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CONTINUITY AND CHANGE IN THE SOCIOLOGY OF LAW

1. INTRODUCTION

Any observer of developments in the field of the sociology of law over the last two decades will immediately note an enormous and growing area of research and intellectual activity. This period has seen the publication for the first time of a large number of scholarly journals devoted exclusively to the discipline. These of course have included the Law and Society Review in 1966, the Journal of Law and Society in 1974, the International Journal of the Sociology of Law in 1979, Law and Policy in 1979, the Sociologia Del Diritto in 1974 and the Zeitschrift fur Rechtssoziologie in 1980. More recently, we have seen the publication of new law and society journals in Australia, Argentina, Sweden, France and Canada, to mention but a few. Publishers such as Academic Press, Longman Inc, Martin Robertson and Oxford University Press have taken advantage of the growing interest in this field by the publication of series of monographs and collections devoted to socio-legal concerns. Whilst some of these have done better than others, together they do reflect a publishing boom in this area.

This having been said, however, it should be noted that all social and intellectual development is characterised by considerable continuity, even during periods of rapid change. This is as much true of the sociology of law as of other disciplines. Concerns with the nature of the legal order are of course ancient ones which can be traced back to the earliest attempts to theorize about the nature of government and social cohesion. In terms of the history of modern sociology, the work of Marx, Weber and Durkheim set the scene for many of the conceptual debates in the sociology of law to this day. The concerns of scholars such as these are still the subject of heated debates amongst sociologists of law. The same can be said of the less well known contemporaries of these earlier scholars, such as E A Ross, R T Ely, William Graham Sumner and Eugen Ehrlich.[1] These scholars were in their own way concerned with such contemporary issues as social control, the relationship between law and the economic order, legal culture and the relationship between 'folkways' and customs on the one hand, and 'stateways' and formal legal norms on the other. Whilst there has been considerable continuity between such earlier concerns and the concerns of current day sociologists of law, I wish to argue that there has, nevertheless, been a transformation in the sociology of law over the last two decades, so that contemporary legal sociology as a discipline differs markedly from anything which has gone before. I want to suggest that contemporary sociology of law is distinguished from earlier sociologies of law by three inter-related features. First, the sociology of law has largely lost the provincialism which so

1 Ross, *Social Control* (1901 and 1970); Ely, *Property and Contract in their Relations to the Distribution of Wealth* (1914 and 1971); Ehrlich, *Fundamental Principles of the Sociology of Law* (1913 and 1975); Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores and Morals* (1907).

often tended to characterise the work of its practitioners. It has adopted an international frame of reference and mode and so has become subject to international intellectual movements, fads and obsessions. This is probably a reflection of the increasing internationalisation of socio-economic and political forces in the modern world. In any event, there has been a broadening of the scope of the sociology of law to draw increasingly upon comparative and cross-cultural perspectives. This process has been most marked in the United States and Europe although it is also quite evident in Australia. Related to the internationalisation of the sociology of law has been a renewed and more broad-ranging concern with theoretical problems. Whilst theoretical issues were uppermost in the minds of classical sociologists of law such as Durkheim and Weber, this was uncharacteristic of most legal sociology up until the early 1970s. Whilst this is not to suggest that theoretical issues were of no concern, these tended to be fairly modest ones and were more often than not submerged beneath a heavy layer of empiricism or legal reformism. This was particularly true in the United States where vast empirical studies were undertaken of courts and crime during the 1920s and 1930s,[2] of lawyers during the 1940s,[3] of courts and juries during the 1950s,[4] of the criminal justice process during the 1960s[5] and of public attitudes to lawyers and the legal system during the 1970s.[6] Whilst recent years have continued to see a heavy emphasis upon empirical studies of such areas as lawyers[7] and dispute processing,[8] these studies have had far greater theoretical sensitivity than was apparent from the more empirically descriptive orientations of earlier studies. Moreover, in recent years, we have seen quite extensive efforts aimed at bringing out the theoretical implications of earlier primarily descriptive empirical studies. For example, in a controversial book published in 1980, Donald Black reworks and develops the theoretical implications of data originally collected from the early 1960s.[9] Similarly, Austin Sarat sought to draw out some of the broader implications from Barbara Curran's massive American Bar Foundation study *The Legal Needs of the Public*.[10] More recently Matthew Silberman has sought to evolve what he calls a sequential model of the mobilisation of law from survey data collected by the 1967 Detroit Area Study at the University of Michigan.[11] None of these attempts at reanalysis has

2 See eg Pound and Frankfurter (eds), *Criminal Justice in Cleveland* (1922); Schlegel, 'American Legal Realism and Empirical Social Science: From the Yale Experience' (1978) 28 Buffalo L Rev 459; Schlegel, 'American Legal Realism and Empirical Social Science: the Singular Case of Underhill Moore' (1980) 29 Buffalo L Rev 195.

