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Casaubon's ghosts: the haunting of legal scholarship

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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 purports to serve. This is *a disheartening and disabling state of affairs. Accordingly, this article will offer both a critique of the present situation and suggest an alternative way of proceeding. The writer recommends a shift from philosophy to democracy so that legal academics will be less obsessed with abstraction and formalism and more concerned with relevance and practicality. In contrast to the hubristic and occasionally mystical aspirations of mainstream scholars, it presents a more humble depiction of the worth and efficacy of the jurisprudential and scholarly project in which 'usefulness'* is *given pride of place. Of course, these fundamental charges are not applicable to all legal scholars. Many scholars are engaged in work that not only challenges the prevailing paradigm of legal scholarship, but also explores exciting new directions for legal study. It will be part of the essay to acknowledge those contributions.*

There are ghosts almost everywhere. The present is haunted by phantoms of what it might have been and what it still might become. It is difficult to do much without some spectral apparition or other hovering around. People spend much of their time either running away from the wraiths of some ghastly visions, past and future, or striving to live up to some ideal phantasms, redemptive and disabling. There seems to be no way to escape from the corporeal effects of these other-worldly spirits. And law and jurisprudence are no different. Indeed, they seem to have more than their fair share of chimeras and charismas with which to deal. Lawyers and jurists work under the influence of many shades. Whether it be 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

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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 occasionally exorcised.

In this essay, I want to do a little bit of my own ghost-busting. Much academic work continues to operate within the cramping and pervasive spirit of a blackletter 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 welcome souls in its offices and classrooms. Although mainstream scholars feign a modesty and subservience, their work smacks of a hubris that is no less acceptable for its more humble presentation. This is a disheartening and disabling state of affairs. Accordingly, as an antidote to this malaise, I will offer both a critique of the present situation and suggest an alternative way of proceeding. In effect, I want to recommend a shift from philosophy to democracy so that legal academics will be less obsessed with abstraction and formalism and more concerned with relevance and practicality. Or, more jurisprudentially, I want to engender a mode of legal theory and scholarship that takes its lights less from analytical philosophy and more from democratic politics. In contrast to the hubristic and occasionally mystical aspirations of mainstream scholars, I will present a more humble depiction of the worth and efficacy of the jurisprudential and scholarly project in which 'usefulness' is given pride of place. As Richard Rorty recommends, there must be 'a moratorium on theory' and those committed to reform, whether on the political right or left, 'should try to kick the philosophy habit' and 'not let the abstractly decided best be the enemy of the better'.[1] Indeed, I will rely substantially, although not uncritically, on Rorty's important work in my efforts to exorcise the familiar ghosts of legal study.

As a helpful foil and illuminating trope, I will rely on George Eliot's *Middlemarch.*

Viewed from a particular perspective, this feted novel captures wonderfully the plot and plight of modern legal scholarship. With a sweep that Tolstoy might have envied and a style that Hugo might have coveted, Eliot's celebrated work chronicles the struggles of a genteel, early nineteenth-century English society that is slowly being forced to confront the precious privilege of its established ways and to come to terms with the bracing challenge of democracy's fledgling forces. At the thematic heart of the novel is the short-lived and ill-fated marriage between the young reformer, Dorothea Brooke, and the ageing scholar, Edward Casaubon. In an early exchange between the two, Dorothea enthuses about one of her most cherished projects, to alleviate the condition of the poor by building cottages for those who worked on her uncle's estate: 'I think we deserve to be beaten out of our beautiful houses with a scourge of small cords all of us who let tenants live in such sties as we see round us. Life in cottages might be happier than ours, if they were real houses fit for human beings from whom we expect duties and affections.' Mr Casaubon's only response is to declare that he 'did not care about building cottages, and diverted the talk to the extremely narrow accommodation which was to be had in the dwellings of the ancient Egyptians as if to check a too high standard'.[2] There is much in this brief exchange (and in Dorothea and Casaubon' s unhappy relation generally) that resonates with the contemporary engagement over the soul of law, legal scholarship and theorising. Reduced to its basic essentials, the point of disagreement between the reigning philosopher-kings of the legal establishment and their democratic critics is quite simple -the actual construction of cottages for the poor or detached ruminations on abstract points of ancient architecture?

Of course, these fundamental charges are not applicable to all legal scholars. Many scholars are engaged in work that not only challenges the prevailing paradigm of legal scholarship, but also explores exciting new directions for legal study. It will be part of my essay to acknowledge those contributions. However, as rich and as vibrant as that literature is, it remains marginal and secondary to the dominant literature and, in an important sense, underlines the prevalence of the traditional model. Accordingly, I will first introduce the ghosts that haunt legal study and explain the extent to which they still influence and

inform the contemporary scholarly agenda. In the next section, I explore some of the philosophical contexts within which these apparitions take hold and inhibit the jurisprudential intellect. Having outlined legal academe's predicament, the larger part of the essay is devoted to elaborating its critique and justifying an alternative approach. One section lays out the basic theoretical critique of legal theorists' tendency to abstraction and system-building and the next section traces the implicit politics of this manoeuvre. Then, I outline the basic thrust of a more useful jurisprudence. By way of conclusion, I distinguish and defend my own brand of radical pragmatism from that of other pragmatic critics. Although my target in this essay is the whole of legal scholarship, I will devote more time and attention to the jurisprudential phantoms that underlie and animate more routine performances of legal scholarship. Whether legal academics accept or appreciate it, their work is overshadowed by a few intellectual and daunting spectres.

MEETING MR CASAUBON

As much as George Eliot's *Middlemarch* can lay claim to being one of the most celebrated English novels, Mr Casaubon stands as a competitor for one of literature's great misanthropic characters. As a central figure in this sophisticated comedy of manners about English provincial life around the tumultuous years of the 1832 Reform Bill, when the old order was beginning to unravel, the Reverend Edward Casaubon was 'noted in the county as a man of profound learning' and whose 'very name carried an impressiveness hardly to be measured without a precise chronology of scholarship'. Piously devoted to researching and writing his life's work, *A Key To All Mythologies*, he was fond of telling people 'how he had undertaken to show (what indeed had been attempted before, but not with that thoroughness, justice of comparison, and effectiveness of arrangement at which Mr. Casaubon aimed) that all the mythical systems or erratic mythical fragments in the world were corruptions of a tradition originally revealed'. 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'. In completing this monumental project, he was intent on not pandering to 'the facile conjectures of ignorant onlookers' nor gaining 'a temporary effect by a mirage of baseless opinion'. For Casaubon and other keepers of scholarship's true flame, 'it is ever the trial of the scrupulous explorer to be saluted with the impatient scorn of chatterers who attempt only the smallest achievements, being indeed equipped for no other'.[3]

Although Casaubon died before completing his pantologic study (but not before he realised its futility), his ghost still stalks the academic groves of legal scholarship. Although often less pretentious or precious, 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. Unable to resist the quasi-divinistic urge, as Holmes put it, to 'catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law',[4] 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 this 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. Judges and jurists are portrayed as being involved in the almost theological task of illuminating the transcendent wonders of human-made law with the intellectual lightning of jurisprudential insight. Like Casaubon, legal philosophers still tend to see themselves as 'something like the ghost of an ancient, wondering about the world and trying mentally to construct it as it used to be, in spite of ruin and confusing changes'.[5]

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. In a sense, if Casaubon is the patron-ghost of philosophical purism, then Blackstone is his legal

representative. Law is taught and written about within the pervasive shadow of the Blackstonian mind-set; this is 'black-letterism'. By this, I mean the tendency of lawyers to focus almost exclusively on material in a way that rarely gets beyond a taxonomic stock-taking. Originally a typographical term, 'black-letter law' was used to refer to rudimentary principles that were printed in boldface type in traditional law texts.[6] However, it has come to designate an approach to law that claims to concentrate on narrow statements of what the law is and eschews resort to any extra-doctrinal considerations of policy or context: the textual formulation of the law is regnant and is treated as a world unto itself. In scholarly terms, the limited aim of black-letterism is to identify, analyse, organise and synthesis extant rules into a coherent and integrated whole; there is much talk of As and Bs in illustrative exegesis with almost no reference to political context or social identity. Criticism is largely confined to highlighting formal inconsistencies and rooting out logical 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.

In undertaking such a black-letter task, the ambition of the scholar is to collate the available cases and materials and then whip recalcitrant areas into conceptual shape. At its most sophisticated, there is an insistence that the common law is much more than the sum of its precedential parts; the precedents are not the law, only evidence and illustrations of it. The informing assumption is that what the courts are doing is largely right: jurisprudence is 'rational science of general and extensive principles' and the common law is 'fraught with the accumulated wisdom the ages'.[7] In short, it is taken for granted that legal doctrine is underpinned by an intelligible and just plan of social life such that the task of the legal scholar is to extend law in accordance with the plan so that it becomes less fragmentary and more intelligible. This tradition of black-letterism runs from Coke, Hale and Blackstone through Dicey, Pollock and Anson to Smith, Treitel and Beatson; it

remains as alive and kicking as it ever has been. A cursory glance at the leading textbooks strongly supports such an assessment: Smith and Hogan's *Criminal Law*, Cheshire and Furmston' s *Contract*, and Winfield's *Tort* all speak to the narrow and precious approach to legal scholarship that dominates legal study. The ambition is to provide a comprehensive and systemic account of the law; any criticism is about discrete errors and particular mistakes rather than any systematic critique. Almost without exception, these authors tend to be male. For instance, Smith and Hogan offer a large tome which is purely about conceptual analysis whose main task is a descriptive account of the law and in which principled consistency within judgments, areas and between areas is the organising device. There is no contextual setting offered about crime or its informing forces, with readers being asked to 'judge for himself how far these [the stated purposes of criminal law] are fulfilled by English criminal law'.[8]

This black-letter literature is not without its jurisprudential champions. Although black-letter law resists larger theoretical concerns and infiltrations, it has been defended in theoretical terms. In a wide-ranging essay, Peter Birks argues that traditional legal literature has played a massive role in the modem development of the common law and is the perfect theoretical complement to the common law's more casuistic practice. Defending the canon of legal literature, he acknowledges 'great academics' as much as great judges, lawyers and cases as the fixed points in the common law. By 'great', Birks is very clear that this is to be assessed by the extent to which a work contributes to 'the search for principle', rationally organises the case law, and is able to advance 'the magic of the common law' in its 'capacity to achieve sensitive pragmatic change without sacrificing structured rationality and predictability'.[9] Accordingly, black-letter law is not simply the product of academic practitioners who are unable or cannot be bothered to engage in a broader and different intellectual exercise, but of those who undertake such a task as a matter of principle and pride. These scholars do not so much reject the Casaubonic influence as embrace it in a less grandiose and more focused incarnation. Nevertheless, modesty is no excuse and humility is no escape from the shortcomings

of a full-blown Casaubonic exercise. And it is such a full-blown exercise that contemporary jurisprudence has become.

Much contemporary jurisprudence is dismissive of black-letter scholarship; it is said to be too limited, unduly isolated and woefully inadequate. It is now conceded that law not only arises and results in social and political circumstances, but that social values and political morality play a vital role in the operation of the law. 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. The shift in scholarly attention has been less to political critique and more to philosophical analysis. However, this explicitly theoretical strain of legal scholarship criticises the textbook tradition from within the same disciplinary mind-set. 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 blackletter theory: Casaubonic commitments have come out of the closet and become a celebrated ideal, not an embarrassing corollary of legal scholarship.

