8 The Use of Unpublished Data in Socio-Legal Research

NEIL RICKMAN

Introduction[1]

A common perception of legal research (and practice) is of a fairly narrow concentration on detail, definition and consistency. This view is understandable but (certainly in the case of research) not wholly accurate. For a number of years now, academics on both sides of the Atlantic have been analysing legal issues from a wide variety of perspectives under the auspices of an emerging academic discipline called `socio-legal studies´. In the UK, this approach has been pioneered (and, indeed, unified) by the Centre for Socio-Legal Studies at Oxford. The objective of the present essay is to explain the extent and nature of the use of unpublished material in these `socio-legal studies´ by way of illustration with some examples from the centre's work. It is hoped that, by explaining this research, attention will be drawn to a broader interpretation of what material is required for studying the law and its effects on individuals and society.

It is not new to observe that law can be viewed legitimately from a number of disciplinary perspectives. Neither is it new to suggest that this observation should enlighten archival policy (e.g. see Hay, 1987). Nevertheless, I have felt the need to approach my objective via a slightly circuitous route, spending some time discussing the nature of socio-legal studies on the way. Thus, the present contribution is of a case study, both explaining how such a broad perspective works (in theory and practice) and

the variety of (in particular, unpublished) data upon which it must, necessarily, draw.

To achieve this, the following section starts with a general discussion of what socio-legal studies are and where their focus lies. Stressing the empirical nature of the focus will enable archivists and records managers to understand what is generating the demand for unpublished material discussed later. It also allows me to draw some general conclusions about the types of data required by socio-legal researchers. The third section provides a broad introduction to the work of the Centre for Socio-Legal Studies by briefly describing its recent research programmes. In this way, I hope to `bridge the gap´ between the theory and specific examples.

This fourth section contains the main body of the essay. By looking at some specific pieces of the centre's work, it highlights the types of unpublished material used therein and how they were employed. It also describes the main research methods used at the centre and explains why some of these involve the creation of new data sets, rather than the use of existing records. One implication of this section is that, on reading some of the centre's output, a heavier reliance on unpublished material emerges than might initially be suggested by its research techniques. Whilst this analysis could have been performed by surveying the whole of the centre's publication list, I have chosen instead to look at a small, representative sample from it. The main reason for this is one of practicality: the extent and scope of the centre's output since its establishment in 1972 are such that a complete analysis would be unmanageable.[2] However, I think that there are some clear trends in its choice and use of unpublished material which the research presented points up; producing more examples might only have clouded the issues.

A brief summary and conclusion end the paper.

Before progressing, a word about my working definition of unpublished material. In Chapter two, Twining has defined criteria for categorizing archival material as `legal records´. The present essay, however, takes a broader view than this and considers the use of all forms of unpublished material in the centre's work.[3] This is because it focuses on the diversity of material that can be relevant to such legal research. One implication of this is that much of the discussion will be of interest to records managers in organizations that generate their own records (e.g. local authorities, solicitors' firms, etc.) and will not always be relevant to archivists as they are traditionally perceived. Given the limited policy that exists towards archives in these organizations, this seems a legitimate fact for a policy-oriented study like the Commonwealth Legal Records Project to highlight.

Socio-legal studies in theory[4]

Socio-legal studies have become increasingly influential in the way law has been viewed and studied over recent years.[5] One might trace this back (in the UK) to the establishment of the Centre for Socio-Legal Studies by the Social Science Research Council (now the Economic and Social Research Council) at Oxford in 1972. This would be justifiable though it should be remembered that the move was `in response to the growing interest from many academic lawyers and some social scientists for an institution which could explore by empirical research aspects of the relationship between law and society´ (Hawkins and Harris, 1988, p.272). Subsequent evidence of influence can be gleaned from the growing text book references to socio-legal research findings (e.g. Hepple and Matthews, 1985; Hoggett and Pearl, 1991), the level of policy debate they have informed, and the numerous university law departments now offering socio-legal course options. Despite this rising profile, however, the purpose and methods of socio-legal studies are often misunderstood. In the context of archives policy, this runs the risk of causing valuable information to be destroyed (because of ignorance as to its potential uses) or inconveniently stored (perhaps because of unawareness as to its relevance to a wide variety of disciplines). The present section addresses the question of `purpose´ in an attempt to indicate generally the types of data requirements that socio-legal studies have.

A broad view of `socio-legal studies´ would define them as the study of law in its social context. Harris (1989, p.1), however, provides a more specific definition: socio-legal studies are `the study of law and legal institutions from the perspectives of all the social sciences (meaning all the social sciences, not just sociology)´.[6] The parenthesis is important because it stresses the breadth of social science inputs used in socio-legal studies, thus preventing the frequent misinterpretation of `socio´ as referring uniquely to the application of sociological techniques (to legal issues). The `social science approach´ allows a combination of the different perceptions that different disciplines can provide of the same social problem. Accordingly, socio-legal studies are well placed to produce policy-relevant research insights.

The socio-legal approach may be contrasted with traditional legal scholarship. The latter focuses attention on the internal consistency of the law and the inter-relationship between legal rules in different areas of the law. The former, however, examines the way that law works in practice and the social consequences it may have. It views legal institutions as only `one of many social institutions (albeit an important one) ... [and argues that] ... legal rules can be properly understood only through detailed study of their actual operation in their social and economic setting´ (Hawkins and

Harris, 1988, p.270). Accordingly, it lends itself to a wider set of questions raised by the social sciences. These include:

> how are legal rules made? Are they in fact complied with in the real world? If not, why not? Who tries to enforce the rules against rule-breakers? How do they set about their task, and with what results? What are the indirect and secondary effects of the law? Do those subject to the law make efforts to avoid the impact of the law? With what results? (Harris, 1989, p.1).

