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USING THEORY TO STUDY LAW: A COMPANY LAW PERSPECTIVE

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A MUCH-REMARKED upon feature of British legal literature is its "descriptive" and "doctrinal" orientation.[1] This characterisation is at least in some measure misleading. Plenty of anecdotal evidence now exists which demonstrates that British legal scholarship does not consist entirely of doctrinal work and has been influenced by theoretical analysis.[2] Indeed, it has been suggested that "legal studies are experiencing a mini-renaissance".[3] This trend is certainly not unique to the United Kingdom. In the United States, for example, theorising about law has flourished.[4] This has caused considerable disquiet in American legal circles. Fears have been expressed that the move towards theory has reduced the practical utility of legal scholarship and could be having adverse side-effects in the classroom.[5]

The controversy which has arisen in the United States concerning the relationship between law and theory has, as of yet, attracted little attention in Britain.[6] Since theoretical scholarship has begun to grow in prominence in the United Kingdom, the situation could change.

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[1] J.H. Langbein, "Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons" in P.B.H. Birks (ed.), *What are Law Schools For?* (Oxford: Oxford University Press, 1996), 1 at p. 3; W. Twining, *Blackstone's Tower: The English Law School* (London: Stevens & Sons, 1994) at pp. 136, 146; P.S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987) at p. 37 and N. Duxbury, "When Trying is Failing: Holmes's 'Englishness' " (1997) 63 Brooklyn L.Rev. 145 at p. 146.

[2] Twining, n. 1 above, at p. 127; for overviews of the theoretical literature, see, for example, R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995) at pp. 80–90 (focusing on socio-legal research); R. Cranston, "A Wayward, Vagrant Spirit: Law in Context Finds its Rich and Kindly Earth" in G.P. Wilson (ed.), *Frontiers of Legal Scholarship: Twenty Five Years of Warwick Law School* (Chichester: John Wiley, 1995), 1 at pp. 7–8, 10 and A.I. Ogus, "Law and Economics in the United Kingdom: Past, Present and Future" (1995) 22 J. of Law and Society 26 at pp. 28–30 (discussing law and economics research).

[3] "Justice With a Differance", *Times Higher Education Supplement,* 23 January 1998, p. 21. See also A. Bradney, "Law as a Parasitic Discipline" (1998) 25 J. of Law and Society 71 at pp. 71–73.

[4] See pp. 202–203 below, at notes 41 to 45.

[5] For a concise summary of the points raised, see P.D. Reingold, "Harry Edwards' Nostalgia" (1993) 91 Michigan L.Rev. 1998. For further discussion, see pp. 203–204 below, at notes 49 to 51.

[6] For exceptions, see Langbein, n. 1 above, at p. 6; G. Jones, " 'Traditional' Legal Scholarship: A Personal View" in Birks, n. 1 above, 9 at p. 12 and W. Twining, "Remembering 1972: The Oxford Centre in the Context of Developments in Higher Education and the Discipline of Law" (1995) 22 J. of Law and Society 35 at p. 44.

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As a result, this is a suitable occasion to assess whether theoretical analysis can make a valuable contribution both with respect to research and teaching. This essay will begin by outlining the basic parameters of the debate. It will then advance the thesis that continued use of theory will have a beneficial influence on academic writing and should lead to improvements in the classroom. This will be done primarily by focusing on a particular subject area, company law.

Defining Theoretical Legal Scholarship

In order to discuss the role which theory can and should play in the study of law, defining what constitutes theoretical legal scholarship is a good point of departure.[7] According to the Butterworths Australian Legal Dictionary, legal theory refers "to any academic analysis of the law which requires a degree of abstraction from the principles stated in case and statute-based law".[8] Under this definition, jurisprudence, which is concerned with questions regarding the nature of law, its general structure, its sources and so on, should qualify as theoretical analysis.[9] For present purposes, however, the focus will be on a different use to which the term legal theory is put. Theoretical scholarship will be defined as the study of law from the "outside".[10] This implies the use of intellectual disciplines, external to law, to carry out research on its economic, social or political implications. Typically, the techniques and approaches are in fact borrowed from the social sciences and the humanities. The ultimate objective of this sort of interdisciplinary exercise is to secure a deeper and broader understanding of the legal system by placing it in its proper context.[11]

Scholarship characterised as "doctrinal" or "descriptive" does not qualify as theory under the foregoing definition. With legal research of this nature, the author typically seeks to organise and categorise legal rules ("doctrine") in a systematic fashion.[12] Social and economic context have little role to play with such an exercise. Doctrinal or descriptive scholarship instead involves an "internal" account of the

[7] M. Dan-Cohen, "Listeners and Eavesdroppers: Substantive Legal Theory and its Audience" (1992) 63 U. of Colorado L.Rev. 569 at p. 570.
[8] P.E. Nygh and P. Butt (eds.), (Sydney: Butterworths, 1997) at p. 681.
[9] Dan-Cohen, n. 7 above, at p. 570.
[10] See R.A. Posner, "The Decline of Law as an Autonomous Discipline" (1987) 100 Harv. L.Rev. 761 at p. 779 and G.C. Lilly, "Law Schools Without Lawyers? Winds of Change in Legal Education" (1995) 81 Virginia L.Rev. 1421 at p. 1431.
[11] Indeed, while the foregoing discussion distinguishes between jurisprudence and the study of law from the "outside", an interdisciplinary approach should shed light on questions of a jurisprudential nature: Cotterrell, n. 2 above, at pp. 275–276 and R. Cotterrell, "Why Must Legal Ideas be Interpreted Sociologically?" (1998) 25 J. of Law and Society 171.
[12] M. Van Hoecke and F. Ost, "Legal Doctrine in Crisis: Towards a European Legal Science" (1998) 18 Legal Studies 197 at p. 197.

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legal rules that govern particular subject matter and tends to reflect a general preference for the coherence of law.[13] Hence, in circumstances where a legal problem does not fall neatly within the purview of an existing rule, a doctrinal analyst will take into account related cases and from them inductively determine the most suitable way to resolve the uncertainty.[14]

An important distinction between theoretical and doctrinal scholarship is the audience to which the writing is directed.[15] Research of a doctrinal character is often written with the objective of helping members of the legal profession, such as judges and the lawyers who argue before them, to "find" the existing law.[16] Such scholarship might take the form of an article addressing a knotty doctrinal problem that is already, or soon likely to be, before the courts. Alternatively and more ambitiously, an author might write a book mapping an area of law so as to identify basic principles and provide a systematic exposition of the relevant legal rules.[17]

Doctrinal scholarship, as well as serving the practical needs of the legal profession, can find an audience among law students.[18] Students, in most of the courses they take, will need to learn the relevant "black letter" law. A text which supplies essential background material and discusses legal rules in a convenient, accessible and lucid manner is likely to be a popular source of assistance.[19] A classic example familiar to British company lawyers is Gower's *Principles of Modern Company Law*.[20]

Those who approach legal scholarship from an interdisciplinary perspective tend to think of their audience in much different terms

[13] E.L. Rubin, "Legal Scholarship" in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), 562 at pp. 564–565.

[14] *Cf.* C. Cook *et al., Laying Down the Law: The Foundations of Legal Reasoning, Research and Writing in Australia,* 4th ed. (Sydney: Butterworths, 1996) at p. 47.

[15] On the topic generally, see B. McDowell, "The Audiences for Legal Scholarship" (1990) 40 J. of Legal Education 261.

[16] See Rubin, n. 13 above, at pp. 566–567 and J. Gava, "Scholarship and Community" (1994) 16 Sydney L.Rev. 443 at p. 444 as well as Atiyah, n. 1 above, at p. 139 and Lord Goff, "Judge, Jurist and Legislature" [1987] Denning L.J. 79 at pp. 91–92.

[17] R.W. Gordon, "Lawyers, Scholars and the 'Middle Ground'" (1993) 93 Michigan L.Rev. 2075 at p. 2078 and H. Collins, "The Sanctimony of Contract" in R. Rawlings (ed.), *Law, Society and Economy* (Oxford: Clarendon Press, 1997), 63 at pp. 64–65.

[18] Twining, n. 1 above, at pp. 135–138; D. Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition" in W. Twining (ed.), *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986), 26 at pp. 50–51 and P. Birks, "Adjudication and Interpretation in the Common Law: A Century of Change" (1994) 14 *Legal Studies* 156 at p. 159.

[19] Such books may also be useful as reference works for practising lawyers (Jones, n. 6 above, at p. 11), though this will not always be the case (Twining, n. 1 above, at p. 135).

