# GIVING THEORY "A LIFE": FIRST YEAR STUDENT CONCEPTIONS OF LEGAL THEORY

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This paper presents findings of interviews conducted with a diverse selection of first year law students to gauge their conceptions of "legal theory". It does so against the backdrop of a long-standing debate about the nature and purpose of the legal theory taught in the undergraduate LLB. In doing so, it maps out the surprisingly varied and complex perceptions and understandings of legal theory that students can develop, after less than one year of a law course that attempts to integrate the teaching of theoretical and doctrinal material. These findings bear out the animistic assessment of one of the students, that legal theory has "got a life".

## THE THEORETICAL AND THE HERETICAL: THE DEBATE ABOUT THEORY IN LEGAL EDUCATION

It is a time of some ferment, both inside and outside the corridors and classrooms of legal education. External forces, if not our own professional consciences, force us to confront questions of the quality and aims of our teaching and our view of the purposes of legal education. Student numbers are historically high and class compositions are diverse across most measures (age, sex, previous study other degree, motivation). Increasingly student intentions about their career paths are broadening beyond the narrow domain of "the profession":[1] realistic attitudes which conform to historical, economic and labour market patterns.

Contemporaneously, the judiciary is the focus of increasing public inquiry and internal, professional scrutiny This reflects a re-birth of dissent, of questioning, and of expectation. The judiciary, in a time of great disillusionment with the processes and possibilities of government activity, has become invigorated and once again the source of leadership and growth in common and constitutional law. This process troubles those who wish to see the law as a closed system by exposing the judicial innovators to the sort of public critique from which they were long shielded. It exposes new legal doctrine, especially judge made law, to a broad range of contemporary critiques.

A time of questioning and uncertainty is a suitable time to rethink questions worn blunt by neglect and the passing years. One central question that has tended to recur, concerns the place of legal theory in an undergraduate legal education.

Over half a century ago, Friedmann said, "those lawyers who are unconscious of their legal theory, are apt to do more harm than their more conscious colleagues. For their self-delusion makes it psychologically easier for them to mould the law in accordance with their beliefs and even prejudices without feeling the weight of responsibility that burdens lawyers with greater consciousness of the issues at stake".[2] Friedmann was condemning the blinkered, positivist mentality that dominated the common law mind in his day.

It became fairly common, after the realist incursion, to proclaim the purpose of legal education to be the training or teaching of students to "think like lawyers". But what does it mean for a student to progress from "not thinking like a lawyer" to "thinking like a lawyer", especially in an age of combined degree programs, diverse graduate placement, and given the fairly broad, and often vague, range of goals and expectations which we find in both first and final year students?[3]

One way of fleshing out the notion of "thinking like a lawyer" is to focus on a broad range of skills

required by lawyers. The Cramton Report listed as fundamental: legal analysis, research and writing, fact gathering, oral communication, interviewing, counselling, negotiation, and organisation/management of legal work.[4] Two Australian authors,[5] drawing on the MacCrate Report[6] comprehensively list 49 skills. Most relate to traditionally taught (eg case and legislation analysis, legal research and writing, advocacy) or more recently identified (eg oral communication, teamwork) "skills" in the sense of relatively confined, replicable and applied activities. Only a few of the 49 skills transcend that categorisation, notably: "evaluation of legal theories and appropriate law", and "recognition and handling of ethical issues".

It seems that even our most detailed current understandings of the abilities and techniques that we aim to impart to our students as "skills", have not yet clearly defined or captured what may be the most fundamental of skills — the ability to analyse legal knowledge theoretically and critically.[7] It may simply be that the abilities involved in the exercise of such "theoretical" skills are seen as too generic. Since these abilities are widely needed in academic and scholastic work, they will probably not be felt to be the primary concern of legal educators, who either presume them to be present, or else conceive their task chiefly as the teaching of profession specific skills — to hone students into (practising) lawyers within the limited time available in an undergraduate degree. Alternatively, those abilities may be neglected because of their "hidden" nature. That is, since they are chiefly mental activities, they are not easy to demonstrate and replicate, and hence are less likely to be seen as skills capable of instruction. Instead, teachers will tend to trust — or hope — that such skills will be acquired subconsciously and over time, in those students who read deeply and widely and have an inclination to reflect on and argue about what they learn.

There is of course a vision of legal education that is not harnessed strongly to any professional paradigm, but rather sees law as akin to disciplines in the humanities, such as politics and history. As Fuller once opined: "the most precious thing legal education has hitherto given [is] an enlarged capacity for free, impersonal, and truly creative thought".[8] This is a noble sounding sentiment: but how do we as teachers aspire to be the ringmasters of such a liberal educational experience?

MacCormick addressed this question by focussing on the need for a substantial philosophical element in the undergraduate curriculum.[9] Twining, whilst agreeing with this sentiment, cautioned against equating jurisprudence — in the sense of legal philosophy — with legal theory.[10] Twining's contribution to the whole debate about theory in legal education, has been so long-standing and significant that it would be fair to describe him as its "leader", on two counts. First, Twining has championed, in the common law world, the need to conceive of legal theorising as a catholic enterprise.[11] Jurisprudence, to Twining, has been a "splendid profusion"[12] of different approaches and currents of thought, achieved in large part because of law's position at the crossroads of the humanistic social sciences. Legal theorists have therefore acted as "conduits"[13] by drawing on the insights of a host of neighbouring disciplines and applying them to bring new understandings to law. In recognising this, Twining is careful to not deny the importance of traditional, quintessentially philosophical (to the point of metaphysical) concerns in jurisprudence, such as "What is law?" and "What is the relationship between law and morality?".

The key to this respectful pluralism is Twining's second insight: that legal theory has many "jobs", because there are many levels of generality at which theoretical questions about law can be posed. Thus, whilst the more exalted, "high order" questions just mentioned are worthy of dedicated study, there is much more work to be done at the often neglected "middle order" of theorising. Examples of this range from reasoned suggestions for law reform, or proposals for sociological research in law, to the design of new contextual materials and approaches to teaching existing subject areas, or the synthesisation of legal knowledge in a developing area.

As legal academics, many of us are either (or both) "dropouts" from the strictures of the legal profession, or "dropins" to the more contemplative world of academia. By inclination, and the demands of our research, we should daily aim to stand back from the dense, subject specific mass of the material we teach and theorise about its political relevance, its historical, philosophical and moral roots, and its "fit" within the wider legal and social worlds. We are all, to different extents and different ways, motivated by theoretical concerns: to order and categorise our knowledge; to critique the working of the law and suggest reform; to draw links with other disciplines, and to seek ever broader understandings. Although few of us would claim to be "jurisprudes" (in the traditional sense of aiming for ontological, metaphysical and epistemological conclusions about law), being caught on the cusp of practice and reflection many of us

recognise the importance of the abstract to the everyday in a discipline and enterprise like law.

Over several decades, in a series of three survey based, empirical studies, British academics have plotted the role given to legal theory in undergraduate curricula.[14] The evolution of this work — which has all the hallmarks of being a "10 up"[15] longitudinal project — is instructive. The first survey focused on the content and status of "jurisprudence" subjects in British universities. (Shortly after followed a questionnaire style "poll" of students in Scotland).[16] The second survey broadened its mandate to include "legal theory" and related subjects, and British polytechnics. The third survey expanded its geographical net to include Canadian and Australian universities.

This third and latest study[17] forms the immediate backdrop to this paper. It reports that whilst legal theory as an umbrella label is diversifying legal academics as a whole have a fairly consistent view of what constitute "core" theory issues. The study limits itself to reviewing "all courses whose content, irrespective of their title, correspond with a 'typical' Jurisprudence or Legal Theory course".[18] lt concludes, on the basis that 89 per cent of UK degrees do not have a theory component in their first year (whereas in Australia 35 per cent of courses have a compulsory element, and 11 per cent have an optional one), that "jurisprudence is not generally thought appropriate as a first-year subject".[19] That view is consonant with MacCormick and Twining's statement that "jurisprudence courses work best towards the middle of the programme.[20] Students are seen as being too immature either in their general academic development or in their specific doctrinal knowledge of law and legal process to tackle theoretical issues early in their law studies. However the latest study does acknowledge "a cogent view that students should be exposed to theoretical subjects or theoretical perspectives within substantive law courses at the earliest possible stage … [and that] theoretical perspectives and dimensions should permeate the teaching and study of all subjects on the law curriculum".[21] Whilst first year theory courses are becoming more common, especially in Australia,[22] they are still far from the norm, and it is much more common for theory to be taught in separate subjects than to be incorporated across subjects. To advocate teaching theory to first year law students, especially in a fashion integrated with the substantive and skills based subjects was once — and still is in some quarters — to be heretical.

