APPENDIX 1: STUDENT PERMISSION FORM

Dear Student

The Faculty of Law is constantly engaged in a process of examination of our curricula and our teaching. The aim of this process is always to improve our educational offerings and to better address student learning needs.

The teaching in this course is being used as the subject of research for a PhD thesis entitled “An Exploratory Investigation of the Microgenesis of the Concept Law in Introductory Legal Study”. Part of the research will involve examination of student responses to writing assignments in relation to the teaching in the course.

In order to complete this research, I would need to examine some examples of student writing. In order to proceed with the research, however, I would need your permission to use this data in my research.

All data used in the research will be treated as confidential, and the names of students participating in this project will not be made public in any way.

If you are prepared to grant permission for your work to be analysed, I would appreciate your signing the form below and returning this page to the Enquiries Office, marked for my attention. If you have any queries about this research, I would be happy to answer them directly. I can be found in room 44 of the Law Building.

Yours Sincerely

Pam Watson
Education Development Officer
Faculty of Law

I hereby grant permission for samples of my writing to be analysed as part of a research project into student learning. I understand that confidentiality will be preserved in this analysis.

Student Name: ______________________________________________________

Student Number: ____________________________________________________

Signature: ____________________________

Date:         ____________________________
APPENDIX 2: FIRST ESSAY TRANSCRIPTS AND ANALYSIS

Student 1

Details
African black male, foreign matriculation, registered for LLB studies.

Transcript:

1 Law is defined as a rule
2 and the rules are laid down for men and women
3 to govern conditions under which they live together.
4 The members of the tribe, region, country should abide by the rules
5 because law is the authority and legislation of the people.

6 It also brings order to the society
7 and acts as a guide or a pattern of life.

8 Law can also be viewed as a control mechanism which exists in human society
9 and persuade its members to think and act
10 in compliance with the norms which make up its culture.

11 However, one might view it as a circular conception
12 for the regulation of human conduct.

13 On the other hand it can be defined as a form of language
14 designed to convey amongst other things
15 the idea that certain rules of conduct are obligatory.

16 It can also be translated as a uniform
17 in the sense that it applies the same way to everybody
18 no matter black or white,
19 with the exception of apartheid
20 where a certain race of people are made superior than others.

21 However, law gives us the solution to our social conflicts
22 and also preserves order and promote justice.

Themes
This student provides what is primarily a functional definition of law. The main point of the essay is made in the first 3 lines of stanza 1, followed by the two lines of stanza 7. In terms of this, law is defined as follows:

[den - (s) - r and ori - i] in order to func - s - i - r and func - i - i - g and func - i - i - c and func - (jus)

An explicit contrast is drawn in the essay between the functions of guide and control as a 'circular conception': although not immediately evident in the essay itself, stanzas 2 and 3, and 4 and 5, are linked in meaning, with 2 and 3 (term used - 'guide' 'persuade' 'norms') referring to the 'guide' meaning, and 4 and 5 referring to the 'control' meaning ('regulation', 'obligatory'). This pattern is repeated (and thus made evident) through the structure of stanza 7 which outlines the three functions:
'solution to our social conflicts' (guide), ‘preserves order’ (control) and ‘promote justice’ (stanza 6 - equality).

A more implicit contrast is drawn within the origin category in stanza 1. In line 2, law is described as 'laid down' (interpreted as imposed), whilst in line 5, law is described as the 'authority and legislation of the people' (developed rather than imposed?). This contrast is not explicitly resolved within the essay, although the subsequent focus on function might be an attempt to resolve this. This could be interpreted as - although law is imposed, its function is to serve the people, therefore it is the authority and legislation of the people.

A further feature of interest in the essay is in its placement of the notion of equality / justice as a function of law (evidenced by 'and promote justice' in line 22, further evidenced by the use of the word 'also' in the first line of stanza 6) - in the thematic scheme this sub-concept was initially identified as a ‘basis’ theme. This placement fits with the attempt at resolution of the origin contrast suggested above. A more explicit rendering of the functional resolution would thus be: if the function is to guide and control and create equity (promote justice), then democracy is served (the phrase 'of the people' does imply some notion of democracy), and the contrast with law being imposed is resolved.

Voice

Structure: Unified at level of concept (no explicit reference to act of defining)
Explicit location: wrt concept as object  ('us' in line 21 is the only personal pronoun used, referring to society as beneficiaries of law)
Tone: Authoritative
Style: Formal (eg. law can be ‘viewed’, ‘defined’, and ‘translated’, lines 8 & 11, 13, 16 respectively)

Task interpretation / location: Interprets context as authoritative, dependant on a particular form of formal discourse, and task as to locate 'own ideas' into this context. Discourse recognition evident, but no positioning of self in context (distanced).
Student 2

Details

African black female, no educational disadvantage, matriculation rating 14, registered for LLB studies.

Transcript:

1 //Law is the foundation and base of operation for every family, society, country or a group of people. Imposing and prohibiting certain actions it outlines the dos, don’ts and consequences that societies should follow.

2 //Without law chaos would erupt and thus cause disturbance to growth within a society. The world is where it is today mainly because of the laws which govern it. Whether the rules of the law are destructive for example, during Hitler’s reign, or good, they were always there.

3 //Law dates back to the beginning of the world. Although some people do not abide by the law, the law is still alive, active and necessary for growth and progress.

4 //Law commands order, and acts as protection for everyone. It creates equality for all humanity, thus giving the weak and unprotected the chance to fight back, belong and gain equality.

5 Law structures differ across the world and are implemented using various methods, for example, South Africa has a constitution which has its laws. You could have a tribe in the Amazon that don’t have the same constitution but still follow laws that date back to their ancestors.

6 //Law plays a significant role in each of our societies. So for me law is the foundation on which a balanced, healthy, growing society is build. Even if that law is not perfect or good, or some people do not abide by it. It still remains the governing factor in everyone’s wellbeing.

Themes

Student 2 appears to provide a very horizontal definitional sequence of the concept, but within this weaves a very interesting pattern of contrast / resolution. The definitional sequence is provided overtly in the opening of every stanza (‘law is’, ‘without law’, ‘law dates back’, ‘law commands’, ‘law ... differs’, ‘law plays’), which can be rendered into the following definitional structure:

den - prac and func - s - i - b and func - s - e -p and ori - (creation) and func - i - e - prot(equality) and nat - v - d and nat - a -e
The two function themes and the two nature themes within this are not integrated, and the appropriate relation does seem to be additive. There are two sub-themes within this structure which are of interest. The first is the placement of a stability dimension within an origin - creation sub-theme (rather than within a nature sub-theme), and the second is the placement of equality as a sub-category of function - protect (rather than linked to a justice basis).

The predominant theme of the essay revolves around the metaphor of construction. Law is defined as a foundation (line 1 and 25) which has the function of promoting growth (lines 7, 13 and 25) or building (line 25). Linked to the foundation and growth themes is the motif of stability, evidenced in the origin theme (law is described as 'were always there' line 10, 'dates back to the beginning of the world' line 11, and 'dates back to their ancestors' line 23), and perhaps also in the invocation of 'health' within the growth / building theme in line 25. The construction metaphor is thus applied at the level of denotation, function and origin.

The explicit contrast provided in the essay sets nature in opposition to the denotation / function / origin cluster. In nature, law is seen to be diverse (lines 19 and 20), imperfect (lines 9 and 26), and its authority relies on individual choice (lines 12 and 27). Indeterminacy thus stands in opposition to stability / growth. The explicit setting of stability within the origin theme rather than as a nature - variation sub-theme highlights this divide.

The key to the resolution of this contrast lies in stanza 4, which differs from the pattern of the essay both in structure and in theme. The essay follows a 5-line stanza pattern, with the final line of the stanza providing the content link to the following stanza for both stanza 1 and 2. Stanza 4 breaks this pattern - the linking sentence is provided in line 15 (which would have been the final line of a stanza if the 5 line pattern had been continued in stanza 3). However, the beginning of a new stanza is indicated by the paragraph break on line 14, as well as by the use of the word 'law' which introduces all other stanzas. The linking sentence thus falls in the middle of the stanza, and is not resumed as a pattern for the remaining stanzas. The linking sentence in the middle of the stanza, together with the stanzas location in the middle of the essay indicate a centrality to the stanza’s theme, which almost provides a hinge around which the rest of the essay is structured. The theme of the stanza is function - individual - effect - protection. That this theme provides the resolution to the indeterminacy / stability contrast is evidenced in the repetition both in theme and in word choice ('everyone', lines 15 and 28) in the final line of the essay.

