Reasoning from the Ground Up: Some Strategies for Teaching Theory to Law Students

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REASONING FROM THE GROUND UP: SOME STRATEGIES FOR TEACHING THEORY TO LAW STUDENTS

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A number of courses in the law curriculum contain significant theoretical content. The most obvious examples are courses on jurisprudence or legal theory. However, courses dealing with topics such as constitutional law or the relationship between law and society typically also raise questions concerning the theoretical context of legal institutions. Lecturers teaching other areas of substantive law may also seek to integrate theoretical perspectives into their courses. A course on property law, for instance, may touch on the philosophical foundations of property rights, while a course on equity might probe the underlying purpose of equitable doctrines in order to bring coherence to the judicial decisions.

The place of legal theory in the law curriculum has been debated in a number of scholarly articles.[1] There is, however, relatively little literature dealing directly with the pedagogical issues encountered when teaching theory to law students.[2] The literature on teaching

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[1] See, eg, Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney Law Review* 537; Charles Sampford and David Wood, 'Theoretical Dimensions of Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 100; Charles Sampford and David Wood, 'The Place of Legal Theory in the Law School' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 98; John Goldring, 'The Place of Legal Theory in the Law School: A Comment' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 159; Alan Hunt, 'The Role and Place of Theory in Legal Education' (1989) 9 *Legal Studies* 146; Neil MacCormick and William Twining, 'Theory in the Law Curriculum' in William Twining (ed), *Legal Theory of the Common Law* (Oxford, 1986) 238; Neil MacCormick, 'The Democratic Intellect and the Law' (1985) 5 *Legal Studies* 172; Wolfgang Friedmann, 'Legal Theory and the Practical Lawyer' (1941) 5 *Modern Law Review* 103.

[2] There are, of course, exceptions. See, eg, Charles Sampford, 'Teaching Theory in Substantive Subjects' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 117; Charles Sampford and David Wood, 'Legal Theory and Legal Education: The Next Step' (1989) 1 *Legal Education Review* 107. For a more recent contribution, see Heather Ann Forrest, 'Jurisprudence Meets Epistemology: Facilitating Legal Understanding and Meaningful Learning in Legal Education with Concept Maps' (2008) 18 *Legal Education Review* 73. For discussion of the related topic of

philosophy provides some guidance, but it frequently focuses on philosophical topics that are unlikely to come up in law classes. The present article takes some preliminary steps towards filling this gap. It examines some of the possible reasons for teaching theoretical perspectives to law students, then offers some concrete pedagogical techniques for doing so.

The article commences by briefly discussing why theory should have a place in the law curriculum, focusing on ways in which theoretical engagement can enhance students' understanding of both law as an institution and their potential role as legal professionals. It then considers four strategies for structuring teaching modules with a theoretical focus, before turning to some classroom techniques for promoting law student engagement with theoretical materials. This article is primarily aimed at assisting law teachers who do not specialise in legal theory to identify and structure theoretical materials in their courses. Specialist legal theory teachers will have their own diverse ways of teaching such topics[3] — this article does not claim to provide a better one. Nonetheless, it is hoped that specialists in legal theory will find the article helpful as an aid to reflect on their existing practices.

I WHY TEACH LEGAL THEORY?

It is possible to identify four forms of theoretical enquiry that are commonly encountered in law courses. The first is conceptual theorising, which concerns the nature of law and legal institutions, as represented by traditions such as natural law theory and legal positivism. The second category is normative theorising, which concerns what form legal institutions ought to take or how specific legal rules should be reformed; while the third is ethical theorising, which concerns how actors within the legal system ought to behave. Finally, there is doctrinal theorising, which seeks to bring coherence to a particular body of substantive legal rules and principles.

There are two broad reasons why it is worthwhile exposing law students to theory. These are, first, that the types of theoretical perspective outlined above help students to engage with the practical point of law as an institution; and, second, that they provide a context for understanding the role of the legal professional. These reasons tend to persuade law students to take theoretical topics seriously, since they have an internal connection with many students' existing motivations. It is therefore possible to integrate these reasons into

integrating critical thinking into legal education, see Nick James, Clair Hughes and Clare Cappa, 'Conceptualising, Developing and Assessing Critical Thinking in Law' (2010) 15 *Teaching in Higher Education* 285.

[3] For a detailed discussion of two contrasting approaches, see Sampford and Wood, 'Legal Theory and Legal Education', above n 2.

the students' worldview without seeking to radically challenge their existing motivations for studying law.

Law teachers who are passionate about placing legal rules in their broader social and theoretical context sometimes try to motivate students by emphasising the radical potential of such perspectives.[4] They stress that students can use theory to question the existing legal order. This is, undoubtedly, an important dimension of theoretical enquiry, which students should be encouraged to pursue.[5] For at least some law students, however, this approach is a turn off. They do not want to radically question their beliefs; they just want to learn the law.[6] Fortunately, it is possible to plant the seeds for future critique by introducing students to theoretical topics in a way that supports, rather than challenges, their existing worldview. This is no mere confidence trick: as discussed below, some of the best reasons for law students to study theory are tightly integrated with motivations that many students already share.