In this paper we consider, by reviewing and analysing student conceptions of legal theory, the value of an early integration of theoretical perspectives into substantive law study. In doing so, we do not seek to confirm or deny the concern that theoretical and critical issues, as well as the broader intellectual heritage of jurisprudence, might become marginalised if confined solely to substantive law courses.[23] Nor do we pass judgement on the counter-claims that, on their own, "Jurisprudence courses tend to reify a foundationalist vision of legal theory, which should instead be embraced as an 'unruly conflict of ideas'."[24] (Noting that no one could deny that the content suggested by categories such as "jurisprudence" and "legal theory" is becoming increasingly varied and contestable).[25]

What we can and do comment favourably on are views such as: "in introducing jurisprudence to a class for the first time, emphasis should be placed on the active nature of its study and its practical relevance",[26] the main intellectual value of studying juristic texts is as an aid to addressing important contemporary issues in legal theory";[27] "understanding law requires a real and considerable element of theory in the curriculum[28]; and "legal education should involve an introduction of … questioning and theorising into the core curriculum".[29]

## A CRITICAL, THEORETICAL EDUCATION — A FIRST YEAR PROGRAM

The Griffith law curriculum introduces students to a wide range of theoretical and jurisprudential perspectives in a single, five unit, foundational first year programme, titled "Law and Legal Obligations". This range of theory is integrated into what is otherwise an introductory subject on legal systems and the law of civil obligations — centring on contract and negligence, but including restitution, equity and statutory materials where relevant.[30] Students each week read and discuss a range of material, from "middle order" theorising such as Atiyah's work on consideration and reliance interests, to higher level notions such as formalism and liberalism, and critiques from feminism, law and economics and critical legal studies. The intention is to integrate the teaching of theory with the teaching of "substantive" law. These perspectives are revisited, enlarged and drawn upon in second and third year subjects where appropriate. In the fourth year,

there is a compulsory theory subject with all students studying a common unit addressing general jurisprudential themes and issues, before moving to separate integrated theory subjects according to the students' other degree program. Some of the fourth and fifth year electives also focus on particular theoretical perspectives.

## METHODOLOGY

A group of first year law students were interviewed, around week six of semester two: at that time they had completed between 19 and 20 weeks of the first year program. As regards age, gender, other degree course and results (measured by their marks in the law program to that time), these students represented a broad cross-section of the class of approximately 170. To help minimise the problem of having an interview group selected solely from volunteers, which might be unrepresentative because of their level of motivation, we also specifically invited two students to take part. In all twelve students were interviewed.

The interview technique used was phenomenographic: a research tradition predominantly founded in the education discipline, which draws upon particular traditions in psychology,[31] it is a form of qualitative research centred on the discovery of patterns or regularities in students' conceptions of certain phenomena.[32] The aim of this is to break free from teacher/expert based assumptions based on what we intend to teach, and instead listen to the variety of ways of understanding and learning that our students are actually developing.[33] In this study, the focus was on students' conceptions of legal theory. No student knew in advance the topic of the interview.

Each interview was roughly 60 minutes in duration and focused on the following key questions:

- What is the purpose, for you, of learning legal theory?
- What is the relationship between legal theory and law?
- What do you understand by the term "legal theory"?

These questions form the basis of our summary of the data (which is appendicised) and its analysis (which immediately follows). Phenomenographic interviewing eschews the use of leading questions, and works best by moving from the particular to the general. Therefore, we did not confront the students with the key questions at the beginning of the interview, but worked towards them by asking students to discuss particular examples of what they might call "legal theory" which came to their minds.

## ANALYSIS: CATEGORIES OF DESCRIPTION

The purpose of phenomenographic research is the discovery of regularities in the ways in which students conceive and understand phenomena. It aims not to derive quantitative, statistical measures of the frequency with which students, *en* masse, hold a particular conception. Rather, it seeks to uncover, in a qualitative way, the variety of and interrelationships between the many conceptions held by a representative sample of students.

Our analysis is focussed on discerning commonalities in students' conceptions or understandings of:

A. The purpose of learning legal theory.
B. The relationship between legal theory and the law.
C. What legal theory is (and, the subsidiary issue: Where does legal theory comes from?)

In the following analysis, phrases in double quotation marks are actual student observations. Fuller summaries of student responses are appendicised.

### *(A) The purpose of learning legal theory*

#### *1. Understanding*

Legal theory assists in creating an understanding of law, either at a fairly practical and basic level in understanding particular legal rules and principles, or in creating a deeper, more complex understanding of fields of legal knowledge or the legal system as a whole. This is a fairly neutral conception, in which theory helps by asking and answering descriptive "what / "how"/ "when" and "why" questions, such as "why/how did this area develop?"

Legal theory captures "why the law is the way it is and how it's evolved to be the way it is … what sort of forces have shaped it, how you can bring all those things together into a coherent account." Learning a combination of theory and rules is "essential to have a full view of both, and to be able to combine the two to make sense." "Theory gives us an understanding of the way, and why, things happen." "You need to know the theory … like you need to know all the basics before you can build and you can't just have half a foundation on which to put a building … you need that full grounding."

Without these extra insights, the "black letter law" is impenetrable, uninterpretable, or one-dimensional. "You could most likely learn [the legal principles] and how they operate and why — that is what you would know — [but without theory] you wouldn't know why they are there … you wouldn't know what they are based on. You could, and obviously people have [learnt legal principles without theory], but I wouldn't want to … it wouldn't make much sense to me." Without learning theory "you could know the law, but … not fully understand why it was there and why it was written in that way … you probably wouldn't get a full understanding of it." "It is very important to be able to look at the law in general, and to be able to put it into some sort of order … not just to … open a book and [look] at the words on a page but] be able to read … intelligently … to be able to interpret the law."

Understanding the legal system as a whole, rather than compartmentalising knowledge, requires theoretical perspectives and vision. "Legal theory is the tool that you use to break down [the traditional] boundaries [between different areas of the law] and you can see a broader picture." "Understanding … is when you've appreciated what the area of law is, why it is shaped the way it is, what are the dimensions of it, what sort of critiques have there been … and what's inadequate about it. Legal theory … puts things in context [and] without that sort of underpinning you're learning things cold, by themselves … devoid of any meaning."

### *2. Critical analysis*

Legal theory enables one to construct a critical framework and method to question and critically analyse the law. Descriptive questions become models and fillips to more evaluative and critical questions such as "why did the law follow this path?" / "how could it be different or better?" "If you are talking about the theory of the law, then you start questioning different areas of the law and different legal systems — why are they there, where did they come from, where are they going …?" "By osmosis from reading all the theory … you can build up a framework for criticism." This framework gives an "ability to look at things from different perspectives and make up your own … decision about that … I'm more methodical about [criticising things] now…"

Theory also provides new, critical insights, often aligned to particular reform programs or ideologies, which can directly inspire students of law to routinely take positions challenging legal orthodoxy.

### *3. Facilitating change*

Legal theory enables change or advance in the law or legal system. This can involve empowering students and even ordinary citizens affected by the legal system personally to effect change in the future. "If you want to change [the legal rules] you need to know how … they've become that way and how … they could be changed." For one student the purpose of learning theory was "to be able to utilise [that knowledge] in the future to change society in the way I feel best; to be able to acquire the power that is necessary for me to introduce my own ideologies."

