

Pegging
Levels

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# Introduction

Being about choices between various possible practical states of affairs, debates about policy necessarily involve contestable—and often contested—issues of values and meaning. This paper explores some of the obstacles that undermine the quality of debate about policy. It takes ‘higher education’ [HE] and ‘further education’ [FE] as convenient examples. It makes no attempt to examine the details of UK tertiary education policy. It draws from two streams: philosophy of mind, acknowledging its psychological turn; and philosophy of language.

# The Title

In the card game *cribbage*, points scored are shown by placing pegs on a 61-holed-board. When two players have equal scores, their pegs are level—hence, ‘level pegging’. But we also use pegs to *fix* things—to preserve the *status quo* (*e.g*. to keep a tent erect, or wet clothes on a line for drying). See our four different colours, kept neatly *on line* and *separate* using pegs.

‘Levels’ are ‘classes’ or ‘categories’ and, as such, function to *separate*.[[1]](#footnote-2) To make our separating classifications, we need criteria—litmus tests or subtler and often multi-factorial ‘tests’. More often than we care to recognise, such ‘tests’—and the ways we choose them and phrase them—are *ex post* rationalisations.

# Hypothesis

Our genetic inheritance and some of our social conditioning combine to produce biases or predispositions. Examples include: confirmation bias (Haidt, 2013, pp. 93-107); a linear conception of causation and a tendency to prioritise force dynamic causal factors (Pinker, 2008, pp. 223-224);[[2]](#footnote-3) mistaking correlation for causation (Cartwright & Hardie, Evidence-based Policy: a practical guide to doing it better, 2012); hindsight bias (Kahneman, 2012, pp. 210-204); suspicion of strangers (Greene, 2014);[[3]](#footnote-4) accepting known risks more readily than unknown risks. (Schmidt, 2004, p. 7); thinking our memories are Rolodexes from which we retrieve the right card; and not recognising that recall is reconstruction (Kahneman, 2012, pp. 60-61) (Michaelian & Sutton, 2017). We are primed and anchored by fragments of information or bids and claims (Kahneman, 2012, pp. 52-58, 109-128).

Moreover, these

‘[c]ognitive biases operate automatically and unconsciously and are not necessarily overcome by training, experience or effort. They are, in consequence, ubiquitous and insidious.’ (Edmond & Martire, 2019)

Often combined with our ‘groupishness,’[[4]](#footnote-5) confirmation bias can produce dichotomisation—a tendency to ‘transpose’ questions from polycentric to binary—or from multivalent to bivalent. How often do we hear, ‘It boils down to ‘either A or B’? The implicit underlying logic is:

*if not A, then B; if not B then A*.[[5]](#footnote-6)

This classic sketch—John Cleese, Ronnie Barker and Ronnie Corbett—deals with three classes: upper, middle and lower. [[6]](#footnote-7) <https://www.youtube.com/watch?v=o4QuSZ2Vvj4>

Hence, it has the form: *if not A or B, then C; if not C or B, then A; if not A or C, then B*.

Of course, sophisticated intellectuals realise that there are often more than two factors to be considered, but—with the same dichotomizing oversimplification—they love to *class*ify or *categorise* and, often implicitly, create *hierarchies*. And, when there are many *classes*, *stratification* can be gloriously applied.

# Hierarchies of Esteem: Jeremy Bentham and JS Mill on pushpin

In pushpin, each player sets one pin (needle) on a table and then tries to push his pin across his opponent's pin. The game is played by two or more players. It is not intellectually demanding but requires some manual dexterity. Bentham famously—and anti-hierarchically—asserted,

‘Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either.’ (Bentham, 1830, p. 206)

By contrast, Mill posited a hierarchy of pleasures.

‘If one of the two [pleasures] is, by those who are competently acquainted with both, placed so far above the other that they prefer it…and would not resign it for any quantity of the other pleasure which their nature is capable of, we are justified in ascribing to the preferred enjoyment a superiority in quality…’ (Mill, 1863, p. 12)

Mill’s emotional commitment was to ‘humans as reasoning individuals’—*distinct from* other animals.[[7]](#footnote-8) His emphasis on the *individual’s* equal freedom from the state[[8]](#footnote-9) exemplifies the post-Enlightenment view that, in Western society, falsely represents much of our normative decision-making as the *product* of reason, whereas it is mostly a sophisticated means of *justifying* intuitions and hunches, *ex post*.[[9]](#footnote-10) Mill suffered from what Jonathan Haidt—as a good disciple of David Hume[[10]](#footnote-11)—calls ‘the rationalist delusion’ that the ‘rationalist tail’ wags the ‘intuitive dog’ (Haidt, 2013, p. 103).

# Individual and hierarchical conceptions of ‘dignity’

Michael Rosen distinguishes ‘the dignity of human beings as such…which…made it natural to represent slavery as a violation of human dignity (Rosen, 2012, p. 41) from dignity as ‘the bearing required by differentiated status hierarchy’ (pp. 47-54). He notes that the French Revolution in the late eighteenth century abolished the aristocratic dignities (*dignités*) (p. 38). Despite the execution of Charles I in 1649, the 17th century English Revolutions—the second of which established a *constitutional* monarchy—are thought not to have had that effect in England. This might account for the excessive concern with social class and classification that has been evident in English society. I am sceptical. France has some well-developed élite institutions—and meritocracy, which is hierarchical, can be inherited through increased opportunities for the children of the successful. Certainly, Sir Henry Maine’s celebrated claim that ‘the movement of the progressive societies has hitherto been a movement from Status to Contract’ (Maine, 1861, p. 165) did not *eliminate* stratification. Rather, it *added* an entrepreneurial aristocracy and an industrial working class; and stimulated the growth and *sub-categorisation* of the middle class.

# Open society and open minds

In a podcast trailer for her 2019 Alan Saunders Lecture, Alison Wylie underlined the connection between Karl Popper’s sometimes wrongly-separated themes[[11]](#footnote-12) of: ‘falsifiability as the touchstone of scientific method’; and ‘open society’ (Wylie, 2019). Protagonists in policy argument, she said, make unconscious assumptions, whereas, ‘a norm central to science’ or a ‘core principle’ is

‘a commitment to hold your assumptions and your claims open to systematic critical scrutiny…To *categorically* reject lines of critique and creative contribution…is…fundamentally inimical to what it is [that] defines our Western tradition of science.’

