Gothic Horror? A Response to Margaret Thornton

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Key Words

corporatization; liberal education; power; resistance; university legal education

Introduction

In responding to Thornton's powerful critique of the current state of university law schools it would be foolish to argue that contemporary law schools and individual academics working in those law schools face anything other than unremitting pressure; this is true both in the countries that Thornton refers to and is also true elsewhere.[1] Equally, it is important to acknowledge that Thornton is not alone in her conclusions about the current position of law schools in particular or universities in general (Kelsey, 1998; Currie et al., 2002). However, in this response, without wishing to deny either the reality or the enormity of the pressures such authors refer to, we will argue that global accounts of the position of law schools can miss important nuances in the way that these pressures are played out in different jurisdictions. The structures of law schools and the interrelationships between them, their parent universities, the legal profession and government plainly differ from country to country (Burrage, 1984: 26). We will suggest that these differences need to be considered before reaching any conclusions about the state of law schools in any particular jurisdiction. Further, we will argue that an understanding of the reality of life in university law schools is predicated on looking both at the bureaucratic and political structures that exist within and outside the law schools and also on an understanding of what Trow (1975) has called the 'private life' of the academics within the university; that there is a need, to slightly change Malinowski's (1924: 11–24) terminology, to understand both what others say that law schools should do and also what academics in the law schools actually do. To do otherwise is

London, Thousand Oaks, CA and New Delhi, www.sagepublications.com
0964 6639, Vol. 14(2), 277–285
DOI: 10.1177/0964663905051224

to risk mistaking the intentions of those such as policy makers or government with regard to universities for the actual reality of higher education. Thus, for example, the polytechnic system set up in the 1960s in the United Kingdom was, on the face of it, an early example of a higher education system set up on a bureaucratic model with vocational, technocratic educational aims in mind. Yet the short history of that system saw a process of 'academic drift' as those working in the institutions began to pursue educational aims akin to those found in traditional universities (Pratt and Burgess, 1974: 23–30); the private life of this system belied its public face.

In this response we will suggest that, at least in relation to the position of United Kingdom law schools, Thornton, by focussing on the corporatizing tendencies in contemporary society and by treating those tendencies as achieved ends in law schools, presents too stark a picture of both the situation as it presently is and as it is likely to be in the foreseeable future. Thornton acknowledges the existence of resistance to corporatization in the university law school. We will argue that such resistance (sometimes overt, more often hidden), rather than being an occasional and diminishing feature of the law school, characterizes the work of many academics in British university law schools.

BRITISH UNIVERSITY LAW SCHOOLS

Contemporary British university law schools are not what they once were, nor are they in a state of equilibrium. The last two decades have seen an exponential growth in the number of university law schools, legal academics and law students in the United Kingdom. In 2000 there were 85 university law schools, in 1996 (the date of the last detailed survey) there were 2,440 full-time academics and 34,466 full-time law students, the latter figure having grown by 50 percent in the previous three years (Bradney and Cownie, 2000: 1–2). All these figures have since increased and are likely to continue to increase. Not all law schools take the same form. The most substantial division in the sector is between those law schools which were former polytechnics and became university law schools by virtue of the Further and Higher Education Act 1992 and the Further and Higher Education (Scotland) Act 1992 (post-1992 university law schools) and those law schools that were part of the traditional university sector (pre-1992 university law schools). Historically law schools in polytechnics in the United Kingdom have had a different funding regime, management structure and mission from those institutions found in the traditional university sector with there being '[l]ess research, longer teaching hours, an emphasis on legal skills rather than scholarship, and often inadequate learning and working environments' (Leighton, 1998: 96).[2]

The focus for teaching in all university law schools in the United Kingdom is the undergraduate LLB, a three or four-year course where students typically start at the age of 18. Such a course does not of itself give any practising

professional qualification but will, in England and Wales, give partial exemption from some courses leading to professional qualification if the LLB is (as it usually is) a Qualifying Law Degree under regulations laid down as the result of negotiation between the Law Society and the Bar Council and university law schools (Bar Council, 2004).[3] It has been estimated that as few as 42 percent of law graduates go on to professional qualification (Sherr, 1998: 37). In addition to the LLB most law schools also provide a range of other undergraduate courses, Master's courses and PhD supervision (Bradney and Cownie, 2000: 3). A number of law schools, mainly in the post-1992 sector, also teach the vocational courses, the Legal Practice Course or the Bar Vocational Course; at present only three pre-1992 universities in England and Wales provide such courses (Bar Council, 2004; Law Society, 2004).