3 Blaustein and Porter, *The American Lawyer: A Summary of the Survey of the Legal Profession* (1954); Phillips and McCoy, *Conduct of Judges and Lawyers* (1952). Another study to come out of this activity in the 1940s was published almost two decades later and then with a somewhat greater concern with theory, see Wood, *Criminal Lawyer* (1967).

4 Zeisel, Kalven and Buchholz, *Delay in the Court* (1959); Kalven and Zeisel, *The American Jury* (1966).

5 Dawson, *Sentencing*; La Fave, *Arrest* (1965); Miller, *Prosecution* (1969); Newman, *Conviction* (1966); Tiffany, McIntyre and Rotenberg, *Detection of Crime* (1967).

6 Curran, *The Legal Needs of the Public: A Final Report of a National Survey* (1977).

7 Heinz and Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982).

8 See Special Edition (1980-81) 15 L & Soc Rev 391 which reports upon various findings from the Civil Litigation Research Project.

9 Black, *The Manners and Customs of the Police* (1980).

10 Sarat, 'Studying American Legal Culture: An Assessment of Survey Evidence' (1977) 11 L & Soc Rev 427.

11 Silberman, *The Civil Justice Process: A Sequential Model of the Mobilization of Law* (1985).

been entirely satisfactory as identical theoretical concerns had not motivated the assumptions upon which the processes of data collection were based. It can be argued that a more international and a more theoretically concerned sociology of law has begun to emerge during the last two decades. A third factor which has contributed to this transformation has been the strengthening of the institutional basis of the discipline. The emergence of new journals and research centres has contributed to this. Sociologists of law have also become much more theoretically conscious, partly in reaction to an excess of governmental reliance upon socio-legal research such as through law reform agencies and commissions of inquiry. These bodies have facilitated the conduct of wide-ranging empirical enquiries, although this has occurred without a very precise or elaborate theoretical focus. Law and society scholars seem to have learnt from this unsatisfactory experience and have called for a greater emphasis to be placed upon more theoretically oriented concerns. A good illustration of this is to be found in a recent report by a leading Canadian sociologist of law commissioned by the Social Sciences and Humanities Research Council of Canada.[12] However, it should be said that much of the contemporary concern with the theoretical implications of empirical inquiry tends to be superficial or quite modest. This is reminiscent of the predominance of programmatic concerns, expressed at a fairly high level of abstraction, found amongst legal sociologists of the 1930s and 1940s, such as Timasheff and Gurvitch.[13] Nevertheless, contemporary endeavours, even if often theoretically modest, have developed a more sustained and elaborate body of legal sociology than has existed up until recent years, due largely to the institutional bases through which the sociology of law has emerged.

2. WAVES IN THE SOCIOLOGY OF LAW MOVEMENT

I wish therefore to argue that it is possible to identify at least three 'waves' in the history of the sociology of law, with the possibility of an emergent fourth 'wave'.[14] The wave metaphor has previously been relied upon by Mauro Capelletti to describe the history of the access-to-justice movement.[15] In respect of the history of the sociology of law, it can be argued that its first wave constituted the European or classical period of broadly based theorizing. Whilst this period is best exemplified by the works of Weber and Durkheim, other lesser-known writers continued in this vein well into the 1930s. Somewhat overlapping with this first wave was the primarily American-based second wave of the history of legal sociology, which was often characterised by a fairly abstract empiricism. It has been said of one aspect of this period, namely American legal realism, that it ultimately 'ran into the sand'.[16] In other words,

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12 Arthus (Chairman), *Law and Learning* (1984).
13 Timasheff, *An Introduction to the Sociology of Law* (1976; first published in 1939); Gurvitch, *Sociology of Law* (1947).
14 For earlier arguments along these lines see Tomasic, 'From Empiricism to the Quest for Theory: Towards a Synthesis in the Sociology of Law' (1983) 1 Aust J of L & Soc 149 and Tomasic, *The Sociology of Law* (1985) 3-8.
15 Cappelletti and Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report' in Cappelletti and Garth (eds), *Access to Justice, Vol 1: A World Survey* (1978) 3-124 and Cappelletti and Garth, 'Access to Justice and the Welfare State: An Introduction' in *Access to Justice and the Welfare State* (1981) 1-24.
16 Quote from Duncan Kennedy by Schlegel, supra n 2.