The key word ‘categorically’ is emphasised because—although categories are essential for the management of complexity and voluminosity—we too often forget that categories push us into over-simplifications and over-rigid distinctions. Furthermore, we can too easily treat a ‘category’ as a ‘mind-independent real entity’ rather than as a ‘human construction’. And we shelter comfortably in our ‘schools’ where all share the same illusions and take so many things for granted.

# Stratifying UK post-school education

In the UK, FE and HE are far from ‘level pegging’ or equality of esteem or financial support, and that inequality seems well ‘pegged’, much as social class was—in many ways, still is—a fixture in British society. But it’s not as ‘binary’ as it looks. ‘Higher education’ embraces, in descending order of prestige: Oxbridge; the other Russell Group universities; the other pre-1992 universities; the former polytechnics that became universities in 1992; and the later-comer universities. And ‘below’ HE there is FE, which deals with those students who are ‘only good enough to prepare for “work”’, rather than for ‘professions’ and ‘policy’ and ‘management’.

The Augur Report notes the ‘disparity of resources between higher and further education and the steep decline in opportunities for education and training in later life.’ (Augur, et al., 2019, p. 8). Augur also notes that, despite the recent increase in HE participation, overall participation in tertiary education has declined—and FE has been the loser.[[12]](#footnote-13) Such are the consequences of explicit and implicit value-judgements of policy-makers and journalists over the years, presumably responding to—and reinforcing—widely held views (Johnson, 2019)

# Dual process thinking

Jonathan Haidt—as does Daniel Kahneman (Kahneman, 2012)—identifies a dual-process or two-stage approach to such judgement-making:

1. ‘[M]oral judgment is caused by quick moral intuitions and is followed (when needed) by slow, *ex post facto* moral reasoning’.[[13]](#footnote-14) Some of our intuitions are ‘directly shaped’ by social pressures. ‘[T]he mere fact that friends, allies, and acquaintances have made a moral judgment exerts a direct influence on others’, although sometimes that might ‘elicit only outward conformity’.[[14]](#footnote-15)
2. Our brains are machines used mostly for winning the argument that our intuitions are right (Haidt & Bjorklund, 2007, p. 191)[[15]](#footnote-16) and only exceptionally for reflective review—and perhaps a change of mind.

‘[C]onscious verbal reasoning [does not] command...our actions [but]...is rather more like a press secretary, whose job is to offer convincing explanations for whatever the person happens to do.’[[16]](#footnote-17)

(Sauer, 2019) posits not two but three processes. In addition to Kahneman’s System 1 (fast: innate or learned automaticity, intuitive), Kahneman’s System 2 (slow: effortful thought), is subdivided to give: System 2 (effortful justification of intuitions); and System 3 (effortful questioning of intuitions). ‘How often this occurs?’ is an empirical question that I cannot answer, but my hunch is that it is rare..

The ‘definitions’ of FE and HE (and indeed of what counts as ‘E’) leave matters wide-open to *ex post* rationalisations of hunches and prejudices. The interpretation of the terms is a form of moral judgement—a plumping (or preference) for one set of outcomes as better than others. Policy decisions are not pure science. They are not Popperian falsifiable hypotheses as to what in fact is the case[[17]](#footnote-18) but contestable value-judgements.

# Discussing Policy

Any serious discussion of policy—say of further and higher education—is unlikely to progress far without someone asking, ‘What do you mean by…?’ or saying, ‘We need some definitions for our report’. Indeed, without ‘some degree of agreement’ about what an item under discussion is, discussion is unlikely to be productive. It will miss issues—or fudge them. There will be pseudo-agreements, avoidable disagreements and protagonists will talk past each other.

Why? I offer several reasons, most of which have roots in our psychology and experience but are manifested in the language that, *faux de mieux*, we use to make and defend our claims.

# Defying Definition

I throw a ball to you. We can as good as guarantee that, if it was a ‘tennis ball’ when I threw it, it will be a ‘tennis ball’ when you catch it. But words are not like that.

If I say to you, ‘I tend to keep to the right’, you might ‘hear-me-to-say’ that: (i) I hog the motorway fast lane; or (ii) I ignore the signs on Tube staircases enjoining me to ‘keep left’; or (iii) ‘I favour Tory candidates when I vote’. As it happens, I don’t do any of these. What I ‘meant-to-say’ is that (iv) I think seriously about justice and that, if that thinking leads me to a conclusion or a Kantian ‘maxim’[[18]](#footnote-19) about what is the right thing to do, I tend to follow that maxim.

# ‘Analogue’ and ‘Binary’[[19]](#footnote-20)

I doubt that we can ‘define our way out’ of this problem. We know that both FE and HE are somehow *additional* to some earlier education but, beyond that, we struggle for precision in definition and consistency of practice. Here’s why.

1. To begin, just think of an on/off switch as ‘binary’ and the volume control as ‘analogue’. The terms of our example—*further*, *advanced*, *higher, general, vocational*—are ‘analogue’ (rather than ‘binary’). They are terms are open-textured or, in W B Gallie’s phrase, ‘essentially-contested’ (Gallie, 1965).[[20]](#footnote-21) Think of voting ‘leave’, or of demanding ‘social justice’. Terms with these characteristics have attracted much philosophical interest, including from: the later Ludwig Wittgenstein (Wittgenstein L. , 1963);[[21]](#footnote-22) Ronald Dworkin (Dworkin, 2011, pp. 123-188);[[22]](#footnote-23) David Miller (Miller, 1979);[[23]](#footnote-24) and many others.

