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LEGAL THEORY AND LEGAL EDUCATION — THE NEXT STEP

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INTRODUCTION

In a previous article,[1] we provided an analysis of some of the problems faced by those who try to introduce the "extra" critical and theoretical dimension into legal education that most law teachers feel is needed. Eight factors militating against its introduction were identified and examined: [2]

1. uncertainty over what the "extra" is;

2. even if the "extra" is successfully identified (for example, economic analysis, moral criticism),[3] staff often lack the training and up to date knowledge to teach it;

3. given limited time and resources, 1 and 2 make it likely that the "extra" will be allocated a low priority;

4. limited texts and casebooks;

5. anticipated unfavourable reaction from students;

6. assessment methods (for example, exclusive use of "problem" questions) that marginalise critical and theoretical issues;

7. perceptions that the profession requires all subjects to be taught in the traditional way; [4] and

8. the structure of the curriculum which marginalises critical and theoretical subjects.

That paper attempted to resolve the difficulty in defining what the "extra" dimension is. It saw that dimension as involving the asking of general questions about law (for instance, about the nature, categories and organisation of legal propositions; the nature of legal techniques, argument, and justification; and the institutional, social, ideological and historical contexts in which legal rules and techniques operate), [5] and the posing and examining of theories to answer those questions. Those theories appear in their general and rarified forms as theories to be discussed in jurisprudence. They appear in less general and rarified form as "middle range" [6] theories in the questions we ask about the particular areas of legal practice (for example, can this rule be justified; what is the origin of this concept; and what particular values, interests and institutions affect the content of this doctrine)?

Suggestions were made as to how the law curriculum could be restructured so as to give legal theory its proper role. A key part of the solution lay in the reintroduction into the curriculum of the kind of questioning and theorising provided by jurisprudence. In all, a six stage process was envisaged: [7]

1. In the standard first year introduction to law course, students would be exposed to theoretical and critical issues through the inclusion of a jurisprudence component.

2. In mainstream subjects, teachers could ask more specific versions of the general jurisprudential questions relevant to their subjects, and draw upon theories with which students, as a result of (l), have some acquaintance. (More importantly, because of (l), they will be familiar with the process of questioning and theorising itself.)

3. In third year, a full blown jurisprudence course would provide the opportunity to compare theories, and reexamine them in the light of how useful they appear to have been in the subjects in which they were considered. It would also provide the opportunity to examine new theories.

4. Advanced jurisprudence subjects would enable students to deal with specific theoretical and critical issues in greater depth.

5. In later year subjects staff would be able to introduce theoretical elements to students with a fair degree of sophistication.

6. Finally, although not part of the formal curriculum, the communication of theoretical ideas among staff should be encouraged and facilitated. This achieves three purposes. First, it acquaints staff with recent developments in legal theory. Second, it enables the teachers of jurisprudence to know the theoretical concerns of their colleagues so that the third year jurisprudence course could provide a good preparation for the theories that they would come across in their other subjects. Third, it improves the state of theoretical debate within the faculty.

Although we tried to show how legal theory could be incorporated into the law curriculum as a whole, we did not discuss, except in the most general terms, how it might be included in individual law subjects. Whereas our previous article was concerned with the structure of the law degree as a whole, this paper is concerned with individual subjects. How is the teaching of crime, torts, contracts, property, and so on, to be changed in light of our proposal? Our purpose here is to take this further step, and indicate how this might be done. The paper sets out and examines two models for teaching non-jurisprudence subjects. They will be referred to as the "critical morality" and "melee" models.

The spirit in which these models are put forward must be made quite clear. It is not suggested that these are the only models, or indeed, that of these two models, one is better than the other. (Indeed, the authors' own preferences diverge on this. The former is Wood's preferred model, the latter Sampford's.) The answer to the question of how to introduce the theoretical element into individual law subjects — and indeed, the content of that element — will vary from teacher to teacher. There is no intention to stifle the creativity of law teachers in putting forward models of their own.

We have no desire to push our particular models. They are not put forward as paradigms, but as combining various elements which could be mixed in different ways, according to the preferences of law teachers. [8] The point is that a range of educational experiences should be provided to every student who enters law school. We would prefer a law school with a couple of would-be Langdells and Kingsfields, [9] than one composed entirely of Sampford or Wood clones. We would vastly prefer a mixture that included only one Sampford and one Wood within the full range of views and styles. It would be disappointing if a student passed through law school without exposure to classic positivists, formalists, natural lawyers, Dworkinians, realists, Marxists, critical legal scholars, deconstructionists,

functionalists, feminists, proponents of economic analysis, and so on. This pluralist stance is not favoured for the same reason that we formerly exposed our children to cow pox in a controlled environment, namely to prevent them from catching the more virulent form outside. It is proposed from a genuine desire that students be exposed to the full range of theories that underlie informed discussion about law and have the opportunity to assess how successful these theories are in handling important legal questions. [10]

Before outlining our two approaches to incorporating legal theory into classic law subjects, some further general points are in order.

First, law teachers should not expect to cover all of the material associated with a particular subject or all of the questions that could be asked about it. Just as we want students to do a fairly wide range of subjects so we want them to be confronted by a range of questions and theoretical answers to them. However, just as we do not attempt to teach every area of law in a single undergraduate law subject, so we would not attempt to pose all the theoretical questions about law nor attempt to use all the theoretical answers in a single subject. Both are tasks that can and should only be addressed by the law school as a whole rather than in individual subjects. Individual academics should ask the questions that are of interest to them and which the theory of law to which they adhere (be it a standard theory or idiosyncratic) tells them is important. This is not to say that we should all be autonomous islands in the choice of questions and theoretical answers. Some communication and cooperation between staff is necessary to ensure that students are exposed to a wide range of questions and theoretical answers to them. But this is no different from any other problem in designing the curriculum. The classic subject areas such as torts, contract, property have to be parcelled up and allocated among the staff. Not everyone can teach their favourite subjects, but the interests of a well balanced staff mean that most can teach most of those areas of law in which they are interested. As it is with the familiar division of traditional subjects, so it is with the division of theoretical elements in the curriculum.