The play of the essay can be described as follows:

- law is imperfect and stable (lines 9 and 10)
- law is stable, but there is choice (lines 11 and 12)
- thus, law is imperfect, but there is choice (lines 26 and 27)
- and there is stability in effect (line 28: the words 'still remains' which are incongruous in the immediate context connect the previous sub-theme of stability to the resolution of effect - protect - equality).

**Voice**

*Structure:* Attached (lines 25 - 28, introduced with ‘So for me ...” are at a different level to the rest of the essay, and relate more to act than to concept)
*Explicit location:* Within act, but focus on concept - object location. (‘for me’, line 25)
*Tone:* Authoritative (in both sections)
*Style:* Formal wrt concept (eg. 'Foundation and base', line 1; 'imposing and prohibiting', line 3; ‘thus’, line 7)
*Syntax breaks down in act section, although formal terms still evident ('abide', line 27; ‘governing factor’, line 28)
Task interpretation / location: Even though the explicit location provided is within the act, it is not related to the act. The structural separation of act and concept, as well as the syntax breakdown in act, indicates a disconnection between the two - for this student the task is an understanding of the concept authoritatively and not personally defined.
Student 3

Details

African black male, no educational disadvantage, matric rating 20, registered for LLB studies.

Transcript:

1 It has crossed everybody’s mind that there are things we can and can’t do.
2 The interesting part about this is that it is not that we can not do these things
3 but it is just that we are not allowed to.

4 Upon asking myself questions like these
5 I have come to perceive law in my own way.

6 I think when things or people started interacting in the early days of man,
7 problems began to arise.
8 A set of regulations or rules therefore had to be made
9 to keep everybody happy or satisfied.

10 Law would therefore be the study of these ‘rules’
11 which everybody would be familiar with,
12 in order not to disobey them.

13 People are then put in charge
14 to make sure that these rules are implemented.

15 Then there are people who study these rules for a profession.
16 These people then represent, defend and advise people how to go about their business,
17 without breaking any of these rules.

18 This is basically the reason why I am a law student
19 and I think there is a great future
20 because these rules change and increase
21 as a result of more people being in contact with each other.

Themes

Student 3’s account focuses on identity within the task (eg. line 18 ‘the reason why I am a law student’), and is fairly brief on the definition of the concept itself:

```
den-proc(study) of den - (s) - r which have ori - d and imp - s and imp - p [and nat -a - c and nat - v - e]
```

There is a hierarchy within this structure: origin and implementation are equivalent concepts, but are subcategories of den - r (the object ‘rules’, derived through origin in stanza 3 and then applied in stanzas 5 and 6), which is set below den-proc (the study of the rules).

Two variation sub-themes are mentioned: nat - a - c and nat - v - e. These sub-themes are, however, disconnected from the definitional aspects, both by their location in the essay (first three and last two lines of the text, separated from the content of the essay in each case by two lines of individual identity markers (lines 4 and 5, and 18 and 19) and by the function they serve in the essay: their connection is to the identity marker rather than to the definitional content. Thus lines 1 - 3 raise the
sub-theme of nature - authority - choice, which is followed by identity choice ('I have come to perceive law in my own way'). Lines 20 and 21 refer to the sub-theme nature - consistency - evolution, and connect to identity evolution ('I am a law student' and 'I think there is a great future').

The structure of the essay revolves around the denotative definition, which, in stanza 4, provides the 'core' of the essay. Thus the theme play prior to this stanza is choice - identity - origin, and following this stanza is implementation - identity - variation. The nature - authority - choice theme that is the subject of stanza 1 is continued within the origin sub-theme: thus rules “had to be made to keep everybody happy or satisfied” (lines 8 - 9). Similarly, the nature - variation theme of the final stanza is found also within the implementation sub-theme: there is implementation at the level of policing (stanza 5), as well as at the level of lawyering (stanza 6). Choice and variation, at the levels of identity and concept, are thus the primary themes of this essay.

Voice

Structure: Broad frame (act stanzas 1, 2 and 7; concept stanzas 4, 5, 6 and Stanza 3 which provides an introduction to concept from within act)

Explicit location: Within act, firstly as someone who has an opinion, secondly as law student. Location wrt concept - Inconclusive, but more as subject than object (focus on not disobeying laws, not breaking rules and implementation, lines 12, 17 and 14)

Tone: Opinion (explicit within act. Within concept indicated by phrases ‘Law would therefore be’, line 10; ‘Then there are people’, line 15)

Style: Adopts a semi-formal tone wrt concept, but overall informal.

Task interpretation / location: Task is explicitly interpreted as opinion. Some context recognition evident in the justification strategy used. Tone and style do not indicate familiarity with context. Explicitly locates self as student. Disconnected structure, informality of approach and interpretation of task as opinion indicate ease with this outsider position.
Student 4

Details

African black female, educational disadvantage, rating 20, registered for BA degree.

Transcript:

1. Time and time again I have asked myself that question
trying to understand what it means to me.
What I always seem to come up with though is not what law is,
but what it stands for - to me.

2. Law is the assurity that no-one is exempt,
and that it applies to all irrespective of race, age, gender and religion.

3. Law, to me, stands as a ‘safety net’
- knowing that if someone breaks the law,
justice can, and God willing will be met.

4. Justice, judgement, fairness, reasoning
all these connotations of law
are all a part of someone’s belief of what law really is.

5. Law is also a link between society and the state,
knowing that no matter how poor you are, you too have a right,
and that your rights - just like the president or the prime minister of this country
are protected.

6. A great example of what I believe law to be and stand for is the Clinton case in the US.
This proved that not even the president of a country is exempt from the law.

7. Again, I ask myself the question ‘what is law?’
And even as I’ve reached the end of my essay I’m not really sure that I’ve identified
or was even able to fathom the ideology behind the concept
of what I believe law to be.

Themes

Student 4 provides an account, framed within identity marking stanzas, which contains a lot of
movement between themes, and is thus difficult to represent in a one dimensional scheme. The
scheme below indicates the overall themes, but does not do justice to their relations:

den - proc through [func - s - i - m (equality) through cons - s] and [func - i - e - prot through cons
just(l)] and [bas - j(i)] and [func - i - e - prot through func - i - e - pun]

An interesting move made within this scheme is from consequence - sanction, to consequence -
justice (l), which is an unusual placement, and finally to the more conventional placement of basis -
justice (ideal). A further interesting move is made within the function theme: the move is from social
- maintain - equality (unusual placement of equality), through individual protection - person/property,
to individual protection - rights.
The contrast addressed in the essay is between a protection function and a sanction consequence. This contrast is set up as a tension in within stanza 2 (consequence - sanction in line 5, followed by the function of maintenance of equality in line 6), repeated in stanza 3 (where the individual - protection function in line 7 is contrasted with the consequence - literal - justice in lines 8 and 9). That this contrast is resolved is pointed to by the fact that it is no longer within the stanzas in stanzas 5 and 6, but rather is split between them (the placement of the stanza break at line 17 may be an over-interpretation, but it does seem to follow the previously set up three-line stanza structure, if the second half of line 15 is seen in effect to be the first line of stanza 6).

The resolution itself is pointed to by the two sets of theme moves outlined above. The consequence - sanction - literal justice understanding is disconnected, so that justice in its ideal form (indicated by the introduction of the word 'reasoning' in line 10: the other three words used all describe concepts previously indicated) becomes a basis rather than a consequence, and sanction as a consequence becomes rather a function - individual - effect (the repeated use of the word 'exempt' in lines 5 and 18 within the two themes highlights this move). The resolution is made through a movement from social to individual, firstly from maintain equality ('of all', line 6) to individual protection (the shift indicated by the words 'to me' in line 7), and then, with a sharp pointer in line 13 ('link between society and state') in the movement from social sanction (line 5) to a function of effect individual punishment (line 18) connected to a function of protect - individual - rights (line 14).

Thus, sanction is not a consequence of law, but is rather a function effect at the level of the individual which serves to promote the function of protect at the level of the individual. Since what is protected includes rights, this protection is in accordance with the stated definition of procedure to maintain equality. Justice is not a literal consequence of law, but rather is an ideal basis.

If this interpretation is correct, it indicates a realisation process for the student in the course of writing the essay. That this may be true is evidenced by the introduction and conclusion: by the movement from what 'law stands for to me' (line 4) in the introduction, to 'what I believe law to be' (line 22) as conclusion. The connection between these two lines, further highlighting this subjective to objective movement, is made in the rhyming structure of these lines.

