

# **A Bernsteinian analysis of the interplay between legal knowledge and the legal professional in university law schools in Yorkshire and Alberta: Rule of Law or Rule of Lawyers?**

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# **A Bernsteinian analysis of the interplay between legal knowledge and the legal professional in university law schools in Yorkshire and Alberta: Rule of Law or Rule of Lawyers?**

## **Abstract**

This thesis explores University-level legal education in England (specifically Yorkshire) using a theory-oriented case study method as a way to analyse and develop to a new context a suite of concepts derived from the work of Basil Bernstein, including classification and framing, the pedagogic device and pedagogic identities. It uses Canada (specifically Alberta) as a comparator research site using a structured, focused comparison approach (George & Bennett, 2005). The research was triggered by concerns about the impact on University-level legal education of the ongoing changes to the entry level qualifications for the legal profession in England that have been initiated by the Solicitors Regulation Authority, and the rapid expansion in the numbers of students studying law.

The research is centred on a macro-level study of the interplay between the legal professional and his/her documentary and visual representation and the classification and framing of legal knowledge in university law schools in England. It identifies, illustrates and analyses some of the nuances in the interplay between the actors and substantive knowledge base in what Bernstein refers to as the Official Recontextualising Field (ORF) and the Pedagogic Recontextualising Field (PRF) of legal education. It develops Bernstein's concepts in the context of legal education, most notably through analysis of what is referred to here as a Specialised Recontextualising Field (SRF), which incorporates the contemplation of a range of specialised discourses in legal education. This leads to the development of specialised theoretical identities that emerged from analysis of the research data. These are referred to here as the Democratic Intellectual, the Democratic Professional and the Democratic Technologist. The key findings are discussed leading to proposals for their use in legal education curriculum design and policy development.

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## **Publications derived from work on the Doctoral Programme**

The topic for this thesis emerged from my experience as a law teacher and the research conducted as part of my doctoral studies at Lancaster University (2015-18). The research conducted for the three main modules has resulted in the following two publications, the first from the *Learning, Teaching and Assessment* module and the second from the *Policy, Change and Organisational Development* module.

Gibbons, J. (2018) Exploring conceptual legal knowledge building in law students' reflective reports using theoretical constructs from the sociology of education: what, how and why? *The Law Teacher* 52(1) 38-52

Gibbons, J. (2017) Policy recontextualization: The proposed introduction of a multiple-choice test for the entry-level assessment of the legal knowledge of prospective solicitors in England and Wales, and the potential effect on university-level legal education *International Journal of the Legal Profession* 24(3), 227-241

For the duration of my doctoral studies I have also been conducting research relevant to my work. This has resulted in the following publications:

Gibbons, J. (2015) Oh the irony!: A reflective report on the assessment of reflective reports on an LLB programme. *The Law Teacher* 49(2), 176-188.

Grimes, R., and Gibbons, J. (2016) Assessing experiential learning – us, them and the others *International Journal of Clinical Legal Education*, 23, 111

Gibbons, J. (2017) Assessment in legal education: qualification or quantification? in Grimes, R. (ed.) *Re-thinking Legal Education Under the Civil and Common Law*, London: Routledge

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Gibbons, J. (2018) Reflection, realignment and refraction: Bernstein's evaluative rules and the summative assessment of reflective practice in a problem-based learning programme *Teaching in Higher Education* 1-15

Gibbons, J. (2018) Whose access to whose justice? The contextualisation of administrative law on undergraduate programmes *Nottingham Law Journal* 27(2), 48-61

## List of Abbreviations

BSB	Bar Standards Board, England
FLSC	Federation of Law Societies of Canada
JD	juris doctorate – postgraduate law degree
LESA	Legal Education Society of Alberta
LETR	Legal Education and Training Review, England
LLB	Bachelor of Laws – undergraduate law degree
LSAT	Law School Admissions Test, Canada
NCA	National Committee of Accreditation, Canada
ORF	Official Recontextualising Field, A term from Bernstein
PBL	Problem-based learning
PRF	Pedagogic Recontextualising Field, A term from Bernstein
QAA	Quality Assurance Agency for Higher Education, England
QLD	Qualifying Law Degree, England
REF	Research Excellence Framework, England
SRA	Solicitors Regulation Authority, England
SRF	Specialised Recontextualising Field, term derived from Bernstein
SQE	Solicitors Qualifying Exam, a component of the proposed change to qualification as a solicitor in England
TEF	Teaching Excellence Framework, England

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## List of Codes

LK-OK: Legal Knowledge - Official Knowledge  
LK-UK: Legal Knowledge - Unofficial Knowledge  
LK-PK: Legal Knowledge - Powerful Knowledge

LP-CP: Legal Professional - Corporate Professional  
LP- P: Legal Professional - Prospective  
LP-RE: Legal Professional - Retrospective-Elite  
LP-DI: Legal Professional - Democratic Intellectual  
LP-DP: Legal Professional - Democratic Professional  
LP-DT: Legal Professional - Democratic Technologist

D-Rev: Discourse - Reverence  
D-Aut: Discourse - Authority  
D-Rel: Discourse - Relevance

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## Chapter 1: Introduction and overview

### 1.1 Personal position and motivation for the thesis

This research stems from my interest in the changing nature of legal knowledge in the ‘post-truth era’ (Keyes, 2004), as exemplified by the approaches to campaigning prior to the Brexit referendum, and the subsequent successful Supreme Court judicial review claim brought by Gina Miller against the Secretary of State for Exiting the European Union<sup>1</sup>. My concern is that, without a greater emphasis on the authenticity of knowledge, and the assertion of agency by those with democratic authority, important public and/or legal decision-making takes place within the noise created online from what is referred to here as **unofficial knowledge**. This is counter to my beliefs that the pursuance of social justice through education is of benefit to collective society, and that the ethical role of legal professionals is integral to their privileged status.

I am a Senior Lecturer (Teaching and Scholarship) in the law department of the University of York, England, with significant responsibilities for programme, curriculum and assessment design. Over the last twenty years I have become increasingly interested in a range of aspects relevant to this thesis including: the empowering effect of legal knowledge; the importance of learning space design; international and comparative law and education; and the merits of theory transfer within and between disciplines. I have also become increasingly frustrated by what I regard as the monolith of inertia found within the legal academy, and the impact this has on the future lawyers, civil servants and business people we educate. It is my belief that it is time for a stronger democratic identity to be more forcefully asserted in legal education.

The brackets in the paragraph above are significant in the contextualisation of my motivation for undertaking the construction of this thesis. I was a legal practitioner before I started teaching, making me a minority ‘non-academic’ in my department, identified more by what I am not than by who I am. I have found that in the era of the Research Excellence Framework (REF) within

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<sup>1</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Available at <https://www.supremecourt.uk/cases/uksc-2016-0196.html>. Accessed 6 December 2018

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higher education, teaching provides a job, whereas academic credentials open the door to a career. I am very ambitious and would love in the future to gain employment as an advisor on educational programme design in Universities abroad. For this reason I would contest the claim that Brown attributes to Bernstein (the central theorist in this thesis) that the PhD has become “a form of driving licence rather than a licence to explore” (Brown cited in Power, 2001, p. 73). I am strongly motivated to obtain the external validation of a PhD to enable me to explore and research further. I am grateful to Bernstein for providing the co-ordinates even if it is my job to construct the map.

## **1.2 Thesis and chapter overview**

This thesis is a theoretical macro-level study about the influence of the legal professional and his/her documentary and visual representation on the classification and framing of legal knowledge. Its’ focal case study is University-level legal education in four law schools in Yorkshire, England with comparative content accumulated from field trips to both of the law schools in Alberta, Canada. The Canadian context is regarded as close enough to the English legal education system, albeit with many unique-context specific characteristics, as explained further at 2.1. The data was collected across a two year period and relates to the six higher education institutions; four in Yorkshire, England (most pseudonyms starting with Eng) referred to here as Engbet, Engcar, Engeve, and York and two in Alberta, Canada (pseudonyms starting with Can) referred to here as Canshay and Canzac.

In this chapter I introduce the aims of the research and the overarching question addressed by this study. I follow this by a discussion of the rationale (and limitations) of the study. In the final section of the chapter, I identify the thesis’ original contribution to knowledge, being the claim that the University-level legal education context is a new field of theory application and development of Bernsteinian concepts. This claim is centred around the theory-oriented comparative case study method adopted here (George & Bennett, 2005), and the emphasis on analysing the discourse in documents in the public domain, multimodal features of visual material and four volumes of fieldnotes collected during field visits to law schools.

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The reference to ‘rule of law or rule of lawyers’ in the title is partly serious and partly ironic. It is serious in that it helps to foreground the problematic in the thesis, and ironic in that it is meant to imply that a simplistic binary is unlikely to adequately describe or explain the findings in a realistic or convincing way. Rather the thesis seeks to identify, illustrate and analyse some of the nuances in the interplay between the actors and substantive knowledge base in legal education via what Bernstein refers to as the **Official Recontextualising Field (ORF)** and the **Pedagogic Recontextualising Field (PRF)**. It develops specific Bernstein’s concepts, being **classification and framing**, **the pedagogic device**, **pedagogic discourse** and **pedagogic identities**, in the context of legal education, most notably through analysis of what is referred to here as a **Specialised Recontextualising Field (SRF)**. This term was first introduced by Bernstein (2000, p. 59) and is developed here through the contemplation of a range of specialised discourses in legal education, including the discourses of **relevance**, **authority** and **reverence**. This leads to the development of specialised theoretical identities that emerged from analysis of the representations and discourses found within the research data. These are referred to here as the **Democratic Intellectual**, the **Democratic Professional** and the **Democratic Technologist**.

The thesis follows a traditional structure, with specific chapters dedicated to the literature review, research design, data presentation, discussion and conclusion, as can be seen in the table of contents above.

### 1.3 Aims of research and research questions

The main aims of this research were to analyse how the identity of the legal professional is represented in the context of University-level legal education, and the extent to which this influences the classification and framing of legal knowledge. Findings throw light on the relative influence of the legal profession within higher education institutions in different locations which may be of use to curriculum designers and policy makers.

A theory-oriented comparative case study design, operating within a social realist paradigm, was chosen. For more detail on the comparative approach see 3.5, for more on social realism, see 3.3.

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The overarching research question is:

How are legal knowledge and the legal professional represented in the Official and Pedagogic Recontextualising Fields of legal education?

The sub-questions are:

- How is legal knowledge classified and framed in the Official and Pedagogic Recontextualising Fields of legal education?
- How is the identity of the legal professional represented in the Official and Pedagogic Recontextualising Fields of legal education?
- How is legal knowledge taught in the University Law Schools studied, and how is it adapted to accommodate representations of the legal professional?
- How is the visual environment in the University Law Schools studied adapted to accommodate representations of the legal professional?
- What implications can be drawn by legal education curriculum designers and policy makers on the basis of the findings? In particular, how is the identity of the legal professional constructed and represented in the University Law School and to what extent does this influence the classification and framing of legal knowledge?

The study follows guidance found in George & Bennett *Case Studies and Theory Development in the Social Sciences* (2005) on the structuring of theory-oriented comparative case study research. As they advocate, I moved down the “ladder of generality” from the country level to the sub-class of specific law schools in defined geographical regions (George & Bennett, p. 77). My research design using this approach is set out below in the form of a table.

<b>Research design: The ladder of generality (George &amp; Bennett, 2005)</b>			
<b>Phase</b>	<b>Task</b>	<b>Decision</b>	<b>Detail</b>
<b>1 – Research design</b>	Specification of the problem and research objective. Choose one of the six different kinds of theory building research objectives	Theory testing case study – Bernstein tested in university legal education	Interplay between actors in the ORF and PRF of legal education
	Developing a research strategy: specification of variables	Structured comparison of different law schools	Representation of legal knowledge and the legal professional in the English law school
	Case selection – primary criterion being relevance to the research objective (avoiding case selection bias)	2 x Canadian law schools and 4 x English law schools. Take care not to over-generalise findings.	Framing of location (Alberta and Yorkshire)
	Describing the variance in variables	Iterative procedure. Creation of a typology	Development of identity and influence of legal professional
	Formulation of data requirements and general questions	Determined by the theoretical framework. Systematic data compilation. General questions asked of each case	Analysis of policy and pedagogy documents found via desk-based research. Fieldwork. Photographs of law school environments.
	Integration of the 5 design tasks	Need for iteration and re-specification.	Analysis and the development of theory

<b>2 – Carrying out the case studies</b>	Look for ‘answers’ to the general questions	Articulate the criteria employed for ‘scoring’ the variables – for inter-coder reliability	Inductive and deductive development of codes to use with the data
	Develop explanations for the outcome of each case	(i) Provisional nature of case explanations: (ii) Challenges involved in weighing explanations of others (iii) Task of transforming a descriptive explanation for a case into an explanation that reflects the theory	Consideration of contextual factors. Consideration of literature review. Development of theory.
<b>3 – Drawing the implications of case findings for theory</b>	Theory development	(i) Establish, strengthen or reduce the support for the theory (ii) Generalisation to another case (iii) Generalisation to a neighbouring cell in a typology (risky)	Adaption and extension of theory to a new context.

Table 1.1: Research design - The ladder of generality (George & Bennett, 2005)

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## 1.4 Rationale for, and limitations of, this study

This thesis has two principle purposes, one substantive, the other theoretical. Substantively it explores the interplay between the representations of the legal profession and legal knowledge in higher education through detailed analysis of a wide variety of documentary, visual and observational data. For this, it is scaffolded by the work of others, with the relevant foundational material set out in chapter 2. Theoretically it builds on Bernstein's conceptual framework and extends and applies this to a new context. Like Brown (2006), I came to the design and rationale for the approach to my research with both a set of professional concerns (relating to my work as a public law lecturer) and a range of theoretical orientations (derived from an ongoing interest in social realism and the sociology of both law and legal education). I therefore found my way to Bernstein's work through its value and applicability to my context. I am aware that there are other PhD theses that have applied Bernstein's concepts to legal education, including Ordoyno (2016, unpublished thesis). None of the studies I found used a theory-oriented comparative case study method nor did they develop and expand his ideas in the manner set out here.

As set out in more detail below, in both England and Canada there are ongoing changes to the regulatory aspects of entry into the legal profession (Cox, McIntosh, Reason, & Terenzini, 2011; John O. Sonsteng with Donna Ward & Michael, 2007; LETR, 2013). This period of flux provided an opportunity to explore the identity of the legal professional and analyse the extent to which this image affects the culture within the law school. There has been considerable commentary on the future of legal education from the perspective of regulatory and institutional requirements, but very little literature adopting a sociological or educational lens. Most comparative studies of common law legal education are overly influenced by events and decisions made in American law schools, which can have the effect of drowning out the lessons that can be learnt from the English and Canadian contexts. They also rarely focus on a specific component of the law school curriculum, such as public law, and are not designed with the intention of developing theory.

The importance of the interconnection of theory and data in the work of Bernstein is explained by Davies who emphasises Bernstein's focus on this interplay, and his insistence on the meaningless of theory without empirical

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evidence and data without conceptual ordering (B. Davies, 1995, p. 54). This is picked up in the research design of this study, which attempts to overcome Lane's important adaptation of Kant that "data without theory is blind, theory without data is empty" (Lane, 1990). Bernstein's theoretical concepts, as developed and critiqued by subsequent scholars including Young (2008), Maton (2014), and Guile (2018), have been used to analyse both the structure of knowledge and the formation of identity through the use of accessible, transferable concepts as identified from analysis of research data in a range of academic and professional educational contexts, including geography (Lambert, 2018) and vocational education (Wheelahan, 2018). The importance of this interplay between theory and data in the work of Bernstein is of particular resonance to legal education where the structure of the curriculum and pedagogic approaches have been under-researched (Cownie, 2011)

Like Ashwin, my interest in the relations between theory and data in empirical research in higher education comes from a concern about the tendency of much of this research to appear tautological, with theories seeming to over-determine the outcomes (Ashwin, 2012). He stresses the importance of researchers being more explicit about the theories that have underpinned their view of the research object, and greater clarity in the associated research methods used. He also advocates for greater reflexivity in recognizing what has been achieved in research (such as this) that uses a single theory or theorist to conceptualise its research object (Ashwin, 2012, p. 954). The thesis is structured with this emphasis on clarity and reflection in mind.

Despite its strong contribution to knowledge, this study is not without its limitations. For example, by choosing such a broad case to study, it has not been possible to include all of the factors that are relevant to the representations of the legal profession, the structuring of identity and the composition of legal knowledge. The voices of students are weak as they are only found in consultation documents and on University websites rather than from focus groups or interviews. Similarly the voices of curriculum designers and policy makers may have been distorted by the early decision not to record conversations but to undertake observations and make fieldnotes instead. Kogan (1996) points to the limitations of mega and macro level studies such as this that concentrate on the upper levels of policy analysis and potentially



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fail to provide fine grained analyses of the extent to which change at the workplace level is taking place. Although this study attempts to address this shortcoming by repeatedly bringing the analysis back to ground level, it is acknowledged that without targeted data collected from the student population, this has not been fully overcome.

The limitations of comparative studies are set out further at 3.5, the more specific limitations of the research design are set out at 3.10 and issues connected to my positionality and status as an insider researcher are explored at 3.5.

## 1.5 Original contribution to knowledge

This thesis claims an original contribution to knowledge on the basis that, until now, there has not been a macro-level study designed to test and develop aspects of Bernstein's theory in the context of University-level legal education. This adds an important new theoretical approach to legal education, as can be seen by the fact that Bernstein's concepts have proved to be of such utility in this context and pave the way for future research. This study also sheds light on the similarities and differences in legal education in two English speaking country contexts that share enough commonality to be compared. The literature in the field on these matters is scarce and to the best of my knowledge, this is the first study to compare the two national contexts chosen with an exploration of the interplay between public law knowledge in higher education and representations of the legal professional using a suite of Bernstein's theoretical concepts.

Throughout the last four years of doctoral study, I kept returning to Bernstein, as can be seen in the publications that stemmed from work undertaken on the doctoral programme at Lancaster University (Gibbons, 2017, 2018a). Bernstein's work sets out how pedagogic practice is a fundamental social context through which cultural reproduction and production takes place. This finding resonated strongly with me as a teacher of public law as, at its essence, this subject is about teaching - and possibly reinforcing - the structural framework of modern society.

Throughout the research process I have found Bernstein's concepts, most notably the **pedagogic device** and **pedagogic identities**, accessible and

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useful as a way to explain and analyse my context. Bernstein once said about Durkheim “I have yet to find *any* social theorist whose ideas are such a source (at least to me) of understanding what the term *social* entails” (B. Bernstein, 1975, p. 17 emphasis in the original). I feel the same way about Bernstein as he did about Durkheim in this regard. Fortunately, the literature review in chapter 2 reveals that the rich legacy of Bernstein has been underdeveloped in higher education generally, and within University-level legal education specifically, making him an appropriate theorist to use here.

My intention to analyse and develop Bernstein’s concepts within the region of law in higher education arose because the literature on this is limited, thus a research gap was identified (Breier & Ralphs, 2009; Clarence, 2016). With the intention of undertaking a theoretical study, I reviewed the data set using Bernstein’s concepts as deductive tools for explanation. In the spirit of enquiry, I also utilised visual research methods developed by Lackovic (2018) and took an inductive approach grounded by Bernstein’s ideas to consider the data unique to this context. By synthesising my findings from these approaches I was able to develop new concepts and undertake both **theoretical extension** and **theoretical refinement** (Snow, Morrill, & Anderson, 2003). My main findings are the theoretical extension of Bernstein’s pedagogic device to University-level legal education to develop the concept of it being a **Specialised Recontextualising Field**, and the theoretical refinement of pedagogic identities that have been labelled here the **Democratic Intellectual**, the **Democratic Professional** and the **Democratic Technologist**. In the context of a rapidly changing regulatory environment in University-level legal education in both England and Canada, this research is both timely and presient, as set out in more detail in the final two chapters of this thesis.

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## **Chapter 2: Context and Concepts**

### **2.1 Chapter overview**

In this chapter the context and concepts that are of most significance in this research are introduced through a thorough review and analysis of the relevant literature using four main headings. As will be seen, there are considerable overlaps between the ideas in these sections. These will be explored further in the following chapters.

In the first two sections the contemporary context of legal education in higher education is explained and Bernstein's concepts that are applied in this study are set out. For the latter I look at how relevant terms were articulated by Bernstein and his contemporaries during his lifetime, and how they have been adopted and developed since his death. The main focuses here will be on the concepts to be used in this study, and the Bernsteinian research that has been conducted to date in higher education contexts.

In 2.4 I look at the concept of knowledge, with a specific focus on legal knowledge and public law knowledge. I am strongly influenced in this section by the work of Young, Muller, Wheelahan and other social realists (Wheelahan, 2010; M. Young, 2008; Young & Muller, 2016, 2014). The relevance of this to my epistemological position is set out at 3.3.

In 2.5 I explore the meaning of the term professional and the relevant aspects of this to develop what is meant here by the identity of the legal professional. Reference is made here to seminal studies of the professions, including that of Abbott (1988), and the more recent – and contentious – work of Susskind (2015). There will also be a consideration of the education of and representation of the legal professional.

In the final section I contemplate the notions of relevance, authority and reverence. Although not defining terms in my research questions these concepts emerged as being significant throughout the research process; are useful for the development of theory; and have proved to have significant currency in the current University-level legal education environment, as seen further in 4.6.

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It is important to note that a deliberate decision was made in this study to focus on specific regions in England and Canada and not use America as a comparator other than where literature from America provided insight not available elsewhere. With regards to legal history, legal education and public law, and to paraphrase the late Jo Cox MP, England and Canada have more in common than that which divides them. As Tight (1994) identified in his comparative study of part-time higher education in the two countries, they share a long cultural inheritance and considerable commonly held values. Importantly, due to their Commonwealth ties, this includes a shared history of a common law tradition, meaning that much of the 'core' of substantive law is the same. Although in modern times Canada is naturally more influenced by America (and, in Quebec, by France), and England by the European countries that are members of the European Union (for now), there is considerable common ground with regards to the legal education issues the countries face. Both countries are under pressure to 'internationalise' the law curriculum, which, in light of recent political events, including the Brexit referendum in June 2016 and the election of President Trump in America in November of the same year, means needing to give greater prominence in the curriculum to international law as a source of law. In public law teaching in England over the next decade this will involve modifying the curriculum to reflect the changing role of the European Union as a source of law. All of these factors contributed to the choice of research sites.

## **2.2 An introduction to the contemporary context of University-level legal education in England and Canada**

A review of both the academic and professional literature about legal education in higher education institutions in England and Canada indicates that it is in a state of flux. In England this has been triggered by the *Legal Education and Training Review 2013* (LETR) that led both the Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA) to conduct a review of the entry level requirements for their respective professions. This process is ongoing and has the potential for far reaching implications for University-level legal education, most notably as a result of the SRAs intention to introduce the two-part Solicitors Qualifying Examination (SQE) as part of its *Training for Tomorrow* programme. SQE1 will be an entry-level knowledge-based multiple choice test assessment taken by graduate entrants to the profession. SQE2 will be a skills-based assessment taken after work place experience. When

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SQE is introduced, currently planned for 2021, the existing arrangements will be phased out, including the regulatory oversight of what is known as the Qualifying Law Degree (QLD) in English law schools (see further Gibbons 2017). One of the main sources of data in this thesis will be the stakeholder responses to the consultation on this proposal, the majority of which indicated significant reservations about the plans (Hall, 2017).

In Canada, the Canadian Bar Association conducted a *Legal Futures Initiative* in 2014 that contributed to the implementation of the Federation of Law Societies of Canada (FLSC) National Requirement. This policy sets out the standards, competencies and substantive legal knowledge the Canadian legal regulators expect students will have following law school making it, in effect, akin to the current QLD requirements in England. The changes to the curriculum in Canadian law schools that were required as a consequence of this initiative are explored further in this thesis. The legal education communities in both countries have also been influenced by the report from the American Carnegie Foundation for the Advancement of Teaching (the Carnegie Report) entitled *Educating Lawyers: Preparation for the Profession of Law* that was published in 2007 and literature on alternative futures for the legal profession, including the work of well-known professional education commentator Susskind (R. Susskind & Susskind, 2015; R. E. Susskind, 2010, 2017).

In the next three sub-sections I set out some more contextual information about legal education before moving on to the key terms used in this thesis.

### **2.2.1 The specific national contexts and the rationale for comparison**

It is common ground that the history of professional legal education in England has been iterative and evolutionary (Maguire, 2018). Historically, qualifying as a lawyer (a barrister or solicitor) required a form of apprenticeship and the need to cram substantive legal knowledge for the Bar or Law Society Finals. More recently, since the late 1980s, the education has been split between the academic stage of undergraduate level legal education and the one year vocational stage, known as the Legal Practice Course for prospective solicitors or Bar Professional Training Course for prospective barristers. For students wishing to pursue the solicitors' route, upon completion of these two stages, there is still the requirement to secure one of

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the increasingly elusive training contract with a law firm. Around 17,000–18,000 law students are admitted annually to degree courses of which 15,950 graduated in 2016 according to the Law Society’s most recent figures (Law Society, 2017, p. 41). This equates to c50,000 law students at any one time spread across the three years of a typical degree (Mark Davies, 2018). The most recent figure for training contracts available is 5,728 (Law Society, 2017, p. 44). This means that the majority of students that undertake an undergraduate law degree (LLB) in England do not ultimately become a lawyer, although many work in law-related fields, including the civil service and corporate management, the relevance of which is explored further below.

In Canada, the academic stage of legal education is currently provided as a postgraduate juris doctorate (JD) programme in a limited number of law schools that require students to pass the Law Schools Admissions Test (LSAT) prior to entry. This creates a high bar for entry, effectively pushing hundreds of Canadian students overseas to study law each year. Most Canadian educated law students immediately follow their JD with a ten-month apprenticeship (known as articles) at a law firm, most commonly within the province in which they had studied, before they take the provincial bar exams. In Canada the majority of law school graduates become lawyers (although, according to the Dean of Canshay, 50% leave practice within the first five years – fieldnotes, v3:19), and of those many return to become visiting lecturers at their alma mater. Foreign educated law students have until recently been considered by the Canadian legal regulators and legal profession as lower calibre than those educated at home. However, as more Canadian students are choosing to study law in other common law countries, including England and Australia, for financial reasons rather than because they failed the LSAT, a former employee of the Legal Education Society of Alberta (LESA) intimated that this view is changing (fieldnotes v3:49). The impact of this is dramatic. As an illustration, in 2017 fewer than half the students taking the Alberta Bar exam were from Alberta, with the examining body having to check qualifications from over 70 different international law schools (fieldnotes, v3: 49: discussion of data from LESA).

Although it is evident that England and Canada differ in the manner in which they have constructed legal education to serve the market and national policy, they are both now subjected to the imperative of making their education and training systems responsive to the needs of economic globalization (McIntyre

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& Soloman, 2000, p. 87). Both countries are faced with similar issues about the transformative and reproductive role of higher education in society, including issues around the student as consumer narrative (Molesworth, Nixon, & Scullion, 2011), the 'economic Darwinism' of neoliberalism (Giroux, 2014) and the problematic nature of the marketisation and commodification of education (Brennan, 2002; D. Phillips & Schweisfurth, 2014; Thornton, 2012). This does not mean that legal education is 'corrupt beyond repair' (Martin, 2009), but that for the discipline of law these issues are particularly problematic due to the link between law, governance and authority. Law students in both England and Canada are privileged members of society, who often have been recipients of the strong secondary socialisation of an elite education (van Zanten, 2010, p. 329) and who are highly regarded by employers as part of the ideology of the 'war for talent' (P. Brown & Lauder, 2010, p. 234). These factors, amongst others, influence both the identity and representations of legal professionals as explained below.

### **2.2.2 The institutional contexts in Yorkshire and Alberta**

Universities in both England and Canada are subject to considerable regulatory oversight. In England the Quality Assurance Agency for Higher Education (QAA) sets out general standards and benchmark statements for disciplines, including law. There are different, and more onerous, QAA oversight provisions for the for-profit providers of legal education, including the higher education institution referred to here as Engbet. Despite this regulatory oversight, law school provision has mushroomed: in 1970 there were 29 institutions offering law degrees in England. There are now 122 (fieldnotes, v4:2: Notes from a presentation at an English legal education event) including the 12 in Yorkshire. In Canada, quality assurance is administered at the provincial level; in Alberta by the Alberta Quality Council and the Legal Education Society of Alberta (LESA). Law school numbers continue to be limited, with only 25 law schools across the country, including the 2 in Alberta that are the research sites in this study. None of the law schools in Canada are run for-profit as is seen in England, although tuition fees in all Canadian law schools are uncapped and higher than those found in all higher education institutions in England (as summarised in the documents

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associated with the approval of an additional law school at Ryerson, Ontario (the Ryerson Documents) dated December 2017.<sup>2</sup>

In addition to State regulatory actors law schools are directed by guidance from professional regulatory actors and policy which, in England, includes the Legal Service Board, the Law Society, the Bar Council, the Solicitors Regulation Authority, the Bar Standards Board and the stipulations set out by the latter two bodies in the Joint Statement on the Academic Stage of Training<sup>3</sup>. In Alberta, regulation is dual layered, with amendments to existing programmes and new law schools needing approval by the Law Society of Alberta and the Federation of Law Societies of Canada, which also sets minimal entry level requirements for the legal profession.

Other than where they are required to comply with the stipulations set out in regulatory documents, Universities in both jurisdictions have considerable discretion and autonomy in the content and design of law degrees, including as an example, the location within the curriculum of the requisite public law knowledge required by the profession. At many institutions, including Engbet and Engcar, the constitutional aspects of public law are regarded as foundational and taught only in year 1. At others, including York, public law is integrated with other subjects as part of a holistic programme design. In Canzac, public law, although compulsory, is taught as three independent modules with content chosen at the complete discretion of the module leader. Both English and Canadian law schools look to legal professionals, including public lawyers, to contribute to both the design and delivery of law programmes, although the terms of these arrangements differ. The consequent variation in representations of the legal professional and legal knowledge as a result of these differences in design are of interest in this study.