[20] Now in its 6th edition; the latest edition was written by Paul Davies (London: Sweet & Maxwell, 1997). On the book and its position as the "classic" English company law text, see C. Bradley and J. Freedman, "Changing Company Law" (1990) 53 M.L.R. 397 at pp. 397–398 and C.A. Riley, "Gower: Still a Blueprint for Curriculum Reform in Company Law?" (1993) 13 Oxf. J. of Legal Studies 270 at pp. 270–271, noting, though, that *Farrar's Company Law* had become a more popular book (now in its 4th ed., authored by J. Farrar and B. Hannigan (Butterworths: London, 1998)).

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from their doctrinal counterparts. Ultimately, those who "do theory" seek to contribute to debates about law and its relationship to society, culture and the economy.[21] Often, such work has no obvious or immediate connection to actual law practice, which reduces the likelihood that it will be of potential interest to practising lawyers or judges.[22] Also, much of the literature is too abstract or specialised to be popular with law students.[23] For many of those who carry out interdisciplinary research, the fact that "theory" does not have the same sort of immediate practical value to the legal profession or law students as does doctrinal scholarship is not a critical problem.[24] This is because their most important constituency is their fellow scholars: for them, legal theory is for legal theoreticians.[25]

Theory and Legal Scholarship in the United Kingdom

Academic legal writing in the United Kingdom is often said to have a strongly doctrinal, descriptive character.[26] The trend manifests itself in a number of ways.[27] Articles in academic journals are commonly constructed as commentary upon the decisions of the courts or upon legislative measures. There is a wide variety of texts available to students to enable them to learn about the "black letter" law in their courses and law teachers monopolise this market. Many of the books which the legal profession uses to "find" the law are written by academics or by combined teams of academics and practitioners.

A number of academics have said that, because legal literature in Britain is primarily descriptive in orientation, it is arid, uncreative,

[21] J.R. Sternlight, "Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications" (1996) 50 U. Mia. L.Rev. 707 at p. 710 and H.W. Arthurs, "Half a League Onward: The Report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct" (1997) 31 Law Teacher 1 at pp. 8–11.

[22] Sternlight, n. 21 above, at pp. 715, 734–35; S. Lubet, "Is Legal Theory Good for Anything?" [1997] U. Illinois L.Rev. 193 at pp. 196, 206–207 and B.A. Ackerman, "The Marketplace of Ideas" (1981) 90 Yale L.J. 1131 at p. 1139; see also Atiyah, n. 1 above, at pp. 3–4, 35–36, 39–40 (arguing that English lawyers and judges are more inclined to the pragmatic and are somewhat hostile to the theoretical approach).

[23] McDowell, n. 15 above, at p. 262 and T.S. Ulen, "The Prudence of Law and Economics: Why More Economics is Better" (1996) 26 Cumberland L.Rev. 773 at p. 790.

[24] R.A. Posner, *Overcoming Law* (Cambridge, Mass.: Harvard Univ. Press, 1995) at p. 87 and S. Levinson, "Judge Edwards' Indictment of 'Impractical' Scholars: The Need for a Bill of Particulars" (1993) 91 Michigan L.Rev. 2010 at p. 2012.

[25] Dan-Cohen, n. 7 above, at pp. 589–591; D.P. Bryden, "Scholarship About Scholarship" (1992) 63 Univ. of Colorado L.Rev. 641 at pp. 642–643 and P.D. Carrington, "Aftermath" in P. Cane and J. Stapleton (eds.), *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991), 113 at p. 148.

[26] See p. 197 above, at note 1.

[27] Twining, n. 1 above, at pp. 114, 137 and P. Birks, "The Historical Context" in P.B.H. Birks (ed.), *Reviewing Legal Education* (Oxford: Oxford University Press, 1994), 1 at pp. 2–3. See also W.T. Murphy, "Introduction" (1987) 50 M.L.R. 677 at pp. 677–678 (discussing contents of the Modern Law Review).

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tedious and lacking in "vision".[28] The prescription typically offered is a shift towards theoretical scholarship. The case in favour of theory can be summarised as follows. Doctrinal scholarship no doubt provides necessary information to those who act within the legal system.[29] On the other hand, since the focus is "internal", the social consequences of law are ignored.[30] This is of importance because the legal system is not marked off neatly from other systems in society.[31] Instead, the subject-matter of law is relevant to most aspects of public and private life and legal institutions are human constructs embodying political, economic and moral choices.[32]

Since the legal order is not isolated from the social order of which it is a part, to understand fully the role of law it is necessary to borrow methodologies that are exterior to conventional legal discourse.[33] Fields outside law provide analytical and conceptual techniques which can be used to broaden perspectives on experience through systematic observation and theoretical reflection.[34] Increased use of interdisciplinary approaches should therefore help to unlock the legal system's animating principles, provide a better understanding of the probable impact of legal rules on behaviour and improve comprehension of law as a field and as a social practice.[35]

Pleas in favour of theoretical legal scholarship have in fact yielded a positive response in the United Kingdom. There is currently a growing interest in interdisciplinary analysis and increased curiosity about how the law works in practice rather than merely on paper. The "mini-renaissance" in legal studies referred to earlier reflects this.[36] Despite the intellectual ferment and diversification in the

[28] Atiyah, n. 1 above, at pp. 133–134; Duxbury, n. 1 above, at pp. 147–148 and P. Goodrich, "Twining's Tower: Metaphors of Distance and Histories of the English Law School" (1995) 49 U. Mia. L.Rev. 901 at p. 910 as well as Twining, n. 1 above, at pp. 123–124, 141 (summarising the argument without agreeing completely with it).

[29] Legal academics carrying out theoretical work fall within this category, since they typically rely on doctrinal scholarship to provide them with a systematic overview of the legal rules they choose to study—J. Goldring, "Babies and Bathwater: Tradition or Progress in Legal Scholarship and Legal Education?" (1987) 17 Univ. of Western Aust. L.Rev. 216 at p. 239.

[30] Posner, n. 24 above, at pp. 20, 36–37, 399; N.C. Sargent, "Labouring in the Shadow of the Law: A Canadian Perspective on the Possibilities and Perils of Legal Studies" (1991) 9(2) *Law in Context* 65 at pp. 65, 70 and G.L. Priest, "The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards" (1993) 91 Michigan L.Rev. 1929 at pp. 1932–3.

[31] L.M. Friedman, "Law Reform in Historical Perspective" (1969) 13 St. Louis L.Rev. 351 at p. 353 and G. Wilson, "English Legal Scholarship" (1987) 50 M.L.R. 818 at pp. 823–824.

[32] Twining, n. 1 above, at p. 10 and Sugarman, n. 18 above, at p. 28.

[33] C. Veljanovski, "Legal Theory, Economic Analysis and the Law of Torts" in Twining, n. 18 above, 215 at p. 221 and L.C. Bollinger, "The Mind in the Major American Law School" (1993) 91 Michigan L.Rev. 2167 at p. 2170.

[34] Cotterrell, n. 2 above, at pp. 294–296; J.B. White, "Law Teachers' Writing" (1993) 91 Michigan L.Rev. 1970 at pp. 1975–76 and E.L. Rubin, "Law And and the Methodology of Law" [1997] Wisconsin L.Rev. 521 at pp. 553–554.

[35] Atiyah, n. 1 above, at pp. 136–140, 148; Collins, n. 17 above, at pp. 68–69, 87–89 and Posner, n. 24 above, at pp. 88–91, 398–399.

[36] See p. 197 above, at notes 2 and 3.

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United Kingdom, British academics who have studied developments in the United States have acknowledged that matters have progressed considerably further in American law schools than has been the case in Britain.[37] To obtain guidance, therefore, on the future prospects for interdisciplinary approaches to law, it is helpful to consider what has taken place in the United States.[38]

Theory and Legal Scholarship in the United States

Although the main trends in theoretical legal scholarship are currently being set in the United States, theory did not always occupy a pre-eminent position there. Until the 1960s, American law professors strongly identified themselves with the legal profession and their writing was in most instances designed to guide judges and practising lawyers in the path of sound legal reasoning.[39] The result was that legal scholarship consisted primarily of law review articles which took a relatively narrow problem and addressed it doctrinally, together with some systematic expositions of substantive law set out in the form of legal treatises.[40]

Beginning in the 1960s, however, the character of legal literature began to change, as conceptual approaches drawn from the social sciences and the humanities were imported into and made the basis of legal analysis.[41] Theorising about the law ultimately became a "growth industry", with academics increasingly producing general, abstract accounts of legal topics which departed substantially from the ways in which law had been conceptualised previously.[42] Tangible manifestations of the intellectual shift abound. There has been an increase in the "market share" of theoretically oriented articles in leading law reviews, a proliferation of specialised journals devoted to

[37] See Twining, n. 1 above, at pp. 143–144 and Duxbury, n. 1 above, at pp. 147–148. See, as well, D.F. Partlett, "The Common Law as Cricket" (1990) 43 Vanderbilt L.Rev. 1401 at p. 1430 and H. Arthurs, "The Political Economy of Canadian Legal Education" (1998) 25 J. of Law and Society 14 at p. 27.

