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SPECIAL ISSUE ARTICLE

Bringing EU law back down to Earth

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Abstract

Traditional approaches to teaching EU law can seem almost deliberately alienating; there is a lot of incomprehensible stodge that students are told they 'just have to get through' before they can really begin. So courses start with memorising technical terminology, institutional facts and then some principles that, without context, can just seem like more jargon. By the time they move on to case-law and legislation, the idea that these things are useful domestic tools has long since vanished. Instead, a contextual approach mitigates a trio of risks that have beset traditional EU law teaching – the risks of excessive positivism, excessive abstraction and excessive black-letter lawyering. Context requires critical engagement with, rather than simple absorption of, law; it makes the law accessible and applicable; and it involves socio-legal and interdisciplinary methods and materials. It is, of course, risky in different ways – but we should have a greater appetite for risks related not to cognitive stagnation, but to intellectual challenge.

Keywords: EU law; empirical work; critical analysis; international perspectives; interdisciplinarity

1 Introduction

'I feel so sorry for you – having to learn all this! It is like memorising gobbledegook.'

This is how one lecturer introduced the subject of EU law when I took my law degree. They had a point; many law schools have served up EU law like an unpalatable medicine, by insisting on teaching context-free jargon first along with institutions, then context-free 'principles' without really getting to grips with what they mean *in practice*, before getting to more meaty areas of law (and even then, rarely translating EU legislation and case-law into useful domestic legal tools).

A contextual approach to teaching EU law, in contrast, offers a chance to make it meaningful, pertinent and accessible – without the risk of indigestion. Of course, there is no way to do so objectively; one person's context is another's distortion. But pretending that any subject can be understood in a contextual vacuum is perhaps the greatest distortion of all. Disregarding socio-economic, political, demographic and other dimensions does not produce ideological neutrality – it produces ideological entrenchment. This piece aims to highlight three risks of traditional EU law teaching – the risk of excessive positivism; the risk of excessive abstraction; and the risk of excessive black-letter lawyering – and the role of contextual legal pedagogy in mitigating them.

Any excursion into the question of *how* best to teach EU law could right now seem indulgent, given that, now that the UK is no longer a Member State, law schools in the UK are wrestling with the question of *whether* to teach EU law at all (Guth and Hervey, 2018), pointing to the possibility of future regulatory divergence between EU and UK law. There are strong arguments for keeping EU law, plus 'withdrawal law' and post-Brexit trade agreements, in the core curriculum of a qualifying law degree, or at least among law schools' optional offerings (Cotter and Dewhurst, 2019; MacLennon, 2020; Barnard, 2022), not least as the Qualifying Law Degree (QLD) components start to look worryingly parochial without it (Cotter and Dewhurst, 2019, p. 186). Put simply, for students in the UK, EU law *is* context.

For some parts of the UK, EU law will have a starker salience than for others. Northern Ireland is the strongest example – it has a land border with the EU, it has a special regulatory status under the Withdrawal Agreement and many people resident there are EU citizens (Barnard and Craig, 2019). It is also possible that Scotland and Wales will seek to align more closely than England with EU rules that fall within the scope of devolved matters.[1] But a geographical patchwork approach to the study of EU law would run several risks. Dropping EU law in *English* legal degrees could significantly impair students' ability to migrate for professional purposes *within* the UK, as well as devaluing that degree on the international market. But beyond this, EU law has an importance and relevance for the whole of the UK legal system, which transcends the question of physical location (just as practices of trade, retail and virtual work increasingly transcend geography).

Writing in 2018, Guth and Hervey warned that the international may move from being a 'necessity' to a 'luxury' in legal education, and identified several 'instrumental' and 'non-instrumental' reasons for continuing to try to internationalise legal education. Those instrumental reasons are especially prominent in the context of EU law; Barnard and Craig (2019) note the prevalence of 'retained EU law', and the need for many students to be able to work in firms that advise on EU law. They will not be able to do this if they have not studied the subject. And law schools wishing to continue to attract international students from EU Member States risk a competitive disadvantage if the EU law component is downgraded or removed from the degree, given that the higher education sector has already been hit by a drop in EU national student numbers (Forrest, 2022).

