather, it challenges the one and only form of interdisciplinarity that turns out to be currently invoked.

Recently, two accounts of the nature and role of interdisciplinarity in socio-legal studies - namely, Vick (2004) and Tomlins (2000) - have appeared in major journals. These provide a helpful picture of the way the field uses one form of interdisciplinarity - one based on its understanding of the 'socio' side of the enterprise - as it defines itself against positivist accounts of what the law is and what it does. We can see from Vick's account that the one form of interdisciplinarity is

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derived from the idea that 'society itself' drives the law: 'the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself' (Vick 2004, p. 182, quoting Ehrlich).

Taking his cue from Tomlins, Vick describes this form of socio-legal interdisciplinarity as 'a "space of encounter" between law and other disciplines' (Vick 2004, p. 164, quoting Tomlins). These other disciplines are effectively the field's only route to society itself, because the way to it through the study of law, so socio-legal studies has always believed, is blocked by orthodoxy in legal analysis (Vick 2004, p. 170).

Tomlins' essay is an historical account of the encounter between law and social science in the USA (Tomlins 2000, p. 912). He traces this encounter from the first half of the nineteenth century, when, he says, law was not yet able to mix with other disciplines (Tomlins 2000, pp. 913-14). Tomlins argues that their encounter was possible because of a joint reliance on an empiricist method (Tomlins 2000, pp. 915-19). After the American Civil War, a different set of factors came into effect: urbanisation; professionalisation; disputes within the American Social Science Association; and the rise of separate law schools at elite universities, with their own distinctive methods (Tomlins 2000, pp. 919-34). The seeds for an encounter between law and the social sciences had now been sown, especially through the arrival of the idea that society, as a separate entity, should be a factor in the study of law. Once university law schools replaced the system of apprenticeship in the 1940s, social science started to make serious inroads into legal thinking. The first step on this road was the teaching of the legal process and, especially, the concept of law in society. The second step, taken in the 1960s, was the subtle shift from law in society to law and society, a step that involved the formation of a law and society movement, with its own journal. The last step was the establishment of the Critical Legal Studies movement (Tomlins 2000, pp. 946-63).

Having used Vick's and Tomlins' pieces to indicate something of the form of interdisciplinarity on which socio-legal studies rely, we must describe the emergence of this idea that society is a separate entity, capable of driving the law. This is the task assigned to the paper's first main section. No single account of society dominates socio-legal studies, as the field has never been concerned to restrict itself in this way. However, it does restrict its 'socio', as we will see shortly. Nor has it been concerned to formulate its own account of society. It has been content, instead, to allow nearly all accounts of society to inform its understanding of the key relationship between law and society, so long as they are consistent with the idea

that society is a separate entity, capable of driving the law. What we need, then, is a broad picture from the history of western thought of a reasonable sample of such accounts. The first main section gives us such a picture, drawing on Colas (1997).

In appropriating insights from Colas's discussions of civil society to inform our own discussions of society, very little adjustment is necessary to make the two terms coincide. The accounts of society that socio-legal studies have employed are also nearly always accounts of civil society.

On the back of the broad picture provided by the first main section, the second will make an argument against the field's one and only form of interdisciplinarity. It will do so by proposing that a different account of society from those considered in the first section - one we call the early modern authoritarian-liberal statist account - could be the basis of an alternative form of interdisciplinarity. The second section will flesh out two foundational accounts of this alternative- one developed by Hobbes (1994), the other by Pufendorf (2003). It will also show - by making clear the difference between, on the one hand, the alternative form of interdisciplinarity that could be constructed from the authoritarian-liberal statist's understanding of society and, on the other, the 'society itself' form that stands as socio-legal studies' one and only form so far - that for our early modern statist account, society cannot be separated from and seen to drive law in the way socio-legal studies have for so long assumed it does. The third section will do two things. First, it will suggest an explanation of how the authoritarian-liberal statist understanding of society slipped from view in the late seventeenth century and remained obscure and unrecognised by socio-legal studies. Second, it will follow up the possibility of deriving a rival form of interdisciplinarity for socio-legal studies, a task that will entail five rhetorical questions. In the conclusion we will briefly show how we would answer 'yes' to these five questions with our criminological audience firmly in mind.