Such questions have two clear implications for the types of research material needed in order to address them. First, the questions are primarily empirical. As Hawkins and Harris note, `we are committed to the development of empirical research on the realities of law, its institutions, actors, rules, and processes with a view to furthering the development of theory´ (p.270). This empirical approach is not typical of traditional legal scholarship. Second, there are implications for the types of empirical data required. The questions necessarily generate a complex view of the law and its effects which, in turn, obviously calls for a richer, wider variety of data sources than does the traditional approach. In the case of unpublished data, this might include data obtained via interviews or internal documents describing an organization's regulatory procedures. Such `hands-on´ data allow researchers to evaluate the empirical workings of a legal rule and the organizations enforcing it, as well as how these differ both from the situation before it was introduced and the aims (stated or otherwise!) of policy-makers.[7]

The numerous types of material used in research at the Centre for Socio-Legal Studies bear these conclusions out. Included here are postal and interview surveys, `on-the-job´ (or participant) observation of how laws and regulations affect behaviour, documentary and records evidence and statistical evidence. It is clear that many of these categories do not fall easily within the framework of perceived archival practice (some, for example, involve the creation of data sets by researchers themselves, either because the relevant material is not available or because it is felt that archive material would not capture the behavioural issues in question). However, they do indicate the richness of the material that can be brought to bear on analysis of the law; their illustration in the penultimate section will, hopefully, stimulate some thought as to whether perceived practice cannot be broadened to incorporate such diversity.

Socio-legal studies in practice: research topics

In this section, I provide some broad practical examples of the research topics pursued at the Centre for Socio-Legal Studies since 1972. This will not only allow a more concrete understanding of the purpose of socio-legal studies, but will also help explain why the centre has used the types of research methods and data that are illustrated later.

The Social Science Research Council's provision of funding continuity to socio-legal studies was intended to stimulate full-time, long-term research in this nascent field. This it has done, all of the centre's work being organized around research programmes of (at least) two or three years' duration. This work is best seen in terms of these research programmes. Not only do they provide a structure for viewing the work, but also stress the diversity of topics upon which the centre has focused. To make this brief sketch more manageable, I have chosen to look primarily at research programmes since 1985. It should be noted, however, that this does not completely ignore work carried out previously as several of the programmes originated at earlier dates.[8]

Since 1985, the centre has been running four major research programmes. In keeping with the eclectic, social science approach outlined in the last section, these have combined the inputs of lawyers, economists, sociologists, psychologists, historians and anthropologists. The first programme, `Regulation and Discretion´, analyses occupational health and safety regulations in the UK. The aim is to follow a wide-ranging set of regulatory rules through their stages from inception to results. Study of this `regulatory cycle´ involves considering the way problems are determined and defined, and how this feeds into the policy and legislation which follow. It then examines how this legislation is implemented and enforced by those concerned, and its effects on/reception by these parties. Studies within the programme have examined, *inter alia*, the history of health and safety regulation (e.g. Bartrip, 1992),[9] the role of field-level inspectors in generating compliance with the legislation (Hutter, 1988; Hawkins, 1989), and the way the enforcement of one particular set of regulations (the Control of Lead and Work Regulations, 1980) has influenced the affected firms' behaviour. The research has provided insights into the degree of discretion enjoyed by those implementing and enforcing the law and the effects of this discretion. This, in turn, has important implications for the effectiveness of this area of legislation and the livelihoods of those at which it aims.

Some similar themes can be discerned in the centre's `Business, Finance and the Law´ research programme. For example, compliance with legislation has been examined in the contexts of tax avoidance and evasion, corporate finance and accounting (McBarnet, 1991; 1992), city regulation

(Fenn, McGuire and Prentice, 1990, on insider trading) and insolvency (Wheeler, 1991). Another important aspect of business behaviour concerns relationships between different sectors of a given industry (e.g. between suppliers and retail outlets). Many such relationships are long-term and contractual in nature. The centre has been conducting research into these in the context of the motor industry, including a comparative Anglo-French study of the ways contract law is used to govern them on both sides of the English Channel (Harris and Tallon, eds., 1989). A major difference highlighted here is the more frequent recourse to formal law when contractual conditions are breached in France than in the UK.

A recurrently important policy issue in Britain is the provision of health care. In this area, legal rules affect practitioners, administrators, patients and their families. There are clear socio-legal issues here and the Centre for Socio-Legal Studies has been conducting research into some of these under its `Law and Health Care´ programme. This has focused on how the above parties are affected by medical negligence law and claims, and by National Health Service (NHS) complaints procedures. Results here have drawn attention to the motivations for making complaints and legal claims and to deficiencies in the processes that have been established for doing so. Other areas of research in this programme are examining wider issues in health sector regulation: the implementation of recently instituted NHS contracting; also the effects of statutory regulation (e.g. patent law) on pharmaceutical product innovation.

The final research programme that the centre has been running since 1985 is that in `Law and Family Policy´.[10] The impact of law on family life is clearly enormous. The centre is studying its role in divorce and child abuse cases, and in encouraging the elderly to use their property as a means of financial support (on the latter, see Eekelaar and Pearl, eds., 1989). Research into the effects of matrimonial (divorce) law has tackled such crucial issues as how the divorce mediation process affects the parties and outcome of proceedings (Greatbatch and Dingwall, 1989), the role of registrars in this outcome (Eekelaar, 1991), the financial consequences of divorce for those involved (Maclean, 1991) and long-term consequences of divorce for children (Eekelaar and Maclean, 1986). As an example of findings from their work on children and divorce, Eekelaar and Maclean (1986) found that, from a sample of 5000 children born in 1946, those who experienced parental divorce before they reached the age of fifteen were likely to leave school with lower educational qualifications than children from continuing two-parent families. Other findings are too numerous to mention, but this example will give a flavour of their relevance to any serious policy debate concerning matrimonial law.