Dworkin’s explanation of kindness and honesty illuminates the notion,

‘Kindness and honesty [two principles that often conflict] cannot *just* have one content or another, because moral claims cannot be barely true…No moral particles fix what these virtues just are…[They] are *interpretive concepts*: their correct use is a matter of interpretation, and people who use them disagree about what the best interpretation is.’(Dworkin, 2011, p. 120)

Similarly, if a sergeant is told, ‘Choose the best soldier for the mission!’ what is meant (or understood) by ‘best’? The fastest runner? The soldier with the most stamina? Or who can lift the greatest weight? Or who is the strongest-minded and most resilient? None of these meanings ‘resides ‘‘in’’ language as furniture resides ‘‘in’’ rooms’. (Black, 2002, p. 176) (Bicchieri, 2014). There is no litmus-test for such value-judgements. Indeed, we have to make them and to justify them. Given our biases, we should heed David Hume’s warning,

‘We speak not strictly and philosophically when we talk of the combat of passion and of reason. Reason is, and ought only to be the slave of the passions, and can never pretend to any other office that to serve and obey them’, (Hume, 1739, p. 415). [[24]](#footnote-25)

Furthermore, we all suffer from binary bias (Fisher & Keil, 2018).

‘We love to dichotomize…Dividing the world into two distinct sides is simple and intuitive, and also dramatic because it implies conflict, and we do it without thinking, all the time…[We] imagine division where there is just a smooth range, difference where there is convergence, and conflict where there is agreement.’ (Rosling, Rosling, & Rosling-Rönnlund, 2018, pp. 38-39)

‘Mankind likes to think in terms of extreme opposites. It is given to formulating its beliefs in terms of Either-Ors, between which it recognizes no intermediate possibilities. When forced to recognize that the extremes cannot be acted upon, it is still inclined to hold that they are all right in theory but that when it comes to practical matters circumstances compel us to compromise.’ (Dewey, 1939, p. 17)

Nevertheless,

‘Our mind is capable of passing beyond the dividing line we have drawn for it. Beyond the pairs of opposites of which the world consists, other, new insights begin.’ (Hesse, 1920, p. 263)

# Certainty often Illusory

There are far fewer ‘binary’ concepts than we imagine. Mostly, a term’s certainty is an illusion created by a consensus of usage. The (apparent) certainty is no more and no less than ‘mutuality of interpretation.’ (Black, 2002, p. 179). Only analytically[[25]](#footnote-26) true (often mathematical or geometrical) concepts—such as ‘two’, ‘hypotenuse’ or ‘isosceles’—do not admit of interpretation (Swaminathan, 2019).[[26]](#footnote-27)

# Context and Consensus

Mostly, the context helps to keep speaker-meaning and hearer-meaning within touching distance of each other.[[27]](#footnote-28) If I say ‘I tend to keep to the right’ and we are talking generally about motorway driving, you would probably be correct to take meaning (i) (fast lane hogging): or, if about tube travel (up the down staircase), (ii); or, if about politics, (iii) (voting Tory); or, if about ethics, (iv) (holding firm to considered ‘rights-based’, rather than duty-based or consequentialist, moral judgements).

But there is a further factor: *viz*. shared experience. If you say to me that you enjoy ‘classical music’, I might take you to mean the whole range of serious music from Palestrina to Stockhausen. But, if we are both musicologists, I might—probably correctly—take you to mean the music of the time and style of Bach, Handel and Mozart and not the more romantic music of Brahms, Wagner, Mahler or Richard Strauss. Given our shared experience, you would not have to explain all this to me.

The key mechanism at work in such situations is ‘lexical priming’. Jenny Kemp gives this example.

‘[L]exical priming will vary between different communities of practice, as the usage of words varies in different communities. If I, as a corpus linguist, use the word ‘corpus’, I am using it to mean ‘a collection of texts, nowadays stored electronically’; I would use it in chunks such as ‘building a corpus’, ‘the corpus was analysed’, ‘corpus linguistics’, ‘parallel corpora’. However, to a medical professional, ‘*corpus femoris*’ or ‘*corpus adiposum*’ would be more familiar; and to a law academic, the chunks ‘a writ of *habeas corpus*’, ‘the Habeas Corpus Act’, ‘the corpus of the asset’ or ‘*Corpus Juris Secundum*’ would be much more likely to spring to mind.’ (Kemp, 2018).

Shared experience—and the lexical priming it entails—is crucial to what we understand by ‘higher education’ and by ‘further education’. The words themselves—‘higher’ and ‘further’—'don’t do it for us.’ Neither is it a matter of lexicography. Dictionaries do not dictate meaning. The often-used terms ‘define’ and ‘definition’ are misleading. They cannot make meaning unambiguously definite. The ‘finite’ is too fluid for that. Dictionaries can do no more than capture some usages as they persist or change.

It is tempting to think of definitional difficulties as ‘core-and-penumbra’ problems. That makes good sense when we are rounding fractions up or down to the nearest whole number or classifying the risks in our risk register as high, medium or low. However, when we are dealing with contestable terms—even if currently uncontested—'core-penumbra’ thinking is often misleading. When pressed, we struggle to find a ‘core’ that is analytically ‘true’ and immutable.[[28]](#footnote-29)

We might agree that we want a ‘just result’ but might disagree as to whether justice is based on property rights, human rights, desert or need. In the seventeenth and eighteenth centuries, the property-owning classes would think the preservation of property rights fundamental to their conception of a ‘just result’. But that—apparently ‘core’—meaning simply reflected a strong value-consensus amongst that class of users of the term. Indeed, we can think of ‘consensus’ as ‘shared bias’, the result of the priming and anchoring acquired by shared or similar experiences (Kahneman, 2012, pp. 52-58, 119-128). ‘When all think alike, no one thinks very much.’ (Lippmann, 1915, p. 51)

Such a consensus can break down—usually gradually. Whilst nowadays even the economically privileged do not think of ‘rights’ as necessarily property-based, there is great dispute over the extent of the ‘right to respect for one's private and family life…home and…correspondence’ and what restrictions are ’necessary in a democratic society’.[[29]](#footnote-30) That dispute is not about lexicological correctness but about ethical values.[[30]](#footnote-31)

# Praxis

Discrepancies between speaker-meaning and hearer-meaning will be rare if:

1. the concepts are ‘mathematical’ (two-ness, triangularity) or ‘binary’ (think of the on/off switch); and/or
2. the speaker and hearer are in shared experiential territory (went to the same kinds of schools and universities, *etc*). Daniel Dennett (1995);[[31]](#footnote-32)

By contrast, there can be latent or patent miscommunication and disagreement where:

1. the concepts are essentially contested concepts, open-textured or ‘analogue’ (think of the continuously variable volume control); and/or
2. the speaker’s and hearer’s experiential backgrounds diverge,

Contestability (or interpretivity) is sometimes patently obvious and the contestants for conceptions of the concept are alerted. But, at other times, contestability is latent and the tension between competing conceptions will go unnoticed as the conversationalists happily ‘talk past each other’.