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<sup>2</sup> <https://flsc.ca/wp-content/uploads/2017/12/RyersonReportENR.pdf>. Accessed 30 November 2018

<sup>3</sup> <http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>. Accessed 30 November 2018



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### **2.2.3 The curriculum, and approaches to teaching in law most relevant to the study context**

With reference to Becher's well-known categorisation, the discipline of law, and by extension legal education, is comprised of contested territories (Becher, 2001). These are usually defined in oppositional terms: education/training, academic/professional, new/old universities, city/high street, knowledge/skills, Bar/Law Society to the extent that the discipline was referred to by Savage & Watt as "schizophrenic and incurably so" (Savage & Watt, 1996, p. 45 see also Maguire, 2018, p114). An exploration of the existence or not of these dichotomies within the dataset was not undertaken, as this was not the main focus of the thesis. It was deemed important however to set out what legal education looks like within law schools so as to be able to evaluate the research question.

As identified and researched by Birks (1994, 1996) and Cownie (1999, 2004, 2010, 2012), academic law has struggled to forge its own identity separate from that of the legal profession. As such, there are longstanding and ongoing disagreements within the discipline of law in higher education about what knowledge needs to be transmitted, how, and why. In England the QLD subjects (public law, the law of obligations, property law, criminal law and EU law) are widely regarded as comprising the 'core' curriculum, with Universities adding to this with optional subjects based on the research specialisms of academic staff. These core subjects (with the exception of EU law) are also found in the compulsory curriculum in Canada. In recent years, most English law schools have added professionalism and/or ethics as a compulsory module, and many also offer modules dedicated to the development of legal skills. These additions are due in part to pressure from the regulators to make students 'practice-ready', but also as a result of the growing body of literature on the need to teach social values and ethics in legal education (Cooper & Trubek, 1997; Paterson, 2011).

Despite the broadening curriculum, law continues to be taught primarily using a traditional doctrinal lecture-seminar model in most law schools. Clinical legal education has become more widespread, including with the use of live and simulated client clinical legal education (Brayne, 1998; Kolb, 1984; Strevens, Grimes, & Phillips, 2014). However, these initiatives tend to be based at the module design level and their success often depends on the motivations of

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individual staff members (R. H. Grimes & Gibbons, 2016). Since its introduction in medical education at McMaster University, Canada, in the late 1960s, problem-based learning (PBL) and other experiential design models have also become more popular in law. As set out below, it was found that at most of the institutions studied here there were staff with an interest in innovative curriculum design.

With regard to approaches to teaching, Canada has been more strongly influenced by models adopted in America most notably in the use of the case method, also known as the scientific approach, the Langdell method or the Socratic method (Langbein, 1996; Leighton, 2015; Markesinis, 1996; Moskowitz, 1992b; Sugarman, 2011). This is a large group tutor-led approach where students have to read allocated court cases in advance and be prepared to analyse them in front of the whole class in structured question-and-answer sessions. The case method has been criticised more recently as creating an intimidating environment for students and being akin to “studying an entire forest by looking at one tree at a time” (Sullivan, Colby, Welch Wegner, Bond, & Shulman, 2007). A review of Canadian legal educational literature indicates a willingness to move away from the case method and adopt more experiential approaches, and this is clearly happening in some institutions, including those studied here (Ferguson, 2013; Holloway, 2014; Sankoff, 2014; Schwartz, 2016; Smyth, Hale, & Gold, 2018). As mentioned above, the focus of this study is not about approaches to teaching per se. It does, however, use policy documents and classroom observations to explore the interplay between the identity and representations of the legal professional and the substantive knowledge base of the curriculum.

## **2.3 Bernstein, his concepts and their application in higher education**

The educational theorist Basil Bernstein (1924-2000) spent his entire academic life on the same project, being the development of a theory on how the structure of social relationships influences the structure of communication, and how the structure of communication shapes people’s consciousness and identity – through the curriculum. He developed an array of conceptual tools for thinking about knowledge, pedagogy, identity and curriculum through his articles and the five books in the *Class, Codes and Control* series (B. Bernstein, 1973a, 1973b; Basil Bernstein, 1975; B. Bernstein, 1990, 2000).

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During his career his work became, in the oft-quoted words of Karabel and Halsey the “harbinger of a new synthesis” (1977, p. 62) and it generated a range of concepts that are often inaccurately depicted as dichotomies, including visible and invisible pedagogies (1975), vertical and horizontal discourse (1999) and vertical and horizontal knowledge structures (2000). He was, in the words of Sadovnik, “a centrally important and controversial sociologist, whose work has influenced a generation of sociologists of education and linguists” (Power, 2001, p. 12). For Arnot, two major reasons explain the attraction of his theory: its *explanatory* power, which is linked to its *universalistic* but also its *transgressive* nature, and, secondly its *educative/transformative* power (Power, 2001, p. 68 italics in the original). It is for these reasons, which are of central resonance to the research questions here, that he was chosen as the primary theorist for this thesis.

I have been mindful of the criticism levelled at Edwards by Bernstein in an exchange in 1994 not to “rummage among the attributes” for items convenient to my case, however, not all of Bernstein’s concepts will be utilised here (B. Bernstein, 1994; A. D. Edwards, 1994). As Bernstein (2000, p.xii) said himself, there is no need to ‘buy into’ all the levels of his theoretical analysis, thus allowing for a certain democracy of access. Although many of Bernstein’s ideas were considered as having utility in this research, most notably the way that vertical and horizontal knowledge structures could have been used to analyse the composition of legal knowledge, the concepts chosen were limited as a way to focus the research and clarify the research findings. There is more detail below of the concepts that are relevant to, and developed by, this thesis, being **classification and framing, the pedagogic device, pedagogic discourse** and **pedagogic identities**.

Bernstein’s concepts have proven to be both powerful and useful in the field of higher education, and they continue to be used in a wide variety of contexts and locations. This includes UK based research on inequality and identity, including the many works of Abbas, McLean and Ashwin stemming from their ESRC funded project *Pedagogic Quality and Inequality in University First degrees* (Ashwin, Abbas, & McLean, 2014, 2015; McLean, Abbas, & Ashwin, 2013); research conducted by Whitchurch on professional identity (Whitchurch, 2009); Hordern’s research on expertise in the professions (Hordern, 2014); and the work of Melewar and colleagues on corporate identity (Melewar, 2003). Outside the UK there has been research conducted

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by Moore and, more recently Shay into curriculum reforms in South Africa (Moore, 2000, 2003; Shay, 2013, 2015, 2016); the theoretical research of Singh and her colleagues (Singh, 2015, 2017; Singh, Thomas, & Harris, 2013); the work of Lockett on policy implementation (Lockett, 2009); Stavrou's research into French higher education curriculum change (Stavrou, 2009); and Tan's exploration of Madrasah education in Singapore (Tan, 2010). Bernstein's work continues to be used by PhD researchers, including Ordoyno (2016, unpublished thesis), and I have already demonstrated the merit of utilising his concepts in my published work (Gibbons, 2018a, 2018b). For these and many other reasons I chose unapologetically to adopt a Bernsteinian approach.

There follows below, from 2.3.2 to 2.3.4, a literature review of Bernstein's concepts relevant to this thesis. In the first brief section I consider the significance of Bernstein the man and the attraction of his concepts to my context. At 2.3.5 I address the main criticisms of his work.

### **2.3.1 Sherpa Bernstein – the researcher and the theorist**

Bernstein's lifelong work involved encouraging researchers to look critically at curriculum as being something more than the organization of knowledge, and to analyse the general principles underlying the transformation of knowledge into pedagogic communication. For this reason he was referred to evocatively by Jenkins (2010) as 'Sherpa Bernstein'.

Bernstein's research is viewed by some as being relevant only to the context in which it was written, being for the most part analysis of the English school system between 1970-2000. This "Britishness of Basil Bernstein" (Goodson, 1995, p. 359) may go some way to explain why, as Atkinson (1985) observes, Bernstein has been one of the most cited but most misunderstood sociologists. I am mindful that his concepts should not be applied mechanically to other socio-historical contexts, but reassured following a review of the literature that there is merit in undertaking a reflective research approach to that effect. Of particular interest in my context is the expansion of Bernstein's theory using new research methods, for example Morais and Neves action-research study of teachers as creators (A. Sadovnik, 2006); and new research contexts, for example Case's study of the acquisition of professional engineering knowledge (Case, 2014).

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As Bernstein made clear in his books, his theoretical work was founded on earlier sociological studies by Durkheim and Weber as a result of his background in linguistics and sociology. This has the unfortunate result of aligning Bernstein with a particular ideological approach because, as he explains, “in Britain, and particularly in the United States, Durkheim is seen as a conservative, functionalist positivist.” (B. Bernstein, 2000, p. 124). I would shy away from being labelled in this way, for the reasons given in 3.2. As such, I align myself more with the potential of Bernstein’s theoretical work than with its Durkheimian origins.

The ongoing Bernsteinian research shows that his theories are not static, and that they have the capacity to be adapted and applied in new contexts. For some, including Donnelly (2015, p. 98) this is because he adopted a ‘value-neutral’ approach in that his main intention was always to make visible the underlying structures of the message systems of education rather than to make value judgements about educational contexts. For others, including Abbas and McLean (2007, p. 728) his focus on values is one of the reasons why his ideas continue to have relevance. As they observe; “for Bernstein (1996), education bestows particular rights: to the means of critical understanding, to seeing new possibilities, and to the capacity to participate actively in the political process.” I will return to the significance of the transmission of values in 2.3.4 below.

### **2.3.2 Classification, framing and the regionalisation of knowledge**

The concepts of classification and framing, and the way they are used to make curriculum choices, are familiar to many of the actors within education, most of whom are, I suspect, unaware of the significance of Bernstein’s contribution to their development. Bernstein’s original paper from 1971 entitled *On the classification and framing of educational knowledge* is, according to Ball, “the best paper ever written in the sociology of education” (Ball cited in Power, 2001, p. 41). For Arnot too the paper “stood out as by far the most ambiguous, ambitious and intellectually challenging of available sociological theories of educational knowledge” (Arnot, 1995, p. 298). As a theoretical model, Bernstein’s work on this presents, in what Sadovnik refers to as “painstaking detail” (1995a, p. 18), the rules of pedagogic discourse and practices and a comprehensive picture of both the “what” (classification rules)

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and the “how” (framing rules) of educational systems. In typical style, Bernstein revised the original iteration of his ideas from this paper many times meaning that it appears in all of his five books to a greater or lesser extent. In his 1999 interview with Solomon he identified the difficulty for those using his work in this approach and advised on the importance of reading later papers rather than earlier ones (B. Bernstein, 2000, p. 211). For this reason, as will be apparent, his 2000 book was relied on most frequently here for his explanation of his terms.

In essence, the importance of classification and framing for the acquirer of knowledge is that they contain or create a boundary around what counts as the legitimate text, i.e. the part of a curriculum that attracts evaluation (Bernstein, 2000, p.xvi). Classification refers to the degree of boundary maintenance between discipline contents and is concerned with the insulation or boundaries between curricular categories. Strong classification refers to a curriculum that is highly differentiated and separated into traditional subjects; weak classification refers to a curriculum that is integrated and in which the boundaries between subjects is fragile. Framing refers to the location of control over the rules of communication and, according to Bernstein, “if classification regulates the voice of a category than framing regulates the form of its legitimate message” (B. Bernstein, 1990, p. 96). These terms have subsequently been adapted and extended by numerous researchers, including Sadovnik, Maton, and Moore et al (Maton, 2014; Moore, Arnot, Beck, & Daniels, 2006; A. Sadovnik, 2006) and are generally useful as a way to categorise a curriculum.

As Bernstein explained, framing refers to the social relations of a given social division of labour. Strong framing marks boundaries and makes terms explicit, whereas weak framing reduces this emphasis. In his later work, Bernstein developed framing to refer to the controls on the two embedded discourses within **pedagogic discourse**: being an **instructional discourse** transmitting specific skills *and* their relation to each other, and a **regulative discourse** transmitting the rules of social order (B. Bernstein, 2000, p. 32 and 102). These are useful concepts that I have addressed in previous work, and to which I return below and in chapter 3.

To give an example of the utility of classification and framing, in this thesis I set out an analogy between a legal education curriculum in higher education

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and a legal constitution (Oliver, 1992; Ridley, 1988; Wheare, 1978). This is because a constitution is a recognisable concept and one that is of huge significance in the teaching of public law. The classification of a constitution would consider the institutions of State, the distribution of power between those institutions and the extent of State control over areas of civic activity. This is essentially constitutional law. The framing of a constitution would look at the mechanisms and processes that could be used to assert the rights set out in the constitution. This is essentially administrative law. In similar terms the structural context of a legal education curriculum is classified by the various educational and regulatory institutions in the ORF. The actors within the PRF, with their emphasis on the translation and interpretation of content and approaches to teaching, provide the resultant framing. In the same way as every country, including England and Canada, have unique constitutions and administrative systems derived from their unique social and political histories that can be understood better through analysis and comparison, so too do curriculums need to be evaluated to uncover the significance of their differences. This was one of the aims of this study.

The use of making an analogy between a legal education curriculum and a constitution is an example of what Bernstein famously referred to as a **language of description**. As he explained, “a language of description is a translation device whereby one language is transformed into another” (Bernstein, 2000, p.132). He set out the importance of both an **internal** language of description, that refers to the syntax whereby a conceptual language is created and an **external** language of description, that refers to the syntax whereby the internal language can describe something other than itself. He went on to argue that both the internal and external languages of description need to be explicit and related to each other in a non-circular manner. This involves the creation of a “*potential discursive gap*” which creates a “site for alternative possibilities” (B. Bernstein, 2000, p. 30). This is how he ensured that empirical data can be used in a way to develop theory rather than simply exemplify theory. This is discussed further below.

It is acknowledged that there are limitations with the use of the analogy between a legal education curriculum and a constitution, as there always are when creating languages of description. However, as identified by both Wilson (1983) and Bauman (2005, p. 363), “[analogies and m]etaphors are good for thinking. They help to conjure up cohesive, legible forms ...[and] allow to

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surmise order in a chaos”. Given that public law is one of the focal points of this thesis, and an understanding of constitutional law and administrative processes are an important aspect of public law in all jurisdictions, I propose that there is merit in the use of the analogy.

As a final point in this section, Bernstein linked the concepts of classification and framing to what he referred to as a “*regionalisation of knowledge*” where “[r]egions are the interface between the field of the production of knowledge and any field of practice” (2000, p. 9). Bernstein identified that where disciplines are regions there is generally greater autonomy over content, meaning that the classification of knowledge becomes weaker allowing for “ideology to play” (p9). In Bernsteinian terms law is a ‘region’ in that it operates both in the intellectual field of the academic discipline and in the field of external practice (2000, p. 52). Bernstein observed that, as regions are inherently more responsive to the market their output is serving, both classification and framing are weaker than in other disciplines leading to greater external dependency. This means that, as a discipline it is ripe for ideological bias to infiltrate during any process of recontextualisation. This will be explored in more detail in 2.4 below, and when I return to classification and framing in chapters 3 and 5.

### **2.3.3 The pedagogic device, pedagogic discourse and their application to University-level legal education**

Bernstein showed us that to be able to analyse the condition for the production, reproduction and transformation of culture through education we need to look at the grammar of pedagogic discourse (where ‘grammar’ is used in a metaphorical sense). For this he introduced what he refers to as the **pedagogic device**. He saw the pedagogic device as the ensemble of rules or procedures by which policy knowledge is selectively translated into what is taught to whom, when, where, why, and how it is evaluated or deemed as acquired (B. Bernstein, 2000). In this section I will set out the key elements of the pedagogic device before moving on to briefly explore the components of pedagogic discourse.

For Bernstein, the pedagogic device, which looks at both ‘the carrier’ (or relay) of knowledge and ‘the carried’ (what is relayed), is comprised of three interrelated rules that are organised in a hierarchical structure. In brief, the



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**distributive rules** regulate the relationships between power, social groups, forms of consciousness and practice; the **recontextualising rules** regulate the formation of specific pedagogic discourse; and the **evaluative rules** constitute any pedagogic practice (B. Bernstein, 2000, p. 28). In the context of University-level legal education, the distributive rules are linked with the sources of law and legal instruction, including knowledge generated from legislators, the judiciary and academia, as well as policy-makers and professional regulators. The recontextualising rules regulate how this knowledge is adapted and transformed in legal education environments including university law schools to become **official knowledge** (M. Apple, 2000). The evaluative rules regulate how this knowledge is assessed. All three of these rules are relevant to University-level legal education (as was explained in Gibbons, 2017) but the focus here is on the recontextualising rules.

The recontextualising rules, in addition to creating specific pedagogic discourses, produce recontextualising fields with agents. Two such fields are of particular interest here. The first field, the **Official Recontextualising Field (ORF)**, is dominated by the actors from the official field of the State and its regulatory bodies. In the 2000 edition of his work, Bernstein stated that “in the case of higher education there is no ORF for the construction of an official higher education discourse” (p. 60). More recent developments, most notably the introduction of both the Research Excellence Framework (REF) and the Teaching Excellence Framework (TEF), and the establishment of the Office for Students, means that what he described then as “strong indirect regulation” has become direct regulation thus arguably creating an ORF of higher education with a dominant market-oriented ideology (Thornton, 2012).

Bernstein (whose research was predominantly conducted in school settings) described the second field, the **Pedagogic Recontextualising Field (PRF)**, as being relatively autonomous and containing trainers of teachers, writers of textbooks, curricular guides etc., specialised media and their authors (2000, p. 53). This too will have changed to become more regulated in the two decades since his death. Although the concept of the PRF is useful when looking at University-level legal education it does not quite fit the reality. In this environment there are a broader range of actors including legal regulators (who could conceivably be seen to reside in the ORF) and lawyers and other

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legal professionals who have an interest in the development of the competent lawyers of the future.

Of significant relevance here is a third recontextualising field that Bernstein merely mentioned in passing in his final book. This he referred to as the **Specialised Recontextualising Field (SRF)**. For Bernstein “(The SRF) produces and reproduces imaginary concepts of work and life which abstract such experiences from the power relations of their lived conditions and negate the possibilities of understanding and criticism” (Bernstein, 2000, p59). The theoretical expansion of the SRF to University-level legal education has particular resonance as the “imaginary concepts of work and life” derive from drivers from both the academy and the legal profession. In this the SRF can be seen as sitting between, and overlapping with, the ORF and the PRF. This embryonic theoretical notion will be expanded and developed at 3.7.2 and 5.2.1 below.

As Shay (2013) explains, the pedagogic device models the relationship between the field of production (where knowledge is produced), the field of recontextualization (where knowledge is recontextualized into curriculum) and the field of reproduction (where knowledge is transmitted through pedagogy). It thus has power as it alerts us to the transformation of knowledge discourses as they move across the different fields. To adapt her example, it highlights the difference between the kind of knowledge produced by legislators and judges, and the knowledge of a first-year law textbook. The pedagogic device demonstrates how “[k]nowledge has been *decontextualized* from its site of production and *recontextualized* into a curriculum. It has become pedagogized; it has become *educational* knowledge (Shay, 2013, p. 567 emphasis in the original). The pedagogic device is therefore what Hillier described as “the family of possible structures that turns institutional patterns into consciousness” (Hillier in Power, 2001, p. 56) and what Inglis refers to as “[t]he black box at the heart of all our linguistic and symbolic transactions”(Inglis in Power, 2001, p. 79).

What is clear from reading Bernstein’s sequence of books is that he developed the pedagogic device as a corrective to the mistaken assumption that pedagogy is a neutral carrier or relay to external power relations. This aspect of his work in school contexts has been developed by numerous researchers and extensively evaluated by scholars, including Apple (2003).

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Although there has been some application of the pedagogic device in higher education, most notably in the work of Ashwin, Abbas and McLean (Ashwin et al., 2015; McLean et al., 2013) where they explore how conflicting policies and drivers have an influence on the portrayal of curriculum content and pedagogical approaches, there has been limited use of the concept in University-level legal education. This is one of the reasons why it is being included in the suite of concepts to be developed here.

As Bernstein identified, and Lingard explains, pedagogy is the art of teaching *plus* its associated discourses to do with learning, teaching, curriculum and much else (2010, p. 170 emphasis in the original). These discourses take the form of communications between the various actors in the recontextualising fields and the **pedagogic discourse** comprised of both regulatory and instructional elements. The relevance here is that the pedagogic discourse is itself a recontextualising principle linked to a transformation in the ORF and PRF that can adjust depending on the strength of the actors in the field. As a final point, and as recognised by Hasan (2004, p. 37), “discourse in society is not homogenous and the most fundamental distinctions arise from subjects’ positioning which is logically related to subjects’ social positioning. It is here that subjects’ orders of relevance are shaped, their sense of what is legitimate formed and psychic defences built and turned into second nature”. It is this idea, as well as the more general Bernsteinian concepts set out in this chapter, that will be developed further when analysing the dataset below.

#### **2.3.4 Pedagogic identities and the transmission of values**

As McLean et al explain (2015, p. 185) the term **pedagogic identity** appeared late in Bernstein’s work and, unlike his other concepts, was not substantiated by empirical research to the same extent. He identified (2000, p66) that the career of a student is “a knowledge career, a moral career and a locational career” and proposed that pedagogic identities are projected through the classifications of disciplinary content and the framings of pedagogy and curriculum. I am mindful that, compared to his other concepts, pedagogic identities are rather under-developed and could appear simplistic. Power, who used pedagogic identities as a framework for analysis of biographical data from a cohort of young adults (2006, p106), found that there is a lack of clarity in both the unit of analysis and the extent to which Bernstein envisaged his identities to be fixed. It is obviously the case too that there is a

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constellation of different identities inhabited by any one individual at any one time. However, as Beck and Young observe (2005, p. 184), “Bernstein, with his penetrating sociological imagination, perceived more clearly than most that what was pivotal... was a restructuring not merely of the external conditions of academic and professional practice, but even more fundamentally of the core elements of academic and professional *identity*.” As a consequence of this observation, the subsequent work of Bernsteinian scholars exploring pedagogic identities, and the potential to develop the idea in a new context, it has been decided to include the term here. To enhance the utility of the concept, pedagogic identity will be explored at both the institutional level and when considering representations of legal professionals within the law school environment.

It is quickly apparent that much of the content of chapter 4 of *Class, Codes and Control* volume 5, written about the allocation of resources in schools in the midst of Blair’s New Labour era, and with the application of the model looking at curricular reforms in the late 1980s, is of its time. What is also clear though is that some of Bernstein’s defining identities contained within it, most notably Retrospective-Elite and Prospective, do still resonate in the contemporary University-level legal education context. As he explains, **Retrospective Identities** use as resources narratives of the past which provide exemplars, canons, criteria, belonging and coherence (p. 74). He defines **Elite** identities as a type of Retrospective Identity that is constructed on the resource of high culture and is built on strong classifications and internal hierarchies (p. 75). **Prospective Identities** are essentially future oriented, “constructed *to deal with cultural, economic and technological change*” (Bernstein, 2000, p67 – italics in the original), and are grounded in narratives of becoming. Bernstein is at pains to point out that these narratives are “not of an individual but of a social category” meaning that they “engage in economic and political activity to provide for the development of their potential”. This is of great contemporary significance in the current market orientated higher education environment and the era of social media activism, exemplified by #metoo. The relevance of a consideration of pedagogic identities will be returned to when analysing the data set below.

The final consideration in this section is the place of values in higher education and the merits of aspiring to educate so as to enhance a sense of citizenship. As a University teacher with a concern about the increasingly

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instrumental approach many students take to their education, I share Harland's view that values influence the way we see the world and how we operate within it, meaning that nothing is ever 'value free' (Harland, 2011). I share a concern with Klabbers (2008, p. 16) that due to cultural changes over time the modern University is structured in a way that it is too easy to omit to teach our students to care for our common world – meaning that there is a risk that we only teach them to care for themselves. For these reasons, I propose that there is a need to develop theory to enhance a focus on values in higher education, although I remain mindful of the limitations. To finish this section with a wry observation from Bernstein (2000, p. 206): "It is perhaps ironic that we understand so much but control so little that we require our theory to confirm so much".

### **2.3.5 Criticisms of Bernstein and his work**

As with all scholars, Bernstein's work has been subject to criticism, both during his lifetime and since. He is often regarded as a product of his time, forever associated (with Young) with the clash of ideologies played out between the 'new' versus the 'old' sociology of education in the 1970s. During his lifetime he used his books and interviews to create a dialogue with other members of the research community and address and respond to the critiques of his work, as can be seen in the Introduction and Part III of his 2000 book and his interview with Solomon reproduced as chapter 11 in the same edition. Set out below is a brief overview of the main criticisms that are relevant to this research being, the inpenetrability of his writing and the slipperiness of his concepts; the lack of emphasis on human agency and his overly structuralist tendencies; the idea that his ideas are deterministic; and the limitations of his work due to it being an example of a white, male, middle class grand narrative (Singh, 2002).

To provide context, and as Rowland reminds us, "[all theories] should be treated with caution. They are all narratives. They each tell a story, but only one story. They may shed light on an aspect... but, in the process, cast others into shadow" (Rowland (1993) p16 cited in McLean, 2006, p. 14). My dedication to adopting a Bernsteinian approach includes being mindful of this advice. Bernstein's concepts are only one of the ways to shine a light on the issue I have identified. In the shadow, other equally useful research into University-level legal education can, and should, be conducted.

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As is the case for many researchers, when first reading Bernstein I found his abstract style rather impenetrable and off-putting. Beck & Young (2005, p. 186) make an analogy with reading Marx, observing that Bernstein's more abstract theoretical statements can appear rather uncompromising. Similarly Power (2006) explains her frustration with the "slipperiness" of some of Bernstein's ideas and the way they evolve in the way they are explained by Bernstein over time. Having now read and re-read Bernstein over a prolonged period of time I share Power's view that "the frustrations can be many, but the intellectual challenges are important and worthwhile" (Power, 2006, p. 108). As Sadovnik (2011) explains, the sociology of education has mirrored the larger theoretical debates in the discipline of education, including the classical sociology of Marx, Weber and Durkheim and the more contemporary influences including post modernism and critical theory. Reading this is never meant to be easy. Apple et al refer to this as a 'discourse community' which is defined and redefined by a set of theoretical and methodological disputes (M. Apple, 2000; M. W. Apple, Ball, & Gandin, 2010) and Bernstein's work continues to be central to the debate. It is notable that by returning frequently to the original source of Bernstein's theory it becomes easier to identify when his ideas have been misappropriated in the work of newer members of the discourse community "for the purpose of a researcher's requirements rather than of the author's intentions" (2000, pxvii). I have been mindful of this concern throughout.

In part as a result of the timing of his research, there was initial criticism of the lack of emphasis on human agency in Bernstein's concepts (Shilling, 1992). Following some of his earliest publications, Atkinson (1995) and Archer (Archer cited in Dale, 1983, p. 186) also wrote respectively about his overemphasis and neglect of the structure of the education system. This focus on Bernstein's perceived Durkheimian structuralism is also evident in the earlier work of Apple (M. W. Apple, 1979, p. 181). As with the comments about his stylistic impenetrability, Bernstein addressed these criticisms during his lifetime, which, in the case of Apple, led to a deepening of mutual respect that turned into friendship between the men. In his later work Apple referred to Bernstein's "theoretically elegant analysis" (M. W. Apple, 2002, p. 608) and he continued to use Bernstein's theories for his own research after Bernstein's death, including studies of education in Singapore with Wong (T. H. Wong & Apple, 2002) who continues to produce Bernsteinian research (T.-H. Wong,

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2017). I am not concerned whether Bernstein's work is perceived as structuralist or not. It is uncontentious to state that both education and the law contribute to the structure of Western society but that the practice of law and education is mediated by the people acting within it. This means that this perceived criticism does not prevent Bernstein's ideas being useful in this research.

A similar pragmatic approach can be taken in relation to the third criticism of Bernstein's work, being that it is overly deterministic. As Arnot explains, the criticism here is that because it is, in effect, a theory of reproduction, it fails to demonstrate either the conditions in which social conflict occurs or the mechanisms for social change (Arnot, 1995, p. 310). In this and subsequent work Arnot gives rather short shrift to this criticism, as it is in effect criticising Bernstein for not doing something that he never set out to do. She explains that Bernstein offers one of the most complex and challenging theories of cultural and symbolic orders in education (Arnot, 1995, p. 317) and showcases his extraordinarily intuitive understanding of the workings of the social order (Arnot, 2002, p. 592). For this he can be forgiven for not finding the solution to social reproduction.

The final criticism is, for me, the most problematic. As Singh explains, some accuse Bernstein of contributing towards 'white, male, middle class grand narratives' (Singh, 2002) and it would appear that there is some truth in this. My understanding of critical and feminist approaches to research is that there is an inherent male centredness to grand theories, including Bernstein's, which use classifications, polarisations, and dichotomies to make sense of the world. This emphasises the points highlighted by Arnot, but originally made by MacKinnon, Gilligan and other seminal feminist writers, about the fragmentation and emotional distancing in male-ordered worlds (Arnot, 1995, p. 307). The relevance of my own feminism to my research is explored in more detail in the research integrity section at 3.2 below. For now, I am assured that Bernstein's ideas continue to have resonance with a broad spectrum of people. For example, Bernstein's work is increasingly being used, discussed and critiqued in non-Western contexts including, as Takayama identifies amongst Japanese scholars (Takayama cited in M. W. Apple, Au, Gandin, & Apple, 2009, p. 362). Arnot explains that being a feminist is only one aspect of her identity and she speculates whether it was her Catholic upbringing which urged her to make sense of the world according to

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structures, rituals and order – and led her to Bernstein (Arnot, 1995, p. 298). Singh contextualises this criticism by stating that it is an opinion rarely articulated by people who knew Bernstein. She describes how he was a passionate supporter of the rights of disadvantage students, and had a nuanced understanding of how education can lead to the (re)production of social inequality. There was nothing Bernstein could do about being white, male and middle class. That does not mean that he should represent all that is wrong with the research tradition of others who share these characteristics.

As can be seen, it is not realistic for one theorist or one theory to be the 'grand narrative' and provide the answer to everything. Theory merely provides thinking tools that help to shed light on an aspect of the social world. Despite, or indeed because of, these criticisms Bernstein's concepts can provide a useful theoretical backdrop to this study, where the emphasis is on the classification and framing of legal knowledge and the representations of the legal professional in the ORF and PRF of University-level legal education. For this there now needs to be further explanation of the meaning of knowledge in the context of this research.

## **2.4 Knowledge, the region of law, and public law knowledge**

The analysis of the meaning of knowledge is one that has taken place for millennia and could, and should, be the subject of multiple standalone theses. The scope of the exploration of knowledge here is far more modest. I first consider the place of knowledge in higher education before moving on to consider knowledge within law generally and public law specifically.