---

**Voice**

**Structure:** Integrated (Stanzas 1 and 7 specifically on act, but carried through in stanzas 2 - 6 eg. 'to me', line 7, 'someone's belief', line 12, 'I believe', line 17)

**Explicit location:** At both levels: within act as 'someone who doesn’t know’ (outsider, lines 1 - 2 and 19 - 22); within concept: object relation ('no-one is exempt', line 5, 'safety net', line 7; 'you too have a right', line 14)

**Tone:** Opinion at both levels (act: ‘ask myself (the) question’, lines 1 and 19; concept: indicated by ‘to me’, line 7; reference to ‘you’, line 14; and ‘example of what I believe’, line 17)

**Style:** Predominantly informal

**Task interpretation / location:** Task interpreted as to provide own opinion. Lack of evidence of familiarity with Discourse context. Explicit location as an outsider, confirmed through tone and style, as well as through content of stanza 4 (the 'connotations' of law are part of somebody else's belief, line 12). Integrated structure indicates no distancing from the task.
Student 5

Details

African black male, some educational disadvantage, rating 18, registered for LLB degree.

Transcript:

1  To me the law is a set of rules
2    which govern a country.
3  These Laws are used by a country’s government
4    to control the behavior of its citizens.
5  //The laws are made by governments which represent the people.
6  They are then signed by the country’s president into law.
7  This is only done when a law is proved to be just
8    and not infringing on anyone’s rights.
9  //The law tells people what they must do eg pay tax
10   and what they may not do.
11  The law also informs them (people) of their legal rights and duties.
12  The law also tells people of the kind of services government is supposed to give them.
13  //In a democratic state like South Africa,
14  the most important law is the constitution
15    for it forms the basis of a democratic state.
16  //These laws are binding
17  to all citizens
18    from the president to the common man on the streets.
19  //If a person breaks any of a country’s laws he / she is punished.
20  Though first they have to be proven guilty in a court of law.
21  Thus a person is punished by being sent to jail or being made to pay a fine.
22  //Though we live in a freedom for all chanting society,
23  some laws are actually oppressive,
24    for no-one is actually free if you have to follow rules.

Themes

This essay was particularly difficult to interpret, perhaps due to the lack of structural clues provided: there is only one major structural movement, from a 4-line stanza to a 3-line stanza arrangement, which coincides with a modification of the denotative category in stanza 4. The themes addressed are:

[den - (s) - r which func - s - i - r] and func - i - c and [ori - d and bas - j(l)]
[den - basis which nat - a - d] and bas - j(l) through imp - p and cons - s

An initial contrast is set up in the essay in stanza 1 between the function to regulate as part of the defining feature of law (lines 1and 2), and the use by government of law as a function to control (lines 3 and 4). This sub-contrast appears to be resolved in lines 12 and 18 through the observation that even government is subject to law, and the denotative definition of law is modified from rules which
Having established law as a basis, what was initially seen as a function of law (to regulate) becomes the nature of law (authority - determination). This sets up an unresolved contrast in the essay between the basis of law as literal justice [outlined as origin (democracy) in line 5, as basis (justice rights) in line 7, and as implementation strategy (equality) in lines 17 - 18 and 20], and law as basis with determinative nature. This unresolved contrast forms the concluding stanza of the essay: 'though we live in a freedom for all chanting society' (line 22) is a play on the democracy theme, and law has been described as the basis of democracy (line 15), laws are oppressive, and no-one is free (lines 23 - 24).

Voice

Structure: Attached ('To me' in line 1 refers to action, 'we' in line 22 seems to be another attempt to relate to action. The rest of the essay is, however, at level of concept)

Explicit location: wrt concept as subject (lines 22 - 24)

Tone: Authoritative

Style: Formal (eg. 'infringing', line 8; 'informs', line 11; 'basis' line 15; 'binding', line 16)

Task interpretation / location: Context is interpreted as authoritative and formal, task is interpreted as being to approximate this discourse. Detachment of self evident in structure, as well as in content of final stanza (which performs the action of disconnecting self from concept).
**Student 6**

**Details**

African black female, educational disadvantage, rating 22, registered for BCom degree.

**Transcript:**

1. All over the world there seem to be laws.
2. It is what holds the world together
   and what brings peace.
3. To understand what law is,
   we have to know where it comes from.
4. In every house there seem to be rules.
   These are then adapted throughout the society or community as common rules.
5. People the adjust to these and they become their conduct.
6. Now, at the authorities only a few common rules are adapted
   and have to be obeyed
   by all in that society.
7. When the western came,
   they brought with them and introduced their ruling systems
   like the government.
8. The governments job was then to collect similar rules from different societies
   and try and merge them as one rule.
9. These then became laws.
10. However, nowadays a bill has to be passed and approved in parliament
    then an act is passed.
11. Then can it be a law.
12. With the above mentioned we can conclude
    that a law is a collection of similar rules into one
    and passed as a law.

**Themes**

The focus of this essay is on an origin definition, and a very simple theme structure is provided:

den - (s) - r equals func - s - i - m and ori - d and ori - i

The overall tone of this essay is romantic (suggested by 'holds the world together' in line 2 and 'peace' in line 3), and possibly also religious ('All over the world' in line 1 as an opening to stanza 1, and 'in every house' in line 6 as an opening to stanza 3 are strongly redolent of a Christian children's song, the third verse of which would begin 'deep down in my heart'). With the exception of a brief reference to a maintenance function in stanza 1, the remainder of the essay focusses on origin (stanza 2 serves an introduction function, which explains the out-of-sync 2-line structure). This is primarily outlined as a historical development - through individual-level adaptation ('every house' line 6) to community adaptation (called 'society' in line 11) to the societal level (called 'different societies” in line 15: the
use of the different terminology reflects a non-western approach, explicitly confirmed in line 12). The contrast that is drawn in the essay is between this historical - development origin and an imposed - creation origin (stanza 7). In keeping with the romantic tone, this student does not have a problem resolving this contrast but simply merges the two approaches in the final stanza: law is simultaneously historical development and imposed creation (lines 22 - 23).

**Voice**

**Structure:** Framed (stanzas 2 and 8 on act, stanzas 3 - 7 on concept)

**Explicit location:** At level of act (‘we’ in lines 5 and 8: this seems to refer to people who study law)

**Tone:** Authoritative

**Style:** [Difficult to interpret because of 2nd language grammar] More apparent formality at level of act (‘conclude’, line 21; ‘collection of similar rules’, line 22) than at level of concept.

**Task interpretation / location:** Despite the occasional formal phrases used there is no evidence in this essay of any recognition of the Discourse context. Disconnection from concept evident in structure as well as in content in stanza 5 (distancing self from ‘western'ers and their ruling systems). However, there is an explicit location within the act as a member of a group who 'know' and 'conclude' (student position?).
**Student 7**

Details

African black male, educational disadvantage, rating 19, registered for LLB degree.

**Transcript:**

1. Law is the body of enacted or customary rules recognized by the community as binding.
2. It is essential for all members of the community to adhere to all this binding rules.
3. Law is made in order to uphold the interests of the citizens of the country. That is why it is important for people to have a say when laws are made because at the end of the day they are the one’s who are going to be affected by those laws.
4. Members of the community look upon the ‘greater community’ to implement laws which will protect them.
5. The court used the enacted laws in order to bring the perpetrators of crime into the book. Law also help to draw a line among the people.
6. When members of the community have decided to engage themselves in something, it is extremely important for them to know the attachment of the law to that particular exercise. Because they can land up in ‘hot water’ if they happen to break the rules in that exercise.
7. There is no way we can go wrong if all of us we can adhere to the rules which are put there by the ‘greater community’.
8. There is absolutely no way we can go wrong, let alone feel the wrath of justice.

**Themes**

Student 7 begins his/her essay with an un-attributed quote drawn from a common textbook (stanza 1). The function this serves in the essay is simple to establish a rules denotation, and this is the only theme drawn from that stanza for analysis purposes.

Students 4 and 5 much the scheme above, because they are raised as problems with, rather than as definitional aspects of, law. The first concerns an origin theme, and the second a ‘knowledge of law’ theme.