## **Section One: Detailing society/civil society**

Our main task in this section is to put together a brief and broad picture of some of the accounts of society with which Colas (1997) deals. The picture we present features Colas's treatment of the accounts of twelve different thinkers. We emphasise that socio-legal studies draws its notion of society from a span of nearly two and a half thousand years of thinking about society.

Colas (1997, p. 32) stresses that contemporary meanings of civil society correspond closely with prior meanings. He notes that the term did not come into the vocabulary of political science until the sixteenth century, despite being a translation of a term used by Aristotle, and did not come into common usage until the second half of the twentieth century (p. 20). Furthermore, he argues:

'although the meanings evolved successively, none completely disappeared from circulation. This causes a sort of confusion that has grown worse ... There exist, for instance, several examples of systems that synthesise Aristotle's and Augustine's theories of the polity, the theory of a pagan Greek with that of a Roman Christian, and it can also be remarked that the place assigned to the state by those who ... vigorously distinguish it from civil society is analogous to that attributed to the Church by those who oppose it to civil society' (Colas 1997, pp. 24-5).

In Aristotle's writing, civil society was considered to be the ultimate expression of community or association (Colas 1997, p. 23). Civil society was, in Aristotle's eyes, superior to all other forms of association, precisely because it was the context in which humans might achieve their full and perfect nature as rational political beings (Colas 1997, pp. 44-7). The socio-legal idea of society has borrowed from Aristotle not only the proposition that society is natural, but also the extension of it - that it is a naturally superior space, while law is merely the instrumental means used to protect it.

Next we consider Colas's handling of the accounts of civil society by the early Christian writers, Augustine and Giles of Rome. Augustine famously distinguished earthly society from the City of God. His medieval legacy was the identification of the City of God with the Church, and the Earthly City with the state (Colas 1997, p. 23). The sphere of civil society, then, was seen by this strand of early Christian thinking to be an obstacle that must be endured and overcome if we are to reach a higher realm. The City of God is for those who seek to live the peace of the spirit, the Earthly City for those who desire to live the peace of the flesh (p. 56).

Written between 1277 and 1279, Giles's 'mirror for princes' essay was remarkably influential. At least eleven editions were produced, the last one in 1616, and it was translated into at least seven vernacular languages. Its arguments - about what rules a prince needs to follow to govern himself and in turn, his household and civil society - entail an insistence that no effective political regime can exist through violence alone. Further, they entail the vital point that government must recognise

the naturalness of society: the fact that human beings are social animals, naturally desiring to live in society with others (Colas 1997, pp. 72-3).

From Augustine and Giles, the socio-legal concept of society has taken on the assumption that an instrumental mechanism - which is, of course, what our target type of socio-legal studies takes law to be - owes a duty to humans to help them live their lives to the maximum of their potential in the natural societies to which they were born. Further, it has adopted the fundamental Augustinian dualism, in which law is the equivalent of the Earthly City, while society is the City of God.

Next we move to Colas's coverage of Luther and other Protestant reformers. Luther extended the key Christian dualism by drawing a distinction between the Earthly City and the kingdom of this world. Where the Earthly City was, as the visible Church, the earthly realm of Christians qua pure Christians on their way to the City of God, the kingdom of this world featured sin. The sinfulness of humanity meant it could only be governed by force - a job for the Earthly City. By contrast, the visible Church could only be governed spiritually and not at all by force. This did not make governing the earthly realm the Devil's work, however. Quite the contrary, it was government as a means of confronting the Devil (Colas 1997, pp. 126-7). Luther was, thus, keen for Christians to accept, as God's choice for them, whatever role in the kingdom of this world they found themselves playing - hangman, judge or prince. He insisted that they should do so, not because it would guarantee them salvation - it would not -but because it would help promote civil society in its vital task of protecting the Earthly City (p. 129). Melanchthon added to this an even stronger insistence that civil society was at its core natural, not artificial, but he did so only in holding that all that was natural in civil society was the equal of divine law (p. 135). Calvin took the two Cities idea further by insisting that Christians in the Earthly City were pilgrims yearning for their homeland. For Calvin, an important function of temporal government was to help Christians on their voyage. Humans who were not given such help were deprived of their human nature (p. 143).