A word that seems ‘incontestable’ can be put under pressure and found to be ‘contestable’. For example, we might take the meaning of ‘instantly’ for granted. Apparently, we mostly automatically but unmathematically conceptualise ‘instants’ as ‘intervals’ of some three seconds—roughly the time it takes to shake hands (Pinker, 2008, pp. 64-72, 188-189). However, in a scientific experiment, three seconds might well not count as ‘instant’ and there might be a dispute as to how to operationalise the concept. That dispute might be resolved pragmatically by agreeing that an effect is ‘instant’ only where the time taken for it to be manifested is immeasurably small.

Many of the vogue phrases and definitions used in the discussion of educational strategy are essentially contestable. But, too often, meetings proceed with ritual incantations of the current buzz phrases—drawn from whatever reports are trending. Speaking and hearing the uplifting phrases might be therapeutic for participants but clear agreement on values and action is too often absent.

# Inclusion

Think of phrases such as ‘inclusive education’. There is widespread if not universal agreement that certain kinds of exclusion—on grounds, say, of ethnicity or gender—are unacceptable. However, who exactly has a right to be included in exactly what? What, for example, are ‘reasonable adjustments for persons with disabilities? Skoogmusic and Yamaha developed an instrument so that Clarence Adoo—a trumpet player so badly injured in a road accident that he is quadriplegic—can participate in musical ensembles. (Osborne, 2012)[[32]](#footnote-33) But what adjustments is it reasonable to make for, say, a partially deaf teacher? In addressing that problem Sections 20-22 Disability Act 2010 make liberal[[33]](#footnote-34) use of open-textured terms (‘reasonable adjustments’, ‘substantial disadvantage’, ‘relevant matter’). Furthermore, the Guidance issued by the Equality and Human Rights Commission invokes such ‘essentially contestable’ concepts as ‘proportionate means’ and ‘legitimate aim’.

Giving practical meaning to these contestable terms is fundamentally a matter of valuing the interests that compete for recognition and primacy. Whilst we often take a meaning for granted, ultimately, we must answer questions like ‘how much do we care about that?’ or ‘do we esteem this more than that?’ Our answers to such question will be intuitive and our intuitions will be informed by our life experiences, many of which have been shared with those others who are of ‘like mind’. The reasons tend to come *ex post* not *ex ante*.

In disconnecting verdicts from motives and justifications, I again follow David Hume and hold passions to provide the motive and reason the justification—*ex post*. In the same vein, Thomas Scanlon writes:

‘Desires come to us “unbidden” and we may feel that they “impel” us to action.’ (Scanlon, 2009)

Or, as the US humourist, journalist, novelist, poet, newspaper columnist, and playwright, Don Marquis (1878-1937), put it,

‘Ideas pull the trigger, but instinct loads the gun.’

Having made up our minds, we choose our words to *justify* our decisions.

Where does this leave us? We can look to Parliament for ‘definitions’ of ‘further education’ and ‘higher education’, but—given the foregoing—we might well be disappointed. Nevertheless, it is to statutory provisions that I now turn.

# Official Definitions

Decades ago, government decreed that post-school college education is divided into two parts. Hence, we confront exercitive (‘official’)[[34]](#footnote-35) (Austin, 1962, pp. 155-157) verdicts that some education is ‘higher’ and some, merely, ‘further’. But verdicts (Austin, 1962, pp. 153-155)—even official ones—are *conclusory*. They can tell us nothing about (i) the motives that cause them or (ii) the reasoning by which they are rationalised, explained and ‘justified’ *ex post.*[[35]](#footnote-36)

The official line is that, when taken out of school, Levels 1-3 are FE, and that level 4 and beyond is HE. Level 6 is the level of the undergraduate honours degree. The justification for this gradation purports to the *level of* *difficulty* (UK Government, n.d.). Nevertheless, it is widely assumed that FE is about skills for workers and HE is about higher-order skills for professionals, managers and policy-makers. Call this ‘the elitist assumption’.

* The interpretive and contestable concept of ‘difficulty’ allows that conception to flourish and that conception is not contested sufficiently widely or strongly to be constrained.
* Moreover, distinction by abstract ‘difficulty’ is *by degree*; whereas the elitist assumption’ purports to distinguish *by kind*.

Seemingly, the elusive—or illusory—touchstone characteristics of HE must be substantially present in Level 4 courses and only trivially present at Level 3 or below.

The *Appendix* rehearses the official definitions, such as they are. But, from these we learn only that:

* higher education presents ‘more difficult’ challenges to learners than further education does;
* further education institutions do further education;
* higher education institutions do higher education; and
* higher education and further education institutions are defined by the level of the qualifications to which their courses lead, which is taken as Level 4 or above.[[36]](#footnote-37)

To get closer to the distinction of FE from HE, we must look at the definition of Level 4, the ‘lowest’ level of HE. The UK Quality Code for Higher Education (QAA, 2014, p. A 4.10) provides that, to be awarded a Level 4 qualification, a candidate must have:

‘knowledge of the underlying concepts and principles associated with their area(s) of study, and an ability to evaluate and interpret these within the context of that area of study; [and]

an ability to present, evaluate and interpret qualitative and quantitative data, in order to develop lines of argument and make sound judgements in accordance with basic theories and concepts of their subject(s) of study.’

‘Typically,’ holders of these Level 4 ‘higher educational’ qualifications ‘will be able to:

evaluate the appropriateness of different approaches to solving problems related to their area(s) of study and/or work;

communicate the results of their study/work accurately and reliably, and with structured and coherent arguments; and

undertake further training and develop new skills within a structured and managed environment.’

Here too we see eminently contestable terms: evaluate, interpret, appropriate, structured, coherent.

# Vocationality

Some Level 4 qualifications have a vocational flavour.

