Legal marginalia

Prejudices and graffiti

Chilla Bulbeck

Where law students are not asked to question their own value positions, the marginalia in law journals are reduced to the smutty, the angry, and the bored.

Legal studies in many Australian universities proceeds on the fiction that students are disembodied legal minds, soaking up the abstract legal knowledge formulated by judges and legislators. However, the lawyers that students finally become are more than disembodied legal minds. They have other things in their minds — unquestioned assumptions about the ordering of society, for example; and they have bodies which experience sexual urges, emotions, desires. All of these elements of the lawyer go into practice. Those aspects which remain unexamined will influence the practice of law just as surely as that one aspect which is honed and refined: legal knowledge. Students' graffiti, written in the margins of legal cases, suggests some elements of the student which are unreconstructed by their legal studies.

The graffiti

Let me illustrate my point with two examples. The first comes from the case of *Cuisenaire v Reed* [1963] VR 719, concerning copyright in a set of colour-coded rods for teaching arithmetic. The law lecturer was exploring whether these rods amounted to artistic craftsmanship for copyright purposes. This is what the students said:

> 'I loved playing with these rods — a great idea — Cuisenaire.'
>
> 'Personally, I always preferred playing with my own rod.'
>
> 'Fancy rubbing shoulders with this wanker in the Titles Office.'

Thus one student remembers his or her own past as a child learning arithmetic. The response comes from a male student who refers to his body, his rod. I like to think the reply to that comes from a female student, who reminds us that down at the Titles Office one will find young men dressed in suits, newly-fledged lawyers, who harbour in their psyches a desire to play with their own rods. In other words, what you see is just a superficial aspect of what you get. And what you get is the whole man or woman, with his or her desires, emotions and prejudices, as the next exchange reveals.

This comes from the family law case of *L v L* (1983) FLC 91-353, concerning whether custody should be awarded to a lesbian mother:

> 'But it's OK for heterosexual parents to encourage their children to become heterosexual.'
>
> 'You pathetic faggot. I hope you get sodomised by a bull elephant.'
>
> 'How about some Family Court judges who don't view homosexuality as disadvantageous?'
>
> 'Your [sic] right. It's not disadvantageous. Its [sic] a disease.'

This exchange reveals one of the heartening aspects of graffiti, women writing back against the male-dominated prejudices found in text books and cases. However, these women are still subject to attacks from their fellow male students. The exchanges also reveal the deep anxieties of young people, I assume men, concerning homosexuality. How will these students, once they become solicitors, respond to the mother in a lesbian relationship who comes as a client seeking advice? Will the solicitor merely tell her that there are now cases, like *L v L* which award custody? Or will the solicitor prepare her for the possibility of demeaning treatment by the judge, which may include stereotyping as a 'typical' butch lesbian? Would solicitors be better able to respond to such a client's needs if, as students, they had examined their own sexual prejudices?

The theory

Critical legal theory of various persuasions has demonstrated that the law usually assumes a legal person who conforms to an autonomous, white middle-class male, 'economic man' as Robin West[1] calls him. Economic man is incapable of intersubjective assessments of utility; he lives in a world of self-interested rational combative and calculating actors. In this world, people's interests are necessarily in conflict. In this world, actors have no inner psychic life; they are measured by their shiny surfaces, by their actions. By contrast, West identifies the author of narratives such as fiction as 'literary woman' who is capable of empathic knowledge, even of those culturally unlike herself. Students who question the law's ability to respond to the culturally 'other' are often accused of missing the point, the *legal* point, or of prejudice. Thus 'what counts as reason is that which corresponds with the way things are'.[2] A number of my lecturers frowned on judicial innovations,

Chilla Bulbeck teaches at Griffith University, Queensland.

as somehow a 'lesser' form of law. Both Justice Murphy and Lord Denning were at times described as judges who went beyond their brief, who made law where it was unnecessary to do so, who rode the unruly horse of public policy into new and dangerous fields. In this way students are led to believe that the law they learn is rational and complete.