There is a further pedagogical benefit of linking the justifications for teaching legal theory to the existing motivations and concerns of students. John Biggs argues that deep learning is based on interconnections. 'In deep learning', he contends, 'new learning connects with the old, so teaching should exploit interconnectedness' by using familiar examples and encouraging students to draw on their own experiences.[7] Shelagh Crooks makes the additional observation that a highly effective way to lead students to engage in the type of argumentative thought that characterises theoretical enquiry is to present them with opportunities for 'metacognition', or critical reflection upon their own thought processes.[8] In order to guide students in this direction, connections should be made where possible between the theoretical perspectives under discussion and their own pre-existing beliefs and reasons for action. The following paragraphs explore two possible ways of drawing out these existing motivations.

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[4] See, eg, James, Hughes and Cappa, above n 2, 287–8; Nick James, *Critical Legal Thinking* (Pearson, 3rd ed, 2011) 9, 13–14.

[5] For a powerful expression of the importance of such enquiry, see Catharine MacKinnon, 'Feminism in Legal Education' (1989) 1 *Legal Education Review* 85.

[6] The problem of law student hostility or indifference towards theoretical material has been discussed by a range of authors; see, eg, Sampford and Wood, 'The Place of Legal Theory in the Law School', above n 1, 102; Hunt, above n 1, 149.

[7] John Biggs, *Teaching for Quality Learning at University* (Open University Press, 1999) 73–4.

[8] Shelagh Crooks, 'Teaching for Argumentative Thought' (2009) 32 *Teaching Philosophy* 247.

A   *Understanding Law as an Institution*

It is impossible to fully understand law as an institution without placing it in its broader theoretical context. It follows that students who wish to understand the law must do more than grasp the black-letter rules. Students who wish to practise law can make good use of this broader knowledge when giving advice and preparing legal arguments. Clients and judges do not always simply wish to know what the statute says. Often, clients would like to know where the law is going or what decision to expect in court. Judges want to know how to interpret the relevant legislation or cases. This requires grasping the purpose of the laws in question.

Students, whether they realise it or not, do not view law merely as an esoteric academic topic; rather, they see it as a theatre of action. However, in order to grasp how law prompts action, it is necessary to look at the reasons behind it. These reasons will often depend on normative and social factors beyond the law itself, narrowly conceived. The normative significance of law does not come from the legal text itself, but from its wider social and ethical context. Legal practitioners need to have at least a basic grasp of these background reasons. Better lawyers will have a subtle grasp of the motivations relevant to their field of practice.

The broader point here is that law is a normative institution. It is a collection of rules that tells people how to behave. This is what makes law important: there would be far less point in learning the law if it were simply a collection of words in a statute book. Students do not want to learn the law just for the sake of deciphering a piece of arcane literature. They wish to understand the way law guides people's actions, so that they can advise clients, or judges, on how best to integrate themselves into this web of behaviours. It is important not to make the assumption that people who act in accordance with the law do so simply because it is written in a statute — there may be diverse reasons for doing so, ranging from a desire to do the right thing to a desire to avoid a legal penalty. These reasons lend law its social importance.

The importance in legal education of viewing law as a theatre of action has been noted by a number of authors. Michael Detmold, for example, argues that 'education and moral ability are logically connected concepts'. It follows that legal education must give due weight to law's reason-giving character.[9] David Wood suggests that legal educators should view law as 'applied moral philosophy', giving appropriate attention to the moral foundations of legal rules. '[T]o think legally', he argues, 'law students must be able to think

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[9]   M J Detmold, *The Unity of Law and Morality* (Routledge & Kegan Paul, 1984) 89–90. For further discussion of Detmold's view, see MacCormick, above n 1, 176.

morally'.[10] Meanwhile, an early article on the place of theory in the law curriculum by Wolfgang Friedmann emphasises that legal decision-making often involves judgements about fundamental matters of value.[11]

This argument for the role of theory in legal studies applies both to attempts to bring theoretical coherence to particular fields of law and to deeper reflection upon law as an institution. A student who wishes to specialise in, say, intellectual property law might be brought to see the practical advantage of understanding the historical drivers and policy considerations surrounding the area. This is, in turn, the first step towards grasping the point of more fundamental theoretical enquiries, since a full explanation of the historical and social context for intellectual property will invoke normative concepts that also play a significant role in other fields of legal doctrine.