Apart from their diversity and inter-disciplinary nature, there are several notable themes to these research topics. First, they all are (at least

partly) concerned with the way law is implemented. In this, they implicitly examine the questions posed by Elmore for analysing the implementation of a legal rule: `why the legal action should be enforced (authority), the way responsibility for enforcement is allocated, and factors which affect the capacity to enforce (competence)´ (in Gessner and Thomas, 1988, p.86). Second, they are very much concerned with who is affected: the regulator, the enforcer and the parties at whom the law is aimed. Finally, they clearly depict the breadth of the definition of law used in socio-legal studies. `Law´ does not refer only to statutory and case law, but also considers rules and regulations that may be put in place to fulfil a wider statutory obligation (e.g. NHS complaints procedures).

These themes are clearly those exhibited by the description of socio-legal studies. Further, having seen there the questions upon which those studies focus, it is easy to see how the research topics described in the present section were arrived at. All can be recognized as addressing crucial issues in policy debates that have taken place in the UK in recent years; indeed, in many cases, they demonstrate how policy-makers have responded to them. For this reason (and their own inherent interest), they seem to me comfortably to illustrate the value of a broad perspective on the law and its consequences.

Socio-legal studies in practice: use of unpublished data

The section on `socio-legal studies in theory´ demonstrated that the focus of socio-legal studies has clear implications for the research material they require. Further, in general, it appears that this material can differ quite substantially from that used in traditional legal research. To substantiate this point, I now turn to some practical examples of socio-legal work; in particular, I review some of the Centre for Socio-Legal Studies' projects in recent years. It will be clear from this that the main focus of the centre's research is on explaining how a chosen area of law actually operates, for instance by studying the behaviour of the people (e.g. lawyers, officials, business advisers, etc.) who translate a legal mandate or rule into action.

Two points should be made about what follows. First, I have chosen to group the work in this section according to type of research. This in turn determines the data used. The implication is not that research reported under one heading does not contain data and methods reported under others (indeed, I have tried to highlight some linkages). Instead, the method of presentation is chosen purely for reasons of simplicity and clarity. Second, as explained in the Introduction, I have used a small sample of the centre's output to make my points below. This has been chosen according to three criteria: (i) its representativeness; (ii) to cover several of the centre's

research programmes and (iii) to span a reasonably long history of its publications. The latter enables a general pattern of continuity to be observed in the research material required.

Uses of archive and library material

The clearest use of unpublished records (as they might traditionally be defined[11]) in centre research is in its analyses of the social history and effects of legislation. To consider this, I choose two books (Bartrip and Burman, 1983; Bartrip, 1987) and one article (Bartrip, 1982). These works have contributed to issues in both the `Regulation and Discretion´ and `Compensation for Illness and Injury´[12] research programmes. It has been noted elsewhere (Hay, 1987) that records (including legal ones) are of immense value to social historians. However, though the examples below confirm this, they also demonstrate the variety of sources that necessarily are required if a full evaluation of the consequences of legislation is to be made.

Bartrip and Burman analyse the evolution of law and government policy in the area of industrial safety and compensation between 1833 and 1897. In so doing, they pick up the earliest British provisions in this area. Using historical documents and statistics, they describe the legal and financial position of workers prior to reform, when industrial accident compensation came only through public and private charity. In this way, they are better able to assess the effects of reform proposals (which first surfaced in the 1860s) and legislation (Employers' Liability Act, 1880; Workmen's Compensation Act, 1897) on workers' conditions. Consideration is given to the role of inspectorates in implementing this legislation and to the parallel development of common law on employers' liability. Unsurprisingly, the research draws on a number of unpublished materials and library archives.[13] The easiest way to illustrate this is to check the bibliography and chapter endnotes. These reveal the following use of sources (figures in brackets indicate the number of references): Public Record Office (HO and LAB series, 38); university libraries (12, including the Joseph Chamberlain Papers at Birmingham and the Asquith Papers at Oxford, also 4 Doctoral theses and one Master's); the Howell Collection (Trades Union Congress - TUC - Papers, 8); National Register of Archives (Broadland Manuscripts, Shaftesbury Diaries, 1). This extensive variety of political minutes, comments, letters, memoirs, etc. are essential to the rich analysis of the introduction and effects of industrial safety legislation that Bartrip and Burman present.

A similar array of sources can be found in Bartrip's (1987) follow-up study on `Workmen's Compensation in the Twentieth Century´.[14] This traces the development of the Workmen's Compensation Scheme after its

nineteenth-century origins, finishing (as did the scheme) with the National Insurance (Industrial) Injuries Act, 1946. Once again, the socio-legal analysis stresses not only the context and background to the legislation, but also its effectiveness in attaining its goals and any unintended consequences for firms, workers, etc. Here the use of unpublished data is as follows: Public Record Office (PIN, CAB, HO series, 72 references); Warwick Modern Records Centre (especially its CBI predecessor materials, 43); the Middleton Papers (Labour Party headquarters, 15); various TUC files (8); PhD theses (3) and one reference each to the National Register of Archives (Broadland Mss.), university libraries and the proceedings of the International Labour Organization's conference (Geneva, 1925).

Finally, I turn here to Bartrip (1982). An important feature of industrial safety legislation as it developed in the nineteenth century was the introduction of central government inspection as a means of ensuring compliance. In the absence of prior empirical research, Bartrip concentrates on the specific role of these inspectorates. He assesses

> the nature and extent of central government inspection between 1832 and 1875 in terms of departments formed, officials employed and budgets deployed ... [he examines] two particular inspectorates, ... factories and mines, to evaluate inspection as a means of enforcing statute law and furthering both social reform and government intervention ... [and], again by taking factory and mines inspection, ... [he considers] the controversial question of inspectors' attitudes to reform and regulation both before and after appointment (p.605).