The hierarchy of lawyering

Furthermore, just as the law best 'fits' certain kinds of people's needs, so too will the unreflective solicitor prefer those clients who fit the law. The hierarchy of lawyering, which places commercial and company law well ahead of family law and minor criminal matters, reflects lawyers' economic rewards and, by extension, the income and status of clients. This hierarchy also reflects how closely clients fit the models provided by the law. Thus law students, although perhaps never explicitly told this, expect clients to come as versions of 'economic man', seeking solutions which can readily be reformulated as legal wrongs and redresses. Austin Sarat,[3] after noting that most law students are not trained to deal with clients under stress, reports the results of client-lawyer interactions in 40 divorce cases. Most clients attempted to enlist their lawyers into a story which blamed clients' partners for the marriage breakdown. Given the legal 'reality' of no-fault divorce, this information, this story, was of no interest to the lawyers, who found their clients difficult, explosive, irrational and demanding. The law's preferred person is able-bodied, autonomous, rational, educated, monied, competitive and self-interested. The law performs best for such people, and confines those who do not fit this ideal to the criminal or family courts, where they are commanded to be subservient or mute,[4] and where they are increasingly serviced by law's lesser minions, women.[5]

As Regina Graycar and Jenny Morgan state in the introduction to their book,[6] the task of the solicitor is to fit clients' lives into legal categories. Sarat's study of divorce lawyers reveals that the legal story is deemed superior to the client's narrative; solicitors only wish to hear as much of the story as has legal relevance. Law students are not taught that legal 'theories are stories' too;[7] they are no more truthful than clients' stories, merely more powerful. For this reason, clients' stories must finally be rewritten as legal stories, but there is not necessarily only one available legal story. How much of the client's story gets told before the legal classification depends on the listening and empathic skills of lawyers. These skills allow the solicitor not only to classify the client's story, but also to translate or bend the law to fit the client. In tutorials student do not learn to listen, to communicate, to construct shared understandings. They learn to debate, to challenge, to combat. They gain practice in the adversarial mode of the Bar and not the facilitative mode of the solicitor's office.

Lansdowne and Bacon investigated why battered women who finally turned on their attackers were regularly offered the defence of diminished responsibility rather than the much more legally efficacious defence of self-defence.[8] Male lawyers have, and expect, control of their domestic environment. They probably cannot even begin to imagine how a battered wife sees the world. What solicitors saw were women incapable of rational action, not women provoked beyond reason defending their lives and their children. Similarly, only the intervention of feminist lawyers has changed the legal meaning of the rape complainant's story, and indeed allowed her to tell only those aspects of her tale that are relevant to the rape encounter, rather than forcing her to reveal her past sexual conduct.

Certainly experiences unfamiliar to law makers will only be heard in law courts if they are translated into legal terms. Feminist lawyers had to search their own understandings of the rape victim's experience and translate these into an acceptable legal language before legal redress was considered. So it is with every client who comes to a solicitor's office. But the practice of innovation, of changing the law to fit the client's experience, can and should be taught in law classes.

Legal education

'The law' is not just an accumulation of cases caught between the covers of law journals. It has been produced by and will influence the world beyond those journals, the law library and the law school. If legal education does not teach students alternative ways to read the extra-legal world, they will reproduce their own understandings 'with potentially serious consequences for the persons who are the objects of legal scrutiny'.[9] Law lecturers, however, resist the claims of 'literary woman', society's members with emotions and bodies, or any suggestion that there is more than definable and defendable rights at stake. Law tutors, in a sense, often say 'I don't care whether it's right or wrong, this is how it *is*'. The legal profession has resisted the apparent quagmire of morality in its search for the high ground of truth (as expressed in precedent or statute), or uncontestable personal attributes (reason, natural rights, property ownership). It is astonishing that the law has so successfully staked out such a claim, given 'the deeply contingent nature of all lawyering activity',[10] the fact that many cases can go either way and all are represented as having two sides. But it is the icon of the judgment that resolves the dispute and grants the label of law to one side of the argument, and usually only to one litigant.

Where students are not trained to interrogate their own perspectives, they will also fail to understand how their own prejudices influence their treatment of clients. Lawyers must know their law, must know the legal background which frames their clients' concerns. But they must also be able to put themselves in the place of their clients, who usually have *more* than legal problems and who presumably care little for the unfolding debates around legal niceties. Their concern is how to get the best, fastest, cheapest, least painful solution. Thus lawyers should be able to both interpret their clients' needs as law, *and* to re-interpret the law to meet clients' needs. Students can only do this if they are asked to question their own value positions. Where they do not, the marginalia in law journals are reduced to the smutty, the angry and the bored.

References

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