As advocated by McArthur, for learners to have a meaningful engagement with knowledge in higher education it should be difficult and unsettling. This does not mean that it should be elitist, but that it should be nuanced, complex and contested (McArthur, 2013, p. 50). This aligns with Burke's view that knowledge amounts to "sublime, abstruse, intricate and knotty subjects, remote from common observation and sense" (Burke, 2000, p. 26). As Wheelahan (2010) explains, if we deny learners access to this type of complex knowledge, we deny them access to important conversations about society and, in effect, systematically undermine the possibilities of democracy. This is an important point that resonates strongly. Knowledge about law, and especially public law, is valuable in empowering people to know their rights



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and responsibilities in society meaning that the discipline of law is especially well suited to this view of the importance of meaningful knowledge exchange in universities.

Consideration will be given here to knowledge contained in curriculum as being both object and product (the canon) and as subjective practice, i.e. where knowledge is recontextualised and framed within higher education institutions based on social interests and relations. This is because educational knowledge is never neutral (Farrell & Fenwick, 2007) It will be asserted that public law knowledge taught at University level should be recognised as being both **official knowledge** (M. Apple, 2000) and capable of becoming what Young (2008) refers to as **powerful knowledge**. By acknowledging the power of knowledge in this way it will be argued that greater access to critical public law knowledge can enhance citizenship.

#### **2.4.1 The question of knowledge in higher education**

There has been considerable academic work undertaken to both identify the defining features of knowledge and to categorise types of knowledge, including the identification by Bernstein of what he terms hierarchical and horizontal knowledge structures (Berger, 1984; B. Bernstein, 1999; Burke, 2000; Delanty, 2001; Maton, 2014; P. Wilson, 1983). As Hoadley & Muller identify, some types of knowledge are relatively static whereas others tend towards robust, conceptually justifiable advances (Hoadley & Muller, 2010). This has echoes of earlier categorisations, including Durkheim's famous distinction between the sacred and the profane (Durkheim & Wolff, 1964). This type of categorisation of knowledge is useful for curriculum design as an understanding of what knowledge looks like can help to plan how it should be transmitted.

The way that knowledge is classified and framed within the curriculum is important as it influences its accessibility to learners, or 'knowers' as they are referred to by Maton (2014). This is because the acquisition of knowledge depends on an individual's intelligence, assumptions and practice, meaning that not every learner's encounter with knowledge will lead to the same outcome (Burke, 2000 p179). In that respect, knowledge acquisition relies on a certain amount of confidence, as is especially evident in the acquisition of professional knowledge, as explored further below.

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In the view of Jarvis, in the modern era it can be seen that there has been a shift in the conception of knowledge from something certain and true to something which is changing and relative (Jarvis, 2004). This is evident in legal education in the fluctuations in interest in doctrinal research and critical and socio-legal approaches (Richard Collier, 2004). Knowledge that is strongly classified and validated by external recognition is socio-historically constructed and inextricably connected to both power and the powerful. In this respect, professional knowledge as taught in higher education institutions, can be regarded as being what King refers to as “a power hoarding system” (King, 2015, p. 81). Choices made within Universities about what knowledge is taught, how and by whom are therefore inextricably linked to the structure of modern society.

Much has been written about the purpose of higher education and the evolution in the role of the University in society (Attewell & Lavin, 2011; Barnett, 2013; Bhopal, 2013; Boud & Symes, 2000; Bradney, 2003; Brennan, 2002; S. Collini, 2012; S. a. Collini, 2017; Delanty, 2001; Fish, 2008; Giroux, 2014; Hordern, 2016; Kogan, 1996; McArthur, 2013; Rochford, 2008; Simpson, 2013). In addition to the contemporary University’s role in the production and transmission of knowledge, it can also be viewed as a site for the diffusion and formation of a dominant belief system, the selection of elites and the training of the powerful groups within society. Using Bernstein’s terminology, in higher education, much of the communication around the purpose of higher education is dominated by implicit rather than explicit meanings and is made via a restricted rather than an elaborated code that has the effect of privileging the already privileged. As Unterhalter & Carpentier (2010) identify, this means that academics in universities, like it or not, are complicit in conferring unfair advantages to those who are already unfairly advantaged in the competition for unfairly distributed goods and positions. In this respect the market narrative – which tells a tale of human capital accumulation through education leading to greater employability in high paying jobs, entrepreneurial science and technology able to create such jobs, and the knowledge economy as the key to citizen’s prosperity - remains powerful (Rosinger, Taylor, Coco, & Slaughter, 2016; Speight, Lackovic, & Cooker, 2013).

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It follows from the above that for people working and studying in universities there is a need for what Lackey (2008) refers to as “epistemic vigilance”. This is especially true in the modern era where what is categorised as valid knowledge is increasingly contested. The increase in the use of technology as a tool in both the production and transmission of knowledge brings with it issues with the credibility of sources within a culture of ‘alternative facts’. The learners, who have to experience the institutionalised pedagogy which our culture and communities have constructed and maintained, bring to the process highly individual expectations and abilities. This means that every new interaction between a learner and knowledge that is previously unknown to them has the potential to be a site for the production of new knowledge.

#### **2.4.2 The region of law within higher education**

As introduced in 2.3.2, Bernstein (2000, p. 52) drew a distinction between three contrasting modes of pedagogized knowledge; being *singulars*, *regions* and *generics*. While singulars face inwards to the field of knowledge production, regions face outwards to various fields of practice in the everyday world (Beck & Young, 2005, p. 187; B. Bernstein, 2000). Regions are therefore knowledge structures constructed by recontextualising singulars into larger units to make an integrating framework (M. F. D. Young, 2008, p. 154). In this respect regions have similarities with both curricula and constitutions in that they are effectively frameworks for substantive content to populate.

As Bernstein (2000, p52) explains, with a wry use of the word ‘perhaps’; “The regions have, perhaps, autonomy over their contents in order to be more responsive to, more dependent upon, the market their output is serving”. For Cambridge (2012, p. 234) the result is that the regionalisation of knowledge should be interpreted as a response to market conditions that dictate its transformation into a commodity in the knowledge economy. This means, in effect, that the development of the region is limited by the constraints of professional input into the knowledge base of the curriculum. Bernstein’s caution on this point should be noted, as he seems to imply that greater emphasis should be placed on the actors’ autonomy within the region. This is particularly pertinent in the context of law, where, as seen below, recent decisions made by the regulators are having an impact on knowledge content within the curriculum.

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Bernstein (2000, p55) does not list law as one of the 'classical' university regions – only medicine, engineering and architecture. However later writers, most notably Young (2007, p154), do include law in the list of regions and it is accepted as being one here. It must be noted that the usefulness of this defining term has been couched by subsequent scholars. For Beck & Young, Bernstein's analysis of regionalisation remains "partial and incomplete", and the differences between new and 'classical' regions, and their implications for the future of the professions and professionalism, are touched upon too briefly (Beck & Young, 2005, p. 189). This limitation is acknowledged. However, the ability to conceptualise law as a region continues to be a useful addition to the more frequently used terms 'discipline' which implies sanctions and 'epistemological essentialism' (Trowler, 2014a, p. 1720)) and the problematically colonial sounding 'territory' (Becher, 2001). In the context of this study the use of the word region is particularly relevant due to its synonym 'province' and the focus of the study being University-level legal education in the region of Yorkshire and the province of Alberta.

It is evident that law as a subject is grounded in both theory and practice and therefore has both a regulative and instructional discourse (Breier, 2004; Cownie, 1999). Legal curriculum designers take seriously the responsibility to hand on to the next generation the knowledge discovered by earlier generations, perhaps, as explored by Shay (2011), to the detriment of focusing on the present in some instances. Although theoretical knowledge is only taught to academic elites, the reality is that it is universally applied so is of relevance across the spectrum of society. This means that theoretical knowledge in law has not been "dethroned and displaced" as Wheelahan (2010) identifies has occurred in other professional curricula. What will be explored is the effect on the representation of the legal professional caused by the potential weakening of the classification of legal knowledge in the research locations in this study, and changes in the framing due to different approaches to teaching.

#### **2.4.3 The contemporary context of public law within legal education**

As has been shown above, England and Canada have much in common with regards to the funding of higher education, the organisation of the law school and the law school curriculum. Where they differ is on the substantive content

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of the curriculum including, as an example, the content and context of public law. This includes the substantial differences in the constitutional arrangements in the two countries and the procedural differences in their administrative justice systems. What is common ground is that public law is a site in the law school curriculum for the relationship between the State and the citizen to be explored, and important implementing institutions and constitutional principles, most notably 'the rule of law', to be introduced, discussed and critically analysed (Gibbons, 2018c). It is the situatedness of public law, and its relationship with other subjects, most notably, politics, history, international relations and sociology that makes it relevant here. It is a useful subject to study the primary function of law which is, for me, to uphold the values of a humane and civilised society as expressed in the internationally accepted canon of fundamental human rights and aspirations. This requires lawyers (including law teachers) to use law proactively to bring about social change in the interests of justice and help students to develop a spirit of enquiry (Cooper & Trubek, 1997). This will be addressed in brief below by setting out what is meant by public law, considering the impact of approaches to teaching on legal knowledge acquisition and concepts of citizenship, and the merits of categorising public law as both **official knowledge** and **powerful knowledge**.

#### 2.4.3.1 Public law

At its most basic, public law is the law of the relationship between the citizen and the State (Elliott & Thomas, 2017). This basic definition encompasses the general area of criminal law and niche areas including tax law. For the purpose of this study the focus will be on public law as it is manifested in the law school curriculum as a consequence of regulatory requirements and legacy factors. Public law is a useful site of enquiry because it is linked to governance models (see 2.2), whilst also having a special connection to reality and material justice. Public law is a 'core' component of legal education in higher education institutions, with a requirement from the regulators of the legal profession that it appears within the curriculum in both England and Canada. What follows is the significance of whether it is regarded as an example of 'top-down' or 'bottom-up' governance. This is because the delivery of public law knowledge has historically been 'top-down' by for example, setting out the constitutional theories, including parliamentary sovereignty and the rule of law, and the structures and institutions of State (Sedley, 2015).

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Only when the structure has been explained does the syllabus typically move on to how ‘bottom -up’ access to justice can be achieved. This is significant to the students’ conceptualisation of public law.

#### **2.4.3.2 ‘Top-down’ public law**

In England the domain of public law has grown exponentially as a result of the expansion of judicial review in the 1960s, joining the European Union in the 1970s and the domestication of human rights following the Human Rights Act 1998. New questions of control and accountability have arisen in respect of the areas of governmental activity formerly occupied by nationalized industries and the contracting out of core aspects of the welfare state (Bradley & Himsworth, 1994). Despite this changing landscape, much of the presentation of the substantive content and the teaching of public law has not evolved, as can be seen from an examination of the table of contents in the most popular textbooks and from curriculum documents found on University websites (Elliott, 2015; Elliott & Thomas, 2017; Le Sueur, 2016; Stanton, 2018; Webley, 2018).

The public law curriculum in higher education institutions can thus be seen as a body of knowledge about the State taught by people with authority. For example, lecturers explain the key aspects of constitutional theories such as the rule of law and democratic accountability; make reference to key historic and contemporary theorists such as A.V. Dicey and Mark Elliott; set out the context and principles of key cases such as *Ridge v Baldwin* [1963] UKHL 2, *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and introduce students to normative issues such as the mechanisms for effective governance. There is a risk that the resources used and approaches to teaching adopted by law schools can have the effect of reinforcing inequality and social reproduction if there is insufficient space in the timetable to engage in debate and/or if teaching predominantly takes place in a tutor-led environment. As will be seen in the discussion, this has a potential effect on the nurturing of future legal professional identities.

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### **2.4.3.3 'Bottom-up' public law**

An alternative view of public law is that it should be introduced to law students in a 'bottom-up' way. This is because many of the problems in contemporary society, including wealth inequality, social deprivation and insufficient support for vulnerable people can only be understood by looking at the effect of the structural societal and legal factors on the people 'on the ground'. In England this includes, for example, drawing students' attention to judicial review challenges to welfare and benefits decisions brought by public interest lawyers, whereas in Canada this tends to be related to highlighting legal challenges upholding the rights of indigenous people.

The relevance of this is that the practice of law is essentially about the application of laws to particular cases. For the most part the common law legal system follows a deductive principle, which has the effect of entrenching principles and practices. By looking at public law 'bottom-up' it can be shown that people are capable of influencing law, making it possible that laws can change with changing economic and social circumstances, as well as changing views of justice (Breier & Mignonne, 2006). From this view the development of legal rules can be seen as inductive, giving credence to the view that legal professionals can be the agents of change rather than the conduits of orthodoxy. This shift in perspective can, and should, have a fundamental effect on a learner's understanding of the power of the law. This view lays the foundation for what is known as public interest law. Public interest law is practiced by so called 'justice warriors' who use law and legal processes in a way that is prospective, experimental and result-oriented. (Ikawa, 2011, p. 199; Nicolson, 2015). The significance of this is that, as recognised by Stone (1997) and others, there is evidence of a waning public interest commitment during law school, caused in part by the rise of individualism within society.

### **2.4.3.4 Public law education and the enhancement of democratic citizenship**

In her 2013 monograph *Rethinking Knowledge within Higher Education*, McArthur sets out a compelling argument that higher education should contribute to a more informed citizenry and promote greater social justice for all, not just those directly affected by it. (McArthur, 2013). Public law provides

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an ideal location for the pursuance of this objective. Even if only a small minority of students go on to practise public law, all of them need to develop awareness of the importance of upholding the rule of law and the responsibility that comes with their elite role within a stratified society (Gibbons, 2018c).

The significance of public law to democratic citizenship through adherence to the rule of law is illustrated by strong judicial judgments, including that of Lord Reed in the recent Supreme Court case that overturned the fees regime in the employment tribunal, *R(UNISON) v Lord Chancellor* [2017] UKSC 51. Such strong articulations of the importance of the rule of law are important as they strengthen the ideal that the pursuance of social justice is of benefit to society. This, together with the assertion that the ethical role of legal professionals is integral to their privileged status, is a narrative thread running through this thesis as seen further in the discussion.

#### **2.4.3.5 Public law knowledge as both official knowledge and powerful knowledge**

As explained above, public law is a core aspect of University-level legal education as it is prescribed content in the Joint Statement on the Academic Stage of Training in England and the FLSC National Requirement in Canada. Beyond this, curriculum designers and module leaders have freedom, subject to University constraints, to teach the subject using their preferred approaches and assessment models. For this, it became evident during the research process that the majority of law teachers turn to established textbooks for content selection and analysis.

In Apple's seminal work (1993) entitled *Official Knowledge: Democratic Education in a Conservative Age*, he analysed the prescribed textbook content in the American schooling system to argue that State power extends to curriculum choices. He aligned the notion of official knowledge with Bourdieu's famous concept of "cultural capital". For Apple, **official knowledge** is *compromised* knowledge, in that it is knowledge that is filtered through a complicated set of political screens and decisions before it gets to be declared legitimate" (M. Apple, 2000, p. 64 emphasis in the original). The relevance of this to public law knowledge is that it needs to be acknowledged that choices – both explicit and implicit – have been made about what



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constitutes the canon; an approach which brings with it certain conceptions about what knowledge is both legitimate and meaningful to students. For this it is useful to conceptualise public law knowledge with recognition of what Young (2008, p. 14) refers to as the dyad; knowledge of the powerful/powerful knowledge:

**Knowledge of the powerful** is defined by who gets the knowledge in a society and has its roots in Marx's (1964) well-known dictum that the ruling ideas at any time are the ideas of the ruling class.

And

**[Powerful knowledge]** refers to what the knowledge can do or what intellectual power it gives to those who have access to it. Powerful knowledge provides more reliable explanations and new ways of thinking about the world and acquiring it and can provide learners with a language for engaging in political, moral and other kinds of debates.

It is acknowledged here that Young's term 'knowledge of the powerful' has utility. However, the opportunity to analyse and develop the concept of **official knowledge** as a counter to powerful knowledge using the research data is preferred here due to the nature of law and its importance in the structure of society. It is also a term favoured by Bernstein who defined it simply as "the educational knowledge which the State constructs and distributes in educational institutions" (2000, p65). As explained by Apple (2013), we need to examine why and how particular aspects of the collective culture are presented in education environments as objective, factual knowledge. As the majority of his research was undertaken in the context of the American schooling system there is scope here to analyse and develop this concept within University-level legal education. In this context the official aspect of knowledge selection is not the State, but a complex hybrid of tradition, textbook preferences, pedagogic approaches and market forces, as seen further below.

As with all theoretical work, both the concepts of official knowledge and powerful knowledge have been subject to criticism. In relation to the latter the debate is ongoing, as seen most recently in the edited collection *Sociology, Curriculum Studies and Professional Knowledge: New Perspectives on the*

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*Work of Michael Young* (Guile, Lambert, & Reiss, 2018). Although these criticisms are noted, for me the two concepts have particular resonance in the context of public law as they go to the heart of the subject. If the purpose of higher education is to transmit the canon of official knowledge, create critical thinkers and furnish students with specialist knowledge, it is specialist powerful knowledge that has the greatest transformative value. By acknowledging the problematic nature of official knowledge whilst also conceptualising public law as having the capacity to be powerful knowledge it is possible to enhance the focus on democratic citizenship in legal education as referred to above.

## 2.5 The identity of the legal professional

As with the concept of knowledge, the concept of identity has been the subject of considerable academic scholarship (Bhopal, 2013; Gleeson, 1977; Nedelmann & Sztompka, 1993). To maintain consistency in this work, the focus here will be on the concept of identity as theorised by Bernstein and Bernsteinian scholars and the literature on professional identity and legal professional identity. This is followed by a consideration of the education of legal professionals and their representation.

As mentioned in 2.3.4, in chapter 4 of *Pedagogy, Symbolic Control and Identity* Bernstein (2000, p. 66) introduced the concept of **pedagogic identities** and the important observation that “a pedagogic identity is the result of embedding a career in a collective base”. In this section the focus will be on the collective base of the specialised professional educational environment and the ‘trainability’ of the legal professional (Hammerslev, 2013). This will provide the grounding for analysis of the research question in chapters 4 and 5.

### 2.5.1 Profession, professional, and legal professional

This thesis is not a study of the meaning of ‘profession’ or professional’, however it is important to acknowledge the considerable number of studies that have undertaken this task, including, as a starting point, the seminal work *The System of Professions* by Abbott (1988) that included law as one of its three case studies. More recently Young, working with both Beck (Beck & Young, 2005) and Muller (Young & Muller, 2014), has reviewed this content,

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with the focus of his work shifting from the sociology of professions to the sociology of professional knowledge, both of which have relevance here.

In both the general and the legal context, Susskind has been a vocal critic of the current representation of professions and has written and presented extensively about the need for professions to embrace the opportunities presented by advances in technology. In his most recent book (R. Susskind & Susskind, 2015, p. 15) he follows Wittgenstein's (Wittgenstein, 1968) concept of 'family resemblances' to suggest that members of today's professions share four overlapping similarities:

- (1) They have specialist knowledge;
- (2) Their admission depends on credentials;
- (3) Their activities are regulated; and
- (4) They are bound by a common set of values.

As shown below, it is uncontentious to state that these elements apply to the legal profession, and that the legal professional family are facing unprecedented challenges: to their autonomy, to the validity of any ethical view of their calling, to their relatively privileged status and economic position, and to the legitimacy of their claims to expertise based on exclusive possession of specialised knowledge (Beck & Young, 2005; Freidson, 2001). What is of interest here is the impact of these changes and the more negative individualistic characteristics of members of the professional 'club' identified by Susskind on professional identity and legal knowledge in University-level legal education.

It is worth acknowledging here that, despite the generally positive representation of the legal professional in popular culture, the reality of legal practice is that it is relatively high-paying but relatively unrewarding and socially sub-optimal work (Unterhalter & Carpentier, 2010, p. 330), whether that be for high status corporate lawyers or what Canadians call 'Mall lawyers'. However, it is evident from the research data here, including applications data from UCAS, the SRA and the FLSC, that the attraction of being associated with the legal professional identity remains strong for students in University-level legal education. This is due in part to the education and representation of the legal professional, as explored next.

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## 2.5.2 The education of the legal professional

Law continues to be a popular choice for students in both England and Canada. This is in part due to its attraction as an interdisciplinary social science subject (Hepple, 1994, p. 111), but primarily because law is seen as a subject with good employment prospects following successful completion of a degree (Bradney, 2011). Although there are always students within the cohort who can appreciate the wider appeal and interdisciplinary nature of law, in every law school there is a sizeable number of students who adopt an instrumental approach to their University education as it is perceived as merely a stage they must get through before becoming a lawyer or other professional (fieldnotes, v2:3: discussion with English law teacher). This instrumentality is exacerbated by the introduction of tuition fees in England and the need for ‘the bank of Mum and Dad’ to evaluate degree choices on the basis of whether they are a worthy investment (Rickman, 2017).

Law is clearly a strong subject to face up to such scrutiny. Whatever happens to society in the future there will still be courts and judges and the need for legal experts to facilitate transactions and contribute to the maintenance of justice. This means that, despite the oversupply of law graduates and the prophecies of Susskind and others about the future of legal practice, there will continue to be a need for humans to have an understanding of law in the future, even if the roles in society that they fulfil look different to the traditional image of the lawyer now. This is reassuring to parents who want the best for their children in an uncertain world, and plays out in the law school as facilitating a culture of inertia and a “keenness to conformity” in legal education (Ikawa, 2011, p. 197) that can result in what Granfield archly referred to as the “detached cynicism” of law teachers (Granfield, 1992, p. 68).

Much can be learnt about the purpose and design of legal education at University-level by looking at the specially commissioned reports, including those set out in 2.2, and earlier reports including the 1971 Ormrod Report in England and the 1984 Arthurs Report in Canada. With the exception of the focus on technology in the Carnegie Report, all of these reports have made similar observations about the reification of knowledge in the legal education curriculum and the insufficient preparation of students for professional practice. These reports are not at the polemical level of criticism seen in the

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well-known analysis of legal education undertaken by Kennedy. His conclusion, that law school serves as ‘ideological training for willing service in the hierarchies of the corporate welfare state’ now appears rather dated (Kennedy, 1982, p. 591). However, there are many who share his concerns about the motivations of law students and the effects of their education on the development of their identity and the consequent influence on wider society (Bezuidenhout & Karels, 2014; Calhoun, 1984; Guth & Ashford, 2014; Spreng, 2015; Stone, 1997).

Finally, it can be seen that the increasing internationalisation of legal education has a positive impact within the ‘collective base’ of legal education. For example, in addition to the rising numbers of students – including Canadians - going overseas to study, initiatives within the European Union have broadened the horizons of both students and law schools. One of the effects of this is the need for curriculum designers to create content that has an international rather than merely UK or European focus. This is because an increasing competition between legal professionals on an international scale needs to be supported by the increasing trans-nationalisation of legal degrees. As BurrIDGE identifies this “borderless discourse” has rekindled an interest in legal education as a vehicle for development (BurrIDGE, 2001, p. 323). This issue will contribute to the discussion in chapter 5. Next the representation of the legal professional will be considered.

### **2.5.3 The representation of the legal professional**

As introduced above, and developed by Paterson (2011), there is an implied social contract between the legal profession and society, in terms of which society accords lawyers high status, financial rewards, protection from competition and independence from State control in return for expert knowledge, quality legal services, ethical behaviour, and, crucially, altruism and access to justice. Although it is evident that elites in most occupations (including law) appear to be doing much better than everyone else, there is currently a job market unable to cope with the rising tide of individual, social and political expectations (P. Brown, 2011; P. Brown & Lauder, 2004). For law students in England, where the provision of legal education is an unbounded market, this has the effect of creating unrealistic expectations of future prospects and consequent job fulfilment.

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This disjuncture between the ideal view and the reality of being a legal professional is strongly influenced by the representation of the legal professional in the visual environment in which we live. The 'Google Images' search results test of culture yields pages of photos of serious looking attractive people in suits in court room or office environments (see Koo & Lin, 2016 for a related study of the image of nursing). These types of images are also prevalent in the physical spaces within law schools and reinforce particular ideas of who the legal professional is and how they look.

What is regarded as significant here is that the range of people who would identify as legal professionals is far broader than tends to be represented in the visual environment of the law school or recognised as such by law students. For example, public sector workers with statutory powers, magistrates, and Ombudsmen may self-identify as being within the 'tribe' of legal professionals as would many law teachers. As explored by Cownie (2004) and Becher (2001, p53) law teachers, depending on their background, are likely to also identify with the concept of professionalism associated with working within an academic discipline thus giving them a hybrid identity. There may be other 'accidental' legal professionals, such as activists and campaigners, who have learnt the law informally and are using it to effect societal change. The conflicts of identity of these people, their visual representation and the interplay with legal knowledge will be explored further below.

## **2.6 Relevance, authority and reverence – and expansion of the analogy between curriculum and constitution**

In the final section of this chapter I set out some context to the three concepts of 'relevance, authority' and 'reverence' that were found to be important aspects of this study. This is due to the significance to law teachers of the commonly made link between the needs of the profession and the substantive content of the law school curriculum (relevance), the high regard afforded by society to individuals that possess legal knowledge (authority), and the respect shown to the history and traditions of legal professionals (reverence). As this is the final section in this chapter, it also returns to the metaphor of curriculum as constitution introduced in 2.3.2 to tie together some of the terms and concepts introduced above.

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There is considerable work on the meaning of 'relevance' in the area of pragmatics, which was the context of Bernstein's earliest work. As Wilson & Sperber explain, in inferring a speaker's meaning a hearer is guided by the expectation that utterances should meet specific standards based on an assumption that conversation is a rational cooperative activity (D. Wilson & Sperber, 2012). For relevance theorists, the very act of communicating raises precise and predictable expectations of relevance as both a cognitive principle and a communicative principle. Relevance is thus a term employed with a relatively positive normative thrust for addressing the outcomes of higher education in general, or more specifically the outcomes of academia that impact society (Cummings & Teichler, 2015; Simpson, 2013). Relevance theory shows that the significance of relevance depends on the power of something else that is more fundamental, meaning that there is always the idea of 'relevant to', and 'relevant for'. As an example, in the context of legal education, the relevance of subject content is almost always aligned with the needs of the profession. This means that what is regarded as 'relevant' and 'useful' education ensures that skills rather than knowledge, and pedagogy rather than curriculum, remain central in educational discourse (Gamble, 2014, p. 57).

This links to the second term to be set out here, being authority. This is because what is regarded as relevant in curriculum is chosen by the educator who is regarded as having sufficient legitimate authority (see further Weber, 1963). In the current higher education environment 'the needs of the market' can be regarded as authoritative. In the legal education context, the needs of the legal profession and policy documents created by the legal regulators can also be regarded as authoritative.

This leads on to the final term to be considered in this section, being reverence. It is acknowledged, due to my experience as a solicitor, that people in positions of authority have the power to create deference in others. For some this 'higher status' can become a defining feature of their personality and can contribute to some of the negative stereotypes of the haughty lawyer (R. E. Susskind, 2010). This is linked to a long tradition of society respecting the status of professionals, including doctors, accountants architects, engineers etc, meaning that there is a tendency towards reverential treatment (Abbott, 1988). The significance of these terms will become apparent when they are returned to in chapter 4.

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This chapter finishes by considering these terms and how they are linked to the metaphor of curriculum as constitution introduced in 2.3.2. This is because teaching constitutional law is an important and interesting aspect of my professional life. It is an example of the 'top-down' public law discussed in 2.4.3, and allows students to be introduced to the inherently political nature of the constitutional framework in the United Kingdom, and how this compares with other countries, including Canada. For this I shall consider structural aspects and theoretical aspects.

The constitution in the United Kingdom is unusual in that it is uncoded, meaning that there is not one recognisable constitutional text to which the State and citizens can refer in times of conflict or dispute (Leyland, 2012). This compares to Canada which has both a codified constitution and the Canadian Charter of Rights and Freedoms (Webber, 2015). Canada is a federal state, with each province, including Alberta, having its own laws and judicial system. In contrast, the United Kingdom is unitary, with certain limited powers devolved to each of the four nations. For the time being, the United Kingdom is bound by some laws created in the European Union, but there is less of an emotional attachment to this authority than the Canadians have to their central federal Parliament.

For the purpose of analogy, there are comparable structural differences between how English and Canadian higher education institutions design curriculum. In England the oversight of degree level education is centralised and includes the quality assurance requirements set out by the QAA and the uniformity of academic levels imposed across Europe by the Bologna Process. In contrast, in Canada, key decisions about curriculum structure remain at the local level. Individual staff members can write and mark assessments without oversight by either internal or external examiners and can enter into conversations about changing marks for students after they have been released (field notes, v1, p32: Discussion with an English academic working in a Canadian law school).

In the teaching of constitutional law, theories including the separation of powers are as important as the analysis of cases. An understanding that the requirement to divide the judicial, administrative and executive branches of government is a way to avoid tyranny and autocratic rule helps students to



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analyse judicial dicta and undertake normative debates. In curriculum design, the emphasis on an understanding of educational theories differs not from country to country but by institution to institution. For example, at York students are taught the rationale behind the problem-based learning model (R. Grimes, 2014) and at Canzac the 'flipped classroom' approach is associated with a staff member who has espoused its virtues at conferences and in print (Sankoff, 2014). All of these considerations can be seen to affect the culture of the law school and contribute to the environment in which the students learn. The way that theory can be developed by conducting research into these locations is the focus of the next chapter.

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## Chapter 3: Research design, methods, and analytical approaches

### 3.1 Chapter overview and research design

This chapter opens with a factual summary account of the research methodology adopted in this study which has been set out in a tabular format and is based on the suggested structure advocated by Hennink et al (2010, p. 275). This is followed by a summary of the data set and a table setting out the research methods and types of analysis for each of the research sub-questions. The rest of the chapter covers broad-ranging content including research integrity, epistemological positioning, the rationale for the choice of case study, and illustrative examples of analytical approaches.

Throughout the design, development and execution of the research process, I have endeavoured to follow the research cycle chain of reasoning. As Tashakkori & Teddlie (1998) explain, the cycle can be seen as moving from grounded results (facts, observations) through *inductive logic* to general inferences (abstract generalizations, or theory), then from those general inferences (or theory) through *deductive logic* to tentative hypotheses or predictions of particular outcomes. As set out in more detail below, I first took an inductive approach to code emerging concepts derived from the data as a way to develop theory. I then applied and extended Tashakkori & Teddlie's cyclical approach by using the existing theory and literature on my key Bernsteinian concepts to deduce and develop a deductive conceptual framework before synthesising the findings and applying it to a different data set. In this way the deductive conceptual framework guided the research, while the inductive conceptual framework helped to answer the research question (see further Hennink, 2010, p. 45).