The socio-legal idea of society has benefited from Luther's position. Just as his position marks a shift in Christian thinking, allowing it to pay much greater attention to secular authority, so does it, shorn of the direct reference to sinfulness, allow the idea of society to insist that while secular law is respected, society is the higher authority. As for Melanchthon's and Calvin's interventions, while the socio-legal idea of society does not equate its naturalness to divine law, nor characterises itself as the beginnings of the heavenly kingdom, it can draw on such reliquaries, such that it can easily take up the Durkheimian suggestion that it is in its own way

sacred, albeit in a secular-intellectual sense. Society can be thought of as the true country of its individual members, as opposed to law, which is seen to be useful but lesser.

Spinoza held that civil society needed obedient citizens to work effectively. For Colas, this signaled the emergence of a new, quasi-religious form of worship in the polis: love of one's neighbour (Colas 1997, p. 196). Spinoza rejected the Catholic model of community in favour of a newly secularised conception of the social bond, and in this way human society became the pinnacle of authority (pp. 198-9). Leibniz's view of the essence of humanity pushed him to reject the dichotomy between society and state; he preferred to view civil society as continuous with the City of God (pp. 227-31). In line with this, no association, including civil society, broke with nature. Yet he did not understand all associations to be equal. In true Aristotelian fashion, he ranked associations into a pyramid. From the bottom up, it ran: 'reproduction in the individual couple'; 'education of the children in the family'; 'satisfaction of needs within the household'; 'welfare in civil society'; and 'perfect happiness ... in the City of God' (p. 232). Further, in opposing Hobbes's absolutism, Leibniz anticipated the law-governed state, in which the sovereign is subject to the law (p. 236).

Locke posited freedom of conscience as a principle of civil society (Colas 1997, p. 248), thereby bringing both toleration and reason more firmly into the realm of society. For Locke, the human capacity to reason was far greater than Hobbes had allowed -so much greater, in fact, that he insisted that absolutism was incompatible with civil society (p. 253). Locke's commitment to reason was at the heart of both his rejection of persecution and his focus on a particular conception of property as the keystone of community (pp. 252-3). Toleration and property were thus part of the one reason-inspired package, which was the only sure basis for rights, as what was crucial for Locke was not so much the ownership of property itself but the right to own it (p. 253). Locke thereby emphasised a legal limitation of power as crucial to civil society. Where, for Locke, 'reason was the supreme legislator and should have the last word over and against enthusiasm, so civil society rejected all absolute power, which flouted its very *raison d'être*' (Colas 1997, p. 254). For both Leibniz and Locke, then, 'Reason claimed for itself the authority to judge in all things'. Only reason, 'the individual's faculty for conceiving the universal, founded the people's political claim to be the foundation of civil society' (p. 255).

Kant approached civil society not so much by seeking to distinguish it from the state, but by insisting that a civil society was a society already in possession of a

constitution founded on individual human reason (p. 266-7). The 'social pact' for Kant was a matter of individual freedom. Like Locke, Kant saw property as central and, of course, he sided with Leibniz in his argument against Hobbes. Kant could not conceive of giving the sovereign power over individuals. He thought it ridiculous to propose, as Hobbes had done, that a divine soul could be attributed to civil society. Instead, civil society was only intelligible in terms of reason-derived culture (p. 270). Kant's individual, reason-driven account of society even allowed him to propose that we can understand moral law in terms of an innate moral tendency. He remained certain that humanity would progress under the auspices of reason (pp. 276-7).

