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SQEezing the jurisprudence out of the SRA's super exam: the SQE's Bleak Legal Realism and the rejection of law's multimodal truth

Luke Mason

ABSTRACT

This article considers the nature of legal knowledge and legal truth, and the ability of certain forms of examination to appropriately assess them. It thereby provides a critical theoretical framework to understand the Solicitor's Qualifying Exam (SQE), the proposed centralised qualifying test to become a solicitor in England and Wales. In particular, it considers the multiple-choice aspect of the so-called SQE1, which purports to test certain core areas of legal knowledge. The author asserts that SQE1 embodies a thoroughly impoverished vision of law, which he labels 'Bleak Legal Realism', where prospective students are reduced to producing brute predictions of judicial outcomes. The author argues that while multiple-choice examinations are capable of testing various forms of knowledge and reasoning, they are inappropriate in legal contexts due to legal propositions' lack of bivalence, that is they cannot simply be said to be either true or false. Examining the nature of legal truth, both in the context of the general philosophy of law and the broader philosophy of truth, the author argues that legal truth is ultimately characterised by its 'multimodality', that is that it rests upon various qualified 'modes' of reasoning which, in turn, justify any given legal proposition. Because legal truth is constituted by these justificatory modes, any attempt to test legal knowledge without requiring a demonstration of such justificatory multimodality will fail to accurately test legal knowledge, seriously compromising the SQE's utility and legitimacy.

KEYWORDS: Legal Education, SQE, Multimodality, Multiple Choice Exams, Legal Truth

1. Introduction

The Solicitors Regulation Authority (SRA), the regulatory body for the large part of the legal profession in England and Wales. The organisation was established by the Legal Services Act 2007, which also sets out its regulatory competences and objectives. This paper focuses on one particularly controversial aspect of that change, namely whether and how such an assessment is capable of testing legal knowledge. What follows is therefore an exercise in legal theory, in that it posits an account of what makes legal statements true or valid. It is emphatically argued that SQE1, as envisaged by the SRA, embodies a thoroughly impoverished, and indeed largely
incoherent, vision of law, termed within this paper “Bleak Legal Realism”, which fundamentally misunderstands how legal truths are created or identified. Due to the multimodal and justificatory nature of legal reason, there is no brute form of bivalence within legal propositions or putative legal knowledge; legal propositions cannot be said to be either “true” or “false” in a simplistic manner, which is what a multiple-choice-type examination requires in order to be fit for purpose in this context.

While multiple-choice assessments are also thought to be problematic in other important respects, not considered directly in this paper, they are reliable in examining many forms of knowledge, even in sophisticated or “deep” ways, but only in certain “types” of epistemic contexts. Broadly speaking, these are when truth in a particular field is constituted by, on the one hand, its immanence or coherence, or, on the other hand, its correspondence with certain external truth conditions. It is appropriate therefore to areas which are characterised by a unified, coherent epistemology, and those which are characterised by an identifiable external ontology. Legal truth is not exclusively characterised by either of these qualities. The multimodal nature of legal reasoning means that even where legal reason incorporates aspects which resemble such elements, these are merely a few amongst many modes of justificatory argument which lead to valid legal propositions. More precisely, the nature of law and the validity of legal propositions are contested to the extent that there are numerous competing modes which stipulate different accounts of internal coherence and external truth conditions.

Upon deeper analysis, legal truth is different to immanent or correspondent forms of truth due to the fact that legal truth is constituted by the modes of argument which lead to the valid proposition. This form of modal constructivism means that a multiple-choice assessment is incapable of reliably testing legal knowledge. This does not mean, of course, that such an examination is devoid of all value: it must, after all, be testing something, and must contain its own innate account of what constitutes legal truth. It is concluded that the SQE1 embodies a form of Bleak Legal Realism, in which legal knowledge is reduced to the ability to predict adjudicatory outcomes. This is a grave problem for three reasons. Firstly, it does great violence to the multimodal nature of legal knowledge, reflecting instead a simplified and simplistic conception of legal knowledge, reflecting none of the reasoning which itself constitutes the proposition being asserted. Secondly, and even more worryingly, this approach to the testing of legal knowledge is incoherent. While legal realism as a broad intellectual movement brought great sophistication to legal knowledge and practice during the twentieth century, in its most simplistic form, that found in the SQE1, it is simply incoherent: legal truth cannot be a prediction of legal reasoning, when it is this reasoning itself which generates that legal truth. This argument of course echoes that famously found in Hart's reductio ad absurdum of this same form of legal realism, found in HLA Hart, The Concept of Law (3rd edn, Oxford University Press 2012) ch 7. View all notes This method of testing legal knowledge through what is effectively the brute prediction of legal outcomes is being introduced just as this aspect of legal practice is on the cusp of being entirely taken over by the superior ability of artificial intelligence and algorithms to perform this very job. Thirdly, this assessment, if it comes to have a dominant effect on the way in which law is taught and studied more generally in England and Wales, will have an impact not only on the quality of students and the ability of the examination to identify those who are capable of generating legally valid propositions. Due to the law’s constructivist nature, the way in which people think about the law has a direct impact on the law itself: its epistemology and ontology are directly and symbiotically linked. Reducing lawyers’ thinking to a prediction of their own profession’s outcomes will have a detrimental impact on the quality and form of legal reasoning in general, and therefore on the quality of both the performance of those exercising legal services and the content and operation of the law itself. If the legal
profession resists this impact, it will be due to the irrelevance of the exam to the broader education, training and selection of future lawyers.