More broadly theory is linked to academics, politicians, judges and others with institutional power developing and implementing coherent projects of law reform by building on theoretical critiques. "It is … legal theory which revives, keeps the whole system/cycle going, and it is through that that the institution [of] the courts and the outside world are able to make advances." "Part of [the theoretical agenda] is … how you might go about making [the law] better … and if you have a theoretical approach … it can help chart a direction for change."

### *4. Broadening outlooks*

Learning legal theory introduces one to new perspectives. "It's good to have … many different views and contributions to your own perceptions." This can broaden one's outlook and give a more balanced

perspective on law. Theory gave one student "more of an open mind … it's given me ideas which I didn't have before … and really the only way to question anything is with knowledge … theory has taken away the blindness."

The effect may be to increase tolerance of other viewpoints and cause one to reflect on one's own values. Having an understanding of different theoretical approaches "encourages a little bit more tolerance … If you educate yourself about these different theories you tend to become a little bit more tolerant towards them." Legal theory allows people to see things from another's "point of view, instead of your own little narrow … perspective that you have picked up." Such pluralism is reflected in a belief that' other things being equal, the more theory one is exposed to, the better. "The more legal theory you have behind you, the better you can understand the black letter law [and] the more … you can compare [theories]. You're broadening your outlook."

*5. Instrumental/practical value*

Legal theory may have practical use, as it allows categorisation of judges and law-makers into particular approaches or schools. This allows a practitioner to predict trends and the likely direction of the law, so as to better advise or advocate. "If you are a barrister and preparing for a case and you've read … some of the transcripts of previous cases from this judge, it might be useful to know if [the judge] … tends to lean to the realist or formalist point of view. You could … weight your case slightly … so it would be more in [the judge's] favour.'' In part this is because "theory enables judges to justify [their] decisions." "I want to learn legal theory … so I can be aware of the different ways that cases can be decided, given that I'm hopefully going to be advocating for people when I graduate, and it is crucial to know how the law deciders approach and view things."

Judges and other law-makers are seen as consciously or unconsciously either drawing on or following certain approaches, which can be labelled and understood by them or observers as consistent with a particular theoretical outlook. "People solving problems might use a common set of rules that categorise them into [an] approach … To adopt a theory … you are … adopting a … rigid approach to the way you think" Theory is identified by finding "links between the way people are thinking and speaking and judging, and finding similar characteristics, and grouping them."

## *(B) The relationship between legal theory and "law"*

*1. Theory is the law*

Law is theory and theory is law, at least at one level. It would be artificial to draw a distinction between the two. "Law" is essentially what we construct, interpret and explain it to be, from a viewpoint that is necessarily theoretical.

"Law is legal theory. Legal theory is law. I see [legal theory] as a very wide concept, not something which is this or that, or 'law is the rules and legal theory is the rest' … Legal theory has obviously shown that rules are not a definite thing … A rule depends on how it's interpreted, the way it's looked at, the way it's perceived." "It could be argued that legal theory is what makes up the law … I'm not entirely sure that … the law is the sum of legal theory, but I think that it could be."

*2. They are two parts of a whole*

Theory and law are separable, but intimately related parts of a greater whole. "They are very closely related … they both are part of 'the law'." Law (in the sense of discrete legal rules) cannot properly be understood without an appreciation of the related theory, and that the substantive law and legal system, and theoretical legal discourse, are in dynamic interaction. "There is… quite a [close] relationship between the two: one looks at influencing and changing … the other, so they are bound up together… Legal theory is certainly part of the law, equally with legal principles, because they are shaping each other all along the way." Legal theory is a "chain of thought linking institutions" where the legal academy is one institution, and the courts/government/legal profession is the other.

### *3. They are different — theory follows and critically analyses law*

Theory is a critique of law (again, in the sense of legal rules). Theory feeds off and may challenge legal doctrine, almost as a parasitic, and running commentary on it. "The law is there and legal theory is separate to it, and legal theory is just discussing the law." "Legal theory is what is happening within … the academic discourse at universities … It is … a body of thought pertaining to the legal system" but is a "break from the legal system." In commentating on different aspects of the law, legal theory describes "'how things are' … 'this is the reason why they are', and then maybe 'this would be … better'." Theory is an "academic discussion, criticism of the law." It can involve analysis and criticism in the sense of both "criticising constructively" and "complimenting in parts … [when] part of the law is working very well."

### *4. They are different — theory precedes and brings about the law*

Theory is different from the law: it forms the historical or ideological foundation for the legal rules. Theory is the intellectual foundation for new law: "before it becomes a rule, it is theory. It has to be thought of as something … realistically useable for that society." "You have to have an idea to base something on … you base practical things on theory." Rules are thus the outcome of theory: rules are seen as theoretical projects distilled — for example a law reform agenda — and adopted into the positive law, whether that be through judicial principle and *rationes*, or legislation. "Laws are the implementation of legal theory." "Law is the rules and regulations that govern a society … and legal theory is an approach to producing those rules. So law is the outcome: the theory is the mechanics."

### *5. They are quite distinct — the law is rules, theory is explanatory knowledge — theory/praxis dichotomy*

The law is cases and statutes: a positive guide for behaviour. Legal theory is "separate and distinct from the law because the law is … cases in court, statutes, the actual set down law, whereas legal theory is … the underlying concepts behind it." One student thought of the law as in two parts, "the theory side of it and the practical side of it."

Theory can improve one's understanding of law, but one can still understand and apply the legal rules without any knowledge or understanding of theory. h this conception, this is what practitioners were often described as doing. "You could probably make yourself a good solicitor … [if you just] learnt the doctrines, the laws and the verdicts." "I wouldn't be surprised if a lot of lawyers in practice don't even know that there is legal theory." Whilst this notion came through quite strongly, it did not suggest a complete, hermetic separation of theory and doctrine/practice. Many students still believed that theory would have an instrumental value in helping them understand and predict trends, especially in judicial law-making which in turn could enable them to better serve their clients.

Some students also saw that it was possible, and perhaps traditional, to treat law and theory as separate ("you could formally separate them into two things") although they did not personally adhere to that approach.

## *(C) What is legal theory?*

### *1. A coherent framework*

Legal theory provides a framework to understand law — a relatively ordered structure in which legal materials (rules, principles, judgments, legislation etc) can be fitted and interrelated, so as to be more easily comprehended and learnt. Legal theory is "a backbone for looking at law." It is important to enable us "to look at the law in general, and … put it into some sort of an order." Theory does this by taking "isolated events and bring[ing] them all together and put[ting] them under a general heading."

Theory aims to *unify* concepts, to give coherence where that is otherwise lacking, and to develop generalisations. This mirrors what was once better known as doctrine — the work of leading jurists and text-book writers in each field. But it also encompasses explanations of legal, especially judicial, reasoning and process (for example a psychological or economic account of adjudication), as well as the mere exposition of rules. This type of theory can also be used to categorise or label individuals and their

approaches to legal questions. “Different people hold different values highly and look at the world in different ways and … you do tend to group them together … and you … label them.”

*2. Questioning/critical analysis*

Legal theory asks “why and how” questions about the development, context and content of law as it is, and alternative models. It may provide explanations of “why” the law is as it is and how did it get that way: “who” brought the law into being, “whose” interests are served, “what” mechanisms and debates were involved. Such commentary on the law can then naturally aid understanding, and lead to both positive and negative evaluations of it. Theory builds “a framework for criticism”. In asking “why have they have structured that particular clause or section … that particular way” theory is the “knowledge” that “allows you to question.”

*3. A personal/individual activity*

Theorising in law is a personal activity: the way an individual understands, explains, questions and interprets the law. “Each legal theory seems to belong to a certain person.” Often this is an activity reserved for those with considerable experience, especially in academic life; but it also may be an instinctive process in which the student is driven not just to understand the law, but to analyse it from a standpoint that blends both current theory and their own concerns, in a way that both colours and is coloured by their own prejudices and experiences. “I am using theory, … whatever I learn I try to incorporate it in my life and I try to use it in practice. … You ask yourself, ‘what does this mean to me, how can I explain this, how does it affect me, how does it fit into my life?’”