[38] Langbein, n. 1 above, at p. 7 (focusing on potential contribution of law and economics) and Twining, n. 6 above, at p. 44. Not all agree that looking to the United States is in fact that helpful in assessing the future of English legal scholarship—Jones, n. 6 above, at p. 13.

[39] Reingold, n. 5 above, at p. 1998; Posner, n. 24 above, at p. 82 and A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard Univ. Press, 1993) at p. 267.

[40] Kronman, *ibid.* at pp. 266–267 and R. Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill: University of North Carolina Press, 1983) at pp. 270–274.

[41] Posner, n. 10 above, at pp. 767–769; Stevens, n. 40 above, at p. 272 and M. Galanter, "Law Abounding: Legalisation Around the North Atlantic" (1992) 55 M.L.R. 1 at pp. 15–16.

[42] J.M. Feinman, "The Significance of Contract Theory" (1990) 58 Cincinnati L.Rev. 1283 at p. 1283; G.L. Priest, "The Increasing Division Between Legal Practice and Legal Education" (1988/89) 37 Buffalo L.Rev. 681 at pp. 681–682 and M. Galanter and M.A. Edwards, "Introduction: The Path of the Law Ands" [1997] Wisconsin L.Rev. 375 at p. 375.

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interdisciplinary approaches to law and much more frequent citation of theoretical scholarship in legal literature.[43]

Within the new theoretical literature, a number of leading schools of thought have emerged. These include "law and economics", which entails the application of economic methodologies to legal subjects, and "feminism", which involves the study of law from an angle that emphasises the perspective of women and is animated by the objective of exposing inequality.[44] Also notable have been "law and society", which is a scholarly enterprise that explains or describes legal phenomena in social and cultural terms, and "critical legal studies", which is dedicated to exposing the indeterminacy and value-laden qualities of legal decision-making.[45]

The rise of theoretical, interdisciplinary study in US law schools has been praised as a "very good thing"[46] which has "increased and refined our understanding of law far beyond what generations of doctrinalists had achieved".[47] Hence, according to some, "the last quarter century has been a golden age for American legal scholarship".[48] Such views are not, however, held unanimously. Instead, the interdisciplinary movement in legal thought has prompted a strong backlash. Judge Harry T. Edwards of the US Court of Appeals for the District of Columbia Circuit energised the debate with a provocative article published in 1992.[49]

Judge Edwards, who served on the law faculties at Harvard and Michigan, argued in his 1992 article that a regrettable disjunction was growing between law schools and the legal profession. He placed much of the blame on academics, deploring their choice to pursue "abstract" theory at the expense of engaging in analysis of legal doctrine. Judge Edwards said that because law professors were

[43] See, for example, P. Brest, "Plus ça Change" (1993) 91 Michigan L.Rev. 1945 at p. 1949; W.M. Landes and R.A. Posner, "The Influence of Economics on Law: A Quantitative Study" (1993) 36 J. of Law and Economics 385; M.J. Saks *et al.*, "Is There a Growing Gap Among Law, Law Practice and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart" (1996) 30 Suffolk Univ. L.Rev. 354 at pp. 370–371 and F.R. Shapiro, "The Most-Cited Law Review Articles Revisited" (1996) 71 Chicago-Kent L.Rev. 751 at pp. 758–759.

[44] For a helpful overview of leading approaches to legal theory see Patterson (ed.), n. 13 above; on law and economics and feminism, see J.D. Hanson and M.R. Hart, "Law and Economics", *ibid.*, p. 311 and P. Smith, "Feminist Jurisprudence", *ibid.*, p. 562.

[45] See L.M. Friedman, "The Law and Society Movement" (1986) 38 Stanford L. Rev. 763 and G. Binder, "Critical Legal Studies" in Patterson, n. 13 above, at p. 280.

[46] P.A. Alces, "Toil of the Firestarters" (1994) 92 Michigan L.Rev. 1707 at p. 1722.

[47] Priest, n. 30 above, at p. 1934.

[48] Langbein, n. 1 above, at p. 6. See also Posner, n. 24 above, at p. 98.

[49] "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91 Michigan L.Rev. 34. On Judge Edwards' views, see also "The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript" (1993) 91 Michigan L.Rev. 2191 and "Another Postscript to The Growing Disjunction Between Legal Education and the Legal Profession'" (1994) 69 Washington L.Rev. 561. Others arguing along similar lines have included Kronman, n. 39 above, at pp. 166–168, 265–270 and A.M. Johnson, "Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice" (1991) 64 So. California L.Rev. 1231.

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choosing not to focus on cases, statutes and related sources of law, the judiciary and practising lawyers were getting less and less help from legal scholarship. He made his case in part by quoting a lawyer who had previously acted as a clerk for him:

> "I look for articles and treatises containing solid doctrinal analysis of a legal question; comprehensive summaries of an area of law; and well-argued and -supported positions on specific legal issues. Theory wholly divorced from cases has been of no use to me in practice."[50]

Also troubling for Judge Edwards was that Harvard and some other "elite" US law schools had acquired significant contingents of "impractical" scholars who preferred to forget that they were in a professional faculty and who were disdainful of the practice of law. He feared that such attitudes were carrying over into the classroom, which meant students were being taught by professors who not only lacked practical legal experience but had little interest in legal doctrine. Law school graduates were therefore in danger of not acquiring the fluency with legal texts and concepts they required for practice. As well, they were prone to feel alienated from their chosen field, which in turn was tending to produce an increasingly cynical and unethical legal profession.

Judge Edwards' appraisal of law schools and the legal profession elicited a strong reaction. Many expressed support for his views.[51] Certainly, there are examples of legal scholarship which seem to bear out his fears, as a sampling of recent titles in US law journals illustrates: "Never Confuse Efficiency with a Liver Complaint",[52] "A Feminist Theory of Malebashing"[53] and "Foucault, Gadamer and the Law: Hermeneutics in Postmodern Legal Thought".[54] Judge Edwards' comments were also met by a torrent of rebuttals.[55] Those who stepped forward to address his arguments typically sympathised with some or many of his concerns but suggested he had overstated his case against theory in various ways. First, while many lawyers in the United States may indeed feel alienated from their profession, law school teaching is unlikely to be the primary cause. Of greater importance is the development of increasingly rigorous competition within the legal services industry, which has fostered accelerated

[50] Edwards, "Growing", n. 49 above, at p. 46.
[51] See Edwards, "Growing . . . Postscript", n. 49 above, which consists in large part of summaries of letters received by Judge Edwards after his first article.
[52] I. Ayres, [1997] Wisconsin L.Rev. 503
[53] S.H. Williams and D.H. Williams, (1996) 4 Michigan J. of Gender and Law 35.
[54] M.J. Clark, (1994) 26 U. of Toledo L.Rev. 111.
[55] There were so many strong reactions that, in August 1993, the Michigan Law Review devoted an entire symposium edition to the subject: (1993) 91 Michigan L.Rev. 1921ff. For an overview of the views expressed, see Saks, *et al.*, n. 43 above, at pp. 356–359.

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commercialisation and has created new business pressures for practitioners.[56]

Second, while interdisciplinary legal scholarship often may not have an immediate connection to the day-to-day life of a lawyer, links do exist between theory and the legal profession.[57] Various attempts have been made, for example, to harness theoretical advances from the social sciences (primarily economics and sociology) to explain how lawyers create value for their clients (*e.g.* by employing their connections in the business community to link compatible parties and by implementing systems to resolve disputes without recourse to expensive litigation).[58] Also, interdisciplinary legal writing can matter to lawyers since it can have a significant impact on the development of the law in important areas.[59] In the United States, feminist jurisprudence has influenced debates over rape law, sexual harassment and the legal protection of pornography. As well, the application of economics to law is generally believed to have transformed that country's antitrust law and contributed significantly to its deregulation movement, which affected fields such as transportation law, communication law and even the regulation of the legal profession itself.

Third, while there is a growing number of interdisciplinary academics in US law faculties, in no sense has doctrine been forsaken. With legal scholarship, the change in approach has occurred primarily in law journals linked with the most prestigious law schools and specialised journals devoted to interdisciplinary approaches to law. Otherwise, the dominance of doctrinal analysis remains unquestioned. Indeed, since there has been a proliferation of law reviews in the United States in recent years, the total output of articles which are "practical" is probably greater at present than it ever has been.[60] In addition, the interdisciplinary movement has not had a revolutionary effect in the classroom. Even in elite law schools, the core curriculum continues to be doctrinal and the dominant form of teaching remains the analysis of cases.[61]

[56] See Posner, n. 24 above, at pp. 92–94 as well as Carrington, n. 25 above, at p. 136 and B. Manning, "From Learned Profession to Learned Business" (1988/89) 37 Buffalo L.Rev. 658.

