

We Should Look to Legal Theory to Inform the Teaching of Substantive Law

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Summary

‘We Should Look to Legal Theory to Inform the Teaching of Substantive Law’ was inspired by the author’s active involvement in curriculum design and review of University courses delivering legal education in the United Kingdom. The article attempts to articulate and present formally what has long existed in some practice in Higher Education, and in this respect there is no aspiration to originality. The argument is carried through two linked propositions. First, that any legal curriculum should be guided by a purpose, or set of purposes. Second, that legal theory should be an important source for the acquisition of such purposes.

The first section conducts an analysis of the propositions advanced. The second briefly sets out the case for purpose being inherent to rational design. The third section is an attempt to demonstrate the necessity of resort to legal theory, when possible, in preference to other potential sources of theoretical guidance. The fourth section attempts to put some flesh on the bones of the argument through an example. Finally, a brief conclusion tries to identify the place of the argument in the practice of legal education in the United Kingdom.

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Introduction

This article argues for importance of two linked propositions. They are: that any legal curriculum should be guided by a purpose or set of purposes; that legal theory should be an important source for the acquisition of such purposes. To achieve this end two tasks must be accomplished. First, the key terms “legal curriculum”, “purpose”, “legal theory”, “source for the acquisition” need to be elucidated, and the nature of the normative force of the word “should” needs to be considered. It will then be possible to consider the propositions in turn. Finally, examples of how the argument might be realised in practice are considered.

This article is inspired by the author’s active involvement in curriculum design and review, in the context of modern Higher Education in the United Kingdom. This involvement has been largely on the academic side of the discipline, but with an awareness of developments taking place on the professional side. The article is partially motivated by an anxiety concerning two specific and significant risks apparent in current developments in legal education. First, is the risk that institutional pressures might generate directionless and incoherent changes. Second, is the risk that contemporary institutional changes might lead to the undermining of the professional autonomy of academics. This article aims to articulate and formalise what has long existed in some practice in Higher Education. This articulation is particularly necessary as there is a powerful antagonistic discourse at work in our educational system.

It seems patent to the author that a managerial or technocratic discourse is being directed towards educational practice in the UK, and that our current educational system, at least below the level of Higher Education, is heavily influenced by this discourse. This discourse tends to over-emphasise measurability of outcomes, consistency of practice, and centralised political direction. This discourse has its normative imperatives, such as: “accountability”, “transparency”, “inclusiveness”, “efficiency”, and “usefulness”. It is not the ambition of this article to attempt an exposition or critique of this discourse, on which see: Whelan 2004, Wragg 2005a and Wragg 2005b. However, the institutional reality of modern practice is that it is constantly necessary to respond to the demands of this discourse. It is extremely valuable to have a principled account of why some matters are not amenable to the normative demands of the technocratic discourse – not because these demands lack validity in their own terms, but because they are obstructive to clearly valuable educational norms. There are few satisfactory alternatives to an articulation and

defence of past practice, which allows a principled projection of future practice. Unsatisfactory alternatives are an inarticulate refusal to comply with the demands of the technocratic discourse, a refusal that gives the appearance of being obstructive, or a distrustful compliance with those same demands.

An Explication of the Terms

It is hoped that what follows will reflect common understandings of practice and values in Higher Education.

legal curriculum

By “legal curriculum” is meant the subject matter, method of teaching, and assessment processes for a course of study in law. The term is intended to be broad enough to cover more than a single module or subject, but the focus of the article is on curriculum design at the subject or module level. There is no attention given to legal education below the Higher Education level, although it is certainly possible that some of what follows could apply to studies at further education level. It is important that “legal” studies are in issue rather than “curriculum design” generally. Although, it is possible that some of what follows will be applicable across disciplinary boundaries the primary concern is with the teaching of law.

Purpose

In an educational setting a purpose of any action must be the production of a change in the learner, or a change in the teacher and learner. The question of how such changes might be brought about is the concern of educational theory, and the author has made a tentative foray into how we might best model this process for the purposes of legal education in a recent article “The Legal education that is Visible Through a Glass Dewey” in *The Law Teacher* (forthcoming). Here, we can restrict our attention to desired end states. We are concerned with the situation before and the situation after the change, rather than the means by which the change is accomplished. Even with this curtailed range of interest the question of how an educator wants a learner to be different is far from simple.

The sort of change that is desired is not the ability to perform the assessment at the end of the course. Rather, the assessment is well designed if a student who has made the desired change finds the assessment meaningful.

The importance of this difference can be illustrated by reflection on the experimental method in the natural sciences. The experimental result (a piece of litmus paper turns red, a colony of bacteria shrinks, a radio telescope picks up a signal) is not inherently of any interest at all. However, what it might indicate is of interest (that the mixture of the two compounds had produced an acid, that penicillin kills bacteria, that an area of sky with no visible features emanates non-visible electromagnetic energy). The task of the scientist is not to celebrate the positive result, but to try and ensure it is not produced by something other than the posited cause (the fingers of the experimenter were acidic enough to activate the litmus paper, the bacteria were left in a draught, the radio telescope was tuned to Radio 4). An experimenter who focuses on producing the experimental result (by dripping a little hydrochloric acid on the litmus paper, by putting the Petri dish in the freezer for a couple of hours, by deliberately tuning the radio telescope to a know source of regular electromagnetic radiation) is not conducting a scientific investigation. Such an experimenter is at best missing the point

of the experimental method, and at worst deliberately falsifying results and thereby harming scientific endeavour (see: Popper 1961, Popper 2002, Kuhn 1996).

The sort of change aimed at is not mere recall under prescribed conditions. It is not essentially similar to computer memory. This is not to deny that memory of “items” is usually an important element of the educational process. However, mere memory and recall on prompt is not generally considered a valuable change in the student.

The inadequacy of seeking merely the addition to the number of recallable items in the learner’s memory is perhaps most clearly illustrated by considering language acquisition. A person who knows a language can produce in theory an infinite number of meaningful sentences (see: Pinker 1999, Pinker 2002, Pinker 2008, and Tammet 2009 for non-specialist accounts). This feat obviously cannot be achieved through memorisation and repetition of sounds or phrases. Language is a symbolic system that has immense generative power. The learning of sounds is an essential part of learning a spoken language. However, if the sounds are recalled only upon specific prompts (such as bread always elicits butter) then the language has not been learnt. The memorisation and recall is useful if it is embedded in the rules of the symbolic system. Memorisation and recall without such integration calls to mind the behaviour of some birds. A common criticism of the unseen examination as a method of assessment is that it is a memory test. This assumes the essential barrenness of a computer data model of educational purpose.

The educational purpose is not to replicate the mental state of the teacher. This is so in two ways. First, becoming like the teacher is not the aim. Second, having the same thoughts as the teacher is not the aim. However, it is clearly apparent that the teacher holds herself out as a model, and that cultural transmission of ideas and knowledge does involve the replication of ideas through educational processes.

It would be an essentially religious impulse to seek the emulation of the teacher as a final aim of the student. The desired change is not desired as an end state for the student, although it is an end state for the educational process. It is not supposed to be the culmination of the student’s development but the basis for future development.

It would be an essentially propagandistic impulse to have as an end the replication of the ideas taught. The change in the student is not desired for the purpose of replicating the ideas involved, it is not intended to function as a “meme” generating process, rather it is intended as a change that has value to the student as a person (see: Dawkins 1976 and Blackmore 1999).¹

What is it that separates such changes as the ability to perform an assessment, the memorisation of sounds or notations, the emulation of a master, and the internalisation of a group of ideas from an educationally desirable change in a student? Understanding. We are concerned with producing understanding in students. Our technical vocabularies, methodologies, rules for reasoning and arguing, our educational practice is directed to the production of the change in a student we call “understanding”. Obviously, what we mean by “understanding” is ripe for

¹ The idea of the “meme” is quite useful for illustrating this point. The term was coined in Dawkins 1976 and was developed in Blackmore 1999. It is useful here because it divorces the idea from any cultural context of meaning, replication of a meme it is not a process that is concerned with understanding. The meme is the mental equivalent of the gene in the selfish gene analysis – it is that which uses organisms, including people, to propagate itself. Education, it is argued here, should be about those being educated, it is not enough to aspire to reproducing culture through people.

investigation (for a powerful account see: Gardner 2006). However, there is no obscurity about the word, and it is not necessary for the purposes of this article to attempt an explication. Hopefully, it is accepted that understanding is something a learner must do, and not something that can be imposed upon a learner.