The premise of the piece is therefore that the subject is worthwhile in the UK, and that in any case, it continues to be a central part of legal learning in EU Member States. From that starting point, we can ask how it can best broaden intellectual, as well as legal, horizons.

2 EU law is what it is: the risk of excessive positivism

In dishing up a bunch of institutions, concepts and principles as some form of vocabulary list for memorisation, and doing so *before* looking at the effects of the ensuing legislation and case-law (and in many cases, *without* looking at the underlying controversies in the Council of Ministers of the EU or debates in the European parliament), we are not exactly equipping students with the tools, or the motivation, they need to critically analyse those institutions, concepts or principles. Instead, students are told there is a glut of things they 'just need to know', which makes the subject more susceptible than some other modules might be to Kennedy's criticism of law courses that create a doubly 'passivising' classroom experience:

> 'The actual intellectual content of the law seems to consist of learning rules, what they are and why they have to be the way they are, while rooting for the occasional judge who seems willing to make them marginally more humane. The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.' (Kennedy, 1982, p. 594)

A focus on learning rules, or even just on the definitions of the words used to describe the rules, not only leads to passivising pedagogical practice. It also has a hermeneutic effect – shaping how students experience 'knowledge' and silently embedding it into a legally positivist theoretical framework. This 'reifies the positivistic myth that law is autonomous and disconnected from the social forces that animate it' (Thornton, 2007, p. 10). This is not to invalidate legal positivism *in toto*; there is value in knowing 'what has emerged as legal obligation, legal definition, legal decisionmaking in this place or that' (Morss, 2008), especially when there is 'just too much *drek*, too much raw matter of the legal system, and too little time, to give everything you have to study a sinister significance' (Kennedy, 1982, p. 599). In the context of EU law, the constant churn of law-making can amplify

[1]See the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and the Law Derived from the European Union (Wales) Act 2018.

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this problem – scholars and students are busy just trying to keep up. Rather, the problem, or the risk, is of *excessive* positivism – a retreat into technocratic, formulaic law-learning, when it comes to EU law, the teaching of which can focus so much on what is that what ought to be does not get a mention, and suggests that the 'validity of the law depends on its sources, not its merits' (Madhloom, 2019; Gardner, 2001). In EU law, the perception of a self-contained legal system can feed into something of a self-contained scholarship that embraces technocratic jargon. Schepel and Wesseling (1997) have argued that the formalism of EU law as a subject of study is self-fulfilling; European lawyers and commentators create and reaffirm that formalism, defining the legal field. We have a role in trying to make sure that 'keeping up' is a case not merely of imbibing, but of engaging in some critical analysis. When teaching, this might mean giving much more time to one legislative proposal than the full field. This may involve some push-back – students may find the memorising of lots of EU law boring, but it is doubtless in some respects easier than engaging with big-picture questions. Rote learning also makes assessments seem more predictable (Elwood *et al.*, 2017). Here, the fact that the law changes so much and so constantly should actually help support the case for more contextual learning and assessment; it is not particularly helpful to memorise a swathe of EU law at a given snapshot in time because it will be quickly out of date. The skills with more longevity are those of navigating and analysing the law in a given area – knowing what to look for and how to identify merits and shortcomings (for uses and challenges). This suggests rethinking not only the curriculum content and delivery, but also its assessment, and considering prioritising formats and tasks that rely less on broad regurgitation and more on in-depth interrogation.