As set out in 1.3, this study follows guidance in George and Bennett *Case Studies and Theory Development in the Social Sciences* (2005) on the structuring of theory-oriented comparative case study research. The focal case study is English legal education in higher education institutions located in Yorkshire, with comparative content derived from law schools in Alberta, Canada. In both countries, the chosen locations are the second biggest market for legal services outside the capital city.

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### 3.1.1 Participating institutions and pseudonyms

In Yorkshire there are twelve providers of LLB degrees, including two private for-profit universities, and two further education providers. In Alberta there are only two law schools that provide the academic stage of the route to qualification as a lawyer. Both of the Canadian higher education institutions require students to take the Law School Admissions Test (LSAT) as part of the competitive admissions process, leading to considerable numbers of potential students without a law school place, many of whom choose to study law abroad. Documents, visual data and fieldnotes from four of the English providers and both of the Canadian institutions form part of the data set for this study.

To maintain the anonymity of the higher education institutions in this study they have all, with the exception of the University of York, England, been given alternative names. The University of York is my home institution and I have been given consent for it to be identified within this research. Engcar, Engeve and Engbet are the names given to three of the twelve providers of LLB degrees in Yorkshire. Engcar and Engeve are, like York, within the Russell Group of Universities. Engbet is a for-profit provider offering both undergraduate and postgraduate legal education with a distinctive vocational focus. All the English higher education institutions LLBs have QLD status. Canzac and Canshay are the two Canadian higher education institutions. They are both highly ranked and together are the only choices for the academic stage of legal training in the province of Alberta.

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**Research Design: Data collection and analysis (George & Bennett, 2005)**

**Research context**

Where was the study conducted?

Canada and England, with field visits to law schools in Alberta and Yorkshire and desk-based research

How and why were the study sites selected?

Sufficient similarities in legal education provision in countries. Similar population size in Alberta and Yorkshire to justify a comparative study of legal education provision. Access to the Canadian context via personal connections

What are the characteristics of each study site?

Common law jurisdiction, stable and respected legal system, highly regarded legal profession

When was data collected?

In Canada, in March 2017 and March 2018. In England at various times throughout the 2017-18 academic year

**Study design**

What is the study design?

Theory-testing comparative case study

Why is the study design suitable for this research?

Bernstein's theory is underutilized in legal education and I identified scope for its development in this context by choosing regional law schools as case studies, with the focus on Yorkshire

<p><b>Study population</b></p> <p>Who are the study population? What are their characteristics?</p> <p>Why is this population appropriate for this study?</p>	<p>The ORF and PRF of legal education in Canada and England, with a focus on law schools and legal regulators in Yorkshire and Alberta. Together they provide the environment for the academic stage of training of the law professionals of the future</p> <p>The contexts provide sufficient data to analyse to explore the problematic set out in the research questions</p>
<p><b>Data collection methods</b></p> <p>Which methods of data collection were selected?</p> <p>What type of information was collected using each method?</p> <p>How does each type of data respond to the research objective?</p>	<p>Desk-based collection of documentary and web-based information from law schools and legal regulators</p> <p>Fieldnotes from observation visits to law schools and legal regulators</p> <p>Photographs taken during observation visits to law schools</p> <p>Policy information, curriculum and delivery information, cultural signs</p> <p>See table below</p>
<p><b>Data collection process</b></p> <p>Were any interviews conducted?</p>	<p>Notes were taken during conversations with informed contributors to the research process. These were not recorded</p>

<p><b>Observation</b></p> <p>Who or what was observed? What was your level of participation?</p> <p>How and why were observation sites selected?</p> <p>How many observations were conducted?</p> <p>How were observations recorded?</p> <p>Who conducted the observations and why?</p> <p>What difficulties were encountered?</p>	<p>Teaching sessions were observed at the five 'away' HEIs. I was in the room, and introduced to the class.</p> <p>I undertook observations in HEIs in Yorkshire and Alberta where a staff member agreed to be observed.</p> <p>Five</p> <p>Fieldnotes</p> <p>I did. This is appropriate for PhD research</p> <p>None</p>
<p><b>Data analysis</b></p> <p>How were data prepared for analysis?</p> <p>What is your approach to data analysis?</p> <p>Why was this analytical approach selected?</p>	<p>Documents were mostly referred to in paper form. Websites and photographs were viewed onscreen.</p> <p>An iterative and reflective approach, using distinct and appropriate inductive and deductive coding for the text and visual data as explained further in this chapter</p> <p>This is an appropriate approach for the data collected to answer the research questions and to suit the general approach of the study. It aligns with the development of Bernsteinian theory</p>

How was data analysed?	Using various tools including tables, spreadsheets and coding strategies as explained further in this chapter
How were conclusions validated?	Using a process of triangulation between the text-based, visual and observational data
<b>Data quality and study limitations</b> What were the strengths and limitations of the data collected? What are the limitations of the study and how were these minimized? How do the limitations affect the research outcomes?	See 3.2

Table 3.1: Research design - Data collection and analysis (George & Bennett, 2005)

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### 3.1.2 Overarching research question

How are legal knowledge and the legal professional represented in the Official and Pedagogic Recontextualising Fields of legal education?

### 3.1.3 The data set

The data set for this thesis was both strategically chosen and comprehensive. The rationale for the selection was to ensure that there was sufficient breadth of material to give credibility to the structuring of a theory-oriented comparative case study of University-level legal education in England. For this reason, the data set is strongly aligned with the research questions, as set out in Table 3.2 below.

In the English context the text-based data set was comprised of:

- Documents connected to the Solicitors Regulation Authority's regulation of content and standards in legal education including the Solicitors Regulation Authority's consultation documents for its *Training for Tomorrow* programme and the consultation responses to the consultation on a proposal to introduce the Solicitors Qualifying Examination (the Consultation Responses Document) dated April 2017.
- Information about the legal knowledge requirements for the entry level to the legal profession obtained from the Solicitors Regulation Authority website in November 2017.
- Information about quality assurance mechanisms and standards relevant to the legal knowledge requirements of the undergraduate law degree obtained from the Quality Assurance Agency website in November 2017.
- Written information obtained from the websites of the four higher education institutions in November 2017.
- Classroom Observation Reports of the three 'outside' law schools written and approved following observations conducted in November 2017.
- Information about public law knowledge found in the most readily available textbooks recommended by publishers for the 2017-18 academic year.
- Information about public law knowledge obtained from open-access internet resources in April 2018
- Curriculum and teaching resources from the four law schools for the 2016-17 and 2017-18 academic years.
- Text-based information obtained from UK hosted law student blogs and forums including [www.legalcheek.com](http://www.legalcheek.com).



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- Fieldnotes made at academic conferences and other legal education events during the 2016-17 and 2017-18 academic years
  - Reflective diary entries made during the 2016-17 and 2017-18 academic years.

In the Canadian context the text-based data set was comprised of:

- Documents connected to the FLSCs regulation of content and standards in legal education including the Final Report of the Task Force on the Canadian common law degree (the Task Force Document) dated October 2009 and the response to this document dated November 2009 from the Council of Canadian Law Deans (the CCLD Response)
- Information about the legal knowledge requirements for the entry level to the legal profession obtained from the National Committee of Accreditation website in February 2018.
- Information about quality assurance mechanisms and standards relevant to the legal knowledge requirements of the postgraduate law degree obtained from the Campus Alberta Quality Council website in February 2018.
- The documents associated with the approval of an additional law school at Ryerson, Ontario (the Ryerson Documents) dated December 2017.
- Written information obtained from the websites of the two higher education institutions in November 2017.
- Law School Reports written and approved following visits in March 2017.
- Classroom Observation Reports of the two law schools written and approved following observations conducted in March 2017
- Curriculum and teaching resources from the two law schools for the 2016-17 academic years.
- Fieldnotes taken during visits to Canadian higher education institutions and meetings with legal education professionals in March 2017 and March 2018.
- Text-based information obtained from UK hosted law student blogs and forums including [www.lawstudents.ca](http://www.lawstudents.ca).
- Reflective diary entries made during field visits in March 2017 and March 2018.
- Primary research material obtained from Aline Grenon following correspondence with her after reading her article *Roadmap for a truly Canadian legal education* (Grenon, 2015).

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In both contexts the visual data set was comprised of:

- Photographs and fieldnotes of observations of the law school visual environments taken during field visits in the 2016-17 and 2017-18 academic years.
- Visual information relevant to legal knowledge and the representation of the legal professional obtained from the websites of the six higher education institutions in April 2018.
- Visual information relevant to legal knowledge and the representation of the legal professional obtained from the websites of the entities responsible for the regulation of legal professional education in both England and Canada in April 2018.

### 3.1.4 Research sub-questions and types of analysis

<b>Research Design: Research sub-questions and types of analysis</b>	
<b>Research question</b>	<b>Types of Analysis</b>
How is legal knowledge classified and framed in the Official and Pedagogic Recontextualising Fields of legal education?	Discourse analysis of the text-based data  Interpretation of fieldnotes
How is the identity of the legal professional represented in the Official and Pedagogic Recontextualising Fields of legal education?	Discourse analysis of the text-based data  Adapted macro multimodal analysis of the visual data  Interpretation of fieldnotes
How is legal knowledge taught in the University Law Schools studied, and how is it adapted to accommodate representations of the legal professional?	Discourse analysis of the text-based data
How is the visual environment in the University Law Schools studied adapted to accommodate representations of the legal professional?	Adapted macro multimodal analysis of the visual data  Interpretation of fieldnotes
What implications can be drawn by legal education curriculum designers and policy makers on the basis of the findings? In particular, how is the identity of the legal professional constructed and represented in the University Law School and to what extent does this influence the classification and framing of legal knowledge?	Thematic analysis of the research data generated from the above for the purpose of theory development

Table 3.2: Research design- Research questions and types of analysis

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## 3.2 Research integrity

As advocated by Ashwin (2012), it is imperative to reflect upon my role within the research process so as to establish and affirm my commitment to research integrity. This will be done by first setting out some observations on research ethics, then exploring relevant aspects of my own identity. This includes reflections on why I take a pragmatic approach, the relevance of my identity as a feminist to my commitment to Bernstein, and the significance of my interest in interdisciplinarity. The significance of my status as an insider researcher and the acknowledgement of the insider/outsider dichotomy in comparative research such as this will be addressed at 3.5 below.

At the start of this doctorate I was a novice empirical researcher, an adequate doctrinal researcher, an experienced law and ethics teacher and a solicitor. As such, I gave considerable thought to research integrity and ethical standards throughout the research process. As I was not working with vulnerable participants, and all of the subjects to observations consented to my presence, the formal ethical process and data storage requirements for this research were relatively straightforward.

In light of the above, I suggest that my approach to research is pragmatic. As Tashakkori & Teddlie (1998, p. 26) identify, pragmatists believe that values play a large role in conducting research, but that this is not particularly concerning. Research, no matter how meticulously planned or tightly controlled, always occurs in social, historical, political and other contexts. Rather than trying to negate the impact of these factors, it is better that they are acknowledged and that empirical research findings are analysed within the contexts they occur, rather than being presented as objectively provable.

The presentation of research findings as objectively provable continues to be a contentious issue, most notably for people who, like me, would identify as being feminist. As Deem explains, feminist approaches to research propose new non-patriarchal approaches to methodology and epistemology, moving away from positivistic notions of science and social science and suggesting that women as knowers are different from men. Feminist methodology grew in popularity in the 1990s in both education and law and it continues to have strong advocates who influence my approach, including Deem (2004), Evans (2014), Bottomley (1996) and Millns (1999).

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Much of the feminist literature around law and legal education argues that the educational setting is a microcosm that reflects, reinforces, and reproduces asymmetrical gender relations of the society at large. Thus, in addition to echoing and amplifying traditional deconstructions of the claims of legal theory and method to neutrality and objectivity, feminist critiques illuminate the androcentric inclinations of the legal academy. These observations, and many others from more contemporary feminist legal scholars provide the theoretical frame to much of my teaching, including the way that I design the public law curriculum at York. For example the feminist emphasis on equality endorses doctrines that emphasise 'looking at the bottom' or the 'anti-disadvantage principle' whereby the courts take on the task of safeguarding the interests of the disadvantaged (Samuels cited in Banakar & Travers, 2013, p. 142). This means that the very design of this research, and the distinction I make both here and in my teaching between 'top-down' and 'bottom-up' approaches to public law derive from my identity as a feminist. The relevance of this to my research is that when conducting my observations, and analysing my research data, there is always a feminist (or, as I would prefer for it to be called, 'equalist') researcher in the room.

This aspect of my identity caused some anxiety over my commitment to Bernstein. Not only is the fact that he is considered in the UK to be one of the 'founding fathers' of the sociology of education problematic (Brady & Bates, 2014, p. 905; Evans, 2014, p. 262) but, as Arnot (2002) explains, Bernstein was the first to admit that feminist theory did not have much direct or conscious effect on his work. As a Durkheimian he has often been categorised as a positivist, which is a contested notion for feminists. One of the major challenges of feminist epistemology to mainstream social science has been a powerful critique of positivism and its underlying assumptions (Wolf, 1996, p. 4). This plays out in legal research as a feminist critique of legal positivism. For feminist legal scholars the entire structure of law - its hierarchical organisation, adversarial nature, and undeviating preference for linear logic and rationality - has been identified as betraying its historical and ideological foundations (Margaret Davies, 2013; Levit, 2016). Within the feminist tradition there is also a commitment to reject attractively simple monolithic theories in which everything is reduced to one explanatory concept (Munro, 2007). This is because feminism is at its heart a modernist project of enhancing social justice through an agenda of change rather than an agenda

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of acceptance (Delamont, 2003; Rhoades et al., 2001). Flaws in traditional legal scholarship have also been picked up by other critical scholars. For example Obiario (1996, p. 412) highlights the hidden "missionary" objectives of legal education to indoctrinate "outsiders" into the white, patriarchal, middle-class system of values that animate the status quo. Further development of these points is beyond the scope of this thesis. However, they are relevant to my ideology and by extension my research integrity.

I am also mindful at this point to make explicit my identity as an inter-disciplinary researcher. My first discipline was psychology, my second discipline is law, and my current research incorporates the overlap between education and sociology. This background influences my interpretation of seminal writers, most notably Durkheim and Dewey, due to them being introduced to me in very different ways linked to the context, traditions and research methods of each discipline. For example Durkheim's work, including his concepts of 'organic solidarity' and 'bureaucratic rationality' could have been useful in the context of the analysis of the rise of the professions (See further Grusky & Galescu, 2005, p. 330) and the classification and framing of legal knowledge (See further Alexander & Smith, 2005). After considerable reflection I decided not to pursue the nuance of these inter-disciplinary aspects of key writers other than Bernstein. The rationale for this was to keep the thesis focused exclusively on the research question and the development of theory. My background, pragmatism, feminism and relationships with people within the locations I visited, along with many other aspects of my identity, become part of the fabric of the research. These were confronted and considered in a conscious way for the purpose of maintaining research integrity (Coffey, 1999; Hanson, 2013).

### **3.3 My social realism stance: Relevance to studies of education, knowledge, and law**

Conducting research into Bernstein has led me to the work of some of his strongest advocates, including Young, and has helped me to identify that my epistemological positioning is social realist, as defined in Young's book *Bringing Knowledge Back In* (2008). This work can be regarded as seminal in the way it repositions the sociology of knowledge away from the relativist tendencies of social constructivism towards the more useful framework of social realism. As Shay explains, with regard to social realism, while the *social*

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stance of this position affirms the 'sociality' of knowledge, the *realist* stance insists that knowledge has a distinct ontological existence and thus cannot be completely reduced to the social (Shay, 2013, p. 564). This has particular resonance in law, where there is always the objective reality of legislation and caselaw.

As Young and subsequent authors state, social realism is an attempt to rescue the sociology of educational knowledge from the epistemological dilemma between relativism and positivism (Maton & Moore, 2010; Moore, 2013b; Wheelahan, 2010). On p31 he explains:

The two complementary goals of a social realist theory are (i) to properly reveal the manner in which external power relations might be affecting knowledge both in research and in the curriculum and how, and (ii) to explore how the forms of social organisations that arise from 'cognitive' interests may themselves shape the organization of society itself.

The focus of this study is on the interplay between representations of the legal professional and legal knowledge in University-level legal education. This aligns with the first goal of social realism. By considering the visual representations of the legal professional in the law school, there will also be an exploration of the second goal.

The reason why social realism is particularly appropriate to a study of University-level legal education can be seen by reference to another social realist, Wheelahan (2010). In her extensive study of knowledge building in vocational education in Australia she explores the links between knowledge and approaches to learning. As she explains on p7:

Social realism is social in arguing that all knowledge is socially produced by communities of knowledge producers, while it is realist in arguing that that knowledge is about an objective world, one that exists independently of our social construction of it.

Social realism is a useful approach to the exploration of public law knowledge in University-level legal education, as both the subject of law and the

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curriculum are socially produced by ‘communities of knowledge producers’ and have, indisputably, an objective reality separate from the ‘knower’.

Since the publication of *Bringing Knowledge Back In* there has been some criticism by writers including Beck of Young’s interpretation of social realism and some of its more memorable concepts, including powerful knowledge (Beck, 2013). There has also been a split from the original social realism movement in the sociology of education by those who advocate for the development of Legitimation Code Theory rather than the development of Bernstein’s theory (Maton, 2014; Maton, Hood, & Shay, 2015). Young (2013) has comprehensively responded to this criticism and reaffirmed his interpretation of social realism. For me, Young’s theoretical framework of social realism, as developed by Wheelahan, is useful and relevant to the aims of this study.

### **3.4 University-level legal education in Yorkshire and Alberta used as a case study**

This study is an example of theory-oriented case study research (George & Bennett, 2005). The structured, focused comparison method adopted was initially devised to study historical experience in ways that would yield useful generic knowledge of important foreign policy problems. The main strength of the method is that it is undertaken with the aim of avoiding the accusation of descriptive and monographic findings that plague single case study researchers by focusing on theory development and the generation of cumulative knowledge. The method has been adapted to a different context here, but with the same intention.

George & Bennett (2005, p. 69) set out three key requirements and two characteristics for structured, focused comparison research. The first requirement is that the investigator should clearly identify the universe – that is the “class” of events – of which a single case to be studied is an example. Here the class is University-level legal education, with a specific emphasis on the representation of legal knowledge and the legal professional in the law schools in Yorkshire and Alberta. The second requirement is that the study needs to have a well-defined research objective and an appropriate research strategy to achieve that objective. This is achieved here as explained in sections 1.3 and 3.8 respectively. The final requirement is that the case study



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should employ variables of theoretical interest for the purpose of explanation. Such variables should provide some leverage for policy makers to enable them to influence outcomes. Here the main variable is the representation of the legal professional in the law school and the implications for the classification and framing of legal knowledge. This is of significant relevance to policy makers due to the current changes being made to the entry requirements to the legal professions, as set out in the second chapter.

The first characteristic is that the investigator needs to ask a set of standardized, general questions that have been developed to reflect the research objective and theoretical focus of each case, so as to obtain comparable data. The questions asked are set out at 3.1 and an iterative, reflective approach was taken in their development as advocated by Hennink (2010, p. 4). The second characteristic is that the study must remain “focused”. This includes the need for theoretical justification for the choices about the sites and timeframes of comparison. (Teune, 1990, p. 45). As George & Bennet explain, a single event can be relevant to research on a variety of theoretical topics. For this reason, a researcher’s treatment of the class must be selectively focused on the develop of the specific theory utilised, which in this case is Bernstein’s theory, as explained further at 3.7.

University-level legal education in Yorkshire and Alberta is a suitable case study for this approach because it is a relatively closed environment with defined parameters. Also, as observed by Cownie (2012) and others, law is a discipline which has opacity to those outside it. Significantly, it is also a discipline in transition as a result of changes within its associated profession, meaning that the findings generated have potential wider resonance (Hall, 2017; Maharg, 2007). In a wry statement from a representative of the Solicitors Regulation Authority in January 2018, the transition process in England is proving to be particularly ‘noisy’ (fieldnotes, v2:60). The document that sets out much of this noise is the 687-page Consultation Responses Document which, in addition to individual respondents’ comments, contained comments from 22 law firms, 24 universities and other training providers, four academic associations and 30 professional associations - with the majority criticising the lack of clarity in the proposals. As shown below this was a rich primary data set for this research as it provided detailed information about the views of the stakeholders of University-level legal education on both legal knowledge and the legal professional.

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### 3.5 Comparative research methods

As set out above, the focal case study in this thesis is English legal education in higher education institutions located in Yorkshire. As this is enhanced by comparative content derived from law schools in Alberta, Canada it is important to consider the utility of comparative research methods. It is widely acknowledged that comparative perspectives and research approaches are useful as a way to deconstruct the often national perspective of causal reasoning, for proving benchmarks, for theory-testing, for opening up the horizon for potential reforms, and for the analysis of the growing internationality of higher education (Arnove, 2010; Crossley, 2003; D. Phillips, 2000; Teichler, 2014). There is a rich literature on comparative studies in law, and I teach on a comparative constitutional law module where many of the theories and ideas are potentially transferable to a comparative education study (Ferrari, 1990), as shown below.

The reasons for, and approaches to, conducting comparative international higher educational research are numerous, as explained by the many contributors to journals including *Higher Education*, *Compare* and *Comparative Education*. Comparison is not a branch of research with a unique theoretical background, it is a basic logical approach of observation and interpretation (Teichler, 2014). For this reason, in some research papers it would appear sufficient to say merely 'a comparative approach is used' (See for example Teelken & Deem, 2013). In this study, as advocated by George & Bennett (2005), a more structured, focused approach was taken.

As Arnove identifies, research findings are more helpful if they can be presented in a way to effect change by contributing to a more realistic and comprehensive understanding of the transnational forces influencing all societies and education systems – to include both their potentially deleterious as well as beneficial features (Arnove, 2010). This is what Bleiklie explains as the development of concepts that can travel well (Bleiklie, 2014). A comparative study thus provides the capacity for a systematic comparison so as to illuminate the dynamics of a particular system better than a single-system study could do, as well as highlighting knowledge gaps (Kosmützky & Nokkala, 2014). As explained in 3.4, the intention here is to use the

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comparison as a way to clarify concepts, and develop theory with a view to influencing curriculum design and policy development.

Comparative education research requires critical thinking, sensitive reflection and objective analysis, and the need to recognise biases and prejudices (Bignold & Gayton, 2007). In essence, without reflective insight comparative studies run the risk of being descriptive, parochial, static and monographic (Lane, 1990, p. 189). This is particularly problematic when, as here, research is conducted by someone with insider knowledge of the context (Trowler, 2014b). It is evident from the literature that insiders bring potential insights into nuanced cultural signifiers, but their familiarity may lead to the recycling of dominant assumptions and other examples of 'guilty knowledge' (Williams, 2009). In contrast, outsider researchers are seen as being capable of bringing a freshness of perspective, but they may impose their own worldviews uncritically. In this research I was an insider in the context of legal education, but even more of an insider in the context of legal education *in England*. Avoiding the traps of cultural assumptions and 'ethnocentricity' (D. Phillips & Schweisfurth, 2014, p. 112) was something of which I was acutely aware throughout the research process, most notably during field trips to Canada.

For Oyen and other comparative researchers all the eternal and unsolved problems inherent in sociological research are unfolded when engaged in cross-national studies (Oyen, 1990; D. Phillips & Schweisfurth, 2014; Teune, 1990). In research projects such as this where there are 'home' institutions, and 'away' institutions the need to avoid what Teichler refers to as "comparative chauvinism" or "comparative humility" is particularly acute. (Teichler, 2014, p. 397). I addressed this issue by repeatedly reflecting on my status whilst in Canada, meaning that I found my status as both an insider and an outsider researcher enhanced rather than hindered the process of my research.

It is evident from the above that all comparative education studies, including this one, are not without their difficulties. Crossley summarises these as problems stemming from complexity, issues arising from political motivations, bias and accuracy of data, focus for research, tension between global and local priorities, conflicting agendas, equivalences and misconceptions, and the changing nature of research problems and priorities (Crossley, 2003). Many of these problems I was able to overcome as a solo researcher with no

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funding stipulations. However, it is acknowledged that there has been scope for bias and misconceptions to arise.

Despite these difficulties a comparative study was chosen here as it was deemed well suited to research University-level legal education due to the shared aims of University education across the world and the fact higher education is a sector less bound by national barriers than most other sectors of society. Through lateral comparisons the differences between the systems can be found at the policy level, where regulatory, funding pedagogic and standard-setting systems are national as a rule (although the Bologna Process does lead to overlaps in the context of the European Union). Vertical studies looking at the relationships between the ORFs and PRFs in different countries are also valuable sites for research. Looking to other countries can thus work to counteract the idiosyncrasies and the relative isolation of national systems of higher education and lead to valid and useful research findings. For example, in a study of national characteristics in higher education, Kogan (2002) found the British had a tendency to extensive consultation, an avoidance of radical policy change, and with a disposition to support well-entrenched interests – observations that are relevant to this study.

The case being studied here is contemporary University-level legal education in Yorkshire, England. In the language of comparative research, this is 'functionally equivalent' with the graduate JD degree in Alberta, Canada despite the difference in the entry level requirements (D. Phillips & Schweisfurth, 2014, p. 117). The rationale for the focus on Yorkshire and Alberta is that they have similar populations of c3 million people, and similarities in their history and cultural identity. For example they both house the second biggest legal centre after the capital, they historically had economic reliance on extractive industries, and a strong regional identity distinct from the dominant national identity. There are of course also significant differences between the locations. For example, in Alberta the physical size of the province and the topographical and climatic conditions are influencing factors with political and cultural implications that should not be forgotten. For example, there is a natural preference for decentralised solutions and self-governing democratic community forums that many people in Yorkshire would envy, but would struggle to replicate. It is worth acknowledging too that this was also a convenient comparison for the

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purpose of undertaking field research due to the established links between higher education institutions in these two regions.

### **3.6 Visual research methods**

With the proliferation in visual technology there has been a consequent increasing interest in visual research methods within social sciences (Marion, 2013; Mitchell, 2011; Rose, 2014; Stanczak, 2007). Such methods are very broad-ranging and address the requirement to research a range of visual data, include the analysis of visible features of physical environments and websites, as explored here. In this study, with its focus on representations of the legal professional, it was felt to be imperative to include a visual research approach. Following extensive research into methods, including a consideration of their limitations (Mannay, 2016), a multimodality approach was adopted for the analysis of the visual data in this study.

Multimodality is a term for a phenomenon rather than a specific theory or an entrenched method. It denotes a key aspect of communication: namely, that it melds a variety of communicative modes into a coherent and unified whole (Margolis & Pauwels, 2011, p. 551). Multimodality can be seen as an extension of the more familiar discourse analysis as it is an inter-disciplinary approach that understands communication and representation to be more than about language (see further 3.8). As Jewitt explains, the key to multimodal perspectives is the basic assumption that meanings are made (as well as distributed, interpreted, and remade) through many representational and communicational resources, of which language is but one (Jewitt, 2008). Multimodality has been developed over the past decade to systematically address much-debated questions about changes in society, for instance in relation to new media and technologies. Kress and van Leeuwen refer to this as the 'grammar of visual design' and argue compellingly that visual images and other non-textual artefacts should be analysed with as much rigour as is afforded to words and speech (Kress & van Leeuwen, 2006). In this study the same rigour was applied to text-based and visual data, as explained further at 3.8 and 3.9.

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### 3.7 Bernstein's concepts to be applied and developed

As this is a theory-oriented comparative case study the research has been designed with a view to developing Bernstein's concepts and ideas to a new context. As McLean explains, making theories explicit allows interrogation, testing, modification and development of beliefs, values and arguments in the research process (McLean, 2006, p. 8). This is why this section is required in addition to the explanation of the relevant concepts taken from the work of Bernstein's in 2.3 above.

As explain by Moore et al (2006, p. 2) in the introduction to *Knowledge, Power and Educational Reform: Applying the sociology of Basil Bernstein*, much of Bernsteinian research is "located within Bernstein's *problematic* rather than within his *theory*, in that there is not a theory that defines Bernstein's intellectual system." As Atkinson also identifies, Bernstein's ideas were always intended to drive a programme of original inquiry: they were never intended to be transformation into a body of sacred texts (Atkinson cited in Power, 2001, p. 35). For Bernstein the theoretical always preceded the empirical, but the theoretical had fluidity meaning that "the interaction between the theory and research has been vital for the development of both" (2000, p. xviii). The context of my research is different to any undertaken by him, meaning that there is scope to interact with his theory in the analysis of data so as to develop his ideas within a new context.

Delamont sets out the structured approach taken by Bernstein, in that he "always concentrates first on the control system, then on the boundaries it sets up, then on the ideological justification which come to surround those boundaries, and finally on the power which underlies the whole system process" (Delamont, 1995, p. 324). This demonstrates that Bernstein's theory is a 'conceptual device' capable of generating models rather than a rigid method. In fact, it is clear that there is no such thing as a Bernsteinian method. Bernstein and Bernsteinian researchers have used a variety of methods, including action research (Morais et al 2004), case studies (Breier, 2004), analysis of curriculum documents (Maton, 2006), and biographical data sets (Power, 2006).

For Bernsteinian research therefore what is required is coherence and transparency in the writing up, leading to research that is "rigorous,

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illuminative and trustworthy” (A. Brown, 2006, p. 137). For Moore (2006, p. 38) this work involves “the placing of conceptual stepping-stones across the discursive gap” between theory and data through the unpacking of concepts into successively more substantive elements. This is the intention of this section, and section 5.3 below.

### 3.7.1 Classification and framing applied to public law knowledge

As set out in 2.3.2, **classification** refers to the degree of boundary maintenance between discipline contents and is concerned with the insulation or boundaries between curricular categories. **Framing** refers to the location of control over the rules of communication and regulates the form of its legitimate message. In the context of public law in higher education, classification is the way that knowledge is organised into modules, and framing is the way that this is transmitted to students through knowledge selection and approaches to teaching.

To analyse the classification of public law knowledge here, there will be a focus on curriculum documents from the relevant higher education institutions as well as relevant information from legal regulators and quality assurance agencies. To evaluate framing, reference will be made to the observations undertaken during law school visits and the field notes made. This will be done with reference to the concepts of **official knowledge** and **powerful knowledge** discussed at 2.4.3 with a view to developing the analytical utility of these terms in a new context.