Theory in this conception necessarily involves personal values, beliefs or ideologies, which then impact on the way law is seen, understood and ultimately created. “A theory is just a person or a group of people’s view … the way they think about things” if that approach is consistent. Values and theories “overlap because everyone has their own values and … theories also have certain values.” “To understand a particular person’s theory, you have to understand the context in which they came up with that theory and also … the goal of that person [in] coming up with that particular theory.” Theorising is an ongoing intellectual process dependent predominantly on the opinions of the individual involved, but which may feed back to amend those opinions and values. “You may end up altering your view — you may not — but it’s good to have … many different views and contributions to your own perceptions.”

*4. A potentially transformative (social) activity*

Theory enables transformative action. It does so through an ideological or value laden response to a critique of an existing law or dilemma in the legal system, if and when that response generates some positive agenda (and motivation) for change in the individual concerned and in the wider legal system. In this conception, theorising may echo the call to arms of the CLS movement, by being a marriage and extension of the previous two conceptions (critical analysis and personal politics). “Ideologies become theories … [and] people [with] their various ideologies and theories about the way society should go, tend to try and encourage their theories to happen.” Alternatively, and less controversially, theory may simply be the *sine qua non* of the law. That is, legal rules, principles, institutions and events are necessarily the product of a process which is underpinned by theoretical assessments of the current law and suggestions for change. The law, then, is the manifestation and “practical” application of theoretical projects. It is through theory that the legal system is “able to make advances because legal theory is educating scholars and future generations [and] people are … analysing. Legal theory is … becoming part of individuals, it is happening, it has got a life.”

*5. “Pure” or unpractised knowledge*

Theory is book work: all that is learnt and studied, especially in written form. Any legal textbook is, therefore, a work of theory. “The theory side of it … [is] cases.” Theory is here opposed to practice, understood as the active or doing, archetypically in the application of legal knowledge to a particular situation, such as the giving of advice, making of a representation or argument, or drafting of a document, in some “real-life” scenario. “You’ve got to read the cases, know the cases before you can] apply the cases

to the practical." Theory is what "you have to know…before you can actually apply [it]."

In a less all embracing conception, whilst not all doctrine is theory, essentially "theory is what people say and write about how the practical (side of law] works or should work." A theory is "something somebody thinks about … it is not actually doing something, it is thinking about it."

*6. Speculation*

Theory is musing, reflection and observation — a quintessentially academic pastime. This conception captures the original Greek etymology that underlay the Latin word "theoria" as speculation/contemplation. This sense need not connote idleness, provided it is not exclusive of the other conceptions of theory above. Rather, it captures something essential about theorising: that it must involve some creative spark or inspiration for it to produce or reveal any insights (whether they be new to the learner or to the discipline as a whole). Theorising about law involves "the thinking of something new… some new idea about law." To be a theorist "you'd be one of the originals…one of the first people to come up with the theory or approach", as opposed to a theoretician who merely studied and applied other's theoretical work Theorising involved not just "aligning yourself with…or criticising other people's views" but also "forming your own view from the situation."

## WHERE DOES LEGAL THEORY COME FROM?

*l. Experts such as writers/thinkers/academics/judges*

Legal theory comes from those who have time and expertise to observe, analyse and generalise from actions and influences in society. "The theory comes from legal … 'watchdogs'. People who watch the system work and maybe speak and write about how it should work and how it does work: scholars, possibly even lawyers." Academic discourse is a major source of legal theory. "It's usually academics who write about [theory] … It's a means to justify their existence but also] maybe [it is] the right thing in a democratic society … people should be notified about how the judicial system operates." Judges, when they decide hard cases, or give interviews or papers, also make theoretical contributions. "Judges … especially the current High Court judges, are very aware of the changing needs of society … they do look to have an impact on legal theory."

*2. Oneself*

Theorising is a personal activity. This may involving drawing on other theorists' work, but it always involves the individual analysing or making a judgment about the value of that work and integrating his/her own values and opinions. "[I theorise] because I have my own ideas and my own values of how something should work." "Everyone has legal theories." One may align oneself with another existing theory if it conforms to the analysis one tends to favour. "I occasionally criticise the way that decision was made or that institution is, I align myself with what some people are saying, and not align myself with what other people are saying … in that way I theorise about law."

*3. Powerful individuals/groups*

The legal community, widely understood, creates legal theory. This means groups or individuals who have the voice and the power to influence the development of the law, such as politicians and bureaucrats, lawyers and academics. Legal theory is not recognised "as a structured legal theory until it comes out of the mouth of someone who is involved in the GIVING THEORY "A LIFE 49 legal profession or is a politician or has … money." So whilst "everybody has legal theories … the further you go up the scale the more power those theories have." The sources of theory include certain social movements or lobby groups which develop critiques and alternatives to what prevails. These projects originate with "people who are unhappy with the existing system. [They] form groups … start to get a bit of power [and] promote an idea [or] another way." This process receives impetus from academics, who "like to align themselves with a line of thought … to write articles … and critique things."

## DISCUSSION

A number of points can be made about the conceptions revealed by this analysis. First, the broad conceptions suggested by our students are not earth-shattering. Indeed they tend to mirror the various semantic nuances of the term "theory" that one finds, say in the *MacQuarie Dictionary,* where "theory" is defined as: (a) a coherent group of general propositions used as principles of explanation for a class of phenomena; (b) a proposed explanation whose status is still conjectural; (c) that part of a science or art which deals with its principles or methods as distinguished from the practice of it; (d) a particular conception or view of something to be done or the method of doing it — a system or rules or principles; or (e) conjecture or opinion.

However, the purpose of this paper was not to legislate some a *priori* list of uses of legal theory as might be drawn up by a subject designer with a background in jurisprudence. Rather, the value of this exercise has been to realise the intricate, complex and living threads that germinate in students' understandings and views of law, out of the materials and discussions offered to them each week. Those threads are by no means predictable or linear growths conforming to the stated weekly aims of the subject, especially in any particular student. Indeed, the overall spread of ideas and conceptions is at once richer, and more real than any preconceived "paper" goals that we as curriculum and unit designer may have nominated in advance.

Secondly these students, despite being in the infancy of their legal studies, have fairly complex understandings of what legal theory is and the purposes of learning it. This supports the belief that the introduction of theoretical perspectives from an early stage of undergraduate legal studies is within the capacity of most students. Introduction of critical and theoretical perspectives also apparently helps to create a view of law which is broader than the understandings many students develop in a more traditional legal education, where consideration of theoretical and jurisprudential perspectives is postponed until later years when students are assumed to be capable of a level of abstract thought which, it is assumed, they do not possess at the earlier stages of their academic lives. The assumption that students who *are* not indoctrinated into the legal discipline do not have this capacity seems to be quite inconsistent with the findings of this study.

Thirdly there is a broad consistency between the conceptions of student learning identified by Säljö[34] and Marton et al[35] and some of the understandings of legal theory which emerge from our analysis. In 1979, Säljö identified five categories of students' conceptions of learning which have been extremely influential in higher education literature.[36] These five conceptions are:

- a quantitative increase of knowledge;
- memorising and reproducing;
- acquisition of facts, skills and procedures which are retained and applied;
- abstraction of meaning;
- interpretive practice which is aimed at the understanding of reality.[37]

These conceptions were found in the study by Marton et all but this later research also isolated another, new, albeit rare conception of learning, described as "changing as a person".[38] There *are* consistencies between some of these six conceptions and our students' understandings of legal theory. An example of this is the way in which some students valued learning legal theory to increase and expand their outlook on the law, and ultimately to empower them to become involved in changing the legal system, which are approaches consistent with the conception of learning as "changing as a person". The importance of learning legal theory for under- standing and critical insight was strongly emphasised, and these views are quite consistent with the fourth and fifth conceptions of learning as abstracting, and understanding referred to by Säljö. Finally, there seems to be a consistency between Säljö's first three conceptions, of learning as acquiring, reproducing and applying quantities of knowledge, and any conceptions which sharply divide theory, as book work to be learnt, from the "practical" work of law in action can be undertaken.