[57] Judge Edwards has in fact conceded this to a certain extent—Edwards, "Growing", n. 49 above, at pp. 44–45 and Edwards, "Another", n. 49 above, at pp. 564–565.

[58] See R.J. Gilson and R.H. Mnookin, "Foreword: Business Lawyers and Value Creation for Clients" (1995) 74 Oregon L.Rev. 1, as well as other articles presented at a symposium on business lawyering which are set out in the same issue of the Oregon Law Review.

[59] See Posner, n. 24 above, at pp. 96–97 as well as Langbein, n. 1 above, at p. 5 and Gordon, n. 17 above, at pp. 2084–5.

[60] Gordon, n. 17 above, at pp. 2100–1; Posner, n. 24 above, at p. 94 and Saks *et al.*, n. 43 above, at pp. 370–371, 374.

[61] Bollinger, n. 33 above, at p. 2173; Brest, n. 43 above, at pp. 1947–8 and S.R. Klein, "Legal Education in the United States and England: A Comparative Analysis" (1991) 13 Loyola L.A. International and Comparative L.J. 601 at pp. 605–606.

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Fourth, while law students might well suffer if they only received instruction from "impractical" scholars who said little about cases and legislation, theory in fact can play a valuable role in law teaching.[62] Lawyers, in order to do their job well, must know more than the rules. Instead, they must be mindful of how the law in action can diverge from the law in books.[63] For example, they should develop a sense of the social context in which lawmaking occurs and regulatory bodies operate since a judge or regulator acting in a particular institutional setting may apply a rule in a manner quite different from a counterpart operating in a different milieu. Lawyers also should be able to reason their way to a sensible conclusion in the absence of case law on point, must be able to apply rules to facts and must be able to argue contrary interpretations. These skills in turn require some grasp of principles and policies and a sense of the importance of contextual variation. Since lawyers face such challenges, law students should benefit from being exposed to the insights which interdisciplinary approaches to law can provide. Resistance in the classroom can be expected since students usually are most comfortable when a course is taught as a clear, well-organised presentation of legal rules.[64] Nevertheless, it should be possible for them to recognise the importance of theory and social context if this is done in the setting of concrete legal problems.[65]

Judge Edwards and British Legal Scholarship

Judge Edwards' plea for a return to doctrinal legal analysis has provoked relatively little comment in the United Kingdom.[66] One reason might be that British judges and lawyers pay less attention to what academics write than do their American counterparts and thus are indifferent to trends in the literature.[67] Since academic law apparently does have an audience within Britain's legal profession,[68]

[62] See Gordon, n. 17 above, at pp. 2107–8 and Sternlight, n. 21 above, at pp. 768–770. See more generally Manning, n. 56 above, at pp. 661–662 and K.R. Heidt, "Taking a New Look at Secured Transactions" (1996) 96 Columbia L.Rev. 759 at pp. 786–787.

[63] P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Clarendon Press, 1987) at p. 405.

[64] G. Parker, "Legal Scholarship and Legal Education" (1985) 23 Osgoode Hall L.J. 653 at pp. 654–655 and C. Sampford and D. Wood, "'Theoretical Dimensions' of Legal Education—A Response to the Pearce Report" (1988) 62 Aust. L.J. 33 at pp. 35–36.

[65] Gordon, n. 17 above, at p. 2108 and Sternlight, n. 21 above, at p. 769.

[66] On exceptions, see note 6 above.

[67] On the contrast between the approach which lawyers and judges take towards legal scholarship in the United States and the United Kingdom, see Atiyah and Summers, n. 63 above, at pp. 356, 401–403 and Partlett, n. 37 above, at pp. 1403–4.

[68] See, for example, Goff, n. 16 above, at pp. 92–94; Birks, n. 18 above, at pp. 159–160, 166–167, 170–171 (admitting, though, that the citation of legal literature by judges is less common in England than in Australia or Canada) and N. Duxbury, "The Narrowing of English Jurisprudence" (1997) 95 Michigan L.Rev. 1990 at pp. 2003–4.

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a more likely explanation is that theoretical writing has not proliferated to the same extent in the United Kingdom as it has in the United States.[69] Nevertheless, if interdisciplinary scholarship continues to grow in prominence in Britain, concerns could arise about the practical value of academic law, both inside and outside the classroom. Legal scholars who "do theory" will then need to work harder to make the utility of their type of scholarship apparent.[70]

If the issues brought up by Judge Edwards do become the subject of debate in the United Kingdom, law teachers should in fact be well prepared to present the case in favour of theory. This is because they have already raised arguments on the point similar to those brought up here. Various British academics have stressed for instance, that using interdisciplinary approaches improves in a general way our understanding of law.[71] Also, while there has been some reluctance to defend theory on the grounds that it is relevant to the legal profession, the existence of a link between theory and practice has been recognised.[72] It has been argued that efforts must be made to address concrete legal issues. This is because, if academics simply pursue theory for its own sake, the relevance and value of their work will be questioned and their voice will be confined to an ever diminishing band of listeners.[73]

A number of British law teachers have also asserted that interdisciplinary analysis has a role to play in the classroom. Support exists for the proposition that "good theory makes good practice", in the sense that the quality of a law student's professional training should improve as a result of injections of theory.[74] Still, those who speak in favour of adding an interdisciplinary element to legal education have not relied solely on vocational relevance to make their case. They say instead that exposure to theory helps to provide the sort of liberal education which a university should be offering. This is particularly relevant for British law students since, unlike their counterparts in the United States, they typically have not had prior

[69] *Cf.* P. Birks, "Editor's Preface", in Birks, n. 1 above, v at p. ix.
[70] *Cf.* Gordon, n. 17 above, at p. 2111.
[71] See, for example, Cotterrell, n. 2 above, at pp. 294–295, 298–299, 314; Veljanovski, n. 33 above, at pp. 221–223, 226, 229 and R. Brownsword, "Book Review" (1988) 104 L.Q.R. 329 at pp. 331–332.
[72] On reluctance to make the case in favour of theory on the basis that it is relevant to practice, see Brownsword, *ibid.*
[73] Cranston, n. 2 above, at p. 20; see, as well, Goldring, n. 29 above, at pp. 247–248, 252 (expressing the same point forcefully from an Australian point of view) and N. Savage and G. Watt, "A 'House of Intellect' for the Profession" in Birks, n. 1 above, 45 at pp. 47, 54–55.
[74] See W. Wilson and G. Morris, "The Future of the Academic Law Degree" in Birks, n. 27 above, 101 at pp. 105–106; O. Kahn-Freund, "Reflections on Legal Education" (1966) 29 M.L.R. 121 at pp. 127–129 and R. Goode, "The Teaching and Application of Fundamental Concepts of Commercial Law" (1991) 25 Law Teacher 200 at pp. 208–210.

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experience in a university setting and frequently have not settled on a career in practice when attending law school.[75]

If the sort of concerns expressed by Judge Edwards are raised in earnest in the United Kingdom, the foregoing suggests that the exchange of views on the role of legal theory should be a lively one. On balance, however, theoretical analysis should be able to make a valuable contribution both with respect to research and teaching. The fact that this is the case can be illustrated by considering a field often thought to be primarily technical and "vocational" in nature, namely company law.[76]

Theory and Company Law Scholarship—Recent Developments

The movement towards theory which has influenced law in a general way has also affected company law. As was the case with legal scholarship overall, until fairly recently there was little theoretical work done on the laws regulating the company. In 1984, Roberta Romano, a US law professor, characterised corporate law as "an uninspiring field for research" and said that the last major work of original scholarship had been published in 1932.[77] Two years later Mary Stokes, a British academic, said that "company lawyers lack an intellectual tradition which places the particular rules and doctrines of their discipline within a broader theoretical framework which gives meaning and coherence to them".[78]

Things soon changed rapidly as theory began to play a considerably more prominent role. Dan Prentice, a leading British company law scholar, said in 1993 that "legal scholarship in the field of company law has been a growth industry over the past decade".[79] Deborah DeMott, a US law professor, wrote similarly in 1996 about "the current vigor of scholarly writing about corporate law" and denounced suggestions that corporate law is "a presently or prospectively moribund field".[80] The development of an expanded intellectual range was an important cause for the new optimism.

[75] Twining, n. 1 above, at pp. 58–61, 74–75, 180–181; D. Oliver, "Teaching and Learning Law: Pressures on the Liberal Law Degree" in Birks, n. 27 above, 77 at pp. 77–80, 85-86 and N. MacCormick and W. Twining, "Theory in the Law Curriculum" in Twining, n. 18 above, 238 at pp. 245–246.

[76] On the reputation which company law has an academic subject, see Bradley and Freedman, n. 20 above, at p. 399 and L. Johnson, "New Approaches to Corporate Law" (1993) 50 Washington and Lee L.Rev. 1713 at pp. 1717, 1721.