Understanding does not exhaust the valid purposes of higher education. The ability to reason correctly, the ability to move from one level of generality to another, the ability to detect ethical tensions – all of these and more are such purposes. However, each of them can be described in terms of the understanding necessary to produce them. Further, if each is underpinned by understanding, rather than merely habit, then it is the more securely acquired. Therefore, we will identify the good of legal education, the value that informs the ethics of academia, and the virtue to which we aspire as educators, as the achievement of an understanding.

A note on the difference between ‘purpose’ and ‘outcomes’

A possible source of confusion is the difference between “purposes” meaning the facilitation of the understanding of something; and “outcomes” meaning measurable abilities demonstrated by students engaged in a course of study. To “target a range of outcomes” is not the same in this context as “to design with a purpose”. This is not always apparent. As a matter of language, to have a specific desired goal in mind (to target an outcome) is to have a purpose. However, it is far more useful to think of the now familiar lists of targeted outcomes as matters that must be attended to, in the pursuance of a purpose that arises outside of the outcome setting process. They may be seen as potential indicators of the achievement of the purpose that informs the design of the course. Our familiar lists of outcomes are ill conceived as a set of purposes, being both too generic (i.e. not tied to the content of the course) and too particular (i.e. they tend to be fragmentary, breaking down the overall purpose into assessable elements).

There is no more beguiling error of thought than the confusion of concept and homonym, of sound and meaning. There is nothing wrong with the word “outcomes” provided it is read as “consequences” or “results” rather than “purposes”. Learning outcomes are some of the intended consequences, or results, of a course of study. One reason the word “outcomes” has become ubiquitous is that it carries a range of possible meanings. The penumbra of meanings carried by “outcomes” will often prevent the need to specify contentious points. It is a word well suited to the diplomacy of committee room and political process. Obviously, generic learning outcomes are not the sole intended consequences of specific courses of study (be the course a module or a programme). Nor, given their generic nature, can they play a predominant role in shaping any specific course of study.

Legal theory

The term “legal theory” is intended to carry a broad meaning. Certainly, the intended meaning is not restricted to one theorist, or one school of theorists, or even one canonical collection of theories that would receive acknowledgment within standard works of jurisprudence. The idea of legal theory is therefore an inclusive one.

A starting point might be the descriptions of jurisprudence given by William Twining in “Some Jobs for Jurisprudence” and “Academic Law and Legal Philosophy” (Twining 1974 and Twining 1979). His broad conception of jurisprudence would be encompassed within “legal theory”, which would also include such established multi-

disciplinary approaches to law as legal history or law and economics, and such methodologically peculiar sub-disciplines as comparative law.

Twining identified five functions for jurisprudence. The integrative, which he described as providing frames of reference; serving as a conduit, being concerned with the relationship between law and other disciplines; high theory, dealing with general theoretical questions; middle order theorising, which included forming hypothesis susceptible to empirical testing, and prescriptive theories of legal processes; and the history of legal thought.

It is possible to attempt a more dynamic approach to the question of what is legal theory. Legal theory is the work produced by the use of legal methodologies in the analysis of law, legal process, legal systems, and other subject matter amenable to legal methods of analysis. Thus, the content of legal theory is determined ultimately by the social practice of those involved in legal research. The identification of those involved in legal research being made by identification of the methodologies they use as legal methodologies. Thus, legal theory is not defined by essential traits, it is identified by the social process that creates it. However, such an approach runs headlong into the problem that it assumes a conception of legal methodology exists that would be recognised and endorsed by lawyers generally. There is no such consensus. Therefore, the question of what is legal theory forces us to consider the related question of what is legal methodology?

“Legal method”

Law as an academic discipline is unusually lacking in generally accepted articulations of what “legal method” might entail. At one level this is a sign of strength, as there is little doubt that academic introspection is more often a sign that a discipline is in peril than that it is in robust health. A thriving discipline is likely to be too concerned with extending its methodologies to new objects of study to have time for copious reflection on the nature of those methodologies.² However, there is something suspicious about the almost total silence on the subject of “legal methodology” in the sense of the manner in which legal research is conducted and the discipline of law is advanced, as opposed to the sense of a series of skills or tasks that students have to acquire or do if they wish to be described as law graduates. It might be fruitful to contemplate what might be meant by legal method, as opposed to any other kind of method.

If we start with a contemporary account of philosophical method one problem becomes immediately apparent (Rorty 2007). “The term ‘method’ should be restricted to agreed-upon conventions for settling disputes between competing claims.”³ The legal system is obviously a system that has imposed conventions for the settling of disputes between competing legal claims. Thus, there is a powerful argument for

² An obvious example is economics, which has extended its subject matter from analyses of private markets and production to analyses of: public policy (Buchanan 1999); crime and marriage (Becker 1976); social mechanisms of trust (Seabright 2004); and even managing mutually assured destruction (Schelling 1980). There may be good reason to fear that “law and economics” is an area of legal theory that approaches the assimilation of law by economics. Indeed the so called “Coase theorem” assumes the subordination of law to economics (Stigler 1989-90).

³ Rorty 2007 puts forward this definition: “The term “method” should be restricted to agreed-upon conventions for settling disputes between competing claims”: as being a less misleading use of the term “method” than treating it as synonymous with “research program”, “leading idea”, or “basic insight”, or “fundamental innovation”.

placing “legal method” firmly outside of the academy and in the practice of law. This should hardly cause surprise – after all the common law underwent independent development for centuries without any coherent or institutionally firm link with the University system. Law exists as a self-aware social system with its own methodology and pretensions to rationality without any reference to the academy.

Therefore, a primary source for legal method should be legal practice, and in particular the conventions for legitimate argument developed within the practice of the law. These are conventions, and as such remain partially unarticulated and implicit within social practices. Some of these conventions have been formalised: e.g. rules for citation of precedent and statutes; rules of polite conduct ultimately imposed through rights of audience privileges and contempt of court procedures; the doctrine of precedent; principles of statutory construction. However, there are many others, which remain only partially articulated or even wholly unarticulated and fully implicit in practice. A proper regard for these conventions must inform any conception of legal method. However, this does not exhaust the possibilities of legal method. Disputes about law are not the same as disputes between legal claims – legal method needs to attempt to formulate conventions for the resolution of meta-disputes. In this field practice may offer helpful insights but cannot offer developed conventions, because it is not the business of legal practice to resolve disputes over the nature of law.

Once the dependence upon practice is overcome legal method faces a bewildering range of possibilities. Law is a multi-faceted activity, it involves communication, drama, power, and the most rarefied calculations of advantage. In what law shares with other human activities there are overlapping methodological possibilities. However, it remains important to remember that “law” the subject of academic investigation is rooted in the use and abuse of “law” in practice. Academic law may no longer be dependant on legal practice for its methods of proceeding, indeed, academic law needs to assert the legitimacy of conventions not rooted in legal practice for resolving disputes about law. Vitaly, this does not mean that academic law can ignore the conventions of legal practice, and it will rarely be necessary to defy said conventions.

It will be preferable to find conventions for academic legal method that can operate without contradiction of the conventions of legal practice if at all possible. It would be unrealistic to regard the two sets of conventions as wholly unrelated (as a matter of logic this may be so, as a matter of social practice it most certainly is not so). Tensions between approaches in academic practice that are “academic”⁴ and “practical”⁵ are ultimately reducible to disputes about the appropriate relationship between these two sources for legal methodology. They are disputes about what academic law is (or should be). There is an unfortunate tendency for such disputes to become polarised (expressed as either/or conflicts), which soon renders them arid. Clearly, the problem is one of an on going and dialectical relationship between legal practice and academic law. Any correct solution to a problem must recognise the legitimate claims of both sources for methodology, because the attempt to substitute

⁴ Or “theoretical”, producing research addressed primarily to the research community, often tending towards introspective focus on issues of no apparent practical import, in terms of curriculum design stressing integration and abstract conceptualisation over concrete understanding.