2. The theory of law and legal education

What follows is a theoretical discussion about the relationship between legal philosophy and the SQE. However, this paper is not about the role of legal scholarship within legal education, nor the role of legal study as a liberal arts degree. Nor is it about the relationship between “academic” and “professional” legal education. On these questions, see the contribution of Anthony Bradney to this issue, and, generally, William Twining, Law in Context: Enlarging a Discipline (Clarendon Press 1997); William Twining, Blackstone’s Tower: The English Law School (Stevens 1994).

It is about the nature of law, or, more precisely, of legal knowledge. This paper explores what it might mean to say that a proposition of law is true, correct or valid, and how we might therefore appropriately test someone’s ability to identify and/or construct such propositions. For the purposes of the present discussion, no position will be adopted by the author regarding whether the validity of legal propositions should be the sole or central component of legal education and training. Legal education, training, and legal scholarship more broadly, can and do include various other aspects, such as the social and cultural significance and genesis of law, its history, its professional usage, and so on. However, most legal education does present such questions as the cornerstone of its curriculum. The Quality Assurance Agency for Higher Education, “Subject Benchmark Statement: Law” (QAA 2015).


At present the solicitors’ profession in England and Wales requires that prospective solicitors demonstrate a sufficient knowledge of the law through a “qualifying law degree”, or equivalent, which covers the so-called Foundations of Legal Knowledge. The SRA’s “Joint Statement” ibid.

The SRA’s proposals for a central SQE replace this “academic stage” of relatively unprescribed legal knowledge with an alternative model. SQE1 proposes to assess legal knowledge in a very specific way, moving from the extreme agnosticism of the past to a sudden and fervent evangelism of the newly converted in measuring it in a new, innovative and very specific way. The proposed form of this stage of the centralised SQE is a multiple-choice examination in which candidates must select the best single answer of a range of options to questions about selected areas of law. These selected areas are, loosely, a combination of the Foundations of Legal Knowledge and those fields of law deemed important for “Day One Outcomes” in the “reserved activities”, that is the specific legal services which solicitors are entitled to carry out, and which fall therefore under the SRA’s regulatory function. Legal Services Act 2007. These are currently the administration of oaths, advocacy, conveyancing, litigation, notarial activities and probate activities. Leaving aside the important and contested issue of whether these fields are the appropriate “Foundations” of Legal Knowledge, either in general or for a prospective solicitor, this change in the SRA’s approach to qualification has a radical effect. The SRA has come to take a specific stance regarding the nature of legal knowledge and the nature of legal truth: of how we know things..
about law and how we test this knowledge. However, reading the SRA’s accompanying literature to its original consultation process and subsequent proposals, there is no discussion about the nature of law or how these views on this matter might impact upon how one can or cannot test the truthfulness or validity of legal propositions.

Solicitors Regulation Authority, “A New Route to Qualification: The Solicitors Qualifying Examination (SQE): Summary of Responses and Our Decision on Next Steps” (SRA 2017). View all notes

It is the assertion of this author in this paper that this has led to an entirely inappropriate form of assessment for legal knowledge. SQE1 is simply incapable of carrying out the role which the SRA assigns to it unless one subscribes to a rather implausible understanding of the nature of law.

A brief word, first of all, on the necessity of this discussion. This is a thesis regarding the nature of law, and therefore is a work of legal philosophy. It is not however a defence, or even a discussion, of the place of the study of legal philosophy within legal education. On this question see Charles Sampford and Hugh Breakey, Law, Lawyering and Legal Education: Building an Ethical Profession in a Globalizing World (Routledge 2017), in particular ch 3.

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However, when one assesses a student’s ability to identify, construct or apply valid legal propositions, there is, explicitly or implicitly, a theory of law which is embodied within the mechanisms of assessment. That is to say, one must have an understanding of the epistemic models which generate or test the validity of certain propositions, or alternatively, an understanding of the ontologically extant “things in the world” which any such proposition must refer to in order to be correct. This, it is hoped, is not a particularly controversial statement. All fields of knowledge and disciplines of science possess their own methodologies and epistemologies. When one asks the question of the nature of those structures, and their object of study, one is engaging in the philosophy of that field. In law, this question is particularly prominent compared to certain other areas of knowledge, study and practice because of the law’s contested nature. More particularly, and pertinent for the purposes of this paper, what characterises the disagreements within modern Western legal philosophy is profound disagreement about what characterises a valid legal proposition. Ronald Dworkin, Law’s Empire (Belknap Press 1986) in particular chs 1 and 2; Dennis Patterson, Law and Truth (Oxford University Press 1999).

In other words, behind both the aggressive posturing and nuanced development of different schools of legal theory over the past century or so lies a debate about how one correctly identifies the content of the law. Some of the more prominent accounts of such matters are of course well known. Such accounts vary quite dramatically: law as rooted in empirically observable social practice constituting rules which then, in turn, identify other rules of various kinds which constitute legal content; John Finnis, Natural Law and Natural Rights (Clarendon Press 1982).

This list could be extended in various ways. In particular, this list does not include those numerous accounts which see law as largely or entirely dependent on some other form of knowledge or social practice. See, variously, the ideas contained in Richard A Posner, “The Law and
Broadly speaking, these disagreements are characterised by the question of how legal truths are generated or located, and to what extent such legal epistemology can be said to be autonomous, that is separate from other forms of thinking or knowledge, such as morality, sociology or economics.

Such questions often strike those interested in putatively “practical” approaches to law as somehow abstract or ethereal, which might be interesting or important in some way, but largely irrelevant to working out what the law says in a particular field, which is what real, that is to say practising, lawyers need to know. Such opinions, to the extent that they are indeed held, are entirely misconceived. This sentiment is most famously and most powerfully expressed by Keynes: “The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.” John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Macmillan 1936) 383.