The questions that a law teacher asks will depend on what his or her own theory regards as important. For example it will depend on whether he or she sees law as capable of study independently of the contexts in which it operates (such theories we describe as more "internalist" along an "internalist/externalist" continuum) or whether it must be studied in one or more of its many contexts (which theories we call "externalist"). The former include most "positivist" and "formalist" theories. [11] The latter include most of the rest including those of the authors. [12] The kinds of theoretical issues in which internalists are interested centre on how legal doctrine is organised independently of its social context (by *grundnormen,* rules of recognition, basic principles) and what those rules or principles are in their jurisdiction. The kinds of theoretical issues that externalists concentrate on are what the most determinative or enlightening context is, or contexts are (economic, political, class, moral, ideological and so on), how that context is to be understood and the extent to which law is immersed in that context.

Although a personal theory will supply the agenda of questions (and will tend to privilege the answers it provides), it would be rare to look only to one's own theory for potential answers. An interesting though not very good example of this is to be found in the way that Dworkin uses versions of positivism, economic analysis and his own theory to answer a theory of "bogus" hypotheticals. [13] The problem with Dworkin's approach is that he does not deal with real examples of his opponent's theories and the case examples seem chosen to illustrate the claimed superiority of his own theory.

The first problem is easily dealt with by the more usual academic activity of dealing with real opponents rather than our own reconstruction of them. The second problem is minimised because we are far more constrained in the cases we choose to cover when we teach an area of law.

Second, natural divisions of subject matter are not to be expected. The main divisions with which we are familiar are those made by nineteenth century textbook writers. They were largely arbitrary even then and to the extent

that they were not, they were related to the way they saw their world and their law. The world, the law and our visions of them have changed markedly since then and we should not assume that the subject divisions should remain the same. [14] This is not to deny that it is necessary to achieve some conventional agreement among staff about what is taught and what questions to ask. The point is that the conventional nature of the divisions should be explicitly acknowledged. Furthermore, they should not be rigidly adhered to. It is educationally very useful for students to see how the cake can be cut in different ways, how it can look quite different as a result, and how different questions can be asked about the material. [15]

Third, once law teachers attempt to incorporate the theoretical component they will truly appreciate that it is not an extra (and certainly not an optional one) but an integral part of the teaching of any subject and the reason for having such subjects in a university at all.

Fourth, the methods adopted will vary depending on whether Jurisprudence has been made part of the compulsory core curriculum. If it has, then students will obviously be more adept in handling theoretical issues. If jurisprudence has been marginalised it will not be impossible — it will just take a bit longer. It would be like trying to teach an ordinary practice subject to students who had no experience of case analysis. The analogy is deliberate. One of the themes we have been emphasising is that the skills involved in the questioning and theorising about jurisprudence should be seen to be as central to a university law degree as any of the classic skills. Indeed, it is the addition of this reflexive questioning about the whole process of legal reasoning and the legal institutions in which it is practised that distinguishes a "trade school" from a university institution. Familiarity with, and the ability to argue from, critical and theoretical perspectives are central to the kind of legal training we should offer in a university law school and demand from our graduates.

THE CRITICAL MORALITY MODEL [16]

This model takes the dominant context to be that of critical morality. [17] It views law as applied moral philosophy. It emphasises the questionable value basis to law, and the need to see the law of a particular jurisdiction as just one possible legal regime among many. This model sees the teaching of a branch or particular topic of doctrinal law as consisting of a number of stages. These stages are logically distinct even though we may move back and forth between them for the very best of pedagogical and intellectual reasons. Indeed, the process of moving back and forth is not restricted to adjacent stages, or any two stages at the one time. The more stages that are involved, the richer and more rewarding the process becomes, each new stage adding fresh ingredients and perspectives.

Depending on the branch of law, or the topic, the basic order of the stages may even change. Similarly, the relative importance of a particular stage and the appropriate time to be devoted to it varies with the branch or topic in question. In the space available, little more can be attempted than sketching the various stages of this model, indicating briefly some of the problems they raise. Fuller exposition, and detailed rebuttal of objections must be left to another occasion.

Delegalisation

The first stage is to "delegalise" the "area of life" (to use the broadest possible term) at issue and to describe it in ordinary language terms. Delegalisation requires stripping the area of life of its legal trappings, making it as accessible as possible to lay persons (which, after all, is what law students are). The aim is to start with a level of description which makes the area of life most comprehensible to those who work and operate in it.

Delegalisation is also essential to facilitate the deepest possible legal analysis of the area of life in question, the analysis which makes the fewest and weakest presumptions. The ultimate concern is with the question of what the

best legal regime to govern the area of life in question is.

Delegalisation is not just the most important stage, but the most difficult to explain. (Subsequent stages could be viewed as successive steps in "relegalisation".) The following points should help clarify it.

First, delegalisation may not always be a matter of a reduction to ordinary language. In criminal law, this will generally be the case, because basic criminal law terms, such as murder, rape, theft, are also ordinary language terms. Murder, rape, theft, and so on, are contrary to moral, and not just legal, norms — they are "moral" and not just "legal" offences. (Indeed, being the former is essential to explaining why they are the latter.) However, in other branches of law, for instance, business law or constitutional law, the reduction may be to another specialist discourse, to a number of specialist discourses, or to a combination of one or more specialist discourses and ordinary language. To put the point another way, the reduction is not necessarily to ordinary language, but to the standard discourse of a particular area of life, the terms of which may, to differing extents, have entered ordinary language.

A second, associated, point is that delegalisation is sometimes a rather truncated process. The "delegalised" end product may not look very different from the legal forms with which we started. This will depend on the area of life in question. Legal terminology is often incorporated into ordinary language (consider the criminal law examples above), or the relevant specialist discourse or discourses. Alternatively, legal terms are often taken over from ordinary language (or the relevant specialist discourse or discourses), and given more precise meanings.

For instance, in teaching the topic murder, one could get students to examine the ordinary language or common sense notion of murder, to consider murder as part of ordinary moral consciousness. Hard cases, conveniently provided by reported decisions, could be used to test ordinary moral intuitions about murder — for instance, whether recklessness is sufficient *mens rea,* or the requirements of provocation to successfully reduce "moral" murder to "moral" manslaughter. [18]

Thirdly, delegalisation is just one stage in what could be a longer process of deconstruction. Having reduced legal discourse to ordinary moral discourse, a teacher could try deconstructing the latter to, for instance (depending on the reductivist theory preferred), discourse about rational self-interest, or about power relations in hierarchical capitalist societies. Such further deconstruction is not specifically envisaged by this model, but neither is it explicitly excluded. The main concern here is to present the insider's point of view, [19] to see how the actors who function and operate in a particular area of life understand it. It is left to further investigation whether this is in fact misunderstanding, "false consciousness" produced by ideological forces beyond their control. This is not to say, however, that more radical types of deconstruction, if successful, could not open to the way to a deeper level of analysis.