Durkheim is one of Colas's main weapons in his direct confrontation with the late nineteenth and early twentieth-century figure of the power-state, which Durkheim opposed in favour of the law-governed state, based on individual reason and respect for the morality that lies within us. Durkheim's main neo-Kantian focus was on reason-based morality. In this way, he limited the state by imputing to it a Kantian ethical purpose. Durkheim was concerned to deny the opposition between state and civil society, especially if such an opposition placed the state above morality. This was to misunderstand the nature of both civil society and the state. For Durkheim, the state was not about power but about organisation and order. In this way, the state's role was to serve civil society by organising and ordering social sentiments that come spontaneously into being: the conscience collective (p. 343).

Now to Colas's own position. He indicates how strongly opposed he is the idea of the power-state. Having earlier positioned Lenin as an example of a ruthless power-state thinker, Colas goes on, in the wake of his discussion of Durkheim's total rejection of the power-state, to include Max Weber in Lenin's camp, which might come as a surprise to many Weber scholars. He does this because of Weber's focus on means and his celebrated account of the monopoly of legitimate political violence within a certain territory. In line with this, Colas bundles Lenin, Schmitt, Treitschke and Weber together as common adherents of the same cynicism, equating social life with power relations and thereby excusing states for their use and abuse of power (pp. 344-5).

Colas, then, takes a reason-based, 'we must release more of the potential of human beings' approach, put together out of the materials provided by the thinking of Locke, Kant and Durkheim - the commitment to reason, reason-based freedom of individuals, reason-based law, reason-based communities and, of course, a reason-based rejection of Hobbes's instrumentalism. Colas's position demands of thinkers

that they strive for a level of perfection consistent with the enormous reserves of reason that lie deep within them, and can be judged to have failed both themselves and others if they do not keep up the quest or, worse, do not treat it as the key tool in their intellectual kitbags, the one which renders all the others operative.

The socio-legal idea of society is happy to accept all the accounts Colas uses to arrive at his position. Such is the nature of the idea of society as it supports socio-legal studies' one form of interdisciplinarity. Now we can move on to consider the account of society the field is certainly not happy to take in - the authoritarian-liberal statist account - knowing it to be built in direct opposition to the idea of 'society itself'.

## **Section Two: The authoritarian-liberal statist understanding of society and socio-legal studies**

We must begin this section by dealing, at last, with Colas's troubling handling of Hobbes. As has been hinted at several points, the trouble lies, not so much in what Colas sees in Hobbes, but in what he does not see. For Hobbes, says Colas,

'civil society ... was the result of an "accident" rather than a "necessary disposition." Hobbes did not anchor political society in human nature as Aristotle had; for him human beings were not political animals but ... homo homini lupus, wolves to one another. "We do not by nature seek society for its own sake," but rather ... to satisfy our self-love, our desire for glory ... It was not benevolence, good will towards the other, but fear that functioned as the cement of social life ... And it was through fear of one another that individual human beings were pushed, by rational calculation, to "contract" a civil society that would bring them security' (Colas 1997, p. 236, quoting Hobbes).

But this was not enough. By nature hostile to one another, humans need a common power so that rule is achieved (primarily through fear of punishment). Famously, individuals have to subject their individual wills to that of another, whether another individual or a collective governing body. It was only on this economy of fear that civil society rested. This economy is a radical break from the state of nature (pp. 236-7).

Colas's basic picture of Hobbes's account makes clear two essential points: Hobbes draws on a very different moral anthropology than do the other thinkers covered in his survey; and an artificial mechanism is needed to rule over humans in



order to prevent the worst excesses of their nature. Consistent with his own position, Colas's treatment of Hobbes is in the same vein and just as unsatisfactory as his treatment of Weber. In aiming to promote a vision of civil society protected by a law-governed state and dedicated to the promotion of reason as the yardstick by which humans can measure themselves and strive to do better, it is par for his course to treat Hobbes's thought as a way-station on the road to the achievements of Locke, Kant and Durkheim.