British law schools are loosely organized together under the Committee of Heads of University Law Schools, a body which exists to lobby government, the legal professions and others about the needs of law schools. Similarly there are a number of professional bodies that individual academics can join. The Society of Legal Scholars (formerly the Society of Public Teachers of Law) is both the oldest and largest of such bodies, having been founded in 1908 and having over 2,000 members. The Socio-Legal Studies Association was set up in 1989 and now has over 600 members. Traditionally the Society of Legal Scholars has been regarded as being a conservative body mainly concerned with the interests of doctrinal lawyers (this is in part leading to the creation of the Socio-Legal Studies Association). However, the current Executive of the Society of Legal Scholars has five members who either are or have been members of the Executive Committee of the Socio-Legal Studies Association (including its current President) with a number of other Executive Committee members plainly being socio-legal scholars. Its annual conference now contains a range of both doctrinal and socio-legal papers. The Association of Law Teachers, set up in 1965, is mainly composed of members in the post-1992 university sector and, as its name suggests, largely devotes itself to issues relating to teaching. All three of these bodies both run a variety of academic conferences and seminars and also lobby on behalf of law schools.

Law schools in the United Kingdom are plainly bigger, busier and more bureaucratic than they once were. But what would constitute evidence that, in this noisier system, law schools have become, in Thornton's terms, corporatized and technocratic? We would suggest that such evidence would have to be found in the research agendas and the curricula of law schools.

'WE ARE WHAT WE WRITE'[4]

There is no doubt that there has been a shift in attitude toward research in United Kingdom law schools in recent years. Research is now seen as being important whereas, historically, research was an occasional activity within the law school (Bridge, 1975: 494; Duxbury, 2001: 71). External audit of

research through regular Research Assessment Exercises first began in 1985 (Bradney, 2003: 182–6). Most but not all law schools now participate in it. Such audit focussed attention on the fact that law schools had made little contribution to the intellectual life of either the university or society at large. Audit also led to consideration of what kind of writing could be said to constitute research and this resulted in those in law schools largely rejecting the notion that writing that was explanatory in character and directly related to practitioner needs constituted research (Vick et al., 1998: 558–9).[5] Instead of work being geared towards the technocratic needs of the legal professions, the law school now has a range of varied and contradictory research agendas that reflect the interests and beliefs of legal academics. For some, research is part of a process of addressing social inequalities (Thomson, 1992); for others it is a search for knowledge (Bradney, 2003); for many it reflects a combination of agendas (Cownie, 2004: 133–41). This does not mean that law school research is entirely divorced from the professions. For example, writing that is of service to appellate judges, work that will play a role in altering fundamental legal principles, is of interest to some academics (Birks, 1998); even for them, however, research that could used by the majority of lawyers in their day-to-day service of the economy does not come within the compass of their agenda.

Research in law schools is now more bureaucratic in the sense that it is measured and re-measured; it is in this sense corporatized. The Research Assessment Exercise is widely regarded by legal academics as being intrusive and irksome. For some it has resulted in pressures to change the direction of their research or to produce more research than they feel is reasonable (Cownie, 2004: 135–41). However, these negative aspects of such audit are some way from demonstrating the shift towards notions of the market of which Thornton writes. There is no doubt that part of the impetus to measure research lay in a technocratic attempt by government to make that research more directly linked to the development of the economy.[6] However, in law schools, like their parent universities, the evidence is that, while measurement has been accepted, this attempt to link research to the needs of the economy has been rejected. Panel members who assess research are established academics who have been nominated by the professional bodies described earlier. It is they who determine the quality of research. As Henkel (2000) writes of British universities in general, the Research Assessment Exercise is a 'structure within which academic values and academic control were sustained' (p. 115).