without theoretical maps to guide them, researchers who were carried forward by this second wave were unable to avoid, and so became immobilised by, the theoretical sand banks which lay in their path. Those on the third and still dominant wave of sociological movement in law have sought to learn from the experiences of the two earlier periods.[17] Drawing in part from the broad-ranging experiences of anthropologists, a less parochial and a more comparative perspective has emerged. With this came a more international dimension to the sociology of law as well as a modest commitment to theorising. A characteristic approach found during this period was what was often referred to as the mapping of the landscape of, for example, legal disputes, the structure of the legal profession or the range of regulatory institutions.[18] Also to emerge during this period has been an interest in new concepts such as 'the mobilisation' of law, its 'transformation' or the transformation of disputes. Whilst the process model was developed during the period of the second wave, it has been articulated more fully in more recent times and has been tied to more explicit theoretical goals. Whilst the crass empiricism of the second wave was in part a reaction to the orthodoxies of legal traditionalism, with its emphasis upon formalism and the quest for scientific legal principles, there are signs that legal doctrine is increasingly being focussed upon by sociologists of law. This, I would suggest, is part of an emergent fourth wave in the history of legal sociology. Thus, whilst the third wave has seen many attempts to theorise upon the basis of observations of legal behaviour, various limitations of this approach to the legal process have become apparent. For example, studies of legal behaviour within courts, law enforcement and administrative agencies have been found wanting as they have tended to neglect these other dimensions of the legal process, such as the construction of legal meaning. This emerging fourth wave is still relatively minor in its salience, although its emphasis upon an integrated approach to theory, empirical inquiry and legal doctrine is likely to represent a huge shift from earlier approaches to the sociology of law. Whilst there has been evidence in the past of tentative approaches of the kind that characterise the fourth wave, these studies have been few and far between and have not been typical of the broad content of a sociological approach to law.[19] Various strands of the current third wave have developed elements of the fourth wave, but have had major limitations which have to date prevented them from making a break from abstract empiricism or abstract theorising. The works associated with the legal behaviourism of Donald Black and his followers,[20] and those which

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17 To use Alan Hunt's description of it in his *The Sociological Movement in Law* (1978).

18 See eg Engel and Yngvesson, 'Mapping Difficult Terrain: "Legal Culture", 'Legal Consciousness', and Other Hazards for the Intrepid Explorer' (1984) 6 L & Policy 299; Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA L Rev 4.

19 See for example, Nelken, *The Limits of the Legal Process: A Study of Landlords, Law and Crime* (1983); Macaulay, 'Non-Contractual Relations in Business' (1963) 28 Amer Soc Rev 55; McBarnet, *Conviction: Law, the State and the Construction of Justice*; Tushnet, *The American Law of Slavery, 1810-1860* (1980). Other contributions towards the approach which has been described as characterising the fourth wave include Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (1979); Hall et al, *Policing the Crisis: Mugging, The State and Law and Order* (1978); McAuslan, *The Ideologies of Planning Law* (1980); Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975).

20 Black, *The Behaviour of Law* (1976); Black, *The Manners and Customs of the Police* (1980). See also Black (ed), *Toward a General Theory of Social Control* (1984).

comprise what has been described as the American Critical Legal Studies (CLS) movement,[21] are each illustrations of these more limited approaches. Black, for example, reduces legal rules and legal ideology to various measurable behavioural indices, whilst the CLS movement has failed to seek to ground empirically its assertions about the link between legal doctrine and legal and social consciousness. However, it can be argued that there is sufficient evidence of studies which combine all or most of the aspects of fourth wave studies to suggest that a shift is slowly occurring within the sociology of law, even though this process is far from being an inevitable one. Some will, however, argue that there is a fundamental contradiction between these alternative approaches, and to some extent their practitioners act as if this is so. However, progress in the socio-legal enterprise must find ways of blending the best of the insights which each approach has to offer to construct a fourth wave in socio-legal inquiry. Whether this fourth wave will constitute a new paradigm is far from clear. Instead, it is likely that it will at best provide us with more complex and subtle pictures of the legal world. This cautionary view is well put by Stewart Macaulay when he tells us that

> 'It is unlikely that some new paradigm demanding new questions and answers is waiting in the wings. Most existing criticism of the social study of law debunks without substituting much concrete in its place...We may be past the point where we can expect to repeat the exciting discoveries of the first days of a new field, but there is still value in filling in uncharted territory.'[22]

I want now to move on to look at a number of specific areas of research within the sociology of law to illustrate some of the arguments or tendencies to which I have been pointing. In particular, I propose looking broadly at research on lawyers, courts and dispute processing, criminal justice, law-making and regulation and to conclude by focussing upon a number of general problems which confront what might be called progress in the sociological study of law.

3. LAWYERS

Whilst classical sociologists of law wrote generally about the role of lawyers and legal education in rationalizing the processes of decision within society and the legal system, detailed sociological studies of lawyers really did not begin until the 1940s, although the Legal Realists of the 1930s and 1940s did spend much time debunking myths about lawyers, particularly in regard to judicial decision-making. The studies of the 1940s were, however, fairly crude data-gathering exercises, so that it was really not until the 1960s that sociologically more sophisticated case studies of the legal profession began to appear. Although motivated by specific, if somewhat narrow, theoretical goals, studies such as Smigel's *Wall Street Lawyers* (1964), Wood's *Criminal Lawyers* (1967), Carlin's *Lawyers on their Own* (1962) and *Lawyers' Ethics* (1966) and Handler's *The Lawyer*

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21 See eg Unger, 'The Critical Legal Studies Movement' (1983) 96 Harv L Rev 563. Also see Critical Legal Studies Symposium in (1984) 36 Stan L Rev 1, especially Trubek 'Where the Action Is: Critical Legal Studies and Empiricism' 574-622. Similar thoughts have been expressed by Munger and Seron, 'Critical Legal Studies versus Critical Legal Theory: A Comment on Method' (1984) 6 L & Policy 257.