Our picture of the alternative account of society offered by the authoritarian-liberal statist tradition will be drawn by clarifying and expanding upon what has been so far said about Hobbes and by outlining at least some of the thinking of the other founder of this tradition, Pufendorf. A sketch of some recent criticisms of 'social thinking' will serve as a useful preamble.

Kriegel (1995) worries about what the avalanche of social thought has done in the last couple of hundred years to a genuinely statist understanding of the state. So many of the visions of society presented in the previous section have swamped the type of state that Hobbes and Pufendorf championed. The state was understood as merely a complex mechanism for social reproduction, but basically inert (Kriegel 1995, p 5, n.9). A corresponding fetishisation of society allows the latter to be seen as an antidote to the cancerous and parasitical state (p. 7). Kriegel places most of the blame for the triumph of society over the state on the rise and rise of German romanticism. From near the beginning of the nineteenth century, she says, 'The word "social" would from now on cover everything'. From that moment onwards, we are invited to conclude, 'the romantic theorem of an immanent society' has ruled the roost (pp. 116-7). Under the pervasive influence of romanticism, collectivity was reduced to society, while politics could only be understood as social. By contrast, Kriegel suggests there is more than just 'the social' (p. 118).

By contrast, Hobbes was committed to the idea of the individual human being as the bearer of rights. Hobbes was the founder of the modern doctrine of subjective rights, or human rights as they have come to be known. Emphasising Hobbes's decisive break with Aristotelianism and with ancient natural law, Kriegel highlights his recognition that the preservation of the individual lies at the centre of natural security (pp. 38-9). On this same theme, Weiler (1994) argues, contra Schmitt, that Hobbes's argument that the sovereign must protect the citizens of his state was at no time an argument that the sovereign can include or exclude groups from this designation on a whim, casting those excluded back to the state of nature (p. 28). Where Schmitt treated the state as a mindless power, totally at the service of the

sovereign and with no necessarily human features, Hobbes made the idea of the state human: rationally illuminating and persuasive (Weiler 1994, pp. 37-8). Hobbes even allowed for participation, and resistance, solely on the grounds of one rational criterion: security, the overriding human interest (pp. 53-4). For Hobbes, the well-ordered state secures the safety of those of whom it is composed (pp. 57-8). Kriegel, pushing her Hobbesian case as hard as she can, even takes on the old shibboleth that Hobbes only said liberal-sounding things up to the point at which all disobedience to the sovereign was dismissed as illegitimate. This misreads Hobbes: not all rights are alienable. 'Personal security is the end and object of all social transactions ... Hobbes, the fervent partisan of ... authority, does not hesitate to justify the right of resistance when an individual's life is threatened' (Kriegel 1995, pp. 39-40, quoting Hobbes).

The direction of authoritarian-liberal statism is clear: a strong state, instituted not to serve itself, but to protect individuals - something it does by separating and protecting from its (the state's) public sphere a private sphere in which individuals can flourish - by remaining indifferent to competing moral and religious visions of human life and by insisting that individuals do not bring their private moral and religious beliefs into its de-moralised and de-sacralised public sphere. What is still to be put in place is an account of how the mechanism by which the relationship between state and individual was made to work, for only then can we understand the very different notion of society at the heart of authoritarian-liberal statism. We can introduce this matter by considering Hobbes's contribution to it and Pufendorf's development of Hobbes's thinking.

For Hobbes, the mechanism by which the relationship between the state and the individual was made to work was what he called the social pact, or social contract, and the individual's role in it was obedience. It is this pact or contract that was society for the early modern authoritarian-liberal statist thinkers. Society - in the sense whereby it is a thoroughgoing rival to the many understandings of society that socio-legal studies welcomes through its doors - is born out of the relationship between the state and individuals. Law, of course, was one of the key mechanisms of the state in the authoritarian-liberal statist package, helping it to protect individuals by separating and protecting from its public sphere the private sphere, and helping to ensure that it does indeed remain indifferent to competing moral and religious visions of human life. It is precisely because law featured as a part of the state in this way that authoritarian-liberal statism cannot allow the sort of relationship between law and society that is standard fare for socio-legal studies. For authoritarian-liberal statism, the law is part and parcel of the relationship (between individuals and the state) that actually produces society. So there is no question of studying law and

society as if 'society itself' were responsible for the emergence of law. By Hobbes's and Pufendorf's way of thinking, the relationship between law and society can only be studied by studying the operation of law as a part of the state, in the manner just outlined, as it goes about producing and maintaining society.