He concludes that inspectorates' importance has been exaggerated; for example, they were in fact provided with insufficient resources to fulfil their objectives. The paper makes use of unpublished material at the Public Record Office (HO and LAB series, 23 and 1 references respectively) to highlight, *inter alia*, the government's motivations for introducing inspection. It is also used to show that, even after this introduction, workers still had cause to complain to the government about accidents whose ultimate causes had been missed by inspectors.

It is perhaps instructive to provide an example of social history where archival material was of no help. Bartrip has been researching the introduction of regulations to counter arsenic-related diseases (these were one of the first four industrial diseases to be scheduled by the Home Secretary in 1895). As part of this work, it was considered necessary to take a longer historical perspective on arsenic regulation, and Bartrip (1992) discusses the introduction to the Arsenic Act, 1851. On reading this paper, it is apparent that no reference is made to unpublished material. The reason is that the Public Record Office apparently has no record of the political

background to the legislation. This, of course, need not be a criticism of the PRO, but it is nonetheless surprising. For my purposes, it confirms that archival policies (decisions about destruction, cataloguing, storage or what records to keep) do have important effects on the work that researchers are able to perform.[15]

These examples evince the value of traditional archive material to socio-legal studies, providing a richer understanding of what legal rules have been intended to do and how they have fared. Thus, as seen, Bartrip is able to apply such data to make an original assessment of the effectiveness of the early factories inspectorates. However, as noted at the head of this sub-section, the range of material relevant to legal issues might be larger than expected. In particular, because the research analyses aspects of political context in the relevant legislation, it draws upon a number of political papers. Further, its simultaneous focus on the social consequences of that legislation brings the unpublished material of workers' institutions into play as well.

Participant observation and interview studies

A substantial amount of the centre's research has not used unpublished material available in public archives. The reason for this should be apparent from the discussions in the previous two sections: many of the questions in which socio-legal studies are interested involve analysing behaviour before any formal record would have been started.[16] Thus, it is of just as much interest to know why one road accident victim did not start legal proceedings (and thus not initiate a case file or statistic) as why another did; both provide us with insights about the way the law is working and is perceived to be working. Similarly, many of the questions that socio-legal studies ask are contemporary legal ones (with, therefore, contemporary policy relevance). The result is that the Centre for Socio-Legal Studies engages much of its time in `creating' data sets through postal surveys, interviews and `on-the-job' (or participant) observation in the research area concerned. Below, I provide some illustrations of these techniques at work. In many of the examples, however, it is important to note that unpublished material is nevertheless essential to the subsequent research. I start with a discussion of the centre's most popular research technique (often known as an `ethnographic' technique) and why it is so frequently used. Following its establishment in 1972, the centre instituted a research programme on `Compensation for Illness and Injury'. The findings are reported in Harris *et al.* (1984) and follow-up work based on these still continues (e.g., see Genn, 1987; Bartrip, 1987). The objective of the programme was a large-scale evaluation of the tort system as a support and compensation mechanism for those injured, disabled or made seriously

ill in accidents (on the road or at work, for example). The centre felt such a study to be needed, believing `that discussion of compensation systems seriously lacked reliable information on the experience of those affected by existing arrangements, and that there was a clear need for a comprehensive investigation of all systems of compensation and support, which studies not only the victims of all accidents wherever they occur, but also that of those who suffered similar kinds of incapacity through illness or congenital defects' (Harris *et al.*, p.xviii). Issues covered therefore included the factors associated with claiming and obtaining damages, the legal procedure for negotiating out-of-court settlements in accident cases, a psychological assessment of accident victims' views of fault and liability, alternative means of compensation available (social security, etc.) and the effects of accidents on victims' earnings and future earning power. The results (see Harris *et al.*) have been highly influential, both in the spheres of government policy and research methodology.[17] The analysis of the issues was carried out using all of the research techniques discussed in the present section. However, it was performed on one main database which the centre constructed between 1974 and 1979. I now turn to this database and the reasons for the centre's belief that such a base was not available elsewhere.

The database was constructed via a two-stage information process (see Maclean and Genn, 1979, for a full account). First a nationally representative sample of 15,000 households was questioned by post to generate a sample of individuals who had suffered some incapacity of at least two weeks' duration, arising from injury or illness. Then a 2,000-strong subsample of individuals was reinterviewed in depth (in person and by subsequent questionnaire) at a later stage, both to determine the circumstances of their incapacity and to follow the progress of any claim for damages made. All of this had been preceded by a pilot study to discover any difficulties with the questions and methods used (e.g. any implicit bias introduced). The result was a thorough data set, as required by the research.

Though in presenting the results generated by this data set, Harris *et al.* make little reference to unpublished data[18], Maclean and Genn (chapter 2) discuss the use to which such data were put and why they were found wanting. This discussion also highlights the potential value of unpublished data, even in what is ostensibly a piece of `survey research'. *A priori*, the types of information required by the compensation study might have been found in the records of the police, hospitals, general practices, and factories and other inspectorates. Other potential sources might have been industrial injury and disablement records, war injury benefit records, sickness and invalidity disablement benefit records, records of the Criminal Injuries Compensation Board, local authority registers of the disabled, blind and chronically sick, court records and the Department of Employment register

of disabled persons. Apart from indicating a wide range of sources to which socio-legal studies might turn, Maclean and Genn's discussion of these demonstrates the potential assistance they may provide to researchers in the field. They note that

> In the process of aiming at a strategy for research which would meet the demands of experience, economy and methodological logic, it was necessary to explore all the possibilities of data collection ... It was ... conceivable that a sample of victims could be constructed from the records of ... agencies, from whom information about the consequences of accidents and illness could be obtained at a later stage either by personal interview or postal questionnaire (p.6).

In other words, even if interview techniques are brought in at a later stage, records may be used to determine the characteristics that a representative sample might display. However, Maclean and Genn continue to explain why such an approach was not taken in this case.