22 Macaulay, 'Law and the Behavioural Sciences: Is There Any There?' (1984) 6 L & Policy 149, 161-162.

and his Community (1967), all contributed greatly to an elementary mapping of the different settings of legal practice. The 1970s also saw a number of other simlar case studies, although these began to be more wide-ranging than earlier case studies.[23] One reason for this, of course, was that they could build upon the works of the more isolated scholars of the 1950s and 1960s. Another reason why studies became more wide-ranging during the 1970s was that scholars in different societies began to focus upon similar research problems as well as to seek to replicate work done elsewhere.

One of the basic theoretical concerns to emerge during this period arose out of the increasing recognition of the wide gulfs which existed within the legal profession between different types of lawyers. This led to a focus upon the legal, cultural and ideological mechanisms relied upon by legal professions to maintain the illusion of the coherence of the professional group. Whilst this is essentially the old sociological problem of explaining the appearance of order despite the reality of conflict and contradiction within society, its implications had never been fully explored in this context. As the legal professions entered into a period of rapid change during the 1970s, these changes highlighted important sociological questions, such as the bureaucratization of both public and private legal work, the rise of what one legal sociologist has called mega-law and mega-lawyering,[24] the political economy of the legal labour market,[25] and the increasingly important role of lawyers as conceptual ideologists within the modern state.[26] However, despite a few broad-ranging attempts at synthesizing empirical and theoretical endeavours,[27] or to apply ideas from more general sociological studies, such as the influential attempt by Margoli Larsen to do this, we have yet to see a major breakthrough in our understanding of the legal profession. Until we see these more wide-ranging studies which reflect upon the relationship between the professions of law and the wider society, it is unlikely that we will advance far beyond the patterns of research in this area which were developed during the 1960s. Only historians (such as Willard Hurst, Lawrence Friedman, Maxwell Bloomfield and Jerold Auerbach) have made much progress in documenting and explaining the relationships between lawyers and lawyering and wider social processes and structures. Even here, however, contributions have been modest. Thus, even if studies of the legal profession may have begun

23 Casper, *Lawyers Before the Warren Court* (1972); Donnell, *The Corporate Counsel: A Role Study* (1970); Handler et al, *Lawyers and the Pursuit of Legal Rights* (1978); Eisenstein, *Counsel for the United States* (1978); Macaulay, 'Lawyers and Consumer Protection Laws' (1979) 14 L & Soc Rev 115; Podmore, *Solicitors and the Wider Community* (1980); Rosenthal, *Lawyer and Client: Who's in Charge* (1974); Tomasic and Bullard, *Lawyers and their Work in New South Wales* (1978); Wice, *Criminal Lawyers* (1978).
24 Galanter, 'Mega-Law and Mega-Lawyering in the Contemporary United States' in Dingwall and Lewis (eds), *The Sociology of the Professions* (1983).
25 Abel, 'Toward a Political Economy of Lawyers' (1981) Wisc L Rev 1117; Luckham, 'The Political Economy of Legal Professions: Toward a Framework for Comparison' in *Lawyers in the Third World: Comparative and Developmental Perspectives* (1981) 287-336.
26 Cain, 'The General Practice Lawyer and the Client: Towards a Radical Conception' in *The Sociology of the Professions*, supra n 24 at 106-130.
27 See eg Rueschemeyer, *Lawyers and their Society* (1973). Also see Abel supra n 25; Luckham supra n 25.

to move beyond the methods and perspectives of the third wave of socio-legal inquiry, we have not attained the fourth wave and if anything we seem to be languishing in a trough between waves in this area of socio-legal scholarship.

4. COURTS AND DISPUTE PROCESSING

Studies of courts and dispute processing have followed a similar path to those of lawyers, although in the former fields theoretical concerns have assumed far greater significance. This is probably due to the fact that lawyers have tended to dominate in studies of the judicial process and of dispute processing. In particular, anthropologists and political scientists have taken special interest in the latter areas. Whilst case studies in this area can be traced back to the 1940s and 1950s, such as to Llewellyn and Hoebel's *The Cheyenne Way* (1944), the great bulk of socio-legal research into courts and disputing took place in the 1960s and especially the 1970s.[28] Classic studies such as Blumberg's 1967 study of the criminal courts and the interactions between members of the court-room work group have been replicated many times. When it had been realised that replications were no longer required, sociologists of law sought to compare the judicial processes of different jurisdictions. However, this did not lead to a greater depth of analysis or more wide-ranging theoretical inquiry. This was acknowledged in a 1982 Presidential Address to the Law and Society Association by Herbert Jacob, a leader in this genre of research, when he observed that 'The trouble is that on the whole we have been unwilling to follow rigorously the implications of any one theory and have, in fact, not developed very fully any of these models'.[29] Instead, he called for longitudinal and more extensive studies of particular courts. A rare attempt at a coherent assessment of the complex theoretical issues arising from studies of the judicial process is the somewhat neglected 1983 collection *Empirical Theories About Courts* edited by Boyum and Mather. This volume could well be seen as the summation of two decades of socio-legal endeavour in this area. Yet further progress is still possible as this volume actually raised more problems than it resolved. A modest attempt at developing a more theoretically systematic court study is to be found in Doreen McBarnet's 1981 study of a Glasgow court. This study is important in that it focussed upon both observable behaviour of court officials, as well as upon the manner in which legal rules were constituted and reconstituted in judicial contexts.