Holders of a Level 4 qualification will have ‘the qualities and transferable skills necessary for employment requiring the exercise of some personal responsibility’;

Level 4 qualifications can be work-based; and

Level 4 qualifications, which are HE, include ‘higher apprenticeships’ and higher national certificates (HNC) and Level 3 qualifications, which are FE, include ‘advanced apprenticeships’.

Nevertheless;

* many qualifications at Level 6 or beyond are strongly work-related and constitute steps towards professional recognition; and
* a good deal of Level 3 work is not obviously vocational. The writ of the Office of Qualifications and Examinations Regulation runs to ‘general’ and ‘vocational’ qualifications.(Understand our Rules, 2019).

Here, as examples, are a couple of questions from the Level 3 specimen A2 AQA paper in ‘Ethics and Philosophy of Mind’, that might be sat by candidates in their final year of secondary school (Assessment and Qualifications Alliance, 2014);

Explain the difference between cognitivist and non-cognitivist theories of ethics.

How might a utilitarian attempt to justify preventative imprisonment (imprisoning someone to prevent them from committing a crime, rather than because they have committed a crime)?

The second of these shows traces of vocationality, but I doubt that the issues raised by the first would be probed in many job interviews. However, it is imaginable that they would be probed in an Oxbridge entry interview.

# ‘Blooming’ Concepts

We have noted Bentham’s denial of a hierarchy of *pleasures*. But is there a robust hierarchy of *skills*? Those who, like Mill, think poetry and philosophy superior to pushpin might—as the natural result of life-experience—be prejudiced. But that possibility does not falsify the proposition that some skills are of a higher order than others are. There could be some foundation beside the prejudice.

Are there ‘higher order’ skills? Is philosophical competence of a higher order than musical competence? The skills of a master craftsperson or of an expert classical singer are clearly different from those of a lawyer or a physicist, but is there any touchstone that renders the latter two of a ‘higher’ order than the former two? Is the third-rate philosophising of an art historian or critic of a ‘higher’ order than the first-rate professional practice of a skilled artist—just because it is ‘philosophising’ rather than ‘painting’?

It is tempting to find in Benjamin Bloom’s well-known taxonomy (Bloom, 1956) a spurious certainty and a rationale for opinions that might well be tainted by prejudice. Bloom arranged classes of skills in linear ascension: from (i) knowing; to (ii) comprehending; to (iii) applying; to (iv) analysing; to (v) synthesising; to (vi) evaluating. It is tempting to imagine that the essence of FE lies in (i), (ii) and (iii) whereas the essence of HE lies in (iv), (v) and (vi).

Brenda Sugrue provides a brief but useful critique of the received version of Bloom’s taxonomy: In addition to pointing out that the taxonomy is ‘not supported by any research on learning’, she comments that, ‘The distinctions in Bloom’s taxonomy make no practical difference in diagnosing and treating learning and performance gaps. Everything above the “knowledge” level is usually treated as “higher order thinking”,…effectively reducing the taxonomy to two levels.’ (Sugrue, 2002)

Bloom’s (i)-(vi) use eminently contestable terms. Can I *know* ‘my way to Prague Castle’ without *comprehending* the roads and trainlines? And do I not *apply* that knowledge when I form the *Gestalt* of ‘my way to Prague Castle. ‘Ah!’ you might say, ‘we concede that the relationship (i)-(iii) is not linear, but your example demonstrates that (i)-(iii) are a group that does not involve (iv)-(vi)—just like FE.’

Acceptance of the non-linearity of (i)-(iii) recognises that ‘knowing’, ‘comprehending’ and ‘applying’ are contestable interpretive concepts of which there can be several competing conceptions. Furthermore, we will get a range of answers if we ask, ‘What am I *doing*:[[37]](#footnote-38)…when I *know* that a zebra is an animal?’; or ‘…when I *understand* that a zebra is an animal?’; or ‘...when I *apply* my knowledge and understanding in order to explain to my granddaughter that a zebra is an animal?’

# Plumbing the heights

But consider an FE course in Plumbing. We imagine that the well-trained plumber will be able to do more than install, repair and replace by knowing, comprehending and applying instructions. We expect her to be able to: diagnose faults; install domestic central heating; and advise on whether a combination boiler is most suitable. And could she possibly complete such tasks competently without—in addition to knowing, understanding and applying—*analysing*, *synthesising* and *evaluating*? Sugrue suggests a

‘more radical approach…to have no taxonomy at all, to simply assume that all objectives are at the use level (*i.e*., “performance” objectives) and that learners will practice or be assessed on the particular performance in representative task situations.’ (Sugrue, 2002)

The concepts in Bloom’s taxonomy are meaningful, but they are not separated from each other in the way that the elements in the Periodic Table are. They are eminently contestable concepts. When they are applied to categories of activities or usages, their interpretive nature is easily revealed.

I do not mean to negate or to make redundant any of the concepts discussed here. For example, ‘justice’ is undoubtedly a value to be cherished even though there are deep disagreements as to its basis and extent. Just consider the notion of ‘justice for the families of murder victims’. Some will feel that only the death penalty is enough. Others will say that life imprisonment should be for life. Others might accept the current custodial practices.

So too with ‘reasonable’, which oftentimes serves as a synonym for the more obviously interpretive ‘sufficiently’ (Is the radio loud enough for you, dear?). ‘What’, we must ask, ‘is sufficient/just?’; and ‘in whose eyes?’. ‘Justice’ is not rendered meaningless by such questions. The questions it begs are worth the begging.

To be clear, my argument is not that contestable terms are meaningless. Rather, it is simply that—from time to time when consensus breaks down as experiences diverge and new attitudes and expectations emerge—they will be contested, and that lexicological or doctrinal reasoning is inapt to resolve such contests.

My argument is semiotic in that it is about the vagaries of some of the signs that we use—and too easily take for granted—in our efforts to communicate. It amounts to a plea for deeper, more careful, conversations amongst and between practitioners and policymakers. But to address this communication problem *lexically* is simply to move the value-bubbles around under a wallpaper of words. The solution, I suggest, is to look at usage—at ‘usage → meaning’, rather than at ‘definition/meaning → usage’. The direction of fit is not word → world, but world → word.