WHAT WE TEACH AND HOW WE TEACH IT

The Law Society's recent suggestions about changes to undergraduate legal education provide evidence of the technocratic and corporatizing pressures that law schools find themselves under. Noting the Government's desire to bring universities and industry closer together, the Review suggests the

creation of more exempting law degrees that integrate the academic and vocational stages of training for the solicitor's profession (Law Society, 2003: 25). However, the Review also provides evidence of the resistance to such pressures in law schools, observing that '[t]he legitimacy of the Law Society's interests in the quality and standards of law degrees is a question frequently raised among academic lawyers' (p. 6).

Examination of the curricula in university law schools provides only ambiguous evidence about the effects of technocratic and corporatizing tendencies within universities. The Law Society and the Bar continue to make requirements of the curriculum but these are arguably less prescriptive than was so at some points of time in the past (Bradney, 2003: 164–71). The last major survey of law school curricula reported that seven out of the ten most common options were those that were linked to practice (Harris and Jones, 1997: 52). However, it is also true that the same survey showed that 41 percent of law schools offered criminology, 30 percent offered legal history and 30 percent 'essentially "academic" subjects' such as sociology of law or feminism and law (pp. 51, 52). Moreover, in assessing how far the curriculum has been suborned to the creation of new knowledge workers, it is the private life of the law school, how teaching is carried on, that matters. Teaching company law may be seen as a simple service to the needs of the economy but if the impetus behind that teaching is a desire to infuse the study of doctrine with a theoretical perspective so as to 'contribute to debates about law and its relationship to society, culture and the economy', the matter is not so straightforward (Cheffins, 1999: 200). British law students, unlike the majority of university students, are largely pragmatic in their desire to study: their goal in studying law is to get a good job (Pitcher and Purcell, 1998: 185). It does not therefore follow that their tutors take the same view about the purpose of the curriculum (Halpern, 1994: 40).

Recent evidence shows that academics in law schools have considerable concerns about teaching and the way that teaching is audited. Part of these concerns relate to the possibility that teaching can become commodified as a concern with measuring teaching quality leads to a focus on that which is measurable, matters such as examination results or entry qualifications, rather than that which is central to the real quality of teaching, increased knowledge or improved intellectual ability in students (Bradney, 2001). However, while, as with the audit of research, it is clear that part of the impetus behind attempts to measure teaching quality in universities lay in a desire to change the standards by which that quality was measured, introducing an element of assessment external to the universities, analysis of reports of teaching quality in law schools shows no evidence of such external criteria being used (Bradney, 1996). Academics in law schools, when interviewed, report significant concerns about teaching. However, in the main, these concerns relate to things such as the low status that is accorded to teaching or the lack of resources available to deal with increasing student numbers rather than a feeling that they are being forced to teach in a manner that they find inappropriate to an academic setting (Cownie, 2004: 121–33).

The Law Benchmark, a statement published by the Quality Assurance Agency (2000) as part of its audit responsibilities, 'sets out the minimum achievement which a student should demonstrate before s/he is awarded an honours degree in Law' (p. 2). All law schools must now adhere to it if they are to receive public funding for their teaching. It does have elements that are directed towards ensuring that law graduates are suitable employees (by, for example, requiring team skills and numeracy to be part of the curriculum) (Bradney, 1999). However, not much emphasis can be put on these aspects of the Benchmark in describing the landscape of teaching in contemporary law schools. First, such elements are minor matters in a Benchmark that is mainly concerned with traditional academic matters. Moreover the Benchmark is, as Bell (1999), the chair of the group responsible for writing it has put it: 'deliberately flexible in setting out what students should learn and how they should learn it. [Because a] national curriculum... is not what professionals in higher education wish to see imposed'. Indeed, the observable impact that the Benchmark has had on law schools is, at best, limited. Far more relevant in describing contemporary teaching than the Benchmark is the fact that, when academics in both pre-1992 and post-1992 university law schools were asked what they were trying to do in their teaching

> [n]one of the respondents mentioned preparing students for entry into the legal profession as one of their educational aims, (indeed, several specifically mentioned that they were *not* preparing students for legal practice; nor did anyone mention teaching vocational skills. (Cownie, 2004: 77))

Instead, '[t]here was a noticeable level of consensus among my respondents that their principal aim was to teach students to think for themselves' (p. 76).

