Casaubon's ghosts: the haunting of legal scholarship

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21 *Legal Stud* 1, 2001, pp 65-98

Lawyers and jurists work under the influence of many shades. Whether it is the chilling admonitions of past judges or the ennobling praise of future jurists, law's ghosts inhabit and spook its daily rites and rituals. Looking over their shoulders, lawyers are constantly battling with ghosts of precedents past or, peering ahead, they are trying to glimpse premonitions of doctrines future. Legal scholarship is in thrall to a daunting series of spectral influences that hold great sway over both the ambition and achievement of its most celebrated practitioners. In an important sense, jurisprudence – put simply, those efforts to step back from the actual practice and operation of law in order to make some general sense of it all – is where such ghostly tendencies are most frequently sighted, often invoked and often exorcised.

Much academic work continues to operate within the cramping and pervasive spirit of a black-letter mentality that encourages scholars and jurists to maintain legal study as an inward-looking and self-contained discipline. There is still a marked tendency to treat law as somehow a world of its own that is separate from the society within which it operates and which it purports to serve. In a manner of speaking, the ghosts of Blackstone and Coke not only prowl the corridors of academe, but are also welcome souls in its offices and classrooms. This is a disheartening and disabling state of affairs.

In George Elliott's Middlemarch, one of the most celebrated English novels, the Reverend Edward Casaubon was 'noted in the country as a man of profound learning' and whose 'very name carried an impressiveness hardly to be measured without a precise chronology of scholarship'. Moreover, although occasionally anguished by deep inward doubts, Casaubon was outwardly confident that 'having once mastered the true position and taken a firm footing there, the vast field of mythical constructions [would become] intelligible, nay, luminous with the reflected light of correspondences'.

Casaubon's ghost still stalks the academic groves of legal scholarship. The belief endures that it is possible to locate or fashion a conceptual key that will unlock the universal mysteries of law's historical existence. In Casaubonic style, jurists strive to reduce law's sprawling and contingent complexities to a simple and singular sense of order and coherence. The most common response is to identify some spectral dynamic at work that integrates the best efforts of lawyers and judges to develop the law justly in specific cases and the general system of norms that results. Within the philosophical account, law always manages to be more than the historical heap of its human-made parts; it has a qualitative dimension that transcends its quantitative mass.

The Casaubonic influence is as strong and as baneful today as it has ever been. Jurisprudence remains in the hold of such a precious mentality from the most doctrinal of legal scholarship through to the most abstruse of legal theorising. Criticism is largely confined to highlighting formal inconsistencies and rooting out local error. This organisational function is seen as an end in itself, with the corollary that any study of the social or political context in which those rules arise or have effect is considered, at best, to be someone else's jurisdiction, like the social scientist or political theorists. It is not so much that such work is unimportant, but that it is not a necessary part of the lawyer's learning or expertise.

Much contemporary jurisprudence is dismissive of black-letter scholarship; it is said to be too limited, unduly isolated and woefully inadequate. The major objective of much mainstream jurisprudence is to demonstrate that law is political, but that its politics are neutral in the sense of not being partisan or ideological. However, while the tendency to talk about law in terms of politics and morality is now well entrenched in both legal theory and legal scholarship, it is still performed as an exercise in abstract analysis rather than engaged inquiry. Whatever its claims to the contrary, mainstream jurisprudence implicitly alleges that the ambition of black-letter scholarship is correct, but that its focus and execution are severely at fault. In a manner of speaking, jurists have dislodged black-letter law, only to replace it with black-letter theory.

Law students are encouraged by institutional training and collective self-interest to cultivate such an awed and respectful posture towards the law and its intellectual, practising and judicial elite.

Despite the wishes of contemporary jurists, there is no difference in character or authority that distinguishes philosophical or jurisprudential debate from any other kind of debate. The standards for judging the merits of particular arguments are part of that debate, not apart from it. The claim that all that is done in the name of black-letterism, whether doctrinal or theoretical, is and can be done in a technical and non-ideological way is no more convincing today than it ever has been. The self-image of legal theorists as privileged purveyors of special knowledge and as peripatetic traders in eternal verities must be abandoned.

This means that instead of seeing progress as a matter of getting closer to something specifiable in advance, pragmatists see it as a matter of solving problems and it is measured by the extent to which we have made ourselves better than we were in the past rather than by our increased proximity to a goal.

Within such a re-visioning of the common law, jurists and legal scholars can play a number of roles. Foremost among them, any study of law or ethics must not, as black-letterism proposes, be done without recognising the political context and conditions of that undertaking. The resilient black-letter practice of decontextualisation must be strenuously combated. Instead, there has to be a greater recognition that law and politics are intimately and inseparably related; it is futile and well nigh fraudulent to study one without the other.