### 3.7.2 The application of the concept of the recontextualising field to legal education

At 2.3.4 it was explained that, due to changes in higher education in the two decades since Bernstein’s death, his two recontextualising fields referred to as the ORF and the PRF, although of enormous theoretical significance and utility, do not fit the reality of University-level legal education. This is because, in Bernstein’s terms law is a region in that it faces both inwards towards its canonical knowledge base and outwards towards the external field of practice (2000, p55). As seen in chapter 1, there are so many actors that influence the law curriculum, that law can be regarded as what Bernstein calls “a pedagogic pallet where mixes can take place’ (2000, p56). A more useful concept that

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was underdeveloped during his lifetime is what he referred to as a **Specialised Recontextualising Field** (2000, p59). This will be developed further in 5.2.1.

### 3.7.3 Pedagogic identities and professional identities

The identity of the legal professional was explored at 2.5 where it was found that societal complacency had allowed for the rise to prominence of an individualistic professional identity at the expense of a collective identity with a grounding in the importance of the pursuance of social justice.

This resonates with many of Bernstein's findings which, although originally made with a view to analysing pedagogic identities within the context of school education, have been extended to higher education in the work of McLean et al (2013), and professional education by Case (2014). They can therefore be seen as having utility when exploring professional identities in University-level legal education. Of particular interest in this context are his following observations:

**"Retrospective identities** are shaped by national, religious, cultural, grand narratives of the past... Retrospective identities are formed by hierarchically ordered, strongly bounded, explicitly stratified and sequenced discourses and practices." (p66)

For an **elitist identity** this narrative of the past "provides exemplars, canons, criteria and develops aesthetic sensibilities" (p75)

**"[Prospective identities]** are constructed to *deal with cultural, economic and technological change.*" (p67) they are "formed by recontextualising *selected* features from the past to stabilise the future through *engaging with contemporary change.* (p68)

In an attempt to generate the language which will transform the language of enactment into a language that can be read by the theory, as advocated by Bernstein, it was decided that, in addition to the use of the above identities, I would work with what was, in effect, a passing theoretical observation on p59 of *Pedagogy, Symbolic Control and Identity* with a view to answering the research questions:



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“**[A specialised identity]** is the dynamic interface between individual careers and the social or collective base... This identity arises out of a particular social order through relations which the identity enters into with other identities of reciprocal recognition, support, mutual legitimisation and finally through a **negotiated collective purpose.**”

In addition to using deductive and inductive coding to identify pedagogic identities and emerging identities within the research data, this idea of a negotiated collective purpose will be utilised when synthesising the research findings and developing theory.

### **3.8 Analytical approaches**

With regard to the analytical approaches adopted in this study I am strongly influenced by the work of Fairclough (2003) and Kress & van Lueewen (2006). In their respective works *Analysing Discourse* and *Reading Images* they repeatedly stress how texts and images are parts of social events and therefore ripe for analysis in the same way as spoken language. Like Bernstein before them, they acknowledge the influence of Halliday's earlier studies of systemic functional grammar in linguistics and make use of the term 'grammar' as a conceptual tool (Halliday, 1985). Like them, I regard the process of analysis as dialogic, with constant movement between theory and the empirical data. This iterative and reflective approach is appropriate where, as here, the research is intended to develop theory.

In the final sections of this chapter I explain in brief the two main analytical approaches used in this research, being discourse analysis and multimodal (inquiry graphics) analysis respectively with some illustrative examples of the research methods used. This is then followed by chapter 4 which sets out the findings of this study.

#### **3.8.1 Discourse analysis of policy documents and illustrative examples of methods adopted**

A considerable part of the data set for this study were policy documents emanating from both the ORF and the PRF. Analysis of these and other documents required both deductive and inductive approaches as a way to

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uncover the discourses between the various agents in the field, and the representation of the legal professional in the law school. As Rizvi & Lingard identify, “[p]olicy analysis not only explores the workings of political power and authority, but is also embedded within relations of power” (Rizvi & Lingard, 2010, p. 50), and it is the interplay between the relations of power of the legal professional and legal knowledge which is of interest here. A conscious decision was made to follow a discourse analysis approach rather than a *critical* discourse analysis approach (Bloor, 2007; Fairclough, 1995). This was because as a social realist researcher I accept that there are certain norms of discourse. My concern with critical discourse analysis is that its advocates have a tendency to look for specific discourse as a way to further an established critical position, as has been acknowledged by Fairclough himself (Fairclough, 2001).

Discourse analysis is a method that helps in constructing and making visible policy processes, their development and the values and power relations behind them (Ball, 1994; Fairclough, 2003; Tannen, Hamilton, & Schiffrin, 2015; Tirado & Gálvez, 2007). It does this by making explicit the ‘external’ relations of text with other elements of social events and, more abstractly, social practices and social structures; and the internal relations of text, which includes analysis of semantic relations, grammatical relations and lexical relations. The focus here will primarily be on external relations as a way to ascertain the representation of the legal professional and legal knowledge in the law school through the development of codes.

### **3.8.2 Inquiry graphics analysis of visual representations of the legal professional and legal knowledge found on websites and within the physical spaces of the law schools studied**

It became increasingly evident when visiting the research sites that there was a need to analyse the visual data. This is because the representations of both the legal professional and legal knowledge as portrayed within the physical environments and online at the six law schools were all very different, thus adding nuance to the analysis required.

As explained at 3.6, a multimodal approach was adopted to undertake the requisite analysis of the visual data. It became apparent that Kress and van Leeuwen's method of visual analysis essentially provided a rather limiting

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descriptive framework. It was found that it did not, on its own, offer all that was needed for the sociological interpretation of websites and physical spaces as required here (Van Leeuwen & Jewitt, 2001, p. 154). Due to this limitation, an adapted version of macro multimodal analysis using the “inquiry graphics” model introduced by Lackovic (2018) was chosen over alternative models, including Pauwels (2011), due to its emphasis on and alignment with the research object. As explained by Lackovic, **Research Object** is a code that links the conceptual focus of the research with the analysis of the visual data. The visual analysis focuses on the represented details of the image (**Representamen**) and the **Interpretant’s Connotation** (the meaning of the visual image in the research context). These terms proved to be useful when coding the visual data, as will be shown at 3.9.4 and 4.3.

### 3.8.3 Analysis of observational fieldnotes

The third method that completed the requisite triangulation of my methods was the analysis of the four volumes of fieldnotes I accumulated over a two-year period in England and during two field visits in Canada (referred to here by volume and page number). These included notes taken during classroom observations, during meetings with experts within legal education (having obtained the requisite consent), at conferences, symposiums and other events I attended where the focus was on public law or legal education, and during presentations by the regulators of the legal profession.

I found observation to be a useful way to gain insights into cultural similarities and differences in law school environments and to capture the dynamic nature of events. I decided to use this method in addition to the collection of text-based and visual data as part of the process of triangulation. I also ensured that I remained reflective about my identity when undertaking observations as a way to acknowledge and respond to potential criticisms of this approach. I maintain a belief that observation methods are powerful tools for gaining insights into situations, in part because they can be used to identify the silent norms and values in a particular cultural setting (Hennink, 2010, p. 171). This final point is what made this method most relevant to this study.

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## **3.9 Illustrative examples of research analysis**

### **3.9.1 Task 1 – Inductive coding of the Solicitors Regulation Authority’s Consultation Responses**

The initial task undertaken was inductive analysis of stakeholder representations of legal knowledge (LK) and the legal professional (LP) contained within the Solicitors Regulation Authority’s Consultation Responses Document and other policy documents. At first each response in the Consultation Responses Document was given one of four codes based on institutional or personal identity; being A – individual (numbered 1-63), B – law firm (numbered 1-22), C – educational and academic institutions (numbered 1-41), and D – professional associations (numbered 1-32). In the first sift responses with no qualitative data were removed. It was also found that there were no significant trends in the responses based on identity, and considerable duplication within and between responses. The codes were retained for identification but there was no further analysis of trends within or between the groupings. The responses to questions 1 and 4 (being ‘To what extent do you agree or disagree that the proposed SQE is a robust and effective measure of competence’ and ‘To what extent do you agree or disagree that our proposed model is a suitable test of the requirements needed to become a solicitor’ respectively) provided the most relevant content.

In the second sift, a table was created with three columns being ‘issue’, ‘evidence’ and ‘emerging themes’. The responses to Q1 and 4 were read and relevant content added as a new row in the table of issue and/or evidence. In this second sift responses that contained no useable data continued to be removed.

The third sift was the same as the second sift but in reverse order. Very little additional evidence was added in the third sift, leading to a conclusion that saturation had been reached.

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Some of the themes that emerged from this inductive approach to identifying stakeholder representations of legal knowledge were:

- Evidence of a purposive view of legal knowledge
- Appreciation that not all legal knowledge is or should be aligned with professional practice
- Distinctions between different kinds of legal knowledge including ‘City knowledge’ and ‘social justice’ knowledge
- Legal knowledge being broadly conceived, to include knowledge of skills

Some of the themes that emerged from this inductive approach to identifying stakeholder representations of the legal professional (LP) were:

- Reverence of both ‘the law’ and ‘the profession’
- An emphasis on the need to share practice between the stakeholders of legal education
- The influence of market/commercial/political forces on the profession
- The concept of ‘a literate profession’
- The practice of the law being referred to as ‘a harsh and unforgiving place’

These findings will be explored and analysed further in chapter 4.

### **3.9.2 Task 2 – Deductive coding of the Solicitors Regulation Authority’s Consultation Responses and other policy documents**

For the second task, Bernstein’s concepts set out in 3.7 were used in a deductive way to code the data contained in the Consultation Responses Document. As with task 1, a table was created but this time the concepts were created as separate rows with columns added for ‘evidence’ and ‘issues.’ This proved to be relatively straightforward and highlighted the power of Bernstein’s concepts as descriptive tools. This approach was applied to some of the other policy documents and further evidence of these concepts was found. The issues that started to emerge from this task meant that I identified that a third composite task was required to synthesis the data with a view to developing the theory.

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### 3.9.3 Task 3 – Synthesis of codes as a way to develop theory

For the final task in this part of the research, the two tables from tasks 1 and 2 were printed and compared. It was noticed that there were some statements about legal professionals from the Consultation Responses Document that appeared in both tables but that some evidence had emerged solely in one task or the other. It was noted that the evidence on legal knowledge was not as rich as the data for legal professional identity. For this reason, it was decided to use the codes on other text-based documents in both the Canadian and English data set and field notes, and systematically work through them for evidence of the issues around legal knowledge and the legal professional found in tasks 1 and 2. Additional concepts were identified as part of this process that led to refined codes for legal knowledge (LK), the legal professional (LP) and discourse (D). It was decided not to add any legal knowledge codes to the Canadian data set due to my status as an outsider researcher lacking awareness of the canon of Canadian public law. During this time, I returned to research I had conducted in 2015 as part of my doctoral studies on the use of the internet as a source of knowledge for public law. This led to the addition of the code LK-UK.

The key codes that were identified during these tasks were given the following identifiers. The definitions of these terms have been set out in the chapters above:

LK-OK: Official Knowledge	D-Rev: Reverence
LK-UK: Unofficial Knowledge	D-Aut: Authority
LK-PK: Powerful Knowledge	D-Rel: Relevance
LP-CP: Corporate Professional	
LP- P: Prospective	
LP-RE: Retrospective-Elite	
LP-DI: Democratic Intellectual	
LP-DP: Democratic Professional	
LP-DT: Democratic Technologist	

In terms of comparative analysis, it was found that there was no or little difference between the two geographical regions in the existence of evidence of the legal knowledge, legal professional and discourse codes. The

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differences lay in their prevalence and relative strength as will be discussed further in chapters 4 and 5.

### **3.9.4 Task 4 – Coding of the visual data**

The visual data in this study was collected when visiting the six research sites and when analysing the content on each of the websites. A review of the visual methods literature indicated that physical spaces, referred to by Ravelli and McMurtie (2016) as 'spatial texts', are rich sources of data. With this in mind, I took numerous photos and made contemporaneous fieldnotes describing the key features of each of the research environments I visited.

All of the visual data was coded via an adapted inquiry graphics model that Lackovic developed from the work of Peirce and Jewitt (Hallewell & Lackovic, 2017; Jewitt, 2014; Lackovic, 2018; Peirce, 1991) with descriptions of visual images labelled as **Representamen**. The legal knowledge, legal professional and discourse codes identified from the text-based data were applied to these elements using a deductive approach as set out in the tables at 4.3, as they were regarded as amounting to the **Connotation** code from Lackovic's model due to their environmental/socio-cultural/contextual meaning (Lackovic, 2018, p. 13). The approach taken here was overseen by, and approved of by, Lackovic.

### **3.10 Limitations of the research design**

Considerably thought went into the research design for this study. This included a detailed consideration of the limitations of the design.

One of the longstanding and consistent criticisms of research that include discourse analyses is that it lacks sufficient 'rigour' - which is why there is so much detail about the rationale for and application of my analytical approaches above. I share Phillips' view that to be too systematic, or too mechanical, in qualitative data collection, can in effect undermine the very basis of discourse analysis, and result in inducing the reification of concepts and objects that it seeks to avoid (N. Phillips, 2002, p. 74). For this I have been mindful of what has been absent in the discourse I have analysed as well as what has been present, as will be discussed further at 4.7 and in chapter 5.

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The limitations and criticisms of multimodal analysis are similar to those of discourse analysis. However, as Aguirre explains, as an object of research, visual sources open up to wider, but more complex and demanding, possibilities of interpretation. How you interpret text can be justified by it being available to others to verify, whereas interpreting what you see is a far more insular pursuit. This can lead to feelings of disorientation due to ‘drowning’ in data. Like Aguirre, I frequently found myself contemplating two opposing paths: to push further forward into the research or to be defeated by self-doubt and a lack of purpose (Aguirre, 2017, p. 8). It was at these times that I found the structure of Bernstein’s theoretical concepts reassuring.

I was also encouraged by the strength of the data I had collected in my fieldnotes. I was mindful of the criticisms of observations and fieldnotes, being that, as a method, they can be subjective, biased, impressionistic, idiosyncratic and lacking in the precise quantifiable measures that are the hallmark of survey research and experimentation (Cohen, 2011, p. 407). To avoid this, I worked very hard at ‘keeping my mind ajar’ by taking a two-page approach. On one page I wrote factual content about what I saw or heard, and on the other I noted commentary and interpretations. These were usually contemporaneous notes, however during the data analysis stage I also added interpretations based on my codes and emerging themes, identities and types of discourse. I was aware that fieldnotes suffer from the lack of external validation referred to above in relation to multimodal analysis. To overcome this limitation, I produced law school reports of my visits to the Canadian law schools and observation reports when I had been present during a teaching session. These were approved by all relevant parties which provided reassurance both of my method and my findings. By writing field notes over a two-year period I also found them useful as a way to trace the development of the focus of my research over time.

As a final observation for this chapter, it is acknowledged that in contemporary society, the dominant media or technology of communication is increasingly visual (Sandford-Couch, 2013, p. 145). As Hallewell & Lackovic (2017) identify, semiotics and related visual approaches are currently underused in Higher Education research and practice. They advocate that such approaches should be used further to gain greater insights and depths of meaning-making practices across disciplines. In this study I have taken their



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advice and undertaken a process of triangulation between the text-based, visual and observational data as a way to ensure the reliability and validity of my findings and work within this research gap.

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## **Chapter 4: Data presentation and findings**

### **4.1 Chapter overview**

This chapter opens with a summary of the data findings. This is followed by analysis of the data using the concepts set out in 3.7 with a view to develop Bernstein's theory to a new context. At 4.6 this includes three illustrative examples of the most prominent discourses that were identified as being of most relevance to the research questions. The chapter ends with a consideration of the 'presence of absence' of democratic values in the data set. This is a theme that is returned to for greater analysis and discussion in the following chapter.

### **4.2 Summary of data findings from the text-based data**

A review of the findings from the first three research tasks set out in the previous chapter indicated that the Corporate Professional code was the most prevalent in the data set, to the point of being ubiquitous. Examples included:

"[The Ryerson program] has an innovation-focused approach that will equip graduates with real-world skills and competences required to meet the present and future needs of consumers of legal services."  
(Ryerson Documents, p3)

"Our alumni include former Alberta Premier Peter Lougheed, current Supreme Court of Canada Chief Justice Beverley McLachlin, three provincial chief justices, numerous influential business leaders and many accomplished lawyers, judges, administrators and scholars." (law school in Alberta website)

"Our degrees are practice-focused, designed to meet employer needs and taught by experienced legal professionals and academics." (law school in Yorkshire website)

Not all of the codes were identifiable in all of the documents but there were sufficient examples for them to be regarded as relevant. The following are illustrative examples of all of the emerging codes:

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Official Knowledge:

“The module is one of the core subjects of the degree, through which students cover the Foundations of Legal Knowledge.” (law school website, Yorkshire)

Unofficial Knowledge:

“Laptops are banned in seminars.” (Fieldnotes, v2:36: Discussion with English law teacher)

Powerful Knowledge:

“Importance of indigenous rights courses”, “Need training on colonialism/cultural competency and reflective practice before getting to the law”, “Call for action on indigenous legal traditions.” (Field notes, v1:42-45: Discussion with Canadian law teacher)

Retrospective-Elite:

“The proposals ignore the value of study and practice that has resulted in our profession being respected for generations.” (Consultation Responses Document – B4)

Prospective:

“The idea of offering solution-focused education of future leaders in the legal profession resonates very widely.” (The Ryerson Documents, p11)

Democratic Intellectual:

“At undergraduate level students are aware of the consequences of law as a human creation and that it is subject to the ethics and values of those that make and apply it. The implications of this in the context of securing justice and the public interest is considered as part of legal study.” (QAA Benchmark Statement for Law, p6)

Democratic Professional:

“Relationships between individuals, the State, and societal and commercial entities are at the heart of law.” (Task Force Document)

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Democratic Technologist:

“The legal industry (and with it legal education) is on the cusp of disruption and transformation driven in large measure by the application of technology to legal work... [Ryerson can] build a law school that competitively disrupts current educational practices in beneficial ways.” (Ryerson Documents, Executive Summary)

Reverence:

“For almost a century, our students have honoured the pioneering spirit of the Faculty’s founders by carrying on their strong tradition of excellence.” (law school website, Alberta)

Authority:

“Our faculty are among the finest legal scholars in the nation, and their work is cited by academics, judges and governments around the world. Our staff is the epitome of professionalism.” (law school website, Alberta)

Relevance:

“The lawyer’s development is never static and must evolve, adapt and expand wherever the lawyer works and in the face of a constantly changing legal landscape.” (Task Force Document)

There was also evidence across the data set that indicated the need to develop the idea of a Specialised Recontextualising Field, including:

Specialised Recontextualising Field:

“The reality [is] that our profession is much more specialised than it used to be.” (Consultation Responses document, B11)

“Legal practice is becoming increasingly specialised.” (Consultation Responses Document, D18)

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### 4.3 Summary of data findings from the visual data

Due to the requirement to keep the research sites anonymous, it was not possible to include the visual data within this thesis. Instead brief textual descriptions of visual data are set out in a sequence of tables together with the connotation/code applied in accordance with the inquiry graphics model adapted from Lackovic (2018). These have been separated into data from the ORF, most notably the websites of the professional regulators and associated institutions in both Yorkshire, England and Alberta, Canada; and data from the PRF, being the websites and physical spaces of the six higher education institutions.

#### 4.3.1 Representamen and connotations in the ORF

<b>Research Findings: Visual Data in the ORF in England</b>		
<b>Website</b>	<b>Representamen/Image</b>	<b>Connotation/ Code</b>
SRA - landing	Young people in suits and casual attire Cartoon animation video	LP-CP
SRA - students	Young people in a line at a desk looking down at paper and holding matching pencils One young man in a library looking at a laptop	LK-OK
BSB - landing	Young woman in casual attire in a library with books and screwed up pieces of paper Female arm with smart shirt using a pen and laptop Statue of justice	LK-OK LP-CP D-Rev
Law Society	Rotating display of 4 men and 1 woman in suits	LP-CP D-Aut

Yorkshire Law Society	Rotating display of formal dining event Headless man in a suit reading a book and writing in a book	D-Rev LP-CP LP-RE LK-OK
Legal Education Foundation	No relevant images 'To promote the advancement of legal education and the study of law in all its branches'	n/a
QAA	No relevant images	n/a

Table 4.1: Research findings - Visual Data in the ORF in England

<b>Research Findings: Visual Data in the ORF in Canada</b>		
<b>Website</b>	<b>Representamen/Image</b>	<b>Connotation/ Code</b>
FLSC	Young people in suits Formal event dominated by older men in suits representing different provinces	LP-CP LP-RE D-Rev D-Aut
NCA	Young people in suits and casual attire Young people in an exam hall using pen and paper Filing cabinet with paper	LP-CP LP-RE LK-OK
Law Society of Alberta	No relevant images	n/a
Legal Education Society of Alberta	Silhouettes of people standing, walking and talking in groups 'Your lifelong partner in continuing legal excellence'	D-Rel
Universities Canada	No relevant images	n/a

Table 4.2: Research findings - Visual Data in the ORF in Canada

#### 4.3.2 Representamen and connotations in the PRF

<b>Research Findings: Visual Data in the PRF</b>			
<b>Location</b>	<b>Website landing page: representation/image</b>	<b>Physical environment: representamen/image</b>	<b>Connotation/ Code</b>
York	Ranking information Welcome message from the Head of Department Research news, including twitter feed Student news Photos of students using interactive whiteboard 'For Innovation and Research Led Teaching'	Lobby – atrium space shared with Management School Student boards Some sponsored spaces Sponsored hoodies	LK-OK LP-DI LP-P D-Rev D-Rel
Engcar	Ranking information Scholarship information Research news Student views Photos of students in classrooms 'Personal Journeys. Shared Excellence'	Lobby – display board about the development of equality law and video display 'equality challenges'. Staff photographs Student boards Hard copy course materials Sponsored hoodies	LK-OK LK-PK LP-DI LP-P D-Rev D-Rel
Engeve	Ranking information Research news Student news Photos of students in court dress 'A top 10 law school, helping to change the law and global society'	Lobby – sponsorship wall, painting of founder member of law school, explainer board for building name. Staff photographs Student boards	LK-OK LK-PK LP-CP LP-RE LP-P D-Rev

Engbet	<p>Site separated between programme site and location site</p> <p>Programme site -</p> <p>Photos of students in suits.</p> <p>Student views: 'Taught by experienced legal professionals and academics'</p> <p>Location site -</p> <p>Interactive photos of learning spaces</p>	<p>Code access in mixed use commercial building.</p> <p>Lobby - Video display of events</p> <p>Staff photographs</p> <p>Reception desk</p> <p>Student boards</p> <p>Trophy cabinet</p>	<p>LK-OK</p> <p>LP-CP</p> <p>LP-P</p> <p>D-Rev</p> <p>D-Aut</p>
Canshay	<p>Research news including twitter feed</p> <p>Student news</p> <p>Link to video about curriculum</p> <p>Support for low income, high potential students</p> <p>'Energy – Innovation – Impact'</p>	<p>Two entrances.</p> <p>Sponsorship wall, donor wall, alumni wall</p> <p>Student boards</p> <p>Hard copy course materials</p> <p>Many sponsored spaces</p> <p>Photos and biographies of visiting lecturers</p> <p>Video display – 'Our strategic priorities'</p> <p>Trophy cabinet</p> <p>Plaque – Canadian Charter</p> <p>Artworks</p> <p>Sculpture and plaque – 'Lest We Forget'</p> <p>Signage for 'Student Legal Assistance'</p>	<p>LK-OK</p> <p>LK-PK</p> <p>LP-CP</p> <p>LP-DP</p> <p>LP-P</p> <p>D-Rev</p> <p>D-Rel</p>



Canzac	Ranking information Research news Photo of students smiling and looking at a laptop Welcome message from the Dean 'The oldest [law school] in Western Canada'	Lobby – sponsorship wall, donor wall, video display of events Builders wall, including explainer board Many sponsored spaces Artworks Aboriginal Justice Award plaque Graduates of the Indigenous law programme plaque Graduating class 1925 and 1926 photos Signage for 'Student Legal Services'	LK-OK LP-CP LP-DP LP-RE LP-P D-Rev D-Aut D-Rel
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Table 4.3: Research findings - Visual Data in the PRF

## 4.4 Classification and framing of legal knowledge

The relevant research sub-question explored in this section is:

- How is legal knowledge classified and framed in the Official and Pedagogic Recontextualising Fields of legal education?

This was analysed with reference to the data from the ORF and the PRF, including, most notably, specific comments found in the Solicitors Regulation Authority Consultation Responses Document As set out at 3.9 above, the stakeholder responses in this document were given codes based on institutional or personal identity; being A – individual (numbered 1-63), B – law firm (numbered 1-22), C – educational and academic institutions (numbered 1-41), and D – professional associations (numbered 1-32).

As set out in 2.3.2 and 3.7.1 the importance of the concepts of classification and framing is that they contain or create a boundary around the essence of a

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curriculum that attracts evaluation. The classification rules set out the “what” of a curriculum and the framing rules set out the “how”. Classification and framing can be analysed along a spectrum from strong to weak, and there is an expectation that law, as an example of a region of knowledge, will have weak boundaries as it is a subject that ‘faces two ways’ – towards its singular and towards its area of practice (Young & Muller, 2014, p. 14).

Public law was identified as providing a useful example of legal knowledge due to its status as a core element of the curriculum in law schools in both countries. It was found that in the ORF both substantive legal knowledge and specific public law knowledge was strongly classified in both England and Canada in the Bar Standards Board and Solicitors Regulation Authority Joint Statement<sup>4</sup> and Federation of Law Societies of Canada National Requirement<sup>5</sup> respectively.

In England, until recently, and in addition to their role in classifying curriculum content, the Solicitors Regulation Authority have been involved in the framing of the knowledge contained in the Joint Statement through the credit requirements of the qualifying law degree and with regulatory oversight of the vocational stages of training. Following the *Training for Tomorrow* process, the Solicitors Regulation Authority have repeatedly stated that their role is to regulate the legal profession rather than legal education, which would logically lead to a weakening of the framing of legal knowledge. However, as a result of their intention to introduce SQE1, the framing of legal knowledge by the profession and the influence of this on University-level legal education continues to be contentious (Gibbons, 2017). The *Training for Tomorrow* process is an example of an ongoing policy implementation exercise as set out in Ashwin and Smith’s systematic analysis of policy implementation studies (Ashwin & Smith, 2015). However, it differs from most policy studies in higher education in that the change in policy on legal knowledge is a policy that derives from the regulator rather than, as in the examples in Ashwin & Smiths study, from the way government education policy is positioned and explained in policy documents and journal articles. This is an example of how Bernstein’s concepts of ORF and PRF do not quite ‘fit’ the analysis of the

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<sup>4</sup> <http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>.

Accessed 3 September 2018

<sup>5</sup> <https://flsc.ca/law-schools/>. Accessed 3 September 2018

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classification and framing of legal knowledge, as will be developed further in the discussion.

In the Solicitors Regulation Authority's proposals, Public and Administrative Law has been joined with Principles of Professional Conduct and the Legal Systems of England and Wales to be tested at the level of "demonstrate an understanding". As the consultation respondent C2 noted, this would mean that students who learn these subjects purely for the purpose of passing the SQE assessment "would not need 'the ability to deploy knowledge in a practical situation for practical purposes.'" This supports comments found throughout the Consultation Responses Document that the proposals mean that foundational legal knowledge and understanding of legal processes and the practical application of the law will be narrower and more superficial than currently (see B3 as an example). For D7 the plan to link the subjects in this way was considered "to be unrealistically wide [with] the result of devaluing their individual importance." This is of particular concern for public law teachers, including me, who regard the subject as an important location to generate discussions to enhance citizenship (Gibbons, 2018c).

In Canada, due to a long tradition of self-regulation and the consequent greater fragmentation of the regulatory oversight of legal education resulting from the federal system (as explained in the Task Force Document), the framing of legal knowledge generated in the ORF was found to be weaker. From discussions with legal academics in Canada (fieldnotes, v1:20) it was evident that the introduction of the FLSC National Requirement has not led to any curriculum changes in public law as the regulators were satisfied that all existing law schools had undertaken a 'sufficiently comprehensive program of study' as required. Discussions with regulators in Canada also indicated that, although not fully approving of the approaches to learning undertaken at law school, they were generally satisfied that students leave law school with sufficient legal knowledge of public law to undertake their professional roles (fieldnotes, v3:59).

In both England and Canada, the extent to which the substantive content of public law is classified in the PRF beyond the minimal content requirements set by the regulators is within the discretion of the University and the module leader. As part of a research project undertaken as part of this doctoral programme and following a review of the most popular textbooks (as set out

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on University bookshop and publisher websites), and English law school websites setting out public law syllabi, it was found that in most higher education institutions in England constitutional law and administrative law are taught sequentially, thus moving from a 'top-down' to a 'bottom-up' model over the course of the degree. This means that public law appears to be strongly classified as **Official Knowledge** in most institutions in England, with York being a notable outlier, as set out below. As a caveat, and as Apple (1993, p.61) reminds us, we cannot assume that what is in the textbook is actually taught. Nor can we assume that what is taught is actually learned. During observations it was evident that many public law teachers in England use 'real world' examples when teaching constitutional law thus framing the content as **Powerful Knowledge** even when working within a 'top-down' model. This was seen at Engcar when during a lecture to c300 students the lecturer discussed the need for activism to push for electoral reform (fieldnotes, v2:32) and at Engbet where in a small group session on the rule of law the tutor emphasised the dangers of restricting citizens' access to the courts (fieldnotes, v2:4). In this public law knowledge can also be categorised as **Specialised Knowledge**, as explored further below (Young & Muller, 2016).

In Canada, in both Canzac and Canshay, there was a strong official knowledge approach to the classification of public law knowledge as there was a requirement that students purchased a specific textbook that was then used as the foundation for all the taught content, and there was a strong culture of selling on textbooks and inheriting notes from year to year (fieldnotes, v3:39: Discussion with Canadian law teacher). The curriculum documents from Canzac and Canshay show that as in England, Constitutional law and Administrative law tend to be distinct modules in Canada with a 'top-down' approach preferred. Differences appear when considering the influence of a different history with, as Grenon (2015) found, human rights options tending to focus on indigenous rights and the interpretation of the Canadian Charter. As in England the personality of the lecturer can greatly influence how content is framed, leading to an enhancement of powerful knowledge acquisition. For example, at Canzac, in a session considering the judicial interpretation of Charter rights within a constitutional law module, there were frequent references to the power of civil rights movements and the importance of reading dissenting judgments in rights-based caselaw.