A GHOSTLY PURSUIT

Herbert Hart served the legal community of black-letter scholars well. His enlightened brand of legal positivism in *The Concept of Law*, with its analytical emphasis on rules, regularity and reasonableness, provided a jurisprudential support that enabled black-letter writers to continue with their academic craft without too many qualms about the legitimacy or efficacy of their work. This is not surprising as Hart's avowed aim was to provide an essay in descriptive sociology in that he sought to make sense of lawyers' daily

practices; he offered a commentary rather than critique.[10] While this garnered obvious support among the adherents to a black-letter approach, it did little to convince sceptics or critics. Many jurists began to suggest that Hart's ideas ran out of steam at the very point that they were most needed; they had little to say about the resolution of hard cases where rules were unclear or clashed, other than that judges had a discretion and responsibility to do the best that they could. While this gave comfort to the critics (who tried to use this opening as a way to establish and further the claim that 'law is politics'), others were convinced that, while law is a system of rules, it is not only that -law is about values as much as it is about rules. Accordingly, a new generation of jurists began to develop a theory of law that took account of law as a thoroughly political enterprise, but somehow to do so in a way that was not itself political or ideological. In this effort, the Casaubonic impulse to abstract organisation and formal coherence proved irresistible. Modem jurisprudence has become increasingly philosophical and increasingly Casaubonic. Although this combination is far from inevitable and is best avoided (as I will shortly explain), its effects have been considerable for both the legal and jurisprudential project. Perhaps as a way to balance the excursion into the realm of values and morals, there was a felt need to become ever more abstract and formal in the hope that this would insulate the resulting theories from charges of partisanship.

As traditionally understood, jurisprudence applies to all those efforts to step back from the actual practice and operation of law in order to make some general sense of it all. As Karl Llewellyn phrased it, 'jurisprudence is as big as law – and bigger' .[11] This venture can be carried out from all manner of perspectives and indeed has been. Economists, sociologists, literary critics, anthropologists, political scientists, psychologists and many others have sought to place the world of law under closer critical scrutiny. However, in recent years, jurisprudence has been hijacked by philosophers. Apart from their usual imperialist claims about philosophy being the intellectual discipline that is assumed and incorporated by all others, legal philosophers claim to be first among jurisprudential equals. They insist that, while there is much of value to be learnt about law

when viewed from the outside as a social or political activity, the effort to understand law in its own terms and as a viable internal operation is entitled to theoretical priority. It is not so much that they dismiss other types of study, but that they claim that they are of a secondary and derivative character to lawyers. While such jurists concede that not all problems and issues in law are philosophical, they do contend that all those problems and issues are capable of becoming philosophical ones and that they are premised on some inescapable philosophical assumptions.

Construed in this way, jurisprudence soon found itself on the familiar terrain of many traditional philosophical conundrums and, in the process, has become dominated by philosophical preoccupations. Mindful of law's black-letter tradition and the challenge of maintaining democratic legitimacy for courts in a society in which important social questions are routinely left to judicial resolution, jurists have considered a central part of the jurisprudential project to develop an epistemology of law: How is it possible to have knowledge about law or to know what counts as knowledge of or about law? And what counts as good and bad knowledge about law? As such, jurisprudence has adopted a traditional and philosophical stance in developing a series of truth claims about the legal enterprise. All the problems of legal philosophy or jurisprudence have tended to begin and, in some cases, to end with this inquiry: 'most of the important arguments in legal thought are epistemological in nature.' [12] What begins as a preliminary condition for any jurisprudential progress or enlightenment to be made, soon becomes, once achieved, a way to underwrite the particular intervention as universally valid and, therefore, superior to all other offerings. Indeed, it is no exaggeration to say that the jurisprudential attention to values has resulted in a tum away from the world rather than a return to it. Legal theorists have come to subscribe to a greater or lesser degree to the Casaubonic cause in which rigour, sweep, form, consistency and integrity are the watchwords. Matters of material or substantive justice are treated as distinctly secondary the actual construction of cottages for the poor or detached ruminations on abstract points of ancient architecture? Or, in more legallyrelevant terms, shelter for the homeless or consistency with the overarching

principles of property law?

Although this way of presenting the ambition and agenda of jurisprudence seems to speak in the mystical tones of bygone days, it remains the implicit mission and mind-set of modem jurisprudence. In the same way that Casaubon maintained that 'all the mythical systems or erratic mythical fragments in the world were corruptions of a tradition originally revealed', [13] mainstream jurists seem united in their belief that Law is more than the sum total of extant laws and decisions: it is felt to be both the expression and repository of a political insight that transcends the bounds of it-; temporary articulation. As such, it is generally agreed that democratic law-making cannot be left entirely to its own promptings, but must be judged by its willingness to conform to the dictates of a loftier discipline. Consequently, legal theorists strive to explain and justify the delicate (and elusive) relation between law's immanence the idea of law as the rational embodiment of an indwelling harmony -and law's instrumentality the practice of using law as an institutional tool for social engineering. In searching for that balance, the cool detachment of philosophical reflection is thought more conducive to democratic advancement than the heated contestability of popular debate. Despite the regular incantation of the Holmesian wisdom that 'the life of the law has not been logic, but experience', what counts as 'experience' is limited to law's own workings and lawyers' own wiles. Moreover, the jurisprudential examination of that experience is abstract and logical. One of the most enduring tropes about the nature of common law development is that it is constantly working on and through itself to satisfy better its own self-transforming ambitions. This assertion can be traced back over 250 years to the arguments of a young Solicitor-General, Mr Murray (later to become the legendary Lord Mansfield), in a relatively unimportant Chancery case about testimonial competence. Contending that the law moves generally from one particular occasion to another, he concluded that 'a statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for that reason superior to an act of parliament'. [14] Always travelling, but never arriving, the common law is portrayed as

continuing process which fulfils and refreshes itself from its own self-generated resources. This extravagantly Casaubonic trope is at the heart of two important and acclaimed contributions to modem jurisprudence. The first is the revival of a Kantian/Hegelian perspective on law and adjudication. For instance, Ernest Weinrib offers a supreme, if stylised, version of this retreat to philosophical purity. While his work is so much better and more serious than Casaubon could ever have anticipated or expected, it represents philosophical hubris writ large. Assuming the mantle of the True Philosopher, he brooks no dalliance with instrumental understandings; he makes an eloquent pledge of his unwavering affections and considerable energies to the revelation of law's neglected immanence. Rejecting less fundamentalist and formalist efforts 'to make sense of legal thinking and discourse in their own terms', Ernest Weinrib offers an Aristotelian account of law-as-justice-ensouled that defends and extols the objective truth of law's coherence and rationality. By attributing to law its own immanent theoretical intelligence that transcends and informs all its instrumental practical instances, Weinrib hopes to show that contemporary law is a deserving philosophical object of democratic allegiance precisely because the essence of law is its capacity to 'work itself pure' .[15] His philosophical modus operandi is to proceed as if the challenge were to isolate certain insights, place them beyond the limitations of historical context and give them privileged status as knowledge on the basis of that relocation. Across Wei nrib' s modem enterprise, the flitting ghosts of Casaubonic thinking cast long and morbid shadows in whose halflight Weinrib visualises all kind of legal entities and philosophical ideas. Indeed, it is to this demi-monde that Weinrib urges fellow jurists to return if they are to maintain and complete the project of modem jurisprudence. However, this attempt to revive the dubious virtues of purism and scholasticism is ill-timed and unwarranted: it should be met with an equally thorough, sustained and unabashed exercise in ghost-busting.

The other 'purist ' among the elite of modem jurisprudence is Ronald Dworkin. He has placed the notion that *the law works itself pure* at the dynamic core of his legal theory. Over three decades, Ronald Dworkin has developed a constructivist theory of law and

adjudication at the heart of which is the naturalist insistence that 'law . . . is deeply and thoroughly political' .[16] While this is promising, the bulk of Dworkin's writings disappoint. For him, the resort to politics is not about getting one's hands dirty in the messy world of real-life circumstances, but is about armchair philosophising in the rarified pursuit of law's inner intelligibility and principled purity. Championing the Blackstonian idea of law-as-integrity and framing the courts as a privileged forum of principle, he lionises judges as princes of law's realm who are charged with the duty of applying and transforming the extant law in line with its own purer ambitions. In the Dworkinian Empire of Law, although these noble judges bear the brunt of that responsibility, they must leave it to philosophical 'seers and prophets

. . . to work out law's ambitions for itself, the purer form of law within and beyond the law we have'. While such work and inspiration may elude rank-and-file lawyers, they are not left to their own devices, for their 'god is the adjudicative principle of integrity' which is a 'more dynamic and radical standard than it first seemed, because it encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle' .[17] Accordingly, while Dworkin has obliged most legal scholars to concede that law is about values as much as rules, he has done so in a way that does not disturb the informing blackletterism that underpins the mainstream academic enterprise. Dworkin has made it safe for traditional scholars to talk about values and remain squarely with the formalised and abstract framework with which they are familiar.

InDworkin, therefore, Casaubon has found his most sophisticated and modem adherent. Dworkin has managed to chastise the black-letter tradition of legal scholarship at the same time that he has taken it to more abstract heights. In his most recent work, Dworkin has not only held firm to these basic convictions, but he has confirmed them in the most unequivocal terms. In determining the correct legal answer to particular discrete legal problems, he maintains it is incumbent upon judges to have reflected upon the whole system of moral and legal principles that comprise a particular area of law and to grasp them in their most coherent and appealing presentation. Consequently, Dworkinian

judges are obliged to take a 'theory-drenched' approach, even though they might well disagree over what that theory is and how it applies to the dispute at hand. As Dworkin expresses it:

> 'A claim of law . . . is tantamount to the claim, then, that one principle or another provides a better justification of some part of legal practice. Better in what way? Better interpretively better, that is, because it fits the legal practice better, and puts it in a better light. In that case, any legal argument is vulnerable to what we might call justificatory ascent. When we raise our eyes a bit from the particular cases that seem most on point immediately, and look at neighbouring areas of the law, or maybe even raise our eyes quite a bit and look in general, say, to accident law more generally, or to constitutional law more generally, or to our assumptions about judicial competence or responsibility more generally, we may find a serious threat to our claim that the principle we were about to endorse allows us to see our legal practices in their best light.' [18]

For Dworkin, therefore, adjudication is less a technical craft and more a philosophical adventure of the grandest Casaubonic kind in which formal integrity and abstract coherence are both their tools and their goal. Nevertheless, Dworkin concedes that not every judge has the necessary Herculean philosophical wherewithal to undertake such an ambitious challenge. Whereas a mythical Herculean judge might be able to master the arcane equipment of philosophical sophistication, synthesise all the available historical material, construct a perfectly attuned and all-embracing structure, and apply it consistently to detailed legal problems, this is far beyond the competence of merely earthly beings. Instead, what is important is that judges should do the best that they can by being prepared to enter on the 'justificatory ascent' that might draw them into a more theoretical argument than they originally anticipated or wanted. Dworkin does not expect judges to make that 'justificatory ascent' as a matter of course, but he does remind judges and jurists that 'the ladder of theoretical ascent is always there, on the cards, even when no one is tempted to take even the first step up it'.[19] Like Casaubon, therefore,

Dworkin maintains that reflective height is the guarantor of moral depth. And, as Casaubon might put it, 'having once mastered the true position and taken a firm footing there, the vast field of [law] became intelligi ble, any, luminous with the reflected light of correspondences'. [20] At the very least within the Dworkinian scheme of things, formal consistency with the overarching principles of property law is as important as substantive shelter for the homeless.