⁵ Or “applied”, producing research addressed primarily to some practitioner community, often tending towards a narrative of specific legal events of no generalised import, in terms of curriculum design stressing casuistic application to concrete situations for the advancement of some identifiable purpose.

one for the other will always be an error, because they are irreconcilably different as a matter of logic.

Sources of non-legal practice methodological assistance

Law is *sui generis*. It will be argued below that this fact is of central importance for curriculum design.

However, law is also an example of many different types of activity, the practice of law overlaps numerous fields which have been the subject of analysis by various disciplines. Therefore, there are a host of potentially available conventions for settling disputes between claims that could be used in law. Different conventions would be suitable for deployment in accordance with the different aspects of law being subjected to consideration. This point is at one level obvious, and yet its importance remains obscure without a fairly lengthy list of examples.

Law is communication, an effort at transferring meaning from legal emitter to legal recipient (see: Allott 1980, Gibbons 1994). Law is an example of social norms, a part of the normative culture of social control. Law is part of the ideological structure of the democratic political state, there are clearly potential ideological advantages to claims that institutions are run by laws (which are impartial and presumptively just) and not by men (who are inherently partial and potentially self interested). The conception of the rule of law as the rule of laws rather than men is embedded in Anglo-American jurisprudence and the concern over the creative role of the judiciary (see e.g.: Hart 1997, Dworkin 2000). Law is a means by which markets are established and maintained, it forms part of the necessary institutional structure of the “free market economy” (see: North 1990, and Sen 1999). Law is conventionally organised human behaviour, and therefore is amenable to analysis in terms of “games” and “rules” (Hart 1997). Law claims to be rational, logical constraints upon argument are accepted by the courts and academics. Suggestion of the contrary by Holmes in 1881 (Holmes 1963) who wrote: “The life of the law has not been logic: it has been experience”, remains one of the most famous of academic epigrams in the Anglo-American tradition of jurisprudence. Law has a history, both institutional and doctrinal, which has informed and shaped contemporary law and legal discourse (Baker 2002). Law makes explicit and implicit claims to ethical authority, and as such falls to be evaluated in ethical terms e.g. Fuller 1969, Finnis 1980. An example of a more “meso” or middle order approach to such questions would be Bigwood 2003. Law is an intellectual process of generalisation through abstraction, therefore, partakes of the “reductionism” methodology so successfully deployed by the natural sciences (see: Popper 1961 and Mokyry 2002). Law is a business, the practise of law, and influence of law on policy makers, is partially determined by this obvious fact. Law is an intellectual process of particularisation from general statement to particular application, therefore, similar to engineering or design, the demand for application of the law by students is of course a very common characteristic of legal education, and this emphasis on particular applications creates the typically casuistic forms of reasoning so typical of legal discourse.

The above examples are not exhaustive. However, they are extensive enough to bring home the fact that there are a bewildering number of possible sources for methodological innovation. Once we accept the need to develop conventions for resolving questions that the conventions of legal practice cannot resolve, as they lie outside its proper limits, we are exposed to the problem of choice. The not fanciful risk is that we become immobilised by this plethora of possibilities, like Buridan’s

ass, which faced starvation when faced with two equally distant piles of hay.⁶ The answer must lie in adhering to the following rules of conduct, or some similar set. First, remember, it is desirable that other lawyers will be able to understand you, therefore, try and select a method that will not contradict the conventions of practice. Second, the methodological problem is caused by the need to answer a question that legal practice is not equipped to resolve. The choice of method should be informed, or possibly even determined, by the demands of the question. This second rule being subject to the first rule, so that the method that is most consonant with the conventions of practice whilst allowing the resolution of the question is selected. Third, the resources available always determine the choice of method in the final analysis.

Thus, we have taken into account the features law shares with other human activities, and the effects these overlaps may have upon legal method, and legal theory. It is this fecund possibility, of methodological innovation inspired by overlapping disciplines, that makes any attempt to constrain legal theory to a collection of *a priori* canonical methods intellectually indefensible.

Source for the acquisition [of such purposes]

The place from which purposes are taken is the underlying metaphor. The expression is intended to indicate that it is from contemplation of legal theory that the curriculum designer can identify what “understanding” in the context of the curriculum under development will mean. Also, legal theory will provide a route to that understanding. Thus, legal theory will provide inspiration and guidance for the designer of a curriculum. However, there are two problems with this account. First, it never overcomes the metaphorical framework of the expression. Second, it assumes the existence of a body of legal theory suitable to the tasks it is assigned by the account.

Perhaps we can move beyond metaphor if we consider an example. It is difficult to explain how the concept of “standpoint” or “viewpoint” as deployed by Holmes 1987, Hart 1959, and Twining 1975 can give purpose to a person attempting to design a curriculum. However, the insight that law will be understood and reacted to in different ways by different participants in legal processes can illuminate an area of law. It is possible to understand the law in a way that any univocal exposition will fail to express. It may become the purpose of the designer to share the understanding achieved through adopting a novel standpoint in contemplation of the law. It becomes a purpose of the course to lead the student to this understanding. This does not necessarily entail any account of the theory that led the designer to the insight. It may be quite possible to present the materials in a manner that facilitate the insight. The theoretical works are the source of the purpose, although they must be mediated by the designer. An understanding once experienced can be “shared” and legal theory enables one to reach new understandings. It is in this new discovery of the law that legal theory can serve as a source for educational purposes to the curriculum designer. However, this is not the same as teaching legal theory to the students.

⁶ The problem is one of logic (or its inadequacies) and the theory of decision-making. The problem is known as Buridan’s ass, after Jean Buridan. The famous dilemma is given by Brewer’s Dictionary of Myth and Fable (1999) Cassell & Co, London, revised by Adrian Room as: “If a hungry ass were placed exactly between two haystacks in every respect equal, it would starve to death, because there would be no motive why it should go to one rather than to the other.” Obviously the problem is how decisions can be made rationally when there is no quality that places one solution above another in terms of desirability for the decision maker.

One can think of legal theory as a means to generate a choice set. Different approaches to law generate different potential purposes for the curriculum designer. This choice set can be extended probably indefinitely. It is likely that different areas of substantive law are more or less suitable for different theoretical illuminations. The challenge becomes not to deliver the curriculum but to deliver a curriculum. It may be that the generation of potential purposes, valuable ways to understand the law that can be put within the reach of students, will be difficult. Alternatively, the purpose might be easy to conceive but the means of leading the students to it may be difficult. Legal theory potentially offers support in either endeavour. However, that “potentially” brings us to our second problem.

It is not the case that there is a readily available corpus of legal theory that is fit for the purpose of informing curriculum design. In fact our discipline is in some ways rather ill served. There is a tendency for our theorists to reiterate debates around legitimacy, and to adopt a less than welcoming attitude to non-specialists. In fairness to our theorists there is a tendency amongst some more practically minded legal academics to adopt a rather philistine dismissal of theoretical concerns. Too often our discipline resembles two distrustful camps, rather than a united force bent upon the accomplishment of a common goal. This defensiveness is exacerbated by our lack of a clearly articulated account of legal methodology. This inclines us towards an outward facing defensiveness within the wider academic community. However, there are valuable accounts of the law available, and the very expression of interest in theory for the purpose of curriculum design is likely to encourage the production of more useful material. Finally, the development of theoretical work into a form sufficiently nuanced to provide purpose to the teaching of substantive law can be accomplished by the curriculum designer, as it is one happy consequence of the underdevelopment of our discipline that there is a lack of any institutional barriers to such activity.