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Despite the similarities set out above, a more fine-grained analysis of the coding of the text-based and observational data showed differences in the classification and framing of legal knowledge within the PRF and across the six sites. By considering all of the data, including policy documents, textbooks, curricula documents, teaching observations, websites, and visual data of the law school environments, it was possible to identify subtle differences that will be of benefit to theory development. The three examples below, being the canon of public law knowledge, approaches to research, and the reflective practitioner are set out for this purpose. It is acknowledged that these are illustrative rather than definitive.

#### **4.4.1 The canon of public law knowledge**

The opportunity to review and consider the canon of public law knowledge as it appeared in the data was enlightening. There was, unsurprisingly, no indication that there was any will to remove the requirement for law students to cover public law in the curriculum but what was understood to be important about public law differed.

Within the Consultation Responses Document it appeared that the requirement for the curriculum to include constitutional law was a given. Where views differed was on the place of what was repeatedly referred to as 'social welfare law', to include welfare benefits, immigration, human rights and housing – the location of much administrative law content. As stated by A9 and others; "These areas cover laws that are of fundamental importance to individuals in their daily lives". The potential demotion of this content was regarded as problematic by many, not just for future lawyers practising in this area, but also for broader society. There was criticism too of the effective downgrading of public law in the Solicitors Regulation Authority's proposals and the lack of engagement with the increasing importance of international and transnational law issues (see e.g. A10). This was stressed by submissions from the learned societies and linked to the need to enhance international competitiveness in light of the impending departure from the EU (D7).

This emphasis by actors in the ORF on 'bottom-up' law and international law may come as a surprise to module leaders in the PRF. A review of curriculum documents indicates that in public law, as elsewhere in higher education,

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rarely is anything dropped from the curriculum. As lecturers have limited time to keep up with their respective fields, they rely on the experts who produce textbooks and other pre-packaged curricular material to curate the canon. Although some of these resources make reference to international public law, in curriculum design terms this content tends to fall outside the boundary of the compulsory public law module and instead be an elective module for students. In the PRF public international law is of interest, but it is not official knowledge. This seems rather a wasted opportunity as through my experience as a public law teacher I have found that educational cosmopolitanism is eagerly sought and happily received by many students.

Within the six sites, there were significant differences in the framing of the canon of public law knowledge as exemplified in different approaches to teaching. At Canzac, Canshay, Engcar and Engeve the primary learning event was the lecture, with seminars being a less frequent learning event and timetabled after the transmission of knowledge. This approach is an example of what Shulman (2005) refers to as a 'signature pedagogy' and, like the case method and doctrinal research, is widely accepted as the most appropriate way to teach law. As explained above, this did not mean that there was uniformity in delivery. It was observed that individual lecturers selected and emphasised content at their discretion which meant that these learning events were the site of both official and powerful knowledge. What this approach at these sites did demonstrate, however, was that the main agency is with the lecturer who retains the fundamental responsibility for maintaining the sacred academic space of the curriculum (Lockett, 2009, p. 443).

Not every research site approached the delivery of public law knowledge in this way. At Engbet, where the LLB student numbers were particularly low, lectures and seminars had been replaced by workshops. In the session observed, the tutor took a very directive approach to knowledge transmission, with clearly articulated pre-sessional instructions; paper handouts of primary sources; interactive whiteboard content; and express links to the associated assessment task (fieldnotes, vol 2:38-57). The students were made aware that the specific cases discussed in the workshop were required to be included in their assessment answers, and how a law essay was expected to be structured. In this there was stronger classification and framing of legal knowledge at Engbet than seen elsewhere. At the other five sites, it was

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generally an expectation that it was for the students to select the taught content for the purpose of assessment.

York was also notable in its difference in relation to the framing of legal knowledge. Under the problem-based learning (PBL) model used at York, it is for the students to collectively devise their learning outcomes in their weekly PBL sessions, and then conduct independent research to enable them to contribute to discussion on these the following week, similar in effect to the flipped classroom approach seen at Canzak and elsewhere (R. Grimes, 2014; Sankoff, 2014). This means that, although the boundaries of the subject area are set by the module leader in the same way as elsewhere, it is for the students to navigate their learning pathways within this space. In this the autonomy of the 'how' of the framing of knowledge passes from the teacher to the student and is consequently considerably weaker than was seen elsewhere.

Another area of interest was the extent to which legal skills and ethics were regarded as being within the canon of legal knowledge at the six sites. During discussions with law school staff in Canada during field visits it was repeatedly stated that "skills without theory is a malpractice case in Canada" (fieldnotes, v1:80). The effect of this entrenched view was that in the public law lecture I observed, the content tended to integrate explanation of both the substantive law and the practical considerations of bringing legal action against public bodies (fieldnotes, v1:74). In contrast, in England, where there is a greater gap of time between the academic stage of legal education and a potential professional career there was little reference in lectures to legal ethics or the requisite legal skills required. It is acknowledged that it is not possible to read too much into this as the number of observations were limited. However, it is of interest for curriculum design in England when considering whether legal skills and ethics discussed within substantive modules (as opposed to contained within standalone modules) could also be regarded as powerful knowledge and therefore of benefit to future students.

#### **4.4.2 Approaches to research and public law knowledge**

A striking aspect of the analysis of the data was the lack of reference made by actors within the PRF of their understanding of how students approach research and how this may differ from past practices. This emphasised an

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ongoing concern of mine about the influence of the internet as an unofficial source of knowledge. This was the subject of a quantitative research task I undertook as part of my PhD studies (Module A, task 2) and also featured in the discussion in my second article in *The Law Teacher* (Gibbons, 2018a). In essence, the fact that students have access to legal knowledge that has not been curated by curriculum designers has an impact on both classification and framing. In my previous research it was found that many students regard open access Google-type resources to be more accessible than traditional textbooks. As they were aware that law school staff have a tendency to be disapproving of these materials, students continue to use them, but do so under the radar. This has the effect of weakening classification as the potential content from these sources is vast, including content from comparative jurisdictions that tend not to be part of the traditional canon of public law. There is also an impact on framing as the students are not following the instructions on 'how'. This means that they may not be reading prescribed materials nor undertaking formative activities that are expected of them. The significance of the effect of this access to **Unofficial Knowledge** is under-researched in higher education and will be the subject of future study.

Within the data set there were references to the importance of the skill of legal research, including D7 of the Consultation Responses who was of the view that "research, analytical, problem-solving and writing abilities" made up half of what was required to become a lawyer. The reality of research in practice, was expressed by C16 and C27 respectively as, "no solicitor needs all [the] facts in their head at any one time in order to function effectively as a solicitor" and "to valorise the capacity to retain knowledge as a characteristic of a good lawyer seems both archaic and odd". References to open access resources on the internet being used as sources of legal knowledge were evident in the student-led blog sites, including [www.lawstudents.ca](http://www.lawstudents.ca) (with guidance including: 'Honestly, there are so many blogs out there that go over case law' (artsydork, posted September 2, 2016) and 'I believe the gold-standard for all legal research is this powerful search engine and tool called "Google". You will not be disappointed, OP!' (happydude, posted June 1, 2016)).

The issue identified here as unofficial knowledge resonates with the theme of authority introduced at 2.6. In the law school the classification of the public law curriculum is chosen by the module leader, who is deemed by the University to have sufficient legitimate authority. In contrast, the material



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found on the internet, which can be accessible and accurate in some instances, but out of date and distracting in others, can be regarded as having charismatic authority (Weber, 1963). The significance of the infiltration of unofficial knowledge to law school curriculum design and its interplay with the discourse of authority will be returned to in the discussion.

#### **4.4.3 The reflective practitioner and public law knowledge**

A final consideration in this section is the extent to which students are expected to interact with and reflect upon the knowledge they acquire within the law school curriculum for the purpose of self-development. This is of particular interest to me due to the emphasis on the work of Schon (1991) within the problem-based learning model at York, and my ongoing research on the effect of the summative assessment of reflective practice on the trajectory of the students' learning (Gibbons, 2015, 2018b).

Following a review of the curriculum documents and fieldnotes it was evident that York was the only site where reflective content was assessed summatively within the core public law module. Conversations with staff, most memorably at Canshay, indicated that there were a variety of opportunities to engage with reflective practice and 'learning agility' elsewhere in the curriculum which, in the context of clinical legal education, could include public law knowledge (fieldnotes, v3:27-33). Within the Consultation Responses Document there was also reference to the benefits of reflective portfolio style assessments (A24) which can be attributed to the fact that these are commonly used as part of continuing professional development activities within the legal profession. There was also evidence of understanding by some of the respondents of the literature on reflective practice and other educational theories, including Miller's (1990) competency pyramid, as these were used as evidence to dispute the proposals for the SQE (C34). The Consultation Responses Document indicated an awareness by some stakeholders of more reflective skills beyond the traditional legal skills such as research, advocacy, and drafting. As C25 stated: "employers are likely to expect lawyers to demonstrate skills in building networks, communication, meeting wider business objectives and developing strategies for long term sustainability". As Hepple (1994, p. 86) observed over twenty years ago "a reflective practitioner must have learned to handle the moral, social, political issues raised by cases, and for that mere legal training is not

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sufficient". It would appear that there are other stakeholders who would now agree with this view.

The importance of legal knowledge being classified so as to incorporate and generate the skill of reflection was summarised by C27 who stated: "Many of our graduates go on to careers in other fields, including acting, politics, journalism, banking and finance and many more. We aim to produce intellectually accomplished well rounded enquiring graduates with a rich, ethically grounded appreciation of law in business and society." This provided evidence again that powerful knowledge is not just about knowledge that can be used for the benefit of society, but also knowledge that can be used for personal enrichment. Creating learning events that facilitate the development of reflective practice within law schools is one way that the framing of legal knowledge could be strengthened within the higher education institutions as a way to promote citizenship, adopting reflective comparative perspectives is another (D. Phillips & Schweisfurth, 2014, p. 176). In this, as advocated by Savage & Watt (1996, p47), practitioners, especially the 'elite' of reflective practitioners, have the capacity to bridge the 'academic-practical' divide. This point is returned to at 4.6.1 below when considering law clinics.

## **4.5 Representations of the legal professional and legal professional identity**

The relevant research sub-questions explored in this section are:

- How is the identity of the legal professional represented in the Official and Pedagogic Recontextualising Fields of legal education?

And

- How is the visual environment in the University Law Schools studied adapted to accommodate representations of the legal professional?

For this the data, most notably the visual data from the physical environments of the law schools, was analysed to consider the choices that had been made either consciously or unconsciously to provide representations of legal professionals. As van Leeuwen & Jewitt (2001, p. 141) identify, representational meaning is first of all conveyed by the (abstract or concrete)

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'participants' (people, places or things) depicted, meaning that the study of visual data is imperative when researching identity.

Where a person's understanding of legal professional identity is taken only from media and fictional depictions and online visual representations, as is often the case for first year law students, it is unsurprising that the Corporate Professional identity is prevailing. As set out at 2.5.3, the 'Google Images' version of a legal professional is a dominant visualisation despite it only representing one version of identity (R. Collier, 2018). What can be seen from an analysis of the broader data set here is that legal professional identity is far more nuanced.

As anticipated, the Corporate Professional identity was prevalent across all of the websites, most notably those from the ORF, and in the physical environments of all of the law schools. This identity was most pronounced at Engbet, as it is, in essence, the unique selling point of a for-profit education provider. Photos of students in suits, and in court dress, and images of libraries and assessment sites reinforce the emphasis that there is a natural continuity between a legal education and a legal career.

There is some overlap between the Corporate Professional identity and the identity labelled here as Prospective. Within the visual data evidence of a Prospective identity included images and associated text that made reference to the power of those with legal knowledge to effect change. The way this differed from the Corporate Professional identity is that this power could come from actors working outside the corporate environment, including academic staff and students themselves. This identity was most pronounced in the research news, student news and student views on law school websites. In some instances what was coded as evidence of a Prospective identity could also be coded as a Democratic Technologist identity. An example being, on the Engcar website, reference to a staff member's leading role within the British and Irish Law, Education and Technology Association (BILETA). It was surprising that on many of the images on the websites within the ORF there was minimal reference to technology. Images instead showed libraries, books, and the use of paper and pen.

The identity that I have, following Bernstein, labelled Retrospective-Elite, was evident in some of the locations, most notable Engeve and Canzac. The

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prevalence of paintings of middle-aged white men in robes is somewhat of a law school cliché, but evidence of these choices in the physical environments of the PRF represents a strong point of view that the history of the law school itself is to be revered and respected. This identity overlapped and merged to some extent with the emerging identity of Democratic Intellectual in the environments where the roles (both historic and contemporary) played by external actors, including donors, alumni and visiting lecturers were emphasised. The Democratic Intellectual emerged as a new and separate identity within this particular context in the way that the identity of academic staff within the law schools were represented. For example, much of the research news on the websites showcased the civic value of research specialisms which, in the case of both the Canadian law schools, included research utilised in judicial reasoning. In the ORF the Democratic Intellectual identity could be seen with the reference to the charitable origins of the Legal Education Foundation website and its objective “To promote the advancement of legal education and the study of law in all its branches”.

One significant way in which the Democratic Professional emerged as being separate from the Corporate Professional was in the prominence in some locations, most notably Canshay and Canzac, to the signage for and student boards about the law school clinic. I return to the significance of this below.

Finally, I turn to the observational data. This is significant as part of the role of legal educators is to introduce students to legal professional actors other than the unrepresentative images of solicitors and barristers that most of them aspire to be when they join the law school. During teaching observations, I noted lecturers explaining the roles of a variety of legal professionals as well as drawing the students’ attention to the importance of their own professional identity as legal academics and commentators. This was most prominent at Engeve as the year 3 optional session I observed was about the role of the Ombudsman, the archetypal Democratic Professional, and the content built on the teacher’s Democratic Intellectual identity, as he is an administrative justice researcher (fieldnotes v2:2).

At Engcar the session I observed was at the political end of the public law spectrum, so discussion of practice was mostly linked to the lack of nuanced legal knowledge of prominent politicians (fieldnotes v2:34). This session highlighted that the emerging identities discussed here do not capture (nor

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proclaim to capture) all potential legal and political identities. As set out at 3.2, I do not aspire to be a 'grand theorist' as this is counter to my feminist identity. It is for someone else, if they wish, to contemplate whether political actors have, or aspire to have, Autocratic (as opposed to Democratic) Professional identities. This will not be pursued further here.

At Engbet, where I observed a first-year seminar for a group of four students of limited ability, the legal professional being discussed was the hypothetical marker of academic essays (fieldnotes v2:40). In higher education in England in the era of REF it is increasingly being argued that law teachers, as opposed to legal researchers, have a lower status (Anonymous, 2019). So much care was taken by this law teacher in this class to explain the processes behind the fair and equitable marking procedures and to provide support for the students' differing needs that a more nuanced Democratic Professional identity was evident. In contrast, in the classes I observed in Canada the focus of discussion was more on the teachers' professional networks, thus adding layers of nuance to the Corporate Professional identity. For example, at Calzac the teacher told an anecdote about a recent meeting with a Provincial Court Judge and the conversation that had taken place about the influence of economic factors on Supreme Court decision-making (fieldnotes, v1:52). At Calshay there was content explaining professional know-how including "former colleagues tell me there has been a lot of litigation about [that provision] in Alberta" (fieldnotes, v1:72). The Corporate Professional identity therefore incorporates the archetypal smart suited lawyer whose image dominates the website images but also encompasses the knowledgeable voices behind the scenes who facilitate the continuance of this identity. This is indicative of the overlap between the ORF and the PRF in the context of law.

As will be developed further below, analysis of the data set illustrated that, in addition to the evidence of legal professional identities aligning with the pedagogic identities recognised by Bernstein, identities emerged that were unique to the law school as a recontextualising field. The significance of this to the utility of University-level legal education being considered a Specialised Recontextualising Field is returned to in chapter 5.

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## 4.6 Emerging evidence of identities and types of discourse relevant to the interplay between legal knowledge and the legal professional

The relevant research sub-question explored in this section is:

- How is legal knowledge taught in the University Law Schools studied, and how is it adapted to accommodate representations of the legal professional?

This was analysed by first giving consideration to the social context of the University law school and then looking at three distinct examples of identities and discourse found within this environment. The key issue is set out succinctly at p35 of the Task Force Document: “Law school deans and faculty understandably expressed concern that the profession may be seeking to dictate law school curriculum and by doing so may undermine the quality of law schools that have benefited from law societies' traditionally minimalist approach to articulating academic requirements”. For this reason, this section explores *what* is relayed about representations of the legal professional from the ORF to the PRF, *how* it is relayed and the significance of this for the interplay with legal knowledge.

As set out in 2.5.1, it is uncontentious to state that professions share family resemblances, summarised by Susskind (2015, p. 15) as:

- (1) They have specialist knowledge;
- (2) Their admission depends on credentials;
- (3) Their activities are regulated; and
- (4) They are bound by a common set of values.

It is shown below that the legal professional has a multifaceted identity and there is considerable nuance in the way (s)he is represented in University-level legal education.

As set out above, the two identities taken from the work of Bernstein are referred to here as **Retrospective–Elite** and **Prospective**. As Bernstein would be the first to stress, neither of these should be regarded as ideal types but merely constructs on a “pedagogic pallet where mixes can take place” (2000, p. 56). He introduced these identities along with other pedagogic identities in Chapter 4 of his 2000 book including what he refers to as “De-

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centred” identities. It would have been possible to look for evidence of all of these identities in the data set, as was done in a study by Power (2006), but this approach was not chosen. The intention here is to develop Bernstein’s theory rather than to use it as a descriptive tool. What became apparent during the research process was that, despite the utility of some of his categorisations, Bernstein’s exploration of identity did not provide enough explanatory power for all of the articulations of identity found in the data. For example, there was considerable evidence of what Whitchurch (2009) refers to as the ‘blended professional’ with aspects of identity drawn from both professional and academic domains.

The key gaps in Bernstein’s theory related to the data specifically connected to what it means to be a contemporary legal professional in the current political and social climate. I have set out here the three main identities that emerged from the data that I have labelled the **Democratic Intellectual**, the **Democratic Professional** and the **Democratic Technologist**. The textual and visual data also led to a representation that can be labelled as the **Corporate Professional**. This is a relatively uncontentious identity and, as explained in 4.2, the evidence of this was ubiquitous. All of these identities are developed further in the discussion at 5.2.3.

The identity I have labelled the **Democratic Intellectual** emerged from a wide range of the data sources including:

- “We evaluate and question to protect and enhance people’s lives worldwide” (law school in Yorkshire website)
- “Ours is supposed to be a literate profession.” (Consultation Response Document - A53)
- “Law societies respect the academic freedom that law schools vigorously defend. There is a strong tradition within the legal education system, particularly in North America, to view law school education as not simply a forum for training individuals to become practitioners of a profession, but also as an intellectual pursuit that positions its graduates to play myriad roles in and make valuable contributions to society.” (Task Force Document, p18)

The term is an extension of the concept of the ‘democratic intellect’ taken from Davie’s (1961) famously path-breaking and majestically polemic work of the same name (as described by Maccormick, 1985, p. 173). In essence, the

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democratic intellect was a term ascribed to the Scottish tradition in the nineteenth century in which the University demonstrated a commitment to civic values, and regarded knowledge itself as a public good (Webb, 2011, p. 18). This idea was transposed to legal education and the teaching of ethics in an exchange of articles in *Legal Studies* in the mid-1980s (Hunt, 1986; Maccormick, 1985), a special edition of the Canadian *Dalhousie Law Journal* looking at the legacy of Madame Justice Bertha Wilson in 1992 (Bryden, 1992; Lessard, 1992; MacPherson, 1992), and more recently in the work of the legal ethicist Webb (2011). The label is useful as it serves to emphasise the importance of the reverence given to people who have a sophisticated understanding of the official knowledge base in law and choose to use their intellect to enlighten wider society.

The concept of the **Democratic Professional** is related and overlapping but it differs in that it is associated with the enhancement of public engagement with the law, rather than, as with the Democratic Intellectual, an individual's knowledge of the philosophical underpinning of the law and a commitment to civic values. It has been developed from Azur's (2008) American monograph entitled *Democratic Professionalism*. His definition of democratic professionalism is "sharing previously professionalised tasks and encouraging lay participation in ways that enhance and enable broader public engagement and deliberation about major social issues inside and outside professional domains." (p130). By extension, Democratic Professionals are people both inside and outside the academy who undertake this work. Evidence of this in the ORF is the process of consultation itself and in the PRF includes the relative prominence of pro bono clinics in the physical space. Of particular note in the Canadian context is the research emphasis within Canzac of working with First Nations communities on projects to enhance their rights (Canzac Report). This is also evident elsewhere in Canada, as evidenced by the research data on optional course offerings acquired from Grenon.

The final identity that emerged from the data was what I have termed the **Democratic Technologist**. This is linked to Susskind's ideas of future 'legal knowledge engineers', 'legal knowledge consultants' 'legal technologists' and 'legal process analysts' but with a democratic aspect adapted from the work of Feenberg (2001) and Brabazon (2007). This identity emerged strongly from the Ryerson Documents and the explanation of work taking place within the



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University's existing Legal Innovation Zone (LIZ), as well as information on law school websites about the use of technology to enhance access to justice.

The theme that links all of these emerging identities is 'democracy', broadly conceived. It is acknowledged that the use of this term here does not engage fully with the subtlety of its meaning, such as in public law when it is used to discuss governance models in constitutional law, and societal aims in administrative law (Murkens, 2018). Instead it is chosen as it was a concept set out in the seminal theoretic study *Democracy and Education* by Dewey (Dewey, 1966) and was also addressed by Bernstein in the Introduction to volume 5. It also stands as a term with which to make a distinction from the concepts of 'autocracy' and 'autonomy' that are used widely in debates about governance models and academic freedom within University environments. I return to these ideas, and provide more detailed analysis of the three emerging identities, in section 5.2.3 below.

The main theme that emerged from the analysis of data in this section was that University-level legal education can and should be regarded as an example of what can be referred to as a **Specialised Recontextualising Field** with its own pedagogic culture. The influence of agents from the legal profession mean that Bernstein's more established concepts of the ORF and the PRF are too simplistic to be useful in this context. As an extension of this, there is scope also to develop some specific legal professional identities. In this research the focus has been on the Democratic Intellectual, the Democratic Professional and the Democratic Technologist but the evidence above indicates that there is scope to extend this further in future research. First some of the discourse themes that emerged from the data are analysed and linked to the terms introduced in 2.6 through an exploration of law clinics, branded student hoodies and the naming of rooms.

#### **4.6.1 Law clinics, optional modules and the discourse of relevance**

All six of the higher education institutions studied here have at least one law clinic run by students with supervision provided by qualified lawyers. At York one of the supervisors is me. The details about the services provided are available on the law school websites, and the clinics are, in most cases, located within the law school with clear signage to assist the service users. The differences in the strength of the discourse of relevance between the

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sites (including the relative positioning, i.e. relevant to, relevant for, set out in 2.6), lies in the way these law clinics are presented to and by the students, the staff, the service users and wider society.

It is common ground within clinical legal education circles that there is a tension between maximizing educational benefit and facilitating social justice, where the latter is often the motivating factor for staff members to get involved (Boothby & Sylvester, 2015; Brayne, 1998; Nicolson, 2015; Strevens et al., 2014). This tension was evident in the data set here where, for example, law school websites often showcase the relevance of developing legal skills through clinical experience to prospective students whereas policy documents, including the Ryerson Documents, highlight concerns about unmet legal needs.

A concern I have as a supervisor in a law clinic is the dominance of the discourse of the relevance of personal skills development in the clinical context. Students articulate motivational factors for involvement with clinical legal education as being more to do with enhancing career prospects than to becoming altruistic and evocatively labelled 'justice warriors' (Nicolson, 2015). The marketing of this resource emphasises this discourse, as illustrated here from a student blog on the website of a Yorkshire law school:

"Whilst volunteering at the clinic I have developed various skills. The experience has vastly improved my interviewing and analytical skills, which are essential for any budding lawyer. I have also grown to understand the challenges that people face when dealing with the legal system, which has enabled me to empathise easily with clients. Whilst at this post I also developed my organisational and communication skills, which have helped to improve my CV."

This is indicative of the positioning of the law clinic in the English context where there is an oversupply of law graduates and the competitive market for training contracts, where interviews are often secured on the basis of having relevant legal experience. This, together with the 'student as consumer' narrative linked to the introduction of tuition fees means that the discourse around law clinics in England is predominantly its relevance to the students in their skills development.

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In contrast, in Canada, the majority of law graduates will secure an articling position following completion of their JD, meaning that law clinics can be used to enhance the ability of service users to obtain relevant and appropriate knowledge and undertake strategic policy work. The difference in the discourse of relevance can be illustrated by the following, taken from the website of an Alberta law school, which indicates a stronger connection to student motivations to enhance social justice and citizenship:

We use the legal system — by engaging in legislative reform and strategic litigation — to help our public interest clients influence the direction of public law and policy.

Our legal work focuses on matters such as:

- enhancing transparency and public engagement in governance,
- improving access to justice,
- generating democratic accountability, and
- scrutinizing the exercise of public power.

Our clients include individuals and community groups who seek to use legal process to achieve systemic change for the benefit of our society.

In both of the examples of law clinics set out here, the students' involvement is voluntary. Without obtaining qualitative data from the students it is not possible to ascertain their motivations in getting involved. For this reason, it is acknowledged that the discourse of relevance is more nuanced than the presentation of this information indicates.

#### **4.6.2 Branded student hoodies and the discourse of authority**

As set out above, the Corporate Professional identity is ubiquitous in the visual media and fictional depictions of lawyers and within the law school environment. An illustration of this identity as a source of authority is that, during field visits to English law schools, it became apparent that a notable minority of students wear hooded jumpers branded with the name of a law firm, vocational legal education provider or student society. Conversations with students indicated that they were willing to wear what they regarded as quality clothing in exchange for a nominal amount of money. It was evident that in most cases the clothing was provided by the same large corporate law

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firms whose promotional literature tended to be most prominently displayed in student spaces. The effect of this is that it reinforces the Corporate Professional as a source of legitimate authority with a stronger visible identity than the justice warriors referred to above (who are occasional identifiable in the law school wearing hoodies branded with virtue-signalling slogans including 'Girls just want to have fun-damental rights').

In Canada the legitimate authority that students emphasise in the way they dress tends to be the higher education institution or the law school itself rather than the paid endorsement of external corporate entities. In both locations in Alberta a shop selling University merchandise was within easy walking distance of the law school and, in addition to hoodies, students had bags, water bottles and stationary branded to indicate their status as a law student. In my, admittedly brief, visits to Alberta the corporatisation of the law school described by Thornton (2012), in the *Privatisation of the Public University: The Case of Law* was more pronounced in the visual environment of the law school than by the students' clothing, as discussed further below. In the words of one of Thornton's Canadian research subjects "the increasing corporatisation patterns are creeping deeper and deeper and earlier and earlier into the law school experience" (p48). The prevalence of the branded student hoodies in law schools does indicate that, without sufficient resistance, this discourse of corporate authority could also become more pronounced in the English law school.

#### **4.6.3 The naming of rooms, the use of pictures and the discourse of reverence**

Reverence for the traditions and history of law is a strong discourse evident in the visual environment of many law schools. For example, in both Alberta law schools, walls are used to display paintings and photographs of individuals such as the former Deans and 13 historic 'Builders' of the faculty of law at Calzac (including 11 white men), and photographs and biographies of visiting professors at Calshay. Visits to other law schools in Canada indicated that the branding of rooms with the names of individual and corporate benefactors and alumni, display boards setting out monetary gifts from donors and the paintings and photographs of distinguished professionals are commonplace. Field visits to law schools in Yorkshire indicated that this is less evident, although the corporate sponsorship of specific rooms, such as moot courts

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and other learning spaces is becoming increasingly common. It was also very unusual for any law school not to have at least one painting of a white man in a judicial robe somewhere within the building.

A notable exception to this discourse of reverence for the traditions, history and practice of law can be seen at Engcar. As is explained on the website, a conscious decision was made when designing the new law school building in 2011 to create a space “intended to promote legal education and research, as well as [Engcar’s]’ desire to advance students’ legal education beyond the classroom and into the community.” The entranceway has a permanent display board setting out the development of equality law in the United Kingdom and temporary displays showcasing the work of an ethnically diverse staff and student population. The discourse here is more about reverence for the power of law to effect change in an unequal world. In this Engcar has bucked the trend. It would be interesting to see how, by changing aspects of the physical environment, other law schools could also adapt the prevailing discourse.

#### **4.7 The ‘presence of absence’ in the data: Democratic values**

The three examples above are intended to show how visual features including displays and marketing materials can potentially affect the discourse within social environments including Universities (Allen, 2018; Metcalfe, 2012; Schertz et al., 2018; Stanczak, 2007). This is relevant to this study about the nexus and interplay between representations of the legal professional and the development of legal knowledge in the law school (Broadbent & Sellman, 2013; Pizarro Milian, 2017). This chapter finishes with a consideration of what is not seen, or what Mitchell refers to as ‘the presence of absence’ (Mitchell, 2011, chapter 6).

Analysis of the visual data indicated that the law school environment includes a wealth of visual signs that have been actively incorporated – as in the display boards at Engcar, or passively accepted – as with the ‘Builders’ wall at Canzac. Some law schools allowed external authorities, including corporate entities, to dominate the student spaces with posters and other promotional materials, whereas others minimized the visual ‘clutter’ by creating designated zones for specific resources and information, as seen at Engeve. Corporate branding has infiltrated the environment in the form of the sponsorship of

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rooms, the provision of student hoodies and the availability of merchandise promoting the law school and its elite inhabitants. This has led to the Corporate Professional becoming the dominant identity, which potentially reinforces a narrow view of what it is to be a legal professional.

What was notable by its absence in the law school environment was any visual representation of alternative legal professionals. This was deemed significant as it has the effect of downplaying the primary function of the law and lawyers. As set out in the introduction, these are, for me, to uphold the values of a humane and civilized society as expressed in the internationally accepted canon of fundamental human rights and aspirations, where lawyers act as the guardians of a fair and equitable legal system (Cooper & Trubek, 1997). This sentiment is shared by others in the law school, for example by the voluntary activities of staff involved in clinics, by the socio-legal research conducted by peers, and often by students within their student societies and extra-curricular activities.