Of course, this Casaubonic style of legal philosophy has not gone unchallenged. It has come in for stem rebuke. Critics condemn such scholarly efforts in which jurists not only seem to believe that law has a supra-historical life, but that they can know and understand it. The idea that law is an immanent whole that transcends the accumulated sum of its immediate parts, that there is a simple metaphysical formula that explains all law or that legal practice can be rendered philosophically pure is increasingly untenable in a world in which lawyers and society at large are increasingly diverse in composition, interests and objectives. The claim that the best way to provide solid and secure footings for law and legal theory is by becoming more and more abstract and removed from its dayto-day operation is doubly mistaken. First, there are no solid and secure footings for law and legal theory that are not themselves part of the very political and situated debate that they are intended to ground and underwrite: there is no escape from the messy and contingent facts of social living. And, secondly, in so far as it is possible to think critically about law, it cannot be done by escaping the concrete circumstances of law and legal theorising: law is a practical enterprise and theory is a specialised form of practice. In the second half of this essay, I will elaborate on and justify these claims.

DOROTHEA'S COMPLAINT

The legal careers of many such critics resemble George Eliot's feisty, but impressionable Dorothea Brooke. Initially infatuated by 'the set of his iron-gray hair and his deep eye-sockets [that] made him resemble the portrait of Locke' and awed by 'a modem Augustine whose

work would reconcile complete knowledge with devoted piety', she saw Casaubon as 'a guide who would take her along the grandest path'. Furthermore, the thought that he might consent to be her husband filled her with 'a sort of reverential gratitude' 'Here was a man who could understand the higher inward life, with whom there could be some spiritual communion; any, who could illuminate principle with the widest knowledge: a man whose learning almost amounted to a proof of whatever he believed!' In that first flush of romance, she spent her days content 'to imagine how she would devote herself to Mr. Casaubon, and become wise and strong in his strength and wisdom'. There is much in Dorothea's condition that resembles young lawyers. While Dorothea came across her devotion through acculturation and inclination, 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. Indeed, under the spell of a Casaubonic mind-set, the life of a law student is 'the mixed result of a young and noble impulse struggling amidst the conditions of an imperfect social state, in which great feelings will often take the aspect of error, and great faith the aspect of illusion'.[21]

Yet Dorothea's selfless besottedness was unrealistic: no one could live up to such callow adulation, let alone the blighted Casaubon. Not surprisingly, Dorothea's admiration soon turned to disillusionment that quickly hardened to contempt, even if it later mellowed to pity. On her return from an ill-fated Italian honeymoon with Casaubon, she realised that even in her earliest and most scholarly devotions she had been 'visited with conscientious questionings whether she were not exalting these poor doings above measure and contemplating them with that self-satisfaction which was the last doom of ignorance and folly'. As these questionings received ever more assured answers, she accepted that a life with Casaubon did not lead to 'large vistas and wide fresh air', but to 'ante-rooms and winding passages which seem to lead nowhither' and that 'her blooming full-pulsed youth stood there in moral imprisonment which made itself one with the chill, colourless, narrowed landscape'. Once Dorothea's anger and resentment had run their course, she looked upon Casaubon with a genuine mixture of

sadness and compassion:

> 'For my part, I am very sorry for him. It is an uneasy lot at best, to be what we call highly taught and yet not to enjoy: to be present at this great spectacle of life and never to be liberated from a small hungry shivering self never to be fully possessed by the glory we behold, never to have our consciousness rapturously transformed into the vividness of a thought, the ardour of a passion, the energy of an action, but always to be scholarly and uninspired, ambitious and timid, scrupulous and dim-sighted.' [22]

There is much in Dorothea's predicament that can be profitably related to the critics' reaction to contemporary mainstream jurisprudence. Instead of revelling in the full amplitude and unbuttoned possibilities of human existence, jurists bring to it a narrow and smothering perspective. Wanting to bring everything down to a dry and bloodless endeavour, they resemble taxidermists rather than naturalists; they want to capture and display legal wildlife in museums rather than marvel at their living colour and glorious vitality. Under their tutelage, jurisprudence is less about rapture and glory and more about rigour and scrupulousness. Although they present their work in grand and confident terms, contemporary jurists are fearful and desperate -they are fearful that, if the world of law and lawyers is not held in check, it will decline into a chaotic and arbitrary exercise and they are desperate because their efforts to establish such a checking device are increasingly less convincing. Rather than celebrate society's diversity and energy, they wish to leash and corral them. Accordingly, in its efforts to rescue law and lawyers from themselves, jurisprudence craves greater theoretical authority not only to bolster individual contributions, but also to salvage its own waning prestige. This characteristic Casaubonic mix of conceit and timidity is held together by an attachment to the idea that there are certain moral and legal facts-of-the-matter that transcend and discipline the beliefs of its participants about what the legal enterprise is and is not about. Maintaining that there are right methods that will produce right results, these jurists claim to speak in the authoritative accent of truth and objectivity. Yet, on closer inspection, these methodological claims are less the imprimaturs of a formalised justice, but more the earnest

ways of simply getting-by. This is no bad thing. Stripped of their philosophical paraphernalia, these jurisprudential accounts might still have something to offer to law and its task of being substantively just in a world that is constantly shifting and changing.

But it is this paraphernalia that must go. The insistence that the theoretical effort to distinguish between 'what the world seems like to us' and 'what the world really is' will pay practical dividends must be abandoned. There is no worthwhile or sustainable distinction between what is thought to be the case about the world and what is the case about the world, about what seems to be right and what is right, and between what is believed about the world and the way the world really is. Despite philosophers' and jurists' best efforts, it has not been possible to demonstrate that there is some critical distance between the world and our thoughts about it such that the world cannot only be what people think it is. To say something true and objective about the world is to do no more than report on what people presently believe or accept to be true and objective about the world. This is not deny that there is a reality or to fall into some absurdly solipsistic understanding of the world: it is simply to accept that there is no way of stepping outside our perceptions about the world to determine whether those perceptions correspond with what is really the case. The critical idea that a theory of truth is a theory of meaning and no more is offered as 'an explanation of what people *do*, rather than of a non-causal, representing relation in which they stand to non-human entities'.[23] There is no truth about what is really there over and above what are treated as the best prevailing beliefs about what is really there. And what is best is whatever has managed to get itself accepted in the relevant community of inquiry.

Of course, many contemporary jurists do not insist that there are facts-of-the matter, such that what is the case or right is entirely independent of what is thought to be the case or right; so-called realists are few and far between. Instead, these 'constructivists' deny the existence of any moral facts as something independent of beliefs; they recognise that truths are as much chosen as they are perceived. Opting for an account that treats what people would think of as right under ideal conditions to determine what is in fact right,

they have traded in notions of fundamental objectivity for more modest notions of constrained objectivity; what they lose in universality, they hope to gain in relevance and credibility. To achieve this more restrained fulfilment of the philosophical project, the most popular strategy has been to keep the truth-question separate from the reality-question by providing an account of truth and objectivity that does not depend on there being a correspondence between what is thought to be the case about the world and what is the case about the world. Denying the realists' insistence on moral facts-of-the-matter (or, at least, their accessibility to human demonstration), they recognise that truth is caught within the social web of language. But they go beyond the simplistic and uninteresting claims of correspondence theorists who deliver only empty tautologies about practice and objectivity.[24] Instead, they offer a coherence account of truth and objectivity in which it is maintained that the most convincing account is the one that shows how a complex structure of relationships can best cohere. This means that the truth of any particular moral judgment is dependent upon its coherence with all other moral intuitions and claims. In contrast to axiomatic or linear theories which establish first principles and then argue deducti vely from them to more detailed and particularised moral judgments, coherence accounts engage in a continual process of adjustment and revision between general moral principles and particular moral judgments until the most balanced and harmonised account is constructed.[25]

Nevertheless, despite their constructivist claims, most philosophers still manage to utilise the realist heirlooms as part of modem theorising rather than shelve them as historical curiosities. Although they accept that what is thought to be the case is related to what is the case or that moral beliefs are relevant to moral facts-of-the-matter, they do not concede that there are no moral facts-of-the-matter; it is more a question of accessibility than actuality. The motivating fear is that, if the attempt to demand what is true and denounce what is false is abandoned, efforts to distinguish right and wrong will also be hopeless and all moral claims will be relativised; each opinion, no matter how quirky or perverse, will merit equal attention. In such circumstances, it is dreaded that morality will be reduced to a crude triumph of might over right or, at best, the tyranny of the majority.

Accordingly, modem philosophers do not insist that it must be possible to demonstrate that a statement is true, only that it can be true or would be true under ideal conditions; the truth of a statement is not entirely reducible to or completely settled by reference to extant practice or the accumulation of prevailing beliefs. The tendency, therefore, is to offer largely constructivist accounts, but to insist that there are limits on that enterprise and to bound it by some strong and realist-grounded claims about morality. It is a tacit acknowledgment that coherence alone will not guarantee justice or fairness. Coherence only works as a guarantor of truth and objectivity where the general orientation of a set of practices is basically just. Whether apartheid or Nazism are wrong will not be determined by their greater or lesser compliance with the demands of coherence, but by their basic commitments and substantive consequences. Accordingly, the constructivist project rests on a foundational platform of realist assumptions. When coherence push comes to relativistic shove, most philosophers reassert their realist commitments by concluding that truth is something that can transcend what is believed to be the case there is more to truth than belief because, in important and critical circumstances, truth acts to discipline an incorrect belief, even though truth is never entirely independent of belief.

It ought not to be surprising that jurisprudence has followed a similar course and reached a similar point in its development as philosophy generally. Cast as a particular comer of the philosophical action, jurists' efforts to understand law and adjudication have followed those of their more generalist colleagues. While there are still some dyed-in-the-wool philosophical realists around and there is a flourishing, if contained, revival of axiomatic theories,[26] the predominant approach to legal theory is constructivist the task of providing a credible and workable account of legal truth and objectivity is achieved by developing the most coherent and compelling account of past legal practice. The most wellknown and successful proponent of such an approach is, of course, Ronald Dworkin; the influence of his work has been enormous in academe and, if less so, in the courts. This is not surprising, as he presents his jurisprudential theory as an account of what judges do as much as what they should do. Moreover, Dworkin's account is explicitly

philosophical in orientation and elaboration. Although he offers an account that gives prominence to prevailing views and existing opinions, he insists that there are definite limits on the moral authority of such beliefs. For Dworkin, there are right answers to legal controversies, even if we disagree about what they are, and integrity's writ only runs as far as certain realist moral truths allow; 'the adjudicative principle of integrity [is not] absolutely sovereign over what judges must do at the end of the day . . . [because], if ajudge's own sense of justice condemned [a particular course of action], he would have to consider whether he should actually enforce it . . . or whether he should lie and say that it was not law after all, or whether he should resign'.[27] For Dworkin, therefore, law is an epistemological undertaking of the most demanding and traditional kind: objectivity and truth are its watchwords and credentials.

This minimally scaled-down project retains all the elements of a Casaubonic understanding of scholarly propriety and success. Jurists cannot seem to accept that justification is not about the abstract or special relation between ideas, but is a social practice that has or requires an external authority to its own contextual development: truth is no different from what passes as true. To insist that there is no distinction between 'what the world seems like to us' and 'what the world really is' is not itself offered as a metaphysical truth, but as a statement about the current state of play in the social enterprise of understanding the world. Any standards of assessment and validity are not external to and thereby controlling of debate, but are internal to the debate in that they inform it as much as they are changed by it. Epistemology fails in the sense that there is no privileged ground on which knowledge or meaning can claim to stand. From an alternative pragmatic perspective, objectivity is about social agreement, whether imposed or assumed: it is not an approximation to some natural, neutral or noncontextualised standard of verification. As Richard Rorty, the most eloquent and cogent of the neo-pragmatists, puts it, 'explanatory power is where we find it'.[28] Accordingly, theoretical inquiry ought to concern itselfless with the truth and objectivity of certain beliefs and more with the moral substance and practical implications of such beliefs.