[77] "Metapolitics and Corporate Law Reform" (1984) 36 Stanford L.Rev. 923 at p. 923. Professor Romano was referring to A. Berle and G. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World Inc., 1932).

[78] "Company Law and Legal Theory", in Twining, n. 18 above, 155 at p. 155.

[79] "Some Observations on the Teaching of Company Law" in P. Birks (ed.), *Examining the Law Syllabus: Beyond the Core* (Oxford: Oxford University Press, 1993), 33 at p. 35.

[80] "Trust and Tension Within Corporations" (1996) 81 Cornell L.Rev. 1308 at pp. 1310, 1335.

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According to Professor DeMott, whereas company law scholarship formerly was "uninspiring" and "parochial" in scope, "the introduction of perspectives grounded in nonlegal academic disciplines has demonstrably invigorated discussion and deepened analysis".[81]

The emergence of theoretical company law scholarship has not been restricted to any one country. Australian, British and Canadian academics have all carried out important interdisciplinary work.[82] Nevertheless, as has been the case with legal scholarship generally, the move towards theory has been most dramatic in the United States.[83] An important characteristic of the US literature is that one school of thought, law and economics, dominates the academic study of corporate law.[84] A significant feature of the economic approach is the treatment of corporate personality. Those writing from an economic perspective attach little significance to the fact that as a matter of legal formality a company is a separate entity.[85] They emphasise instead that a business firm is a focal point for bargaining relationships entered into voluntarily and thus operates as a "nexus of contracts". As such, a company resembles a market, which is a medium where buyers and sellers engage in free and willing exchange.[86]

Law and economics scholars, having established the parallel between the company and exchange relations elsewhere in the economy, seek to describe fundamental features of corporate activity in terms of economic logic. For instance, the limited liability enjoyed by those who own shares in companies is characterised as distributing the risk associated with business failure in a manner which is mutually advantageous for investors and creditors.[87] Similarly, vesting

[81] *Ibid.*, at pp. 1308, 1335.

[82] On the emergence of theoretical company law scholarship in Australia, see M. Whincop, "Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law" (1997) 21 Melbourne Univ. L.Rev. 187 at pp. 188–189. An important example of Canadian interdisciplinary work is R.J. Daniels and R. Morck (eds.), *Corporate Decision-Making in Canada* (Calgary: University of Calgary Press, 1995). With Britain see, for instance, S. Deakin and A. Hughes (eds.), *Enterprise and Community: New Directions in Corporate Governance* (Oxford: Blackwell, 1997; also published as vol. 24, issue No. 1 of J. of Law and Society); J.E. Parkinson, "The Contractual Theory of the Company and the Protection of Non-Shareholder Interests" in D. Feldman and F. Meisel (eds.), *Corporate and Commercial Law: Modern Developments* (London: Lloyd's of London Press, 1996), 121 and V. Finch, "The Measures of Insolvency Law" (1997) 17 Oxf. J. of Legal Studies 227.

[83] Prentice, n. 79 above, at p. 35.

[84] T.A. Gabaldon, "The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders" (1992) 45 Vanderbilt L.Rev. 1387 at p. 1402 and W.T. Allen, "Contracts and Communities in Corporation Law" (1993) 50 Washington and Lee L.Rev. 1395 at p. 1399.

[85] On the company as a distinct legal entity, see Davies, n. 20 above, at pp. 77–89 and P.I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford Univ. Press, 1993) at pp. 3–25.

[86] See F.H. Easterbrook and D.R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass.: Harvard Univ. Press, 1991) at pp. 8–22 and B.R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford: Clarendon Press, 1997) at pp. 32, 38–41.

[87] Easterbrook and Fischel, n. 86 above, ch. 2 and Cheffins, n. 86 above, at pp. 499–504.

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the power to run companies in the hands of the board of directors and executives appointed by the board is said to be a sensible delegation in favour of individuals who have the special skills required to make managerial and entrepreneurial decisions.[88]

The bargaining relationships which exist in companies do not necessarily yield optimal outcomes. For instance, the delegation of managerial power to executives creates the danger that investors will suffer "agency costs" as a result of self-serving behaviour by those in charge.[89] Still, law and economics scholars are sceptical whether government regulation is a suitable solution for such possible market failure. They say that defects in the law-making process and problems with the administration and enforcement of legal rules can often render state intervention counterproductive.[90]

The fact that law and economics has mounted a largely successful takeover of the corporate legal academy in the United States means that scholars who take a different interdisciplinary approach tend to be more firmly united in what they oppose—unjustified reliance on economic analysis—than by what they support.[91] These sceptics say the relevant theories go too far in attributing materialistic motives to people and thus fail to account adequately for key human traits such as altruism and an underlying sense of social justice. Furthermore, they denounce the nexus of contracts concept, saying it is unrealistic to characterise relations as contractual when parties such as shareholders and employees often become involved in a company on a "take it or leave it" basis instead of engaging in any sort of meaningful negotiations before acting. As well, law and economics scholars stand accused of being thinly disguised apologists for the rich and powerful who are pursuing a deregulatory agenda in order to perpetuate the existing distribution of wealth and influence in our society.[92]

Theoretically-oriented academics who are sceptical of economic analysis have not focused solely on criticising economics. Instead, both in the United States and elsewhere, they have also begun to use conceptual approaches in an affirmative fashion in order to analyse corporate behaviour. For example, feminist corporate law literature is

[88] H.N. Butler, "The Contractual Theory of the Corporation" (1989) 11 George Mason Univ. L.Rev. 99 at pp. 106–108 and L.E. Ribstein, "The Mandatory Nature of the ALI Code" (1993) 61 George Washington L.Rev. 984 at pp. 991–993.

[89] Butler, n. 88 above, at p. 109 and S. Bottomley, "From Contractualism to Constitutionalism: A Framework for Corporate Governance" (1997) 19 Sydney L.Rev. 277 at p. 286.

[90] See Cheffins, n. 86 above, at pp. 163ff. and Ribstein, n. 88 above, at pp. 995–998.

[91] S. Bainbridge, "Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship" (1997) 82 Cornell L.Rev. 856 at pp. 857, 873.

[92] For a summary of the criticisms of economic analysis of company law, see DeMott, n. 80 above, at pp. 1331–2; Bainbridge, n. 91 above, at pp. 860–873 and P.N. Cox, "The Public, the Private and the Corporation" (1997) 80 Marquette L.Rev. 393 at pp. 402, 418. For a response to some of the points raised, see Cheffins, n. 86 above, at pp. 66–67, 82–83, 237, 713.

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beginning to appear.[93] Feminist academics have sought to explore issues of gender and male domination hidden by the basic concepts of corporate law.[94] They have drawn attention to the lack of women in the boardrooms of public companies, have sought to explore women's involvement in family-owned companies and have criticised limited liability on the grounds that it diminishes personal responsibility by allowing shareholders to impose risks others must bear.[95]

In addition to feminist scholarship, there is a substantial body of theoretical literature for which it is difficult to provide a satisfactory label but which does seem to be defined by a common set of ideas.[96] One possible designation is "institutionalism", since an aspect of the line of thinking in question is that companies should be thought of as institutions reflecting an independent and distinct reality rather than merely a nexus of contracts.[97] It is said that relations between those involved in companies have an important social component and therefore are not the sort of "arm's length" arrangements one normally associates with market activity. For instance, in a well-run business enterprise, a key source of success can be that all those involved share a strong sense of mutual trust and a deep commitment to the firm and thus are keen to work effectively on an interdependent basis.[98] The existence of this sort of pattern illustrates that the organisational life of a company is more than the sum of the actions of those associated with the business enterprise.[99]

Another aspect of the line of thinking in question is that there must be recognition of the whole community of interests who contribute to or are affected by the corporate entity.[100] Since various constituencies are integrally involved in corporate enterprise, the classic view that a company is to be run for the benefit of the owners

[93] See, for example, T.A. Gabaldon, "Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law" (1995) 5 Texas J. of Women and the Law 1; K.H. Hall, "The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia" (1996) 6 Australian J. of Corporate Law 1 and C. McGlynn, "Finding the Right Woman for the Job" (1998) 19 Company Lawyer 24.

[94] Hall, n. 93 above, at p. 17.

[95] On the board of directors, see McGlynn, n. 93 above, and S. Chesterman, "Gender Ltd: Why Aren't More Women on the Boards of Australia's Top 100 Listed Companies?" (1996) 14 Co. and Sec. L.J. 352. On family-owned companies, see B. Fehlberg, "Women in 'Family' Companies: English and Australian Experiences" (1997) 15 Co. and Sec. L.J. 348. On limited liability, see Gabaldon, n. 84 above, particularly at pp. 1429–30, 1449–54.

[96] On the problem, see Bainbridge, n. 91 above, at p. 857.