This line of thought integrates the case for teaching theory to law students with a motivation many students already share: the desire to equip themselves for various forms of legal practice. A recent study found that students of all abilities express more consistent levels of interest in 'devising legal arguments and strategies' than any other aspect of the law curriculum.[12] The approach is, however, no mere cop out from a philosophical perspective. As H L A Hart famously argues in *The Concept of Law*, law can be fully understood only from the 'internal point of view' — the perspective of someone who views it as a practical guide to action.[13] A similar point is made by John Finnis in *Natural Law and Natural Rights*: in order to understand law as an institution, one must first attempt to grasp its 'practical point'.[14]

A related benefit for law students of studying theory concerns the reasoning techniques and habits that one acquires from theoretical enquiry. Studying theoretical topics shows students how to engage in foundational reasoning; that is, they are prompted to look at the reasons that lie behind rules and practices they would otherwise take for granted. It is this type of 'reasoning from the ground up' that equips them to identify and interrogate the underlying purpose of legal doctrines. An understanding of the motivations behind the law holds obvious utility for legal practice. As Charles Sampford argues,

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[10]   Sampford and Wood, 'Legal Theory and Legal Education', above n 2, 113, 116. See also Sally Kift, '21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18 *Legal Education Review* 1, 4–5, 26–30.

[11]   Friedmann, above n 1.

[12]   Wendy Larcombe, Pip Nicholson and Ian Malkin, 'Performance in Law School: What Matters in the Beginning?' (2008) 18 *Legal Education Review* 95, 110.

[13]   H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 89–91.

[14]   John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) ch 1.

it makes for more decisive and coherent advocacy, more far-sighted advice and a more balanced assessment of legal conflicts.[15]

B *A Wide View of Professional Ethics*

Another way to conceptualise the role of theory in the law curriculum is to view it through the prism of legal professional ethics. Lecturers teaching professional ethics to law students face the challenge of integrating two competing demands: first, to give the students some understanding of ethics as a discipline; and, second, to teach the specific rules and cases pertaining to legal professional conduct. The former topic faces the usual hurdles associated with teaching theory, while the latter can seem disappointingly prosaic or needlessly technical.[16]

One of the problems here is that, ironically, students see ethics as something disconnected from their everyday lives. This is ironic because ethics, properly understood, is the most practical topic possible. The point goes back to Aristotle, who observed that, in ethical reasoning, 'what we deliberate about is the same as what we decide to do'.[17] Something is going wrong when students cannot see the relevance of ethics to their daily existence. The problem seems to be that philosophical ethics is too abstract to make the connection obvious, whereas the formal rules of legal professional conduct sometimes appear too technical and obscure, particularly for students with little or no experience of legal practice.

The challenge is therefore to fill in the gap between abstract ethical principles and the minutiae of professional regulations. One way of doing this is to take a wide view of professional ethics, looking at not just the formal rules governing legal practice but the context for the practice itself. Students need to know about legal ethics because at least some of them will become lawyers. This raises two interrelated questions. First, what does it mean to be a lawyer? Second, what is the point of being a lawyer in the first place?

The first question raises some of the issues encountered in the previous section concerning the nature of law as a normative practice. A lawyer is someone who plays a specific role — namely, advisor and advocate — in a wider normative framework that directs various forms of social behaviour. This shows that understanding the role of the lawyer requires grasping the nature of law as a normative institution. As we saw above, understanding law as a normative institution requires placing it in a social and ethical context.

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[15] Sampford and Wood, 'Legal Theory and Legal Education', above n 2, 131.

[16] See Christine Parker, 'What Do They Learn When They Learn Legal Ethics?' (2001) 12 *Legal Education Review* 175.

[17] Aristotle, *Nicomachean Ethics* 1113a2. I follow the translation offered in Robert Audi, *Practical Reasoning* (Routledge, 1989) 15. Cf Aristotle, *Nicomachean Ethics* (Oxford University Press, W D Ross trans, 1980) 57.

The second question, on the other hand, has a direct connection to students' lives: many of them will be struggling with the question of whether or not to pursue a career in legal practice.[18] How are they to decide? A person's choice of career is, after all, an important existential decision. It is tied to deeper ethical questions, such as what constitutes a good and worthwhile life. There are, in this context, instrumental reasons to pursue a career in law, such as the promise of career advancement and financial reward. There are also deeper possible reasons concerning the role of the lawyer in promoting justice and the common good.

A recent study by Tamara Walsh suggests that a significant proportion of law students are motivated to pursue their studies by a desire to promote just outcomes.[19] This provides a natural starting point for examining the connection between legal institutions and the common good. However, even students without such a conscious motivation can sometimes be led to engage with such issues by considering how a potential career in the law would connect with their broader view of their character and motivations. Encouraging students to reflect upon their reasons for studying law can therefore provide an entry point for examining the role of the lawyer and, by extension, the wider theoretical context for legal institutions.

II STRUCTURING THEORETICAL MODULES

The previous section had two interrelated aims. It sought to illuminate some of the reasons why it is worthwhile to teach theory to law students, and how these reasons could be integrated with students' pre-existing motivations so as to show them the value of pursuing theoretical enquiry. The lecturer's job is made considerably easier if she can show students the value of the material under discussion, rather than facing a class of people who cannot see why they should care about the topic at hand. There are, however, other types of challenges that also need to be acknowledged.