If the formalistic tendency is exacerbated by trying to cram too much in, we should ask why we are not more radically, ruthlessly selective about what we cover. In a 2010 survey, Ball and Dadomo asked legal education providers in the UK which factors affected their EU law course content. The factor reported as most influential was 'the requirements of professional bodies'; out of fifty respondents, twenty-six cited it as a crucial or determinative factor and fourteen as of considerable importance. The authors described this as 'somewhat surprising' given just how *unprescriptive* the professional bodies have been (Ball and Dadomo, 2010, p. 44). The 1999 Joint Statement of the Solicitors Regulation Authority and the Bar Standards Board on the academic stage of training merely required the covering of the 'key elements and general principles' of EU law.[2] Yet one respondent to Ball and Dadomo's survey lamented that '[y]ou have to start by studying the institutions which is boring' and another that the 'fundamental problem is that the professional requirements lead to too much being crammed into a single course'.

So why have we perpetuated this ancestral academic misery – this belief that so much must be taught, in such a way, because, well, it must? It may, in part, be down to the sheer enormity and complexity of normative questions, when there are so many national political and cultural systems at play. A positivist approach, always coming back to 'what is the Treaty basis for x?', provides at least a common denominator. However, writing about post-colonial legal education in India, Lakshminath (2008) argues that a focus on rote learning and absorbing information rendered 'teaching and learning law a self-referential enterprise in the interpretation of rules' in order to meet the 'minimal requirement of producing "legal technicians"'. Not only do we risk doing the same in EU law modules, but also we risk producing incompetent legal technicians, since we labour under the misguided belief that, because the module has a catch-all title, it must be possible to condense all, or most, of EU law down into a single module. It is not.

Rather than attempting the impossible or fretting about things not within our control (module sizes/contact hours/rapidly changing laws/multiple competing claims on student learning time),

[2]As the Solicitors Regulation Authority (SRA) and Bar Standards Board (BSB) diverge on the approach to qualification, with the advent of the Single Qualifying Exam (SQE), the statement will no longer apply; the BSB have issued a 'Qualifications Manual' that simply lists 'Law of the European Union' as one of the 'seven foundations of legal knowledge' – with no more specific requirements (BSB, 2022). The SRA have instead adopted a 'Statement of Legal Knowledge', which no longer requires the study of EU law in itself, but rather the study of 'retained EU law' in the UK (SRA, 2021).

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we could be more ruthlessly selective, and so capitalise 'on things within our control to get students to use higher order cognitive processes' (Meyers and Nulty, 2009, p. 567). That selection process should then allow us to explore some key topics/ideas from a variety of perspectives, not just the default White, male, non-disabled, heterosexual vantage point (Lakshminath, 2008, p. 623; Guinier *et al.*, 1994).

For example, EU law is an ideal site to encounter critiques of capitalism. A polity constructed around a single market, with its own international legal order to uphold that market – it is the apotheosis of economics, politics and law coming together. And it is underpinned with unspoken ideological assumptions – about the ideal consumer (Waddington, 2013); about what counts as valuable market activity (O'Brien, 2016); and about what counts as 'common constitutional traditions'.[3] There is a degree to which many of us dabble in this already, but at best as an afterthought. Maybe, instead, we should try identifying one key overarching question/learning outcome that can frame the module – something along the lines of 'Whose interests does a single market serve?'. It is by interrogating the EU's *raison d'être* that we can more readily understand long-standing debates around specific rights and freedoms – and appreciate the deep tensions and contradictions in 'market citizenship' (Peebles, 1997; Everson, 1995; Ackers, 1998).

The study of human rights offers another 'way in' to counter EU-by-rote-learning tendencies. Just by asking the question 'Is the EU a human rights (based/protecting) institution?' we can open up big questions about the role human rights have/have not played throughout the history of the EU and the ambiguous place that human rights instruments currently occupy. This can lead to an examination of different EU institutions, and/or the legislative process, and/or documented debates in council or parliament on specific human rights issues and/or Court of Justice of the European Union (CJEU) case-law and the treatment of human rights instruments and arguments. And it offers a way to do this through live, current issues. The opportunity EU law offers to cultivate a 'living curriculum' is also an opportunity to mitigate the second risk we face when EU law is taught as an alien, and alienating, mass of facts – the risk of excessive abstraction.