This tendency to abstract theorising has become a way to remain a spectator rather than a player at Dorothea's 'great spectacle of life'. Contemporary jurisprudence remains in the scholastic shadow of a Casaubonic need for scientific rigour and abstract detachment as if this was the key to unlock the normative secrets of the universe. The fact is that there are no normative secrets to the universe to be unlocked that are not the projections of our own ideals and desires. Contemporary jurists continue to waste valuable energies in this hapless pursuit; they have a lingering theological ambition in that they wishes to ascend to some super-human vantage-point what else is Hercules but a mythic and super-human alter ego of Dworkin himself? For instance, Dworkin wants us to make a 'justificatory ascent' to some abstract remove from which we can catch an echo of the infinitely true and carry it back to society for people's edification and enlightenment the more recalcitrant the problem, the higher the ascent; the more entrenched the controversy, the more transcendent the escape; and the more convoluted the possibilities, the purer the ambition. Yet, contrary to the Casaubonic instinct for escape, progress is not about becoming more objective and true, about achieving justificatory height in order to attain moral depth, or about advancing towards some higher, more removed and abstract plane on which rationality can hold sway outside of the disabling influence of interests, commitments, fuzziness, history, culture and ideology. Despite traditional theorists' wishes and work to the contrary, there is no way to escape the politics of human finitude and transmigrate to an infinite realm of pure reason that secures people against the need to make difficult and always-contestable choices. Elegance, coherence and simplicity are valued attributes of any theory, but they are hollow and hopeless as ends in themselves; they must be subordinated to usefulness. Progress is about closing the gap between aspirations and actuality so that the world can become a better place. There is no epistemology that operates as something above rhetoric and there is no metaphysics that is something above rhetoric. Like debates about substance, there is nothing beyond persuasion among real people in real situations. Settled or fixed principles are simply those that have acquired and still manage to retain sufficient support

in the political scheme of things; basic principles do not so much obviate the need for politics as provide a marker for them.[29] The demand for integrity or consistency falls down because, at a suitable level of analysis, sometimes high and sometimes low, most things can be made to look more or less coherent.

Accordingly, rather than commune with Casaubon and his juristic imitators about the common law *working itself pure,* it is more instructive to think about judges as engaged, through their own efforts and imagination, in the process of law simply 'working itself'. Indeed, despite its hubristic arguments and ambitions, modem jurisprudence manages to confirm the modest claim that the practices of law and philosophy are no more (and no less) than a human pursuit - situated, fragmentary, and flawed. Like all histories, the development of private law is best understood as a way of coping that is more or less successful in direct proportion to its capacity to achieve substantive justice in the contextual circumstances. Judges who make 'bad ' decisions do so because of their substantive leanings, not because of their weak or incorrect judicial method that they deploy; the decisions in *Donoghue* or *Rylands* are not right or wrong because of the formal merit of their judicial techniques, but because of the lasting appeal of their substantive politics.[30] Contrary to what mainstream jurists believe, formal method cannot save the law and judges from themselves. Nor, if such techniques are followed, will judges be able to distinguish right decisions from wrong decision, not only as a matter of morality, but of law. Judgment is a substantive instinct that can never be applied in any easy or uncontroversial way: what is and is not useful will change as the circumstances and context shift.

ON THE ASCENT

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. For instance, although Dworkin contrasts moral and aesthetic disagreement, his account of how aesthetic debate proceeds is a fair explanation of how moral and jurisprudential engagement takes place. In discussing whether Picasso was a greater artist than Braque, Dworkin states that:

> 'though Braque was a very important artist, all things considered Picasso was a greater one. Ifyou challenge me, I will try to sustain that opinion in various ways -by pointing to Picasso's greater originality, inventiveness, and range of qualities from playfulness to profundity, while nevertheless admitting certain advantage in Braque's work: a more lyrical approach to cubism, for example. Because artistic merit is a complex subject and my claim is an all things-considered one, the issue can tolerate a complex discussion. The conversation would not soon tum silly, as it would if l were trying to defend a claim about the greater nobility of Petrus compared with Lafite. I might or might not convince you, after sustained discussion, that I am right about Picasso and Braque; you might or might not convince me that I am wrong. But if neither convinces the other, I will continue in my opinion, as no doubt you will in yours. It would tell against my view that I could not convince you of it, but I would not count this as a refutation.' [31]

This kind of exchange in which the standards of assessment -greater originality, inventiveness, and range of qualities from playfulness to profundity are part and parcel of the debate is not dissimilar to moral or jurisprudential debate. Although the standards are of a different kind -freedom, solidarity and justice, for example and there is a constant hankering after more compelling or objective standards, there are none. There is no difference between what we honestly believe to be the case or right and what actually is right or the case. And the belief that there is such a difference is simply one more belief. To take such a stance is not to say that aesthetics and morals are the same or that morals is only as important as aesthetics. But it is to say that there is no killer-argument that can claim its authority from somewhere outside the human and situated debate that constitutes morals and

aesthetics: authority is where you find it and, where you find it, is here-and-now, not in some imagined other-world. However, in the same way that Dworkin accurately captures the quality of both aesthetic and moral debate in talking about whether Picasso was a greater painter than Braque, he also showcases the fundamental mistake that Casaubonic theorists make when they tum to debate whether Picasso is a greater genius than Beethoven:

> 'But if I were asked whether Picasso was greater genius that Beethoven, my answer would be very different. I would deny both that one was greater than the other and that they were exactly equal in merit. Picasso and Beethoven were both very great artists, I would say, and no exact comparison can be made between the two. Of course I must defend the distinction I have now drawn. Why can I rank Picasso and Braque, but not Picasso and Beethoven? The difference is not that people agree about standards for comparing artists in the same period or in the same genre. They don't, and it would not follow that the agreed standards were the right ones even if they did. The difference cannot be based on any cultural or social fact of that sort, but must be based, if it makes sense at all, on more general, perhaps even quite theoretical, assumptions about the character of artistic achievement or evaluation. I would try to defend my judgment about Picasso and Beethoven in that way. I believe that artistic achievement can only be measured as a response to artistic situation and tradition and that only order-of-magnitude discriminations can be made across such traditions and genres. So though I do thi nk that Shakespeare was a greater creative artist than Vivaldi, I believe no precise ranking makes sense among evident geniuses at the very highest levels of different genres. This is not an evidently stable view, and I might well change my mind. But it is the view I now hold.'[32]

For all the good sense that Dworkin makes in his earlier account of aesthetic disagreement, this explanation of 'genius' bears all the unnecessary and unconvincing diversions of a Casaubonic mentality ahistorical, abstract and schematic. He maintains that it is only possible to be 'theoretical' if one escapes the bounds of 'cultural and social' context and seeks to transcend 'traditions and genres'. In contrast to his earlier emphasis on

situated standards and engaged persuasion, Dworkin has once again entered on a justificatory ascent toward some super-human realm where truth, objectivity and, therefore, authority are the reward of those who best ape the gods. In contrast, I insist that progress is not

about ascending higher to some there-and-then, but about coming to terms with where we are in the here-and-now.

Accordingly, once stripped of their philosophical paraphernalia, recherche juristic theories are revealed as a another political and partisan intervention. 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. Under cover of this apparently modest and apolitical intellectualised approach, there is a very real set of substantive biases in play; what is claimed to pass for philosophical rigour in the name of coherence and intelligibility is really a barely disguised effort to maintain and defend the status quo. In the same way that the immediate popularity and lasting appeal of Blackstone's *Commentaries* owed as much to the ideological leanings of its author as to its intellectual excellence, so the contributions of today's leading scholars to synthesise the law into a comprehensive and systematic body of rules and principles are neither neutral, objective nor detached.[33] It is not that there is a vast and overt conspiracy in play, bu t that the naive craf t commitments of the mainstream academic community are much less benign than many members realise or choose to recognise. However, the complacent assumption that the law is, by its nature as law, good and that this goodness will be enhanced in proportion to its increasing internal coherence and formal intel ligibility wears extremely thin in light of much evidence to the contrary: the camel is no animal for legal academics to emulate and sand is a poor building material for law schools. As Pierre Schlag concisely puts it, 'the progressive fallacy is the bel ief that the aspects of a practice

. . . that are "good" are constitutive or essential to the practice, while those aspects of the practice that are "bad" are merely by-products of or contingent to the practice' .[34]

In short, black-letterism works as a convenient mode of denial. It enables legal academics and lawyers to engage in what is a highly political and contested arena of social life namely, law and to pretend that they are doing so in a largely non-political way. The main advantage of this is that they can go about their daily routines without assuming any political or personal responsibility for what happens in the legal process. However, the insistence that lawyering is a neutral exercise that does not implicate lawyers in any political process or demand from scholars a commitment to any particular ideology is as weak as it is deceptive. Such a Casaubonic-like image is a profoundly conservative and crude understanding of what it is to engage in the business of courts, legislatures and the like: it accepts and works within the bounds of the status quo. Lawyers tend to confuse legal justice with social fairness. Indeed, the power and prestige of lawyers flow from their professional allegiance to the state's official laws and existing institutions; lawyers as a group, in spite of the efforts of many individual lawyers, are the enlisted custodians of the status quo. By pretending otherwise and renouncing responsibility for the system that their actions hold in place, lawyers and academics are able to maintain their so-called independence and apolitical authority. The black-letter tradition of legal scholarship is in the business of producing political tracts as much as the politician and polemicist; the fact that they are presented and styled in the opaque jargon of professional disinterest and technical expertise serves to compound the disingenuity. As such, black-letterism is an ideology in the profoundest sense of the world in that it presents a particular and partial view of the world as neutral and natural.

None the less, not all the critics of a Casaubon-style legal theorising share the same complaint or pursue the same cause. Even self-described pragmatists pursue their pragmatism in the most unpragmatic of ways. There is a growing band of anti-theorists who are merciless in their critique of the kind of grand Casaubonic theorising in which Dworkin, Weinrib and others engage. For instance, Richard Posner insists that moral

theory not only has little to offer law, but that it is positively dangerous to it; it draws judges and jurists off into the kind of ideological and indeterminate speculation that is inimical to legitimate lawyering. For Posner, this does not mean that law must be unprincipled or technocratic, only that it is wrong to equate 'moral principle to principle, and morality to normativity'. Instead, he concludes that what is required is that judges develop 'a disposition to ground policy judgments on facts and consequences than on conceptualisms and generalities': judges and lawyers must eschew philosophy for social science. However, this audacious proposal that the empirical tools of economists are morally neutral and ought to be adopted by judges is no less hubristic in its own rationales and recommendations. Indeed, Richard Posner manages to out-Casaubon Dworkin; he simply wants to replace moral philosophy with social science. While it is true that judges and jurists would do well to take greater heed of the socio-political context in which they work and of the actual consequences of their decisions and suggestions, it is absurd to imagine that this can be done without some resort to social values or political commitments. As an empirical matter, it is simply not the case that there is 'a fair degree of value consensus among the judges', such that they can 'seek the best results unhampered by philosophical doubts' .[35] As I have been at pains to demonstrate, what theory cannot do is provide a method, be it moral or scientific, that will relieve people from the responsibility and challenge of constantly arguing and re-arguing what should and should not be done in particular contexts at particular times.