One of the difficulties many law students face in grasping the point of theoretical topics is their unfamiliarity with theoretical modes of enquiry. A significant proportion of law students lack any significant prior exposure to theoretical perspectives, particularly if they have never taken courses in the humanities or cognate disciplines. This not only leads them to question the point of theory; it also makes them unsure how to go about it. Sampford and Wood have identified uncertainty about what theory is and what it involves as one of the main barriers to the integration of theoretical perspectives

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18   Larcombe, Nicholson and Malkin, above n 12, 111.
19   Tamara Walsh, 'Putting Justice Back into Legal Education' (2007) 17 *Legal Education Review* 119, 131–2.

into the law curriculum.[20] Neil MacCormick and William Twining take this analysis a step further, explicitly connecting law students' lack of familiarity with theory to the resistance they often show to theoretical materials.[21]

Law students sometimes complain that lecturers introducing theoretical issues into the course are seeking to indoctrinate them into a favoured theoretical or political framework. This complaint may sometimes have merit; in other cases, however, it is made even though the lecturer has encouraged students to critique the presented points of view. In these cases, the complaint may reflect a feeling of powerlessness on the part of the students — even though the lecturer has invited them to question the material, they are unclear about how to do so.

We saw above that theoretical enquiry, unlike some other forms of study, involves reasoning from the ground up. Many law courses centre on teaching students a series of specific rules and principles. Theoretical enquiry involves seeking the deeper reasons behind the rules and principles. A thorough approach to this form of enquiry will potentially produce a complex series of nested reasons. This then presents a new challenge to students: the chain of reasons must end somewhere, but how is it possible to put a stop to it? Students may feel that any theoretical questioning puts them on a slippery slope to relativism or nihilism.

For example, students studying property law may be invited to reflect upon the philosophical foundations of private property. The legal rules of a country like Australia strongly protect private property, but why is this so? Is there, for example, a natural right to property? This invites the further question: what are natural rights, anyway, and how do we identify them? This type of fundamental questioning, carried out with reference to the long catalogue of philosophical literature on the topic, is likely to lead at least some students to despair of clear answers. They might be excused for thinking that there is little practical point in embarking on the enquiry in the first place.

One way of combating this sort of problem is to equip students explicitly with the tools to evaluate the various perspectives on offer. They need to know what they are looking for in evaluating a theoretical chain of reasoning. If they can try to identify flaws in the lines of argument presented to them, it enables them to exercise some control over the conclusions. Otherwise, they are liable to find themselves confronted by two sets of ideas leading inexorably to opposed outcomes, without knowing how to choose between them.

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[20]   Sampford and Wood, 'The Place of Legal Theory in the Law School', above n 1, 100. See also Keyes and Johnstone, above n 1, 550.

[21]   MacCormick and Twining, above n 1, 250. See also Hunt, above n 1, 149.

The remainder of this article explores some possible strategies for overcoming this barrier to learning.

A *Supplying Methodological Knowledge*

The first strategy involves supplying basic methodological and conceptual knowledge that students studying law courses often lack, such as the structure of a sound deductive argument. As we have seen, students faced with theoretical topics may find the material difficult and alienating because they lack the tools to engage with it. It is possible to make headway in this area by prefacing theoretical material with a short module introducing students to the basic principles of logical reasoning, including the structure of a sound deductive argument. The tools provided in such a module can help students not only to engage with theoretical topics, but also to structure their essays, moot submissions and other assessment.

One possible way of structuring an introductory module on logical reasoning is as follows. Students are first invited to consider how a logical argument fits together. They can be taught that an argument has two parts: the premises and the conclusion. The conclusion is what the author is claiming, while the premises give reasons for accepting the conclusion. In a sound argument, it is impossible to accept the premises without also accepting the conclusion. This can be illustrated through a simple example, such as this classic syllogism:

Premise 1: Socrates is a person.
Premise 2: All people are mortal.
Conclusion: Therefore, Socrates is mortal.

Students should be able to see it is impossible to accept the premises of this argument without also accepting the conclusion. It is important to point out that most legal and philosophical arguments will not be this simple or clear-cut. However, the principle is the same: the connection between premises and conclusion should be as tight as possible.

It is also useful to teach students the difference between *soundness* and *validity*. A sound argument, as we have seen, is one where it is impossible to accept the premises without affirming the conclusion. A valid argument is a sound argument where all the premises are true. The conclusion of a valid argument must therefore also be true, but not all sound arguments are necessarily valid, as they will sometimes have false premises. The distinction shows students that there are two ways of challenging an argument. The first is to show that the premises do not support the conclusion. The second is to question the premises themselves.

This sort of short module on logical reasoning has two benefits for students. First, it provides them with a process to follow in writing argumentative essays. They can begin by considering the issue

carefully, then identifying what they think is the right conclusion. The next step is to think carefully about the reasons that drew them to that conclusion — in other words, to identify their premises. The objective of the essay is then to present the premises in such a way that the reader is drawn towards the desired conclusion. This reasoning process provides students with a simple and effective essay structure. The various stages in the argument, once clearly identified, give them a useful guide as to how to divide up the essay itself.