# Application to Law Teaching

Day-to-day undergraduate HE teaching is—at least in my experience as a student and teacher of law—often dominated by a pedestrian version of Bloom (i)-(iii), with only a leavening of Bloom (iv)-(vi). A large proportion of time is spent in setting out and learning ‘what is the case.’ Furthermore, and increasingly, to secure their entry qualifications for HE, some students have been ‘taught to the test’. ‘A’ level has not set these students free intellectually. They learn ‘facts’ and ‘criticisms’—for recall when prompted by signals that are also taught—much as they learned about Santa Claus and about the Tooth Fairy. That ‘facts’ are falsifiable by counter-evidence—whereas value-judgements of the implications of those ‘facts’ are not—goes largely unnoticed. Hence, teachers in the first year of higher education in law face the problem of whether to expose their students to inconvenient and unsettling contestabilities or, for the time being, to meet their exaggerated expectations of certainty and wait for much longer processes of realisation to take place.[[38]](#footnote-39)

Arguably, even at the beginning of higher education or in some at least of further education situations, students should begin to confront such questions as Who? What? Where? By what aids? Why? How? When? which, as John Mikhail argues, ‘can transform one description of an action into another’ (Mikhail, 2011, p. 126).

Of course, we need to master some information and skills to free the mental space needed for using them in more demanding problem-solving and decision-making. But ‘teaching to the test’ oversimplifies too often. Legal rules come from cases and are used to decide other cases. The process is dynamic. Rather than take snap shots, students need to make a movie—and to remember that we shall never get to the end of some of the movies.

Clinical legal education steers around this ‘Santa Claus Syndrome’. Being un-didactic and un-expository, it can greatly hasten the realisation process. Faced with clients and their problems, students cannot help but see for themselves that:

* ‘law in action’ is very different from ‘law in the books’;
* real world problems involve evidence and proof, documents, procedure, financial and intellectual resources;
* the relevant law is to be found from a range of sources, rather than neatly packaged in one textbook;
* law is operational and argumentative;
* not all of the law works well; and
* inequalities of resources, both economic and financial, have profound effects on the way the law works, or does not work, for the clients that they see.

Evidence and procedure appear immediately as crucial factors. Whilst there might be a contractual aspect to the dispute, the finer points of the postal rule about offer and acceptance are far less likely to be relevant than ‘Can the client find that document?’ or ‘Can the other party can be persuaded to answer letters or is insured?’

Furthermore, the business of advising clients involves choosing—often from several alternatives—a plan of action. That polycentric or many-bodied problem probably uses all six of the Bloomean skills. The challenge lies in bringing many things together for consideration.

The contrast between the clinical model and the Mrs Beeton-style approach to the law of contract formation—which, for most students, constitutes the most common induction into common law method—is stark. The books tell students that contracts are made by assembling the ingredients—bargained exchange of *x* for *y*, evidenced by offer, acceptance, intention to create legal relations. That the contractual cake made by this mixing of ingredients often fails to cover all eventualities, or that many contracts are on take-it-or leave-it terms, or that contracts modify other—non-contractual—rights and duties is, of course, made clear eventually. But I fear that the ‘assemble the ingredients, mix together and cook until done’ model has a narrowing effect on students’ appreciation of how law works—and hence of what law is like.[[39]](#footnote-40)

Legal certainty—the predictability of litigation outcomes that litigants and potential litigants crave, and the economy needs—is often a function of a normative consensus amongst those who have the (often covert) power to shape the law. But the literature and students’ conditioning conjure up the misleading notion that certainty is only a matter of using clear words when articulating the rule. Of course, whilst the consensus is settled, the contest of meaning and morals is postponed.

I draw from this experience the more general notion that we might be well-advised to identify three standpoints or ideal types:

* the non-reflective practitioner—easily conflated with ‘teach me to the test’;
* the reflective non-practitioner—the inconvenient critic; and
* the reflective practitioner—to be valued particularly.

But, I hope I have convinced readers that it would be a mistake to assume that FE students are to be trained to be totally unreflective practitioners.

# Soft and hard

In a letter to *The Times* newspaper, Adam Pettitt, the Head of the independent Highgate School, said,

‘Since the introduction of the EBacc and Progress 8 measure, young people have fled subjects such as the creative arts *in the belief that there is a hierarchy of subjects that will make them more employable*. Yet the UK’s creative industries contribute an estimated £92 billion to the economy. To make the necessary changes that will leave early learners with the widest pallet of opportunity, we need a mature, sustained political dialogue about curriculum reform with a longer time frame than that allowed by electioneering.’ (Pettitt, 2018) (my emphasis).

* Which of the curriculum subjects is the ‘higher’ in that hierarchy?
* Is there a 1, 2, 3, *etc.* order?
* Or, 1= ,1=, 2, *etc.*? Or 1, 2=, 2=, etc.?

Again, we struggle for precision about ‘higher’—and our prejudices can run riot.

# Conclusion

Practically, pragmatically, organisationally, we need Levels, or something like them. Without them, the academy would probably be chaos except at very low student:staff ratios. Hence, my purpose in this piece has not been to sweep away all boundaries and categories. Rather, it has been to alert us to their inevitable subjectivity and arbitrariness and to encourage thinking that might be clothed in language but is not thereby straight-jacketed, literally or by overweening fashion.

# Further Questions

* Do we appreciate and value craft skills sufficiently? Karl Llewellyn regarded lawyering as a ‘craft’ that could appropriately be taught at postgraduate level in US law schools (Llewellyn, 1962, pp. 317-8). To illuminate his conception of craft, consider this telling passage from an address Llewellyn gave at a banquet in the early 1940s.

‘We have fooled ourselves, we have fooled our law professors, we have fooled the whole bewildered public, into the idea that the essence of our craft lies in our knowledge of the law...

The essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive wisdom and judgment in selecting things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularising* the results, for building into controlled large-scale action such doing things and such moving of men. Our game is essentially the game of planning and organising management (not of running it), except that we concentrate on the areas of conflict, tension, friction, trouble, doubt—and in those areas we have the skills for working out results.’

* What are we to make of the atelier and conservatoire models of teaching?
* Is what artists *say* about their work a true account of the creative process?
* And what about critics’ opinions?