An explicit contrast outlined in the essay is between the function effects of protect and punish. The last line of stanza 3 establishes the function - individual - effect (‘affected by’ line 7). Stanza 4 picks up on the protection theme, whilst stanza 5, and in fact the rest of the essay, picks up on the punish theme. Implementation is mentioned in both stanzas, with an distinction within this theme between the ‘greater community’ (line 8) with respect to protection, and ‘the court’ (line 10) with respect to punishment. The explicit contrast is thus resolved through this rendering of the implementation
The implicit contrast in the essay is with respect to the punish effect and the problems inherent in this. The first problem is raised in line 6 'It is important for people to have a say when laws are made': although unstated, the manner in which this is couched - it specifically does not state that people do have a say - suggests that there may not be such a say. The second problem is raised in line 13: 'It is extremely important for them to know the attachment of law to that particular exercise', again suggesting that people often don't. The repeated use of 'important' brings these issues to the fore in the essay. Stanza 7 in conclusion highlights the issues raised and resolves them by effective denial (most evident in line 17): we can't go wrong (line 15 repeated line 17) if 'we can adhere to the rules which are put there by the greater community' (lines 15 - 16, note that both references to the 'greater community' in the essay are in attempt at resolution). The punishment theme is, however, given additional emphasis in the final line by reference to cliche ('the wrath of justice', line 18).

**Voice**

<table>
<thead>
<tr>
<th>Structure:</th>
<th>Unified at level of concept (no explicit reference to act of defining)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explicit location:</td>
<td>Wrt concept as subject (lines 15 - 18, where 'we' can / can avoid 'the wrath of justice')</td>
</tr>
<tr>
<td>Tone:</td>
<td>Authoritative</td>
</tr>
<tr>
<td>Style:</td>
<td>[Difficult to interpret because of 2nd language grammar] With the exception of a few terms ('adhere', line 4; 'enacted', line 10) the style seems informal.</td>
</tr>
</tbody>
</table>

Task interpretation / location: Structure indicates identity coherence (not distanced or disconnected), but the mismatch between the informal style and the authoritative tone seems to indicate a lack of familiarity with academic discourse.
Student 8

Details

African black female, some educational disadvantage, rating 20, registered for LLB degree.

Transcript:

1 Law is somekind of rules
2 laid by a government
3 to make peace among people.

4 For example when it was possible for individual person to have his own land,
5 there will be no reason to produce law in that particular area
6 cause he is living alone
7 and can do whatever he wants at anytime

8 cause he is disturbing no one.
9 But when it happens that a second person is coming to live,
10 certain rules have to be made
11 to make peace between the two.

12 Law is laid to be obeyed by people
13 but also giving them their legal rights
14 and freedom.

15 To maintain peace and unity among the community,
16 people have to follow the orders of law
17 made by authorities or by a government.

18 Whoever disobey the orders of the law is being punished
19 the way he deserve to be punished.
20 He can be fined or put in prison.

Themes

This essay plays mainly with the themes of origin and function, but does set up a relation within the function theme. The structure is:

den - (s) - r and ori - i and func - s - i - m and func - s - e - c through func - s/i - i - c and func - i - e - pun

Stanza 1 (lines 2-3), in juxtapositioning the imposed nature of law creation with a maintenance of social peace function, could suggest a thematic contrast. However, the student seems to realise this, and spends the following two stanzas expanding on this juxtaposition, effectively neutralising the contrast with origin ('rules have to be made' line 10) through a rationalisation of the maintenance function (with a repeat of the peace theme in line 11). Stanza 4 picks up the origin / function contrast again, but this time with function at the level of individual control ('law is laid to be obeyed by people' line 12): this appears to be the primary contrast in the essay, and an overt attempt to resolve this is immediately made by invoking a second social function of law, the creation of rights and freedom (lines 13 - 14). The real resolution to this contrast is however provided in stanza 5, where a hierarchy is set up within the function theme: the individual control function is subordinate to and necessary for
the social maintenance function. The structure of the stanza provides further evidence of the
resolution: the control sub-theme (line 16) is sandwiched between the previously resolved contrast
themes of maintenance and origin (lines 15 and 17). The final stanza carries the function control
theme further into the effect of individual punishment. However, the resolution has been established,
and the student raises no further issues in this regard. In fact, the resolution has carried through to the
point of personal identity, and in the student's view, 'he deserve to be punished' (line 19).

**Voice**

**Structure:** Unified at level of concept (no explicit reference to act of defining)

**Explicit location:** None (distanced). The word 'deserve', line 19 may indicate an concept -
object location.

**Tone:** Diminished authority ('somekind of rules', line 1 indicating uncertainty; 'for
example', line 4 and 'cause', line 8 have a justificatory tone)

**Style:** Informal

**Task interpretation / location:** Overall position is one of uncertainty. Lack of familiarity
with Discourse indicated by informal style and tone of uncertain authority (which could indicate a reading of the
context as authoritative, but a positioning of the self outside of this).
Student 9

Details

African black female, some educational disadvantage, rating 20, registered for BA degree.

Transcript:

1 The Oxford English Dictionary describes law as the legal science operationing from a system of rules that are binding on a community”

2//My definition of law though is that yes, law is a science based on a system of rules that are not only binding on a community

3 but more primarily to protect it,

4 ensuring their everyday existence is governed by ‘law and order’

5 and then imposed on them the rules and regulations.

6//My definition is based on what law intends on establishing rather than its definition

7 and to some extent that is the case

8 but law to me is an “invisible blanket”

9 that provides comfort, warmth and shelter from the cruel and harsh elements of a otherwise lawless community.

10//Law in my view is the epitomy of a protector (second only to mother’s love)

11 and that its intention would be to maintain ‘law and order’

12 throughout the community.

13//Therefore it should not be seen as a complex science burden

14 with heavy rules and regulations

15 but rather as the moral fibre that binds us together.

Themes

Student 9 begins with a dictionary definition of law, and then proceeds through the course of the essay to modify this definition to his/her own understanding. In the process, a functional hierarchy is set up.

den- (s) - r which are bas - e(m) in order to func - i - e - prot through func - s - i - r

The initial dictionary definition sets up the following scheme: [den - (science)r (which are) nat - a - d]. The student's engagement with this is at the level of the determinant nature: whilst he/she does not deny this, the point made is that this aspect of law's nature is by virtue of its function to protect.

Stanza 1 sets up the dictionary definition, which is effectively repeated in stanza 2, with the conceptual addition only of the phrases 'my definition' in the first line of the stanza (line 4), and 'not only' in the final line of the stanza (line 6). Stanza 3 is linked to stanza 2 (the two could be read as a single stanza, but since a new point is being made, a new stanza seems appropriate - this is not vital to the interpretation), by the use at the beginning of the stanza of the word 'but' (line 7). The theme
raised in stanza 3 is one of function - protection: this is set above (or prior to) the previously raised theme of determinant nature by the use of 'more primarily' (line 7), and also by the use of 'and then' in line 9, prior to the re-invoking of the determinant nature theme.

Stanzas 4 and 5 follow the structure of stanzas 2 and 3, with the beginnings of each stanza mirroring the previous ('my definition' in the first line of stanzas 2 and 4, and 'but' in the first line of stanzas 3 and 5). In stanza 4, a functional intent definition is explicitly adopted, instead of the dictionary definition (or 'its definition', line 11), however, since the equivalent sentence in stanza 2 accepted the den - (sci)r part of the dictionary definition, what seems to be at issue is the determinate part of that definition. This is not entirely rejected ('to some extent that is the case', line 12), but rather, the modification with the inclusion of the protect function is repeated in stanza 5.

A connection is made within stanza 3 of the essay between the function intent of individual protection in line 7 and a social effect function of regulation ('ensuring...law and order') in line 8. Stanza 5, whilst addressing the same themes, seems to reverse the intention / effect: protection appears to become an effect (the blanket provides comfort in lines 13-14), whilst the intention becomes regulation ('of an otherwise lawless community', line 15). This understanding is carried through to and strengthened in stanza 6: law is a protector (function - effect, line 16), with the intended function of maintaining law and order (regulation, line 17). This regulation-intention-function, for the student, replaces the nature-determinant description given in the dictionary definition. What is 'binding on a community' in lines 3 and 6 becomes regulation 'throughout the community' in line 18. However, the contrast is not yet resolved, as the 'nature' theme remains open. The student addresses this in stanza 7: the nature is not 'complex' and 'heavy' (lines 19-20), descriptors which could be associated with a determinant nature, but rather is connected to an ethical basis, and law is the 'moral fibre that binds us together' (line 21).

Voice

Structure: Integrated (act and concept intertwine, eg. 'My definition', line 4 followed by concept lines 5 - 9, repeated structure with 'My definition', line 10; 'law to me', line 13 and 'in my view', line 16)

Explicit location: Object wrt concept, and 'definer' and 'viewer' wrt act.