3 EU law as unexplained foreign object: the risk of excessive abstraction

The teaching of EU law as something separate to domestic law and which happens Over There courts the dual risks of geographic and substantive abstraction. In the UK, post-Brexit, the subject can seem even further removed from the lives, and future careers, of students. But that sense is misleading; EU law has been wound into the fabric of UK law for over four decades. Aside from explicitly 'retained' EU law, its legacy is in how it has shaped *domestic* laws and legal norms. And the departure from the EU has created a discipline's worth of law in itself – through new international agreements, new UK primary law and a positive cascade of new secondary legislation – not to mention the litigation to which all of these (have already started to)[4] give rise. As Wallace and Hervey put it, Brexit offers 'a chance to regroup and rethink, to re-justify what we are doing when teaching and researching EU law, how we are doing it, and why' (Wallace and Hervey, 2019, p. 226).

Ploughing on with a three-pillar approach to teaching – institutions, principles, substantive law – and expecting students to absorb a deal of new terminology before starting on anything interesting is even less appropriate under these circumstances. While we may combat excessive positivism through a complete re-imagining of the questions around which we structure an EU law module and the best 'way in', we have an opportunity to combat excessive abstraction by selecting GRAND topics around the central question – topics that are Grounded, Relatable, Applied, Newsworthy and Dynamic.

[3] A formula invoked in many cases – but rarely explained. See Opinion of Advocate General Stix-Hackl delivered on 18 March 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, EU:C:2004:162, 42, 46, 58, 70.

[4] *CG v. The Department for Communities in Northern Ireland*, Case C-709/20, EU:C:2021:602; *Fratila and another (AP) (Respondents) v. Secretary of State for Work and Pensions (Appellant)* [2021] UKSC 53; see O'Brien (2021a).

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These characteristics help us work towards a 'living curriculum' – a concept Kelly (2015) put forwards in advocating for 'serendipity-sensitive' curricula. Topics that are *grounded* speak to students' prior knowledge and other areas of the curriculum, rather than seemingly dropping from outer space. But we can make this a two-way discussion, by integrating aspects of EU/retained EU law into other modules (not just public law!). Topics that are *relatable* speak to students' experiences (e.g. travel, buying stuff, data protection). Topics that are *applied* always have an eye on the question: 'How can you use this idea/activate this right?' For example, how can we persuade a national court to make a preliminary reference (under either Art. 267 TFEU or Art. 158 of the Withdrawal Agreement)? *Newsworthy* topics track what is going on in real time, and in the last few years we have been through a time of unprecedented topicality. Almost any possible lecture slot has coincided with some parliamentary debate, or vote, or select committee hearing – and we have not always been well placed to capitalise on that. Doing so, in many cases, requires us to do a better job than the politicians of explaining to students exactly why these measures are significant, and even exciting. And *dynamic* topics capture some of the fast pace of change and have built-in flexibility to allow student input, quick updating and refreshed source material.

Starting with a list of institutions is a great way to inculcate a sense of abstraction early on. At York Law School, in a recent curriculum redesign, we have included EU law in an introductory problem-based learning (PBL) scenario – one that brings a number of subjects together. It is a social security tribunal case; the content was thus *grounded*, *relatable* and *applied*. The aim was to create a sense of proximity, in terms of both place and subject matter. And by 'micro-dosing' students with EU law early on, we aimed to better acclimatise them (or help them build up a tolerance!) to it as part and parcel of the legal environment, and the curriculum. But we could do more to mainstream EU law/retained EU law/withdrawal law throughout the degree – more to challenge its segregation from the other subjects.