An attempt is made below to give an example of how this process of deriving purpose from legal theory can work (at: “4. Examples of the use of Legal Theory to inform the design of curricula”). Irreducibly the manner in which legal theory can inform teaching is inherently difficult, as it touches upon that part of the teaching role that is necessarily informed by the teacher having been a learner. In the parlance of Higher Education it is an example of the nexus between research and teaching. This tension, and this inherent “immanence” of educational purpose is captured by Karen Armstrong’s rather frightening description of the Socratic method as practised by Socrates (Armstrong 2006):

“Conversation with Socrates was a disturbing experience. Anyone with whom he felt an intellectual affinity ‘is liable to be drawn into an argument with him; and whatever subject he starts, he will be continually carried around and around by him’ said his friend Niceas, ‘until at last he finds that he has to give an account of his past and present life; and when he is once entangled, Socrates will not let him go until he has completely and thoroughly sifted him.’ Socrates’ purpose was not to impart information, but to deconstruct people’s perceptions and make them realise that in fact they knew nothing at all... You did not receive true knowledge at second hand. It was something that you found only after an agonising struggle that involved your whole self.”

When we achieve our purpose we change a person, we lead that person to an understanding we have experienced. It is by allowing us to realise for ourselves new

insights and new understanding that legal theory can be a source for our purposes when we in turn lead others to that peculiar mental state.

Should

The word “should” clearly indicates that a normative assertion is being made. We identified the facilitation of “understanding” in a learner as the good of Higher Education above. Therefore, a thing should be done when doing it is conducive to the production of understanding in the learner.

This principle assumes that education is an activity undertaken for the benefit of the learner: rather than the teacher, or for the benefit of any interest group, or for the perpetuation of broader society. Thus, it assumes that the pleasure I take in teaching, and the benefits to employers of a highly literate and numerate work force with a strong sense of responsibility, and the reproduction of culture through educational processes, are all incidental consequences of education and not its ends.

Identification of the key virtue of education in a change that takes place in the learner is a tight focus on the cognitive development of students in Higher Education. This tight focus on the learner is vulnerable to various criticisms. It neglects the emotional and ethical development of those students. It has nothing to contribute to debates on the role of values in informing the curriculum in Higher Education. It denies the validity of the concerns of the Professional bodies in establishing the purpose of a curriculum design. It refuses to respond to the demands of the Government, which funds the activity of institutions of Higher Education. It is uninterested in the demands of the economy for specialised labour. Therefore, the identification of “advancement of understanding” as the “*telos*” of Higher Education needs defending.

First, it is a powerful tool for the focussing of attention on the demands of curriculum design. It is an internal standpoint, for the orientation of practitioners of legal education, and not an attempt to give a generally complete account of Higher Education. Therefore, in stating that the guiding purpose of curriculum design should be the advancement of understanding in the learner the giving of consideration to the pursuit of other possible values is not forbidden. The claim is not that understanding is the sole value or aim that might be considered, but that it is the guiding or controlling aim. Other things can be achieved providing they are achieved as consequences of the advancement of understanding. However, the pursuit of any of those other aims at the expense of understanding is a violation of the ethic proposed. Clarity of purpose is essential if the complex task of curriculum design is to be performed well.

Second, the identification of the ethic was arrived at by a strongly descriptive method of reasoning. It is not proposed to impose a new or alien value on Higher Education, but to acknowledge the accepted place of the value in Higher Education.

If this task has been performed correctly then the proposed value already reflects the values of wider society: as society values education, and education values understanding, so society values the advancement of understanding in learners, a process it supports in the practice of Higher Education. There is no reason to suppose that this social valuation is without inherent contradictory impulses. Just as I value the independence of my children and want them to take my advice, so a society might value education but want learners to be more accepting of the explanations given by authority.

Third, the assertion of an independent educational value is the assertion of educational independence, in the sense of not being determined solely by external operative causes. It is widely recognised that Higher Education needs to be able to operate outside of the direct control of political or economic power structures. This principle is usually associated with “academic freedom” which means the freedom to make any argument publicly, despite the offence it may cause to powerful individuals or groups. This freedom is not granted as a reward for personal merit, rather it is a recognition of the need for Higher Education to be independent of any external direction if it is to fulfil its appointed task. It is submitted that in the teaching and learning aspect of Higher Education it is the advancement of understanding that is the appointed task that requires a degree of operational independence to be achieved.

Any legal curriculum should be guided by a purpose or set of purposes

At one level this proposition seems difficult to doubt. There may be disagreement about the nature of the purposes that should be pursued. There may be disagreement about how these purposes should be pursued. However, it is hard to imagine an argument being seriously advanced that the design of a course of study should not be informed by some sort of purpose.

The importance of such purpose might be disputable. It might seem to some that the purpose is rather remote from practical questions of design and delivery. However, whenever a selection has to be made, whether it is a selection of material, or of teaching method, or indeed of assessment, the purposes of the course should play an immediate role. Therefore, unless there are very few choices to be made the purpose will play an important role in course design and review.

Thus, the remaining areas of dispute are likely to be around how demanding the purposes should be and what might be meant by purposes. We have already explored what is meant by purposes in the context of this article (at: “Purpose” above). Given the problem of controlling the ever-increasing corpus of material that could be the subject matter of study the best rule of thumb would be nothing is included in the curriculum unless it is useful in advancing the purposes of the course. Thus, the purpose would be used as a gate for inclusion of material.

The basic model for curriculum design is standard in educational theory, and accords with a philosophically pragmatic approach that is congenial to the author. It seems likely that any substantive objection to this proposition will be directed towards the nature of the appropriate purpose or the implied assertion that a purpose can guide the design of a curriculum. This objection will be dealt with through examples of how it might do so (at: “4. Examples of the use of Legal Theory to inform the design of curricula”) rather than considered abstractly here.

Legal theory should be an important source for the acquisition of such purposes

If law is *sui generis* then the teaching and learning of law must be informed by an appreciation of the unique aspects of the law. Legal theory must be resorted to because no other body of theory will be fit for the educational purpose. This argument can be illustrated by a fairly short consideration of an activity that is common across many disciplines – interpretation. However, it will be demonstrated that legal

interpretation involves features that preclude reliance upon any general or non-legal account of interpretation.

The importance of distinctive aspects to the law

Law is fairly obviously concerned with interpretation whether of legal sources, or of actions, or of documents, or of spoken words. To an active researcher this activity of 'interpretation' is fairly obviously not unproblematic. This is not to say it is hard to do, although it often is, but that it is hard to state quite what one is trying to do. If we have not thought about legal interpretation then it is unlikely that we can focus our teaching of legal interpretation, unlikely that we can even articulate what it is that we are attempting to teach. If we cannot articulate our teaching of legal interpretation then it is unlikely that the students can identify effective learning strategies - that they will not be able to identify what it is they cannot do. Although we might seek some guidance from outside the law: from the theory of learning, or from philosophy (see: Austin 1976, and Searle 1979, and possibly Gadamer 2008), or from the study of grammar, or from literary criticism: this will not avail us if the practice of interpretation within the law is peculiar. To deal with the particular problems of legal interpretation it is necessary to resort to legal theory in some manner. Therefore, if it can be demonstrated that legal interpretation has features that are either unusually pronounced, or even unique, within the context of other interpretative enterprises then the need for a teaching practice that is informed by legal theory is established.

A short consideration of legal interpretation

The lawyer is an interpreter of legal sources and practices, whether consciously or unconsciously, whether acting as a private client lawyer, an employed lawyer (in business, or Government), a judge, or an academic. The nature of the lawyer's interpretative enterprise is peculiar to law. First, legal interpretation is purposeful in motivation – this distinguishes it from literary interpretation. There is no aspiration of fidelity to an author's meaning, indeed there is often no identifiable author. The act of interpretation is not justified by the activity itself, there is no ideal of law for law's sake. Second, legal interpretation can appeal to no absolute, or objective, or external, arbiter of truth – this distinguishes it from religious and scientific interpretation. There is no external measure of truth, as successful interpretations become true by force of successful adoption. What is true is that which receives authoritative approbation, and given a change of authoritative opinion what was true becomes false. Third, legal interpretation has social and physical corollaries – this characterises it. An interpretation of legal sources can justify enforced payments of money, ejection of a family from a home, the imprisonment of individuals, and the deployment of lethal force. Furthermore, such effects are not distant results working through a causative chain, these effects are the corollaries of legal interpretation, often the very reason the interpretation was undertaken was to force the corollary to take place.