It was Justice Brandeis' prediction that little progress in society will made until the lawyers' obsession with 'the logic of words' has been healed by their attachment to the 'logic of realities'. [36] However, in emphasising that law's development is better explained as a contingent responsiveness to historical circumstances than as the unfolding of law's inner logic, I ought not to be taken to be making the very different claim that law develops in line with some external deep-logic of social reality it is 'logic' as much as the words or the realities that is the problem. There is no one account of the organic relation between law and social relations that is valid for all time, all societies

and all legal developments. The connections between legal doctrine and material interests are often as casual as they are causal and as contingent as they are necessary. It is not that legal doctrine is without any rhythm or reason at all, but that any efforts to go beyond either the most general or the most detailed account are confounded by the doctrinal and social facts; the explanations become either so abstract as to lack any practical predictive force or so elaborate as to capture only a particular historical moment in time. There are always too many plausible and competing rationales to satisfy the Casaubonic need for explanatory primacy or closure. In the same way that E P Thompson announced that 'the greatest of all fictions is that the law evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations',[37] the reverse can be proclaimed with equal force -law does not evolve, from case to case, by the partial logic of class struggle, true only to established interests, unswayed by logical considerations. By different measures at different times, the development of law is a mix of the *logical* -in the sense of attempted compliance with law's own generated (and indeterminate) rationality and the *expedient* in the sense of responsiveness to society's own political (and indeterminate) demands. Both logic and expediency infiltrate and affect the operation of each other; lawyers and judges are neither only the lackey of established (or any other) interests nor always the intellectual captives of a professional tradition. Black-letterism sees only the *logical* and, when it does see the *expedient,* it seeks to avert its eyes or obliterate it.

This all having been said, it is not my intention to condemn theory *tout court.* It should be clear that I am not against theory per se, but only its continued and exclusive Casaubonic self-image: a sophisticated anti-theory is not same as a vulgar anti-theoreticism or a crude practicalism. I am against grand-theory and theoreticism, not theory or philosophy. If philosophers are to be of use to societies that claim or aspire to democratic ideals, they must abandon the belief that their task must be to lay down authoritative blueprints for legal and political action in the name of some universal truth about the human condition or law. It is not only possible, but more effective to talk about politics and morality without a commitment to a theory of objective truths; an emancipatory or transformative project does

not depend on or require a grand theory to back it up. In the same way that there is no sharp break between theory and practice, so there is no gap between law and politics or between jurisprudence and practical lawyering; it is not that each collapse into each other and have no relevant differences, it is simply that there is no fixed and clear line dividing one from the other that is not itself hostage to the context in which it arises and is sustained. In an important sense, it is more theory that is need, not Jess. As such, I agree with Dworkin that 'we have no choice but to ask [judges and lawyers] to confront issues that, from time to time, are philosophical' . However, I also maintain that such philosophical work need not and must not be of the Casaubonic variety; Dworkin's jurisprudence does not so m uch abandon 'all the familiar legal phlogistons', as he claims, but in its attachment to integrity, truth and objectivity adds to that alchemical collection.[38] Instead, what is required is a more useful jurisprudence. In the end, there must be talk about substance without the distracting diversion of theory talk. But not, as Posner insists, as an exercise without values and not, as Dworkin and his Casaubonic colleagues insist, as a matter of grand theorising. It is to a more useful account of legal theory that I now tum, one that can lead to 'large vistas and wide fresh air' rather than 'anterooms and winding passages which seem to lead nowhither'.[39]

TOWARD A USEFUL JURISPRUDENCE

After Casaubon' s demise, Dorothea struggled to come to terms with the meaning of his death for her life. Not helped by Casaubon's vengeful will (which made her inheritance conditional on not marrying Will Lad islaw, a young, if headstrong admirer), it took her a long time to break free of his chilling influence. Moreover, it took even longer for her to confound people's opinion that, despite her reputed cleverness, she had thrown herself 'at Mr Casaubon's feet and kissing his unfashionable shoe-ties as if he were a Protestant Pope'. Although she never subscribed to the uncharitable view that he was 'a cursed white-blooded pedantic coxcomb', she did recognise the false allure of Casaubon's scholarly pretension:

'And Dorothea had so often had to check her weariness and impatience over this questionable riddle-guessing, as it revealed itself to her instead of the fellowship in high knowledge which was to make life worthier.' Dorothea intuited that intelligible and responsible action was not a gift from the gods or a result of allegiance to a priori truths about fixed principles; it was to be achieved in and through a social practice that interrogates standards of action as it formulates them. Moving from the parochial Middlemarch to a cosmopolitan London and marrying the free-spirited Will, she ended her days in 'a life filled with a beneficent activity'. Although she did not engage in grand projects, 'the effect of her being on those around her was incalculably diffuse; for the growing good of the world is partly dependent on unhistoric acts; and that things are not so ill with you and me as they might have been, is half owing to the number who lived faithfully a hidden life, and rest in unvisited tombs'.[40]

Legal theorists would do well to imitate Dorothea's humility: the self-image of legal theorists as privileged purveyors of special knowledge and as peripatetic traders in eternal verities must be abandoned. As practised in the grand tradition, jurisprudence ought to have no particular authority or priority over democratic deliberation. In place of Casaubonic conceit, there is a definite need to give a more sustained and sympathetic account of 'Dorothea's complaint' and its implications for the practice of law and legal theorising. While most lawyers and legal theorists are still prepared, through a combination of intellectual naivety, institutional allegiance and political advantage, to buy into the possible realisation of jurisprudence's philosophical project or, at least, to tolerate it as a noble undertaking, a number of critics refuse to accept such a pretence. True to the Dorothean spirit of progressive transformation through more humble doings, they realise that traditional philosophical peregrinations not only lead 'nowither', but that more is to be achieved by practical and unpretentious interventions than by grand and arcane gestures. Indeed, rather than perpetuate popular enthraldom to the cause of Philosophical Enlightenment, the need for there to be critical disenchantment in the name of democratic empowerment is fully recognised. When viewed in these terms, the pressing question of how people should live

or think about law becomes not a methodological puzzle of abstract dimensions, but a substantive challenge of historical proportions. There is neither universal Truth nor supra-historical Knowledge, but only the human effort to do the best that we can with full range of human resources at our disposal. And this first demands a switch in jurisprudential attention from the pursuit of metaphysical truth to the practice of political usefulness a juristic account or proposal is mistaken not because it is philosophically wrong, but because it is not practically useful.

In adumbrating this different approach to the jurisprudential task, the first thing to clear up is the allegation that the anti-Casaubonic perspective that I am proposing is somehow the equivalent of a nihilist or relativist stance in which all values and proposals are as good (or bad) as any other. This is nonsense and says more about mainstream jurists and their inability to get beyond their own limited and limiting understandings. For them, there is no choice other than objectivity or subjectivity; anything that does not live up to the objective standards of truth is *mere* conviction, convention, ideology, etc. This is exactly the Casaubonic kind of either/or, all-or-nothing thinking that is to be resisted; there are more possibilities than objective truth 'a matter of how things really are' or subjective opinion 'in our own breasts'.[41] To be against objective truth does not mean that one is left with only subjective opinion and to be against only subjective opinion does not imply that one is defending the existence of objective truth. It is arrant nonsense to insist that the loss of objectivity in the transcendent sense means that all interpretations are subjective and all truths are relative. It is entirely possible and reasonable to insist that, although the traditional search for objectivity is a lost cause, there are not only subjective opinions and relativised truths. Instead, one truth is not as good as another if one understands by truth nothing more than that it meets the familiar procedures of justification that hold sway. As such, therefore, it is entirely mistaken to assert that pragmatists offer an account of truth that is based upon consensus in that what passes for truth is truth; the pragmatist does not have a relativistic theory of truth because the pragmatist has no theory of truth.[42] There is no such thing as nihilism or relativism if the traditional idea of

truth and objectivity is rejected; there are only better and worse views in advancing the substantive cause of political justice. Accordingly, dumping grand theory does not entail a resigned relativism in which each and every idea or claim is as good as any other. Pragmatists take the view that all cultures are not equal, but that all do have something to contribute to debate. Justification is a practice and what works will depend on the context in which justification is offered and heard. It is not about striving to reach a promised land of truth that will make further justification unnecessary. Instead, jurisprudence must become more useful such that success is not vouchsafed by reliance upon a particular epistemic method, but by the usefulness of the results arrived at and their effect upon meeting certain objectives that are taken to be morally or politically significant: 'pragmatists see the charge of relativism as simply the charge that we see luck where our critics insist on seeing destiny.' Pragmatists, like Rorty, prefer hope over knowledge and insist that moral choice is 'always a matter of compromise between competing goods rather than a choice between the absolutely right and the absolutely wrong'.[43] Instead of reflecting upon universality to justify particular principles, there should be talk about the concrete and relative advantages of choosing one over another in particular circumstances. There is only justification; it does not lead to nor is it underwritten by truth, but is to be judged by its contribution to democratic agreement and greater emancipation. In an important sense, therefore, the alternative to knowingness is not ignorance, but awe and wonder. And the alternative to theory is not practicalism, but romance and politics. By seeing itself as a tool which can be used to spark the imagination and create hope in people for the improvement of society, jurisprudence will become more useful and relevant, not less.

In advocating a useful jurisprudence, I ought not to be taken as championing some fixed or foundational idea of usefulness that is intended to inform and guide practice. On the contrary, I want to ensure that this definitional effort is a integral part of the very argumentative culture that develops and allows transformations of what is and is not useful. 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' .[44] Consequently, the emphasis on usefulness is not another disguised strategy of Casaubonic theorising in which usefulness replaces integrity or purity as the underlying standard of jurisprudential worth. In moving from truth to usefulness, a pragmatic jurisprudence does not set out to know things as they really are or to isolate a universal criterion of usefulness. Because usefulness is a continually contested and contextualised yardstick, it begs to be judged by its contribution to the ambitious project of challenging the present arrangements in order to improve the future. To do this, jurisprudence requires a different vocabulary more suited to its practical demands. There must be less formal talk of integrity, consistency and harmony and more substantive talk of justice, well-being and empowerment. Although pragmatism cannot answer the compelling question of *what to do next?* in any fixed or certain way, it can encourage the jurisprudential effort to ensure that valuable energies are not wasted on pseudo-debates about truth and objectivity. In doing so, it will become possible to open a space in which people can engage directly about what is more and less useful in specific contexts at specific times.

In pursuing this useful agenda of jurisprudential study, mainstream theorists still have a possible role to play and contribution to make. A demonstration that Dworkin's or Weinrib's ideals do not flow inexorably from the law does not, of course, dispense entirely with their claim on our ju risprudential attention. While it robs them of their claimed authority as objective truths, their proposals must still be judged as another contingent proposal for making sense of the world and the possibilities for its remaki ng. Consequently, their work still has value provided that its insights are treated as rhetorical interventions in a continuing democratic conversation, not as authoritative conversation-stoppers regarding eternal verities. Once such jurists ditch their metaphysical baggage, not only might they get to their chosen destination quicker, but they might accept that, as well as there being several approaches, the destination will

change as events move on. Dworkin, Weinrib, Posner and others should engage in a justificatory descent that will bring them down-toearth so that they will talk more about unemployment, racism, poverty, and the like. If there is agreement on the problems (and, for instance, Dworkin and Rorty share much more in their vision of a better world than they disagree upon), then more time can be spent on their practical resolution than on pseudodisputes about philosophical niceties. If there is disagreement, it will not help much to take time out and argue about abstract notions of truth and objectivity. Even if there was agreement abou t such matters, it has no necessary consequences for the more crucial efforts to improve the quality of people's lives. Instead, it is more productive to unpack and identify what is shared and to work to persuade each other how best to go forward as part of a common commitment to improve society.