## WORLDLY HEADS

Philosophy, to Hegel, is "the world stood on its head".[39] Entering law school for the first time, especially for students straight from high school, can be akin to having one's world inverted. Why subject minds, already shell-shocked by a bombardment of strange vocabulary, texts and skills, to further "abuse" by sand-

blasting them with mountains of complex, undigested theory? Up until recently there has not been a great deal of ready-made theory material specifically directed to early year teaching. The notable, mostly very recent, exceptions are usually drawn from particular existing courses — in theory,[40] or in specific doctrinal areas[41] — or are British primers which focus on simplifying traditional jurisprudential debates.[42]

Why take the risk of teaching theory from day one of law school? It verges on the banal, but it could be said "Do it not because it is easy, but because it is hard." Students, in surveys, discussions and even their behaviour and comments in class, tend to describe theory as hard — it demands considerable reading and reflection. But in our and our students' experiences, the rewards may be manifold. Those new to legal studies quickly see the value of studying legal doctrine in tandem with a range of theoretical perspectives. They feel their understanding of doctrine and their capacity to adopt different angles on, and question, the *law*, to be enriched. Whilst this project cannot guarantee that these students' favourable beliefs about the necessity and benefits of learning theory will be reflected in long term gains compared to other styles of teaching, the intensive nature of the interviewing method we used convinced us that these beliefs are sincerely held.

In turn, students believe that their conceptions of particular aspects of theory are made more meaningful by seeing theory applied and illustrated in its interaction with particular aspects of doctrine or process. Students can begin to draw links with non-legal fields by seeing how more abstract ideas, approaches and theories can generalise knowledge, and may be better able to resist pigeon-holing their knowledge into discipline and sub-discipline specific compartments. Ultimately students can be grounded, from their first tentative steps in the morass of law, with a respect for the different possibilities of law and legal knowledge. These, we believe, are elements crucial to both critical and liberal education in law. Given the constancy of change, there is a need for adaptability. For students to become self-sufficient and self-directed learners by graduation requires an educational process creating both an awareness of different ways of thinking and a flexible framework of knowledge.

What we cannot hope for in the first year of legal study is to generate jurisprudes and legal philosophers. That would take deep instruction and reflection in the realms of higher level theory and philosophy of the kind traditionally reserved for the best jurisprudence courses at degree's end or master's level. Even then, such courses tend only to engage a relative few — the lovers and seekers after that unique and abstract type of wisdom which is endless, philosophical questioning.

In the meantime, however, the integration and teaching of less exalted theoretical perspectives and issues into substantive law subjects at all levels, is an achievable goal. The first steps are laid, also, for students to build a more holistic conception, with legal theory as an integral part of, or perhaps even the essence of, law. If our students cannot necessarily turn the world on its head, then at least we can aim to turn out from our law schools some more worldly heads.

## APPENDIX: THE DATA

A condensed version of each interview follows: as nearly as possible these are direct quotation summaries of the conceptions expressed by each student. Rarely does one student adhere to a single or narrow conception. Rather, in the course of an interview, a student will articulate a variety of conceptions. The point is not to judge an individual student's conceptions, but to appreciate how a *group* of students reveals a variety of overlapping, interrelated and sometimes conflicting conceptions. Together these represent the variety of *different* ways students at the same level of study are conceiving of theory. Nonetheless it is instructive to remember that each student and his or her varied conceptions form a complex whole.

### *Student "A"*

For this student, theory is a dynamic chain of thought, feeding off and into the legal system. "Legal theory is what is happening within … the academic discourse at universities." "It is … a body of thought pertaining to the legal system" but which is a "break from the legal system. … The legal process … takes part in the real world". Legal theory is a "chain of thought linking … institutions", where the legal system is one institution and the law schools are another institution. "[I] always saw it as two institutions linked

together through legal theory. It is this legal theory which revives, keeps the whole system/cycle going, and it is through that that the institution [of] the courts and the outside world are able to make advances because legal theory is educating scholars and future generations." "People are … analysing. Legal theory is being criticised constructively or adhered to, or becoming part of individuals: it is happening, it has got a life."

This student theorised about law "through [the] knowledge obtained from … theories" which became "instruments" which could be "put … into the law", although "[I am] not up to the analytical process where [I could] develop [my] own theories". Without theoretical knowledge "[one] would have very, very limited understanding of the law… I was amazed how important it was." Before studying law, "[my] perception of the law was [that] I mainly saw it as a systematic process", where "systematic" was equated to the formalist conception of law. Besides deeper understanding of law generally, a purpose of studying legal theory was "to reflect on society, it's a way of including societal change, it's a way of advancing the system." Legal theory had a role "to expose the law to society, to acknowledge different trains of thoughts … to educate the next generation [about] not only the law process but how and why and what is going on, and how it relates to society, how it can fit in with the society: it has to be criticised but also] it has to be complimented in parts … [when] part of the law … is working very well."

### *Student "B"*

Legal theory "concerns the way we make decisions in the law … it's separate and distinct from the law because the law is … cases in court, statutes, the actual set down law, whereas legal theory is … the underlying concepts behind it, the way the law is developed, the reason why the law is as it is, the reasons why certain judgments occurred as they did. Legal theory is "not actual law" but "it impacts on the law." If the "groups of people that hold high positions of power, for example High Court judges, people high up in Parliament, … are all thinking along the same sort of lines… that is going to impact on the law because of the way they make judgments and the same goes for Parliament."

Theory is a way of grouping people with shared values together — it is a labelling process: "Different people hold different values highly and look at the world in different ways and you can stereotype them but you do tend to group them together … and you can … label them." Values and theories "overlap because everyone has their own values and these theories also have certain values." Theory comes about by finding "links between the way people are thinking and speaking and judging, and finding similar characteristics, and grouping them, [as] formalists, for example." "Everyone has leanings to some particular areas and their sympathies lie in different areas, and it's … how your own personal values … match up with something like formalism." A theory is "just a perspective". Judging "comes down to personal values … the way the judge speaks and his own personal values … is going to impact on his judgment."

Learning about theory "helps people to understand what different groups of people are on about. It helps you look at it from their perspective." You can then "get a better understanding of what they are trying to get at." Having an understanding of different theories "encourages a little bit more tolerance." "I think a lot of it comes down to tolerance. If you educate yourself about these different theories you tend to become a little bit more tolerant towards them." Having an understanding of theory would be also useful "if you are a barrister and preparing for a case and you've read … some of the transcripts of previous cases from this judge it might be useful to know if [the judge] … tends to lean to the realist or formalist point of view. You could use it when preparing for a case because you could … weight your case slightly … so it would be more in [the judge's] favour."

### *Student "C"*

"Everybody has legal theories… . the further you go up the scale the more power those theories have." The relationship between ideology and theory is "fairly close". "[I]deologies become … theories". Some theories then become the law: "before it becomes a rule it is theory. It has to be thought of as something … realistically useable for that society." "People believe that their theories are proven and … they become law, but that [proof] is not necessarily the case. That's why law changes … Even though it does change very slowly … people [with] their various ideologies and theories about the way society should go, tend to try and encourage their theories to happen."

Theory "is more flexible [than] … black letter law or statutory law. With statutory law you've got your set of rules and on the theoretical side of it [theory] tends to be an idea and it can be used or dismissed depending on the situation; depending on the person using it at the time." There are differences between learning the law and learning the theories. "You can learn the theory without knowing the rule. You can learn the idea behind it without seeing its final end." Learning the combination of theory and the legal rules "is essential to have a full view of both, and to be able to combine the two to make sense … you can't utilise [the black letter law] in a moral and ethical fashion" without having the theories behind it.

The purpose of learning legal theory for this student is "to be able to utilise that [knowledge] in the future to change society in the way that I feel is the best; to be able to acquire the power that is necessary for me to introduce my own ideologies." Legal theory should be utilised "to change society in the fashion that is more equal for everybody, gives more rights to people." "You need to be within the structure of the society to be able to utilise the theories and laws to change it."