The reasons given are the types of data collected by these agencies and their accuracy. The former can be broken down into two parts. First, an organization's data will tend to reflect its criteria for collection. These, in turn, will be determined by the functions of the organization rather than an individual's circumstances. They are

> primarily a record of the activities of the agency or organisation ... a record of clients seen, treatment given or cases reported. They are subject to the same limitations as the organisation itself and embody the bias determined by the terms of reference of the organisation (p.11).

Second, there are `individual´ or `group factors´ involved:

> The path which an individual must follow to reach the final stage of inclusion in official records can be characterised as a series of steps consisting of actions which follow from perceptions and definitions of given situations. Failure at any stage in this process will result in the individual not appearing in such situations (p.12).

Thus, both over- and under-reporting of cases may occur in agency statistics because reporting involves a subjective process on the part of the reporter. The `internal accuracy´ (p.14) of agency records is also discussed by Maclean and Genn. In particular they ask whether, if successful contact has been made between agency and client, the subsequent record reflects what took place. They give several examples of why this might not be the case

(pp.14-17). It would thus appear that the most useful agency records, from the perspective of a socio-legal researcher, would be ones that were consistent, accurately kept and economical to access (possibly computerized).

Such issues can be further illustrated by other centre work using this ethnographic technique. Hawkins (1984) and Hutter (1988) both contribute to the `Regulation and Discretion´ programme. Both analyse government inspectors in their role as enforcers of particular legal rules and regulations. Hawkins considers water pollution control, using a combination of participant observation, tape-recorded interviews and internal water authority documents. In particular, he looks at the work of staff at two regional water authorities to determine the role played by the criminal law in the daily routine of protecting water quality. He also enquires into the level of discretion they enjoy. By doing this, Hawkins is able to describe how abstract statutory statements are translated into administrative action and how differences between legal word and legal deed can provide valuable enforcement strategies. The bibliography refers to the use of only ten pieces of unpublished material[19] but the appendix, `A Note on Research Method´, confirms the use of unpublished documents internal to the water authorities concerned. Apart from his interview and observation data, Hawkins says, `I also made use of published agency materials and those internal agency documents to which I was given access: notes, minutes of meetings, reports, and statements of policy´ (p.226). The limited extent of this use is made clear in that only five references are made to them in various chapter endnotes.

Hutter's study considers the work of Environmental Health Officers. Again combining observation and informal discussion (to learn about the officers' work) with a second phase of more specific (taped) interviews, she examines issues similar to those explored by Hawkins in this different context. Once again, the bibliography contains few references to unpublished material[20] but the `Research Methods´ appendix (Appendix 1) does:

> The second phase of field-work comprised more formal methodological techniques than the first, namely examination of the records of the environmental health departments in the sample and semi-structured interviews with officers (p.11).

In discussing this use of unpublished internal documents, Hutter confirms the problems and potential uses as noted in Maclean and Genn. As she says, `the documentary survey proved less helpful than had originally been anticipated´ (p.211). This was because records varied in their content (due to differing attitudes to recording within departments) and in their quality

and quantity (due to financial constraints). Though access was easily obtained, many case files were hard to locate because of administrative staff shortages. In consequence, the ones examined were those that were centrally available and centrally collated - those whose contents were most efficiently available. The information in these varied and was usually brief; many of the decisions to which they referred were taken in conversation and the departments required only the outcomes of such decisions to be recorded.

However, Hutter continues (and here she is worth quoting in full):

> Despite these problems with the documentary sources they did provide a valuable check on some of the assertions made by officers, most particularly claims about the stringency with which the law is enforced by the various departments [under examination]. For instance, they gave some idea of the proportion of cases which resulted in prosecution, formal warnings, and informal action, and gave some indication of how environmental health cases were treated by the courts (p.212).

Thus, as well as their usefulness on matters of detail, internal documents were valuable in providing `a feel´ for the departments analysed, comparability across the (four) departments and a benchmark against which other information could be assessed. These are exactly the points identified in Maclean and Genn.

A whole series of other centre work uses interview and observation analysis, reinforced by unpublished organizational data. I briefly add another to further indicate the range of data sources that have been used.[21] In the `Law and Health Care´ programme, researchers have been granted access to two NHS districts' patient complaints processes - from patients', practitioners' and administrators' perspectives. Subsequent interviews (with patients and NHS staff) have followed up on the findings here. This work is (at time of writing) being prepared for publication so cannot be quoted. However, when discussing the project with the researchers, it is interesting to note the importance they placed on initial analysis of the files. Once again, this unpublished material provided a stock of information upon which to better `target´ the interviews and against which to check findings, as well as helping to determine the representativeness of the interview sample. In short, it provided a foundation for the subsequent research.

What of the records of those regularly involved in litigation themselves? During its research, the centre has studied solicitors, barristers, court registrars, insurance companies, trade unions and medical defence unions. Gaining access to case files can often be difficult, the problem, of course, being one of confidentiality. Nonetheless the centre has been able,

on occasions, to gain direct access to case files, or at least indirect access through interviews with the relevant lawyers. Genn (1987), for example, studies out-of-court settlement negotiations in personal injury litigation to determine how plaintiffs and defendants use to their advantage the various legal rules at their disposal. Using a combination of observation and interview/questionnaire surveys, she gains a fascinating insight into the negotiation process involved. This includes a substantial amount of material from negotiators' discussions of specific cases (kept anonymous) and, in chapter 8, the outcomes of two cases which could not have been published.[22] Harris (in Harris *et al.*, chapter 3) did not receive direct access to solicitors' confidential documents but reports that solicitors were generally willing to respond to a questionnaire (with client consent) about cases that the centre was following. However, interestingly, nine solicitors (out of 98) reported that the relevant file had been destroyed (something which must have occurred within five years) and five could not trace it (p.134, note 2).