There must be many, many more.

### **Appendix**

The National Strategy for Access and Student Success in Higher Education (Department of Business, 2014, pp. 107-108), gives the following definitions. *Faux de mieux*, we can take these to be in tune with the law and official practice

‘Further education is for people over compulsory school age (at time of writing,16 in England) which does not take place in a secondary school. Further education courses are generally up to the standard of GCE A-level or NVQ Level 3.

Higher education courses are programmes leading to qualifications, or credits which can be counted towards qualifications, which are above the standard of GCE A-levels or other Level 3 qualifications. They include degree courses, postgraduate courses and sub-degree courses such as those leading to HNCs or HNDs.’

Section 28(1) Further and Higher Education Act 1992 provides that a Further Education Institution is,

‘any educational institution principally concerned with the provision of one or both of the following—

(a) full-time education suitable to the requirements of persons over compulsory school age who have not attained the age of nineteen years, and

(b) courses of further or higher education.’

By virtue of Education Reform Act 1988 Section 129 (as amended by Section 72(1) of the 1992 Act) to be eligible to receive funding for higher education courses an institution must have

‘full-time equivalent enrolment number for courses of higher education exceed[ing] 55 *per cent* of its total full-time equivalent enrolment number.’

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1. Alan Lacey gives ‘categories’ as ‘the most fundamental divisions of some subject-matter’. (Lacey, 2005, p. 130) [↑](#footnote-ref-2)
2. ‘The force-dynamic model in *language* singles out one entity and conceives of another as impinging on it, whereas in physics neither object in an interaction is privileged’ (emphasis added). Pinker draws on (Talmy, 1988). See also (Cartwright, Causal Inference, 2014) [↑](#footnote-ref-3)
3. ‘Our brains were not designed to care deeply about the happiness of strangers. Indeed, our brains might even be designed for indifference or malevolence toward strangers.’ (Greene, 2014, loc 4118). [↑](#footnote-ref-4)
4. ‘[O]ur minds contain a variety of mental mechanisms that make us adept at promoting our group’s interests, in competition with other groups. We are not saints, but we are sometimes good team players.’ (Haidt, 2013, p. 221) [↑](#footnote-ref-5)
5. In a section headed ‘We can believe almost anything that supports our team’, Jonathan Haidt notes the ‘“attitude polarization” that happens when you give a single body of information to people with differing partisan leanings.’ (Haidt, 2013, p. 100) and cites, *inter alia*, (Lord, Ross, & Lepper, 1979, p. 2099), ‘[T]here is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs. The biased assimilation processes underlying this effect may include a propensity to remember the strengths of confirming evidence but the weaknesses of disconfirming evidence, to judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically.’ [↑](#footnote-ref-6)
6. Roderick Floud’s work on nutrition, health, and height confirms the literal origins of the ‘look down on’/ ‘up to’ metaphors. (Floud, Fogel, Harris, & Hong, 2011, pp. 229-230) and references given there. [↑](#footnote-ref-7)
7. ‘It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question.’ (Mill, Utilitarianism, 1863, p. 14) [↑](#footnote-ref-8)
8. Albeit equal freedom for male and female: see (Mill, 1869). [↑](#footnote-ref-9)
9. ‘[T]he human brain is, in large part, a machine for winning arguments, a machine for convincing others that its owner is in the right—and thus a machine for convincing its owner of the same thing…The brain is like a good lawyer: given any set of interests to defend, it sets about convincing the world of their moral and logical worth, regardless of whether they in fact have any of either. Like a lawyer, the human brain wants victory, not truth; and, like a lawyer, it is sometimes more admirable for skill than for virtue (Wright, 1996, p. 280).’ See also (Hutcheson, 1929). [↑](#footnote-ref-10)
10. ‘[W]hen Hume (1739, p. 415) said that reason is the “slave” of the passions, I think he went too far. A slave is never supposed to question his master, but most of us can think of times when we questioned and revised our first intuitive judgment.’ (Haidt, 2013, p. 79). [↑](#footnote-ref-11)
11. Popper advocated ‘open societies against the pretensions of planners and politicians who claim the right to impose their blueprints on the rest of us by virtue of their supposed knowledge of the course of history.’ (O'Hear, 2005). See: (Popper, 1945); (Popper, 1959); and, for an overview of Popper’s work, (Thornton, 2018). [↑](#footnote-ref-12)
12. ‘In many developed economies, increased participation in tertiary education has been associated with productivity growth over the past half century but in England—where attention has focused largely on degree-level study—the total number of people involved in post-18 education has in fact declined. This decline needs to be reversed urgently.’ (Augur, et al., 2019, p. 8). [↑](#footnote-ref-13)
13. For a perspicacious review of other broadly similar accounts, see (Frankish, 2015). [↑](#footnote-ref-14)
14. (Haidt, 2001, p. 817). [↑](#footnote-ref-15)
15. Citing (Wright, 1996, p. 280), see note 9 above.