While questions of the grounds of law, Patterson (n 14) 171. View all notes such as whether a particular statute is in force, do not require such “theoretical” accounts in order to generate answers, the question of whether a particular statute should apply in a certain circumstance can only be answered through what one considers to be a correct way of arriving at the correct content of law in general. Dworkin, *Law’s Empire* (n 14) 90. Dworkin expresses Keynes’ famous remark in the legal context, and with even more force: “Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge’s opinion is itself a piece of legal philosophy. […] Jurisprudence is the general part of adjudication, silent prologue to any decision at law.”

The briefest of surveys in this section has shown that questions of identification of correct legal propositions are extremely contested, perhaps infinitely so. Indeed, this contested nature is currently reflected in the regulatory agnosticism and openness to different approaches found within the loose framework which governs and informs the teaching and examination of law in England and Wales. As well as the lack of prescriptive requirements regarding the Foundations of Legal Knowledge in the Joint Statement, discussed above, there is also the supreme epistemic agnosticism of the Subject Benchmark Statement for law issued by the Quality Assurance Agency for Higher Education (QAA).

The Quality Assurance Agency for Higher Education (n 6) 6. Section 1.2 of that document explicitly states: “The study of law exposes students to a wide range of methods and techniques, some of which are specific to the discipline but some of which are drawn from the humanities and social sciences. The emphasis placed on the range and type of methods varies between law schools. […] The common denominator is the requirement on the student to apply their understanding of legal principles, rules, doctrine, skills and values. There are many ways of achieving this and different higher education providers will choose different approaches.” View all notes While the Statement asserts that the study of law covered under its remit is an academic matter, ibid (emphasis added). View all notes it would be hard to understand its reference to the requirement that students develop “an ability to recognise ambiguity and deal with uncertainty in law” ibid 9. View all notes as anything other than a reference to disagreement about the content, interpretation and application of the law and how one properly goes about resolving such matters. It is a reference not to questions
of academic doubt, but rather to the academic study of legal questions of doubt. It is indeed from such questions of doubt that the viability of such diverse perspectives on legal truth emerge. As Ronald Dworkin famously argues, legal reasoning and practice are characterised primarily by disagreement. Dworkin, *Law’s Empire* (n 14) 6–7. View all notes and this in the context of his holistic account of legal content which defends the idea of a single correct legal answer to any given legal question. How lawyers resolve such disagreements and arrive at conclusions regarding the content of the law is of course the determinant of what counts as truth in law. In an almost embarrassed manner, legal education in England and Wales, emerging from the shadows and into respectable areas of scholarship and study only during the twentieth century, Twining, *Blackstone’s Tower* (n 5). View all notes has therefore been characterised by no single clearly articulated method or epistemology. Certain law schools have emerged and grown with different signature approaches to legal learning, and these have added to the wealth of legal scholarship and education. Conversely, many English and Welsh law schools have probably continued rather unreflectingly, through a process of autopoietic curriculum and assessment regeneration, or perhaps, on the part of some, due to the misapprehension that a far greater level of regulation of their curriculum exists than is in fact the case. No regulatory or overseeing body has ever attempted to prescribe the nature of legal truth within legal study in England and Wales. This has perhaps led to the impression on the part of many practitioners of legal education, in particular of professional legal education, that there is no link between legal theory and legal education. In reality, there has simply been no regulation of that link. Every act of legal education embodies a theory of law.

3. Multiple-choice tests and the nature of legal truth: bivalence and multimodality

Whether a multiple-choice-type assessment is capable of properly assessing knowledge depends, of course, on the type of knowledge to be assessed. Building on the discussion in the preceding paragraphs, the present section analyses the viability of assessing legal knowledge in such a way. It builds a picture of legal truth which seeks to make sense of the disagreements which exist within accounts of a “general jurisprudence” on the nature of law. It will be argued that legal reasoning is characterised by a specifically multimodal form of justificatory reasoning, making multiple-choice examinations singularly unsuitable for assessing legal knowledge.