[97] See T.A. O'Neill, "Toward a New Theory of the Closely-Held Firm" (1993) 24 Seton Hall L.Rev. 603 at pp. 620–621 as well as Allen, n. 84 above, at pp. 1401–3 and Cox, n. 92 above, at pp. 402, 471–472.

[98] On the value of such features to firms, see J. Kay, *Foundations of Corporate Success: How Business Strategies Add Value* (Oxford: Oxford University Press, 1993), ch. 5.

[99] Bottomley, n. 89 above, at p. 288.

[100] Johnson, n. 76 above, at pp. 1717–9; Stokes, n. 78 above, at p. 178; and F.M. Patfield, "Challenges for Company Law" in F. Patfield (ed.), Perspectives on Company Law: 1 (London: Kluwer Law International, 1995), 1 at pp. 10–14.

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of the company—the shareholders—must be replaced by a new paradigm.[101] A company should instead be thought of by reference to its employees and others potentially having a "stake" in the business, such as suppliers, customers and perhaps society at large. The fact that stress is placed on the need to recognise the multilateral community of interests affected by corporate behaviour has led some to refer to the set of ideas involved as "communitarian" or "stakeholderism".[102]

An additional feature of "institutionalist", "communitarian" or "stakeholder" thinking is a favourable disposition towards regulation. Reforms proposed have included restructuring the duties of directors to ensure that a company's various constituencies are taken into account by those in charge, fostering increased consultation with stakeholder groups (*e.g.* by providing representation in the boardroom) and deterring transactions that pose threats to key corporate relationships (*e.g.* corporate acquisitions motivated primarily by the objective of cutting costs by firing staff).[103] The case in favour of state intervention has been made in part on a pragmatic basis. Again, a characteristic of a well-run business can be that relations between the company and its stakeholders are supported by a strong sense of trust and commitment.[104] Laws which provide a suitable framework for the creation and survival of such ties should in turn foster corporate success.[105]

Those who think of companies in communitarian or stakeholder terms also say that public scrutiny and control of corporate activity is justified because companies are sufficiently crucial for the economy as a whole to be categorised as quasi-public entities.[106] As institutions of this character, companies should not exist for the benefit of a single constituency, such as the shareholders or management.

[101] On the "classic" view, together with a discussion of how it has been modified by statute and case law in the United Kingdom, see J. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press, 1993) at pp. 81–88.

[102] On the use of the "communitarian" terminology, see Bainbridge, n. 91 above, at pp. 857, 873–874; Cox, n. 92 above, at pp. 393–394, 402–405 and Patfield, n. 100 above, at pp. 10, 14–15; *cf.* Stokes, n. 78 above, at p. 180 (referring to communitarianism but relying much more on the term "corporatist countervision"). On "stakeholderism" see Bainbridge, n. 91 above, at p. 877 and J. Parkinson, "Company Law and Stakeholder Governance" in G. Kelly *et al.* (eds.), *Stakeholder Capitalism* (London: Macmillan, 1997), 142 at pp. 148–152.

[103] On possible reforms, see Cox, n. 92 above, at p. 403; G. Kelly *et al.*, "Conclusion: Stakeholder Capitalism" in Kelly *et al.*, n. 102 above, 238 at pp. 251–253 and P. Ireland, "Corporate Governance, Stakeholding and the Company: Toward a Less Degenerate Capitalism?" (1996) 23 J. of Law and Society 287 at p. 295.

[104] See p. 211 above, at note 98.

[105] For overviews of this line of reasoning, see Parkinson, n. 82 above, at pp. 144–145; Bainbridge, n. 91 above, at pp. 877–78 and B.R. Cheffins, "Trust, Loyalty and Cooperation in the Business Community: Is Regulation Required?", in B. Rider (ed.), *The Realm of Company Law* (London: Kluwer Law International, 1998), 53 at p. 64.

[106] Such reasoning is more relevant for a public company than it is for a small, closely held enterprise—O'Neill, n. 97 above, at pp. 625–626.

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Regulation which secures fair treatment for potentially vulnerable stakeholder groups is therefore justifiable, even if the measures in question may reduce corporate profits or restrict the latitude available to executives.[107]

Reaction to the Move Towards Theory in Company Law Scholarship

Since the rise of theoretical, interdisciplinary study in the legal academy has prompted criticism from people such as Judge Harry Edwards, the emergence of new approaches to company law might have been expected to prompt some form of backlash. As of yet, however, there is little evidence of concern that changing trends are causing company law academics to neglect practical issues unduly. Admittedly, there have been warnings that new approaches to company law should not operate wholly at the level of theory; academics instead should deal with concrete contemporary legal issues (*e.g.* the implications of the growing influence of institutional investors in publicly quoted companies).[108] Also, in a 1993 law review article an influential Delaware judge pointed out that, while there are matters which have an obvious theoretical dimension, there are technical questions where the link may not be important. For instance, it should not be surprising if the validity of terms in the corporate constitution, the need for a vote by a class of shareholders and the tabulation of votes at meetings are dealt with as matters of form according to pre-existing rules rather than by reference to contestable assertions of social meaning.[109] Despite the expression of such reservations, overall the move towards theory in company law has not prompted the same degree of controversy as it has in the legal academy generally.

There is a variety of possible explanations for the absence of a hostile reaction to the emergence of new approaches in company law. First, indifference and ignorance might have played a role. Lawyers and judges who choose not to pay attention to the academic literature are unlikely to react in an adverse manner to new trends. A second possible answer is that practitioners who do follow academic writing are unconcerned by the change in approach because plenty of doctrinal scholarship is still being produced. In Britain, for example,

[107] Parkinson, n. 82 above, at pp. 143–144; O'Neill, n. 97 above, at pp. 620, 624 and Patfield, n. 100 above, at pp. 14–15.
[108] Johnson, n. 76 above, at p. 1723.
[109] Allen, n. 84 above, at p. 1403. Judge Allen was chancellor of the Delaware Court of Chancery, which hears numerous corporate law cases because a substantial number of large, publicly quoted US corporations are incorporated under the laws of Delaware. He subsequently joined the law faculty at New York University.

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both academics and practising lawyers continue to contribute to a rich body of company law literature devoted to the analysis of cases and the description of statutory measures.[110]

Third, those members of the legal profession who are familiar with theoretical company law literature may be favourably impressed with the work which is being done. There is in fact some anecdotal evidence which supports this proposition[111] and it probably should not be surprising that this is so. This is because, according to Professor DeMott, "the recent literature eagerly embraces as topics for study all manner of current developments in business and financial practice".[112] Perhaps the strongest evidence of receptivity to theoretical scholarship is in the United States, where "judicial opinions and practitioner publications are filled with the jargon of law and economics".[113] No such trends have emerged in the United Kingdom, but the Insolvency Service provided an endorsement of interdisciplinary scholarship by referring to economic literature in a 1993 report on the restructuring of financially distressed companies and the Law Commission did likewise in 1998 by securing a contribution from law and economics experts as part of its examination of the duties of directors of companies.[114]

Fourth, even when theoretical company law literature has not been of a sufficiently practical nature to be of direct interest to those in the legal profession, the fact that the focus has often been on issues which are significant from a public policy perspective may have

[110] See, for instance, books such as *Palmer's Company Law,* G. Morse (principal ed.), 25th ed. (London: Sweet & Maxwell, 1992ff.); M. Bowen, *Fox and Bowen on the Law of Private Companies,* 2nd ed. (London: Sweet & Maxwell, 1995) and P. Goldenberg, *CCH Guide to Company Law,* 4th ed., (Bicester: CCH Editions, 1997) and journals such as the Company Lawyer (in particular under the headings News Digest and Company Lawyer Briefing) and the Journal of Business Law (in particular under the headings Companies in General, Companies/Securities Regulation and Insolvency, set out as part of British Business Law).

[111] Allen, n. 84 above, at pp. 1403–7; P.J. Omar, "Book Review" [1998] I.C.C.L.R. 34 and D. Bennett, "Book Review" (1998) 43 J. of Law Society of Scotland, No. 4, 51; see also M. Kirby, "Rethinking Company Law and Practice" (1995) 5 Aust. J. of Corporate Law 176 at pp. 179–180 and R. Saliterman, "Perceptions Bearing on the Public Policy Dynamics of Corporation Law" (1996) 20 Hamline L.Rev. 261 at pp. 291–299, 321–322 (suggesting, though, that theoretical work needs to be done with greater precision and rigor to make a significant contribution).

[112] Note 80 above, at p. 1335. Furthermore, she has suggested this happy state of affairs is likely to continue, since the fact that "current practice intrigues theoretically-oriented academics helps ensure that corporate law scholarship will not run dry"—*ibid.*

[113] Bainbridge, n. 91 above, at p. 858.