While the 'law' side of the socio-legal studies enterprise is not under investigation in this paper, we do need to provide, before moving on to consider Pufendorf's contribution, a brief account of the way authoritarian-liberal statism understood the law. For this position, 'law' refers to an ensemble of juridical institutions operating inside the security envelope of the state. While perfectly concrete, this ensemble should not, as we saw immediately above, be thought of as part of some organic social whole - as a part, that is, of 'society itself'. In the light of this definition it should be noted that Hobbes insisted on distinguishing 'law' ('lex') from 'right' ('ius'), in what Silverthorne (1991, p. 684) suggests was a distinctive effort to mark the ground we are calling authoritarian-liberal statism: 'Though they that speak of this subject use to confound ius and lex, right and law, yet they ought to be distinguished; because RIGHT consisteth in liberty to do, or to forbear: whereas LAW determineth, and bindeth' (Hobbes, quoted in Silverthorne 1991, p. 68). Law is part of the state to which individuals bind themselves through the social contract, while right is the expression of the freedoms they gain by doing so. While individuals surrender their rights to the sovereign to gain personal security unavailable in the state of nature, they end up gaining the benefits of liberal-statist rule of law: civil law, then political law, family law and hereditary law - slowly but surely, law in its entirety is built up from individual rights (Kriegel 1995, p. 39).

In 1672, Pufendorf published his monumental *De jure naturae et gentium*. He followed this a year later with *De officio hominis et civis*, an abridged version of the *De jure* book, designed to spread the message of the earlier work more widely, especially to students training to work as officials of government, and especially to show how civil authority could be protected against the natural law of clerical academics. Pufendorf, as a political adviser to the Protestant states of Sweden and Brandenburg-Prussia, is interested in the philosophical reconciliation of coercive force and justifying reason (Hunter 2004). It is in this spirit that Hunter presents a detailed reading of Pufendorf's project against a reading of the subtly, but importantly different, project of Jean Barbeyrac and against a reading of the markedly different, indeed fiercely competing, project of Leibniz. We borrow from Hunter an account of Pufendorf's development of Hobbes's understanding of the way the social pact was made to work, particularly regarding the idea that

individuals are obliged to obey their side of it and regarding the necessity for the state to maintain indifference to competing visions of human morality.

Hunter (2004) says that for Pufendorf, obligation is induced by one who is superior both in strength and in just cause. As such, Pufendorf refused the problem of how to make morality authoritative and free it from coercion:

‘Despite the allure of the doctrine that rational beings might govern their wills by thinking the pure idea of morality - the attraction of a moral life free of coercion - Pufendorf rejected it as wholly unsuited to constructing the grounds of civil obligation ... [T]his was in part because he regarded the anthropology of a self-governing rational being as inappropriate for a creature whose violent passions required external governance’ (Hunter 2004).

This last point is central. In building an account of the authoritarian-liberal statist picture of society, featuring individual rights built on the back of individuals' obligations to obey, as their side of the pact with the state, we must not forget that the authoritarian-liberal statist vision of human beings was not the same as any of the reason-based visions employed by the many different accounts of society outlined in the previous section. Hunter sets out Pufendorf's development of what Hobbes had to say on the matter in the following terms:

‘[Pufendorf] 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 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’ (Hunter 2001, pp. 171-2, quoting Pufendorf).