Legal theory "comes from the people who have been thinking about the way we want this society to go and people who can in some way put forward their ideas and their theories to a more powerful arena." Legal theory is not recognised "as a structured legal theory until it comes out of the mouth of someone who is involved in the legal profession or is a politician or has an extremely huge amount of money. [O]therwise it is just somebody with an idea and nobody takes any notice of someone with an idea." "[I]f you have a belief or an idea about something in particular and are given the right forum it can become a theory. If you are not given the right forum it is still just an idea." All ideas are not theories, "they have got to have consistency … [and] they have to be effective in some way."

### *Student "D"*

"I see legal theory [as] an explanation or interpretation of the rules in society. If you are talking about the theory of the law then you start questioning different areas of law and different legal systems — why are they there, where did they come from, where are they going…? Whereas legal rules [are] what pertains to society today But they are very closely related … they both are part of the law." Of lawyers who don't theorise, "[I] would assume there are many lawyers … who just look at their profession as just being a job and being happy with the status quo." "On the other hand … judges, … especially the current High Court judges, are very aware of the changing needs of society … they do look to have an impact on legal theory." It is "definitely" essential to have an understanding of legal theory to know the law. "Legal theory allows a person to analyse the black letters. Black letter laws … are just words on the page … but they really don't explain anything … they are very, very narrow … whereas legal theory allows you to really look behind the black words on a page and ask yourself 'well, why have they structured that particular clause or section … that particular way?' It allows you to question… . [Theory has] given me more of an open mind …it's given me ideas which I didn't have before … and really the only way to question anything is with knowledge … theory has taken away the blindness." "The purpose to study theory for me is … one day I would like to practise as a lawyer … it is very important to be able to look at the law in general, and … put it into some sort of an order … not just to … open up a book and [look] at the words on a page [but] to be able to read … intelligently … to be able to interpret … the law."

Legal theory is acquired "… by reading legal theorists: academics, judges … their cases … interviews … lectures … an article… . You pick up various points … then you may or may not agree with the particular point" and you try and apply them in further reading (e.g. a case) and new situations. "You can then make up your own mind." "I'm developing my own theory on what law is in our society … legal theory is analysis … I am using theory … whatever I learn I try to incorporate it in my life and I try to use it in practice. When you theorise about something you try to explain something … You ask yourself, what does this mean to me, how can I explain this, how does it affect me, where does it fit into my life?" This was "rationality" and it was essential to theorising. However different people may have different understanding of the law because of "our different backgrounds … ages … what we've been brought up to think, our education levels, even down to the different law schools we've been to…" "The more legal theory you have behind you, the better you can understand the black letter law [and] the more … you can compare [theories]. You're broadening your outlook." This allows you to read more into a case/Act.

## *Student "E"*

"We don't just jump in and say …'this is a principle and you need to know this', [rather we ask] 'why is it the way it is, how did it come about?'" Theory is opposed to practical. "Practical" is "working out a basic contract problem, if you were to advise someone" about a legal problem. A practical problem on the exam is one with a "question at the end [which] asks, advise this person … So you have to go step by step through contract, through tort, that's practical". Theory is "more the historical side of things, how it came about, how we apply to problems today" "[W]hatever topic we first start with seems to be theory … heaps of reading on it, heaps of different points of views, of different writers … definitions, the historical side of things, all that to me is theory. How something came about, and how it is today, the change, all that to me is theory, and then once we know all that we can actually apply it, but you have to know all this before you can actually apply [it]". "The theory side of it also being cases, you've got to read the cases, know the cases, apply the cases to the practical." "I consider cases being theory because you have to read it … then you have to learn that case, know that case, apply it to the principles you were taught in theory."

"I look at theory as a way of learning something, reading something, knowing what it is about, how it came about, basic principles … The way I distinguish theory from practical is … when they [teachers] ask you to advise someone or work out a problem, [that] is [the] practical side of things." Formalism and liberalism are theory "[b]ecause of the exam. Theory — practical." Understanding the theory helps to understand the practical: "it's easier for me to apply to things". In first semester "I didn't like [the theory] because I left it too late … you had to from day one of the semester, learn it and keep on using that with what you were doing with your practical side of things — because it *all* blended in — you had to know the … base of it". Legal theory is "one part of the law". Law is in two parts, "the theory side of it and the practical side of it.'' The practical side of it makes the theory more tolerable, and the theory helps to understand the practical. "[O]nce a person portrays their own ideas of the law or how they think it should be or what the problem is or what actually is happening now and writing about it … that's a legal theorist." Practising solicitors use theory when they research and read books.

## *Student "F"*

Legal theory "is a base … something you use to create your laws … you can create your laws so that they work better.… You'd look at legal theory, create a theory and then … work out how you'd create laws that fit in with that … theory and create a better society … Laws are the implementations of legal theory." "You find a theory by observing what people do in society … looking at … what influences their actions and the results of those actions. … Theory gives us an understanding of the way, and why, things happen. It takes isolated events and brings them all together and puts them under a general heading." The purpose of studying legal theory for me is "to gain an understanding of how and why the law works as it does … some histories and background … to see how the law got to where it is today, what influenced it in the past and what may influence it in the future… . Theory is the basis that you create your laws on. … It's the foundation and you create your laws along that general theme." Without learning theory "you could how the law, but … not fully understand why it was there and why it was written in that way …you probably wouldn't get a full understanding of it."

"Useful theories set out to achieve something: they might try and improve society by showing how things are wrong and how they can be improved by the implementation of different ways of doing things. … Useless theories may be ones that don't actually do anything: they may state some things but then [not] offer ways of improving them." "I can't see any application [of legal theory] in my day to day life, but I can see [its] usefulness in law… [It] helps show me something more about the law … You can see the idea behind the law." This student didn't theorise about law, where "theorising [is] creating by yourself" because he did not think he yet had "enough knowledge or expertise … to start creating theories", whereas that "if I enter practice, being able to work out what may happen or what is the current trend would be valuable [in] advising clients." But "Learning theory is important to pass exams … it helps you with the learning of the law as it is at the moment: it helps you gain an understanding of the law", which was "the important bit at the moment".

## *Student "G"*

"Law is legal theory. Legal theory is law. I see [legal theory] as a very wide concept, not something which is this or that, or 'law is the rules and legal theory is the rest'… Legal theory has obviously shown that rules *are* not a definite thing … A rule depends on how it's interpreted, the way it's looked at, the way it's perceived …". Legal theory is "anything that fits within the context of law or tries to establish the context of law and anything that boosts an understanding of law."

"You could probably make yourself a good solicitor …[if you just] learn the doctrines, the laws and the verdicts … but if you want to go further than that you're not going to have … the skills to question … I [don't mean] further 'careerwise', I [mean] further in understanding or at least … awareness … [and that's] all about … being able to question."

"I enjoy … looking at all the different perspectives that we have come across … it's really refreshing to have someone else's work saying 'this is the way I look at it' … You may end up altering your view — you may not — but it's good to have … many different views and contributions to your own perceptions… . You've got to look further than the textbook … you can't take everything that is given and a lot of it is up to you, the way you perceive it. I am quite cynical … I think legal theory … encourages [that] … It … forms a basis for an argument … You can have a look around and … see different angles … . It's a matter of taking pieces of people's arguments that you think are valid and stringing them together… . You build up a knowledge … ways of looking at and analysing knowledge you have and adding to it and editing it… . A backbone for looking at law."

"Theorising is something you don't necessarily have to do to pass the course … it's something I do fairly instinctively … . Understanding has to come before you learn anything [and] when theorising you've got to understand [and] theorising deepens [your] level of understanding and perhaps creates an understanding in yourself." Learning theory "is a bit different" to theorising as it is "other people's theorising on paper … I'd put that in as part of learning and part of understanding which aids your own theorising… . To understand a particular person's theory you have to understand the context in which they came up with that theory and also … the goal of that person [in] coming up with that particular theory…". Ultimately, "learning theory is building a framework … on which to base your own thoughts … everything I learn shifts my own thoughts around … Every bit of theory you take in … if you understand it [is] a way of shaping your knowledge."