As noted above, on some occasions, the centre has gained access to litigated files. In such cases (as in all matters of confidentiality) it offers anonymity and confidentiality, as well as some opportunity for the provider of the data to see a draft of any publishable findings. An instance of case file access, that the centre has at present, involves its current research into the operation of the tort system in medical cases.[23] This is being undertaken with excellent access to the case files of medical defence unions. Yet again it is the breadth of knowledge that these provide and the insights they offer into settlement strategies that have enabled very fruitful interviews and postal surveys to be constructed and carried out with lawyers, doctors and patients. The analysis has been able to highlight the stressful nature of medical litigation (for doctors and patients) as well as the strategies that plaintiff and defendant lawyers use in negotiating pre-trial settlements.

It is clear that legal actors and their files are of much import to aspects of the centre's work, whether this is through direct access or via the opportunity they give lawyers to refresh their memories on cases in question (as Harris's example demonstrates). Staff to whom I have spoken about access to confidential documents have generally been happy with that which the centre has received. A key point that comes across is the need (on both sides) to negotiate this access and to be flexible in doing so. A corollary of the access issue, however, is that the data destruction policies of those generating files etc., might take a broader view of the use to which such files can be put (in particular, once closed).

A final (though tangential) example of the importance of unpublished legal records to research has been provided to me in conversation by the centre's Peter Bartrip. He is presently conducting some research for the

British Medical Association (BMA), who has apparently not operated a consistent archives policy but has recently appointed an archivist to establish a collection of past and future BMA material. The lack of past record keeping has obviously added to the difficulty of this task. Fortunately, the BMA has retained the services of the same solicitors over the years and is currently enquiring as to which files they have kept that might provide a more thorough account of its work in the past.

What conclusions can be drawn from this sub-section? I have described a research technique (participant observation and interview) which is extremely important to the centre's work. The reasons for using this have been given as the contemporary nature of its research, its desire to capture the influence of the law at the earliest stage (which often pre-dates records) and a recognition that much unpublished data are not suitable (for legitimate reasons) for its needs. Accordingly, it has sought its own data. However, unpublished material has frequently performed a crucial role in defining the parameters for these ethnographic studies and has provided essential breadth, depth and background. It seems clear to me that this is particularly so where research has focused on the contribution of a specific organization to some socio-legal phenomenon, rather than the wider phenomenon itself.[24] This strongly suggests that all manner of agencies involved in work that requires the policing or operation of legal rules should be aware of the rich research potential of the unpublished material they generate (everything from minutes of meetings to internal monitoring statistics to files concerning finished work).

Statistical work

Statistical methods are frequently employed at the centre to draw results from sets of data. In this sub-section, I shall illustrate the use of unpublished data in relation to two types of statistical work. The first is econometrics while the second involves more descriptive statistical techniques. In both cases, the data are often from the internal material of an organization under study, as in the previous sub-section. The following examples therefore provide more illustrations of the uses of such data. However, the data are now being used `in their own right´, as opposed to providing breadth and background for the subsequent construction of interviews and questionnaires.

A particularly common approach adopted at the centre is econometrics (a set of computer techniques often used by economists to quantify and test hypotheses). Plenty of examples of the centre's work exist in this area. I choose to consider Gray and Fenn (1991), a contribution to the centre's `Law and Economics´ research project.[25] This draws on work commissioned by the Legal Aid Board to examine the factors behind the

recent increase in the unit cost of legally-aided criminal cases in England and Wales. It finds that the court-determined length of case is the main explanation of regional and temporal variations in unit costs. The unpublished data in this research involve a random sample of 2,914 legal aid bills drawn from all legal aid areas and covering the period 1988-1990. These were supplied by the Legal Aid Board.

Two important features of Gray and Fenn's data set are of note. First, these bills were originally constructed to help determine the payment due to the lawyer in each case. Thus, a lengthy initial part of the research involved inspection of bills to determine the richness of the data available, followed by the processing of the sample to distil out the relevant information (coded in a style suitable for computer analysis). This supports an observation made in the last sub-section: that the form in which data are initially stored can have a great impact on the duration (and cost) of a research project. Second, as the researchers say, `the timescale [of the survey] could not be longer [than 1988-1990] because the destruction policies of [Legal Aid] offices result in no bill being kept for more than three years´ (p.1,622). As a result of this observation, the Legal Aid Board is reviewing this policy, with the aim of extending the destruction deadline. This provides a valuable example of the discrepancy that may emerge between archive and research needs, and the way in which it can be solved by making archivists aware of their collections' research potential.

Whilst econometrics can provide valuable quantitative data, it is often sufficient to analyse figures by comparison of tables, etc. An example of this `descriptive´ method is Fenn and Dingwall (in Dingwall and Fenn, eds., 1993).[26] This compares medical negligence litigation experience in the UK and the USA. The UK data were taken from

> an extensive series of case files when Oxford Regional Health Authority commissioned [the authors] to review all the records available in the region of closed claims alleging negligence by hospital or community medical staff to see what could be learnt from the aggregate picture (p.14).

The authors' comments on these files are interesting and provide further evidence of the themes that have permeated the discussion until now. Some districts maintained complete records, while others were more `fragmentary´ (p.14). These latter were often dispersed across locations, as opposed to centrally kept. However, procedures had been tightened in 1980-1981, enabling Fenn and Dingwall to have `much greater confidence in the data from that period onwards´ (p.14). They continue:

> This picture of disarray ... sends its own message about the importance with which these files were regarded as a source of information ... As we learned from the staff involved, claims were managed on a case-by-case basis. Each was treated as a one-off event, resisted or settled or closed. Only one district produced any kind of statistical summary, although another was in the process of creating a small computerised database which would allow it to do the same (pp.14-15).

They continue to maintain that the benefits to the districts from collecting such data were not obvious (an example of Maclean and Genn's `organization´ point). However, given the size of the resulting data set, the authors conclude `if tort claims are to be used in medical risk management, and to contribute effectively to the process of quality assurance in the NHS, arrangements will have to be made to collect reports on a much larger scale´ (p.15). The implication is clear: it is in the interests of agencies to maintain effective records if they wish to improve the quality of their output through research findings.