It is posited that this focus on collective, democratic values needs to be sharpened and a stronger discourse around the duty to pursue social justice and enhance citizenship needs to be articulated. Only this will counter the prevailing discourses of vocational relevance, the corporate professional as legitimate authority and the reverence for the past; discourses that have been evident at multiple legal education events in recent years where speakers have been invited from the Solicitors Regulation Authority or, more recently, the Office for Students (fieldnotes, v2:72: Presentation by the Office for Students at a legal education conference). On the current trajectory tomorrow's lawyers seem destined to serve their own self-interest and the demands of capitalism rather than any conception of the public interest (Economides, 1997). This presence of absence is therefore significant and problematic and requires the development of theory to enable it to be addressed.

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## Chapter 5: Discussion

### 5.1 Chapter overview and key themes

In addition to the synthesis of the findings of the previous chapter, the relevant research sub-question explored in this penultimate chapter is:

- What implications can be drawn by legal education curriculum designers and policy makers on the basis of the findings? In particular, how is the identity of the legal professional constructed and represented in the University Law School and to what extent does this influence the classification and framing of legal knowledge?

Analysis of the data set above indicated that it is possible to develop Bernstein's concept of pedagogic identity in the context of University-level legal education as a way to consider new articulations of how legal professionals can and should be represented in the University law school. As set out in 2.3.4, the concept of pedagogic identity was under-developed by Bernstein during his lifetime meaning that this and many of his other ideas, including the pedagogic device and the recontextualising rules, are ripe for application to a new context. University-level legal education will be presented as an example of a Specialised Recontextualising Field (SRF) with its own discourse and identities. For this there will be a consideration of Bernstein's observation that "The career of a student is a knowledge career, a moral career and a locational career" (2000, p66). This idea will be reordered to place the locational career first. Next, there will be a consideration of the implication and the applications of the findings both within public law teaching in Universities but also in the wider curriculum application and policy development fields of professional education.

There will be reference in this chapter and the next to the narrative threads running through this work, being the analogy between a curriculum and a constitution and the ideas that the pursuance of social justice through education is of benefit to collective society, and the ethical role of legal professionals is integral to their privileged status. For this there will be engagement with the theoretical literature on transfer and convergence from comparative constitutional law as a means to evaluate the influence of approaches to curriculum design in the six research locations, with a view to analysing how perceptions of devolved power influence the interplay between

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legal knowledge and the legal professional. This is significant as the chosen locations of Alberta and Yorkshire are the second biggest legal markets in Canada and England respectively, and therefore struggle with an identity independent of the primary locations of Ontario and Greater London. This is also important because it highlights the challenges of using the nation-state as a focal point in comparative research due to the enormous diversity of education between and within countries, as seen here.

The central arguments of this thesis will be discussed and developed in this chapter and the next with continual reference to the data and analysis. This aligns with the research cycle chain of reasoning used throughout (Tashakkori & Teddlie, 1998). This approach, and the ongoing commitment to the development of theory in a new context, is strongly aligned with the epistemological position of social realism.

## **5.2 Development of Bernstein's concepts using data and analysis**

By his own admission, Bernstein was receptive to the development of his ideas, stating in his response to the papers in Sadovnik's edited collection: "It is very reassuring when the theory is found to be useful in contexts other than those for which it was originally designed" (A. R. Sadovnik, 1995b, p. 385). This illustrates his appreciation of the distinction between what Snow et al (2003) refer to as **theoretical extension**, and **theoretical refinement**. As they explain, the former involves explaining the relevance of pre-existing theory to a different context and examining the transferability of a theory. The second is the elaboration or modification of a pre-existing theory using new empirical material. This research is primarily an example of the former, with the extension of the SRF to University-level legal education and the development of new theoretical identities examples of the latter.

The main theoretical development here is to engage more with the concept of **specialisation** in University-level legal education where it can be seen to have particular resonance. This idea was introduced in Bernstein's latter work and is now the focus of some of Young and Muller's most recent work (Young & Muller, 2016) and the work of Guile et al (2018). As Brown explains, the ultimate test of a developing a language of description is to gauge the extent to which it can be acquired and used with a minimal level of ambiguity (A.



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Brown, 2006, p. 140). It is hoped here that there is sufficient clarity in the meaning of the term to fulfil this aim. The intention is to align my approach with Moore's description of Bernstein as "a theorist not of reproduction but of *interruption*: of the principles and possibilities of disordering and disruption, of the structuring of *change*" (Moore, 2013a, p. 37 emphasis in the original). Suggestions for change are set out within the discussion below.

### **5.2.1 The Specialised Recontextualising Field: The education of legal professionals in University-level legal education**

The students' locational career is situated in what is referred to here as the **Specialised Recontextualising Field** (SRF). As Bernstein explained, this site produces and reproduces imaginary concepts of work and life which abstract such experiences from the power relations of their lived conditions and negate the possibilities of understanding and criticism (Bernstein, 2000, p59). Like all social spaces, the SRF is influenced by both its structure, and the agency of the actors working within it (Archer, 2003). The concept of the SRF was developed by Bernstein following research into the English school curriculum in the 1980s, meaning that its inclusion here is for the purpose of theoretical refinement. It has particular resonance when considering the educational of legal, and other, professionals because the access to specialist knowledge and the need to adhere to a common set of values are the fundamental aspects that prospective lawyers need to demonstrate to be granted admission to the profession. Physical location is relevant in that regulations differ by jurisdiction and, as seen here, this has an influence on the differences between the structures of the SRFs of the two country locations uncovered by analysis of the data set, and the motivations of the actors within them.

It has been shown that Bernstein's better-known terms the ORF and PRF do not really 'fit' when considering the education of legal professionals. Although he made reference to regulatory bodies in his original definition of the ORF, the fact that he stated in his last book that "there is no ORF for the construction of an official higher education discourse" (2000, p. 60) implies that his reference to regulatory bodies were to State bodies rather than, as here, specialised professional bodies. Similarly, the term PRF, has been developed almost exclusively by Bernstein and Bernsteinian researchers in either school settings, or when conducting research into 'singlars'. This

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means that the theory can be refined for University-level legal education by giving greater prominence to the idea of a SRF sitting between, and overlapping with, the ORF and PRF, with actors moving within and between the sites.

It is relatively uncontested that the SRF that includes University-level legal education 'produces and reproduces imaginary concepts of work and life' and this was evident in the analysis of the text-based, visual and observational data. For example, the curriculum documents and field notes indicated the pervasive focus in the Canadian law schools was on the development of legal skills, including mooting and advocacy, and there was greater use of simulation as a teaching approach (Stevens et al., 2014). There was also a strong message from the law teachers I met in Canada that the local legal community wants to be involved in the life of the law school and that there is a drive to make students 'practice-ready' (fieldnotes v3:1-3) to include the ability to manage appropriate communications with clients and peers (fieldnotes, v3:51). In contrast, in England, there was a greater emphasis on research-led teaching as befits undergraduate level education. It can be seen that these variations in the SRF and the differing approaches to legal knowledge acquisition within it can influence students' critical understanding of the law and the extent that 'the power relations of their lived conditions' have an impact. As mentioned above, this is relevant in the context of University-level legal education at the two locations due to the structural, regulatory differences in the location of the acquisition of legal professional knowledge. For further analysis of this, the analogy of curriculum as constitution will be developed with reference to some of the most popular and persuasive theoretical ideas from comparative constitutionalism and comparative education (Arnove, 2010; Hantrais, 2009; D. Phillips & Schweisfurth, 2014).

One theory that is pervasive throughout the comparative constitutionalism literature is that there is an ultimate version of a constitution to which all other constitutions will eventually **converge** (Jackson, 2005). The timescale for this is not set out, however the evidence of constitutional **borrowing** (Smith, 2011) and constitutional **transfer** (Frankenberg, 2010) is presented by many as evidence of this trend. I share the reservations of Dixon & Posner (2011) in this regard and see this as an example of academic scholarship failing to take due account of political reality. What can be seen to have greater utility in this context are the ideas that there is much to be learnt from analysing the

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constitutional **dialogue** that takes place between the constitutional actors within and between different countries, leading to examples of what are referred to as resistance to, and engagement with, the features evident elsewhere. (Amos, 2012; Dixon, 2007; Jackson, 2005).

As can be seen from the data set, contenders for influence within the SRF of University-level legal education include the legal regulators, the legal profession, law schools, educational theorists, policy makers and the students themselves, all of whom can be regarded as actors within the field. As a consequence, there is no unanimous agenda and the field is riven by competing needs and wants. The significant differences between the structures of the SRFs of England and Canada can be seen to contribute to the variation in environments. Most notably these include the greater influence of policies emanating from the legal regulators in England, and the stronger regionalised autonomy within Canada. Although there is evidence of change in this regard, for example the greater regulatory oversight brought in in Canada as part of the FLSC National Requirement, the two curriculums are a long way from anything resembling convergence. This is especially the case as now England, under the direction of the Solicitors Regulation Authority, are moving away from an approved common law degree approach.

It is clear following a review of the data that there is engagement with curriculum features found elsewhere, akin to the ideas of borrowing or transfer. One example of this is the acknowledgement in the Ryerson letter that the simulation technology used on the Legal Practice Program at Ryerson was adapted from the UK. Another is the reference to educational models from different jurisdictions set out in the Solicitors Regulation Authority's consultation documents. The influence of the ideas set out in the Carnegie Report and those of theorists including Susskind are also evident in both locations, although the relative engagement with them differ. It can be noted that the pursuance in England of the Teaching Excellence Framework (TEF) was also met with interest by the Canadian legal educators and regulators I met (fieldnotes, v3:65).

With regard to dialogue, Priestley et al found that teachers tend to mediate the curriculum in ways that are often antithetical to policy intentions, leading to an implementation gap and unintended consequences. (Priestley, Biesta, Philippou, & Roinson, 2016). This is of concern in the SRF where policy and

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curriculum are so intertwined. Parts of the data set, most notably the Consultation Responses Document and the Task Force Document, shows that dialogic conversation is taking place to a limited extent between the regulators and academics with a research interest in education within each jurisdiction. It can also be seen that the Heads of Law Schools in each country location have regular communication, with the purpose of sharing practice and influencing policy. What is missing though is evidence that any of this dialogue crosses borders. This was evident during discussion with regulators in Canada in which there were significant commonly held misunderstandings about legal education in England (fieldnotes, v3:19). Elsewhere in the data set there was significant misunderstanding about other institutions and jurisdictions and a propensity towards resistance to curriculum ideas emanating from elsewhere, a situation not helped by a general culture of stasis.

What can be seen here is that for the concept of dialogue to be meaningful there needs to be greater opportunities for the various actors within and between the SRFs to meet and discuss the similarities and differences in the challenges they face. In this the SRF is akin to the PRF which is “composed of positions (oppositional and complementary) constructing an arena of conflict and struggle for dominance” (Bernstein, 2000, p62). A framework for dialogue therefore needs to be constructed to ensure those interested in improving the education of legal professionals can assert their dominance in this space. This is so as to counter the prevailing marketisation of higher education and the problematic discourse of ‘value’ (Thornton, 2012). There are some examples of this, such as international conferences organised by the Clinical Legal Education Organisation (CLEO)<sup>6</sup> and the Legal Education Research Network (LERN)<sup>7</sup>, but these are not open to the majority of people working within the SRF.

It is apparent that in many cases in the current market driven SRF, it is not the intellectual quality of the education offered by law schools but its perceived economic value that is of interest to many students (and their parents), a factor that contributes to a growing instrumental view of education in higher

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<sup>6</sup> [www.cleo-uk.org](http://www.cleo-uk.org). Accessed 3 September 2018

<sup>7</sup> <http://ials.sas.ac.uk/about/leadership-and-collaboration/legal-education-research-network-lern>. Accessed 3 September 2018

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education institutions (Bradney, 2011, p. 61). This concern about the instrumental outlook of law students runs alongside another concern about what Samuel refers to as the 'authority paradigm' (Samuel, 2012, p. 477). His concern is that in professional education the professional bodies can always rule that a specific degree is not adequate to permit exemption from professional examinations, meaning that they ultimately hold the trump card (although, in the context of law, they are unlikely to wield it). For Samuel this paradigm is restrictive in its effect because it can result in a faculty that is largely enslaved to the outlook of the profession. From the fieldtrips conducted, it is evident that concerns about both student instrumentality and the impact of the actions of the regulators are currently influencing the educational terrain within the SRF. It is proposed that to counter the power of the regulatory agents, curriculum designers need to strengthen their voice and increase their dialogue with the other actors within the SRF, to include the legal profession, other law schools, educational theorists, policy makers and the students themselves, as a means to reset the educational agenda for law schools. Enhancing and promoting dialogue between the actors within SRFs in different countries through the greater use of technological methods of communication could help to realign this trajectory.

It is acknowledged that the boundaries of the SRF are fluid and porous, with considerable overlaps with both the ORF and the PRF. It is therefore more useful to see the SRF as a living legal and social culture where people do not need to take entrenched positions and where they should be encouraged to respond and reflect on events to enable them to modify and refine their views. As was seen in the Consultation Response Document, actors within the SRF have multiple and overlapping identities. For example, the concept of academic autonomy is highly valued even by consultees within regulatory roles demonstrating that they too can be seen to straddle the ORF and the SRF. What was most striking was the pride most respondents took in their inclusion in the SRF and their identified status as actual or aspiring professionals. This focus on identity will be returned to in 5.2.3. First there will be a consideration of the development of ideas around specialised discourse.

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### 5.2.2 Specialised discourse: Countering the potential influence of unofficial knowledge

It has been shown in 4.6 above, that the knowledge career of the law student is influenced greatly by the specialised discourses that take place within the SRF. These included: the discourse around the canon of public law knowledge and its status as both official and powerful knowledge; the discourse of relevance in relation to the acquisition of legal skills; the discourse of authority emanating from corporate law practices as seen in the increasing use and promotion of branded clothing; and the entrenched discourse of reverence towards the 'founding fathers' and traditions of law as it is taught in higher education, such as that found on the Canadian law school websites. It was seen that there was a strong shared specialised discourse in both country locations, most notably in the entrenchment of public law knowledge within the curriculum and the prevalence of the corporate professional identity. There were some differences between the discourse in the two countries which, for the most part, could be attributed to the different educational levels of the students. This included a strong discourse in Canada of the law school being the gatekeeper to the profession (fieldnotes, v3:15: Discussion with Canadian law teacher) and a discourse about the importance of critical thinking in England linked to the broader concerns of higher education institutions around the purpose of undergraduate education. However, there were also locational differences within countries, most notably between the relative focus on the societal importance of a legal education at Engcar and Engbet, meaning that distinctions in the specialised discourse between and/or within sites in England and Canada were found to be more nuanced than anticipated.

Many of the findings from this research could have been chosen for theoretical extension. However, the focus here will be on what was identified as an emerging specialised discourse, being the need to counter the potential influence of unofficial knowledge on the classification and framing of legal knowledge.

To recap, for Bernstein (2000, p65) **official knowledge** refers to the educational knowledge which the State constructs and distributes in educational institutions. For Apple (2000, p64) official knowledge, exemplified by the textbook, is compromised knowledge, in that it is knowledge that is

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filtered through a complicated set of political screens and decisions before it gets to be declared legitimate. In this view certain texts are given legitimacy by an academic community, in that they support a particular set of epistemological and narrative assumptions about what constitutes ‘teaching’, ‘research’, ‘knowledge’ and truth’ with certain pedagogic assumptions either explicit or implicit within them (R. Edwards & Usher, 2000, p. 109). The term has been adapted here to include the ‘top-down’ knowledge about the State taught as part of the public law curriculum within University-level legal education. This is because law is an example of a trained knowledge code (B. Bernstein, 1981). There is a need in law for a mastery of particular, principled disciplinary skills, practices and knowledge, signalling stronger epistemic relations. It was found in chapter 4 that the canon of public law was strongly framed by the requirements of the regulators and the content found in textbooks in both countries, however, the framing differed by location. Although there was a strong persistence of the traditional lecture-seminar approach, the influence of more experimental approaches to teaching and/or staff positioning had an effect on the relative strength of the framing. With regard to the latter point, it appeared to be due in part to the fact that experts teaching at University level find themselves in a dilemma between the requirements related to the formal capacity of their educative role on the one hand, and the role expectations that are aroused by them being experts on the other. This was partly mitigated in York due to the problem-based learning design, but still evident from the observations of teaching practice.

The argument introduced at 2.4.3 and developed in 4.4 was that public law should be conceptualised as **powerful knowledge** and **specialised knowledge** in addition to its status as official knowledge as this would help to instil a sense of citizenship when considering the social justice aspects of legal challenges against the State. It is suggested here that this may go some way to weakening the discourse of authority that was evident in the data. There is potential for this example of specialised knowledge to be developed using the distinction made by Young & Muller between knowledge *specialised to develop conceptually* and knowledge *specialised to a contextual purpose* (Young & Muller, 2016, p. 210 italics in the original). This is of great interest however, it is beyond the scope of this thesis.

The additional categorisation of knowledge that emerged from the analysis of the data has been labelled **unofficial knowledge**. This is the term applied to

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the weakly classified knowledge available via internet search engines including, but not limited to, Wikipedia. The problematic nature of using the internet as a source of knowledge was identified by Apple back in 2000 when he stated: "The effects of [the internet] on definitions of official knowledge and where knowledge comes from will be profound. The official approved text no longer has a monopoly. There is little public accountability on what is seen as "fact" (M. Apple, 2000, p. xxvii). It is evident from the notes from discussions with curriculum providers during field visits and at conferences that this verification issue has become more pronounced over time. As an example, the comprehensive Wikipedia sites for all of the caselaw referred to in this thesis make frequent appearances as core content in University essays despite not being of sufficient academic rigour to be source material. The reason this can be regarded as unofficial is that the referencing of student essays often does not cite the sources appropriately as they resort instead to secondary referencing to give the illusion of authenticity. It was reported by Engbet that this issue was most pronounced in work produced by distance learning students (fieldnotes, v2:58). Elsewhere in the dataset, the rise of unofficial knowledge was found in the presence of absence (see further 4.7). As Brabazon (2007, p. 20) identifies the impact of Google and other internet resources on education, training and learning is assumed, but underwritten.

There is no intention here to advocate for greater State regulation of the internet as a means to monitor the influence of unofficial knowledge, as this is beyond the scope of this piece. Instead it is suggested that there needs to be a greater theoretical engagement with the problem created by the prevalence of unofficial knowledge within University-level legal education. Some initial progress on this can be seen in the following extract from the Taskforce Document:

Technological advances for delivering information are moving rapidly. The Task Force does not wish to inhibit innovative delivery or experimentation in this area. At the same time, however, it is of the view that Canadian law school education should, as it does today, provide a primarily in-person educational experience and/or one in which there is direct interaction between instructor and students. The use of the term "primarily" in the Task Force's recommendation is intended to allow for innovation and experimentation. (Task Force Document, p41)



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The significance of the influence of the internet as a source of unofficial knowledge for Bernsteinian theory development is because, in the language of the pedagogic device set out at 2.3.4 above, the internet is ‘the carrier’ (or relay) of knowledge and the websites such as Wikipedia are ‘the carried’ (what is relayed). It is acknowledged that learning is not ‘done’ via the internet, just as no one learns anything ‘by themselves’ or in isolation. All learning is conducted in a context that constructs a scholarly and structured relationship between data, information and knowledge. What is of particular concern about unofficial knowledge in University-level legal education is that the internet ‘carrier’ is global, but the content of ‘the carried’ is dictated by a small number of American companies. As a consequence, the internet allows for mainstream opinions to be formed without sufficient substantive background evidence, meaning that there is the appearance of a growth of knowledge, but a paradoxical decrease in the degree of knowledge grasp.

One way to address the inherent ideological bias caused by a lack of control over the source of information on the internet, is for the actors within the SRF to develop a **specialised discourse** to counter its effect and recontextualise ‘the carried’ for knowledge development. For this, the actors need to acquire greater familiarity with the literature on relevance (touched upon at 2.6) and the effects of technology on the creation of echo chambers and filter bubbles (Menchaca, 2012; Pariser, 2012). They need to be mindful of the role of technology being what Soloway evocatively termed “a Trojan mouse” (Soloway, 1996). This is because the internet represents new technoscientific modes of production that stand for new modes of domination (Banakar & Travers, 2013, p. 282). This is of particular concern when the very nature of the subject being researched, most significantly public law, is about the extent of State power.

It is evident, most notably in the edited works of Birks (Birks, 1994, 1996) and more recent writers including Cownie (1999), Burridge (2001) and Thornton (2012) that the aims of legal education in any particular era are influenced by the wider social context. Due to factors including the greater internationalisation of the curriculum in higher education, and, for public law in England, the effects of Brexit, attempting to address the potential ideological influence of ostensibly neutral carriers of knowledge is of paramount importance. This is so as to avoid the risk of what Bernstein refers to as

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**pedagogic appropriation** (2000, p57), which can occur when the weakening of classification creates a space within the relevant field where actors are able to assert their position and change the direction of educational policy.

Developing specialised discourse including a discourse to counter the pervasive influence of unofficial knowledge, and being mindful of pedagogic appropriation, has the potential effect of strengthening the concept of agency within Bernstein's theoretical armoury.

### **5.2.3 Specialised identities: The representation of the legal professional and enhancing democracy as an underlying value**

For Bernstein (2000, p59) a **specialised identity** "arises out of a particular social order, recognition, support, mutual legitimisation and finally through a negotiated collective purpose". The SRF set out here is an example environment where such a specialised identity can develop. As seen at 2.5, the **mutual legitimisation** of a professional identity has a long provenance, with specific approaches to the classification of the specialised identity. What amounts to the **negotiated collective purpose** is rather more problematic, due to the conflicting representations of what it means to be a legal professional in an environment where the image of the corporate professional is ubiquitous. As was seen in chapter 4, the framing of the role of the legal professional is inextricably linked to articulations of legal knowledge within the SRF. Thus, the moral career of the law student, which includes the development of specialised identities, begins to emerge during their time within the SRF, and can be seen to be influenced by curriculum choices and the physical environment. This is in accordance with Bernstein's belief that hierarchies of power in society are embodied and communicated in the cultural reproduction that happens in the classroom, through the selection and distribution of identities (M. W. Apple et al., 2009, p. 90). In the famous words of Bernstein: 'The construction of the inner was the guarantee for the construction of the outer. In this we can find the origin of the professions' (B. Bernstein, 2000, p. 85).

Within this idea of the 'construction of the inner' is the formation of the importance of the concept of **democracy** to the emerging identities that derive from the data. As explained in 4.6, the term refers to how it was used in *Democracy and Education* (Dewey, 1966) and in the Introduction to *Pedagogy, Symbolic Control and Identity* (Bernstein, 2000) as, in effect, a

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shorthand for the importance of education in the pursuance of collective, civic values. This means that regulators too can be perceived as “democratic designers” (fieldnotes, v4:62: Notes from a presentation at an English legal education conference). I am mindful that we currently live in an age of what Murkens (2018, p. 43) has recently labelled “confused democracy”. As he explains: “[The fact] that ‘democracy’ obtains several meanings is something we can live with. But if ‘democracy’ can mean just anything, that is too much.” I am mindful of this concern. Here the antonym of ‘autocracy’ is useful to draw attention to the pursuance of collective rather than individual values. This aligns with what Jensen refers to as the twin aspects of educational democratization – being structure and experience (Jensen, 2008, p. 33). For Jensen democratization is a concept that concerns a continuous struggle about influence and power sharing. Pursuance of the experience of democratization is of value in the context of schooling (of which he wrote) but also within the SRF as it “captures a notion of a continuous process to do with the development and enrichment of everyday life” (Jensen, 2008, p3). In typically evocative style, Giroux states “Higher education may be one of the few public spheres left where knowledge, values, and learning offer a glimpse of the promise of education for nurturing public values, critical hope, and a substantive democracy” (Giroux, 2014, p. 140). This promise provides guidance for the rest of this section.

The idea that the development of specialised identities involves a **continuous process** of learning indicates that there is a need for a focus on reflective practice and reflexivity in the development of identity in the SRF. For Durkheim (1983, p. 8), all discussions about law and morality have to incorporate elements of reflection, and be subject to criticism, so as to be flexible enough to change gradually whilst simultaneously retaining authority. In my previous work on the assessment of reflective practice I argued against the view that reflexivity is intrinsically linked to individualism (Gibbons, 2015). University-level legal education is an environment where it is important to nurture collective reflexivity. As can be seen from the data, this can assist in the development of a democratic underpinning to specialised identities. This is of particular benefit in the teaching of public law.

Set out below are some thoughts on the characteristics and benefits of the three emerging identities that need to be strengthened in the SRF to counter the pervasive market driven agenda and competing identities that are more

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individual and instrumental in their pursuits. During field visits it was often stated by peers that there are a broad range of legal professionals, and this was evident in the way legal professionals were represented in teaching sessions too. With the exception of Canshay and Engcar, the physical environments of the six sites portrayed a rather narrow visual image of specialised identities which could have the effect of limiting the types of identities to which students aspire.

### 5.2.3.1 The Democratic Intellectual

The first specialised identity that needs to be strengthened in the SRF is the **Democratic Intellectual**. Although notionally this identity accords with the image of a legal academic, it was seen from the data that the focus on collective values was not universal and that despite being a literate profession, individuals who could be regarded as Democratic Intellectuals struggle to have a place in representations outside the classrooms of specific staff.

There were glimpses of the nurturing of the Democratic Intellectual at the six sites. Examples of this are website images of groups of students studying together and reference to student academic and skills competitions and prizes. The focus on intellectual was more pronounced in some settings, for example the physical prominence of the site of the library at Canzak, and the location and labelling of the staff photos at Engeve. However, for the former, the democratic aspect of this identity was countered by the labelling of rooms with the names of individual benefactors in the immediate vicinity. For the latter, the information fell short of providing information about how the impressive academic credentials and research work of staff contributed to the enhancement of collective society. Although this information is available on the law schools' websites, it was not prominent in the physical environment at any of the research sites.

One way that the identity of the Democratic Intellectual was more pronounced in some locations was in the signage advertising public lectures and events. It is understandable why this content is not overly prominent in the physical law school environments, as they are not truly public spaces. However if, as Harland believes, the key function of higher education is to produce wise citizens who are willing to confront and understand their own values, to

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develop these and to have the intelligence and emotional resource to be able to challenge the values of others, it would be of benefit for them to be made more aware of the identity and work of the Democratic Intellectuals in their midst (Harland, 2011, p. 5). Very few public intellectuals obtain the recognition and status of, say Noam Chomsky, Edward Said, Germaine Greer or Henry Giroux but the gradual demise of the ‘public academic’ in public life is a loss not only to wider society but to students who are in the process of developing and reflecting upon the construction of the inner (Harland, 2011, p. 7).

One location where the Democratic Intellectual has a prominent role for those who know where to look is on academic blogs such as the UK Constitutional Law Blog<sup>8</sup> and the UK Human Right Blog<sup>9</sup>. These have proven to be important sites for intellectual debate in public law in the current tumultuous political environment. Despite there being a concern about the strength of the male voice in these forums, they can be seen to counter Harland’s view and strengthen the image of the Democratic Intellectual for those students who are made aware of them.

### 5.2.3.2 The Democratic Professional

The second specialised identity that would benefit from greater promotion in the SRF is referred to here as the **Democratic Professional**. As set out in 4.6 the Democratic Professional is located both within and outside the academy and works to enhance public engagement with the law. Gina Miller and her legal team exemplifies this specialised identity following the successful case to clarify the role of Parliament in the wake of the Brexit referendum.<sup>10</sup> Within University-level legal education the classic example of Democratic Professionals are staff who adopt clinical methods within legal education and involve students in pursuing the rights of people in a bottom-up approach.

Analysis of the data set showed that the work of Democratic Professionals is far broader than originally conceived, and that the interplay between representations of this identity and legal knowledge was more nuanced. The

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<sup>8</sup> <https://ukconstitutionallaw.org/blog/>. Accessed 6 December 2018

<sup>9</sup> <https://ukhumanrightsblog.com/>. Accessed 6 December 2018

<sup>10</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Available at <https://www.supremecourt.uk/cases/uksc-2016-0196.html>. Accessed 6 December 2018

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idea from Bernstein of a negotiated collective purpose provides for a broad conception of the motivations of this identity. For example, in Alberta, it was seen that there were numerous prominent State and corporate employers within the province who provided financial support and employment opportunities to students within the law schools. These included representatives (often alumni) from the energy and extractive industries and national security bodies (fieldnotes, v3:1: Discussion with Canadian law teacher). Instinctively I regarded this in a negative way as examples of market-driven education. However, following conversations with relevant staff, who were passionate about educating students not only about the law underpinning contractual relationships between multi-nationals but also, for example, the property rights of the indigenous population, it was evident that the negotiated collective purpose was far more complex. This was an example of how the emphasis on enhancing knowledge to include a focus on local culture and the local economy was being used in a way to counter the effects of globalisation from outside the region.

There is the potential for the Democratic Professional identity to be strengthened to enhance the law students understanding of the role of law in contemporary society. In the context of public law, the emphasis on public engagement with the law can include both knowledge about, and activism to help, people whose rights are infringed, but also a greater appreciation of international influences. The increasing numbers of international students within law school classrooms, books from other jurisdictions in University libraries (fieldnotes, v3:13: Law school environment observation), combined with a greater emphasis on inter-disciplinarity in University-level legal education can also assist in developing a more sophisticated understanding of who Democratic Professionals are, and what Democratic Professionals can do.

#### **5.2.3.3 The Democratic Technologist**

The final emerging identity is termed here the **Democratic Technologist**. Much of the literature, including the work of Susskind, positions technology as a disruption. The data set also revealed the negative influence of technology on the emerging discourse of unofficial knowledge. However, the potential disruptive effective of technology should not be overplayed, it is within the power of actors within higher education institutions to position technology in a

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positive way. For these reasons the Democratic Technologist identity builds on Bernstein's concept of a Prospective Identity but with a greater emphasis on the power of technology to enhance collective civic values.

There are examples of technology being used in this way within law schools, with for example, the CLOCK project<sup>11</sup>, and in the wider community as seen by CrowdJustice<sup>12</sup> and other professional services and access to justice platforms such as Neota Logic<sup>13</sup> and Rocket Lawyer<sup>14</sup>. These together with the alternative viewpoints and delivery methods exemplified by YouTube content could help to weaken the discourse of reverence in SRF and provide opportunities for the strengthening of the female voice. As Brabazon is right to stress, Google and other open access resources make searching for information more democratic, but they need moderation (Brabazon, 2007, p. 22). It is however demeaning of the expertise involved in well-theorised interpretations and scholarship in law to expect the medium to be responsible for the message.