## *Student "H"*

Theory is "about different approaches to deciding legal problems … when you're faced with … a dispute of some nature … working out what is just, what should be upheld, what is right or wrong… . There are many different approaches … to solving legal problems. People solving problems might use a common set of rules that categorise them into [an] approach." That approach "comes in their attitude" so "a theory is just a person or a group of people's view …the way they think about things" if that approach is consistent. "To adopt a theory … you are simulating … adopting a rigid approach … to the way you think." A theorist wedded to a theory "would solve a problem like that."

To really be a theorist, "you'd … be one of the originals … one of the first people to come up with the theory or approach." Although "often [the approach] might have been prevalent a long time before … but … only become a theory when someone picks it up and … give[s] it a name and say[s] "this is what is happening"… . When it's acknowledged; when it's recognised." "It's usually academics who write about that sort of stuff. … It's a means to justify their existence [but also] maybe [it is] the right thing in a democratic system to now… . Because what we are talking about is ruling people, deciding cases … and given that it is a democratic system people should be notified of how the judicial system operates and how cases are going to be decided… . [People can get to know legal theory] by students learning it from academics and [then] coming into … contact with clients … and by publication of papers, general reading and people writing books with genuine interest on the people's behalf in how cases are being decided… . [But] for the most part" people who haven't studied law don't come to understand theory. "In the Australian case … a lot of people, their level of understanding … is very limited … they don't like to talk about … topics [that] are controversial. People like to relax …

"The judges are pretty discretionary … they decide cases on how they feel personally they should be decided and that reflects on … their background … the area [they were] trained. … [They] decide possibly pretty early in the piece who … should succeed… . Where [they] place emphasis on the facts determines … which approach [they take]… Theory enables judges to justify [their] decisions… . They bind themselves into a theory when they decide who they feel should win and they think what theory is going to best help them to demonstrate why that person should succeed."

New theories come "from people who were unhappy with the existing system… . that acts as a catalyst for people to start to question it. [They] form groups …start to get a bit of power … They 'insight' or promote an idea [which] might be picked up by other people even though those people haven't been affected … . A theory is just an idea or way of doing something … this group of people would be promoting another way or at least critiquing the old way. … [The theory] emerges over time and to someone who is totally oblivious to the law, they might not be aware of the theory even though [it] is around." The theorists are "the people who advocate the initial theory … people who are annoyed with the current system. [Academics] like to align themselves with a line of thought … they've got to write articles … and critique things."

"Law is the rules and regulations that govern a society … and legal theory is an approach to producing those rules. So law is the outcome: the theory is the mechanics." Learning theory "helps you understand why [a] law came about, who decided it, what approach they adopted, then you can see trends over time." Theory "makes you aware of" differences and trends in approaches. "I want to learn legal theory … so I can be aware of the different ways that cases can be decided given that I'm hopefully going to be advocating for people when I graduate, and it is crucial to know how the law deciders approach and view things."

### *Student "I"*

"Legal theory is a commentary of one aspect of the law, why it happens this way … how it happens". Legal theory describes "how things are and then saying that maybe this is the reason why they are and then maybe this would be a better situation." There are at least two possible conceptions of what legal theory is — these are extreme positions. First, "it could be argued that legal theory is what makes up the law … I'm not entirely sure that … the law is the sum of legal theory but I think that it could be." "An alternative [conception] would be that the law is there and legal theory is separate to it and legal theory is just discussing the law." In this case, the law is "all the rules, all the legal institutions and such, other people that make up the law are separate from the commentaries, the discussion of that in legal theory." The "people that make up the law" include ('barristers, solicitors, lawyers and judges; in a really narrow sense you could say that they are the people who make up the law." In the second conception, legal theory "is not going to have an impact on the law, the law is just constant and legal theory is just a discussion of that." In this case, theory is an "academic discussion, criticism of the law." Another conception of theory was also mentioned: "the theory of the situation … as opposed to the practical." "Theory is the way things should work, I guess that is part of what I mean by legal theory …it's sort of a layman's definition of theory." "I occasionally criticise the way that decision was made or that institution is, I align myself with what some people are saying and not align myself with what other people are saying. I guess in that way I theorise about the law." Theorising for this student involves "forming your own view from the situation, but then there is also aligning yourself with other people's views or criticising other people's views, I think it is a combination of the three." One of the consequences of being exposed to theory in this course is that "by osmosis from reading all the theory … you can build up a framework for criticism." This framework gives an "ability to look at things from different perspectives and make up your own … decision about that", and consequently "I'm more methodical about [criticising things] now …"

### *Student "J"*

"Learning is to see that there are different ways of looking at things … developing an awareness that there's no right answer to anything … ." "You come to [the learning process] with your own ideas and prejudices." The term "legal theory" captures "why the law is the way it is and how it's evolved to be the way it is … what sort of forces have shaped it, how you can bring all those things together into a coherent

account of them." "Law is an area … especially the way it is taught [that] it's sort of cut and dried … as though areas … stand alone by themselves. But if you look more deeply you can see a sort of blurring of the boundaries … . Legal theory is the tool that you use to break down those boundaries and you can see a broader picture… . Common principles that underlie … aspects that are common in each [area] which may not be obvious at first glance… . As you progress through a course, then if you're thinking about what you're doing … you don't necessarily view things in pigeon holes, and [you] can see that there is a broader pattern. … [Thinking about legal theory is] like a synthesis exercise."

Learning legal theory "gives you a deeper understanding … because you are forced to think about not just the content, like contract rules, but about why they've become that way. … It helps to understand the rules themselves, and if you want to change them you need to know how … they've become that way and how … they could be changed. … One part of the theoretical agenda is to help clarify why things are the way they are and how they became that way but … part of it is … how you might go about making [the law] better … and if you have a theoretical approach … it can help chart a direction for change."

"Theory grows up around the [legal] principles … there's … quite a [close] relationship between the two: one looks at influencing and changing … the other, so they are bound up together, so that legal theory is certainly part of the law, equally with legal principles, because they are shaping each other all along the way… . Legal principles are a theoretical manifestation … in that sense they are a representation of a particular theory … but they are also different … Obviously you could formally separate them into two things. … You can have a set of rules … which at face value seems pretty straightforward … unambiguous … you think of them as being logical and rational." "I think of legal theory as … having a deeper underpinning." "When you are learning rules [they] tend to be presented in a much more mechanical process … you learn the rules and you apply them, and you don't really … question them." "Understanding … is when you've appreciated what the area of law is, why it is shaped the way it is, what are the dimensions of it, what sort of critiques have there been … and what's inadequate about it. Legal theory … puts things in context [and] without that sort of underpinning you're learning things cold, by themselves … devoid of any meaning."

## *Student K*

"Legal theory is why the system works as it does or maybe why it's supposed to work in a specific way Maybe it doesn't work quite as well as the theory says it should". "You have a practical side of the law and … the theory is what people say and write about how the practical [side] works or should work." "I often don't see [the practical and the theory] connecting at all". "[T]he judgments … try to address the theoretical side but I think they tend to more address the facts of the case." "Sometimes … the theory contradicts what happens in practice in the cases that we read." "I think you need the theory because in practice … the legal system tries its best to … work with the theory." "[Y]ou need to know the theory … like you need to know all the basics before you can build and you can't just have half a foundation on which to put a building … you need that full grounding." "The theory comes from legal … 'watchdogs'. People who watch the system work and maybe speak and write about how it should work and how it does work: scholars, possibly even lawyers." "[S]ometimes the theory would come [before the rule] but in the case of interpretation … I think it is coming after… . [T]he interpretation theory is addressing what has happened, they are saying this is an alternative, this is undermining … preconceived presumptions about how [the system] works". A theory is "something somebody thinks about … it is not actually doing something, it is thinking about it." "[E]ach legal theory seems to belong to a certain person." I theorise "because I have my own ideas and my own values of how something should work".