Studies in the area of dispute processing have certainly also shown an excessive interest in describing particular disputing institutions. However, researchers in this area have been more self-conscious about their theoretical assumptions and methodological research problems. In fact it could be said that of all the many areas in which sociologists of law have recently been interested, this area has produced the greatest changes amongst its practitioners. This may perhaps be attributed to the role of government funding in imposing unrealistic models of alternative dispute processing institutions upon researchers. As researchers in this area were often acutely theoretically sensitive from the outset,[30] and have continued to raise

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28 See eg Eisenstein and Jacob, *Felony Justice* (1977) and Levin, *Urban Politics and the Criminal Courts* (1977).

29 Jacob, 'Trial Courts in the United States: The Travails of Exploration' (1983) 17 L & Soc Rev 408, 417.

30 See eg Felstiner, 'Influences of Social Organizations on Dispute Processing' (1974) 9 L & Soc Rev 63.

theoretical questions,[31] it has not been surprising to find that critics have been able to build a composite picture of research in this area. Thus, for example, Cain and Kulcsar in 1982 concluded that there were at least five misleading assumptions upon which dispute theory was based. They described these as, first, the belief in the apparent universality of disputes; secondly, the ideological functionalism inherent in the reformist beliefs of dispute theorists; thirdly, the assumption that courts should settle all disputes and that where they did not, an alternative mechanism should be found; fourthly, that parties to disputes are qualitatively identical; and finally, the belief that disputes can all be compared, regardless of their location.[31] In this important critique, Cain and Kulcsar conclude by pointing to four reasons for the rapid growth of dispute related research during the 1970s. These are worth quoting. As they put it:

'There appear to be four illegitimate reasons for the burgeoning of a sociological interest in disputes. [Firstly, due to the emergence of what has been called the absorbent State]...Dispute theorists could thus find themselves lending support to an appearance of popular justice which disguises either direct class justice or a new form of state-controlled adjudication which is not accountable via the usual democratic representative and parliamentary processes. Second...the notion of dispute derives from and embodies fundamental tenets of legal ideology...Third, dispute theorising provides the best support for delegalisation processes, because the concept of disputes depoliticises conflicts, and in so doing implies that a particular remedy for each case is all that is required...Finally...dispute theorising supports that view of individuals as having equal, indeed the same, potential status...'[33]

The scene having been set for some radical debates concerning the relationship between law and the state, it should be said that dispute processing theorists have also evolved a number of useful models and concepts which seem to be worthy of further empirical application, despite the problematic nature of the concept of dispute. These range from Yngvesson and Mather's work on the transformation of disputes and Black and Baumgartner's attempt to evolve a model of third parties, to the concept of legal culture in the dispute process which has been developed by Joel Grossman and his colleagues.[34] It may, however, be that the disputes-focussed approach has been exhausted;[35] this exhaustion is more properly linked to the decline of government funding in this area, the

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31 See eg Fitzgerald and Dickins, 'Disputing in Legal and Non-Legal Contexts: Some Questions for Sociologists of Law', (1980-81) 15 L & Soc Rev 681; Kidder, 'The End of the Road? Problems in the Analysis of Disputes' (1980-81) 15 L & Soc Rev 717; Tomasic, 'Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement' in Tomasic and Feeley (eds), *Neighborhood Justice* (1982) 215-248.

32 Cain and Kulscar, 'Thinking disputes: An Essay on the Origins of the Dispute Industry' (1982) 16 L & Soc Rev 375, 378-383.

33 Ibid 392-394.

34 Grossman et al, 'Measuring the Pace of Civil Litigation in Federal and State Trial Courts' (1981) 65 Judicature 86.

35 See Trubek, 'The Construction and Deconstruction of a Disputes-Focussed Approach: An Afterword' (1980-81) 15 L & Soc Rev 727.

overly large size of empirical data gathering exercises in this field during the 1970s and the realization of the complexity of theoretical issues which underlie studies of disputes. In any event, the area of judicial and dispute research is of such central significance within the sociology of law that it is likely to continue to be a major focus for research, although at a less frantic pace than was evident during the 1970s.