General Moral Theory

At this stage, a critical moral theory must be developed at the most abstract and general level. This task is best undertaken in a course of its own, or more briefly, in the jurisprudence component we recommend as an essential part of standard introduction of law subjects. The aim here is not just to expose students to different moral theories (for example, utilitarian and deontological), but more importantly, to acquaint them with the process of moral theorising itself, and to train them in its techniques. Students should be encouraged to develop their own theories. Apart from anything else, this is the best way to get them to understand, to see inside, existing standard theories.

What is vital here is that students come to realise that moral thinking presents an alternative form of normative thinking to legal thinking, and indeed that legal reasoning cannot handle a practical problem properly unless it is based upon sound moral principles. To think legally, law students must be able to think morally. They must be first

and foremost moral philosophers. They must learn how to face issues as moral issues, and not retreat prematurely into law, using legal techniques to disguise their essential moral nature.

Moral reasoning is not just the basis of legal reasoning, but is often explicitly incorporated into legal decision making. This happens when, for instance, a statute bestows a discretionary power upon an official and lays down broad standards for its exercise, or when a constitution includes human rights guarantees. Moral reasoning is also obviously relevant when law-making rather than mere law-application is required. On the standard positivist view of law as an incomplete system of rules, a judge is forced to exercise his or her discretion and create law whenever the relevant rules are exhausted. A capacity to reason morally is similarly required by academics, law reform officials, and all whose business it is to criticise the law and propose improvements, as well as by anyone generally involved in legal policy work. [20]

Concretisation

It is necessary now to develop a lower level moral theory to apply to the area of life one is dealing with. Application is not generally a simple matter. The theory will have to be worked out in greater detail, to see what is the best legal regime to cover the area of life in question. The more abstract the theory, the more development is required to see how it applies — the longer, the more complicated, and the more controversial the process of "concretisation". Each level of detail means more forks in the road, more alternatives.

Concretisation will, among other things, require relying upon debatable propositions about human psychology, and the functions, structures, and dynamics of social organisations. Social theory will be well and truly in play here. What is crucial is the extent to which and the way in which personal ideals must be compromised — or, alternatively, further enriched — by an understanding of what people and societies are really like.

Grafting

Institutional factors, for instance, stability, security, efficiency and cooperation, will have been taken into account in the process of concretisation. Whereas stage 2 is concerned with developing an abstract moral theory and concentrates on such traditional political morality ideals as justice, liberty and community, stage 3 is concerned with practical questions which arise in trying to transform a political or legal ideal into a workable system of human arrangements. However, where, as will generally be the case, one is working at a level lower than the design of an entire legal system, the question remains how the best legal regime personally developed for a particular area of life is to be grafted onto the actual system. A preferred legal regime will require modification so as to articulate with the one already in existence.

The Local Legal System

The stages examined up until now will, on the whole, appear foreign to most law teachers. However, from here on, things will look more familiar. My fundamental criticism of standard law teaching is that it excludes these stages. It opens the book halfway through, so to speak, skipping the first four chapters. It therefore presents a misleading view of law which accounts for at least some of the difficulties law students experience. So far, then, we have been concerned just with the question of what the law should be — not just normatively, the moral theory it should serve, but also analytically, the best conceptual scheme (simplest, most powerful, and so on) to house this theory. [21] In the present stage the teacher turns to consider his or her own legal system, to examine the existing legal regime that governs the area of life under consideration. The reasons for this stage may seem obvious, but are nevertheless worth spelling out. First, there is the undoubted danger that, if allowed to proceed in isolation from any existing legal regimes, the task of law construction will become too abstract. The very abstraction which is the virtue of the

initial stage of delegalisation becomes increasingly a vice as one turns to the successive stages of "relegalisation". It is necessary to look at a real legal system to keep one's feet on the ground. Trying to develop the best possible legal regime for an area of life without any knowledge of any existing regime is rather like trying to play chess with oneself. A real system will not only present possible solutions to problems already considered, but perhaps more importantly, reveal totally new issues. Legal fact is often stranger than legal fiction. It is also essential to have some understanding not just of particular legal regimes in order to handle the area of life being considered, but with an entire legal system, to assess how successfully a legal system can function as a whole. It does not need to be pointed out that there are obvious advantages in choosing the local legal system as an example of an entire legal system. Students should have some knowledge of the law of their own particular jurisdiction, at least, on the assumption that this is the jurisdiction in which they are most likely to practise. Also, irrespective of this, there is the benefit of having first-hand experience of the social context in which the law of their jurisdiction operates.

Historical and Comparative

Although it is important to look at the local and familiar legal system, it is far too narrow to consider the system merely as it presently stands — to take a "time-slice" [22] view of it. It is essential to see the current legal regime in its proper historical context and to understand the forces — both internal to the law, and of a broader social nature — which shaped its development. It is equally important to compare the current legal regime not just with legal regimes produced in the past in this jurisdiction, but with those of other jurisdictions, especially jurisdictions with a different legal heritage; to contrast, for instance, Roman rather than common law.

Just as considering the current legal system will lead to revising conclusions reached at the end of stage 3 regarding the best legal regime for the area of life at issue, so also further historical and comparative knowledge will doubtless lead to further modification. Examining other regimes will not only improve understanding what is the best (or, at least, which are commendable), but will give a better idea of the full range of possible regimes. As pointed out earlier, this model envisages a continual movement between the various stages. What is considered at any one time to be the best possible legal regime is always open to revision. The conclusions reached at the end of stage 3 are at best tentative. They are "permanently provisional."

Criticism and Reform

We now have before us tentative knowledge of the best possible legal regime for the area of life in question, some knowledge of the local legal regime, together with some awareness of how it has developed and how it differs from other legal regimes. This is a sound position — or, at least, as sound a position as can reasonably be expected — to examine the legal system critically and propose modifications and improvements. [23] To reiterate, the ultimate concern of this model is the design and implementation of the best possible system.

So much for a brief stage-by-stage exposition of the critical morality model. To conclude, it stresses the constructive nature of law, the fact that law is a human artifact, not something handed down from on high. [24] The best way to get a student to understand law, to see it from the inside, is to make him or her construct it for himself or herself — take it to bits and see whether he or she can put it back together again. For instance, constitutional law students should be required to write a constitution, contract law students to draft a contract, and so on. The underlying belief is that it is in the most practical contexts that theoretical issues are best studied. (Clinical legal education has an essential role in any genuinely theoretical law course.) The aim is to instil in students a sort of "theoretical practicality", in contrast with the "atheoretical practicality" which is all that an apprenticeship system or a "trade school" legal education can provide.