The second point of the module is to empower students to engage critically with theoretical topics. Rather than being overwhelmed by different theoretical perspectives, they can be taught to focus on the details of each individual argument. Each theoretical outlook will invoke a series of premises on the way to its preferred conclusions. If students are able to identify and question the premises, it gives them control over whether to accept the conclusion. This should help them to view theoretical content less as indoctrination to be absorbed without question and more as a set of ideas to incorporate into their own worldviews.

B *Structuring Theoretical Understanding*

A second strategy centres on the importance of structure in allowing students to build up increasingly sophisticated knowledge of an unfamiliar topic. A highly structured and methodical approach to teaching theoretical topics allows students to see the overall context and motivation for each theory before examining the details. This equips them to independently identify the assumptions of other theories they encounter.

For example, when teaching an introductory course on jurisprudence, the lecturer might begin by explaining the methodological starting point for philosophical enquiry before applying this to legal theory. A similar structure can then be applied to each individual topic by outlining the philosophical context and introducing key motivations before presenting the substantive theories. Some areas of jurisprudence are attempts to explore the concept of law. Others have normative questions in mind. Students will find these topics much easier to grasp and synthesise if they can spot the types of questions each theory is attempting to answer.

An example of this sort of exercise can be found in the opening chapter of the author's textbook on *Legal Theory*.[22] The text begins by presenting legal theory as a branch of philosophy. This raises the initial question: what is philosophy? One way of understanding philosophy is as a quest for understanding: it seeks a clearer and

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[22]   Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) ch 1.

more precise understanding of everyday ideas and concepts. In the words of the philosopher, John Campbell:

> Philosophy is thinking in slow motion. It breaks down, describes and assesses moves we ordinarily make at great speed — to do with our natural motivations and beliefs.[23]

If philosophy is the search for greater understanding, then legal theory becomes the search for greater understanding *about law*. Our starting point should therefore be our pre-existing beliefs about the nature of law and legal institutions. The next step is to highlight three features of popular understandings of law that legal theorists have sought to examine: first, law is a set of social rules; second, we should normally, but not always, do as the law requires; and, third, the purpose of law is to promote the common good.

A good legal theory helps us to better understand the popular view of law by critically assessing its content and exploring how its different aspects fit together. Many legal theories can accommodate some aspects of the popular view of law, but the best theories will account for all of them. The popular view of law raises a number of questions for legal theorists, such as the following, extracted from the text, *Legal Theory*:

> According to the popular view, law is a set of social rules. But what exactly are social rules and how and why do people recognise them as binding? Are there different types of social rules? How do we tell them apart?

> According to the popular view, we should normally, but not always, obey the law. But why? Is obedience to law really required? And what is the status of a morally repugnant law? Should we obey such a law? And if we shouldn't obey it, is it really a law in the first place?

> According to the popular view, law is for the common good. But what is the content of the common good? And how exactly does law promote it? What is the relationship between the common good and the notion of legal obligation?[24]

The aim of identifying the methodological premises of theoretical topics is to acquaint students with the questions various theorists are asking, before examining their points of view in detail. This not only prepares students to understand the theories, but also gives them tools for engaging in critique: once they understand what the theories are aiming to achieve, they can assess whether they succeed in that aim.

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[23] Steve Pyke, *Philosophers* (Cornerhouse, 1993) 22.
[24] Crowe, above n 22, 6.

C *Using Analogies and Examples*

A third strategy for making theoretical topics accessible to law students involves making use of analogies and examples to illustrate theoretical points. The best examples are often those that resonate with the everyday experiences of students. Philosophers are well-known for producing examples (often called 'thought experiments' or 'intuition pumps') to draw out various problems. Unfortunately, these can be very far-fetched.[25] Science fiction style examples are sometimes effective in grabbing students' attention, but they also risk undermining efforts to help them grasp the point's relevance to their own motivations.

Two sample passages serve to illustrate the relevant technique. The first concerns the view natural law theorists take of the notion of an unjust law:

> Imagine that a Martian comes down from outer space and lands its spaceship in your backyard. The Martian has heard that humans have something called a 'car' and asks you to explain the concept. Now, it just so happens that your neighbour has a rusty, broken down car sitting at the back of her house. The wheels and the engine are missing and it has been sitting on blocks ever since you can remember. One option you have is to say to the Martian, 'Look, that's a car over there', and point to the wreck in your neighbour's yard. Would that be a very good response?

> It would technically be correct for you to answer the Martian's question in this way. The object in your neighbour's yard *is* a car, after all. On the other hand, if someone comes all the way from Mars to learn about cars, surely they deserve a better answer! The problem is that while your neighbour's wreck is technically a car, it is not a very good example of a car, since it does not do what a car is supposed to do. The Martian would miss out on a crucial piece of information about cars: they are used to get people from place to place. You would do far better to take the Martian down to the road and point out the cars driving past; even better, you could take the Martian for a drive yourself.