5. CRIMINAL JUSTICE

Much contemporary interest in the law and society field has had its roots in earlier activities in the fields of criminology and penology. Some of these influences are evident from research in mainstream areas of the sociology of law, such as in studies of sentencing in the criminal courts[36] or of policing conduct.[37] A more sociological approach to traditional criminal justice concerns began to emerge during the early 1970s with the works of radical criminologists such as Quinney, Taylor, Walton, Young and others. Whilst much of this activity of the early 1970s has now been reassessed,[38] the 1970s at least provided a major illustration of a long overdue, if ultimately very modest, attempt to redirect studies of crime and justice and to inject into these more broad-ranging theoretical goals. It revived a style of approach to crime and justice which had been dormant since the tentative efforts of early theorists such as Durkheim[39] and Bonger[40] and the later efforts of Rusche and Kirchheimer.[41] This more theoretically sensitive approach was facilitated by more recent historical studies, such as those of Douglas Hay and his colleagues,[42] as well as by the widespread crisis in the criminal justice field which emerged during the 1970s and which called for explanations of crime and justice other than those which had been available from traditional correctionalist criminology.[43] Unfortunately, much of the Marxist-inspired radical criminology has not led to new empirical work, and where it has, it has tended to focus upon the politics of crime and justice, of policing, of criminal courts and of law and order campaigns.[44] Whilst this has not been entirely inappropriate, it has often merely restated the obvious, without going on to evolve more widely useful theoretical models. Moreover, these studies generally failed to focus upon the criminal law as such, and instead have usually concentrated (in a fairly abstract

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36 See eg Hogarth, *Sentencing as a Human Process* (1971); Levin, supra n 28; Feeley, *The Process is the Punishment* (1979).

37 Black, *The Manners and Customs of the Police* (1980); Cain, *Society and the Policeman's Role* (1973); Manning, *Police Work: The Social Organization of Policing* (1977); Muir, *Police: Streetcorner Politicians* Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (2nd edn 1975).

38 See eg Inciardi (ed), *Radical Criminology* (1980); Taylor, *Law and Order: Arguments for Socialism* (1981); Lea and Young, *What Is To Be Done About Law and Order?* (1984).

39 See eg Durkheim, *The Division of Labour in Society* (1964); Durkheim, *Suicide: A Study of Sociology* (1951). Also see Lukes and Scull (eds), *Durkheim and the Law* (1983).

40 Bonger, *Criminality and Economic Conditions* (1916).

41 Rusche and Kirchheimer, *Punishment and Social Structure* (1939).

42 Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (1975).

43 See eg Balbus, *The Dialectics of Legal Repression: Black Rebels before the American Criminal Courts* (1973); Hall et al, *Policing the Crisis: Mugging, the State, and Law and Order* (1978); Chambliss and Seidmann, *Law, Order and Power* (1971) and (1982); and National Deviancy Conference *Permissiveness and Control: The Fate of the Sixties Legislation* (1980).

44 See eg Adlam et al (eds), *Politics and Power Four: Law, Politics and Justice* (1981); Mathiesen, *The Politics of Abolition* (1974).

theoretical way) upon surrounding social and institutional contexts without drawing too close a connection between these contexts and the law itself. However, as has been argued elsewhere, 'What we have seen since the late 1970's has been a return to the objects of inquiry, namely, law, crime and criminal justice policy, as the new criminology did little if anything to remove the control of these from the hands of more traditional criminologists'.[45] Where either liberal or radical scholars sought to develop more comprehensive theoretical frameworks as part of a sociology of criminal law, these have often been extremely abstract, artificial and tentative, as is evident, for example, from works by Gross, Gorecki, Quinney and Rich.[46] Quinney, for example, began by drawing upon Pound's theory of interests in seeking to evolve a sociology of criminal law. However, he ultimately abandoned this project and instead focussed for a time upon crime control in advanced capitalist societies. Quinney seems to have finally retreated from sociological theorising about crime to a more philosophical and transcendental realm. For example, in 1984, when receiving the Edwin H Sutherland Award from the American Society of Criminology, Quinney observed somewhat poetically that 'Crime is a homelessness in the world physically and spiritually. We will eliminate crime only when we find a way to travel home...only when we can be at home in this world of universal consequence'.[47] As if to justify his abandonment of explicit theory, Quinney also observed that 'As criminologists, we tend to do little more than explicate, elaborate, and synethesize the obvious. When will we cease to name and begin to live...life first hand?'[48]

In contrast to Quinney, Donald Black's attempts at general theory in respect to the area of social control were also stimulated by the works of Pound (such as his 1942 text *Social Control Through Law*) and by the work of Durkheim. Whilst Black has certainly not retreated into the realm of the transcendental, his general theory of social control has, however, sought to go far beyond law as such and where law is his focus it is reduced to behavioural categories such as its style, form and quantity.[49] John Griffiths has sought to salvage Black's theory by arguing that the taxonomic approach should be abandoned as the distinction between law and other forms of social control should be seen as arbitrary. Instead, he proposes that relative legalness and not law should be the basis of theorizing about social control.[50] Like Durkheim, Griffiths stresses the importance of the division of social control labour to account for the legalness of social control. Whilst all of this is very interesting conceptually, we have not really moved very far toward an empirical general theory of criminal law, even though forests must have been shredded over recent decades to fuel the heated conceptual debates which have characterised this area of legal sociology.