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THE "MELEE" MODEL

The "melee" model is informed by Sampford's "melee theory" of society and law [26] but is not limited to it. This model will hopefully be useful to many who would not adopt that theory in whole or part.

Texts

Like Wood's critical morality model, the melee model does not eschew a close look at the texts of law — judgments and legislation. What distinguishes this model is the way it handles these texts. It sees the secret to understanding legal texts in the continuing and only partially resolved conflicts that lie within them. This not only provides a method for more comprehensively interpreting legal materials, it provides a focus for handling the contextual, critical and theoretical materials as attention is drawn to the various conflicts outside the courts that generate attempts by parties to the conflicts to use legal institutions to further their ends.

Traditionally many legal academics have seen their activity as the exposition of a "body of law" (in fact a set of texts) as a coherent body of rules, standards and principles. (This is not only the aim of Dworkin's hypothetical Hercules but legal positivists like Kelsen and Harris see it as the defining characteristic of a "legal scientist".) [27] At other times attempts are made to show some historical trend in which the law has been evolving towards some set of principles — principles that are usually portrayed as more natural, sophisticated and correct. [28] For example, it is common to see the law of personal injuries evolving towards negligence and personal responsibility (even if the responsibility is merely to insure) and away from strict liability, although an interesting variant is to see it evolving towards legislative "no fault" schemes.

The melee model rejects such notions. This is not proffered as something new. It seems that much of twentieth century legal philosophy has been driven by the realisation that law does not reflect a coherent and systematic set of rules and principles and is not evolving towards one. It has generated a search for causes of this failure and what alternative views of law can be offered. [29] The "melee theory" of law identifies the causes of this failure in the divergent interests, values, ideals, and beliefs of those who have influenced the content of the law. [30]

However, where some who come to similar conclusion [31] might regard this as signalling an end to the exposition of law, the melee model suggests a new expanded role for it. Rather than presenting as coherent that which is not and whose manner of creation is unlikely to make it so, it attempts to highlight the inconsistencies — identifying the conflicts in decided cases and between the different judges in split decisions.

By incorporating conflicting rules, principles and other legal propositions, this mode of exposition can actually cover and account for more material than traditional legal exposition. It is far more inclusive than a Dworkinian legal system. The latter declares many "mistakes" and must exclude them from law (something which is very difficult for decisions which the Herculean judge has no power to overturn). This kind of exposition includes — indeed it embraces — the cases that are an embarrassment for the others. It includes both Dworkin's preferred decision and what he calls a "mistake". It also attempts to explain why the conflict was generated and why it is likely to continue. Whereas the evolutionary theories have to treat the cases that are still determined according to the old principles as historical throwbacks or areas in which the coming ideas have not yet come, this approach can cite these cases as evidence that the struggle continues. For the conflict model these cases are not a marginal part of the law but are part of its essence. The creation of legal texts is something over which there is constant struggle.

This struggle is never perfectly balanced. Some interests, groups and institutions win more often than others. But neither is it ever won completely, finally or in every case by either side. Indeed one of the reasons for this is the multiplicity of sides involved so that the line up of interests vary from case to case, statute to statute. But there are

other reasons of course. First of all there is the limited determinacy of legal texts — even when one side has won there is usually room for argument left within it. Secondly, judicial institutions involved enjoy a "relative autonomy" and independence. This is not because judges have some miraculous source of objectivity or access to the correct legal answer. It arises because judges do not see their task as ensuring that one side wins or loses and because the legal conflict is pursued on what is essentially a different battleground from that on which the external conflicts that generated it are fought. In the same way that two armies may fare differently in different conditions on different days depending on the resources available and committed on the day, so the kinds of conflicts that are taken into law may have different outcomes when taken onto the field of legal argument. [32]

Of course, legislative institutions are, unlike judicial ones, intended to be the subject of social forces (especially when expressed in terms of voter preference) and their key officials do see themselves involved in conflict. But even these institutions enjoy a degree of autonomy because politicians are primarily interested in struggles with other politicians, and legislative outcomes are not determined simply by the strength of the contending parties to the external conflict but by the party political conflict it generates.

The melee model sees law in terms of the cut and thrust of the groups and interests that attempt to affect law, sometimes in concert but more often in an uncoordinated way as they pursue their own conceptions of right and/or self interest. We can see the victories — usually temporary and limited, occasionally sudden and/or far reaching, but rarely final. The expository part of a classic law subject concentrates on the analysis of the score board and the current state of play and the way that the various scorers (academics) and players (judges, legislators and advocates) perceive the score and the play. This can be fascinating and holds greater attention and interest than the more traditional and dubious account of law as the slow triumph of reason. It is also less bewildering to students who genuinely wonder why cases are decided as they are and cannot fathom why the often unobvious solution adopted by the courts has angels and reason on its side.

Such an account of the classic materials of law raises a host of compelling questions — questions that underwrite our interest in the conflicts within the texts of law and which must be addressed before we can understand them. What are the external conflicts which legal conflicts reflect? How were those external conflicts rephrased as legal conflicts? What alternatives did judges have (whether consciously or not), and why did they "choose" the way they did? How are those same conflicts rephrased as philosophical debates over principle? How will the results of the legal conflicts dealt with by the cases discussed in the course bear upon future, similar legal conflicts? How will the results of the legal conflict affect the external conflict that generated it? What opportunities are there for either side to exploit their victory or to make a comeback? The focus on conflicts helps us to comprehend the external relations of law even more than it helps its "internal" exposition. Let us now look at some of these questions in more detail and suggest some ways in which they may be handled.

Legal Conflicts as Recollections of External Conflicts [33]

Asking such questions introduces historical and social dimensions in the most natural way. The former is supplied as we seek the origins of the conflicts that drive law; the latter is supplied by relating the conflicts in law to those in society. It also demonstrates for those who still doubted it that it is impossible to adequately comprehend law without taking into account these dimensions but also how such an account will be impoverished and will necessarily fail to explain the material it seeks to cover.

This provides an excellent opportunity to apply various theories about the kinds of conflict that find their way into law. These might be general theories of conflict that are generic to modern state and society (for example, Marxism and Feminism) or more limited theories about the conflicting groups in a particular place and time (for example, those between manufacturers and consumers or between "taxpayers" and the Commissioner [34]).