Tone: Opinion

Style: Mixed (informal evident in line 4 and stanza 5, formal evident in for eg. 'primarily', line 7; 'to some extent', line 12; 'in my view', line 16 and 'therefore', line 19)

Task interpretation / location: Some discourse context recognition evident in, for example, reference to dictionary, formal terms used, but appeals to metaphor more appropriate to literary genre. Misinterpretation of 'science' also indicates lack of familiarity with context. Integrated structure indicates coherency, but this could be a problem with context misinterpretation.
Student 10

Details

African black female, foreign matric, registered for BA degree.

Transcript:

1. Law is a guideline
2. set by higher authorities
3. as to the lifestyle of its place.
4. It enables us to do the right thing always
5. and to be aware of the consequences
6. should we decide to stray from it.
7. Though usually found as restricting by people of unlawful ways,
8. it was brought about to enable us to live in harmony with each other
9. //Law is a way of showing one’s weakness or strength.
10. If you have good laws that are not flexible in any way
11. the basic outcome is a lawful state with very little disruptions.
12. //Take for instance, Japan and China two of the worlds greatly populated countries
13. and yet because of the Laws, have a very low crime rate, if existent at all
14. regardless of all the influential ‘kung fu’ films shown there.
15. //Therefore law is what determines our lifestyle,
16. it is a way of setting things straight in a given area.
17. Despite the fact that to an individual at a given time,
18. law may seem to be unfair or unjust,
19. truly it is meant for the best and is set with everyone in mind.
20. //Basically the above information states clearly what Law is
21. and its purpose to those living under it.

Themes

This student provides a fairly unusual denotative definition of law as a guideline: although the 'guide' sub-theme is moved to a more usual placement of function in stanza two and is a key theme of the essay, a denotative definition is not re-attempted, and it is not clear whether it is the understanding of this denotation, or the denotation itself which is modified in the course of the essay.

den - (guide) and ori - i and [func - i - i - g with nat - a - c and cons - s with func - s - i - m] and nat - a - d in order to func - s - i - r

Stanza 1 of the essay sets up the denotative definition as a guideline, with imposed origin. Stanza two continues the guide theme into function ('it enables us to do the right thing always and to be aware...’ lines 4-5), and, together with stanza 3 sets up an implicit contrast between the nature choice ('should we decide to stray from it’ line 6) and consequence sanction ('found as restricting’ line 7) sub-themes. Perhaps in attempt to resolve this contrast, this is followed by a repeated appeal to function, this time at the level of maintenance.
The 'restriction' referred to in line 7 implicitly becomes the sub-theme of stanza 4 - this can be weak or strong (line 9), but 'good laws ... are not flexible in any way' (line 10). This strengthening of the restrictive aspect leads, in line 11 to the adoption of a regulative function. Stanza 5 simply provides illustration for the understanding expressed in stanza 4: (lines 12-13) two of the worlds most populated countries (which therefore presumably need a high level of regulation) have a low crime rate, because of, presumably, inflexible laws (the authoritative or inflexible nature of these laws being accentuated by the capitalization on 'Law', line 13), even though they may be influenced by 'kung fu films' (line 14 - people of unlawful ways?)

This understanding resolves the contrast: law is what 'determines our lifestyle' (page 15), and 'is a way of setting things straight' (line 16), that is, not flexible. The nature choice with consequence sanction has been replaced by nature determinate in order to function regulate. This is confirmed in the final stanza: this essay 'states clearly what law is' (nature) 'and its purpose' (function) (lines 20 - 21).

Whilst the sanction consequence remains Stanza 7, lines 17-18), this now strongly locates at the individual level (as opposed to 'people' in stanza 3), and is seen to be justified ('for the best', line 19).

Voice

Structure: Attached (act lines 20 - 21, concept lines 1 - 19)
Explicit location: Subject wrt concept; not explicitly situated wrt act
Tone: Authoritative at both levels
Style: Formal at both levels ('consequences', line 5; 'enable us', line 8; 'despite the fact', line 18; 'states clearly', line 20)

Task interpretation / location: Context is interpreted as authoritative. Some Discourse recognition is evident in style and tone, as well as in the micro-structure form (argument, expansion, example, conclusion). The attached structure does not seem to indicate any detachment or distancing. Level at which content is worked with is obscure (possibly due to use of ideas drawn from other sources, eg. 'weakness and strength', line 9 comes from course-pack, and is not fully explained / understood by the student). This may indicate a task interpretation as being to approximate the authoritative.
Imagine a society without law. Visions of anarchy, mayhem and disorder flood my mind. The reason for this lawlessness created is because we are all individuals, with individual viewpoints and ideas. In this society, in any argument, who would decide which person was right or wrong and how could one person have more authority than another. No feud would ever be resolved.

Although many people have a natural inclination to what they should do and shouldn’t do etched into their mind, it differs in each person slightly. In order to have order and civilisation it is necessary to create a national official set of rules and boundaries which would act as guidelines to how we should behave and control our natural inclinations - This is Law.

In order for law to be followed it should be flexible and change with the times, as well as fair and just. The set of rules should be made diplomatically so that the laws represent the majority of the peoples belief system. If the law is diplomatic, flexible and fair few people would wish to break the law or take the law into their own hands.

The point of law is not to destroy individualism and create automatons. It is merely to regulate and ensure fairness in dealing with disputes and to help to create a kind of order for us to live safely in.

Themes

The denotative definition of law is placed at the end of stanza 2 in this essay (lines 12 - 16), clearly marked by the ending ‘- This is Law’ (line 16).

There is one major contrast in this essay between the two major themes of the essay (variation and control); a second contrast is evident within each of the sub-themes.

The control theme is evident in the major themes of each of the first two stanzas, and is most evident
in the opening and closing lines of these stanzas. Thus, in stanza 1, the dominant theme is social control (indicated by ‘a society without law’, line 1, where ‘no feud would ever be resolved’, line 8). Other themes within the stanza are the functions of social - (effect) - prevent (‘anarchy, mayhem and disorder’, line 2) and of social - (effect) - create / define (defining right and wrong and authority, lines 6 - 7).

The broad theme in stanza 2 is individual control (indicated by ‘people have a natural inclination’ in line 9, and ‘control our natural inclinations’, line 15). Two of the specific themes in the stanza are both functions at the individual level: that of intention - guide (‘would act as guidelines’, line 14) and that of intention - control (line 15). A social function of intent - maintain is however also mentioned (line 12).

Although the social functions of prevent and create are usually described as effect functions, the language used in stanza 1 seems to suggest intent, rather than effect (‘who would decide’, line 6, and ‘how could’, line 7). This language is echoed in stanza 2 (‘which would act’, line 14), where the individual functions of guide and control, which are usually used as intent functions, are outlined. The juxtaposing of this ‘intent’ at both levels, repeated again in the social - intent - maintain line in stanza 2 (‘in order to have order and civilization’, line 12), which could perhaps be read as ‘in order for law to achieve its intended control aims at the social level, it must intentionally guide / control at the individual level’, may suggest a minor contrast between the social and individual control themes. This contrast is further evidenced through the placement of the denotative definition of law within the individual-intent theme.

A resolution to this contrast can be found within the ‘choice’ theme in stanza 3 (this theme is again indicated by the first and last lines of the stanza: ‘in order for law to be followed’, line 17, and ‘few people would wish to break the law or take the law into their own hands’, lines 23 - 24): thus law intends to control the individual, but the individual has choice about compliance. There is a further dimension to this choice, however, suggested in line 17: if law wishes to achieve its intended control aims, it must be responsive to individual choice (‘in order for law to be followed it should be ...’, lines 17 - 18). The control theme is reversed: law controls people, but people also control the law.

Individual variation has an additional relationship to law in stanza 3: the origin of law must be democratic (reflecting this variation), ‘so that the laws represent the majority of the peoples belief system’ (line 21). This origin (with the word ‘diplomatic’ substituted for the more appropriate ‘democratic’, probably not intentionally), together with the notions of flexibility and fairness (line 22, a ‘justice’ basis of law) is what is required of law, if it is to be accepted and not broken (lines 23 - 24).

The second major theme of the essay is also indicated structurally, through the clear separation of each of stanzas 1 - 3 into two main parts (indicated through the sentence breaks, as well as through the contrast of informal language in the first part, with formal language in the second part of each stanza), with the first part of each stanza addressing a ‘variation’ theme. Individual variation is strongly established in stanzas 1 and 2: ‘The reason for this lawlessness created is because we are all individuals, with individual viewpoints and ideas’ (lines 3 - 4), and ‘it differs in each person slightly’ (line 11). The response to this individual variation is variation in law itself, expressed in stanza 3 as ‘it should be flexible and change with the times’ (line 18).