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45 Tomasic, *The Sociology of Law* (1985) 90.
46 Gross, *A Theory of Criminal Justice* (1979); Quinney, 'Toward a Sociology of Criminal Law' in Quinney (ed), *Crime and Justice in Society* (1969) 1-30; Rich, *The Sociology of Criminal Law* (1979).
47 Quinney, 'Myth and the Art of Criminology' (1985) 9 Leg Stud Forum 291, 296.
48 Ibid 296.
49 Black, 'Social Control as a Dependent Variable' in Black (ed), *Toward a General Theory of Social Control* Vol 1 (1984) 1-36.
50 Griffiths, 'The Division of Labour in Social Control' in Black (ed), *Toward a General Theory of Social Control* (1984). See further Abel, 'Redirecting Social Studies of Law' (1980) 14 L & Soc Rev 805.

6. LAW MAKING AND SOCIAL CHANGE

In contrast to the three areas of socio-legal research discussed above there has been a relative neglect of important areas such as law-making, the interpretation and implementation of legal rules, and the administration of law. Areas of research, such as into the legal profession and the judicial process, have tended to fall more readily within what might be called the legalist paradigm which has dominated legal education. Similarly, the criminal law and criminal justice concerns have received disproportionate attention when contrasted with other areas of law because of the fact that popular stereotypes of law tend to be based upon the misconception that the criminal law and criminal justice institutions are typical of all other law and legal institutions. This view derives in part from the dominance of the misleading social control model of law. Another reason why studies of such areas as law-making and social change have tended to be neglected is that they have often required the use of macroscopic and social structural explanations and methods, rather than the use of microsocial techniques which tend to dominate much of legal sociology.[51] This helps to explain why sociologists of law have tended to have such little success in evolving broadly based theories of law and social change.[52] Elsewhere it has been argued that a series of conceptual obstacles has bedevilled theorizing about law-making.[53] Some of these have included the tendency to rely upon unstable dichotomous approaches, such as the conflict-consensus dichotomy and the public-private distinction. Excessive reliance upon the somewhat simplistic gap approach and the tendency to rely upon one or other of these explanations have accentuated the resort to single-cause explanations of law-making, despite the fact that such activity is often far more complex than it seems. Some, like William Chambliss, have sought to avoid the quagmire of interlocking explanatory frameworks by emphasizing only such law-making as is regarded as a 'significant' turning point.[54] He has thus been able to rely upon the useful model of conflicts, dilemmas and contradictions in order to explain the nature of law-making. This approach has been satisfactory so far as it goes, although it ignores the powerful effects of incremental change as a result of a vast number of minor legislative initiatives. Nevertheless, there have been a number of important recent case studies of law-making which have been sensitive to the empirical and theoretical problems in this area. These have included David Nelken's study of the emergence of British fair rent legislation, Stuart Hall's study of morals legislation and Pat O'Malley's study of libel legislation.[55] Having said this, one should note that it is still true, as the author of one of the almost classic studies

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51 See however, Friedman, *The Legal System: A Social Science Perspective* (1975); Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978); and Kidder, 'Towards an Integrated Theory of Imposed Law' in Burman and Harrell-Bond (eds), *The Imposition of Law* (1979) 289-306.

52 Tomasic, 'Towards a Theory of Legislation: Some Conceptual Obstacles' (1985) Stat L Rev 84.

53 Chambliss, 'On Law-making' (1979) 6 Brit J Law & Soc 149.

54 Nelken, *The Limits of the Legal Process* (1983); Hall, 'Reformism and the Legislation of Consent' in *Permissiveness and Control: The Fate of the Sixties Legislation* (1980) 1-43; O'Malley, 'Accomplishing Law: Structure and Negotiation in Legislative Process' (1980) 7 Brit J of L & Soc 22. See further, Tomasic (ed), *Legislation and Society in Australia* (1980).

55 Aubert, 'On Methods of Legal Influence' in Burman and Harrell-Bond (eds), *The Imposition of Law* (1979) 27-43.

in this area has noted, that 'The social science of legislation has not advanced much since the time of Bentham'.[56] Whilst studies of law-making have become conceptually more sophisticated we have yet to see studies in this area which represent a major theoretical advance. As in studies of the implementation of law, the continuity with past understandings and methods is still considerable in regard to law-making research. Although law-making and law implementation studies such as Bardach's 1977 book *The Implementation Game* do present novel insights, none of the basic observations about this area goes significantly beyond Pound's 1916 discussion of 'The Limits of Effective Legal Action'. There is therefore a strong sense of both continuity and development in more recent studies of the nature of law-making and social change.[57]