There exists a wealth of literature on multiple-choice questions (MCQs) as a form of assessment within higher education. Richard F Burton, “Quantifying the Effects of Chance in Multiple Choice and True/False Tests: Question Selection and Guessing of Answers” (2001) 26 Assessment & Evaluation in Higher Education 41; Paul McCoubrie, “Improving the Fairness of Multiple-Choice Questions: A Literature Review” (2004) 26 Medical Teacher 709. View all notes and elsewhere. For instance, Leonard B Bliss, “A Test of Lord’s Assumption Regarding Examinee Guessing Behavior on Multiple-Choice Tests Using Elementary School Students” (1980) 17 Journal of Educational Measurement 147. View all notes This work is found in both generalist pedagogical science as well as the scholarly research of specific disciplines and their teaching. In law, however, there is very little work on this matter, either in England and Wales or elsewhere. However, the more general research covers all manner of issues, regarding the reliability of MCQs, McCoubrie (n 30); Mark G Simkin and William L Kuechler, “Multiple-Choice Tests and Student Understanding: What Is the Connection?” (2005) 3 Decision Sciences Journal of Innovative Education 73; Burton (n 30). View all notes their impact on questions of equality and discrimination. Gershon Ben-Shakhar and Yakov Sinai, “Gender Differences in Multiple-Choice Tests: The Role of Differential Guessing Tendencies” (1991) 28 Journal of Educational Measurement 23. View all notes their vulnerability to plagiarism and other forms
of cheating, Robert B Frary and others, “Indices of Cheating on Multiple-Choice Tests” (1977) 2 Journal of Educational Statistics 235. View all notes and so on. Predominantly, however, the work tends to question the effectiveness of MCQs in examining “deep” forms of knowledge within different disciplines. Jennifer L Momsen and others, “Just the Facts? Introductory Undergraduate Biology Courses Focus on Low-Level Cognitive Skills” (2010) 9 LSE 435; Paula P Lemons and others, “Questions for Assessing Higher-Order Cognitive Skills: It’s Not Just Bloom’s” (2013) 12 LSE 47; Stephen Buckles and John J Siegfried, “Using Multiple-Choice Questions to Evaluate In-Depth Learning of Economics” (2006) 37 The Journal of Economic Education 48. View all notes Much work looks at the differences between MCQs and what are often termed in the pedagogical literature “constructed responses”, that is long-form narrative or prose-based answers in which the student constructs their own answer in response to a more or less open question, including explanation, justification and references where appropriate, rather than selecting the most appropriate answer(s) from a closed selection. William E Becker and Carol Johnston, “The Relationship between Multiple Choice and Essay Response Questions in Assessing Economics Understanding” (1999) 75 Economic Record 348; Nixon Chan and Peter E Kennedy, “Are Multiple-Choice Exams Easier for Economics Students? A Comparison of Multiple-Choice and ‘Equivalent’ Constructed-Response Exam Questions” (2002) 68 Southern Economic Journal 957. View all notes There are a range of conclusions drawn in these papers, and there is no general consensus in this regard. However, there is a general tendency for deeper reflection on such matters through such research to lead to broader considerations of the different orders of knowledge within a given field, and the difficulty in assessing complex forms of knowledge with either single or multiple best answer-based MCQs. Lemons and others (n 35); Buckles and Siegfried (n 35). View all notes This general literature cannot therefore give us any form of transdisciplinary guidance regarding the suitability of MCQs in general, except for the general observation that higher forms of knowledge within a particular field require more intricately constructed questions, which take into account the nature of that complexity. There is nothing inherently “wrong” with MCQs, even in the testing of the “deep knowledge”, which the Legal Education and Training Review (LETR), Julian Webb and others, “Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales” (Legal Education and Training Review 2013). View all notes an evaluation of legal education in England and Wales commissioned by the SRA and others and published in 2013, emphasised as crucial in the training of lawyers moving forwards.

The present work seeks to make a different contribution to the literature on MCQs, however, that is on their appropriateness for evaluating only certain types of “truth” or correct answer. MCQs, in particular the single best answer-type proposed by the SRA for SQE1, are potentially appropriate as a method of assessment when the “truth” of a particular field can be understood as bivalent, that is to say where propositions may possess only two states, true or false. John McDowell, “Truth-Conditions, Bivalence, and Verification” in G Evans and J McDowell (eds), Truth and Meaning (Clarendon Press 1976); Kenneth F Rogerson, “Truth, Bivalence, and Realism” (1994) 43 Iyyun: The Jerusalem Philosophical Quarterly 43. View all notes In such circumstances, regardless of the potential complexity of constructing questions to test such matters, MCQs are a viable form of assessment, although this is not to take any position regarding whether they are a more or less desirable method of assessment than any other competitor model. Within formal logic, the falsehood of the universality of the so-called law of bivalence of all semantic constructions, found within classical forms of logic. On this question generally see Paul Tomassi, Logic (Psychology Press 1999) 123–25. View all notes has been overcome though the use of a third broad category for those propositions which have yet to be determined as either true or
Jan Łukasiewicz, “On Three-Valued Logic” in Selected Works (Studies in Logic and the Foundations of Mathematics, North-Holland 1970) 87–89. Of course, matters of classical or formal logic do not necessarily tell us anything directly about legal knowledge, given law’s status as a socially constructed institution, however the notion of bivalence and its transcendence within formal and other accounts of logic are instructive in numerous ways. They point us in the direction of an analysis of legal propositions which can test the suitability of MCQs. What, therefore, is the nature of the truth of legal propositions?

Let us move beyond the restraining confines of formal logic and consider more generally the nature of truth, that is what it is to say that a proposition is true or correct. Truth is one of the longest standing questions in the canon of Western philosophy, and it remains one of the most central and important, in particular due to its relationship with the equally central questions of knowledge, language and ontology. Alexis G Burgess and John P Burgess, Truth (Princeton University Press 2011).

Broadly speaking, philosophical accounts of the nature of truth, which are not sceptical about the very concept and generally embrace bivalence, can be categorised into two groups. There are those accounts of truth which see propositions as true when they refer to objectively extant facts in the world. Things are true on this view when they can be safely said to correspond to things or states of affairs which exist. These accounts can be broadly grouped together as “correspondence” theories of truth, where propositions are true where they correspond to an ontology outside one’s understanding or perception of it.

On the other hand, there are accounts which reject such a vision, seeing truth as a more holistic question not of identity with facts in the world but rather with other matters of understanding. Such accounts therefore generally understand propositions as true when they fit with our surrounding knowledge in that area. These can be labelled coherence theories of truth, in that statements are true when they cohere with our broader understanding of things.

Ralph Charles Sutherland Walker, The Coherence Theory of Truth: Realism, Anti-Realism, Idealism (International Library of Philosophy, Routledge 1989). Such theories therefore see truth as a broadly epistemic question rather than a metaphysical or ontological one. If we can find a plausible account of law and the validity of legal propositions which seems to fit with one of these accounts of truth, MCQs remain a theoretically plausible form of assessment for legal knowledge.