Variation and control are brought together in stanza 4 in an explicit addressing of the relationship: ‘The point of law is not to destroy individualism and create automatons’ (line 25) - the control function should not extent to destroying variation. Rather, law’s function is ‘merely to regulate’ (line 26, echoing the social control theme from stanza 1), and ‘ensure fairness in dealing with disputes’ (line 27, echoing the justice basis of stanza 3), and ‘to help create a kind of order’ (line 28, echoing the social maintenance / individual control theme of stanza 2).
Voice

Structure: Unified act (through argument structure)
Explicit location: Mixed wrt concept; act implicit
Tone: Opinion (not explicit opinion, but evident through argument structure)
Style: Formal (‘in any argument’, line 5; ‘in order to’, line 12)

Task interpretation / location: Argument construction form indicates a fairly sophisticated reading of Discourse context. Task within this context is interpreted as to provide justified opinion in argument form.
Student 12

Details

White female, educationally advantaged, rating 20, registered for a BA degree.

Transcript:

1 'When a group of people get together, conflict will always arise.
2 No two people have the same ideas or beliefs
3 and everyone likes to have things their own way.
4 Because of this conflict, we can’t just have people doing things the way they think is best.

5 ^2^There need to be guidelines and rules that apply to everyone.
6 When this group of people is a country
7 then everyone needs to follow the same set of rules
8 and to avoid chaos there needs to be punishment for those who break them.

9 ^3^Everyone in the country can’t decide on the rules or laws
10 as a large group would never agree amongst themselves
11 and therefore a select group of government is chosen
12 to decide on the laws for the whole country.

13 ^4^The laws have to include all areas of society.
14 There need to be laws that condemn what is considered immoral behaviour
15 and punishment suited to each crime.
16 Laws are also needed in economic, political and religious areas.

17 ^5^I think law is a tool
18 needed to control a large group
19 who need to follow the same guidelines to keep the peace
20 and for all to feel equal.

Themes

This student provides what is, in effect, a justification for law (definition: functional intent). The structure is as follows:

den - s (tool) needed to func - s - i - r through [func - i - c and func - i - g and
bas - j(l)] and ori - i and nat - f - d and [bas - e (v) with func - i - e - pun] and
func - just(l)

The overt theme of this essay, set out in argument form, is the need for law as a means of resolving social conflict (the conflict theme is expressed in lines 2, 4, 10 and 18, and more subtly in 14. The counter is in 5, 7, 14 and 19). In keeping with this form, no overt contrast, beyond the themes contained within the argument, is expressed. There are a couple of more implicit contrasts evident in the essay though. The first is evident through a theme play in the essay between individual variance (‘no two people have the same ideas or beliefs’, line 2) and law’s universality (‘apply to everyone’, line 5 and ‘all areas of society’, line 13). This universality is initially expressed as a need for procedural fairness (basis - literal justice), which is nonetheless a contrast, since the same rules apply to everyone who is different. This contrast is resolved in the final line of the essay, by means of the
unusual placement of justice literal as a function of law: the rules apply to everybody so that they can ‘feel equal’ (line 20).

The second contrast arises through the same theme play, and is evident in the connection of ‘belief’ to individual difference (line 2), and in the lack of this connection to the universality theme. One the one side stands individual belief, and on the other, universal law disconnected from such belief. This disconnection is explicitly addressed in stanza 3 of the essay: the origin of law does not lie with the people (‘as a large group would never agree amongst themselves’, line 10) and their beliefs, but rather comes through a ‘select’ (line 11 - note not ‘selected’) group. The resolution to this contrast is again in the placement of what is normally a basis of law (ethics) as a function: laws need to outline ‘what is considered immoral behavior’ (line 14) and thereby act as ‘guidelines’ (lines 5 and 19) to behavior (and belief?).

### Voice

**Structure:** Unified act (argument structure)

**Explicit location:** Object wrt concept; act implicit

**Tone:** Opinion (explicit and through argument structure)

**Style:** Informal

Task interpretation / location: Although this student has an understanding of the context that includes the form of the Discourse (evident in argument style), there is a lack of familiarity with this context evident in the informal style. Task has been interpreted as opinion.
Student 13

Details

White female, educationally advantaged, rating 25, registered for a B.Com degree.

Transcript:

1 I am not really sure how I would define law
2 because I have never really considered this question before.
3
4 But after some thought I decided that
5 with civilisation comes rules by which people must live,
6 laws are just rules which are made more concrete.
7 Laws create boundaries that are needed
8 to ensure a functional way of life and society.
9
10 //Laws define clearly what is right and wrong
11 and to what degree it is right or wrong.
12
13 Laws are enforced firstly by the police
14 and then by the court of law
15 where judgement is presented and passed.
16
17 //Most importantly, laws protect the innocent
18 and ensure that criminals do not get away with wrong-doings.
19
20 Without laws there would be no standards
21 by which people could be judged
22 and the lack of control and order would create chaos in everyday life.
23
24 //No matter which way you look at law it is clear to me
25 that laws create a very important part of civilised society and they are essential.

Themes

A functional definition of law is given in this essay, with a simple but connected structure:

\[
den - (s) - r \text{ which } [func - s - e - c \text{ and } func - i - e - prot] \text{ in order to } [func - s - i - r \text{ and } func - i - i - g] \\
with cons - s \text{ through imp - s}
\]

The contrast in this essay is between the function effect of social-create (‘create boundaries’, line 6, and ‘define clearly what is right and wrong’, line 8) and its effect on the individual (protect / punish - stanza 4). The contrast lies in the power of law both to define and to operate on that definition: laws ‘protect the innocent and ensure that criminals do not get away’ (lines 13 - 14), where the concepts of innocence and criminality are part of the definitional aspects of law. The student does not explicitly mention this concern, but her recognition of it seems evident in her immediately following the mention of innocence and criminality with the statement that ‘without laws there would be no standards’ (line 15). This acknowledgment is also part of the resolution, which is obtained not through theme addition or modification, but rather through hierarchy of existing themes: the overt resolution as part of the conclusion in line 18 refers to ‘ways of looking’ at law. These ways of looking are structured in lines 15 - 17: the creation function of law (‘Without laws there would be no standards’, line 15) is necessary for its implementation (by which people could be judged’, line 16), which is necessary for its regulation-intent function (‘and the lack of control and order would create chaos’, line 17). This then justifies the individual effect/creation contrast.
Voice

Structure: Framed (act in stanzas 1 and 5, concept in 2 - 4)
Explicit location: Within act
Tone: Opinion (established within act, lines 1 - 2; linked in line 3 to concept. The rest of concept has a more authoritative tone)
Style: Within act informal (eg. I am not really sure’, line 1; syntactical structure of lines 18 - 19); within concept more formal.

Task interpretation / location: Overall position is one of uncertainty. Possible reading of context as authoritative (evidenced in tone within concept section), which may explain hesitancy. Detachment evident through structure again seems to be more of a 'holding back' / uncertain technique. Concept is dealt with at descriptive level, with some evidence of analysis in lines 15 - 17.
Student 14

Details

White female, educationally advantaged, rating 28, registered for a BA degree.

Transcript:

1 Laws are guidelines or rules laid down by a government
2 in order to protect its citizens against harm
3 and leading unstructured lives.

4 The penalty for breaking these rules is a punishment,
5 which could include fines, a jail term or even a death sentence,
6 depending on the severity of the crime.

7 //A lawyer will either try to prove a client guilty/innocent of the committed crime
8 and present the case to a judge.
9 A lawyer has to uphold the law
10 by making sure that criminals get punished
11 and that the guilty party will not be punished for what he or she did not do.

12 This process might sound simple in theory,
13 but it is not as easy to put this theory into practise.

14 The seemingly definite difference between right and wrong can sometimes be blurred
15 ie circumstances like poverty can almost make a crime seem excusable
16 and could cause a person to commit a crime
17 which he or she would not commit
18 if they were living in affluent conditions,

19 therefore a lawyer has to analyse the motives responsible for the crime.
20 A lawyer's job is also difficult as he or she might not agree with the law (eg in a dictatorship)
21 but he or she will have to live with these laws ,
22 at the expense of his or her ethics
23 or rebel and risk losing his or her job or worse.

Themes

There is an implicit denotative definition of law as a practice in this essay; however, the explicit


den - (guide) [and den - prac] in order to func - i - e - prot and func - i - e - pun and imp - s and
imp - p with bas - e (v)

This essay sets out two functions of law: that of individual-effect-protect, and individual-effect-punish. A large proportion of the essay focuses on the punishment theme, and on the relation of the

practice law to this theme.