One way to advance that useful agenda is to treat the courts and common law as venues for the resolution of concrete disputes rather than as the site for the philosophical elaboration of doctrinal integrity or purity. This will demand a shift in jurisprudential emphasis from the law-making focus of judges to their problem-solving capacity. Indeed, despite their protestations to the contrary, Dworkin and his Casaubonic colleagues do not take law seriously. By asking judges to be open to 'justificatory ascent' and thereby turning them into grand theorists, they neglect the pragmatic strengths of the common law and reduce politics to an abstract pursuit. The potential strength of the common law is its practicality and situatedness: the courts must concentrate more on practical solutions to practical problems than on philosophical responses to philosophical problems. Like Dorothea, judges achieve the greatest fulfilment of their institutional responsibility when they work toward 'a life filled with a beneficent activity' rather than when they aspire to 'the fellowship in high knowledge'. In proposing this juristic realignment, I do not want to be taken as suggesting that the common law has been or necessarily will be the perfect complement to the kind of useful approach to jurisprudence that I have been advocating. However, I do maintain that, when viewed from such a

pragmatic perspective, the common law has all the possibilities to become an institutional site for the kind of experimental, contextualised and practical interventions that I support. While the history of the common law ought not to impress the critics' sensibilities, it does not mean that resort to the courts is a hopeless or counter-productive diversion. Because the present is the only place to begin in making a better future, it is appropriate to utilise existing institutional arrangements at the same time that one works to effect their transformation in line with a more progressive and emancipatory ideal.[45] To allow the ideal future to be the enemy of the flawed present is a recipe for resignation and complicity, not action and change. Ideological purity is no more attractive or useful than its philosophical relative. 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. However, the study of politics and its relationship to law is not enough in itself. That study must be done in such a way that avoids the pitfalls and problems of blackletterism. There is little point in examining law's political context and determinants if it is done within the capacious reach, but narrowing influence of a Casaubonic mind-set. To demand anything less is to allow the lingering spirit of black-letterism to intoxicate people into believing that clear directions and speedy routes can be mapped onto the messy and changing terrain of ethical and political inquiry, especially in mapping and exploring the relation of law and politics. Although the useful kind of legal scholarship recommended is scarce, it is not entirely absent: there is exciting work being done by -and this should come as no surprise -women and people of colour. For every Smith and Hogan, there is a Lacey and Wells; for every, Treitel and Beatson, there is a Wheeler and Shaw; and for every Salmond and Street, there is a Conaghan and Mansell. For instance, in contrast to Smith and Hogan's scholarship, the work

of Nicola Lacey and Celia Wells is a breath of fresh air: they are truly inter-disciplinary, they make explicit their operative assumptions, they move socially-relevant issues from margin to centre, and their focus is theoretical in the best practical sense.[46]

However, as a complement (and a compliment) to the work of such legal scholars, jurists can also play an explicitly and suitably theoretical role. Apart from tackling the lingering influence and Casaubonic practice of mainstream theory, they can bring fresh insights and appreciations to jurisprudence. In particular, jurists can develop alternative modes of discourse, so that philosophy will become more a discourse of dissent than a monologue of reverence. Rather than draft grand schema for political or legal action under the authority of some alleged universal truth, philosophers can seek out new possibilities and alternative openings. By cultivating 'the ability to redescribe the familiar in unfamiliar terms' ,[47] such useful theorists can help dislodge the deep-seated belief that present socio-historical arrangements are inevitable and frozen in place. They can reassure people that, once epistemology has lost authority, mob rule will not fill the theoretical void. But empowered citizens might and, in doing so, can begin to claim authority over their own lives and participate more effectively in the civic elaboration of situated truths. By being activist in imagination and commitment, pragmatists will come to recognise that their philosophical task is to be as much inspired poets as robust political operatives. Or, to put it another way, jurists will recognise that the best way to do legal philosophy is to do it pragmatically, usefully and poetically. The persistent belief that 'law is the calling of thinkers', whether in the form of metaphysicians or economists, and 'not the place for the artist or the poet' is to discarded once and for all.[48] Like all the other Casaubonic distinctions, the difference between art and science or literature and philosophy is one of emphasis and practice, not essence and theory. In becoming artists and poets, jurists and legal scholars can become better thinkers.

A RADICAL TURN

As will be obvious to anyone vaguely familiar with the contemporary jurisprudential scene, pragmatism has become very much the *de rigeur* intellectual fashion of the day. While it is not quite accurate to say that jurists have adopted the slogan that 'we are all pragmatists now', there is a definite desire on the part of many jurists to be identified with the pragmatic turn in legal theory. In many ways, this is an encouraging trend. But, on closer inspection, it becomes clear that these conversions are more superficial than real, more a simple change of clothes than a substantial transformation of life-style. Many of those who call themselves pragmatists have done little more than incorporate pragmatic phrasings and vocabulary into their jurisprudential writings; they still subscribe to the same Casaubonic understanding of the jurisprudential project and what would count as its successful completion. In short, they practice pragmatism in the most unpragmatic of ways and deploy pragmatic means for distinctly unpragmatic ends. Accordingly, it is necessary to chart and criticise the different forms of jurisprudential pragmatism in terms of their willingness to pursue the full implications of a pragmatic sensibility. There seem to be three possible groupings conservative, liberal and radical.[49] Whereas the first two hedge on the implications of a pragmatic critique, the third carries through that critique in the most uncompromising way. However, while I support a radical pragmatism, I do not do so as the best or only form of pragmatic jurisprudence - that would smack too much of a Casaubonic standard. Instead, I do so because it is the most useful and effective possibility for improving the lot of those most disadvantaged and disenfranchised in society. The three kinds of pragmatism can be summarised as follows:

- *Conservative pragmatism* is conservative because, as the name implies, it accepts much of the contextual situation as given; there is no willingness to disturb present arrangements. In jurisprudence, conservative pragmatists propose a pragmatic mode of legal reasoning that rejects the theoretical pretensions of the Casaubonic grand-theorists and treasures the virtues of technical craft and particularised judgment. While its practitioners make all the right noises,[50] their accounts remain profoundly abstruse

and rationalistic in the sense that they are unsituated in the material circumstances of history and inured to their political dynamics: 'abstract universality' is ditched, but only to be replaced by 'abstract particularity'. There is little appreciation that legal reasoning operates in the real world of historical struggle or of how law does (and does not) change. The only experience and context that matters is the legal one: the experience of the law is the life of its own logic.

- *Liberal pragmatism* is much less insulated and contained than conservative pragmatism. The whole idea and force of contingency is given much greater recognition. Stepping outside the hermetic world of legal experience, scholars look to legal reasoning as a much more constructed and contextualised practice. Under this view, law and jurisprudence are a language game that people play with greater or lesser facility; it is as much a matter of coping as it is getting it right. Although many follow the conventional script, some struggle to escape from inherited descriptions and to offer fresh discursive options. As such, truth and objectivity are ethical practices that are not about 'the accurate representation of something nonhuman', but 'a matter of intersubjective consensus among human beings'.[51] As an ethical ideal, transformation and emancipation are treated as more a personal undertaking than a social project; the emphasis is on private irony than public reconstruction.
- Last, but not least, there is *radical pragmatism.* In contrast to both conservative and liberal pragmatism, it does not hedge on the subversive implications of the anti-essentialist insight. In a manner of speaking, radical pragmatism is radical because it accepts that it is pragmatism all the way down: there is no artificial distinction between what is and is not up for grabs. Because everything has been constructed, everything can be deconstructed and reconstructed: if conservative pragmatism ignores both history and politics, liberal pragmatism has succeeded in placing present arrangements in an historical context, only to fail to politicise that history; liberal pragmatism tends to apprehend more benign and accidental forces at work in social life than is the case. In

law, this means that legal reasoning is as much about political oppression as it is about ethical consensus.[52] The liberal pragmatists' failure to appreciate adequately the grubby, materialistic and public conditions under which private efforts at self-realisation take place make their notion of political struggle too clinical, intellectual, and individualistic.

Accordingly, by refusing to duck the corrosive consequences of a thoroughgoing pragmatism, the radical version ensures that what amounts to a useful politics or jurisprudence is opened up to the widest range of possible options and, most importantly, to the widest range of participants. By giving the idea of social practices a more political than ethical spin, it brings the operation of power into the centre of debate; consensus (and, therefore, standards of persuasion and justification) can be treated as imposed as much as chosen. Careful not to slip back into a discredited version of ideological suffocation, such a radical pragmatism can thereby work towards ensuring that those voices presently left out of democracy's sustaining conversation are included and able to articulate for themselves what is and is not useful. I say 'for themselves' because it is the lingering influence of a Casaubonic h ubris that mistakenly suggests that the educated and wise can speak best for the dispossessed: public and local efforts at transformation must be undertaken to permit the disenfranchised to speak in their own voices, with their own vocabulary and through their own visions about usefulness. Nor should the voices of the presently excluded be valorised or given authority simply by virtue of their excludedness; democracy demands neither the demonisation nor the romanticisation of the oppressed. Moreover, as well as broadening and substantiating the popular franchise, there must be equally vigorous efforts to multiply and transform the institutions in which such debate and struggle occur. A radical society is not one that has a fixed idea of usefulness or a set inventory of institutional opportunities for its elaboration; it is one in which the idea and institutions of usefulness are themselves being constantly revisited and revised. There is nothing about this plea for such a robustly democratic society which depends on any philosophical claim that such a society is more natural,

more rational, more coherent, more pure or more anything else than any other society. On the contrary, it is simply a substantive argument that such a society is best suited to ensure the emancipation of people from suffering and deprivation. As a political proposal, it is defended and espoused in the name of usefulness, not truth.

In this radical view of pragmatism, the democratic ideal of a 'free and open encounter' about values and commitments is to be encouraged, but that 'freedom' and 'openness' cannot be understood outside some context of power and politics.[53] While there is no truth or reason to set over against power or politics, it does not follow that one simply collapses into the other. Those critics who argue that reason is only power are as mistaken as those who argue that reason and power can be totally insulated from each other. Although truth and reason are always located within a context of power and politics, the possibility of maintaining standards of justification and persuasion is not thereby sabotaged entirely. Rather than attempt the impossible by seeking to establish standards that are pure and undistorted by power, efforts should be taken to make standards more shared and to include the widest possible diversity of voices in their social construction; the claim to establish neutral or objective standards is fated to reflect the ideas, no matter how well-intentioned, of a select few. Indeed, because 'judgments of merit are inevitably culturally and ideologically contingent' ,[54] an unbiased standard is simply one that does not favour one group over other; it is not one that is supposedly based on no values at all. Indeed, the problem is not the intervention of power in the halls of reason, but the traditional belief that power can be somehow excluded and that there exists some non-cultural and non-social standard of merit. The democratic ambition is not to ensure that reason is detached from value or power, but that the values and interests that help constitute reason represent and are conducive to a truly democratic society. The debate must be about what counts as reason and merit and what standards are most useful to a democratic society. Accordingly, a meritocratic ideal is not anti-democratic, provided that what is understood as meritorious is a situated and substantive assessment, not a formal and far-fetched one.

In a similar vein, a radical brand of pragmatism insists that, although any

accommodation to the status quo is not required, nor is a root-and-branch rejection. Being opportunistic rather than doctrinaire, those committed to significant transformation should be prepared to use whatever resources are available to them. On the basis that no strategy has any necessary or inevitable consequences, but will depend on the particular context in which it is utilised, radicals should be prepared to draw on the conservative and liberal repertoire to advance the cause of democratic empowerment. Accordingly, while the courts have been a privileged site for defending the status quo and the history of the common law is more reactionary than revolutionary, radical pragmatist should countenance litigation as a possible tool for social change if or when the local conditions are propitious. In short, because everything is constructed, it does not mean that everything has to be deconstructed or reconstructed all at once: the fact that everything is up for grabs does not demand that everything be 'up' or grabbed at the same time.