[114] On the Insolvency Service, see "The Insolvency Act 1986: Company Voluntary Arrangements and Administration Orders: A Consultative Document" (issued October 1993), 7 and appendix E. On the Law Commission, see Law Commission and Scottish Law Commission, *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties* (Law Commission Consultation Paper No. 153), (London: HMSO, 1998), Part 3; Simon Deakin carried out the study on behalf of the Law Commission. The Law Commission has been criticised in the past for failing to make sufficient use of theoretical analysis in dealing with company law issues: see, for example, D. Sugarman, "Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies: Part 2" (1997) 18 Company Lawyer 274 at pp. 277–278.

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served to deflect criticism. Consider "stakeholding", which has proved to be a popular theme in recent company law literature in the United Kingdom.[115] Most legal practitioners do not have to worry on any sort of regular basis whether a proper balance of duties, rights and responsibilities exists for those constituencies which have a stake in companies. Still, "stakeholder" has emerged as a key term in British political debate, in large part because Labour politicians fell into the practice of relying on it when discussing policy issues.[116]

While those who practise company law currently do not have to follow debates about stakeholding for any sort of pragmatic reason, in the future they may have to increase their awareness of the status of the various constituencies affected by corporate activity. The Department of Trade of Industry (DTI) announced in a discussion paper released in 1998 that it was carrying out a fundamental review of the framework of core company law and in so doing implicitly placed stakeholding on the agenda.[117] The DTI said its review could lead to the enactment of legislation redefining the duty of directors to act in a company's best interests so as to compel them to take into account employees, creditors, customers, the environment and the wider community.[118] A change of this nature would serve to ensure that stakeholder issues took on immediate practical relevance for lawyers who advise those managing companies.

Theoretical Analysis of Company Law: Future Directions for the United Kingdom

While interdisciplinary company law scholarship is becoming more common and there has, as yet, not been an adverse reaction to this trend, this does not mean complacency is justified. Since the use of theory by legal scholars has prompted a backlash in the United States, the possibility remains that the same could occur with respect to British company law. In such an event, the case will have to be made that continued emphasis should be placed on theoretical work. We have already considered in a general sense the arguments in favour of interdisciplinary research,[119] but points which are of particular relevance with company law deserve mention.

To start, the law is only one factor which influences corporate activities, and in many circumstances it is not the key one.[120] This

[115] See, for example, Deakin and Hughes, n. 82 above; Parkinson, n. 102 above, and J. Kay, "The Stakeholder Corporation" in Kelly *et al.*, n. 102 above, 125.
[116] Kelly *et al.*, n. 103 above, at p. 238 and Cheffins, n. 105 above, at pp. 68–70.
[117] *Modern Company Law for a Competitive Economy* (London: DTI, 1998) at p. 10.
[118] *Ibid.* For further discussion of the implications of the points the DTI has raised, see J. Dine, "The Consultative Document" (1998) 19 Co. Lawyer 82 at p. 83.
[119] See p. 201 above, at notes 30 to 35.
[120] Cheffins, n. 86 above, at pp. 26–31.

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means it is impossible to assess the impact of company law rules by addressing only the subtleties of legal doctrine. It is necessary, in addition, to take into account the manner in which business enterprises operate in practice. This will be an enquiry of an interdisciplinary nature, with fields such as economics, management theory (including accountancy) and sociology providing potentially crucial guidance.[121]

Also noteworthy is that company law changes rapidly. For instance, in the United Kingdom during the present decade, the law governing insider dealing has been revised, the regulations governing disclosure of financial information by smaller companies have been changed, a new scheme regulating public offers of securities has been introduced and the rules of the London Stock Exchange have been amended to enhance disclosure of corporate governance and executive pay practices.[122] Since the rules governing corporate activity tend to be in a state of flux, knowledge of the law as it is now should be accompanied by an understanding of the forces which determine its current form and its ongoing development.[123] The method of enquiry again needs to be interdisciplinary, drawing upon political theory, studies of managerial behaviour, economics and history.

A final consideration is that while British company law academics have begun to carry out important interdisciplinary work, scope nevertheless remains for future research and writing. In various areas, the theoretical literature has developed in a promising fashion. This is the case, for instance, with "stakeholder" issues,[124] shareholder remedies,[125] corporate governance[126] and corporate acquisitions

[121] Riley, n. 20 above, at p. 273; Bainbridge, n. 91 above, at pp. 874–875 and J. Freedman and M. Power, "Law and Accounting: Transition and Transformation" (1991) 54 M.L.R. 769 at pp. 769–770.

[122] See Criminal Justice Act 1993, c. 36, ss. 52–64; Companies Act 1985 (Audit Exemption) Regulations 1994, SI 1994/1935; Public Offers of Securities Regulations 1995, SI 1995/1537 and Stock Exchange *Listing Rules,* paras. 12.43A, implementing recommendations in *Report of the Committee on the Financial Aspects of Corporate Governance* (London: Gee, 1992) commonly known as the Cadbury Report, in *Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury* (London: Gee, 1995) commonly referred to as the Greenbury Report and *Report of the Committee on Corporate Governance* (London: Gee, 1998) commonly known as the Hampel Report.

[123] Riley, n. 20 above, at p. 273 and Bottomley, n. 89 above, at p. 204.

[124] See sources cited note 115 above as well as Ireland, n. 103 above.

[125] See D.D. Prentice, "The Theory of the Firm: Minority Shareholder Oppression: Sections 459–461 of the Companies Act 1985" (1988) 8 Oxford J. of Legal Studies 55; C.A. Riley, "Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts" (1992) 55 M.L.R. 782 and C. Bradley, "Contracts, Trusts and Companies" in J. McCahery *et al.* (eds.), *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation (*Oxford: Clarendon Press, 1993), 217.

[126] See, for example, J. Parkinson, "The Role of 'Exit' and 'Voice' in Corporate Governance" in S. Sheikh and W. Rees (eds.), *Corporate Governance and Corporate Control* (London: Cavendish Publishing, 1995), 75 and J. Dine, "The Role of the Non-Executive Director" in Sheikh and Rees, *ibid.*, 199, particularly at pp. 204–207, as well as V. Finch, "Corporate Governance and Cadbury: Self-Regulation and Alternatives" [1994] J.B.L. 51.

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(including takeover bids).[127] With other significant topics, however, relatively little has been written from an interdisciplinary perspective. Examples include executive pay,[128] closely held companies[129] and the rules regulating self-serving conduct by directors.[130] Furthermore, the forces which determine the nature and content of British company law have, generally speaking, escaped serious theoretical scrutiny.[131]

Current developments in fact provide an ideal opportunity for academics to gain a better understanding of the forces which influence the development of company law. The DTI acknowledged in its 1998 discussion paper that British companies legislation suffers from difficulties such as over-formal language, excessive detail, over-regulation and complex structure.[132] This suggests that there have been serious problems with past efforts at law reform.[133] The DTI has promised that its fundamental review of core company law will yield better results.[134] Academics can use the DTI's current efforts at reform as an opportunity to evaluate whether obstacles to effective change can be relatively easily addressed or are deep-seated and endemic.

The DTI's review of company law should act as a catalyst for theoretical scholarship in another respect. The Department has said that the terms of reference for the exercise include designing a framework for carrying out business activity which permits the maximum amount of freedom and flexibility to those organising and directing companies. At the same time, the interests of shareholders, creditors and employees are to be properly protected, through

[127] See, for instance, J. McCahery, "Risk, Trust, and the Market for Corporate Control" in McCahery *et al.*, n. 125 above, 247; S. Deakin and G. Slinger, "Hostile Takeovers, Corporate Law and the Theory of the Firm" in Deakin and Hughes, n. 82 above, 124 and D. McBarnet and C.J. Whelan, "Creative Compliance and the Defeat of Legal Control: The Magic of the Orphan Subsidiary" in K. Hawkins (ed.), *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford: Clarendon Press, 1997), 177.

[128] For instance, there does not appear to be a theoretical article written about the issues raised by the Greenbury Report, a much publicised discussion document released in 1995 (note 122 above). See, though, C. Riley and D. Ryland, "Directors' Remuneration: Towards some Principles of Substantive and Procedural Review" in Sheikh and Rees, n. 126 above, 181.

[129] There are no direct counterparts to articles from the United States such as O'Neill, n. 97 above; F.H. Easterbrook and D.R. Fischel, "Close Corporations and Agency Costs" (1986) 38 Stanford L.Rev. 271 and C.R. O'Kelley, "Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis" (1992) 87 Northwestern Univ. L.Rev. 216. Still, valuable empirical work has been carried out: J. Freedman and M. Godwin, "The Statutory Audit and the Micro Company An Empirical Investigation" [1996] J.B.L. 105 and A. Hicks *et al., Alternative Company Structures for the Small Business* (London: Certified Accountants Educational Trust, 1995).