Rephrasing External Conflicts as Legal and Philosophical Conflicts

This leads us to questions and theories about the way lawyers individually and institutionally react to the interests of their actual and potential [35] clientele. Are the external conflicts translated into a merely technical legal language (the traditional view) or are some interests involved in the external conflict rendered invisible or ineffective because of some dominant ideology within law or the ideology or organisation of the legal profession (as many critical legal scholars would argue). Similarly, we are led to ask how the same conflicts have been reflected in philosophical debates about rights and morality and whether those debates have had an indirect influence on the way that the conflict is seen within law. For example, has the predominantly individualist philosophy in the west led lawyers to see a particular problem in terms of the conflict of interests between individuals rather than the economic interests of groups? [36]

Judicial Choice

The fact that judges can come to different decisions on the basis of the same legal texts is demonstrated weekly in virtually every appellate court. One of the great questions in jurisprudence has been explaining how the choice arises, the extent to which it is circumscribed, and how it is that judges can exercise choice while believing that they do not. The considerable time spent on discussing cases in the classic law subjects should provide an excellent opportunity to use the various jurisprudential theories that address the problem. We could examine the choices judges had to make (whether consciously or not). We could look at the opportunities provided by the conflicts within the legal texts as well as the limitations imposed by the institutions of which they are a part (notably the possibility of appeal and, in extreme cases, impeachment; the necessity to carry fellow judges; the desire to retain the good opinion of the profession) and the conceptions they have of their role. We should then analyse why they "chose" the way they did using Hart, Dworkin, MacCormick, Stone, Posner or others that the teacher finds useful. [37]

Effects on Future Legal Conflicts

If the earlier cases did not determine the outcome of the cases considered in class, the issue of what effect such cases have becomes an important one. What opportunities are there for either side to exploit their victory or to make a comeback? This raises the various theories of precedent and authority which are often put in simplistic form in first year and not subjected to re-examination and scrutiny in the subjects in which they were supposed to be of most assistance. It also raises the issue of judicial reasoning and autonomy from a slightly different perspective — having asked how constrained the judges were in reaching previous decisions we also ask how far they now constrain later judges.

Effects on the Wider Conflict

The question here is how the legalised version of the conflict affects those involved in the conflict. The answer to this is not necessarily straightforward. The results in court cases are sometimes adopted and implemented without much fuss. But in many cases the result cannot be achieved without the mediation of government and non-government institutions and the officials within them. Here, theories about the operation of institutions in general or of particular institutions are highly relevant. Most of these will emphasise the importance of the institutional medium through which the effects are achieved and ability of officials to deflect and redirect the intended effects, especially where those officials are given a degree of autonomy and are not subject to close monitoring. [38]

The Changing Conflict

Like most approaches that possess an historical dimension the melee model easily allows a future dimension as well. If the current law results from a balance of factors, it is natural to ask whether those factors have or will change and what effect that altered balance will have on law. Suppose a teacher viewed the existing law of employment as resulting from a combination of the superior financial resources of the employers, the greater organisational resources of the unionists, the individualist ideology of the judges, the institutional interests of the Arbitration Commission and the High Court's ambivalence towards the institution. It would be natural to ask whether any of these factors have changed and if so how they are likely to affect the texts and operation of the law? If changes in them have occurred since the law to be explained was made, has any change in the law been commensurate and, if not, does this reflect adversely on the theories that posed these as explanations of the dynamics of law? [39]

Criticism and Reform

A critical dimension is easily accommodated within the melee model. As the law does not neutrally solve the problems that come before it by providing a battleground on which the conflict is played out, we are entitled to take sides. Indeed, it is difficult to do otherwise. We can be critical of the social forces which shift the range of choice of officials and judges in specified directions. Even when acknowledging the limits of parliamentary action we can be critical of legislators and legislation — we are used to as much. But we can be critical of much else. We can and should criticise appointments to the judiciary when the values of those chosen are unrepresentative of the range of views within the community. We can be critical of the way judges exercise their choice and hence enforce the responsibility for their own choices that is central to the judicial role. We can examine any judicial justifications of rules based on a claim they will have certain desired consequences. Academics can discuss whether those effects really are achieved and criticise judges if they do not revise their chosen formulation of the rule when it is demonstrated that the consequences predicted by the judge do not eventuate. The critical dimension includes the identification of the part that various officials and texts play in producing effects for which law is criticised. Most importantly of all, it includes the identification of what has to be done to achieve desired effects or eliminate undesired effects by action in a variety of fields — judicial, parliamentary, social, economic and why action in some fields is insufficient. For example American activist lawyers in the 1970s failed to improve the lot of the urban poor significantly by litigation alone. [40] Any substantial change requires actions at many different sites so that we should have realistic expectations of the degree of success achievable at any one of them. We should not expect any single change to achieve the desired effects but should appreciate it for what it is — a positive part of that broader change.

Likewise where some intended and desired effect is not being achieved, the critical dimension includes a search for the site(s) at which official decisions, errors or obstruction is occurring and where new personnel need to be added or new relations created to ensure congruent activity by the valid official. For example, if a tax crack-down is failing, academics can identify judges who wilfully misinterpret the text of the Act, the existence of complex wording that is genuinely misunderstood, lax foreign exchange control which allows income to leave the country without being taxed and so on.

An integral part of this critical dimension is that students should learn to argue for themselves the merits of legislative, judicial and other official decisions. This should be twofold. First they should consider how a preferred result could be achieved by coordinated action of the various officials and institutions who would be needed to bring it about. Secondly, they should consider how officials could best realise those values in the absence of such co-ordinated action. The first involves a critique of law as a whole, the latter of individual actors within it.

In this the student should be encouraged to apply values that he or she is prepared to endorse personally. One of the consequences of the disordered and conflicting nature of law is that law as a whole does not incorporate any specific set of values but a profusion of them. The answer as to what values should be applied to the resolution of

conflicts within law is inevitably an individual one. This is not an invitation to moral bankruptcy. It is an insistence on the very opposite — a deep moral responsibility for personal moral conclusions and the actions that flow from them. Moral bankruptcy occurs when the values applied are not ones that we would defend as our own. As law and the community offer only a cacophony of values anyone who says that they apply legal or communal values in reaching decisions is merely applying some of those values — usually the ones that appeal to the lawyer or its [41] client. Elsewhere Sampford argues that individuals possess "moral sovereignty" in the sense that for any individual it is true that no other person or institutions can invalidate a moral judgment by that individual. [42] Even where the teacher believes that there is some other source of moral value outside the individual's moral judgment, the same process would lead him or her to insist that students apply whatever source to which they adhere. In so doing an individual is not denying law but taking part in the legal melee as a full human being which is by its nature purposive and reflexive in the sense that it is aware of what it is doing and why.