> This type of example illustrates the view that natural law theorists take of unjust laws. According to natural law theory, it is technically correct to call an unjust law a 'law'. However, it is not the best possible example of a law, because it does not do what a law is supposed to do. Laws are meant to direct our actions in accordance with the common good. A law that does not do this is still a type of law, but it does not qualify as a law in the best and fullest understanding of the term.[26]

There is, of course, a significant science fiction element to this example. The core point of the illustration, however, is to prompt students to imagine explaining a familiar functional concept, like that of a car, to someone who does not know what it is. This helps

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25   See, eg, David Lewis, 'Mad Pain and Martian Pain' in *Philosophical Papers* (Oxford University Press, 1983) vol 1, 122; Frank Jackson, 'Epiphenomenal Qualia' (1982) 32 *Philosophical Quarterly* 127.

26   Crowe, above n 22, 11–12.

to draw out the natural law point about the functional nature of the concept of law. A second passage concerns Lon Fuller's distinction between moralities of duty and moralities of aspiration:

> The distinction is perhaps best illustrated by reference to the external morality [of law]. Imagine you are walking along the footpath on the way to the shops. Every so often, someone passes you, heading in the opposite direction. If you make it to the shops without punching any of these people in the nose, will anyone praise you? No. Refraining from actions such as assault is the *minimum* you are expected to do. It forms part of the morality of duty.

> On the other hand, suppose that instead of just refraining from assaulting the people you meet, you go out of your way to help them. You meet a parent with a large stroller and help him to carry it up the stairs. You come across someone who seems lost and help her to find the house she is looking for. These are the types of actions that warrant praise, since they go beyond the minimum you are expected to do. This is the type of behaviour Fuller has in mind when he talks about the morality of aspiration.[27]

The point of this passage is to allow students to grasp the relevant philosophical concepts by drawing on their pre-existing knowledge and experiences. As in the previous section, the point is not to hold up these passages as ideal models, but rather to show the role examples can play in making theoretical concepts and issues accessible to students. The best examples will be tailored to the specific topic under discussion, but the philosophical literature certainly provides plenty of material that can be adapted as appropriate.

D *Avoiding the Descent into Nihilism*

We saw above that one of the reasons students may feel overwhelmed when encountering theoretical topics is that clear answers appear out of their reach. The abstract nature of the issues in question, combined with the diversity of possible answers, may lead them to doubt that any resolution is possible. This has the potential to serve as a disincentive to any serious attempt to understand and engage with the material.

A similar challenge has been identified in the literature on teaching philosophy. A number of authors have noted that undergraduate students tend to be drawn towards a relativist view of truth and, in particular, that they find moral scepticism appealing as a response to moral disagreement.[28] Students with a predisposition towards these sceptical outlooks are likely to find their suspicions confirmed by their initial encounters with theoretical enquiry. This is because the

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[27] Ibid 64.
[28] See, eg, Allan Bloom, *The Closing of the American Mind* (Simon and Schuster, 1987) 25; Russ Shafer-Landau, *Whatever Happened to Good and Evil?* (Oxford University Press, 2004) 30.

types of theoretical topics raised in university courses tend to be difficult, if not intractable: the issues are slippery and disagreement is easy to find.

How, then, can law teachers avoid sending students down the slippery slope to nihilism whenever they introduce theoretical perspectives? Daniel Callcut suggests some useful strategies.[29] One possible approach is to consider the sceptical position directly. Having canvassed the various theoretical viewpoints on a given issue, the lecturer might raise the prospect that there is no correct answer to the problem and consider where this leads. This approach seeks to prompt students to exercise the same level of scepticism towards the relativist or nihilist option that they are naturally inclined to give to the other possible points of view.

Students who are inclined to adopt a relativist or nihilist view of truth might be led to question their outlook through discussion of obvious examples of knowledge. Callcut suggests asking students the question, 'who is a better basketballer, Michael Jordan or me?' Students are inclined to say with confidence that Jordan is better; this, then, is a statement that seems objectively true.[30] The discussion might then lead into examples of other obviously true statements, including ethical claims like, 'it is wrong to kidnap random children and torture them'. The idea is to lead students to adopt a more nuanced view of truth and knowledge.

These general examples might not be suited to a law course where such issues arise only obliquely. However, a related strategy might nonetheless be appropriate. Suppose the course is considering how to bring coherence to a particular body of legal doctrine. Students may be inclined to say that there is no right answer: the case law is simply arbitrary and inconsistent. In some cases, of course, they might be correct. However, the consequences of adopting a knee-jerk scepticism about correct legal answers can also be drawn out.

What happens if we give up on the idea of legal coherence? Would that not give unfettered power to judges? How would people go about predicting legal outcomes and making arguments in the courtroom?[31] The point of raising these questions is not to weed out the budding legal realists in the class, but to help students reach a reasoned position by prompting them to take all the options seriously, including the sceptical ones. Students need to be reassured that engaging in critique does not mean giving up on the search for knowledge. The fact that a question is disputed does not mean there is no way of evaluating the different views.[32]

[29] Daniel Callcut, 'The Value of Teaching Moral Skepticism' (2006) 29 *Teaching Philosophy* 223.
[30] Ibid 226–7.
[31] For a famous discussion along these general lines, see Hart, above n 13, ch 7.
[32] For further discussion, see Hunt, above n 1, 159–60; Sampford and Wood, 'The Place of Legal Theory in the Law School', above n 1, 108–9.