Purposeful interpretation

There is no stability in the purpose of interpretation or of the materials to be interpreted. One facet of legal interpretation is that the paradigmatic form is disputed interpretation. The reason for the dispute in interpretation in the paradigmatic form is a difference in interest; rather than difference in aesthetics, or ethics, or politics. Legal reasoning is notoriously teleological in nature. Indeed, it can degenerate into casuistical rationalisation of interest. One facet of legal interpretation is that although the materials for interpretation are the generally approved legal sources of repute

(Statutes, cases of authoritative courts, Statutory Instruments, International Treaties incorporated into domestic law) these materials are not the sole objects of interpretation. Lawyers will also interpret formally drawn up dispositions or contracts, the spoken words of businessmen and lovers, the actions of anyone who falls within the jurisdiction of the courts. The corpus of material potentially subject to legal interpretation is not fixed, there is no delimitation other than that imposed by the legal culture of the time. In the recent past academic publications have been received into the English and Welsh courts in a novel manner, over a longer period legal procedural changes have allowed into evidence mere writing and mere reporting of spoken words; and changes in substantive law have made the importance of interpretation of half remembered statements or conversations crucial to the resolution of legal disputes.⁷

Authoritative approbation renders an interpretation true

If an authoritative court relies upon an interpretation to resolve a case before it then that interpretation becomes law. Thus, the question of which of two contending interpretations represents the true interpretation, which of the two is the law, is settled by authoritative approbation of one. This settlement is provisional whenever a higher court can be resorted to by way of appeal. A future court may renounce this settlement. However, once the appeal process becomes unavailable the issue is settled finally between the parties to a case, and pending any future developments the issue of truth is settled generally. Legal truth is inherently 'relativistic', it rests explicitly upon an authoritative declaration by a person (or people) given the power to determine a dispute between parties to a legal action. Truth is persuasion. Falsity is failure to persuade. Within the paradigmatic case, the legal action, the person or people to be persuaded are identifiable individuals of known background and propensities.

Outside of the legal action there is a similar, although less formal, mechanism which can bestow truth upon that which is approved. If an interpretation is adopted by a large enough group of people of sufficient influence, either within the legal profession or including those outside of the legal profession, then their opinion can become authoritative. Ultimate sanction might await a legal action or legislative recognition. However, there are clearly situations in which one interpretation of the law achieves

⁷ I cannot resist the pull of a legal footnote here. Examples from property law are the express oral declaration of trust and the common intention constructive trust. The voluntary declaration of trust has long been recognised and rests on the capacity of the property owner to dispose of her property. The institutional trust rests upon the express common intention of the property owner and another, or of joint property owners, hence the name. There is often a dearth of reliable testimony of oral declaration, or of any such express intention, at the time the trust needs to be specified. The possibility of such trusts of personalty was recognised in the nineteenth century and was greeted with horror by the Courts (see *Scales v Maude* (1855) 6 De GM&G 43; 43 ER 1146; recanted in *Jones v Lock* (1865) LR 1 CH App 25; impact of reform of law of evidence realised in *Forrest v Forrest* (1865) Jan 34 LJ (NS) Ch 428). The late twentieth century saw a far more relaxed approach to personalty (see: *Re Kayford Ltd* [1975] 1 All ER 604; *Paul v Constance* [1977] 1 All ER 195) and in *Gissing v Gissing* [1971] AC 886 let loose the common intention constructive trust of land in the face of statutory hindrance (s. 53(1)(b) Law of Property Act 1925). Subsequent attempts to tame the beast (see: *Burns v Burns* [1984] 1 All ER 244; *Lloyds Bank v Rosset* [1989] Ch 350) have been less than successful. The area was last reviewed by the House of Lords in *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432.

truth status from acclamation. This may be rationalised as ‘legal practice’ that informs the law (practice of Courts, practice of lawyers when engaged in the conveyance of land), or as lay practice that generates law (law merchant, the trade practice of bankers). It may lack a formal status until confirmed by judicial endorsement. However, the pre-action acclamation has already established the claim to legal recognition prior to any formal authoritative confirmation.

Social and physical effects of legal interpretation

Within the paradigmatic situation of a legal action the very purpose of advancing or adopting an interpretation, whether of legal sources or private documents or actions, is to resolve the dispute before the court. The interpretation is desirable, or undesirable, because of the consequences of the interpretation for the parties before the court (and others similarly placed). It is the corollaries of the interpretation in society that is the real focus of concern for the parties, their lawyers, and the judge. The judicial power of legal declaration is a necessary consequence of the judicial duty to resolve according to the law the dispute before the court. For consideration of such matters at the highest judicial level see: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, and *Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41; [2005] 2 AC 680.

Therefore, unless the system is to be irrational in operation the process of interpretation is always influenced by the reason for undertaking the interpretation. One example of this should suffice. The Administration of Estates Act 1925 provides in absolute terms (with no caveats or exceptions) for the devolution of a dead person’s estate in the event of intestacy (if the dead person left no will). The obvious interpretation of the provisions was that they meant what they said. However, when the murderer of a dead person tried to claim the estate of the person they had murdered the court found an alternative interpretation preferable. The absolute words were subject to an exception in such circumstances, a common law exception known as the law of forfeiture. The consequences of the obvious interpretation: one based in the rules of language, in the rules of statutory construction, in the principles of legislative supremacy and legal consistency, and in the policies that demand that the law be as simple as possible, apparent to laypeople whenever possible, and as certain as possible: made it repellent to the court, and it was rejected in *Re Sigsworth* [1935] Ch 89.

Thus, we can see that the effect of a legal interpretation can be the most significant factor determining its acceptance or rejection. However, the significance of this feature of legal interpretation is not appreciated if we stop there. Legal interpretation, which we have identified as a central concern of all lawyers, is analogous to the tail of a dog. The dog is the effects of the interpretation on people. An authoritative interpretation of the law is followed by the availability of the forces of the State in the enforcement of claims.

This makes slips in legal interpretation more directly costly than in any other field. A failure to interpret the instructions for rendering a nuclear warhead safe for transport can carry a very heavy cost – but it is not the necessary corollary of the interpretation; it is simply a mistake that can lead to a disastrous outcome. In similar fashion, the hard of hearing interpreter who mistakenly informs the President of the United States that the Russian Federation has just declared war might cause more carnage than any lawyer, but the carnage does not necessarily follow from the mistake in interpretation. The mistake will probably be discovered and corrected subsequently. In the example

of the hard of hearing interpreter the mistake did not make itself true by being made, and the true situation could be uncovered. In law the mistake does make itself true by being made. When a damaging interpretation is made true by authoritative approbation the law is necessarily defective, and will wreak damage upon some or all of the people subject to the jurisdiction. Authoritative legal interpretation is social action supported by the forces of the State.

Return to the argument

Hopefully, this partial consideration of the peculiar nature of legal interpretation has convinced the reader that legal interpretation has distinctive qualities. The consideration has been partial – no reflection upon the normative qualities of legal interpretation, or on the embedding of legal interpretation in processes (both judicial and other), has been made. In less obvious terms there has been no consideration of the powerful co-ordinating potential legal interpretation has, nor of the dialectical qualities of legal interpretation over time. However, it is not necessary to attempt a complete account of legal interpretation – the argument requires only that legal interpretation be recognised as distinctive in nature.

If legal interpretation is something we desire to teach on law courses then we need some help in identifying what it is we hope to achieve. Some aspects of interpretation are generic, and we can gratefully borrow from other disciplines. Those aspects that are peculiar require the aid of legal theory, and are almost certainly made into operationally possible subjects for teaching by reflection upon the methodologies that underlie legal theory.