How therefore do we generate valid answers regarding legal propositions? There of course exist numerous accounts which are entirely sceptical about any such enterprise within law, which one might label the “no right answer thesis”. Elements of such an account are found within strands of the legal realist tradition, or at least those parts of it which focus on the indeterminacy of legal standards, and also within elements of the broader critical legal studies movement, in particular those which adopt a post-structuralist or deconstructivist approach. It would seem axiomatic these accounts of law would reject any notion of a single best answer-based assessment. Paradoxically, it will be argued below that it is precisely this form of rule-scepticism which SQE1 does in fact embody. However, if one takes it for granted that some element of legal knowledge is both plausible and also a relevant part of legal education, such radical rejections often in fact overlays its hand, failing to perceive in its own account of the operation of law that it locates “true” legal propositions within some other observable or otherwise knowable phenomenon, such as inchoate power structures, discourse, economics or single acts of adjudication based on subjective judgment. Some classical accounts of this nature can be found in Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harvard Law Review 457;
It is necessary to consider whether there is any plausible account of the truth conditions of legal propositions, which would be capable of being accommodated within both the contested nature of law, discussed above, and the form of assessment which the SRA is proposing. For an excellent and original attempt to understand the relationship between law and truth, see Patterson (n 14). Patterson also examines the possibility that legal truth might be modal in nature, albeit in a different form to the account presented here. View all notes

Such an account might fit within a legal coherence thesis, in which there is an agreed "way of knowing" whether a certain legal proposition is true, or a legal correspondence thesis, in which there exist knowable facts or states of affairs in the world, which would "validate" a legal proposition as true. Let us consider both possibilities.

For there to be a legal coherence account of truth, there would have to be an "immanent" quality to the law's content, in that it would have to be found within the law itself. There exist numerous accounts of law of this type, often captured by the family resemblance concept of "legal formalism". For a survey of this concept see Morton J Horwitz, "The Rise of Legal Formalism" (1975) 19 The American Journal of Legal History 251. View all notes

Such accounts of law see its operation as autonomous, somewhat scientific and as separate from the vagaries of politics and power, from which law is insulated by its formal nature. Brian Leiter, "Legal Formalism and Legal Realism: What Is the Issue?" (2010) 16 Legal Theory 111. View all notes

For legal formalists of all stripes, it is the very nature of law (its "form") which renders its content intelligible. There are two broad, and in many ways radically different, versions of legal formalism, each compelling in its way. On the one hand, there is the classical form of legal immanence found within the formalism of contemporary authors such as Weinrib, Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1987) 97 The Yale Law Journal 949. View all notes

Such formalist accounts of law are almost exclusively focused on questions of private law, Weinrib, The Idea of Private Law (n 20). View all notes in which questions can be framed within the Aristotelian account of corrective justice, with its pseudo-mathematical structures. On this view, questions of distributive justice, according to the celebrated Aristotelian dichotomy, lie outside law in the central formalist account.

A similar account of legal immanence is found within the interpretivist proto-natural law models of theorists such as Ronald Dworkin. Dworkin, Law's Empire (n 14). View all notes
notes Dworkin rejects out of hand the brute “logic” of private law formalists such as Weinrib, and instead builds an account of internal legal reason which builds precisely on those elements of legal practice which would seem to disprove it. Much of Dworkin’s ingenious work focuses on the inability of the grounds of law alone to solve legal disputes, or lead directly to clear legal propositions: Dworkin argues that such problems demonstrate the inability of perceived legal rules of whatever genesis to resolve legal problems. For Dworkin, however, legal practice is characterised by the use of deeper legal “principles”  
Ronald Dworkin, “Hard Cases” (1975) 88 Harvard Law Review 1057. View all notes to use the vernacular of his earlier work, which are, broadly, moral notions located within the legal system itself. In his later work, Dworkin comes to argue that these moral aspects of law are to be found through the interpretation of past legal practice (that is, previous legal decisions, legislation, etc.) in the light of their best moral justification.  
Dworkin, Law’s Empire (n 14). View all notes In this way, Dworkin also perceives law as an autonomous form of reason which possesses a form of immanence; in his later work he labels this law’s integrity  
ibid 176–275. View all notes a near-synonym for coherence, with an additional moral connotation. While Dworkin sees law as a special form of institutionally bound moral reasoning,  
Ronald Dworkin, Justice for Hedgehogs (Harvard University Press 2011) 400–15. View all notes his account is one which can be classed as formalistic, in that it sees law, just as Weinrib does, as separate from politics, or as Dworkin’s celebrated early work would have it, “policy”.  

If, therefore, either of these accounts, or some similar account, is correct, there is a certain viability in the MCQ-based approach of SQE1. On reflection, neither seems particularly plausible, and both seem far from the open and ecumenical nature of legal education discussed within this paper. The problem with formalist and immanent theories of legal knowledge is that they misunderstand the nature of legal reason in two important ways. Firstly, they put forward an account of law which is focused on one form of reason or argument which appears familiar to lawyers. In the two versions which we have examined here, these are the logical forms of reasoning based on the consequences of core legal concepts and the moral forms of reasoning based on the imaginative reinterpretation of the grounds of law. It is true that both of these forms of argument are indeed familiar to lawyers, and are indeed found within both the everyday practice of solicitors attempting to understand the law in front of them, and the detailed reasoning of an appellate judge. Such arguments, however, do not constitute the “end of the story” in any case. They are always part of a rich tapestry of competing modes of reason,  
Patterson (n 14) 128–50; Philip Bobbitt, “Is Law Politics?” (1989) 41 Stanford Law Review 1233. View all notes some of which might be equally “formalist”, while others might be based on matters extrinsic to legal form, but nonetheless a recognisable part of legal argumentation. These might include historical accounts of past events, such as legislative intention or the evolution of the usage of the laws in question, or pragmatic or instrumental considerations, such as the consequences of a certain outcome. Accounts such as those of Weinrib and Dworkin are infinitely valuable because they help us to understand certain forms of reason which lawyers utilise in a legitimate way to reach legal conclusions. However, they tend to overstate their case because they fail to recognise that such accounts are in fact modal forms of reason, that is to say certain forms of qualifying argument, in order to add sophistication to legal thought.  
In logic, a modality qualifies a statement or proposition in some way. View all notes While it is true that it is a powerful legal argument to point out that, from a certain point of view, or taking a certain modal approach, the logical correlative of a claim right in a certain area of private law is a duty on another party, such as Weinrib would have it, this would rarely if ever be seen as the end of the argument. On the contrary, other modes of argument
intervene at this point, such as the moral interpretation discussed by Dworkin, or any other form of legal mode. Legal reason allows for different forms of qualifying proposition or statement to arrive at conclusions.