But it was not, Hunter insists in his more recent piece, just this very different moral anthropology that led Pufendorf to reject the idea that morality itself was authoritative and could be freed from coercion. He also rejected it on the grounds that such an idea, featuring as it does the idea of a self-governing rational being,

threatened political stability because it allows higher forms of obligations than those the state imposes in search of civil peace (Hunter 2004). Pufendorf's denied that reason was the normative source of moral principles, suggesting it be downgraded to a limited instrumental capacity (Hunter 2004). In rejecting Christian-metaphysical anthropology, he abandoned the possibility that we can govern ourselves with powers of reasoning. While our reasoning is useful to us many times and in many circumstances, we have only so much of it, certainly not enough to govern ourselves to the point where our uncontrollable passions will no longer imperil society; we need help if we are to maintain peace and, in exchange for such help, we must undergo obligation (Hunter 2004).

Turning once more to the necessity for the state to maintain indifference to competing visions of human morality, it needs to be stressed that Pufendorf's early modern authoritarian-liberal statism was not a total rejection of norms. He was transforming norms, not rejecting them. In this way, he insisted on a new, strictly limited form of morality. For him, developing Hobbes, as there could be no higher standard of morality, whether in the City of God or in our reason or in 'society itself', against which our actions must be judged, the moral standards to be used in civic life had to be worked out on the plane of this life by the sovereign, whether individual or council, but in a specific manner, not as universal codes. Subjects were obliged to take them on in their specificity as particular departments, ways of performing their roles as subjects who have entered into the pact. On the other hand, different moral standards from these were allowed to operate in other spheres, such as the religious, familial or commercial, and the sovereign was not permitted to interfere with these, unless of course they threatened the civil peace.

### **Section Three: Discussion**

On the basis of our exploration of what is involved in the central idea socio-legal studies - that society is a separate entity, capable of driving the law - we can conclude, that there is only one form of interdisciplinarity at work in the field. We say this, of course, not out of any joy for the triumph of this particular form, but out of frustration that the field, because of its blind commitment to it as its founding form of interdisciplinarity, has for so long shunned an account of society that could so easily lead to a rival and, we think, better form. To point out a path towards the rival is the second of our two concluding tasks.

The first is to suggest where we might look to find a better explanation of how the early modern authoritarian-liberal statist account of society came to be so obscure, not just to socio-legal studies but to all disciplines concerned with the study of society. The suggested explanation can be summed up in two names: Locke and Kant.

Locke was convinced, Pocock (1987) tells us, that there was no point in seeking the basis of society in the history of law, government and sovereignty, in the way both Hobbes and Pufendorf sought it, for it could only be found in human reason: 'the ultimate guarantee against sovereign will is located in principles of nature and reason which lie outside history and do not change with its changes' (Pocock 1987, pp. 235-6). Pocock is obviously not describing the hero Locke, but the anti-historical Locke who chased Hobbes from the stage of English political thought. Universal, anti-historical reason won out and there was seen to be no place for the empirically grounded authoritarian-liberal statist vision. Hobbes was given a temporary respite in the 1670s and 1680s by being assimilated into the work of Pufendorf in Germany. However, as Hunter (2004) points out, in 1692 Pufendorf's English translator, Andrew Tooke - closely following Barbeyrac's French translation of the *De officio*, into which he (Barbeyrac) had inserted many renegade Lockean propositions to suit his own position - effectively de-Hobbesified Pufendorf, despite the German thinker's overwhelming Hobbesianism. And it was not just Barbeyrac's influence that led Tooke in this direction. He knew the wisdom of structuring his work to suit the Lockean temper of the times. Such times, it should be noted, were only nineteen years after Pufendorf's book was first published - the impact of Locke's influence was as swift as it was powerful and prolonged. The long-term outcome was to make both founders of the authoritarian-liberal statist tradition appear to be simply warm-up acts for the first of the two great champions of reason who followed them:

'In the late 1680s, at the very moment when Hobbes was careering toward the margins of English political debate, he was stepping into the centre of political discussion in Protestant Germany, in part as the result of his vivid presence in Pufendorf's *De jure* ... [However], when he translated Pufendorf's *De officio* into English in 1691, Andrew Tooke did everything he could to purge it of Hobbesian statist connotation ... This Whig rendering was intensified in the 1716 edition, when anonymous editors revised Tooke's translation, using Barbeyrac's as a model ... In short, if Hobbes remained current in Brandenburg via Pufendorf, then Pufendorf's limited currency in England was mediated by Barbeyrac who helped assimilate him to Locke' (Hunter 2004).