While it might be true that law and legal scholarship, like all stories, are haunted by the ghosts of the stories they

might have been, law remains thoroughly spooked by the jurisprudential phantoms of what it could and should never be. A more appropriate response to such jurisprudential fantasising is not awe-induced toleration, but a defiant and decisive act of ghost busting. The time has come to break free of all ghosts or, if that is not possible, to opt for ghosts that are more, not less conducive to a democratic imagination.

GENDER ISSUES

Women in legal education: what the statistics show

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50 *J Legal Educ* 3, 2000, pp 313-357

What can statistics derived from publicly available data establish about how women are being treated in legal education? This study is an attempt to find out. Its goal is to collate into one coherent picture the most significant data presently available. The statistics predict that women will very soon constitute the majority of law students nationally. For the most part, statistics that could illuminate whether women are being treated fairly after admission are not publicly available. There is one significant exception. Although women who apply for admission to law schools have higher undergraduate grade averages than men who apply to law schools, that differential reverses in the first year of law school, and men suddenly receive higher grades on average than women.

The statistics show that women are not applying for tenure-track jobs at rates that equal their presence in the cohorts from which law faculty are initially hired. A woman applying for a tenure-track job does not have a statistically better chance of being hired than a man does and might have statistically worse odds. At the point of hiring, men receive a higher percentage of the associate professor appointments, while women tend to be appointed at the assistant professor rank. The available statistics suggest that women achieve tenure at lower rates than men. And there is evidence that women are paid less than similarly qualified men within the same status and at the same experience levels. Perhaps the starkest finding is that everywhere in legal education the line between the conventional tenure track and the lesser forms of faculty employment has become a line of gender segregation.

It appears that as a group, women get better grades than men in undergraduate school and worse grades than men in law school. The data suggest that many women are not performing as well as they could be or should be in the current legal education environment. The grade gap is undoubtedly more pronounced at some law schools than others. A statistical picture of law school deans and faculties is much less promising than the composition of law school student bodies.

Although we do not know the exact dimensions of the gap, it is clear that women are applying for law school teaching jobs at a disproportionately smaller rate than would be expected from their presence in the population from which applicants for law faculty jobs are generally drawn.

Although the statistics of law school employment are gradually improving, the rate of change has become much slower than is generally assumed. In fact the rapid progress of earlier years has now become so slow that, if practices do not change, it will be a very long time – decades, in fact – before a substantial improvement could be noticeable. If all of these things were remedied – if women were to apply for faculty jobs as frequently as men do, if they were hired as frequently and at the same ranks as men, and if they were tenured as often as men – progress would not be as slow as it is now, but it would not break speed limits either, simply because faculty vacancies will not be abundant in the near future.

The line between the conventional tenure track and lesser forms of faculty employment has become a line of gender segregation. Wherever jobs exist off the conventional tenure track, women are being hired into them at very high frequencies, and at those same schools proportionately fewer women are being hired onto the conventional tenure track.

What could be causing the difference in tenuring rates? Academics comfort themselves that they live in a meritocracy, but all four traditional tenure criteria (scholarship, teaching, collegiality, and service) are so subjective that except in extreme cases a tenuring authority can rationalise any result it wants.

Of the four traditional tenure criteria, collegiality may be the most problematic for women. The practical definition of collegiality differs, of course, from faculty to faculty. At some schools, a candidate is uncollegial only if the candidate's personality makes it difficult for others to do their work. But at others, an uncollegial candidate is one who has not formed bonds with the tenured faculty that the latter find pleasing. In addition, there is evidence that at least some academics are unable to avoid undervaluing professional work once they know it was done by a woman – a problem that can affect not only tenuring rates but also hiring and job status decisions.

The statistics suggest that many law schools individually and legal education generally could profit from reflective self-examination. The statistics create the impression that women are welcome in legal education in subservient roles but otherwise are greeted, at best, with ambivalence. In the next few years, we will discover the extent to which that impression continues to be accurate.

Working out women in law schools

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21 *Legal Stud* 1, 2001, pp 116-136

Although well over half of law undergraduates are women, in nearly all law schools they are likely to encounter more male lecturers than women. Few of them will meet a woman law professor and even fewer will see a female head of department. Compared with their male counterparts, fewer women students and academic staff will go on to the top of their profession. There is clear evidence that women of all ranks in universities are paid less than their male counterparts. The university sector as a whole is only slowly coming to recognise that some proactive policies might be