

Teaching theory or teaching substantive law?

One of the most bitterly contested disputes among academics is whether a law degree should teach legal theory (i.e. jurisprudence), or the social context of the law, or substantive law. The argument is usually conducted on the basis that a law degree should teach only one or the other of these approaches, but not all three. This seems to me daft. A law degree should enable students to learn about all three of these sources. The question is to get the right mix of law, theory and context.

It may be surprising to you that there are different approaches to teaching law degrees. It is likely that you will assume that the way in which you are learning the law is *the way* in which the law should be learned. However, among academics a lot more is known about the different approaches taken by different law schools and about different academics within different law schools to teaching law as a whole or particular legal subjects. Some law schools are renowned for their focus on jurisprudence and legal theory, and so are likely to prioritise the theoretical understanding of law over learning particular rules. In the 1970's, some law schools (for example) took a straightforwardly Marxist approach to law: for example beginning the study of property law with the observation that 'all property is theft' (pace Proudhon), and would have criticised law schools which simply taught the legal rules as being bound ideologically to the capitalist system. Few law schools are this straightforwardly political today; but there are still ideological differences between law schools and academics within law schools, even if they are not as obviously political as in the old days. So, some law schools, for example, pack the study of land law and trusts law effectively into one academic year, so as to leave an entire academic year to consider things like Locke's theory of property, the approach of native Americans to use of communal property, and so forth. Other law schools, spend two academic years covering as much technical land law and trusts law as they possibly can into the teaching slots available.

There are law programmes in the UK which do not see their principal goal as being to teach substantive law. Instead their goal is to present a theoretical understanding of how law functions, or of its social roles, or something of that sort. After all, this is the principal interest of many academics and forms the basis of their research. For them, the theoretical context or the journal literature are more important than the detail of the substantive law. Other law schools clearly prefer to teach 'black letter law': that is, only the substantive, technical law. On some courses, discussion of academic commentary beyond the black letter law is discouraged, either by not putting it on the reading materials or by formulating assessments so that there is no opportunity (or time) to mention academic commentary.

My approach is different to both of these. My preference is to teach substantive law, *inter alia*, as a means of getting into theoretical discussion. It seems to me that students can only form a theoretical view of the law for themselves once they have had the chance to come to know the detail of that law, and then to consider for themselves whether or not theoretical models or academic arguments about the law are convincing. If one does not attempt to cover as much technical, substantive law as is practicable before coming to theoretical questions, then one is simply pushing an ideology on students and the theoretical questions can seem tediously abstract because

they are not linked to anything real in the world. This means that in considering a single topic for a single seminar that one can cover both theory and law, as well as leaving a large amount of theoretical and/or journal material until the later stages of the course.

The other role of a law degree, it seems to me, is obviously to teach substantive law. Students must graduate with a comprehensive knowledge of the core, compulsory legal areas required for a qualifying law degree (not just because the professions require them but more particularly because they are the core of learning law, given that all contextual legal topics are based on that core (as discussed elsewhere on this site)). In so doing, students must subconsciously (although consciously in the mind of the academics running particular courses, and the school running the law degree) acquire skills necessary for thinking about substantive law, and a mind improved by studying and thinking about law as a technical discipline and also as a humanities degree and a social science. It seems to me that it is a misunderstanding of the theoretical nature of law or of the context of law to ignore simply how much law there is: to ignore the paradoxes in its detail, its inconsistencies, its surprising victories, its forgotten oases, and its capacity for rapid and for subtle change. Particularly with the electronic databases which have made *all* of the law visible to the naked eye (whereas previously a large number of cases were forgotten if they were not reported in the hard copy law reports), we cannot ignore substantive law and still claim that we are truly understanding its social context. Law is the perfect social science in that we can know about the reasoning and arguments of its actors (judges and barristers), we can know about the detail of the parties' motivations and lives (from the facts of decided cases), and about the detailed effects of the decisions of actors in the legal system. To claim to be teaching legal theory requires that we look at the substantive and quantitative material, not simply at the theory.

It should be noted that simply to say that theory should interact with practical issues is in itself controversial for some academics because they would say that theoretical questions should be kept pure and distinct from practical matters; and that to dissolve them in practice is to stop thinking theoretically and instead to succumb to however the law happens to be structured at any particular time. I would suggest that this depends on what is meant by 'theory' in this context. If one means philosophical systems (like Marxism or positivism) then they can be taught without reference to the practical world, of course. However, I do think that those systems are more interesting *in the context of a particular law course* (such as property law) if they are linked to practical law.¹ Another meaning of 'theory' in this context relates to the journal literature which asks whether or not the cases are properly decided, whether there are other models, whether other cases were missed, and so forth. In the middle of the 20th century, often when one talked of 'jurisprudence', one meant the organisation of the substantive law,² as opposed to meaning the philosophical work of HLA Hart, Lon Fuller, etc., as it relates to law.

¹ For some academics this sounds worryingly like those systems of thought are required to have practical proof to be worth studying. That is not what I mean, although I do think the possibility of putting a philosophical system to work practically is in itself a fascinating exercise.

² See e.g. Keaton, *Jurisprudence*.

Personally, I think that the study of law is enriched by wrestling with substantive law and then by reflecting afterwards on what that substantive law actually *means* and how one might think about it, whether philosophically or by reference to journal literature or whatever. In fact, the way in which one feels most comfortable reflecting on that law is an important part of understanding the intellect that you are: whether philosophically minded or practically minded, whether positivist or more at home with ethical thinking.

(For the record, I do think that Jurisprudence should be a compulsory course in all law schools because the study of law must involve some consideration of the philosophy of law and because one's view of jurisprudence (the ideas one likes or dislikes, ways of thinking which stick with you) is one of the things which is likely to stay with you long after graduation, whereas much of the substantive law that one learns will have changed by the time one gets into practice. This raises questions as to what we study law for – considered below. I am also an advocate of teaching some jurisprudence in the first year of a law degree so that the students are given some rudimentary philosophical frameworks against which to measure the law that they study across the law degree. Putting all of the jurisprudence at the end has the result that one comes too late to the 'positivist law *versus* morality' debate, to models of critical jurisprudence and so on.)

What does this mean for you?

Knowing about this debate could have two benefits for you. First, if you feel slightly disaffected with your own law degree, it might be because you are studying at a law school which prefers an approach to law which is not your personal preference. I have two suggestions for you. There are bound to be some academics at your law school who are similarly out of step with the rest of the school (whether theoretically minded or preferring black letter law): and so I suggest you choose their optional courses when you have the chance. Also, there are other forms of literature for even the courses which you do not like: so, find those different approaches to the material you are studying and so find your own way through. If you are at a black letter law school, then you will find alternative approaches in the textbooks to which you have not been referred or articles in the journals which are aimed at presenting alternative approaches.

The second benefit is that you can get the measure of the academics and the purpose of the course on which you are studying. To know that the academics around you have taken one approach rather than another might help you to understand more about the people they are and their personal attitudes to the material – you can find out more about this in their published research as well. You may also find that there are some people teaching on your programme who do not agree with the overarching view of how the material should be presented, and so those people might be able to give you alternative views. This will add to your education. If you are being cynical, it may also given you interesting ways of improving your grades by incorporating radical views into your studies.