Secondly, and even more importantly, however, accounts of legal immanence misunderstand the nature of these arguments in a more fundamental manner. The various modes of argument which are used within law to take us from broadly agreed grounds of law to a valid legal conclusion, or legal truth, are not mechanistic in the way that formalists would have it. They are justificatory. The modality of legal reason is not an attempt to uncover in some clever way the deep truth lying within law. Instead, legal truth depends entirely on the use of legal modes to arrive at a given conclusion. Propositions of law are true because they are constructed through their justification by recognisably legal modes of argument. To point to a form of moral justification for a certain reinterpretation of established case law, for instance, is an attempt to justify a certain legal proposition through a certain form of modal reason comprehensible to lawyers, not simply an attempt to grapple with law's immanence.

Concurrently, these two aspects (the modality and justificatoriness) of legal reasoning have a dramatic impact on the viability of SQE1 and MCQs more generally in assessing legal knowledge and the ability to "identify" legal truth. On the one hand, there is no single mode of legal reason: legal argument is multimodal. In the absence of a coherent account of legal metamodal reason, that is, how we negotiate between different forms of competing legal argument, the notion that an MCQ could capture this complexity is far-fetched, although not, it must be said, logically impossible. More significant, however, is the nature of the multimodal form of reason found within legal argument. Due to the justificatory nature of legal modes, there exists no bivalence within legal propositions. Legal propositions are not simply true or false in a simple way. The truth of any legal proposition will depend, in a very specific manner, on the multimodal reason which justifies it. Legal truth is ultimately constructivist in nature, in that it stems from the very modes of reason which are used to identify it. This modal constructivism entirely undermines the notion that legal propositions can possess bivalence. Arguments are only, at best, potentially true or false, when divorced from the modes which generate either outcome.

Before dismissing out of hand the SRA's proposal however, it is necessary to consider the possibility that a correspondence form of truth might lie within SQE1's account of law and offer an alternative plausible defence of the use of MCQs. Such would be the case if it could be argued that the truth of a legal proposition were clearly dependent on some external fact in the world. Numerous accounts of legal truth of this nature exist, ranging from efforts to locate legal content in the empirically observable social practices of a society to theories which seek to recast legal reason as some other form of truth or logic which can be identified outside law. Such accounts avoid the hubris of accounts of legal immanence, but thereby exhibit another flaw: they reject entirely the notion of the autonomy of legal reason or knowledge, effectively making an assessment of the truth of a legal proposition dependent on something extrinsic to law. If one posits that "the law" simply is, to take some random but influential examples, the economically most efficient outcome, or the morally most appropriate conclusion, the very notion of legal truth becomes redundant. This is not to make any sort of argument related to the social locatedness of law or the complex relationship between law and other forms of thought or reason. However, the correspondence theory of truth would seem to have very little going for it in terms of an account of law which might justify SQE1. More fundamentally, even where such accounts of factors extrinsic to law enter into legal reason, which they of course do on a regular basis, they do so in the modal form described above.
That is to say they do so as part of a multimodal justificatory form of reason which constructs a legal outcome. While an economic analysis of a question of liability in an appellate court might be influential in leading to a radical redrawing of an area of private law, A classic example of this kind of thinking being present within judicial reasoning is *Hunter v Canary Wharf* [1997] UKHL 14. View all notes there is no sense in which a legal proposition is true *simply by virtue* of an analysis of Pareto efficiency in a particular transaction or area of economic activity for example. Such arguments, to the extent that they are part of the identification of legal truth are *modal* in nature and *justificatory* in function, i.e. from the perspective of such an argument, a particular proposition would seem justified. While extrinsic factors therefore come into legal reasoning, there is no sense in which the bivalence of legal propositions can be established through their correspondence or identity with something extrinsic to law. Of course, certain extrinsic facts in the world are often part of a process of establishing the validity of legal propositions in very obvious and central ways, such as the passing of a particular piece of legislation, or a previous judicial decision. However, these are *grounds* of law which might form the basis of a subsequent multimodal form of legal reasoning to take us *from* that ground *to* the legal proposition. While the modality of legal truth makes space for all manner of extrinsic “facts”, “events”, states of affairs and conclusions from other areas of knowledge, law cannot simply be *reduced* to those things. They need to be presented in the characteristic modal form of legal argument which then constructs the valid legal proposition.