Where to Start — Cases or Conflict

As outlined above, the melee model starts with case analysis. This is not essential. It would be feasible to start with the historical changes, interest groups or social movements which influence law. If the teacher of a subject was of the view that the prime impetus behind legislation and case law development in his or her subject were the same as in another area of law that had already been studied by his or her students then it could be perfectly feasible to start the topic in the following way. "Remember how the law of torts was driven by the conflict between consumers and manufacturers whose success in court waxed and waned in relation to their relative power. First the manufacturers got bigger while their consumers were increasingly drawn from the lower middle classes then…. Well the interpretation of exclusion clauses generated the conflicts between the same sorts of parties and traced the same paths of relative success."

Although theoretically feasible, the practicality of taking things in that order must be doubted. It would depend on the first teacher having used the same theory to draw the same conclusion about the range of relevant factors in his or her subject. Furthermore, it is doubtful that a sophisticated analysis using the same theory would find the same combination of factors at work in different areas of law. [43] One would expect to find many recurring factors in the operation of law, not least because any theory worth consideration will have staked its claim to have identified some. [44] In the analysis of any area of law it is appropriate to highlight such factors and highlight their broad influence over other areas of law. But we should always be wary of distorting the relative importance of the factors that influence law to make them fit a pattern that is not there.

Sampford is happy to start at the same point as traditional legal subjects — the decisions of the courts and the textual material they use. This is not the whole of law or necessarily its most important part. However, it is a vortex within law. So much is drawn towards it. So much of what goes on outside it is affected by it or at least seems to rotate in the same direction. As with other vortices, the dynamic largely comes from outside but much of the drama occurs therein and it reflects much of what happens outside. Of course courts are by no means the only vortices in modern law. But they are important enough themselves and they reflect in their own way so much of what goes on outside. At the very least the courts and the texts they produce is a good enough place to start. If we are to make a long journey into the unknown, it is just as well to start at some familiar point — not least because we may pick up more passengers that way!

The Place of This Model in Legal Education

This approach should not be seen as an indulgence to theoretically minded academics. It offers a very suitable way to train both practising lawyers and those who undertake law courses for other reasons. For the latter, who

generally study law for an understanding of how the law operates in the context(s) in which they are interested its appeal is obvious. But it has clear application for aspiring practitioners too. First, it helps them to better locate their place in relation to the law in which they will be immersed. Secondly, it may help to identify new areas of practice by looking for external conflicts where the relevant parties will have the resources to fund the legalisation of their conflict. Thirdly, by seeing the law as the result of conflict between different groups of people it makes the lawyer's choice of sides more obvious and less avoidable. Fourthly, even those who work for the traditional clientele will find that they are more capable of assisting them. Whereas the giving of legal advice was once about a body of rules which were thought to be fairly static, it is now indisputably about a changing set of texts and institutions. An understanding of the conflicts that drive those changes will enable them to give better long term advice about the kinds of ways that the law affects them. [45] Fifthly, seeing the overall conflict may help the lawyer to understand the way that the other side views the conflict — an invaluable aid in settling and fighting cases. Finally, the realisation that the law is the result of incompletely resolved conflicts will give lawyers new hope that they will be able to find support within the texts of law for the position they take. However they will also realise that finding such support is only the start of the battle because the other side will also be able to find support. The result of the issue will depend at least in part on the personnel before whom and the institutions within which those arguments will be carried on. None of this is news to practising lawyers. The problem is that it has not been incorporated into legal education in anything other than an off-hand and anecdotal way. The challenge is to introduce these in a rigourous way suitable for the academy and useful for the profession and those whom it would serve. The above model is sketched as one way of meeting that challenge.

CONCLUDING REMARKS

This paper has presented two possible models of legal education, two alternative approaches to injecting theoretical and critical dimensions into black-letter law subjects. They differ according to the particular concerns they emphasise, and the way in which they propose to introduce them. Some might wonder why we do not combine each of our separate models into one "super-model", or alternatively, expand one so as to incorporate the other. Note that the critical morality model explicitly allows for social theory (see stage 3, "Concretisation"), as does the melee model for critical moral theory (see "Criticism and Reform"). The danger in attempting to merge the two models, however, is that the resulting analysis loses the varying emphases of the approaches it tries to combine. What is important here is that each method reflects the specific priorities it accords to the various questions that jurisprudence addresses and the different theories it offers as answers. As we said in the Introduction, the greatest need is for innovation rather than the search for some new panacea.

Rather than further abstract discussion, what is required now is experimentation with the two models. We certainly do not see them as cut-and-dried, capable of mechanical application. They are not intended as step by step instruction manuals. Application — seeing how a classic law subject, such as crime, or torts, or trusts, would be taught if either of them were to be adopted — is rather a tentative process, a matter of trial and error. Each model must be developed and modified in the context of the particular subject. Constant revision will be order. It is only through such a process of "constructive application" that the suitability of the model to the subject and teacher in question will become apparent. Indeed, this process will serve to stimulate teachers to develop their own models. As we made clear in the Introduction, this is something we wish to encourage, not stifle. To be comfortable and self-assured in introducing theoretical issues, teachers must use a model which is truly theirs, in the sense that it is their own variant on a general model, if not their own creation. This means that the attempt to introduce theoretical and critical dimensions is less likely to be abandoned when difficulties are encountered. What must be resisted here is the temptation to return to the more comfortable and familiar ways of the atheoretical and uncritical pattern of legal education that seems so often to be the norm in Australia and New Zealand. The difficulties (which are many and great) in trying to introduce theory into legal education should never lead a law teacher to lose sight of the importance of this task. In putting forward our two models we have not tried to make a difficult job look any easier

than it really is, but merely to sketch two ways in which the job might be done.