Examples of the use of Legal Theory to inform the design of curricula

Given a large body of material it is necessary to generalise and order the material for the purposes of exposition. Legal theory can provide a framework or context that enables this task to be carried out in a logical and coherent manner. Legal theory can provide ways to sort and arrange material. It can also provide a means for the selection or rejection of material. Thus, theory can inform the purposes pursued and the means to pursue the purposes chosen, it can be important for what is attempted and for how it is attempted.

Theory can inform the lines of division both within and between subject areas. It provides means to link together apparently disparate material, and to distinguish apparently similar material, functions we tend to call synthesis and analysis. It can also inform judgments over what should be considered simple or complex. In terms of the analytical theory of Hohfeld legal rights are complex; for the exposition of commercial law legal rights tend to be treated as simple (Hohfeld 1913, Hohfeld 1917). It can determine what features of social life or law are particular and inconsequential in legal terms or general and “material” for legal analysis. Belinda Fehlberg’s analysis of how and why wives guaranteed the business of their husbands, brilliantly expressed in epigrammatic form as “Sexually Transmitted Debt”, makes the gender of a guarantor a general feature of a situation (Fehlberg 1997). The analysis of the same situation propounded by the House of Lords in *Barclays Bank plc v O’Brien* [1994] 1 AC 180 based on constructive notice treats the gender of a guarantor as a particular feature of the situation. Legal theory can indicate the correct level of precision or abstract generality to focus upon. For the comparative lawyer

relatively high levels of generality are necessary if the materials for comparison are to be reduced into a manageable order, for the purposes of a transactional analysis of a situation it is likely that precision is essential. The very import of central legal terms such as “principle” will vary with the theoretical context of discussion. Hence when contrasted with “policy” a “principle” will indicate predictability and logical coherence; when contrasted with “rule” a “principle” will indicate breadth and flexibility in application. Such “meta” terms of legal parlance are illuminated by theory, which finds its origins in contemplation of law. Such contemplation leads directly to the coining of “meta” terms applicable to law. It is from theory that such necessary tools for the handling of law derive. It is to the tools bequeathed by the activity of legal theorists that one must turn in the attempt to shape legal exposition to educational purposes.

To act with purpose is to act with an end in view. We have already argued that in designing legal curricula the end in view should be the advancement of the understanding of the student. Purpose is unlike outcomes in that it is not necessary to measure the achievement of the purpose for it to fulfil its role. It remains sensible to strive to achieve a purpose despite never knowing whether the effort has been successful, nor being able to demonstrate it has been so. However, it is normal to attempt to ascertain whether the purpose has been achieved through assessment.

Generally, the hope will be that the achievement of understanding will open up the potential for future development of the student outside of the confines of the specific course of study. Generally, there will be no means to discern whether the student will ever generalise from the specific instance to others or develop the understanding achieved outside the course of study. However, it is only within the context of specific examples that the role of a purpose in guiding curriculum design can be appreciated. Therefore, there follows an account of possible purposes in the context of the teaching of land law.

Conflicts between original owner and purchaser

An examination of this conflict illustrates the recurring tension between “dynamic” and “static” security of property that pervades property law. A useful starting point for inculcating understanding of the law in this area is the idea of standpoint. The work of Holmes 1897, Hart 1959, and Twining 1975 inform this in a general manner, and the work of Cooke and O’Connor 2004 is an excellent example of the power of such analysis at work.

Of course alternative theoretical approaches can also be used to illuminate the area. For property lawyers and commercial lawyers the tension between original owners and purchasers can be described in terms of the conflict between the *nemo dat* principle and the protection of market participants. For economically minded lawyers the law is about the tension between security of property rights and transaction costs. Perhaps more tendentially this area of property law can be viewed as involved with the legal regulation of transactions and establishes minimum norms of behaviour for buyers. An example of this was the way that the doctrine of notice operated as a powerful tool for shaping the professional practice of purchaser’s solicitors.

The area is remarkable for several distinctive features. The dispute is not resolvable by allocation of fault (or blame) as each contender for legal validation may be innocent. The dispute is not resolvable by recourse to the dealings between the parties, as they may not have interacted or even been aware of each other. It is in

bringing students to an understanding of these issues that standpoint is most useful. An empathic association with each of the idealised parties in turn allows the student to realise that nobody is in the wrong. As the student imagines himself in the different roles in sequence he realises that law may be “good” for one person in direct correlation with the degree to which it is “bad” for another. Given that each person is engaged in approved behaviour and acting properly it creates an insoluble dilemma for the law. Legitimate interests can be in opposition to each other, and then the law must draw a line that will be damaging to at least one or other of those interests. Furthermore, the same person over time is likely to be in each of the roles. The law favours people not for their individual qualities as ethics usually demand, but in one aspect of their action. It is not the good or the bad person that the law is partial to, but rather the active or the passive person in the transaction who is favoured or sacrificed. At this point it becomes clear that there needs to be at least a third standpoint if the law is going to develop in a coherent manner. A standpoint that is located outside of the claims of the parties to the dispute, e.g. the general social interest in market security or in the security of the family home (see: The tension between “family” and “commercial” applications of the law”, below).

There are still other issues raised by this conflict. The resolution of the dispute should be capable of easy generalisation and not confined to the particular qualities of the candidates. This is because the costs of disputing the issues are extremely high, and it is highly desirable that in the future people can take steps (on legal advice) to avoid the problem. Ensuring that the problem is avoided is very difficult to do if the resolution does not clearly identify what steps are necessary to avoid the problem expressly or by implication. Particular outcomes are likely to either produce little consensus on the fairness of resolutions, or not be susceptible to conceptions of fairness at all, a situation also easily explicable in terms of standpoint. Finally, the logic of property law precludes splitting the difference as a solution to the dispute.

It is very easy to recite a general account of the problem, and subsequently label specific cases or statutory provisions as an example of the issue in the law. However, it is very difficult to awaken an awareness of the constant presence of the issue in property law, or to bring about an understanding of how this problem relates to other problems of the law. It is in moving a student from being informed and towards an understanding that the theoretical insight can be so powerful. It is difficult to even inculcate sufficient awareness of the problem to cause recognition of the problem when it recurs without the habit of imaginative projection into the role of the people involved in possible disputes. It is also difficult to bring students to understand why there is no right solution to such a problem (it can only ever be a balance between two evils) and why it is not possible to promulgate a rule that avoids the problem without their empathic involvement.

The conflict between certainty of disposition and loyalty to intention

This conflict is created by failures to correctly execute intention whilst doing enough, at least arguably, to allow the discernment of intention. In simpler terms, it is a problem raised by knowing what someone is trying to do although she fails to achieve her purpose. This recurrent problem illustrates the tension between respecting “formalities of disposition” and showing fidelity to the “intention of the disponent”. This stress in the fabric of the law can also be described as a tension between “certainty” and “justice”, where “justice” means fidelity to the property owner’s wishes. For those of an economic bent it is an area concerned with transactional costs

and the potential economic utilisation of property. For those of a philosophic bent it raises issues of interpretations of language use that turn upon the nature of “performatives” (or “speech acts”, operative words in legal terms) as opposed to using language to make statements.

There is not a tradition of useful theoretical work that can be called upon as easily as there was at: “Conflicts between original owner and purchaser” above (hereafter referred to as: “(i)”). The law of formalities, with its frankly magical connotations, has not attracted many theorists. Even the jurist of legal irrationality Jerome Frank had relatively little to say on the subject, see: Frank 1970. However, there is some work that can be utilised. As the nature of the problem formalities exist to counteract are difficult to appreciate those works that help one to become aware of the multifarious nature of “third parties” or “the rest of the world” are useful routes to illumination. Formalities help people not directly involved in a situation to know what did or did not occur. Therefore, an awareness of the reasons such people might be concerned can illuminate the area. Hohfeld 1917, in his discussion of personal and property rights is one source that helps in this regard, as is Maitland 1923 on the development of the defence of bona fide purchaser. However, neither offers any easy path down which to lead the student. A more pliable theoretical approach is the “law jobs” analysis of Llewellyn 1940 (also Llewellyn and Hoebel 1941), and similar functional approaches to legal concepts utilised in comparative law (see: Zweigert and Kotz 1987). There are also a few middle order works of real use, such as Youdan 1984.