THE POLITICS OF LAW SCHOOLS

Thornton contends that 'a depoliticized and positivistic legal pedagogy appears to be once again in the ascendancy'. There is substantial evidence to suggest that this is not the case in the United Kingdom. Law schools are more alive to a variety of intellectual debates both within the academy and outside it than they once were (Thomas, 1997; Goodrich, 1999). Law schools with a wide variety of intellectual perspectives, including those associated with both critical and socio-legal scholarship, achieved the highest ratings in the last Research Assessment Exercise (RAE, 2001). One major professional association, the Socio-Legal Studies Association, represents a form of scholarship which is highly resistant to pedagogy of the kind described by Thornton, while the biggest and oldest professional association, the Society of Legal Scholars, contains a range of legal scholars, both in the main body of its membership and in its organizing committees, including significant numbers of socio-legal academics. Indeed, some research would indicate that socio-legal work, broadly defined, now dominates the legal academy in the United Kingdom. In a recent survey of legal academics only one half of those

questioned described their approach as being doctrinal or black-letter, the rest describing themselves as socio-legal or critical (Cownie, 2004: 54). Of the half that did describe themselves as black-letter or doctrinal, the majority did so with an immediate qualification to the effect that they thought it was 'important to introduce contextual issues (social, political, economic and so forth)' into their work (p. 55). 'Only a small group of the academic lawyers. . . interviewed thought that the future of academic law lay in doctrinal analysis' (p. 65). The USA has seen a change in the politics of law schools whereby, in some instances, '[t]he outsiders seem to have become insiders' (Subotnik and Lazar, 1999: 604). The legitimacy of the full range of legal scholarship is still not accepted within every United Kingdom law school; nevertheless, a similar claim could be made here.

CONCLUSION

Recognition of the reality of increasing external pressures on British law schools led to calls on the law school to defend itself (McAuslan, 1989; Brownsword, 1996: 26–7). Now, at an individual level, at the level of the law school itself, and at the level of professional associations, resistance is a recurring feature of the academy (Birks, 1998: 414; Cownie, 2004: 205–6). Managing audit so as to mitigate its deleterious effects and lobbying government and professional bodies comes at a cost for academics in terms of time and energy. The work is largely administrative in its nature and, as such, is far removed from the core business that brought most academics into the law school (Cownie, 2004: 104–9). It is thus doubly irksome. British law schools are undoubtedly a less comfortable place to be than once they were (Collier, 2002). Efforts to secure finance through overseas student fee income or research grants have a much more dominant place in the life of the law school than once they did. Forms and procedures multiply. Universities greedily feed on academic time and a long-hours culture prevails just as much in law schools as in their parent universities (Kogan and Hanney, 2000: 194; Bradney, 2003: 196–7). Legal academics in contemporary British university law schools do feel themselves to be harried and harassed with factors like age, seniority, gender and the difference in managerial structures between pre- and post-1992 universities altering the ways in which this is precisely played out. Yet, at the same time, a major part of the business of the law school continues to centre round the critical analysis of law. Moreover, the flexibility in working hours that work–life balance studies show to be important in achieving a satisfactory working environment remains a feature of law schools (Bradney, 2003: 201–3). Despite the pressures inherent on the pursuit of an academic career in the modern law school, when questioned, 'legal academics are very positive about their career choice' (Cownie, 2004: 118).

Most law students will graduate to be the knowledge workers that Thornton describes but most will have received an education that, at least in part, will have given them an ability to transcend the limitations of their

employment and many will have seen in their tutors an example of a very different way of life (p. 205).

NOTES

1. Thus, for example, for the situation in the USA, see Johnson, Kavanagh and Mattson (2003).
2. There are also some differences between the structures of law schools in England and Wales and those in Scotland or those in Northern Ireland.
3. The situation in Scotland and Northern Ireland is slightly different.
4. See Kennedy (1997: 186).
5. The USA has witnessed the same process (McDowell, 1990: 262; Rhode, 2001: 159).
6. See *The Development of Higher Education into the 1990s* (1985) Cmnd 9524.

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