 (Hauser, Cushman, Young, R. Kang-Xing Jin, & Mikhail, 2007, p. 15) conclude: (1)…all of the demographically defined groups tested within our sample showed the same pattern of judgments and (2) subjects generally failed to provide justifications that could account for the pattern of their judgments.’ And, at 17, ‘under the conditions employed, intuition drives subjects’ judgments, and with little or no conscious access to the principles that distinguish between particular moral dilemmas.’ [↑](#footnote-ref-16)
16. (Haidt, 2001, p. 819). [↑](#footnote-ref-17)
17. Since the very influential work of Karl Popper (see note 11 above), scientific method has been thought to depend on (i) the formation and then (ii) the testing of *falsifiable* *hypotheses*. The hypothesis ‘the moon is made of cheese’ has been tested and falsified by visiting the moon, digging beneath its surface and finding rock but no cheese. However, a hypothesis that the moon has cheese at its centre has not yet been falsified. [↑](#footnote-ref-18)
18. ‘A *maxim* is the subjective principle of acting, and must be distinguished from the *objective* principle, namely the practical law.’ (emphases in the original). (Kant, 1785, p. 31) [↑](#footnote-ref-19)
19. I’ve found this metaphor helpful with neophyte students [↑](#footnote-ref-20)
20. Although, as explained at some length below, I prefer ‘essentially-contestable’ [↑](#footnote-ref-21)
21. ‘Someone says to me “shew the children a game.” I teach them gaming with dice, and the other says “I didn’t mean that sort of game.” Must the exclusion of the game of dice have come before [the speaker’s] mind when he gave me the order?’ And, I would add, to the hearer’s mind when hearing it? (Wittgenstein L. , 1963, p. 33e) [↑](#footnote-ref-22)
22. Dworkin cites (Gallie, 1965) and at 60, 124 and 160 refers explicitly to Wittgenstein (Wittgenstein L. , 1963). [↑](#footnote-ref-23)
23. Miller explores three *contesting* conceptions of the concept of social justice: (property) rights-based; desert-based; and needs-based [↑](#footnote-ref-24)
24. Ayer comments that this ‘celebrated dictum…was intended…to apply not merely to judgements of value but to all the formal exercises of our understanding.’ (Ayer, 1980, p. 19). (Bargh & Ferguson, 2000) suggest that there is a good deal of automaticity in what we take to be effortful reflection. See also: (Hutcheson, 1929); (Shepherd, 2015). [↑](#footnote-ref-25)
25. As distinct from ‘synthetically’ true. It is sufficient here to note Immanuel Kant’s definition of analytical truth as where ‘the predicate B belongs to the subject A as something contained (though covertly) in the concept A’. (Kant, 1781, p. intro.) *Cf.* ‘The difference between the concept of 'knowing' and the concept of 'being certain' isn't of any great importance at all, except where "I know" is meant to mean: I can't be wrong.’ (Wittgenstein, 1969) [↑](#footnote-ref-26)
26. *Pace* (*e.g*.) Lord Sumption who, in *Lachaux* v. *Independent Print Ltd* [2019] UKSC 27 [9], referred to the ‘*inherent propensity of the words* to injure the claimant’s reputation’ (my emphasis). [↑](#footnote-ref-27)
27. (Strawson, 1962) underlines the differences between the perspectives of: a first party (*cf*. speaker); a second party (*cf*. addressee-hearer); and a third party (*cf*. overhearer, witness, adjudicator). [↑](#footnote-ref-28)
28. See note 21 above. *Cf.* ‘Literal meaning, rather than being independent of perspective, is a product of perspective…[I]t is itself an interpretation and cannot therefore be the indisputable ground on which subsequent interpretation securely rest.’ (Fish, 1989, p. 185) [↑](#footnote-ref-29)
29. Article 8, European Convention on Human Rights provides, ‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is *necessary* in a *democratic* society in the *interests of national security*, *public safety* or the *economic well-being of the country*, for the prevention of *disorder* or crime, for the protection of *health* or *morals,* or for the protection of the *rights and freedoms of others*.’ Note the italicised open-textured words and phrases. [↑](#footnote-ref-30)
30. Lady Hale, President of the UK Supreme Court began a recent lecture, ‘Way back in the mists of time when I first studied Family Law, we thought we knew what a family was. It was a group of people linked together by consanguinity or affinity or a mixture of both.’ (Lady Hale, 2019) [↑](#footnote-ref-31)
31. ‘[T]here is no such thing as philosophy-free science; there is only science whose philosophical baggage is taken on board without examination.’ (Dennett, 1995, p. 21). See also (Dennett, 1990). [↑](#footnote-ref-32)
32. The innovation is brilliant, but was there a *duty* to invest in the development, or a *right* to expect it? [↑](#footnote-ref-33)
33. Now there’s another word! [↑](#footnote-ref-34)
34. I can name my car ‘Ferrari’ but to the Driver and Vehicle Licensing Agency it remains officially a Mini. I have no name-changing power to ‘exercise’. [↑](#footnote-ref-35)
35. ‘I’ll have a cappuccino’. Although that’s my verdict, it says nothing about why? My usual? For a change? Because you are having one? Because I’ve read in the newspaper that milk helps to avoid brittle bones? [↑](#footnote-ref-36)
36. Level 4 includes: certificate of higher education (CertHE); higher apprenticeship; higher national certificate (HNC); level 4 award; level 4 certificate; level 4 diploma; level 4 NVQ. [↑](#footnote-ref-37)
37. *Cf* note 34 above. [↑](#footnote-ref-38)
38. Although, it might be the case that some of the teachers also believe in Santa, or behave as if they do. But that is a problem for another day. [↑](#footnote-ref-39)
39. In the mid-1970s, the Law Division (which I was privileged to head) of the then Polytechnic of the South Bank began to draw on the clinical experiments that had emerged in the USA. In the UK, only Warwick University shared that interest with us. Our 1979 submission to the Council of Academic Awards for revision and continuation of our Ll B course mainstreamed clinic. We used: taster exposures to real clients: simulations; and, for some students, a final year option in Welfare Law that assessed students’ handling (under professionally qualified supervision) at real cases.

However, it is important to note that we did not see ourselves a starting a ‘trade school’ or as heavily vocational. The submission document stated clearly that, ‘[t]he clinical element has not been introduced with the primary objective of enhancing the student’s professional competence although we believe this to be an important and worthwhile by-product. Instead, it is our aim to complete (or to provide additional perspectives) on the picture painted by the more conventional taught elements of the course. To put it shortly, we intend that students should learn ‘by doing’, and are not primarily concerned they should learn ‘to do’. In the 1980s, I wrote some theoretical pieces about this development: see (Weaver, 1983) (Weaver, 1985).

London South Bank University is still very much in the game, but so too, it is pleasing to say, are many others. See further, amongst many other items: (Global Alliance of Justice Education, n.d.); (Evans, et al., 2017); (European Network for Clinical Legal Education, n.d.), which has started STARS—Skills Transfer in Academia: A Renewed Strategy Enhancing Legal Clinics in the EU (<http://www.lawstars.eu/>).

In the USA, the American Bar Association now requires that US law degrees should contain at least six credits of experiential learning. (American Bar Association, p. Standard 303).

Clinical legal education is widely thought to be beneficial, but its causative mechanisms have not been thoroughly researched. It works, but we are not quite sure how and why it does. [↑](#footnote-ref-40)