III Techniques for the Classroom

The previous section canvassed some strategies for structuring theoretical modules in law courses. These ideas are relevant regardless of the mode of delivery; for example, they could be adapted for distance education. There are, however, additional techniques available for traditional classroom-based modes of delivery. One point that emerges from the scholarly literature is the importance of student involvement.

A *The Role of Student Involvement*

Reference was made earlier to Crooks's study of techniques for teaching students argumentative thought.[33] Crooks identifies two effective methods for developing this ability: interpersonal discussions where the learner is 'prodded' through dialogue to consider the presuppositions behind certain beliefs; and 'metacognition', where the student engages in independent critical reflection upon her own thought processes.

Crooks argues that these two methods should ideally be employed together. The method of 'prodding' or dialogue is necessary because people, left to their own devices, are credulous and disinclined to question their existing beliefs. It is best combined with metacognition, because this gives the learner a greater personal and emotional stake in the relevant thought process. This suggests that an ideal learning environment would engage students in dialogue on the theoretical questions under discussion, while connecting these to their existing belief systems and inviting further independent reflection.

It should be obvious that the model envisaged above is not ideally implemented in a traditional lecture format, where students serve as recipients of a prepared text delivered by the lecturer. This scenario affords neither interpersonal dialogue nor strong prompts for students to engage in metacognitive reflection. A range of studies have concluded that, while lecturing may be effective at imparting information and providing explanations, it is relatively ineffective at imparting skills and changing attitudes.[34] As John Goldring notes, small group teaching may not be absolutely essential to the development of evaluative skills in law students, but it is clearly better suited to that purpose than large lectures.[35] There is therefore reason for law lecturers teaching theoretical topics to institute a more interactive classroom format.

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[33] Crooks, above n 8.
[34] See, eg, Biggs, above n 7, 98; George Brown and Madeleine Atkins, *Effective Teaching in Higher Education* (Routledge, 1990) 11, 52.
[35] Goldring, above n 1, 163. See also Keyes and Johnstone, above n 1, 552.

Should law teachers dealing with theoretical topics seek to do away with lectures altogether? A study by Brook J Sadler cautions against this conclusion.[36] Sadler argues that a mix of lectures and student interaction is most appropriate in teaching philosophy. She begins by noting the clear value of engaging students in dialogue and requiring them actually to *do* philosophy, rather than simply to hear about various thinkers and ideas. She further notes the value of making philosophical enquiry a communal enterprise, where students can feed off one another's ideas and continue their discussions after class is over.

Student interaction is therefore crucial — but this does not mean that lectures are redundant. The worth of lectures, for Sadler, lies in giving students a concrete example of how an experienced philosopher or academic can engage in a deep and meaningful dialogue on their own beliefs and values.[37] Student discussions of theoretical points, even if carefully encouraged, can be facile or uninformed; they will typically occur without a deep understanding of the history of the relevant debates. Lectures can also help avoid the descent into nihilism discussed above by showing students how, even for a sophisticated interlocutor who knows about the different perspectives, firm conclusions are nonetheless possible.

Sadler makes it clear that, while the lecture format has its uses in theoretical courses, not just any type of lecture will fit the bill. Rather, she presents a model of what can be achieved within the constraints of the traditional lecture, provided that, as she puts it, the lecturer presents an example of a 'vivid, live' thought process engaged in by an 'honest, engaged, expert and skilled' academic.[38] This means the lecturer must be prepared to engage deeply and openly with the issues and to reach clear conclusions where these are warranted.

A similar conclusion is reached by Stephen Brookfield and Stephen Preskill, who emphasise the importance of discussion in effective learning at the tertiary level, but caution against doing away with the lecture format. Brookfield and Preskill argue that skilful lecturing can enhance the more interactive components of a course in a variety of ways, such as by furnishing students with the information and tools necessary for fruitful discussion and allowing lecturers to demonstrate their own commitment to critical enquiry.[39]

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[36]   Brook J Sadler, 'How Important is Student Participation in Teaching Philosophy?' (2004) 27 *Teaching Philosophy* 251.
[37]   Cf Kift, above n 10, 21.
[38]   Sadler, above n 36, 264.
[39]   Stephen Brookfield and Stephen Preskill, *Discussion as a Way of Teaching* (Open University Press, 1999) 35–8, 40–2.

B *Some Practical Strategies*

While skilfully executed lectures can hold value in teaching theoretical topics, student participation is essential. How can this be achieved in practice? Small class sizes obviously help — but how can we make the most of the opportunities these afford? Some useful suggestions can be gleaned from an article by Eddy Nahmias.[40] Nahmias notes that a seating arrangement where students are facing one another in a horseshoe or circle is more facilitative of dialogue than when the class is seated in rows facing the lecturer. It helps students get to know one another, by appearance if not by name; makes it harder for them to hide and avoid the discussion; and gives the impression that students are there to engage each other, rather than talking to the instructor.