What emerges from this discussion therefore is an account of legal truth which takes seriously both the idea that it is possible to assess someone’s ability to identify valid legal propositions, but which also accommodates the pluralistic, contested and complex nature of such questions. These aspects of legal knowledge are currently accommodated by the regulatory agnosticism which has long characterised legal education and training in England and Wales. What this section has sought to demonstrate is that while MCQs are certainly capable of testing knowledge in all manner of complex ways when that knowledge possesses some form of bivalence, this is not the case for legal knowledge. Legal knowledge incorporates the forms of knowledge and reason which are referred to in competing general accounts of law through its *modes* of argument: the success of these arguments leads to, or *constructs*, the validity or truth of a legal proposition. Law’s *modal constructivism* means that while things can be true or false to a greater extent in law, such matters are inseparable from the modes which justify them. Legal thought is therefore not merely constructivist but also justificatory. The modal and justificatory constructivism of law requires that a test of legal knowledge, such as that proposed in SQE1, be in the form of *constructed responses*, that is to say some means of allowing candidates to construct legal truths through the use of the multimodality of legal reason. This would allow for a greater distinction between candidates through their ability not only to demonstrate greater skill in these modes, but also to navigate the complexities of metamodal reasoning, where the modalities of legal truth conflict, which lawyers habitually refer to as *hard cases*. The notion that MCQs alone could allow for such sophistication of assessment is fanciful at best. The present discussion has not attempted to deal with what form of reason or argument characterises the clash of apparently incompatible legal modes; however, this is a major driver of the “doubt” referred to within the QAA Benchmark Statement, and the “deep learning” within the LETR. It must be emphasised that the present discussion is not attempting to argue that this deep learning or metamodal reasoning is somehow connected to academic legal study, or theoretical legal scholarship (although this is often a source of attempted resolution for such hard cases, referred to explicitly by appellate courts and referred to by practising solicitors). It is, on the contrary, a rather straightforward attempt to characterise the nature of legal truth from a practical perspective.
4. The Bleak Legal Realism of SQE1 and the role of lawyers

The preceding discussion is not a prescriptive one about the form of assessments within law in general or the appropriateness of a centralised examination in qualifying to become a practising lawyer. It is a measured and meditative attempt to underscore some of the often unstated reasons why the ecumenical approach towards legal learning has persisted within legal education and training within England and Wales. The “academic stage” of legal learning is valuable for many reasons, some of which will of course be retained by the “graduateness” requirement in the SRA’s envisaged changes. However, this academic stage has acted as a forum within which the multimodal nature of legal reason and truth could be learned and assessed in all manner of creative ways. Indeed, it is not even a logical consequence of the arguments presented here that MCQs be excluded from the summative assessment of legal knowledge. They must, however, be combined with elements of constructed response which allow for the multi- and metamodal arguments which justify the asserted propositions.

Without this justificatory modal framework, MCQs embody a very particular theory of law. Given what was argued previously regarding the lack of bivalence within legal propositions, in the absence of justificatory modes within the structure of assessment which render any answer “true” or “false”, all potential answers come to possess the “third” quality of propositions within formal and temporal logic: that is to say, not yet determined whether true or false. The selection of the answer is therefore a prediction: a prediction of someone else’s adjudication on such a legal matter. Of course, predictions can be extremely valuable in all forms of learning and professional practice, including within law. They can also form the basis of MCQs where this is their aim. One could for instance, have a multiple-choice exam regarding the outcome of a football match to take place in the future. When the football match concludes one would very objectively be able to calculate the candidate’s ability to predict its outcome. This is the account of law which SQE1 embodies. It is, in short, a form of Bleak Legal Realism, of the sort often pastiched by critics of legal realism in general. Legal realism of this kind, often labelled American Legal Realism, finds its roots in the celebrated work of Oliver Wendell Holmes. The work of these American Legal Realists is in fact far more sophisticated than the pastiched version which is often presented. Legal Realism as a broader family of theories is of course an extremely nuanced account of the social function and locatedness of law and its operation.

Legal realism of this kind, often labelled American Legal Realism, finds its roots in the celebrated work of Oliver Wendell Holmes. The work of these American Legal Realists is in fact far more sophisticated than the pastiched version which is often presented. Legal Realism as a broader family of theories is of course an extremely nuanced account of the social function and locatedness of law and its operation. View all notes which takes as its starting point the idea that law is effectively inert regarding its eventual application due to the open-textured and indeterminate nature of legal sources such as rules and principles. It is, in short, a rejection of a romanticised vision of law of the type described in the preceding section as an immanent or formalist theory of law. However, rather than seek to locate the numerous justificatory modes which characterise legal argument, legal realism of the type in question seeks to find objectivity elsewhere, that is in the actual decisions made in the courts and empirical questions of adjudication more generally. Brian Leiter has more recently described legal realism's impact as one of “naturalizing jurisprudence”. Leiter (n 18). View all notes in that it makes the study of law and its content akin to the natural sciences, where hypotheses must be empirically tested. The upshot, for theorists who subscribe to the Holmesian account of law, is that any proposition of law can, at best, be seen as a prediction of an adjudicatory outcome. In this sense, through its lack of space for justificatory modes, SQE1 embodies such an account of law. It is a Bleak Legal Realism because it reduces and essentialises legal knowledge to a hunch about future actions of others, and permits no sophistication or justificatory argument which might temper this vision of law. Of course, in the MCQ itself, it is not the judge’s outcome which is being predicted, but rather the question.
setter’s. It is a form of legal realism without even the redeeming feature of being located within the empiricism of the social or natural sciences, and indeed law’s deep social situatedness.

This paper has attempted to present in a reasoned and informed manner the nature of legal truth and the validity of legal propositions. This is a fraught field, and it could be that the reader does not feel prepared to accompany the author all the way along his meanderings through modal, multimodal and metamodal reasoning, or through the justificatory modal constructivist account of legal knowledge. However, this account has been constructed here to make sense of a rather simpler proposition, that is that the exercise of a recognisably legal form of reason or argument is inherent within the practice of law, and, more particularly in the identification, articulation and application of valid legal propositions. The modal account given here attempts to accommodate the rather unambitious and hopefully uncontroversial claim that law’s nature cannot simply be reduced to something else which is easily knowable, nor to a form of logic. If this were the case, it would hardly seem appropriate to test legal knowledge among prospective lawyers rather than knowledge of that other thing or their ability to reason logically. The structure of SQE1 reduces law and the truth of legal propositions to the ability of a candidate to predict the application of legal thought by others.