Kant was soon to join the fray, maintaining an 'absolute contemplative conception of morality such that the mere thought or representation ... of the moral law should be enough to conform the will to it, thereby bringing the search for grounds to an end in self-grounding "pure practical reason' (Hunter 2004, quoting Kant). This could only have made Pufendorf spin in his grave, for it was precisely this metaphysical culture that he thought he had defeated at the end of the previous century. For Pufendorf's way of thinking, Kant's arguments were not only wrong, they were dangerous: 'In blurring the boundary between philosophy and theology, it tempted metaphysicians to imagine a source of civil norms higher than the exchange of obedience for protection that institutes civil authority, thereby opening the latter to subversion' (Hunter 2004).

But dangerous as he may be, Kant has to be acknowledged as the one who shaped so much of what followed: a Leibnizian metaphysical ethics took hold of the Protestant universities of eighteenth-century Germany, which, transformed by Kant, eventually made its way to the USA over the course of the nineteenth century (Hunter 2004).

It is unlikely we can knock Locke and Kant off their perch any time soon. But at least we can imagine an alternative. Saunders (2002) helps us with the second of our concluding tasks: to suggest the contours of an argument about what an alternative form of interdisciplinarity based on the authoritarian-liberal statist account of society might look like.

Saunders suggests that the field is missing something very important in not fully embracing legal positivism's determination to establish that law is not necessarily connected to morality (Saunders 1987, p. 2,173). Might it be, this allows us to ask, that an alternative form of interdisciplinarity for socio-legal studies has actually been available all along but has been considered off-limits, as part of that against which the field, under its dominant - indeed, only - form of interdisciplinarity has defined itself? Might it be that the positivist account of law is actually an account of 'law and society'? Might it be time to expand the respect in which socio-legal studies has long held many of the positivists' accounts of law, such that the field can now recognise that the positivist tradition also has something fundamentally useful to contribute to the 'society' aspect of its work? Might it be worth considering the positivist tradition as an important rival type of interdisciplinarity? Finally, might it be time to acknowledge that, in wanting never to bow before any of the socio-legal versions of 'law and society' so far produced, the positivists have long had a very good point?

## Conclusion

Now to show briefly how we would answer 'yes' to the above five questions with our criminology audience firmly in mind.

Might it be that an alternative form of interdisciplinarity for criminology has actually been available all along but has been considered off-limits, as part of that which the field, under its dominant - indeed, only - form of interdisciplinarity has defined itself against?

This is the case, we contend, because for most of its life criminology has been trapped in an embrace with sociology that has stifled its relationship with positive law.

Might it be that the positivist account of law is actually an account of 'law and society'?

In answering 'yes' to this one, we suggest that we are allowing criminology to enter into a closer relationship to positive law without losing its connection to society.

Might it be time to expand the respect in which criminology has long held many of the positivists' accounts of law such that the field can now recognise that the positivist tradition also has something fundamentally useful to contribute to the 'society' aspect of its work?

This, we suggest, is vital if criminology is to continue to hold the attention of Western governments as they seek to use the law to deal with heightened security challenges in a way that has the least impact on traditional rights and freedoms.

Might it be worth considering the positivist tradition as an important rival type of interdisciplinarity?

In answering 'yes' here, we have to own up to a suspicion that the most effective criminology has always done this.

Finally, might it be time to acknowledge that in wanting never to bow before any of the socio-legal/ criminological versions of 'law and society' so far produced, the positivists have long had a very good point?

Yes, but again it may well be that the most effective criminology has known this all along.



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