## *Student L*

Theory is the foundation for practical things: "you have to have an idea to base something on … you base practical things on theory". Theories are different points of view: "feminism is just someone's point of view … it's just a certain group of people's beliefs". The purpose of learning theory is that "I personally would like to know what is behind it, what is behind legislation … what is behind everything." Theory "is most certainly relevant, it gives you foundation". Legal theory is "probably taught just to give us a

background to the practical side of things … to show what's behind it and why it's there and how the laws and rules are formulated, and also how they relate to society". "I don't know whether [legal theory] is different [from the law] or whether it is just another section of it but I wouldn't be surprised if a lot of lawyers in practice don't even know that there is legal theory out there". "It is just so hard to get a grasp on [the legal principles] if you don't know why it is there and for that reason I think … [theory] is most relevant and that is why it should be taught." "You could most likely learn [the principles] and how they operate and why that is what you would know, but without the theory] you wouldn't know why they are there, … you wouldn't know what they are based on. You could and obviously people have [learnt the principles without the theory] but I … wouldn't want to … it wouldn't make as much sense to me." The legal theory this student has learnt has applications: "[W]henever I read a judgment … you just see how it has all come about and how it evolves in the meaning, the reasons the judge has done this and you can look at some judges' decisions and you can say 'that is pretty formalistic, isn't it?'" Theorising about law involves "the thinking of something new … You would have to bring up some new … idea about law". Legal theory allows you to see things from other people's "point of view, instead of your own little narrow … perspective that you have picked up." Learning legal theory "gives me an edge" over other law students who have not learnt it, "because not only have we learnt the other aspects of the practical side in depth … we've been taught to know this."

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 (1996) 7 *Legal Educ Rev* 31.

1 C Roper, *Career Intentions* of *Australian Law Students* (Canberra: AGPS, 1995) 31–37.

2 W Friedmann, Legal Theory and the Practical Lawyer (1941) 5 *Mod L Rev* 103, at 103–04.

3 As evidenced in the survey by Roper, *supra* note 1.

4 American Bar Association, *Report of the Task Force on Lawyer Competency* (Cramton Report) (Chicago: ABA, 1979), quoted in J Costonis, The MacCrate Report: of Loaves, Fishes and the Future of American Legal Education (1993) 43 *J Legal Educ* 157, at 171.

5 M Le Brun, & R Johnstone, The *Quiet (R)evolution: Improving Student Learning in Law* (Sydney: LBC, 1994) 170–72.

6 American Bar Association Section of Legal Education and Admission to the Bar Task Force, *Legal Education and Professional Development — an Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (MacCrate Report) (Chicago: ABA, 1992).

7 It should be noted however that C Sampford, & D Wood, Legal Theory and Legal Education — the Next Step (1989) 1 *Legal Educ Rev* 107, goes some way to developing models and ideas for the incorporation of theoretical perspectives into non-jurisprudence subjects. Perhaps part of the answer lies not in the law schools alone, but in the wider school and university curricula: liberal arts subjects in logical thinking and argumentation, such as have spawned texts like V Barry, & J Rudinow, *Invitation to Critical Thinking* (Orlando: Holt, Rinehart and Winston, 1990) would be useful prerequisites to undergraduate law study.

8 L Fuller, On Teaching Law (1950) 3 *Stan L Rev* 35, at 45.

9 N MacCormick, The Democratic Intellect and the Law (1985) 5 *Legal Stud* 172.

10 N MacCormick, & W Twining, Theory and the Law Curriculum, in W Twining ed, *Legal Theory and the Common Law* (Oxford: Basil Blackwell, 1986).

11 Most entertainingly in W Twining, The Great Juristic Bazaar (1976) 14 *J Soc'y Pub Tchrs L* 185.

12 W Twining, Some Jobs for Jurisprudence (1974) 1 *Brit J Law & Soc'y* 149 at 157.

13 *Id.*

14 R Cotterell, & J Woodliffe, The Teaching of Jurisprudence in British Universities (1974) 13 *J Soc'y Pub Tchrs L* 74; H Barnett, & D Yach, The Teaching of Jurisprudence and Legal Theory in British Universities and Polytechnics (1985) 5 *Legal Stud* 151; H Barnett, The Province of Jurisprudence Determined — Again! (1995) 15 *Legal Stud* 88.

15 By analogy with the "7 up" British television study, which re-interviews its subjects every 7 years.

16 P Sheldrake, Jurisprudence in the Law Course (1975) 13 *J* Soc'y *Pub Tchrs L* 342.

17 Barnett, *supra* note 14.

18 *Id* at 96.

19 *Id* at 103.

20 MacCormick and Twining, *supra* note 10, at 248.

21 Barnett, *supra* note 14, at 103.

22 *Id.*

23 Z Bankowski, & G Mungham, Images of *Law* (London: Routledge, 1976), a concern re-iterated in MacCormick, & Twining, *supra* note 10, at 181.

24 A Hunt, The Role and Place of Theory in Legal Education: Reflections on Foundationalism (1989) 9 *Legal Stud* 146 at 146; see also A Hunt, Jurisprudence, Philosophy and Legal Education — Against Foundationalism: a Response to Neil MacCormick (1986) 6 *Legal Stud* 292. For a sketch of a more moderate pluralism, see C Sunstein, In Defence of Liberal Education (1993) 43 *J Legal Educ* 22.

25 Something long ago identified and celebrated by Twining in a pluralist rejection of the idea of a "jurisprudential canon", see *supra*

note 11. In a more post-modern vein, see G Minda, Jurisprudence at Century's End (1993) 43 *J Legal Educ* 27.

[26] R Tur, Jurisprudence and Practice (1976) 14 *J Soc'y Pub Tchrs L* 38, at 44.

[27] MacCormick, & Twining, *supra* note 10, at 244.

[28] *Id* at 247.

[29] C Sampford, & D Wood, Theoretical Dimensions of Legal Education: a Response to the Pearce Report (1988) 62 *Austl LJ* 32, at 52. The authors further developed their ideas in Sampford, & Wood, *supra*, note 7.

[30] M Le Brun, Law at Griffith: the First Year of Study (1992) 1 *Griffith Law Rev* 15.

[31] F Marton, Phenomenography — Describing Conceptions of the World Around Us (1981) 10 *Instructional Sci* 177.

[32] F Marton, Phenomenography: Exploring Different Conceptions of Reality, in D Fetterman ed, *Qualitative Approaches to Evaluation in Education: the Silent Scientific Revolution* (New York: Praeger, 1988).

[33] An example of its practical application to issues of assessment and student approaches to learning law is the ongoing work of Le Brun and Bond, reported in preliminary form in C Bond, & M Le Brun , Promoting Learning in Law (1996) 7 *Legal Educ Rev*, 1.

[34] R Säljö, Learning in the Learner's Perspective — Some common sense conceptions (1979) 1 *Rep from Inst Educ, U Gothenburg* 76.

[35] F Marton, G Dall'Alba, & E Beaty, Conceptions of Learning (1993) 19 *Int'l J Educ Res* 277.

[36] Reflected in P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992), and Marton et al, *id*.

[37] Cited in Ramsden, *id* at 26, and Marton et al, *supra* note 35 at 283–284.

[38] Marton et al, *supra* note 35 at 292–94.

[39] As quoted in M Heidegger, *Existence and Being* (Chicago: Gateway, 1949) 325.

[40] Eg: S Bottomley, N Gunningham, & S Parker, *Law in Context* (Sydney: Federation Press, 1994); R Hunter, R Ingleby, & R Johnstone eds, *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (Sydney: Allen & Unwin, 1995).

[41] Eg: S Wheeler, & J Shaw, *Contract Law: Cases, Materials and Commentary* (Oxford: OUP, 1994); or many of the volumes in the British *Law in Context* series.

[42] Eg: J Harris, *Legal Philosophies* (London: Butterworths, 1984); J Riddall, *Jurisprudence* (London: Butterworths, 1991). A less traditional alternative is W Mansell, B Meteyard, & A Thomson, *A Critical Introduction to Law* (London: Cavendish, 1995). Equally contemporary, though perhaps better suited to later years of study, are two recent Australian texts: S Berns, *Concise Jurisprudence* (Sydney: Federation Press, 1993); M Davies, *Asking the Law Question* (Sydney: LBC, 1994).