Brexit offers a fairly unrivalled way in to content that is both *newsworthy* and *dynamic* – and also offers a mainstreaming opportunity. Arnull noted in 2018 that 'ironically, Brexit has caused an explosion of interest in the subject among academics, students, politicians, publishers and the media' and meant that there was 'likely to be greater need for collaboration with specialists in other areas of the law, e.g. public law, contract, tort' (Arnull, 2018, pp. 8, 11).

There has been, and continues to be, a vast amount of change in the UK legal landscape, but Brexit still remains largely confined to EU law courses and where the EU or Brexit makes an appearance in public law, it is often part of the 'constitutional law' content (Ball and Dadomo's 2010 survey found only one administrative law course with substantive EU law content). However, in light of the flurry of Brexit-related statutory instruments and the potential for a rise in legal challenges, Brexit could play a significant role in administrative law teaching – both in terms of 'traditional' judicial review, but also the types of review to which the Withdrawal Agreement gives rise, and the monitoring/enforcement roles of the Independent Monitoring Authority and the EU Commission.

However, for many of our students, Brexit is what they have grown up with and we cannot assume that they think of it as newsworthy or that they have much general knowledge of the EU. So we should consider how Brexit can be used to shed light on ways in which EU law has infiltrated and affected a vast range of legal spheres – a point I tried to make with a light-hearted blog post on the myriad ways in which Santa's job had changed (O'Brien, 2021b). Using Brexit as a 'way in' to understanding the process of EU integration can help to bridge the potential gap, and address the potential tension, between 'EU law-related stuff in the news' and 'EU law in its own right'. Newsworthiness is a dimension that helps to situate EU law, to give it currency and to increase student interest – it is not what gives the subject value in itself. It is one form of context, to be combined with historical context (indeed, it is worth noting how *past* developments were, in their time, newsworthy). Through the prism of Brexit we can see how EU law touches on the laws of contract, tort, property and even criminal law – not to mention immigration and employment. In light of the increased number of potential subjects to the hostile environment, it seems a profound omission that criminal law courses do not typically cover criminalisation through immigration status.

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When it comes to the challenge of making EU law seem relevant and real, we could learn how teachers in other jurisdictions overcome the problem of abstraction. If they can help students in New Zealand and the US get past scepticism and apathy, when the 'complexity of European Union law acts as a repellent to students' (Masselot, 2016), then there must be hope for us in the UK as a long-term and withdrawing Member State with continuing legal links. Masselot, writing of teaching in New Zealand, recommends a focus on contextual issues 'such as climate change, trade or regional integration' and adopting a 'more flexible and adaptive course module', while Caruso, on teaching EU law in the US, emphasises the importance of the internal market as a 'perfect laboratory' for observing the dynamics between different fields:

> 'The interdependence of foreign trade policy with municipal regulatory matters, individual rights, and redistributive policies remains generally opaque in the fragmented teaching of U.S. law… the [EU] course is a rare opportunity to see how, in law as in life, all things are connected.' (Caruso, 2011, p. 194)

In that light, again, in spite of possible pressures to replace the study of EU law with international law (Wallis, 2021, p. 785), the subject can and should continue to be at least as pertinent to students in the UK as other non-EEA states.

The use of authentic case materials and scenarios that focus on how to make use of EU legal arguments, and how to call upon, or get evidence from, EU institutions, can help to embed the subject and bring it back down to Earth from lofty CJEU case-law. By thinking about the methodology of our teaching, the selection of sources and how we encourage students to do their own research and ask their own questions, we can start to combat the third risk – that of excessive black-letter lawyering.

4 EU law as indoctrinating doctrinalism: the risk of excessive black-letter lawyering

A colleague once described EU law as 'black letter plus'. I did not take this as a compliment. A heavy focus on the principles established in CJEU case-law, to the exclusion of even the basic underlying facts of foundational cases (many of us have to remind ourselves exactly what gave rise to *Van Gend en Loos*),[5] along with legislation, can lead to excessive doctrinalism. This is a distinct risk from, albeit related to, that of excessive positivism; one can take normative positions on, and question the ideological orientation of, the law while only undertaking doctrinal analysis.