The area poses some real hurdles to a sympathetic understanding of the law. It shares with example (i) the desirability of easy and robust generalisation, for the reasons mentioned there, and also because of the often imperative need for third parties to be able to identify where property rights lie (e.g. personal representatives, insolvency practitioners). Once again the issues are not easily resolvable in terms of fault. However, there is often a significant difference from (i) in the impact upon the law of formalities of general conceptions of fairness. Often, although by no means always, there is a candidate who can call in support common notions of fairness in support of its claim. Far more difficult to perceive are the beneficial effects of certainty of property rights to those not intimately involved in the dispute. The difference in this respect between (i) and the law of formalities is in large part due to the high likelihood of interaction between the failed disponent and the disappointed disponent. This history can give rise to moral claims based upon the sanctity of promise, or notions of fair play. Finally, the economic consequences of how problems in the law of formalities are resolved may be dramatic, especially in the context of developing nations. This aspect of the issue is far from straight forward. However, it is clear that divergence between formal property rights and actually enjoyed property rights can cause serious problems, as can any system that does not allow for the ready identification of valid property rights. Examples of work on this area includes: Allott 1980, Coldham 1978a and Coldham 1978b, De Soto 2001 and North 2005.

Our theoretical insights identify two potential roads to understanding. First is to develop an awareness of the difficulties posed to specific third parties of failures to comply with formalities. Until the nebulous “third party” takes on human form the student will tend to favour the identifiable claimant who wants the wishes or promises of the failed disponent to be honoured. One fact that the theoretical sources make apparent, although without specific attention being paid to the point, is that the third party often represents others who in turn have powerful claims in morality or fairness: such as the family of a deceased property owner, or the creditors of an insolvent.

The second road is to think about formalities as directed to a job, the effecting of intention. This is quite a difficult matter to perceive. However once fully realised it is a very powerful insight. There is clearly a difference between wanting something and doing something, indeed it is quite possible to want something with absolutely no intention to do the same, a mental state we call fantasy. Our language has two relevant types of uses for words: we can use words to make statements, or to perform an act. For a property owner, and for those who might become entitled to an interest in her property, it is essential that it is possible to distinguish between: playing with an idea, wanting something conditionally, promising to act in the future, and making a change in property rights now. We need some sort of marker or sign to demarcate our actions from our fantasies. This is the law job performed by formalities.

Once again the recitation of the above and labelling of examples is simply achieved. However, students find it very difficult to identify the source of the problem when faced with the law of formalities. In (i) the existence of two claimants, each with a reasonable claim dramatised the tension between conflicting interests. When faced with failed dispositions the problem is not so starkly portrayed. The interests harmed by foregoing certainty in the interests of fidelity to the owner's intention are generally not personified. The allure of individualised justice is powerful, unless of course one is ever involved in the process of realising the same – as litigation is expensive, distressing, and if prolonged effectively sterilises, and may eventually entirely consume, the disputed property. Also, in the absence of a compelling counter-argument based upon fairness the concept of fairness remains unexplored and inchoate.

The tension between “family” and “commercial” applications of the law

This recurring tension illustrates the difficulty inherent in operating a system of property law suitable for both commercial purposes and domestic purposes. It can be described in terms of the problem of informal interests in land, and as such an aspect of: “The conflict between certainty of disposition and loyalty to intention” (hereafter referred to as: “(ii)”). At the level of “policy” it is a clash between market norms in law and norms based on the “family home”. Obviously, one possible solution to this tension would be to demarcate two types of property, commercial and domestic, each governed by different law. However, this solution would pose a host of problems itself. Therefore, the true tension may be between a unified law of property and a particularised set of property laws.

The area is remarkable for several features. The typical manner in which this tension manifests itself is the mortgagee seeking to enforce its remedy of sale against a family home. As such it presents opposed conceptions of fairness in conflict. Fault may, or may not, be attributable to one or both parties in dispute. As such the area is susceptible to resolution upon moral (fairness and fault) lines more often than (i) or (ii) above. It raises acute difficulties of appropriate classification, over whether such a loan should be considered a “commercial matter” or a “domestic matter”. This classification issue is surely resolvable, if at all, at the level of policy. The loan should be commercial if the law favours financial interests, or domestic if the law favours security of families in their homes. The issue must be one of balance between two legitimate interests (in a similar manner to (i)) and therefore is not susceptible to a single answer or correct answer. It is possible to analyse this issue as merely an example of the general issue raised by (i) – although such a classification tends to

assume the primacy of a unified property law as the appropriate tool for resolving the difficulties inherent in the area.

The legal theory that is likely to help us here comes from two different streams. On the one hand the theoretical support for the commercial approach is likely to come from considerations of freedom of contract – although the area should really be one treated in terms of freedom of disposition the theory in this particular respect is underdeveloped (on freedom of contract see: Atiyah 1979). There are two powerful insights contained in this theoretical literature. First, that respect for personal autonomy favours enforcement of agreements freely entered into, and that protection will come at a cost to the group that is protected. Second, that the enforcement of voluntary transactions lies at the heart of our market economy. On the other hand are theorists concerned with the security of family interests, and they also bring two insights (see: Fox 2006, Fehlbeg 1994 and Fehlbeg 1997). First, that the loss of a home impacts upon not just the individuals who enter into a mortgage but upon others who live in the home, a group that might well include both the vulnerable and those unable to take action to protect their own interests. Second, that autonomy and voluntary decision making in the real world are far more problematic than in the rational choice model assumed by enthusiastic supporters of a freedom of disposition principle. This faces the course designer with several possible ways to approach the subject.

As before one can recite and label. One feature this problem possesses that was largely absent from (i) and (ii) is a clash of policy issues, a clash of views about what constitutes fairness, justice, and blameworthy behaviour. Although most people would accord some respect to the fairness claims of each party to the dispute the dispute can only be resolved in such terms by effectively giving priority to one or the other ground of fairness. It is possible to resolve the dispute without recourse to such concerns – insist that it is an area governed by the issues raised by (i) and (ii), and that claims to protection for commercial or domestic interests are irrelevant. However, this solution raises its own flock of troubling issues. Should the policy of the law be blind to substantive claims of fairness? Should social changes be reflected in law? Should legal change proceed through legislative change or piecemeal through dispute resolution? Does the fact that judges resolve such disputes have an effect upon who is suitable and appropriate to act as a judge? Typically students find it difficult to proceed from deciding whom they sympathise with to generalising the issues involved.

Reflection upon purposes

Hopefully, the three examples given illustrate sufficiently the (rather mundane) nature of a theoretically informed purpose in property law. The three examples are extremely common in undergraduate legal education, and there are many materials available that support one or more of them. One could say they represent traditional choices. It is also apparent that (i) and (ii) are compatible with: “4.A.iii. The tension between “family” and “commercial” applications of the law”: and that the three purposes could be held together without any inherent contradiction. This is unsurprising, given the practice of contemporary legal academe.

There has been no attempt to include all of the useful theoretical works that can inform the teaching of land law. Discussions of the nature of property serve as invaluable aids in conceptualising property law. Two outstanding examples are: Lawson and Rudden 2002 and Honore 1987. The wealth of historical material that

could be utilised is almost overwhelming. In short what has not been considered above far exceeds that which has.