APPENDIX — PLURALISM IN LEGAL THEORY

The conclusion reached above, indeed the whole structure of the article may appear highly pluralist — something for which we have been criticised [46] (as well as praised [47]). The criticism is that this amounts to tokenism and possibly "repressive tolerance" of a few alternative ideas that would be presented as the views of a few intelligent but misguided academics among a sea of traditional wisdom. The prevailing ideology would not only be represented as the views of the vast majority of right thinking academics but would also appear to be enlightened in allowing other views to be presented. The main answer to this is that we should aim to "take pluralism seriously". Pluralism is not achieved by the atomism of forty individual academics with their own idiosyncratic theories. Neither does it involve the tokenism of a few holding minority views among a hefty majority with traditional views. If a law school is to be genuinely pluralist a range of views must be adequately represented. [48] Adequate representation is not provided by a token individual but by a range of individuals so that student exposure to their ideas will be a substantial one that can be tested and compared to others. This requirement serves more than a pedagogic purpose — it also allows for a "critical mass" of people with similar orientation to develop with all the benefits for research and the development of ideas that that implies. [49]

One reason why we do not see law schools populated with a dominant ideology is the difficulty we have in accepting that the ideas informing the traditional scholars constitute an "ideology". [50] The first problem for anyone constructing a dominant ideology theory is to find a set of ideas that is sufficiently definitive to discriminate between the alternative actions with which those supposedly in its thrall. The other problem is to find anyone who actually believes them! We were quite taken by Ronald Dworkin's response to the characterisation of liberal theory in some CLS writing. He frankly denied holding any of the views attributed to liberals and disclaimed any knowledge of any liberal who does. [51]

Of course, not every view that has ever been held about law can be so represented. Indeed it would be our academic duty to make some kind of selection despite the fact that the grounds of selection are hardly objective and even those which we exclude may sometimes come to have great influence. [52] In reality, the problem is not so acute. There is a degree of self selection in that a shallow view of law is unlikely to be held by a large number of potential legal academics so that such views would not be likely to be held by a large number of candidates for appointment to positions at law schools. Also, academics tend to hunt in packs of like minded individuals so that at any time there will be a fairly manageable number of theories to be represented.

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[1] C Sampford *&* D Wood, Theoretical Dimensions of Legal Education — A Response to the Pearce Report (1988) 62 *ALJ* 32.

[2] *Id* at 33–34.

[3] This is not to suggest that there is necessarily one right answer to the question of what the "extra" is. Indeed, as is made dear below, different teachers will inevitably develop different views on this.

[4] It is interesting that the decision to introduce jurisprudence into the compulsory curriculum at the Melbourne Law School bore out our prediction that the profession would not oppose the move. Indeed, it supported the move most strongly, one professional representative (Cummins J) calling for the establishment of a chair in jurisprudence.

[5] Sampford & Wood, *supra* note 1, at 39–41. It is in fact the full but shifting agenda of questions that legal academics have posed about the law and legal regulation that are or should be of interest to those who work within or are affected by law.

[6] Compare W Twining, Introduction, in W Twining ed, *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986).

[7] See Sampford & Wood, *supra* note 1, at 43–49.

[8] Naturally, the more they select from them, the closer their models approach either of ours, the more flattered we — or, at least, one of us — shall be.

[9] In lumping all these characters together — the fictional but all too real Kingsfield and the historical but all too present Landell — no insult is intended to either although we are not sure which would lay claim to be insulted.

[10] This is not to suggest that questions are necessarily prior to theories, that questions always come first, and theories second. On the contrary, questions are often — some would say always — "theory-laden", what one counts as an important question depending on one's theoretical presuppositions. This point is taken up below.

[11] Whether Dworkin's theory is "internalist" is a matter for debate.

[12] One of our reasons for believing that internal theories are inadequate is that legal practice is not limited to a "knowledge" of the legal rules as an internal phenomenon but a knowledge of how the legal texts and institutions operate in the context of the client's interests and affairs.

[13] "Bogus" in the sense that they were based on very real cases in American law.

[14] For example commercial practice and prevailing views of society led them to see contracts as the predominant form of interpersonal relationship created and enforced by law. Today there are many relationships established or controlled by statute. Marriage breakdown results in much more litigation and torts have been extended. To see contracts as the paradigm of legal interpersonal relationships and to teach only contracts and torts in the compulsory core in separate subjects reproduces distorted images of the law.

[15] The latter point is a particularly important one. The law school is not solely concerned with the question, "what is the legal rule that …" It is concerned with many other questions such as the context in which legal rules operate. Even though each subject should attempt to address some of those questions it cannot, as indicated above, address all of them. Therefore it may well be that the same set of legal rules will pop up in more than one course. For example, rules about family law may turn up in a basic course dealing with interpersonal relationships that are regulated by law, in a classic family law course, in a property course and in a course in gender and the law. As the issue is not the same, there is no overlap and curriculum review committees should not regard it as involving one. The only overlap would occur if all the subjects were to teach the legal rules in detail (hence attempting to answer only the question "what is the legal rule that…") rather than asking some of the other and perhaps more interesting questions about those rules.

[16] First person references in this section are to Wood.

[17] Critical morality can be contrasted with positive morality. As HLA Hart explains this distinction, positive morality is "the morality actually accepted and shared by a given social group," while critical morality consists of "the general moral principles used in the criticism of actual social institutions including positive morality". HLA Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) 20.

[18] I have in mind here the reflective equilibrium technique of moral theory building. For a brief exposition, *see* RM Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) 15156.

[19] HLA Hart, The Concept of Law (Oxford: Oxford University Press, 1961) 86–88.

[20] Moral subjectivists, relativists, sceptics, nihilists, and others, will undoubtedly reject the importance I attach to morality and moral thinking. The challenge such views throw out to moral objectivism must be the first item on the agenda of the proposed course on moral reasoning and theory-building. (It is, in fact, the first topic in the course I teach at Melbourne on law and theories of justice.)

[21] Could the critical morality model be redescribed as "moral Langdellism"?

[22] I take this term from Nozick but use it for a rather different purpose. See R Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1975) 153–55.

[23] It is not to be implied that legal regimes are always worth reforming. Sometimes revolution, and a fresh beginning, is more appropriate.

[24] Despite some judicial pretentions to immortality!

[25] First person references in this section are to Sampford.

[26] See C Sampford, *The Disorder* of *Law* (Oxford: Basil Blackwell, 1989). In brief outline the theory sees both law and society as composed of highly variable individuals and the consequently variable relationships between them. Those social relations include relations of power (which include "authority"), unintended effects and value-effects (which include phenomena some would call "norms"). Institutions are formed from the largely unpatterned sets of relations found between those in closer, more frequent, or more intense interaction with each other than outsiders. The nature of these social relations and the way they mix, interact and mingle is such that they generate disordered multi-layered and cross-cutting conflict within and between institutions. This combination of conflict both within and between institutions in which the former mutes the latter explains the failure of legal theories to find system in law and why disorder is compatible with relative social peace. Law is depicted as an important part of this scene, compromising some of the institutions which are integral and subject to that conflict. Indeed much of the conflict is channelled through law.