A more contextual approach *has* to mean a more socio-legal approach – which in turn suggests a wider use of empirical, and interdisciplinary, sources and methods. As with planning any research project, simply tagging some socio-legal materials onto the end of a reading list is not persuasive; the sources need to speak directly to the learning objectives, just as methods need to speak to research questions. So a socio-legal curriculum needs socio-legal learning objectives. This may mean asking different questions of cases rather than 'with which key principle do we associate this case?'. For example, in *EU Law Stories* (Nicola and Davies, 2017), different authors go behind key cases, look at the backgrounds and compile narratives of the case stories – with Hennette Vauchez using *Grogan*[6] to 'retell the story of reproductive rights in Europe' and Davies arguing that a 'strategic miscalculation' lay at the heart of *Internationale Handelsgesellschaft*.[7] Other scholars are doing fascinating work on re-evaluating cases through judgment rewriting projects – such as *Feminist Judgments* (Hunter *et al.*, 2010), *Feminist Judgments in International Law* (Hodson and Lavers, 2019) and *Rewriting Children's Rights Judgments* (Stalford *et al.*, 2017). While collectively those three projects only rewrote

[5] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, EU:C:1963:1. Customs duties applied to urea-formaldehyde, in case you were wondering.

[6] *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, Case C-159/90, EU:C:1991:378.

[7] *Internationale Handelsgesellschaft vs. Einfuhr- und Vorratsstelle für Getriede und Futtermittel*, Case 11/70, EU:C:1970:114.

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three CJEU cases between them, they offer a new way of reading cases and playing with the law that could form the basis for student-directed activities.

But socio-legal teaching is not just about moving away from reading the same old case-law in the same old way – it is about getting beyond that case-law and shattering the illusion of a self-contained legal-ecosystem-in-a-vacuum. Socio-legal studies has 'been animated by a commitment to social and political change, and a confidence that this was not … incompatible with serious intellectual enquiry' (Creutzfeldt *et al.*, 2019, p. 3). Such a commitment requires questioning institutions and looking at issues of disproportionate impact on marginalised groups. And to do that, we need to look at data. We should equip students so that they can ask whether and to what extent the law entrenches existing imbalances of power and privilege. As Wald puts it, our 'society is plagued by many forms of social injustice, and the failure of law schools to engage their students in a social justice discourse is a crisis' (Wald, 2018, p. 114).

By loosening the 'vice like grip of doctrinal legal analysis' over the legal curriculum, we can help students to question 'the expression of the approved rules of conduct' and to 'develop analytical, conceptual, research oriented and other intellectual skills that enable them to make better choices in their lives' (Lakshminath, 2008, pp. 608–609). We can give our students the option of making the world a better place – but only if we do not shy away from helping them explore what is wrong with it to begin with. In reminding us of the importance of 'fears, hopes, dreams … [and] relations of power, hierarchy and subordination' in how the law is conceptualised, Cardwell and Hervey point to the potential of EU law as 'an effective instrument for an agenda of social progression, but … technical law can also fail to do or deliver the very things we expect from it' (Cardwell and Hervey, 2015, p. 175). However, most reflections on socio-legalism are research-oriented. Guth and Ashford (2014, p. 19) have noted that in spite of a growing and flourishing socio-legal research agenda, there has been 'less willingness' or even 'relative silence' when it comes to translating that agenda into learning, teaching and the content of law degrees. In EU law, that silence is fairly resounding. But we have a wealth of important contextual data at hand – for example, statistical data through Eurostat and survey data through Eurobarometer, all of which can be used in illustrating arguments, but also to provoke questions and to remind students of the multiple domestic legal systems in which EU law really, for most purposes, manifests.