[130] See, though, Parkinson, n. 101 above, ch. 7 and Law Commission, *Company Directors,* n. 114 above, Part 3 as well as writing on directors' and officers' insurance by V. Finch: "Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance" (1994) 57 M.L.R. 880.

[131] See, though, J. Freedman, "Reforming Company Law" in Patfield, n. 100 above, 197 and M. Power, "Auditing and the Politics of Regulatory Control in the UK Financial Services Sector" in McCahery *et al.*, n. 125 above, 187.

[132] *Op. cit.* note 117 above, at pp. 6–7.

[133] This in fact has likely been the case: Cheffins, n. 86 above, at pp. 183–196.

[134] *Op cit*. note 117 above, at p. 1.

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regulation where necessary.[135] Academics will likely seek to assess possible changes to the law in accordance with the terms the DTI has set down and when they do so they will probably find that conventional legal discourse is not adequate for the purpose. It will not be sufficient, for instance, to rely on an intuitive sense of what is good and bad in company law.[136] Doctrinal analysis will also not be of much assistance since carrying out an exposition of principles from an internal standpoint offers little scope for critical reflection, except perhaps in terms of the intrinsic coherence of the set of rules in question.[137]

Since conventional legal discourse is unlikely to be adequate, academics seeking to evaluate the DTI's current efforts at reform should make explicit use of theory. By taking into account how business enterprises operate and by assessing the impact which legal rules are having on existing patterns of behaviour, it should be possible to gain a sense of whether a legislative regime is placing undue restrictions on beneficial corporate activity or is exposing various constituencies affiliated with companies to excessive risks. As we have seen, interdisciplinary methodology can be used to gain a sense of how legal rules affect corporate activity.[138] Theoretical analysis therefore should provide academics with the means required to evaluate current and proposed legislation in accordance with the terms set down in the DTI's 1998 discussion paper.[139]

If British company law academics in fact do respond to the challenges posed by the DTI's review by increasing their use of theory, the prospects for company law research look bright. It is more difficult to be optimistic with teaching. Traditionally, company law instructors in the United Kingdom have not made extensive use of theory.[140] Furthermore, scepticism is likely to persist, even if progress is made with research and writing. For someone who has not followed recent developments in the literature and is not planning to write about company law in the future, taking the time to learn about unfamiliar interdisciplinary theories is unlikely to be an appetising prospect.[141] Since the presence of a huge mass of company law raises the conundrum of what to leave out of the syllabus, even a

[135] *Ibid*. at p. 14.
[136] *Cf.* Riley, n. 20 above, at p. 274.
[137] *Ibid*.
[138] See p. 216 above, at note 121.
[139] On the case in favour of using theory to evaluate the merits of rules governing companies, see Riley, n. 20 above, at p. 274; Hall, n. 93 above, at pp. 1, 4 and Sugarman, n. 114 above, at pp. 281–282.
[140] I. Snaith, "Company Law on Degree Courses: Survey Report" (1990) 11 Co. Lawyer 177 at pp. 181–182.
[141] Riley, n. 20 above, at pp. 273, 280 and C. Bradley *et al.*, "The Future of Company Law: Themes and Structures" in Birks, n. 79 above, 41 at p. 42.

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law teacher who has an open mind about theory will become concerned about "overload" and will wonder whether it is possible to discuss the issues raised and still "cover the field".[142]

Also potentially significant is negative feedback in the classroom. Since students are most comfortable when a course is taught as a well-organised presentation of legal doctrine, attempts to introduce abstract theoretical notions may well be met by resistance.[143] Such a reaction seems particularly likely to occur with company law. Students can perceive it to be a "vocational" subject where thorough knowledge of the rules will provide them with better prospects of success in a lucrative area of practice.[144]

Though teaching company law from an interdisciplinary perspective poses difficulties, the possibility of progress should not be dismissed out-of-hand. There may be some law teachers for whom change will be more than they wish to contemplate. For those with an open mind, however, further consideration is worthwhile. Theory can play a valuable role in the classroom,[145] and this should be the case with company law as much as with any other field. Since the law is only one of the factors which influence corporate activities, if students only learn about cases and statutory rules, there is a mismatch of business law education and business law practice.[146] A law teacher, by drawing upon interdisciplinary research, should be able to introduce students to some of the key aspects of corporate reality. This, in turn, will allow them to understand better the facts of the cases they are reading and provide them with a sense of how they would use the rules they are learning about in the real world.[147]

Increased use of theory should also improve the quality of analysis of policy issues in the classroom. Few teachers of company law adopt a purely "black letter" approach; they instead make some attempt to evaluate and criticise the law they describe.[148] Students are likely to find such normative critiques to be more coherent and intelligible if they are made aware of the theoretical premises which underlie the arguments being advanced.[149] Given this, and given that

[142] On problems with the content of the company law syllabus, see Snaith, n. 140 above, at p. 182 and A. Hicks, "Introducing Modern Company Law—The Life of a Company" (1994) 28 Law Teacher 138 at p. 138. On theory and "overload", see Bradley *et al.*, n. 141 above, at p. 42.

[143] See p. 206 above, at note 64.

[144] Parker, n. 64 above, at pp. 658–659.

[145] See p. 206 above, at notes 62 and 63.

[146] Prentice, n. 79 above, at p. 33; R.J. Gilson, "Value Creation by Business Lawyers: Legal Skills and Asset Pricing" (1984) 94 Yale L.J. 239 at pp. 304–305 and B.S. Black, "Is Corporate Law Trivial?: A Political and Economic Analysis" (1990) 84 Northwestern Univ. L.Rev. 542 at pp. 591–592; see also Goode, n. 74 above, at p. 205.

[147] Heidt, n. 62 above, at p. 785; Prentice, n. 79 above, at p. 34 and Gilson, n. 146 above, at pp. 305–306.

[148] Riley, n. 20 above, at p. 280.

[149] See Riley, *ibid.* at pp. 280–281 as well as Bradley *et al.*, n. 141 above, at p. 41.

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the use of theory may increase in some ways the practical utility of a company law course, student resistance to interdisciplinary analysis may in fact not pose as much of a problem as might be anticipated.

Concerns about "overload" also might not pose as serious an obstacle to the use of theory in the classroom as would seem to be the case at first glance. It is becoming increasingly obvious that academic company lawyers cannot teach the whole subject.[150] A law teacher's reflex reaction might be to continue to try to cover as many topics as possible, but an alternative approach is available which can readily accommodate the use of theoretical perspectives.[151] The aim will be to enable students to grasp the basic formal principles of company law while ensuring they understand in outline how the law operates in the context of business and legal practice. A course taught in this manner should convey the intellectual excitement of company law while establishing a conceptual framework students can rely upon if they continue with the subject in future life. Since they should be well-prepared to expand their expertise outside the classroom, dispatching particular topics to the quiet place where laws go that are no longer worth teaching ultimately should not be a cause for great concern.

Conclusion

As part of a general "mini-renaissance" in legal studies in the United Kingdom, company law academics have been developing an expanded intellectual range. Together with their counterparts in other countries, they have begun to carry out important interdisciplinary work. To this point, the rise of theory has been fairly uncontroversial. The situation, however, could change. In the United States, where theorising about law has flourished, the interdisciplinary movement in legal thought has prompted a strong backlash. Fears have been expressed that "impractical" scholars are doing the legal profession and law students a disservice by pursuing "abstract" theory at the expense of engaging in analysis of legal doctrine.

The criticism of interdisciplinary work which has occurred in the United States should not be accepted at face value. Theory can have practical relevance and can be valuable in the classroom. These are points which are salient with respect to the regulation of corporate

[150] Bradley *et al., ibid.* at p. 42 and A. Hicks, "Teaching Modern Company Law The Pint Pot" (1992) 26 Law Teacher 4 at p. 5.

[151] British company law academics have already discussed in more detail the sort of approach discussed here: see Bradley *et al.*, n. 141 above; Hicks, n. 150 above, at pp. 5–6, 12–13 and H. Rajak, "Substance and Method in Company Law" in Birks, n. 79 above, 47 at pp. 48–49. See also Goode, n. 74 above, at pp. 204, 213 and Black, n. 146 above, at pp. 591–592.

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activity in the same way they are generally. The fact that the Department of Trade and Industry, in its current wide-ranging review of company law, has implicitly put stakeholding on the agenda illustrates that matters which have noteworthy theoretical dimensions can have significant implications for practising lawyers. With respect to teaching, students are never going to learn about all aspects of company law in one course. As a result, sacrificing discussion of some topics in order to provide an improved understanding of how the law operates in the context of business and legal practice is probably a sensible trade-off. The upshot is that even if the development of an expanded intellectual range within British company law ultimately provokes disapproval, academics who use theory have recourse to persuasive arguments they can use to defend their efforts inside and outside the classroom.

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