Within the punishment theme, the focus is on implementation (structure / process), and an implicit reference in made to an absolute value basis of law: a person is either guilty or innocent (line 7), and is either punished or not punished (lines 10 - 11). An explicit contrast is drawn in the essay between this absolute value basis in implementation, and a more relative understanding of a value basis ('the seemingly definite difference between right and wrong can sometimes be blurred', line 14). Two sub-
contrasts are raised in this regard: firstly between the absolute implementation value and the punish effect (lines 15 - 18), and secondly between this value and the protect function.

The resolution, in both instances, is made through reference to practice. With regard to protection, at the level of practice the tension is mitigated through the responsibility of the lawyer to analyze motive (line 19), thereby incorporating some notion of relative value into the implementation process. With regard to the punish function, the resolution is less direct: the laws are absolute and the lawyer must comply (and 'live with these laws', line 21 or 'risk losing his or her job or worse', line 23), however, resolution is obtained through a personal distancing move. Thus there is choice at the level of individual belief ('he or she might not agree with the law', line 20), even though the practice is determinate (and it may compromise 'his or her ethics', line 22).

**Voice**

*Structure:* Unified at level of concept

*Explicit location:* Subject wrt concept. No explicit location wrt act

*Tone:* Authoritative

*Style:* Formal (eg. 'The seemingly definite differences', line 14; 'therefore', line 19)

Task interpretation / location: The context is interpreted as authoritative, but there is some mitigation of this in the content (blurred difference between right and wrong, line 14). No personal location; opinion is ventured in stanza 5, but conclusion (line 19) is expanded rather than justified: some Discourse recognition, but not realization.
Student 15

Details

White female, educationally advantaged, rating 32, registered for a BA degree.

Transcript:

1 My basic perception of laws
2 is that they are regulations put into place by elements of power
3 to determine the everyday actions of members within a society.
4 Laws determine what may or may not be done
5 and what actions are acceptable and tolerated within a particular society.

2 //It is my belief
3 that laws operate on different levels:
4 from the laws that determine my actions on a daily basis eg stopping at a red robot,
5 right up to the laws that are used to govern the country in which I live.
6 In a sense I believe that laws contribute towards the peaceful co-existence of individuals.

3 //I also believe
4 that each person's personal understanding of law is different.
5 The importance and value of laws differs in different societies,
6 and therefore I believe that a person's religious, tribal and cultural background
7 impact on their interpretation of the law.

4 //For example, a law that may be a fundamental part of one person's life
5 may not even exist in the society of another individual.

5 //Most importantly, it is my opinion
6 that ultimately the beliefs of people that are in power
7 play the most essential role in determining laws on every level
8 because, after all, it is these elements of power who instate the laws.
9 This is perhaps where the concept of morality becomes apparent.

6 Making use of my limited knowledge of the legal system I have come to believe
7 that the country in which I live
8 has one of the most democratic constitutions in existence,
9 which has been determined by the laws
10 based on the beliefs of those who had the power in SA.

7 At the same time, I understand
8 in the past the beliefs of the previous rulers caused them to instate laws
9 which were immoral and unjust.
10 Due to their beliefs, ordinary people were forced to abide under laws
11 which were detrimental and destructive to our society.

8 //I feel
9 that it is the people who exercise power and determine laws
10 who essentially govern my life and the lives of those around me.
11 For that reason I have an interest in,
12 and would really like to have a deeper understanding of the concept of law.
Themes

This student provides a long essay which is rooted in belief and understanding (evidenced in the first line of each stanza), and which uses this theme to ultimately resolve a contrast between determination and variance:

den - (s) - r with nat - a - d which func - s - i - r and nat - f - d and nat - v - d and ori - i with bas - e (v)
which can lead to bas - j(l)

Law is defined in the first stanza of the essay as regulations which determine action at the level of society (‘determination of actions within society’ is repeated twice in this stanza, line 3 and lines 4 - 5).
Stanza 2 continues the theme of determination of action (line 8), but changes the level of focus (‘laws operate on different levels:’, line 7) to that of the individual: this individual level is expressed personally in lines 8 and 9 (‘my actions’ line 8, and ‘the country in which I live’, line 9), however the broader reference to the individual level is established in line 10 (‘laws contribute towards the peaceful co-existence of individuals’).

The individual theme is continued in stanza 3, but picking up this time not on determination, but on variance, expressed as belief (‘personal understanding’, line 12) and interpretation (line 15). Individual belief and interpretation is seen as a function of ‘religious, tribal and cultural background’ (line 14), and differences in these backgrounds can lead to societal variance (diversity) in law (expressed in the middle of this stanza in line 13: ‘the importance and value of laws differs in different societies’). The placement of this line in this middle of this stanza, followed by a repeat of this theme in the short stanza which follows suggests that, although there is a contrast between the determinative function of law and individual variance, it is not at the level of this societal difference. Stanza 5, serving as an example, emphasizes this, and with its short structure closes off this avenue: ‘a law that may be a fundamental part of one person’s life may not even exist in the society of another individual’ (lines 16 - 17).

The real contrast, for this student, between determination and variance at the individual level, lies within an understanding of origin and power. Thus, law determines and is individually understood and interpreted, but law is also determined by individuals, who have their own understandings and beliefs: ‘ultimately the beliefs of people that are in power play the most essential role in determining laws on every level’ (lines 19 - 20). This power to determine laws can be used for either good or bad, and this, for this student, is ‘where the concept of morality becomes apparent’ (line 22).

The following two stanzas contrast this morality through a variation - evolution theme. In the past, in this country, laws (based on the beliefs of people with power) were ‘immoral and unjust’ (line 30, stanza 7), now however (and again based on the beliefs of those with power) the country has ‘one of the most democratic constitutions in existence’ (line 25, stanza 6, justice - basis?).

The resolution to the contrast, expressed in stanza 8, again focuses on belief and understanding: people with power determine laws which determine individual action (lines 34 - 35); however, the student believes (‘I feel’, line 33) that this can be countered through enriching personal knowledge and understanding (it is in his ‘interest ... to have a deeper understanding of the concept of law’, lines 36 - 37).

Voice

Structure: Integrated (first line of every stanza relates to belief, opinion or understanding)
Explicit location: Within act primarily, object wrt subject.
Tone: Opinion (explicit)

Style: Formal (eg. ‘My basic perception’, line 1; ‘Making use of my limited knowledge of the legal system’, line 23 within act; ‘play the most essential role’, line 20; ‘caused them to instate’, line 29 within concept)

Task interpretation / location: Task has been explicitly interpreted as opinion, but is worked with at a level that indicates strong context / Discourse familiarity. Although each stanza relates to a different point (enumeration style), the last line of each stanza expresses evaluation, again an indication of Discourse familiarity.
Student 16

Details

White female, educationally advantaged, rating 27, registered for a BA degree.

Transcript:

1 Laws are the rules
2 that ordinary people live by everyday.
3 All aspects of our lives are touched by the law,
4 and the penalties for those who break it can be harsh.

2//I believe that law, in most cases, is the search for the truth.
3 People are given the opportunity to present their case
4 to be judged on it's merits.
5 One can only hope that a fair result is given.

3//It has been said that “justice is blind” but I don't believe that.
4 Laws are made by people
5 and people make mistakes.
6 Many have been wrongly imprisoned or put to death because of this.

4//But law is not just about courts and lawyers and legal briefs.
5 It is about the way our lives and our country are governed.

5//South Africa has one of the most liberal and democratic constitutions in the world
6 and this is something to be proud of.
7 Here, all people are equal in the eyes of the law
8 and everyone (of legal age and sound mind) can determine their future with a vote.
9 This is a truly wonderful achievement.

6//I want to study law
7 because of the huge impact it has on our lives.
8 It affects us in so many ways (from speed limits to the government)
9 and without it we would be truly lost.

Themes

Law is defined primarily through consequence in this essay:

den - (s) - r with cons - s and [bas - e(v) with nat - s - i through imp - s] and bas - j(l)

The explicit contrast in the essay is between the sanction consequence (lines 3 - 4) and the imperfect nature of law (stanza 3); stanza 2 highlights this contrast by surrounding an implementation description (lines 6 and 7) with lines relating to value basis (‘the truth’, line 5) and imperfection (‘hope (for) a fair result’, line 8).