In drawing upon socio-legal sources, we can make the most basic foray into interdisciplinarity. If it is a challenge to simply connect EU law to different aspects of the law curriculum, then it may seem ambitious to seek connections with other disciplines. But any meaningful conception of 'context' is interdisciplinary by definition. Incorporating other disciplinary perspectives helps students to get a better understanding of the law, according to Kleeger, because 'law is explained as a social construct and system of beliefs and meanings that attach to human behavior' (Kleeger, 2019, p. 14). When it comes to the EU, it can be easy to get lost in the procedural complexity so that the ensuing law seems like the product of a technical legal assembly line. We can lose sight of its character as a *social construct*, related to human beliefs.

As soon as we start investigating the development of EU integration, we find ourselves delving into materials from sociology, politics, economics, geography and history (all of which are to some degree necessary if we want to, for instance, decolonise our study of the EU and EU law). We can ask not only *how* and *when*, but crucially *why* the EU developed as it did – and ask whether its Member States would make the same decisions now. For students of UK law, this may be a rare insight into civil-law-inspired jurisprudence, and a chance to reflect on how and why judge-made law in the CJEU seemed so startling to some civil lawyers. In drawing upon interdisciplinary sources, we may face objections that lawyers in practice have no need for these sources. And here is where we may need to rally round the defence of a liberal legal education, defined by Guth and Ashford as 'one which does not focus on education for a particular purpose other than education itself … [and is] concerned with pursuing knowledge for knowledge's sake and developing skills of knowledge acquisition through research, critical thought and debate' (Guth and Ashford, 2014, p. 6). In reflecting on legal pedagogy and warnings about keeping the curriculum 'authentic', Wallace (2018, p. 271) suggests that we be 'straightforward about the fact that ours is a community of legal scholarship, not vocational

training' while also making the case that participating in that legal scholarly community is of value to prospective legal practitioners. I would also add that such participation is of value to legal practice at large, and that a more socially aware legal sector is of value to society.

It is not just subject matter and reading lists that need attention – but the basic mechanics of our teaching. It is hard to combat the risks discussed in this paper by teaching to a textbook, not least as there is a limited selection of relatively similar textbooks available, which are mostly doctrinal and context-light. While there is a case for developing a greater variety of contextual textbooks, it is likely easier to adopt a contextual approach by *not* tethering a course to a specific text. At York Law School, it was clear from the outset in all core modules that teaching to a textbook was not compatible with PBL (and especially not with integrated subjects) and so we had to select a range of materials drawn upon for each learning objective, problem, plenary and feedback session. This creates its own problems of course; I went through various course iterations, trying to impose a coherent structure to the course and materials and trying to avoid the pitfall of pedagogical magpie-ism – seizing on and chucking in shiny new items. By sketching out learning guides, we risked just creating bad and incomplete simulacra of textbooks. The most successful strategy was to create online bite-sized guides that mostly served as springboards with links to resources, all of which could be kept current not too onerously, where the underlying computer logic – the structure connecting these guides – was designed to endow the course with a sense of structure, but not a straitjacket. There is definitely still work to be done on striking the right balance between the comfort zone of a textbook-based syllabus and the risks and rewards of ditching the book and exploring new ways to pick and mix materials.

A review of the mechanics of our teaching is a chance to think about equality and inclusion. Thiemann (1998) made a series of recommendations to make legal pedagogy more inclusive, to avoid favouring the same (male) students and reproducing the same biases and exclusions through generations. In sum, they were to include more opportunities in the curriculum for discussion groups, brainstorming, the use of actual case files, role playing, and narrative and storytelling. These methods are increasingly in use and have been since YLS started in 2008 as a result of using PBL. In PBL, most of the learning happens in small groups – student law firms. They are presented with scenarios, but not questions. Nor are they told which areas of law are engaged. While they have support from a tutor, the tutor is hands-off; each session is chaired by a student and scribed by another. Together they brainstorm the different issues raised – and make a mind map. They group them together and then identify their own learning objectives, conduct their own research and reconvene to feedback. This core learning process is then supplemented with debates, mini conferences, workshops and plenaries. But even so, with limited time and a lot to cover, the focus will always be on consulting (doctrinal) legal materials. More by way of large-scale simulation exercises could be a way to demonstrate the importance of extra-legal context. Zeff in 2003 conducted a simulated European Council exercise to teach US students about the EU, to give students some insight into the different sociopolitical/economic variables influencing individual actors/Member State representatives, though this is most clearly of use for institutional-level rather than individual-level analysis. An exploration of some of the overarching questions noted above, to combat excessive positivism, could involve simulations that encourage students to think about the ways in which individuals can be disadvantaged by, for example, rights based on economic status.