Legal knowledge on this view becomes an instance of predictive justice. This is a curious time for prospective lawyers to be tested on this, at least in terms of their future job prospects, given that we are on the cusp of a revolution within the provision of legal services in which the predictive aspects of the legal profession will be far better carried out by artificial intelligence (AI) and algorithm than by human beings. Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (2nd edn, Oxford University Press 2017); Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (2nd edn, Oxford University Press 2010). The author is not asserting that this is inevitable in any way. Universities, law firms and others are of course still “free” to set curricula as they see fit. Whether this happens under the proto-regulatory pressure of SQE is an example of a proposition in formal logic whose truth is yet to be determined.

View all notes

The gatekeepers of the legal profession: judges, law firms, law schools, existing practitioners, various other stakeholders, and even the market for good quality legal services, will not allow this to happen. However, this would be despite an inappropriate form of assessment which fails to identify those candidates which are best able to construct valid legal propositions. The consequences of such a failure can only be empirically measured,
and do not fall within the remit of the present work. However, an examination which fails in its attempt to differentiate between candidates’ ability to do the very thing which it is seeking to examine is unlikely to have its intended impact.

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Notes

1 The organisation was established by the Legal Services Act 2007, which also sets out its regulatory competences and objectives.

2 For details of the nature and goals of this reform, see the contribution to this issue by the regulators, in particular the section authored by Julie Brannan of the SRA.

3 For excellent analysis of the process which led to the SQE’s introduction, and its potential impact, see Elaine Hall, “Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: ‘Comment Is Free, but Facts Are Sacred’” (2017) 51 The Law Teacher 364; Eileen Fry and Richard Wakeford, “Can We Really Have Confidence in a Centralised Solicitors Qualifying Exam? The Example of the Qualified Lawyers Transfer Scheme” (2017) 51 The Law Teacher 98.

4 This argument of course echoes that famously found in Hart’s *reductio ad absurdum* of this same form of legal realism, found in HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) ch 7.

5 On these questions, see the contribution of Anthony Bradney to this issue, and, generally, William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press 1997); William Twining, *Blackstone’s Tower: The English Law School* (Stevens 1994).


8 ibid.


11 Legal Services Act 2007. These are currently the administration of oaths, advocacy, conveyancing, litigation, notarial activities and probate activities.


15 Hart (n 4).


17 Dworkin, *Law's Empire* (n 14).


19 Stanley Eugene Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Harvard University Press 1980).


22 This sentiment is most famously and most powerfully expressed by Keynes:

“The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.”


23 Patterson (n 14) 171.

24 Dworkin, *Law’s Empire* (n 14) 90. Dworkin expresses Keynes' famous remark in the legal context, and with even more force:

“Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy. [...] Jurisprudence is the general part of adjudication, silent prologue to any decision at law.”

25 The Quality Assurance Agency for Higher Education (n 6) 6. Section 1.2 of that document explicitly states:

“The study of law exposes students to a wide range of methods and techniques, some of which are specific to the discipline but some of which are drawn from the humanities and social sciences. The emphasis placed on the range and type of methods varies between law schools. [...] The common denominator is the requirement on the student to apply their
understanding of legal principles, rules, doctrine, skills and values. There are many ways of achieving this and different higher education providers will choose different approaches.”

26 ibid (emphasis added).

27 ibid 9.

28 Dworkin, Law's Empire (n 14) 6–7.

29 Twining, Blackstone’s Tower (n 5).


37 Lemons and others (n 35); Buckles and Siegfried (n 35).


40 On this question generally see Paul Tomassi, Logic (Psychology Press 1999) 123–25.


45 In fact, however, the “no right answer thesis” often in fact overplays its hand, failing to perceive in its own account of the operation of law that it locates “true” legal propositions within some other observable or otherwise knowable phenomenon, such as inchoate power structures, discourse, economics or single acts of adjudication based on subjective judgment. Some classical accounts of this nature can be found in Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harvard Law Review 457; see also Duncan Kennedy and Karl E Klare, “A Bibliography of Critical Legal Studies” (1984) 94 The Yale Law Journal 461. A more genuinely “open” version of the no right answer thesis can be found in AD Woozley, “No Right Answer” (1979) 29 The Philosophical Quarterly (1950-) 25.

46 For an excellent and original attempt to understand the relationship between law and truth, see Patterson (n 14). Patterson also examines the possibility that legal truth might be modal in nature, albeit in a different form to the account presented here.

47 For a survey of this concept see Morton J Horwitz, “The Rise of Legal Formalism” (1975) 19 The American Journal of Legal History 251.


50 ibid 972.


52 Weinrib, “Legal Formalism” (n 49) 974.


54 Dworkin, *Law’s Empire* (n 14).


56 Dworkin, *Law’s Empire* (n 14).

57 ibid 176–275.


61 In logic, a modality qualifies a statement or proposition in some way.
62 Hart (n 4).


64 A classic example of this kind of thinking being present within judicial reasoning is *Hunter v Canary Wharf* [1997] UKHL 14.

65 Holmes (n 45).

66 Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Quid Pro Books 2012). The work of these American Legal Realists is in fact far more sophisticated than the pastiched version which is often presented. Legal Realism as a broader family of theories is of course an extremely nuanced account of the social function and locatedness of law and its operation.

67 Leiter (n 18).


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