The seating arrangements suggested above can be supplemented by techniques that prompt students to learn one another's names. Nahmias suggests the use of large name cards that are legible from a distance. An alternative is to invite students to introduce themselves by name at the start of the first class, preferably also offering some facts about themselves to aid recognition and recall. This process can be briefly reinforced by asking students to repeat their names at the start of subsequent classes, until this is no longer needed.

These preliminary measures are designed to set up the class in such a way as to facilitate dialogue. How, then, should the class itself be conducted so as to make this possible? A sound rule of thumb is for the teacher to heavily favour questions over lengthy statements or explanations. The aim is then to provoke student discussion and follow that where it goes, resisting the temptation to launch into an extended lecture.[41] Of course, a class consisting entirely of unanswered questions is unlikely to satisfy many students and may leave them confused and misinformed. The key lies in striking the right balance between prodding and clarification.

The notion of a philosophical dialogue is often taken to be exemplified by the discursions of the Ancient Greek philosopher, Socrates. As Nahmias points out, the actual Socratic dialogues recounted by Plato were hardly models of student interaction, largely consisting of monologues by Socrates punctuated by expressions of agreement from his interlocutors.[42] The idea, however, is to apply Socrates' example of following the arguments where they lead. This model, if it is to be implemented in the classroom, requires some

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[40] Eddy Nahmias, 'Practical Suggestions for Teaching Small Philosophy Classes' (2005) 28 *Teaching Philosophy* 59.

[41] Brookfield and Preskill, above n 39, provide a useful list of different types of questions that can be used by the instructor in this way: at 69–71.

[42] Nahmias, above n 40, 61. For a feminist critique of the Socratic method, see MacKinnon, above n 5, 93.

restraint on the part of the instructor, who is likely to feel she already knows at least some of the answers.

A further technique suggested by Nahmias consists in making summaries of key points available to students after the discussion is over. This helps to avoid the distraction of students madly scribbling (or, these days, typing) all the details of the discussion for revision purposes.[43] Tutorials, in particular, can be made more conducive to discussion by assuring students that the key examinable content will be made available in note form afterwards. Students can then be encouraged to close their books and computers and engage with their peers.

Nahmias also suggests the use of short progressive assessment items that require students to reflect critically upon the materials. Similar techniques have been discussed in the legal education literature; for example, Patricia Easteal suggests the use of 'learning chronicles' to encourage ongoing critical engagement with course content.[44] A variation on this model involves devoting part of the assessment to short critical responses to the set readings. Students are allocated around 1000 words to do two things: first, select and explain one or more arguments advanced in their chosen reading; and, second, assess the success of the arguments by reference to their assumptions, logical coherence, and practical and theoretical utility.[45] This task, if repeated three or more times across a course, tends to yield a clear improvement in quality of reasoning, theoretical competence and incisiveness of analysis over the different items.

IV Conclusion

This article has sought to expose some of the challenges legal academics face in teaching theoretical topics and to suggest some ways of overcoming those barriers. It began by proposing two reasons why it is worthwhile for law students to study theoretical perspectives: first, because it helps them grasp the practical point of legal institutions; and, second, because it aids in understanding their potential role as legal professionals. These are, of course, not the only reasons that could be given for including theory in law courses. However, they provide a useful way of connecting theoretical topics with common student motivations in studying law.

The remainder of the article discussed some practical techniques for helping law students to engage with theoretical material. It proposed four strategies for organising theoretical modules in

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[43]   For discussion of a case study utilising this technique, see Biggs, above n 7, 100.

[44]   Patricia Easteal, 'Teaching about the Nexus between Law and Society: From Pedagogy to Andragogy' (2008) 18 *Legal Education Review* 163, 172–5.

[45]   The author first used this form of assessment in a course designed and taught jointly with two colleagues, Francesca Bartlett and Nick James.

law courses: supplying methodological knowledge; structuring theoretical understanding; using analogies and examples; and avoiding the descent into nihilism. It then offered some techniques for the classroom, outlining the potential role of lectures and proposing methods for facilitating an optimal level of classroom dialogue.

There is a tendency for teachers and students alike to view theory as something of an afterthought in the law curriculum. The main focus of law teaching is often taken to be conveying substantive legal rules and imparting skills for legal practice. Theoretical perspectives are often tacked on to existing course structures, rather than being integrated into the curriculum.[46] This produces a corresponding tendency to overlook the distinct pedagogical challenges involved in teaching theoretical topics. There is, however, reason to view theory as an integral part of the law curriculum, since some level of theoretical reflection is essential in enabling students to grasp law's importance as a theatre of action. This would also require taking seriously the difficulties law students often face in engaging with theoretical topics. It is hoped that this article will help to spark an ongoing dialogue on strategies for addressing these challenges.

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[46] For further discussion of this issue, see Hunt, above n 1, 147–8; Sampford and Wood, 'The Place of Legal Theory in the Law School', above n 1, 103–5.