It was evident from the field visits that most law schools are now beginning to embrace the power of technology as a medium for enhancing access to justice through subject specific modules (such as seen with the family law incubator project at Canshay – fieldnotes v3:23: Discussion with Canadian law teacher) or designated legal technology modules. The privilege of a higher education places a special responsibility on students and academics to give something back to the society they serve. A commitment to the development of a Democratic Technologist identity is one of the ways that this could be achieved.

#### **5.2.3.4 Context and moderation of specialised identities**

When considering the formation of specialised identities in the SRF it needs to be remembered that professional identity is not fixed, but positional (Moorhead, 2010). It is possible for any individual, institution or region to embrace any or all of these identities at any given time together with the

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<sup>11</sup> <https://clock.uk.net/>. Accessed 3 September 2018

<sup>12</sup> <https://www.crowdjustice.com/>. Accessed 3 September 2018

<sup>13</sup> <https://www.neotalogic.com/>. Accessed 3 September 2018

<sup>14</sup> <https://www.rocketlawyer.co.uk>. Accessed 3 September 2018

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multiple other identities that were evident in the data set. No student or context is a 'blank slate'. As seen from the analysis of discourse in chapter 4, people always come with a background that influences their thinking, and every institution, whether elite or not, provides an environment that is always open to interpretation from those within it, which is based in part on their aspirations for their identity in the future. What is clear is that there needs to be a greater engagement with the specialised identities of professionals to ensure they become agents for change in the future rather than agents of reproduction. As a minimum this means that we should be considering making changes to the visual environment of our law schools to provide alternative images in a bid to cultivate the democratic values that underpin the identities that emerged from the data.

### **5.3 Implications and applications**

In this section the implications and applications of this research to legal education curriculum development and design will be considered before moving on to policy developments. First there will be a brief overview of the utility of the theory-testing comparative case study design used here. This is because, as Ozga identifies comparative research in education often produces definitions of 'good' or 'bad' education systems, defines policy 'problems' and offers directions towards solutions in an overly simplistic and unreflexive way (Ozga, 2011, p. 219). In this the modern nation-state is often represented as a kind of container that separates an 'inside' of domestic political interactions from an 'outside' of international or interstate relations (Rizvi & Lingard, 2010, p. 13). Too dogmatic an allegiance to this idea runs the risk of the "comparative chauvinism" and "comparative humility" identified by Teichler when, as here there is a 'home' and 'away' context (Teichler, 2014, p. 397). This is despite the fact that the work of comparison offers considerable possibilities for theory building around a multitude of issues including transformations of governance, knowledge enhancement and curriculum design, which is why it was chosen (Kettley, 2010).

For the reasons above, I am mindful not to make claims about the implications and applications of my findings that are too bold. Comparison has been used here for the purpose of identifying relative similarities and differences in the classification of legal knowledge and the interplay with representations of the legal professional, rather than dichotomies. This approach has identified



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where there are significant overlaps in, for example, the integration of ethics within the curriculum but also where the two sites are moving in opposite directions, such as with the requirement for an approved common degree programme, and different interpretations of competencies. There has also been review of structural elements of legal education where there are no overlaps between the sites, such as in the education level of the academic stage of professional training and the different approaches to programme admissions. Despite this, it has become apparent that, as anticipated, between England and Canada there is more in common than that which divides us.

One important distinction between the two countries that must be acknowledged is the fact that (for now) England is in the EU, meaning that it has been subject to a greater degree of standardisation as a result of the Bologna process than Canada, leading to an approach to regulation which includes implicit discursive mechanisms such as language used, knowledge making and meaning making in general (Karseth & Solbrekke, 2010, p. 565). This 'Europeanisation' process in Western Europe and 'globalisation' trends worldwide, have, according to Zgaga, pushed European higher education into a situation which required a quite radical cut with extremely diverse national traditions (Zgaga, 2009, p. 176). Although the effect of this in law was less pronounced than other subjects, meaning that readjustment post-Brexit may not be so pronounced, this broader context has greatly influenced the belief systems of actors within the SRF and can be seen to partially explain some of the variations in discourse between the research sites.

### **5.3.1 Legal education curriculum design: A way forward**

The focus of this study has been a macro-level study of the influence of the legal professional and his/her documentary and visual representation on the classification and framing of legal knowledge in the University law school in England. As Cownie identifies, a key feature of legal education is that it is controversial, and law teachers disagree about its objectives, the relevance of other disciplines to the study of law, its place relative to the legal professions and a host of other matters (Cownie, 2011, p. 130). This observation is not of itself overly problematic. However, analysis of the data set reveals that in the SRF much of the communication around both legal knowledge and the legal professional is dominated by implicit rather than explicit meanings – and what

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Bernstein would refer to as a restricted rather than an elaborated code. As Wheelahan found in her study of vocational education in Australia, this type of 'hidden curriculum' has the potential to lock out the less advantaged students from access to powerful knowledge and has the potential to reinforce inequality and social reproduction (Wheelahan, 2007). In the language of this thesis, and as identified by Young & Muller access to powerful knowledge can be seen as fundamentally undemocratic (Young & Muller, 2016, p. 117). For this reason, it is advocated in this section that programme designers need to make explicit their content and environment choices to assist students to navigate around the complex region of law. This picks up on the narrative threads that the pursuance of social justice through education is of benefit to society.

In this section the external factors that influence and challenge curriculum design are first set out in brief. This is followed by a consideration of the need for a more overt recognition of the potential influence of self-interest in the design decisions made by those with authority, and observations about the classification and framing of legal knowledge at the research sites. There is then a consideration of the positioning of individual students within the SRF before some suggestions for a change in approach to curriculum development and design in public law taught at University-level.

Legal education within higher education institutions has not developed in a vacuum. It is evident in both England and Canada that various national and international social, economic and political processes have shaped curriculum design and are embedded within the discourses that take place in law school. In addition to this, there are strong institutional factors that can have the effect of dictating practice and inhibiting innovation, such as the hidden economic cost of staff time, and institutional standards on matters such as assessment formats and marking standards. Flood is of the view that there are now three main challenges for legal education: globalisation, technology, and regulation (Flood, 2015). The influence of globalisation is set out in brief below whereas technology and regulation have been highlighted elsewhere within this work.

Arguably law as a discipline has been late to the influence of globalisation and internationalisation due to the domestic character of practice. This can be seen by the general domestic and historically positioned nature of most subject content. This is despite the recent influx of international students who

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have less of an interest in the societal changes in England that led to the development of key legal principles. More broadly, the focus of globalisation is less on knowledge as seen in subject content, but more on the students and their future needs, and society's needs for them as global citizens. In this it can be seen that globalisation requires a two tiered system; one affirming scholarly standards, and the other vocational competency, with one system focused on knowledge, the other on information (Brabazon, 2007, p. 161). In this view information has no value in and of itself. It must be sorted, contextualised and evaluated by those responsible for curriculum design. For Grossman, this requires a fundamental reconceptualisation of legal training. In his view, today's law school graduates should have the skills to play the role of facilitators and problem solvers in international transactions and failing to teach them this is an omission amounting to negligence (Grossman, 2008, p. 30) The data set shows that, with some notable exceptions, currently curriculum designers in England neither tend to recognise this discussion nor feel it is their responsibility to teach students what can be regarded as the unofficial knowledge of vocational information. Much of the reason for this can be seen to arise in the character of law teachers.

It is a privilege to be a University law teacher. There is the freedom to allow one's own pedagogic beliefs and experiences about knowledge to influence the choice of knowledge taught and pedagogic approaches adopted. In general, the content of the syllabus is greater than the time allowed, meaning that it is the responsibility of the teacher to select, to simplify and to distil in a way that aligns with their interests. The general population would be surprised to know the power that is wielded by all academics over syllabus content, delivery methods and assessment, a freedom that is largely unreported and underplayed. Despite this power, law teachers in the SRF in England tend to be a fairly docile academic community with a propensity to reproduce rather than revolutionise their teaching materials for the core curriculum year on year. Cownie identifies the irony in the difference between law teachers' attitudes to the study of law, where familiarity with the academic literature is a fundamental, taken-for-granted requirement, and their attitudes to pedagogy, where there appears to be, at best, indifference to the existence of the relevant literature (Cownie, 2011, p. 123). Innovation when it does occur tends to be situated within research-led optional modules. As Malcolm identifies, the particular contribution of the most recent decade of research has been to establish by extensive example the research-teaching link as a

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pedagogic choice framed by layers of disciplinary, departmental and institutional variation (Malcolm, 2014, p. 296). This innovation is to be welcomed, but where it sits only in optional modules it is experienced by self-selecting groups within the wider cohort and therefore not comprehensively. In contrast, in Canada the influence of legal practice on the law school curriculum is more pronounced. For example, at Canshay, all final year students undertake a rigorous and testing three-week trial advocacy course delivered by a Queens Bench judge to help them to become 'practice-ready' (fieldnotes, v3:21).

As shown in chapter 4, the stipulations from institutions about matters such as constructive alignment, programme level learning outcomes and assessment rigour, together with the research interests of law teachers, are not the only influence on the classification and framing of legal knowledge. Students are also subjected to both the official knowledge from textbooks and the unofficial knowledge from open access online resources, features of the visual and social environment and their own motivations and beliefs, all of which influence the way they filter and synthesise legal knowledge.

In the Canadian context it could be seen that the framing of legal knowledge was influenced by income streams from outside the law school. For example, individual modules on subjects as varied as energy law and family law were funded or supported by external agents (fieldnotes, v3:23 and 41). When speaking about these modules I found that law staff tended to be objective, detached and dispassionate about the influence of the financing of education in this way even where, as at Canshay, there were extensive budget allocations for the education of small numbers of students (fieldnotes, v3:41). As stated at 5.2.3 I was reassured that this model did not amount to a subservience to market forces. However, in the English context, where students are younger and potentially more impressionable, the borrowing of this model could prove to be more problematic. I share Grossman's view that it is vital that we adapt legal pedagogy to reflect the global nature of today's legal reality by rejection the traditional focus on an autonomous domestic system (Grossman, 2008, p. 34). However, from teaching international law for many years, I am mindful of the potential influence of multinational companies on societal values and would be wary of the influence on the culture of the law school if there was a drive to accept more external financial support.

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In addition to external influences on content, the framing of legal knowledge can also be influenced by approaches to teaching. Despite the fact that in many institutions, most notably in Canada, there is a recognition that legal problem-solving should be a central theme and driving force of curriculum design, as has been advocated by scholars including Moskowitz and Nathanson for a while, it remains the case that only York has a programme level problem-based learning (PBL) model (Moskowitz, 1992a; Nathanson, 1994).

One of the benefits of PBL is its strength in developing knowledge and skills beyond the traditional transmission of legal concepts and cases. This could include some of the skills identified by Canadian peers as being of value, including economic analysis, digital programming, global mindedness and leadership skills (fieldnotes, v3:3: Discussion with Canadian law teacher). As Hepple (amongst others) identified, in many jobs and occupations the skills of criticism, synthesis, lateral thinking, generalization and so on are required, even if the substantive material of the subject turns out not itself to be relevant (Hepple, 1994, p. 79). This point should be strongly emphasised to curriculum designers in the English context where the majority of students do not go immediately into the legal profession.

Future legal education curriculum design must occur with the developmental needs of a student cohort of reflective lifelong learners positioned centrally. The current syllabus in England is largely based on the assumption that students will go into private practice and that they will need to memorise core concepts. In reality, many graduates fulfil a variety of private and public roles including decision-making positions within emanations of the State, such as the civil service or local government. They will also have access to credible up to date legal resources so in effect do not need to 'know' substantive content. For these reasons, there is space in the curriculum for a greater educational focus on the pursuance of social justice for the benefit of society.

Across higher education there needs to be a greater acknowledgement that the relative youth of the student body means that their views on their societal environment are different from those held by the older generation. For example, what has been identified here as a discourse of reverence to the traditions and values of the past might actually be a discourse of incredulity within the student population. As was stated by Canadian peers on a number

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of occasions, “Clever people learn despite the way they’re taught” and “High achieving students don’t need good teaching” (fieldnotes, v3: 15 and 37). Law school students undergo a rite of passage within the law school environment in which they become assimilated into attitudes and behaviours that prepare them for their future. It is for them to interpret all that takes place, including their views about their perceived and anticipated status. To obtain a greater understanding of the discourse of relevance, there needs to be further studies recording the voices of this lived experience.

For all people, young and old, part of their lived experience is their interaction with the State, which is why the teaching of public law has been accorded so much prominence in this thesis. My concern in this regard is with the entrenched conservatism towards both the classification and framing of public law knowledge within the University-level legal education curriculum in England as seen most notably in the core textbooks. Although there obviously have been developments, for example in the decline in the focus on Commonwealth and Empire law, and the rise in prominence of international treaties and the international and comparative study of human rights, the curriculum in most higher education institutions very much follows the constitutional law mantra of “evolution, not revolution”. In this there is a marked difference with Canada, where constitutional law is presented simply as the case law of the court with Supreme constitutional jurisdiction, thus providing more time in the curriculum to consider the effect of Charter rights and administrative law decision making on sectors of society, including indigenous peoples.

In both jurisdictions a place must be found for examining the coercive powers of the State to include normative considerations about the extent of State power. On this, field visits to Canada were inspirational in allowing for consideration of what bottom-up teaching approaches could and should look like. An example of where I saw a novel example of powerful knowledge was where reference was made in the Canadian constitutional law class I observed to the oppressive role of England in their colonial history. The discussion I had about a clinical module where students assisted indigenous peoples to assert their rights to welfare was also illustrative of a powerful knowledge approach to public law and citizenship.

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These examples illustrate that at the core of public law are essential strands of history, politics and legal theory. It is therefore important to remember that law schools have a significant constitutional role in training the Democratic Professionals of the future. For this it is imperative that we stress to students what Mauthe identifies as the facilitative nature of public law (Mauthe, 2007). Public law classrooms are perfect environments for engaging with the concept of interdisciplinarity and developing new ideas for global survival and for social and individual justice (fieldnotes, v3:3: Discussion with Canadian law teacher). In this law teachers need to argue against the Solicitors Regulation Authority's proposals to downgrade public law in the professional syllabus. As can be seen by considering the Canadian examples, public law teachers need to assert their authority so as to enhance the emphasis on education for social justice to increase citizenship and facilitate public interest. To this end and to effect curricula reform, there needs to be a greater consideration of the positions and interests of the actors within the SRF. This is because, as Bernstein identified, when undertaking curricula reform there is a need to engage with... contemporary cultural, economic and technological change and acknowledge the struggle between groups to make their bias (and focus)...policy and practice. (p65).

At an individual level changes in the curriculum tend to involve improvisation at the edge of consensus about what belongs in the law school curriculum based on personal beliefs, research interests and other idiosyncratic factors (A. Bernstein, 1996, p. 218). At an institutional level it usually involves a consideration of what knowledge to recontextualise from the field of production and how this is to be integrated with the existing material and established approaches to teaching. At a national level there are multiple influences, but not many that will result in curriculum change. As seen following the Solicitors Regulation Authority's consultation, the majority of Universities have intimated that they have no plans to change their curriculums in response to the proposed changes to the entry standards to the legal profession although the pressure to downgrade the emphasis on public law is strong.

This continuation of curriculum stasis at a time of constitutional and societal upheaval does not reflect well on legal education curriculum designers. There is currently an opportunity to reflect societal changes with a shift towards a more collective, international curriculum, defined by tighter boundaries, with

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the authoritative specification of content and the greater focus on the sequencing and pacing of knowledge to enhance the focus on social justice. This is despite the potential threats caused by Brexit, marketisation and the introduction of the SQE identified by Guth & Hervey (Guth & Hervey, 2018). What is potentially lost by reducing some of the traditional historical contextualisation, could be replaced with content from other disciplines, such as politics and sociology, and also from non-standard disciplines, such as vocational education and training, economics and management. Curriculum designers need to heed the message from agents within the field of practice that there is a requirement for new skills, new thinking patterns and new perception filters. Such skills have the potential to be powerfully transformative for thinking processes. However, this comes with a caveat: the absence in such a radical curriculum of traditional knowledge and information gatekeepers creates the potential for a slippery fall into mass mediocrity. There is still a need for experts to provide editorial and curatorial functions to prevent everything becoming miscellaneous. In this regard curriculum designers can be regarded as having valuable cultural capital in their ability to critique and organise knowledge.

It can thus be seen that, in curriculum design, much depends on how one defines law and legal knowledge. Samuel argues that if one takes a narrow formalist view – where law is a system of rules isolated from other non-legal norms – it is difficult to escape from the conclusion that developments in the accumulation of knowledge in law can only be achieved by mining disciplines outside of law (Samuel, 2012, p. 476). In this I disagree. The current expansion of legal norms within public law means that the curriculum design should be adapted to represent the move from symbolic to transformative knowledge, or in the language of this thesis from official to powerful knowledge. This would represent a recognition of the utility of the focus on the terminology set out here.

### **5.3.2 Policy developments: A message**

In the final section of this chapter the potential contribution to policy developments of the three emerging theoretical identities will be considered. It is hoped that these alternative representations of the legal professional will help to refocus policy makers on the idea that the ethical role of lawyers is integral to their privileged status. The main policy areas to be discussed will



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be the potential impact of the forthcoming changes to the entry level qualifications of solicitors in England and the limitations on access to justice brought in by the restrictions to legal aid set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). In this it is accepted that policy cannot be understood as a text or a document alone, but rather as a process that is a complex, shifting meld of values, contingency and context (Ball, 1994, 2013). The diversity of approaches to agency is also acknowledged. As stated by a representative of the Solicitors Regulation Authority at a recent event “to pretend higher education is homogenous is misinformed for policy development” (fieldnotes v2: 62).

As explained above, the Solicitors Regulation Authority’s *Training for Tomorrow* consultation process has proved to be controversial within the SRF; and perceived by some as reigniting divisions between the academy and the profession (fieldnotes, v4:54: Notes from a presentation at an English legal education conference). Despite a long process of consultation, discussions with stakeholders at multiple events, lobbying by the Legal Education and Training Group (LETG)<sup>15</sup> resulting in the intervention of the Justice Committee in the form of a letter to the Legal Services Board in March 2018, the decision made at the end of the process to introduce SQE bore a striking similarity to the proposal at the beginning.

This example can be seen as part of a wider belief within higher education that governance is subject to the whims of assertive agents in the field rather than undertaken as a public responsibility (Whitty, 2002), as exemplified by the introduction of the Office for Students in April 2018 amidst widespread incredulity<sup>16</sup>. This is alongside the fact that the increasing presence of corporate interests in the University environments, as seen in the data set, fuels the widely held view that market forces are driving curricula (Tomlinson, 2013). In legal education where it has recently been announced that the for-profit provider Kaplan will be running the SQE exams this certainly seems to be playing out. In policy terms this exemplifies the identified shift towards the individualisation of benefits of higher education and the relative invisibility of its social benefits.

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<sup>15</sup> <http://letg.org.uk/>. Accessed 30 November 2018

<sup>16</sup> <https://www.officeforstudents.org.uk/>. Accessed 30 November 2018

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For these and many other reasons there is now a need for greater activism and public engagement by those who would identify as Democratic Intellectuals, Democratic Professionals and Democratic Technologists. Set out below are three ideas for policy development. This is a non-exhaustive list.

The first suggestion is for Democratic Intellectuals to engage more pro-actively with Parliamentary outreach and the evidence gathering undertaken by Parliamentary groups. This should include providing evidence to Select Committees, including the Justice Committee<sup>17</sup> and the Education Committee<sup>18</sup> as well as the lesser known All Party Parliamentary Groups which include the subject groups Democratic Participation, Public Legal Education and Pro Bono.<sup>19</sup> For some this may require adapting the traditional academic writing style to make their research more accessible to policy makers, but the merits are great for both civic engagement and potential research impact.

The second suggestion is for Democratic Professionals to bring more strategic litigation to highlight injustice and poor practice in public life. The case brought by Gina Miller is the most high-profile example of this but recent work by UNISON to overturn the fees regime in the employment tribunal (*R (UNISON) v Lord Chancellor* [2017] UKSC 51), research on the effect of LASPO on vulnerable people, and the work of organisations such as the Child Poverty Action Group to challenge welfare decisions such as the bedroom tax in the case of *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58 are other ways that people can use their public law knowledge to challenge State power. As the lecturer at Engeve said: “There is a need to speak for those without the energy to complain” (fieldnotes, v2:10). For a speaker at a legal education event in England this is necessary as otherwise “when legal aid returns there won’t be people capable of doing it” (fieldnotes, v4:64).

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<sup>17</sup> <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/>. Accessed 30 November 2018

<sup>18</sup> <https://www.parliament.uk/education-committee>. Accessed 30 November 2018

<sup>19</sup> <https://www.parliament.uk/about/mps-and-lords/members/apg/>. Accessed 30 November 2018

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The final suggestion is for more Democratic Technologists to design technological solutions to create more open access legitimate knowledge and enhance access to justice to counter the stranglehold of the Corporate Professionals who receive the lion's share of legal practice service income. Democratic Technologists, with their greater understanding of algorithms and coding, could also use their knowledge to assist with the establishment of specialised discourse to counter the effect of unofficial knowledge within the SRF.

The examples above illustrate the need for University-level legal education to be proactive as a site for the promotion of powerful knowledge, which, as recognised by Young & Muller is increasingly, specialist knowledge (Young & Muller, 2016, p. 110). One of the benefits of working in academia, being the autonomy afforded to choose how to work, is also one of the pitfalls in that it runs the risk of overly individualistic endeavour. Being a member of a profession is a publicly recognised form of socialisation and by recognising their situatedness in the SRF it is hoped that collective action will be enhanced.

As has been shown above, there are numerous issues to be addressed within University-level legal education in England. These include an oversaturated student market, a lazy pedagogy and unresponsive curriculum, internal wrangling between the academic/vocational factions, excessive, intrusive regulation, and a somewhat morally dubious and protectionist profession with a resistance to technological change. It has been seen here that many (but not all) these issues are also apparent in Canada. By enhancing dialogue between and within the SRFs in both the countries it may be possible to work to integrate an ethical education and enhance the focus on powerful public law knowledge to inspire Democratic Intellectuals, Democratic Professionals, Democratic Technologists and current and future students to effect much needed societal change.

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## Chapter 6: Conclusion

The overarching research question in this thesis was “How are legal knowledge and the legal professional represented in the Official and Pedagogic Recontextualising Fields of legal education?” This was answered by undertaking a comprehensive literature review and thorough discourse and multimodal analysis of a wide variety of documentary, visual and observational data from both England and Canada using a structured, focused theory-oriented comparative case study method underpinned by Bernsteinian concepts. This is an original and significant contribution to knowledge in that it addresses both the substantive and the theoretical ambitions set out in the introduction. It adds to the substantive legal and professional education literature as the detailed analysis has resulted in important findings on the interplay between representations of the legal profession and legal knowledge in higher education and the differences in how these are manifested both within and between Yorkshire and Alberta. Of perhaps greater importance is the contribution it makes to the theoretical literature by building on Bernstein’s conceptual framework and engaging in both theoretical extension in the development of the concept of the **Specialised Recontextualising Field (SRF)** and theoretical refinement in locating the three **specialised identities** labelled here the **Democratic Intellectual**, the **Democratic Professional** and the **Democratic Technologist**. I am already aware that this content is of interest to other legal education scholars and researchers as I have been approached to contribute to forthcoming publications following the presentation of my findings at recent conferences.

The analysis of the research data uncovered that there are currently seismic shifts in the representation of legal knowledge in University-level legal education, including the way it is classified and framed by actors within the SRF and the relative influences of **specialised discourses** within the field, including **discourses of relevance, authority and reverence**. Of primary concern is the effective demotion of the teaching of public law in the proposed changes to the entry level qualification for solicitors in England. I argued that this goes against the direction of travel in the Canadian context where the regulators have decided instead to maintain their oversight of public law knowledge. This is of particular concern to law teachers who, like me,

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consider the public law curriculum to be an important site to promote democratic values, social justice and citizenship.

The theoretical developments arising from the analysis demonstrate the value in utilising Bernstein's concepts when studying the education of lawyers and other professionals. In a characteristic throwaway comment that has been central to this work, Bernstein (2000, p.59) drew attention to a site he called the Specialised Recontextualising Field (SRF) and what he referred to as a **specialised identity**. As he explained "[the SRF] produces and reproduces imaginary concepts of work and life which abstract such experiences from the power relations of their lived conditions and negate the possibilities of understanding and criticism." This idea was illustrated and illuminated with reference to the identities he referred to as **Retrospective-Elite** and **Prospective** and the uncontentious identity within the law school referred to as the **Corporate Professional**. It was also developed through analysis of the data leading to the recognition of the three emerging specialised identities that are unified by their focus on democratic values. It is acknowledged that legal professional identity is multi-faceted, meaning that there are other ways to label these types, and other potential specialised identities that have not been developed. Despite this limitation, it is hoped that there is value in the use of these terms in future research into legal or other professional education.

The theoretical extension of the SRF, the theoretical refinement of the emerging specialised identities, together with the identification of the requirement for a **specialised discourse** in legal education to counter the impact of students' reliance on **unofficial knowledge**, can be seen to contribute to the literature in a number of ways, of which three will be explored in more detail below. It is hoped that these contributions to the suite of Bernsteinian theoretical concepts will be further developed by others. It is anticipated that these findings would have the greatest utility in other professional education contexts, and be of greatest interest to scholars developing the concept of **specialised knowledge** and the distinction identified by Young & Muller between knowledge *specialised to develop conceptually* and knowledge *specialised to a contextual purpose* (Young & Muller, 2016, p. 210 italics in the original). As such, I will continue to disseminate my findings in relevant publications and at academic conferences with this intention.

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Firstly, the use of the term 'democratic'; in all three identities has the potential to be another example of what Young refers to as **powerful knowledge** (2008, p. 14). From his definition, powerful knowledge provides more reliable explanations and new ways of thinking about the world and acquiring it and can provide learners with a language for engaging in political, moral and other kinds of debates. The term democratic being utilised in this way would be of benefit in this context because, as Durkheim advocated, one of the tasks of modern society is to elaborate a secular morality as the source of social cohesion, and in this law plays a significant role (Banakar & Travers, 2013, p. 28). As shown above, in the English uncodified constitution there is an irony that, despite frequent assertions that the country is governed by the rule of law, there is a need for judicial intervention to ascertain the parameters of what that means, as exposed by the Miller case.<sup>20</sup> By using the term democratic in the way it was interpreted by Dewey and Bernstein, there is a stronger conception of collective values. This should have the effect of helping to develop critical thinking about the status quo and the relative balance between collective and individual interests. In this there is a need to be mindful that knowledge has the critical function of transforming society as well as the more conservative one of transmitting received culture.

Secondly, the three specialised identities add a level of sophistication to the established dichotomy in legal education between academic and vocational approaches. The data showed that professionalism is not unique to the actors in the profession, nor is a belief in academic rigour found only in the academy. By broadening the conception of what it means to be a legal professional and what knowledge is required there is a hope that curriculum design could become more nuanced, with, for example, a greater emphasis on the purpose of education, normative discussions about the ideal moral and social order, staged notions of an ideal learner or graduate and notions about how learning occurs (Francis, 2011; Lockett, 2009). The data from law schools including Canzak, Canshay, Engcar and York shows that it is possible, through the use of experiential learning models, to impart both academic knowledge and transferable skills that are of benefit to students heading for academia or practice – or alternative careers across the spectrum of professional life (R.

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<sup>20</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Available at <https://www.supremecourt.uk/cases/uksc-2016-0196.html>. Accessed 6 December 2018

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Grimes, 2014; Holloway, 2014; Maranville, 2001; Sankoff, 2017; Wallace, 2018).

Finally, the development of the three specialised identities could help to ground the more fanciful suggestions of legal commentators, including Susskind (2017), about what the future holds for professional practice. As was shown in the Carnegie Report, one of the problems with having the academic component of professional education located within Universities is that academia is structured in a way that is not conducive to significant change. Universities, more so in England than in Canada, have notoriously slow administrative procedures, rigid standards, competing interests that tend to place research as being of higher value than teaching, and faculty that have a tendency to replicate the environment in which they succeeded. For these and many other reasons it would appear that it is only the disruption of the new that can counter what Trowler (2005, p. 29) refers to as the inherent inertia found in education settings. In this, curriculum designers need to focus on relevance but also allow space for serendipity and happenstance to accommodate the motivations and interests of the learners. Academics would be advised to move out of what Brabazon refers to as the “gated local community of the mind” (Brabazon, 2007, p. 183) and open the doors to new ideas from professional and educational research. As an example, the use of problem-based learning at the holistic programme design level was disruptive when it was first introduced at York 10 years ago. The fact that other law schools have decided not to modify their curriculum in this way despite York’s success could be seen as an example of the inertia found in this gated community. The current proposals in the Ryerson Documents that effectively promote the development of Democratic Technologists to enhance the success of Corporate Professionals seem disruptive, but only time will tell if the future of lawyers is as narrow as predicted by Susskind.

In relation to the second and final point, what is clear is that the internet and its influence is not going away. As shown at 5.2.2, it is another driver of the curriculum, not a gimmick to be ignored. The concern is that it allows for mainstream opinions to be formed without substantive background. Unlike more traditional sources of legitimate knowledge there are no limits to access, and little editorial control. Rather than ignoring this problem, what has been found here is that a specialised discourse needs to be established to counter the effects of this unofficial knowledge. In this, actors in the SRF need to take

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on a nuanced, curatorial role to maintain their role in both classifying and framing the legal knowledge they impart.

In this research I have been mindful of my own competing identities, including my background as a Corporate Professional, my allegiance to feminism and the imposter syndrome I have felt in my current role as a Senior Law Lecturer at York. These have all influenced my interpretation of what Evans (2014, p. 276) refers to as the 'big' questions of sociology, being the questions about social transformation, social inequality and social cohesion. They also influence my feelings about my new status as a comparatist educational researcher. I found, as warned by Teichler (2014. P.394), that the actual comparative empirical research processes turns out to be enormously complicated. Rather than being off-putting, this means that I now have greater confidence and interest in conducting further comparative research. Like most converts, this has led me to be not only a questioning observer but also a ferocious defender of my new identity.

To finish, I return to thoughts raised by Bernstein (2000, p. xix). Bernstein believed that having a more nuanced understanding of education can have a crucial role in creating tomorrow's optimism in the context of today's pessimism. This aligns with my positioning. For this and many other reasons we must respect what he taught us, and always be open to the possibility that future social movements will necessitate the rethinking of even our best theories.



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