Finally, it is instructive to deal with a particular and telling criticism that might be made against 'useful jurisprudence' and my radical version of it. An important charge is likely to be that, although I urge a more useful performance of the jurisprudential craft, I am engaged in exactly the same kind of indulgent word-mongering that is typical of the Casaubonic mind-set. Withdrawn form the real-world, I am long on words and short on action how many more people will be off the streets and in better accommodation as a result of this essay? To phrase this objection in terms of *Middlemarch,* it would seem that what separates Dorothea from Casaubon is not her philosophical commitments, but her commitment to abandon philosophy entirely and simply dedicate herself to action. Moreover, juristic Dorothea wannabees, like me, run the real risk of befalling the same fate as the emulous Dr Lydgate. One of the new breed of professionals, he arrives in Middlemarch with grand ambitions of changing the face of traditional medicine and establishing a modem hospital for the poor. However, spumed by the establishment and mismatched to an extravagant wife, Lydgate takes a loan from the unscrupulous Bulstrode, a wealthy landowner, which embroils him in a series of social and legal fiascoes. Unable to recover from the ensuing disgrace, Lydgate ends his days as a physician who practices

the very kind of medicine that he originally wanted to revolutionise and who toadies to the very elite that he originally despised. Whereas Dorothea acts on her disenchantment and abandons entirely the hypocrisy of genteel Middlemarch society, Lydgate succumbs to the blandishments of the social elite and, unable to beat them, joins them.

I have three responses to this. The first is that there is much wisdom in this criticism, but its force is more cautionary than condemnatory. I cannot disagree that it would be better if there were more Dorotheas and less legal theorists: there are too few Dorotheas and too many Lydgates. However, this does not mean that legal theorists have no role to play at all, only that it should be a more humble and limited one which receives far less kudos than it presently does; Dorothea is a much better role model than Casaubon or Lydgate. This leads to my second response. As a legal theorist, I am doing something useful in that I am challenging the way that jurists and legal scholars tend to tum all practical problems into philosophical ones, thereby unhelpfully re-presenting them as abstract puzzles rather than substantive problems. In contrast, I urge those involved in legal study to abjure such flights of fancy and to keep their feet firmly on the social ground, even as that ground shifts and changes with time and circumstance; it is situation-sense that is best culti vated, not conceptual sophistication. For me, the hapless and pusillanimous Lydgate stands as an acute reminder of the need for both conviction and courage, without either of which co-optation and complicity seem inevitable. However, the obvious riposte to this defence is that being a legal theorist, of whatever colour or commitment, is the real problem. While Casaubonic theorising is to be deplored and Dorothean critique is to be preferred, Dorothean scholarship remains too close for comfort and is part of the same academic indulgence. Even if the talk is about usefulness, it remains only talk and ignores the main lesson of Dorothea's life that it is better to live 'a life filled with beneficent activity' than talk about living one; good intentions do little in themselves to alleviate suffering and cruelty. This is a stiff challenge and must be confronted directly.

My third and more fundamental response, therefore, is to return to the basic thrust of a radical pragmatism and, in particular, its opposition to Casaubonic thinking. The insistence

upon a hard-and-fast distinction between talk and actions is not as real or as compelling as some might think. Moreover, it is made no less palatable because it is deployed in the service of a more progressive agenda. Such a contrast between words and acts, like all other distinctions (ie theory and practice, law and politics, etc), is difficult to maintain and smacks of a lingering Casaubonic influence. Indeed, to treat talk and action as conceptually distinct is a hallmark of the kind of thinking that this essay has sought to discredit. The practical power of ideas or talk is not something to be underestimated. After all, it was talk and ideas that contributed to Dorothea's epiphany. Moreover, on the broader canvas of social history, it is talk of ideas as much as acts of force that hold oppressive regimes in place and can contribute to their downfall: both Vorster and Mandela as well as Hitler and Churchill testify to that. What is a problem and what one should do about it implicates some theory and, similarly, what tells you to act instead of only talk is itself a theory. Of course, what I mean by theory is not something to be set over against or above practice, but is part and parcel of the same enterprise. In a manner of speaking, talk is an act that, while it might not be as immediate or as obvious as other acts, is as necessary to what we do as anything else. Just as there are better and worse ways of acting, so there are better and worse ways of talking. Accordingly, there is no one way to challenge injustice; it takes many people doing many different things at many different times and in many different ways. Doing legal theory is one of those ways, no intrinsically better and no worse than any other ambition. But, as this essay has sought to argue, there are better and worse ways of doing legal theory a Dorothean perspective is more useful than a Casaubonic approach. Theory is an act that makes possible other acts or, to put it more pragmatically, theory is itself a contextualised practice which is also one of the contexts within which acts take on shape and substance: theory's success at doing that will be a measure of its usefulness and such a measure will be situated and substantive, not abstract and conceptual. And talking with a Casaubonic accent is a way of doing things that stands to do more harm than good.

GIVING UP THE GHOST

Years before Nietzsche's apocalyptic obituary, James Mill confided to his more famous son that 'there is no God, but this is a family secret'. Yet, over 100 years later, the announcement that *God is dead* remains as controversial today as it ever was; its impact on the world of jurists and jurisprudence is still being felt and resisted. Indeed, a reader of much modern legal scholarship and jurisprudence could be forgiven for thinking that there is still a conspiracy of silence within the Law and Legal Philosophy family. In so far as the announcement was intended to disabuse belief in a standard of instruction or guidance in regulation of human conduct that could be drawn from outside humanity, lawyers and jurists long ago grasped that law did not represent God's design or direction. It was conceded that law was essentially a human artefact; it could never amount to much more (and was often much less) than a flawed distillation of divine wisdom. None the less, while lawyerliness might no longer be next to godliness, dreams of hubris still fire the jurisprudential imagination. Despite protestations to the contrary, contemporary lawyers and legal theorists have fulfilled Nietzsche's subsequent prediction that 'given the way of men, there may still be caves for thousands of years in which [the Deceased's] shadow will be shown'.[55] Jurisprudence is one of those enclaves where such spectral deities still roam and where its practitioners still aspire to mediate divine intimations. Committed to a continuation of the black-letter project, legal academics and jurists do not seem able to give up the Casaubonic ghost.

Rather than treat God's death as an opportunity to seize the democratic initiative, some philosophers and jurists have interpreted it as an invitation to tum themselves into gods. Yet there is no Coherent Truth or Objective Integrity that inheres and endures in the heavens, humanity's essential nature or the general scheme of things. And it most certainly cannot be divined from the erstwhile musings of jurists and judges across space and time. As a thoroughly human and thus flawed artefact, law has little or no qualitative dimension that transcends its quantitative mass. In the struggle for social justice, philosophical hubris is

not to be preferred over democratic humility. If lawyers and jurists are to help society make good on itself, they must resist the temptation to pay homage to the dubious deities of Truth and Objectivity. And they most certainly must resist the temptation to treat democracy as a divinistic ritual or as its own god. Without God or other lesser deities, there need be neither chaos nor tyranny. On the contrary, exorcising the ghost of Casaubon can provide an opportunity for transformation and renewal. What it does not do is render all knowledge illusory, tum all truths into falsehoods, throw all order into chaos and reveal all objectivity as sham. This is a ghastly projection of the Casaubonic imagination and ought to have no more hold on our intellects than Casaubon himself.

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',[56] 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. When all is said and done, there are simply people, with all the frailties and possibilities that this entails, trying to make sense of themselves, the contingency of their situation, and the responsibility to make and re-make their own lives in the best way that they see fit. But there is no bargain, Faustian or otherwise, that can get us out of the continuing present to some redemptive future or forgiving past. The present is all that we have or will have and it is our responsibility to make it the best that it can be. So, what is it to be? Dorothea or Casaubon? The actual construction of cottages for the poor or detached ruminations on abstract points of ancient architecture?

Notes

1. R Rorty *Achieving Our Country: Leftist Thought In Twentieth Century America* (Cambridge, Mass: 1998), pp 91, 105.
2. George Eliot *Middlemarch: A Study Of Provincial Life* 26-27 (M Drabble (ed), 1985). Originally published in 1871 by Mary Ann Evans, it is described by Virginia Woolf as 'one of the few English novels written for grown-up people'. V Woolf 'George Eliot' in *The Common Reader* (New York: Harcourt, Brace, 1925), pp 166-176. Of course, the issue of what counts as a 'great novel' and what follows form that is a contested matter. Although 1 would defend the claims of *Middlemarch* for inclusion in a canon of English novels, I do not do so in any final, essential or objective manner. For a conventional assessment of *Middlemarch's* literary merits, see F R Leavis *The Great Tradition* (London: Chatto & Windus, 1960) and, for a less conventional one, see S Gilbert and S Gubar *The Madwoman In The Attic: The Woman Writer And The Nineteenth-Century Literary Imagination* (New Haven: Yale University Press, 2nd edn, 2000). There are several critiques of Eliot that challenge its merits and worth.
3. Id at 7, 19 and 184. Casaubon is also the hero of Umberto Eco's *Foucault's Pendulum* (W Weaver trans) (San Diego: Harcourt Brace Jovanich, 1989) who is involved in the search for the One True Meaning of Things. For a postmodern reading of this novel, see R Rorty 'The Pragmatist's Progress' in *Interpretation And Overinterpretation* S Collini (ed) (Cambridge; New York: Cambridge University Press, 1992). Eco insists that his Casaubon is not named after Eliot's clergyman, but after the great philologist Isaac Casaubon. See U Eco 'The Text and Author' in ibid at pp 81-82.
4. O W Holmes *The Collected Legal Papers* (New York: Harcourt, Brace, 1920) p 202.
5. Eliot, above n 2 p 13.
6. B Gamer (ed) *A Dictionary Of Modem Legal Usage* (New York: Oxford University Press, 2nd edn, 1995) pp 109-110.
7. *Blackstone's Commentaries* I, 2 and II, 425 and IV, 435. See also *Fisher v Prince* (1762) 3 Burr 1363, per Lord Mansfield ('the reason and spirit of cases make law, not the letter of particular precedents'); *Jones v Randall* (1774) Cowp 37, per Lord Mansfield ('precedents serve to illustrate principles and to give them fixed certainty'); M Hale *History Of The Common Law* 67 (4th edn, 1739) ('Though such decisions are less than a law, yet they are greater evidence thereof); and C K Allen *Law In The Making* (Oxford: Clarendon Press, 6th edn, 1958) p 213.
8. J Smith and B Hogan *Criminal Law* (London: Butterworths, 8th edn, 1996). This is especially so on so-called unnatural offences (pp 492-497), although they note that while this term may be 'offensive, but it is in the heading of the Act' (p 492, n 20). See also E H Bum *Cheshire and Burn's Modern Law of Real Property* (London: Butterworths, 15th edn, 1994) (no account of what is idea of property or homelessness, but Jots on estates and titles); G Treitel *Law of Contract* (London: Sweet & Maxwell, 9th edn, 1995); J Beatson *Anson's Law of Contract* (London: Sweet, 27th edn, 1998) (account of contract as a single body of general principles); and M Brazier and J Murphy *Street on Torts* (London: Sweet, 10th edn, 1999). There are a number of texts that offer a more contextual approach, but this is usually token and used to explain deviations as though the general principles simply just *are.* See P Atiyah *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 5th edn, 1995); J Funnston *Cheshire. Fifoot and Furmston on Law of Contract* (London: Butterworths, 13th edn, 1996); and R Dias and B Markesinis *Tort Law* (Oxford: Clarendon Press, 2nd edn, 1995).
9. P Birks 'Adjudication and Interpretation in the Common Law: A Century of Change' (1994) 14LS 156 at 168and 176. In a similar vein, see R Goff 'In Search of Principle' (1983) 69 Procs Brit Acad 169 and J Beatson 'Has the Common Law a Future?' (1997) 56 CLJ 291.
10. H L A Hart *The Concept Of Law* (Oxford: Clarendon Press; New York: Oxford Univerity Press, 2nd edn, 1994). I say 'too many qualms' because Hart's work can be read as being much more subversive and unsettling than many jurists allow. See A Hutchinson 'A Postmodem's Hart: Taking Rules Sceptically' (1995) 58 MLR 788.
11. K Llewellyn *Jurisprudence* (1962) p 372.
12. J Boyle 'The Politics of Reason: Critical Legal Theory and Local Social Thought' (1985) 133 UPALR 685 at 779. See generally R Tur 'Jurisprudence and Practice' (1976) 14 JSPTL 38 and 'What is Jurisprudence?' (1978) 28 Phil Q 149. This tendency towards arid conceptualism and abstract coherence is particularly marked in traditional jurisprudence textbooks and courses. See H Barnett 'The Province of Jurisprudence Determined-Again!' (1995) 15 LS 88.
13. Eliot, above n 2 p 19.
14. *Omychund v Barker* (1744) 26 ER 15 at 23 (emphasis added).
15. E Weinrib *The Idea Of Private Law* (Cambridge, Mass: Harvard University Press, 1995) pp 3 and 13.
16. R Dworkin *A Matter Of Principle* (Cambridge, Mass: Harvard University Press, 1985) p 146.