[27] Indeed, Peter Goodrich argues that this kind of activity is almost exclusively confined to academia. See P Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford: Basil Blackwell, 1986)

[28] Though sometimes the argument is that the wrong view won out.

[29] See Sampford, *supra* note 26. It is a major point of *The Disorder* of *Law* that too often we look for a systematic theory of another type (for example, an authoritative hierarchy of norms or a functional system of interdependent institutions) rather than a non systematic theory for something whose manner of creation, operation and

modification is unlikely to be systematic

[30] Sampford, *supra* note 26, at ch 8.

[31] Including many of the more crude "realists" and critical legal scholars.

[32] One way in which I express the relative autonomy of law is by rephrasing Clausewitz, *"law* is the continuation of politics by other means."

[33] This approach can be seen as incorporating many other approaches. Wood's approach can be seen as asking questions about the moral dimension of that conflict. Mine ultimately reaches the same point but for the individual who ultimately has to decide what he or she is going to do about it. Critical legal scholars ask first how they arise in legal doctrine; second, how they tend to be resolved, not through legal reasoning but by the way ideology tends to construct the problem, setting up sets of "antinomies" one of which is always privileged; and thirdly, how these doctrinal conflicts reflect political struggles for power in specific social relationships.

[34] In describing these conflicts, I always puts the former in inverted commas. Although the law reports always refer to them as "taxpayers," the whole dispute is created by their failure to pay tax in the first place.

[35] It is at least as interesting to ask why lawyers do not represent certain interests whose claims could be pressed in court as it is to ask the more obvious question of why they represent the interests that they do.

[36] This is a particular problem in labour law where the traditional western concentration on individual rights leads to talk of the individual "right to work" that undermines the ability of labour to organise and provide a single front against the single employer. A perception of the essential conflict as that between organised capital and organised labour helps dear the rhetoric in both law and philosophy. As each side has recognised the benefits of organisation and achieved legal recognition and protection for it (through laws that permitted the registration of joint stock companies and, later, unions) each would like to deal with a divided opposition. We can see how this demanded right is really a right of the employer to choose a work force that will not exercise its rights to organise and which can be dealt with piecemeal in the on-going conflicts it has. In the context of organised labour and capital it is as unreasonable as if a union insisted in dealing with each shareholder rather than with their elected leadership. (Incidentally a look at the philosophical context would show that the so-called "right to work" as conceived by employers is not a civil and/or human right because it cannot be enjoyed by all citizens and, in the context of trade union disputes can only be enjoyed at the expense of other citizens. *See* CJG Sampford, The Dimensions of Rights and their Statutory Protection, in CJG Sampford & DJ Galligan eds, *Law, Rights and the Welfare State* (London: Croom Helm, 1986).

[37] This utility may be based on the help it provides in answering the question or the flaws in the theory highlighted by the case.

[38] See discussion in Sampford, *supra* note 26, at chs 5,7,8.

[39] Note that this analysis is not limited to broad social forces but also the relevant legal actors (i.e. all the legislators, judges and the multitude of minor officials through whom the effects of law are achieved or frustrated), whose activity generates the legal texts and effects their operations will change. We must always ask who these officials will be and how they will exercise their choice within the range of choices left open to them.

[40] R Gordon, New Developments in Legal Theory, in D Kairys ed, *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982).

[41] The impersonal pronoun is used not only as an alternative to "his/her" but to indicate that such an abrogation of moral responsibility denies the purposive nature of humanity.

[42] See Sampford, supra note 26, at chs 8,9.

[43] This is perhaps underlined by the difficulty in finding any example of this method that does not appear simplistic — including the example given. Nevertheless, the failure of someone opposed to a method to find a successful example of it is hardly a telling counter-punch. If any are attracted to it they may find plausible examples.

[44] For example, Marxists will keep on returning to class factors and the Chicago School will keep on claiming that government interventions have failed to achieve their goals while frustrating the goals of the wealthy (for them this is not a consolation prize but the real problem).

[45] It is not good enough to say that the advice was given on the law as it was at the time or, increasingly commonly, on the way that the law was generally interpreted at the time. These excuses seem weak if another lawyer has made it his or her business to advise courses of action that will fall outside the changes that may occur in the Act. Even if the customer can alter its affairs to be outside the new ruling (or case), the customer will face heavy costs in terms of time, money and angst and the law firm will face heavy costs in the form of lost goodwill.

[46] As seen in several of the comments from the floor during the fourth session of the 1988 AULSA Conference.

[47] *See* J Goldring, Comments on "The Place of Legal Theory in the Law School" (1987) 11 *Bull of the Aust Soc'y of Legal Phil* 159.

[48] We note that it has sometimes been suggested that different law schools should reflect different views of law and the student will choose which he or she wants to enter. We do not agree with this approach. The choice of theory is for the individual theorist be he or she academic or student — it is a "category mistake" to think of it as an institutional choice. The task of the institution is not to make a choice as to theory but to facilitate that choice. In any case there is the practical objection that an institutional choice of this nature would either be purely temporary or would condemn the institution to stagnation. The point is that theories and theorists change so that any initial choice would have to be either quietly abandoned as both existing members and, especially, new appointments (who would come from a changing pool of qualified people whose theoretical orientations change with the tide of on-going academic debate) went in different directions or could only be sustained at the cost of intellectual ossification about an increasingly irrelevant theory. On the other hand a pluralist institution will change gradually as the ideas of existing and future appointments are influenced by that same tide of debate.

[49] Note that this does not preclude a concentration in a research institute of those with only one theoretical orientation. The lack of the pedagogic limitation would permit this and the sole emphasis on research enhances the "critical mass" argument.

[50] For the authors the problem is not so much an ideology as an atheoretical, uncritical and unselfconscious approach that too many legal academics adopt.

[51] The latter part of this answer may be seen less as a convincing endorsement of American legal academia than as an indication of the company he keeps. See RM Dworkin, *Law's Empire* (Cambridge Massachusetts: Belknap Press, 1986) 274.

[52] Sampford calls his rule of thumb his "rebuttability index" — based on the length of time it takes to find the flaw

in the argument. This proceeds on the normal academic assumption that no other academic is above refutation unless he or she happens to agree with you. The only question is how long it takes to find the flaw in the other person's argument. This may range from those whom one can rebut in the twinkling of an aphorism to those about whom you puzzle for months and only conquer in the shower when the penny, or rather the soap, drops. For the sake of academic comity neither of the authors will name those they believe fall at which end of the spectrum!