If we want to frame the curriculum differently, ask different questions, cover different topics, use different materials and teach differently – then, as noted above, we have to think about how to assess differently, too. Assessments should reflect the mode and content of learning (Biggs, 1996; Meyers and Nulty, 2009) and it would do students a considerable disservice to make adjustments to their learning, only to set assessments that are embedded in positivist, abstract, doctrinal traditions. Ball and Dadomo found, in the UK Centre for Legal Education (UKCLE) survey, 'resounding' evidence that 'EU Law lecturers appear to be highly conservative in their utilisation of more innovative forms of assessment' (Ball and Dadomo, 2010, p. 84). Part of the problem is that the regulatory bodies require that separate modules be graded separately – so an interdisciplinary, inter-modular curriculum is all very well, but students need an 'EU' mark, making discrete module assessments inevitable. But that does not mean

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we have to be 'highly conservative'. Writing in 2012, I found evidence of creative and imaginative forms of *formative* EU law assessment and original assessment methods in optional EU-adjacent modules (O'Brien, 2012), but they had not (and suspect still have not to any great degree) percolated into the setting of summative assessments for the core EU module. Simulations, portfolios, quizzes, group tasks such as writing preliminary reference requests or infringement complaints to the EU Commission, blogs, vlogs, etc. – all these and more can play a part in how students can demonstrate engagement with, and the meeting of, our reframed learning objectives.

5 Conclusion

> 'Context matters: contextual insights should be infused throughout every chapter of every casebook assigned in every course taught in law school and not relegated to a specialized chapter.' (Wald, 2018, p. 134)

EU law matters – and it is through a contextual approach that we can best show how and why it matters. It is an ideal site for exploring the power relations, different political and ideological agendas, and structures of identity and exclusion that underpin the law. It is an opportunity to help students combat narratives of legal neutrality and topics like Brexit are a chance to engage in discussion on the importance, and even just the existence, of *truth* (Dougan and O'Brien, 2019).

I have suggested that contextual pedagogy can help mitigate three risks courted; by traditional EU law teaching through redesigning the curriculum around a key, normative question and a radical, ruthless, selection of content to go for more depth and less breadth, so we can avoid excessive positivism, whereby students are expected to accept the law is what it is, because we are cramming them full of it. In selecting content to speak to our new overarching question(s) we can avoid excessive abstraction, whereby the law is geographically and substantively removed from students, through GRAND topics – those that are Grounded, Relatable, Applied, Newsworthy and Dynamic. And in drawing upon more socio-legal sources and teaching methods, we can help students pose their own questions and avoid retreating into 'black letter plus', where the only normative debates to be had are doctrinal ones.

These strategies are not just about making the subject more entertaining. They are about honesty, and about fairness – about recognising power imbalances and giving voice to those who have been marginalised and/or disempowered by the law. And that can be an uncomfortable process for teachers and learners who occupy a position of privilege. Abel notes the discomfort some students felt when faced with critiques of the law and how it is practised: '[c]ommitted to becoming lawyers, they did not want to entertain doubts about the ethical foundations of their chosen profession' (Abel, 2020, p. 91). But such reflections are important; in a liberal legal education, complacence is not a virtue, but curiosity is.

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