Fenn and Dingwall's reference to computer databases leads me to a final `anecdote´ with which to conclude this sub-section. I have already argued that computerization is an obvious way in which some material could be made more `researcher-friendly´ (as well as more useful to the organization concerned). Not only can this make data easier to access and analyse, it can also make it more transportable (the centre regularly receives computerized databases through the post). However, one must be careful here as some computers store data in ways that are incompatible with other machines. This observation was confirmed at some cost when the centre was given access to the Health and Safety Executive's large computerized database in the 1980s. Incompatibility of computers meant that the whole set had to be printed out in London, transported to Oxford, then re-input.[27] Such an exercise, costly in both time and money, reminds researchers and archivists alike of the need to be mindful when considering a choice of computer hardware and software.

Conclusion

Socio-legal studies provide a perspective on legal issues that traditional legal scholarship does not aim for. By focusing on the social consequences of legal rules, they aim to assess how these rules are working and to isolate any contributory factors in their success or failure. The results that such research yields are becoming increasingly important in policy debate, as well as being of interest in their own right. Should archivists and records managers take note of this?

It seems to me that the answer to this question should be `Yes´. In this essay, I have made clear that the emphasis of socio-legal studies is on empirical issues. In fact, though, the interdisciplinary nature of socio-legal research generates demands for complex combinations of data. This complexity and the contemporary focus of much socio-legal research would seem to render large quantities of archival material useless to answering these empirical questions. I have tried to suggest, however, that this is not so; from a reading of some of the ethnographic research performed by the Centre for Socio-Legal Studies, it is clear that unpublished data provide valuable (and often crucial) foundational material upon which subsequent research is based. This is particularly so of work which examines the role of a particular organization in, for example, the implementation of, and compliance with, a given legal rule. However, it is also clear that the unpublished data to which I refer carry a much broader definition than simply `traditional archive collections´: I am also talking of records held by authorities and private firms (like solicitors). None of this should diminish the fact that traditional archive material is still invaluable to socio-legal studies, particularly those involving the social historian's perspective. However, the earlier discussion of these materials has demonstrated that even here, socio-legal studies necessarily require that the definition of what records are relevant for `legal research´ is a broad one. This is because they adopt a broad view of how the law should be assessed.

What should the archivist or records manager take away from this essay? The point of the paper has been very much one of `consciousness raising´. A recognition and awareness, therefore, that a broader perspective on legal issues exists, is valuable and has its own empirical needs would certainly be a good start. From here, a number of questions seem to be raised: what is a legal record (an `old chestnut´ there!)? If socio-legal studies rely so heavily on participant observation, will video-recorded data adopt a higher profile (e.g. court cases)? If so, how might they be kept? Similar issues arise with tape-recorded material (police interviews). Should archivists be familiarizing themselves with the data sets being created by institutions such as the Centre for Socio-Legal Studies (so that, at least, they might help direct other researchers to them)? Should firms in possession of unpublished data (case files) ever be willing to relax their access restrictions in return for anonymity/confidentiality (as the centre always provides)? How might archivists in organizations and firms be made more aware of the research potential of their records? Indeed, if there are important decisions to be made with regard to records collection in organizations, it seems that they should first ensure that they have archivists in place to take these (this is clearly not always the case, as in the BMA example above). I certainly do not have answers to these (and many other similar) questions. However, it seems to me that they are the kinds of

question necessarily raised by an acceptance of the need to address the types of question addressed by socio-legal studies. If the essay stimulates such thoughts, it will have succeeded.

Notes

1. I am grateful to the members of the Centre for Socio-Legal Studies for discussing some of the issues in this essay with me. Unattributed opinions are my own.

2. For example, during the period 1985-91 alone, centre staff (solely or jointly) authored 48 books and reports, 324 chapters in books or articles in academic journals, and edited 15 other books.

3. I am excluding from this statistical sources published by the government etc., and also the unpublished data that the centre generates itself. I am concentrating on unpublished material that could have been created by any process other than the centre's research (and therefore could have been properly recorded).

4. Apart from the specific references in the text, see the special issue of *Law and Policy* edited by Gessner and Thomas (1988) for a variety of perspectives on socio-legal studies.

5. See Harris (1983) for a more detailed account of this development than is presented here.

6. This definition suggests clear similarities between socio-legal studies and the `Law-jobs´ perspective taken by the Commonwealth Legal Records Project (see Twining, ch.2, above).

7. One might add that it can also have implications for the format in which data are usefully kept (for example, economists often find it convenient to work with tabulated data).

8. Also, in the fourth section, I discuss the `Compensation for Illness and Injury´ research programme, started in 1973-74.

9. All of the citations given in this section are examples of the outputs produced by the research programmes. There are many others to choose from (see note 2 above).

10. Space does not permit descriptions of the centre's other research projects in `Law and Psychology´ and `Law and Economics´. However, an example of work in the latter occurs in the account of `socio-legal studies in practice´ given below (see the discussion of Gray and Fenn, 1991).

11. In other words, public archives, libraries, collections of papers, etc.

12. See below.

13. Of course, much published material available in such places is also used, e.g., parliamentary papers and newspaper reports.

14. For a journal article discussing related issues and making use of similar unpublished material, see Bartrip (1985).

15. Bartrip informs me that, since completing his research, his attention has been drawn to recent PRO recataloguing activities, which may bring relevant material to light.

16. A common observation concerning socio-legal studies is that they analyse the workings of the law from `the bottom up´.

17. In policy, several studies (including the centre's) contributed to the government's institution of the Civil Justice Review (e.g. `Personal Injuries Litigation´ Consultation Paper, Feb. 1986) to overview the English personal injury litigation system. In research, the recent Rand study of personal injury litigation in the United States (Hensler *et al.*, 1991) adopted the centre's approach.