The mediation of legal theory through professional experience

The above account is bloodless. Legal theory seems to exist in the context of an intellectual space, where it informs and has a positive effect upon the decision-making processes of a fully informed and rational course designer. Obviously, legal theory does not exist at all without a human carrier or carriers. Curriculum design is a social process that is carried out under less than optimum conditions. There is negotiation involved, both within the team, and between the team and the rest of the faculty, all questions that affect resource allocation are disputed in the modern University. The process is carried out under arbitrary institutional deadlines, and in the context of other events that demand time and attention. There is an understandable fear that any change may presage a descent into chaos, and that the best thing to do is to keep doing the same as past experience has validated only more assiduously. This strategy will always work for a short while, although in the long term it is known disparagingly as: “when in a hole keep digging”. Such well intentioned but ultimately counter-productive effort is depressingly common in modern public life, and far more difficult to diagnose when operating within an organisation than from the outside. Curriculum design is more likely to resemble the intellectual equivalent of last minute packing than the measured and fully articulated process of decision making implied by the account given above.

The use of legal theory in curriculum design must be mediated by the professional staff who undertake curriculum design. It is the experience and reflection of academics that make the process possible. It is the satisfaction of improving the quality of student and staff experiences that enables the sustained application of professional attention to curriculum design. The very human motivations are not peripheral to the process of coherent curriculum design. Remove these professional motivational factors and there is no process, although it is possible to generate a simulacrum of the process through organisational directives. Therefore, it is vital that the abstracted account given above be understood as just that, and not as a sufficient account of course design.

The purpose that can be supplied by legal theory is specific to the subject content of legal study. Having such a purpose can inform the shaping and use of materials in course design, whether those materials themselves are legal or non-legal. It is not necessary to have a clear purpose in mind in order to deliver legal education. However, a purpose, or set of purposes, does provide a way to deal with innumerable choices that face the designers of any course of study. It is important to note that purposes are not inevitable or imposed by any outside force. As the choice of purpose, or purposes, will often be heavily value laden it is important to be self aware of the reality of the choice. This is not to deny that choices are constrained. However, constraint is always present in human action, and, for example, the need to ensure that a course of study will satisfy generic learning outcomes does not reduce the importance or utility of a purposeful approach to course design.

References

- Allott, A (1980) *The Limits of Law* (London, Butterworths)
- Armstrong, K (2006) *The Great Transformation* (London, Atlantic Books) at p 257
- Atiyah, PS (1979) *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press)

- Austin, JL (1976) *How to do Things with Words* (Oxford, Oxford University Press)
- Baker, J (2002) *An Introduction to English Legal History* (London, Butterworths)
- Becker, GS (1976) *The Economic Approach to Human Behaviour* (Chicago & London, University of Chicago Press)
- Bigwood, R (2003) *Exploitative Contracts* (Oxford, Oxford University Press)
- Blackmore, SJ (1999) *The Meme Machine* (Oxford, Oxford University Press)
- Buchanan, J M Jnr (1999) *Public Finance and Public Choice: two contrasting visions of the State* (Cambridge Mass & London, MIT Press)
- Coldham, S (1978s) 'Land Control in Kenya' *Journal of African Law* 63, and
- Coldham, S (1978b) 'The Effect of Registration of Title Upon Customary Land Rights on Kenya' *Journal of African Law* 91
- Cooke, E and O'Connor, P (2004) 'Purchaser liability to third parties in the English land registration system: a comparative perspective' *120 Law Quarterly Review* 640
- Dawkins, R (1976) *The Selfish Gene* (Oxford, Oxford University Press)
- De Soto, H (2001) *The Mystery of Capital* (London Black Swan)
- Dworkin, R (2000) *Law's Empire* (Oxford and Portland Oregon, Hart)
- Fehlberg, B (1994) 'The Husband the bank, the wife and her signature' *57 Modern Law Review* 467
- Fehlberg, B (1997) *Sexually Transmitted Debt: surety experience and English law* (Oxford, Clarendon Press)
- Fox, L (2006) *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart)
- Finnis, J (1980) *Natural Law and Natural Rights* (Oxford, Clarendon Press)
- Frank, J (1970) *Law and the Modern Mind* (Gloucester Mass, Peter Smith)
- Fuller, LL (1969) *The Morality of Law* (New Haven & London, Yale University Press)
- Gadamer, H-G (2008) *Philosophical Hermeneutics* translated and edited by David E Linge (Berkeley, University of California Press)
- Gardner, H (2006) *The Unschooled Mind: Why Even the Best Students in the Best Schools May Not Understand in The Development and Education of the Mind: The selected works of Howard Gardner* (Abingdon, Routledge)
- Gibbons, J (1994) (ed) *Language and the Law* (London, Longman)
- Hart, HLA (1959) 'Scandinavian Realism' *Cambridge Law Journal* 233
- Hohfeld, WN (1913) 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' *23 Yale Law Journal* 16
- Hohfeld, WN (1917) 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' *26 Yale Law Journal* 710
- Hart, HLA (1997) *The Concept of Law* (Oxford, Clarendon Law Series)
- Holmes, OW (1897) 'The Path of the Law' *10 Harvard Law Review* 457
- Holmes, OW (1963) *The Common Law* (Boston Little, Brown and Company) at p 1
- AM Honore, (1987) 'Ownership' in *Making Laws Bind*, (Oxford, Clarendon Press)
- Kuhn, T S (1996) *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press)

- Lawson, FH and Rudden, B (2002) (Oxford, Oxford University Press)
- Llewellyn, KN (1940) 'The Normative, the Legal, and the Law Jobs: The Problem of Juristic Method' 49 *Yale Law Journal* 1355
- Llewellyn, KN and Hoebel, E A (1941) *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, University of Oklahoma Press)
- Maitland, FW(1929) reprinted (1984) *Equity: also, The forms of action at common law: two courses of lectures*, edited by AH Chaytor and WJ Whittaker (Littleton Colo, Rothman)
- Mokyr, J (2002) *The Gifts of Athena* (Princeton & Oxford, Princeton University Press)
- North, D C (1990) *Institutions, Institutional Change and Economic Performance* (Cambridge, Cambridge University Press)
- North, DC (2005) *Understanding the Process of Economic Change* (Princeton, Princeton University Press)
- Pinker, S (1999) *Words and Rules: The ingredients of language* (New York, HarperCollins)
- Pinker, S (2002) *The Blank Slate: The modern denial of human nature* (New York, Viking)
- Pinker, S (2008) *The Stuff of Thought: Language as a window into human nature* (London, Penguin)
- Popper, K (1961) *The Poverty of Historicism* (London, Routledge and Kegan Paul)
- Popper, K (2002) *Conjectures and Refutations* (London, Routledge Classics)
- Richard Rorty, R (2007) *Philosophy as Cultural Politics* (Cambridge, Cambridge University Press) at p 143
- Schelling, TC (1980) *The Strategy of Conflict* (Cambridge Mass & London, Harvard University Press)
- Seabright, P (2004) *The Company of Strangers: A natural history of economic life* (Princeton & Oxford, Princeton University Press)
- Searle, JR (1979) *Expression and Meaning: studies in the theory of speech acts* (Cambridge, Cambridge University Press)
- Sen, A (1999) *Development as Freedom* (Oxford, Oxford University Press)
- Stigler, GJ (1989-90) 'Two Notes on the Coase Theorem' 99 *Yale Law Journal* 631
- Tammet, D (2009) *Embracing the Wide Sky* (London, Hodder & Stoughton)
- Twining, W (1974) 'Some Jobs for Jurisprudence' 1 *British Journal of Law and Society* 149 from 156
- Twining, W (1975) 'The Bad Man Revisited' 58 *Cornell Law Review* 275
- Twining, W (1979) 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' 95 *Law Quarterly Review* 557 at 575
- When, F (2004) *How Mumbo-Jumbo Conquered the World* (London, Fourth Estate)
- Wragg, T (2005a) *The Art and Science of Teaching and Learning: the selected works of Ted Wragg* (London, RoutledgeFalmer)
- Wragg, T (2005b) (ed) *Letters to the Prime Minister: the future of education* (London, New Vision Group)
- Youdan, TG (1984) 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*' 43 *Cambridge Law Journal* 306

Zweigert, K and Kotz, H (1987) *An Introduction to Comparative Law*, translated by Tony Weir (Oxford, Oxford University Press)