17. R Dworkin *Law's Empire* (London: Fontana, 1986) pp 407, 400 and 220. This kind of hubris is not uncommon in law or other fields and, indeed, explains some of its appeal. For instance, in his best-seller, Stephen Hawking states that his goal is 'nothing less than a complete description of the universe we live in': see S Hawking *A Brief History Of Time* (London; New York: Bantam Books, 1989) p 13. He concludes the book with the opinion that the discovery of why the universe exists will be equivalent to knowing 'the mind of God' (p 175).
18. R Dworkin 'In Praise of Theory' (1997) 29 Ariz St LJ 353 at 356-357.
19. Above n 18 at 359.
20. Eliot, above n 2 p 19.
21. Eliot, above n 2 pp 12, 19, 23, 22, 17 and 765.
22. Eliot, above n 2 pp 28, 179, 250 and 255.
23. R Rorty 'Representation, Social Practice, and Truth' in *Objectivity, relativism and truth* (Cambridge; New York: Cambridge University Press, 1991) vol I, p 154. See also R Rorty *Contingency, Irony, Solidarity* (Cambridge; New York: Cambridge University Press, 1989) pp 5-13. For my own attempt to elaborate on this approach forjurisprudence, see A Hutchinson *It's All In The Game: A Non-Foundationalist Account Of Law And Adjudication* (Durham, NC: Duke University Press, 2000).
24. F Fernandez-Armesto *Truth: A History And A Guide For The Perplexed* (London; New York: Bantam Press, 1997) pp 216-220. For a good introduction to these philosophical difficulties in jurisprudence, see Leiter 'Objectivity And The Problems of Jurisprudence' (1993) 72 Tex LR 187 and J Coleman and B Leiter 'Determinacy, Objectivity and Authority' (1993) 142 U Pa LR 549 at 600.
25. For a general account of coherence theories in moral and legal reasoning, see M Hanen 'Justification as Coherence' in M A Stewart (ed) *Law, Morality And Rights* (Dordrecht, 1983) p 67; J Stick 'Can Nihilism Be Pragmatic?' (1986) JOO Harv LR 332; N Rescher *The Coherence Theory Of Truth* (Oxford: Clarendon Press, 1973); C Wright *Truth And Objectivity* (Cambridge, Mass: Harvard University Press, 1992); and Kress 'Coherence' in D Patterson (ed) *A Companion To Philosophy Of Law And Legal Theory* (Cambridge, Mass: Blackwell Publishers, 1996) pp 533-552.
26. For a defence of the view that truth is explained by resort to something that is beyond a particular practice and that there are moral facts which can be accessed in similar ways to other facts, see M Moore 'The Interpretative Turn in Modern Theory: a Tum for the Worse' (1989) 41 Stan LR 871 ; 'A Natural Law Theory of lnterpretation' (1985) 58 S Cal LR 277; and 'Moral Reality Revisited' (1992) 90 Mich LR 2424. D Brink 'Legal Theory, Legal Interpretation and Judicial Review' (1988) 17 Phil & Pub Affs 105. For examples of more axiomatic accounts, see Weinrib and Brudner, above n 15.
27. See Dworkin, above n 17 at 21 8-219 and generally 213-228. Dworkin explicitly resists categorisation as a pragmatists if that means sharing views with Rorty and other 'new pragmatists', whose views he describes as comprising 'a dog's dinner'. See 'Pragmatism, Rights Answers and True Banality' in M Brint and W Weaver (eds) *Pragmatism In Law And Society* (Boulder: Westview Press, 1991) pp 359 at 360 and generally 366-369. Dworkin has never abandoned the one-right-answer thesis, although he has modified it. As he states, 'for better or for worse, I have not [changed my mind about the character and importance of the one-right-answer thesis]': Ibid at p 382, n I. See also R Dworkin *Taking Rights Seriously* (London: Duckworth, 1978) chs 4 and 13; Dworkin, above n 16 at ch 5; and Dworkin, above n 17 at ch 7.
28. R Rorty *Philosophy And The Mirror Of Nature* (Princeton: Princeton University Press, 1979) p 209. See also R Rorty 'Texts and Lumps' in *Philosophical Papers* (1991) vol I, 81; R Rorty *Objectivity, Realism And Truth* (Cambridge; New York: Cambridge University Press, 1991) pp 22-24; H Putnam *Representation And Reality* (Cambridge, Mass: MIT Press, 1988) p 115 and W Quine 'Two Dogmas of Empiricism' in *From A Logical Point Of View* (Cambridge, Mass: Harvard University Press, 1953) pp 20-46.
29. See SFish *The Trouble With Principle* (Cambridge, Mass: Harvard University Press, 1999).
30. See A Hutchinson 'In Praise of Leading Cases' in E O'Dell (ed) *Leading Cases Of The Twentieth Century* (Dublin: Roundhall, 2000).
31. R Dworkin 'Objectivity and Truth: You'd Better Believe It' (1996) 25 Phil & Public Affs 87 at 133.
32. Above n 31 at 133-134.
33. See W Twining *Blackstone's Tower: The English Law School* (London: Sweet & Maxwell, 1994) pp 130-132 and generally Kennedy 'The Structure of Blackstone's Commentaries' (1979) 28 Buff LR 205.
34. P Schlag *The Enclumtmellf Of Reason* (Durham, NC: Duke University Press, 1998) p 99.
35. R Posner *The Problematics Of Moral And Legal Theory* (Cambridge, Mass: Belknap Press of Harvard University Press, 1999) pp 133, 227 and 262. See also C Sunstein *Legal Reasoning And*

Political Conflict (New York: Oxford University Press, 1996) and *One Case At A Time: Judicial Minimalism On The Supreme Court* (Cambridge, Mass: Harvard University Press, 1999). For once, I fully agree with Dworkin when he argues that Posner's claims about the political process are not descriptive or technical. but moral in the sense that they are not only judgments about how best to achieve stipulated goals, but rather highly controversial claims about the distribution and exercise of government powers and the limits imposed by respect for indivictual moral rights: '[Posner] calls for the death of moral theory, but, like all of philosophy's would-be undertakers, he only means the triumph of his own theory.' R Dworkin 'Darwin's New Bulldog' (1998) 1 1 1 Harv LR 1718 at 1738-1739.

36. See *DiSanto v Pennsylvania* (1927) 273 US 34 at 43, per Brandeis J dissenting.

37. E P Thompson *Wh(S?s And Hunters: The Origins Of The Black Act* (London: Allen Lane. 1975) p 250.

38. Dworkin, above n 18 at 375-376.

39. Eliot, above n 2 at 179.

40. Ibid at 44, 199, 436 and 766.

41. Dworkin, above n 31 at 92. See also D Farber and S Sherry *Beyond All Reason: The Radical Assault On Truth In American Law* (New York: Oxford University Press, 1997) pp 7, 22, 73, 119 and 133.

42. Rorty, *Objectivity,* above n 28 at 23-24.

43. R Rorty *Philosophy And Social Hope* (New York: Penguin, 1999) pp xxxii and xxix.

44. Rorty, above n I at 28.

45. For a more elaborate defence of this position and some suggestions for its implementation, see Hutchinson, *Game,* above n 23 at 288-319 and A Hutchinson *Waiting For Cord A Critique Of Law And Rights* (Toronto: University of Toronto Press, 1995) pp 172-83. It might be claimed that this essay itself is long on formal exhortations, but short on substantive recommendations. I am sensitive to this charge and am presently writing a book along such lines, entitled *Work-Jn-Progress: Theory, Law and Politics.*

46. See N Lacey and C Wells *Reconstructing Criminal Law* (London: Butterworths, 2nd edn, 1998).

47. Rorty, above n 43 at 87.

48. 0 W Holmes, Jr 'The Profession of the Law (Conclusion of a Lecture Delivered to Undergraduates of Harvard University, February 17, 1886)' in R A Posner (ed) *The Essential Holmes: Selection From Letters, Speeches, Judicial Opinions, And Other Writing Of Oliver Wendell Holmes Jr* (Chicago: University of Chicago Press, 1992) p 218.

49. I borrow the idea for this taxonomy from Roithmayr, although I organise it in a slightly different way. See D Roithmayr 'Guerrillas in Our Midst: The Assault on Radicals in American Law' (1998) 96 Mich LR 1658.

50. See C Sunstein *Legal Reasoning And Political Conflict* (New York: Oxford University Press, 1996) and R Posner *The Problems Of Jurisprudence* (Cambridge, Mass: Harvard University Press, 1990) and *Overcoming Law* (1995).

51. Rorty, above n I at 35 and generally C Anderson *Pragmatic Liberalism* (Chicago: Chicago University Press, 1990). For a representative jurisprudential rendition ofliberal pragmatism, see Farber and Sherry, above n 41.

52. See D Kennedy *A Critique Of Adjudication Fin De Siecle* (Cambridge, Mass: Harvard University Press, 1998).

53. Rorty *Contingency* above n 23 at 60. As for Rorty himself, there seems to be something of shift taking place in his thinking. He used to argue that consensus about conflicting vocabularies is generated through a 'free and open encounter' undistorted by power. However, in his more recent work, while he still occasionally talks about 'inter-subjective consensus' as a purely ethical ideal, he seems more willing to follow the more radical intimations of his pragmatic critique. For instance, he talks much more about public measures required to achieve 'a classless and casteless society': the exclusive concern with private efforts at transformation has been replaced with a much more encompassing account of political action as a public responsibility. See Rorty, above nn I and 28.

54. D Kennedy 'A Cultural Pluralist Case for Affirmative Action in Legal Academia' [1990] Duke LJ 705 at 733.

55. F Nietzsche *The Gay Science* (W Kaufmann trans) (New York: Random House, 1974) s 108.

56. S Rushdie *Shame* (London: Jonathan Cape, 1995) p 1 16.