18. To be precise, four conference papers and four working papers.

19. Four conference papers, four PhD dissertations and two working papers.

20. Two Masters' dissertations, one Doctoral, one conference paper and one internal report (on `Staffing in Environmental Health´, a report for the Association of District Councils, Association of Metropolitan Councils, Local Authorities Conditions of Service Advisory Board and the Local Government Training Board, 1978).

21. As further examples: a piece of research currently being written up uses the internal (unpublished) manuals of compliance officers in London financial firms in order to be better informed when preparing and conducting interviews; McBarnet (1991; 1992) uses internal company documents along with interview data to consider tax evasion and avoidance together with `creative accounting´.

22. One was settled, the other went to trial but was not reported.

23. See also the discussion of Fenn and Dingwall, in Dingwall & Fenn (1993), below. Another example of such access is Wheeler (1991).

24. For instance, much of the work in the `Law and Family Policy´ programme is conducted without recourse to internal documents which very rarely exist in this field.

25. As another example, see Fenn and Vlachonikolis (1990).

26. Other good examples of such work are Lloyd-Bostock (1988) and Whelan, ed. (1990).

27. For an account of some of the work performed on this data set, see Lloyd-Bostock (1988).

Bibliography

Bartrip, P.W.J. (1982), `British Government Inspection, 1832-1873: Some Observations´, *The Historical Journal*, vol. 23.

_____(1985), `Beveridge, Workmen's Compensation and the Alternative Remedy´, *Journal of Social Policy*, vol. 14.

_____(1987), *Workmen's Compensation in the Twentieth Century*, Gower Publishing Group, Aldershot.

_____(1992), `"A Pennurth of Arsenic for Rat Poison": The Arsenic Act, 1851 and the Prevention of Secret Poisoning´, *Medical History*, vol. 36.

_____& Burman, S.B. (1983), *The Wounded Soldiers of Industry: Industrial Compensation Policy, 1833-1897*, OUP, Oxford.

Dingwall, R., ed. (1989), *Socio-Legal Aspects of Medical Malpractice*, Royal College of Physicians of London, London.

_____& Fenn, P., eds. (1993), *Quality and Regulation in Health Care: International Experiences*, Routledge, London.

Eekelaar, J.M. (1991), *Regulating Divorce*, OUP, Oxford.

_____& Maclean, M. (1986), *Maintenance After Divorce*, OUP, Oxford.

_____& Pearl, D., eds. (1989), *An Ageing World: Dilemmas and Challenges for Law and Social Policy*, OUP, Oxford.

Fenn, P. & Vlachonikolis, I.G. (1990), `Bargaining Behaviour by Defendant Insurers: An Economic Model´, Geneva Papers on Risk and Insurance, vol. 54.

_____, McGuire, A. & Prentice, D. (1990), `Information Asymmetry and the Securities Market´, in Hopt, K. & Wymeersch, E. eds., *European Insider Law*, Butterworths, London.

Genn, H. (1987), *Hard Bargaining: Out-of-Court Settlement in Personal Injury Actions*, OUP, Oxford.

Gessner, V. & Thomas, J. (1988), `Special Issue: Socio-Legal Research and Policy Studies´, *Law and Policy*, vol. 10.

Gray, A. & Fenn, P. (1991), `The Rising Cost of Legally Aided Criminal Cases´, *New Law Journal*, vol. 141.

Greatbatch, D. & Dingwall, R. (1989), `Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators´, *Law and Society Review*, vol. 23.

Harris, D.R. (1983), `The Development of Socio-Legal Studies in the United Kingdom´, *Legal Studies*, vol. 3.

_____(1989), `An Introduction to Socio-Legal Studies´, in Dingwall, ed. (1989)

_____ *et al.* (1984), *Compensation and Support for Illness and Injury*, OUP, Oxford.

_____& Tallon, D., eds. (1989), *Contract Law Today: Anglo-French Comparisons*, OUP, Oxford.

Hawkins, K. (1984), *Environment and Enforcement: Regulation and the Social Definition of Pollution*, OUP, Oxford.

Hawkins, K. (1989), `Rule and Discretion in Comparative Perspective: The Case of Social Regulation´, *Ohio State Law Journal*, vol. 50.

_____& Harris, D.R. (1988), `Policy Research and Funding: Socio-Legal Studies in a Changed Political Climate´, in Gessner & Thomas (1988).

Hay, D. (1987), `Archival Records in the History of the Law: A User's Perspective´, *Archivaria*, vol. 24.

Hensler, D.R. *et al.* (1991), *Compensation for Accidental Injuries in the United States*, Rand Publication: R-3999-HHS/ICJ, California, USA.

Hepple, B.A. & Matthews, M.H. (1985), *Tort: Cases and Materials*, 3rd ed., Butterworths, London.

Hoggett, B. & Pearl, D. (1991), *The Family, Law and Society: Cases and Materials*, 3rd ed., Butterworths, London.

Hutter, B.M. (1988), *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers*, OUP, Oxford.

Lloyd-Bostock, S. (1988), *Legalism and Discretion*, Centre for Socio-Legal Studies, Oxford.

Maclean, M. (1991), *Surviving Divorce: Women's Resources After Separation*, Macmillan, London.

_____& Genn, H. (1979), *Methodological Issues in Social Surveys*, Macmillan, London.

McBarnet, D. (1991), `Whiter Than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma´, *British Journal of Sociology*, vol. 42.

_____(1992), `Legitimate Rackets: Corporate Tax Evasion and Avoidance´, *Journal of Human Justice* (forthcoming).

Wheeler, S. (1991), *Retention of Title Clauses: Impact and Implications*, OUP, Oxford.

Whelan, C.J., ed. (1990), *Small Claims Courts: A Comparative Study*, OUP, Oxford.