7. REGULATION

Studies of the nature and effectiveness of business and welfare regulation have become increasingly popular over the last decade or so, although this genre is by no means a new one. It is based upon many of the conceptions found in the law-making and social change literature and it tends to be focussed upon the work of regulatory agencies or commissions. To some extent it also parallels the literature on the sociology of policing. Studies in this area have tended to focus upon two key aspects of regulatory agencies: first, their effectiveness as instruments of public policy; and secondly, the related issue of the manner in which rules are applied by these bodies.[58] These kinds of studies have dealt with business regulatory agencies and the vast area of welfare administration which has tended to be ignored by sociologists of law, despite its massive significance. Michael Lipsky's *Street-Level Bureaucracy* is a good illustration of the latter kind of study,[59] although it is interesting to note that most of the issues raised in these regulatory studies, such as problems of consistency, capture, disintegration and other dilemmas, were raised at least as early as the 1950s as, for example, in Herbert Kaufman's 1960 study *The Forest Ranger: A study in administrative behaviour*. However, attempts have increasingly been made to apply to the area of regulation theories derived from broader perspectives in the sociology of law. For example, the influence of Black's theorising upon the work of Grabosky and Braithwaite in relation to Australian regulatory agencies is an illustration of this point. It is likely that this area of socio-legal inquiry will receive increasing attention over the next few years.

8. CONCLUSIONS

As has been seen above, there has been a massive expansion in socio-legal studies during the last two decades. Whilst many new initiatives, which have had the effect of internationalising the sociology of law, have been taken during this period, continuity with earlier waves of socio-legal inquiry quite overshadows the innovations which have occurred. This can

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56 See eg Allott, *The Limits of Law* (1980).
57 See eg Hopkins and Parnell, 'Why Coal Mine Safety Regulations are not Enforced' in *Business Regulation in Australia* (1984) 351-368; Kagan, *Regulatory Justice: Implementing a Wage-Price Freeze* (1978); Bardach and Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982). Also see Hawkins, *Environment and Pollution: Regulation and the Social Definition of Pollution* (1984).
58 See, however, Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (1980).
59 See generally Sugerman (ed), *Legality, Ideology and the State* (1983).

be illustrated in many ways. For example, the extent to which resort
has been made by contemporary writers to the theorizing of earlier scholars
such as Marx, Pashukanis, Weber, Durkheim and Gramsci is illustrative
of the hold of the past.[60] Similarly, it can also be argued quite plausibly
that the 'trashing' style of the Critical Legal Studies Movement has more
in common with the Legal Realism of the 1930s than it dares to admit.[61]
Also, the continued potency of functionalist analyses, particularly in the
form of systems theory, cannot be ignored.

Despite the obvious and strong patterns of continuity, it must be stressed
that the sociology of law is today a far more sophisticated discipline
than it has ever been in the past. A good indication of this greater
maturity may perhaps be found in the spate of texts reviewing this field
which have been published over the last 10 years or so. By far the best
of these is the 1984 text by Roger Cotterell, although others which might
be listed include those by Hunt, Grace and Wilkinson, Kidder, O'Malley,
Rich, Roshier and Teff and Tomasic, to mention but a few.[62] These
illustrate a discipline-wide attempt to 'take stock' of the accomplishments
and failings of the sociology of law, and to seek to chart a path for
further development. What is evident, however, from these examinations
of the discipline is both the common problems faced by its many
practitioners and the discipline's considerable fragmentation. The overriding
problem is probably that of finding an adequate mix or integration of
theoretical purposes and empirical endeavour. All too often one of these
has tended to be sacrificed at the expense of the other. A synthesis of
empirical and theoretical concern is essential if the problems of earlier
eras are to be avoided. A good illustration of this is the Critical Legal
Studies Movement and its failure to take empirical inquiry sufficiently
seriously. Marxist analyses of law have also encountered this problem,
although an increasing number of Marxist-inspired legal sociologists (such
as eg Maureen Cain, Doreen McBarnett and Pat Carlen) have produced
path-breaking contributions to the sociology of law by their skilful
integration of empirical and theoretical inquiry. Regrettably such scholars
are still few and far between. The development of a fourth wave of
the sociology of law depends greatly upon the appearance of further work
of this kind being undertaken, particularly if such a sociology of law
also stresses the doctrinal and ideological aspects of law. Whilst the
sociology of law is far from being a fully developed area of scholarship
(as there is much room for further growth), it has become widely
recognised that its insights are an essential component of any
comprehensive scheme of legal education and legal knowledge. A fourth
wave in the sociology of law will only serve to provide further confirmation
of this point.

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60 See eg Note, "Round and Round' the Bramble Bush: From Legal Realism to Critical
     Legal Scholarship' (1982) 95 Harv L Rev 1169 and Levinson, 'Escaping Liberalism:
     Easier Said Than Done' (Book Review) (1983) 96 Harv L Rev 1466.
61 Aubert, *In Search of Law: Sociological Approaches to Law* (1983); Cotterell, *The
     Sociology of Law: An Introduction* (1984); Hunt, *The Sociological Movement in Law*
     (1978); Grace and Wilkinson, *Sociological Inquiry and Legal Phenomena;* Kidder,
     Connecting Law and Society (1983); Rich, *The Sociology of Law* (1978); Roshier and
     Teff, *Law and Society in England* (1980) and Tomasic, *The Sociology of Law* (1985).