The explicit resolution to this contrast is provided by the recourse to an additional basis: that of literal justice (stanza 5), with stanza 4 (with a shorter structure but delineated through the paragraph breaks), serving to define the divide between contrast and resolution. Thus, although law is imperfect and does carry sanctions, its intentions are good (we have ‘one of the most liberal and democratic constitutions in the world’, line 15 - establishing justice basis, which is ‘something to be proud of’, line 16), and the sanctions which it carries are applied equally to all people (line 17, procedural...
justice). This resolution is further evidenced through examination of the last lines of the stanzas, with negative last lines given in stanzas 1 - 3 (‘penalties for those who break it can be harsh’, line 4; ‘One can only hope that a fair result is given’, line 8; ‘Many have been wrongly imprisoned or put to death because of this’, line 12), contrasting with the positive line at the end of stanza 5 (‘This is a truly wonderful achievement’, line 19).

The significance of the last line of the stanzas in this essay points to a further implicit contrast in the essay: the last line of stanza 6 (‘without it we would be truly lost’, line 23) makes no apparent sense in the context of the essay since, very unusually, no functional definition of law has been given in the essay. The question of why we would be lost, or what we would lose, is apparently unanswered by the essay. The meaning of this line can perhaps best be understood by extending the apparent metaphor: ‘we would be ... lost’, or ‘directionless’, which could easily be followed by ‘in a sea of relativity’. Imperfection provides this sense of relative chaos, again contrasted with sanction (which in terms of the essay can be the only possible meaning of the ‘impact’ referred to in line 21). The resolution here is found by searching for the ‘it’ referred to in line 23. The only possibilities for this ‘it’ provided in the essay are ‘the law’ in line 3 and 17, which does not seem to resolve the contrast, and ‘the truth’ in line 5 which could. Thus, the basis of absolute value (the truth) is what provides the resolution to the uncertainty provided by imperfection in the face of sanction. Without this (absolute value), ‘we would be truly lost’ (line 23).

Voice

Structure: Integrated (evidenced in for eg. lines 5 and 9)
Explicit location: as student (‘I want to study law’, line 20) and subject wrt concept (focused on sanction, lines 3 - 4, 8 and 9, and having a vote, line 18)
Tone: Opinion
Style: Informal

Task interpretation / location: The style of this essay is informal, and the content relates more to a 'popular' notion of law than to the Discourse context. There is an explicit location as a law student. Style of writing and interpretation of task as opinion seem to indicate an ease with this outsider position.
Student 17

Details

White male, educationally advantaged, rating 29, registered for an LLB degree.

Transcript:

1. I believe that law is the fundamental basis on which civilization was created.
2. To me law is what prevents us from succumbing to our basic instincts and desires.
3. //This system is the cement that holds our society together and directs the lives of the inhabitants of society.
4. This does not mean that I find no fault with the current legal system.
5. Law is a dynamic system, as society’s values and morals are consistently changing through time and therefore making room for improvement and modification of our legal structure.
6. //This is one of the reasons why I have chosen to study law.
7. The constant developments in law and the ever changing nature of law appeal to me as I believe this will interest and motivate me in my career.
8. Law’s importance to me is magnified due to it dealing directly with people's lives and their relationships with the state and each other. This personal aspect of law has also influenced my decision.
9. //I hope to acquire a finer legal understanding as a student and hopefully make a positive contribution to this system as a lawyer.

Themes

Personal location as a law student is a theme that takes up almost half of this essay. This theme is used in stanza 5 to provide a description of the levels of legal functioning which is perhaps more explicit than is provided in other essays.

Perhaps the most obvious explicit contrast within the essay is between the social prevention function of law (‘law is what prevents us’, line 3) and what is prevented or controlled at the individual level (‘from succumbing to our basic instincts and desires’, line 4). This contrast is seen as justified (‘This system is the cement’, line 5) in terms of law’s other functions which are to maintain and guide (lines 6 - 7), but the contrast is not resolved by this justification, as the system can still be faulted (line 8).

The resolution rather can be found, in stanza 3, in the variation aspect of law, and its evolving nature. Thus, although law does control the individual, it is responsive (a ‘dynamic system’, line 9), and is improved and modified (line 11) as society’s values and morals change (line 10). That this evolution
is a resolution to the contrast is confirmed in stanza 4, evidenced in the personal identification with this theme (‘This is one of the reasons why I have chosen to study law’, line 13). Evidence is also provided in the examination of the first lines of the stanzas, with line 13 (this is one of the reasons...) contrasting with ‘law is’ (line 1), ‘this system is’ (line 2), and ‘law is’ (line 3).

The same resolution, particularly in the personal identification with change, serves also in respect of a second contrast implicit in the essay which exists between the level of the individual who has ‘basic instincts and desires’ (animal-like? line 4) which seem to be presented as unchanging (in stanza 1 it is by means of law standing opposed to these that civilization ‘was created’, line 2), and the variation theme at the level of society in stanza 3 (where ‘values and morals are consistently changing’, line 10). The fact that this contrast is of interest to the student is the subject of stanza 5: not only in she interested in the changing nature of law (from stanza 4), but also (the importance ‘is magnified’, line 17) in ‘people’s lives’ (line 18) - the level of basic instincts and desires - and their ‘relationships with the state and each other’ (line 19) - the level of values and morals.

Voice

Structure: Integrated (first person references throughout text at level of action)

Explicit location: As student (line 13); as object wrt concept (lines 3 - 6)

Tone: Opinion

Style: Formal (eg. ‘Fundamental basis’, line 1; ‘dynamic system’, line 9; ‘magnified’, line 17)

Task interpretation / location: Recognition of the discourse context evident through formal style. Situates self easily within this context: tone indicates familiarity with the context. There is an interpretation of task as theoretical conception: all references to concept are at an abstract rather than concrete level (commenting on ‘law’ rather than listing attributes of law).
Student 18

Details

White male, educationally advantaged, rating 32, registered for a BCom degree.

Transcript:

1 Law is a practise
2 based on a system
3 of rules and regulations
4 put in place to protect members of society
5 from wrong-doing at the hands of others
6 and to prevent these members of society from doing wrong to themselves.
7 These rules and regulations,
8 ranging from petty misdemeanours such as littering and traffic violations
9 to the more serious felonies such as theft, rape or murder,
10 all serve to create a “safety net”
11 which serves to protect members of the public
12 from transgressing the boundaries of common decency and the law
13 by providing would-be wrong-doers with a threat against crime
14 in the form of punishments such as fines, jail and even death (in some countries)
15 depending on the severity of the crime.
16 Thus, Law, can be said to be a practise
17 which is interested in firstly, the application of the law
18 thereby protecting society from itself and a state against lawless anarchy.
19 Secondly, law is interested in the control of the application of these laws,
20 ensuring that the law is carried out in the most fair way possible,
21 ensuring that the innocents' rights are upheld.

Themes

Some of the themes in this essay are implicit rather than explicit, or are mentioned only briefly. Only the predominant explicit themes are listed below:

den - prac based on den - s - r with nat - f - d and cons - s which [func - i/s - e - prot and func - (i) - e - prevent] through bas - j(l)

Perhaps the most striking feature of this essay is a reflexivity within the protect function which is a recurring theme within the essay. This theme begins in stanza 2 as two related function sub-themes: individual - effect - protect (‘from wrongdoing at the hands of others’, line 5), and individual - effect - prevent (‘to prevent these members of society from doing wrong...’, line 6). However, in the same line within which it is raised, the prevention function is subsumed into the protection function: law prevents people not from just doing wrong, but from ‘doing wrong to themselves’ (line 6). This subsumption is made more obvious in stanza 4, in the use of the word ‘protect’, where ‘prevent’ would have been more appropriate: thus law ‘serves to protect members of the public from transgressing the boundaries of common decency and the law’ (lines 11 - 12). Although not
expressly evoked, this understanding fits best with a function-intent-guide theme.

This ‘protection from self’ reflexive notion is extended in the essay from the individual level in stanzas 2 and 4 to the societal level and the defining function of law in stanza 6: law’s function is ‘to protect society from itself’, and ‘a state against lawless anarchy’ (line 18). The reflexivity is taken to a further level in stanza 7: not only must individuals and society be protected from themselves, but law too must be protected from itself, and law’s second function is to control the application of law, ensuring that ‘innocents’ rights are upheld’ (line 21).

Although only explicitly mentioned in passing (law provides a ‘threat against crime’, line 13), consequence is a second major theme of the essay. This is evident if the meaning of ‘wrong to themselves’ in line 6 is probed. Stanzas 3 - 5 answer this question. Stanza 3 provides examples of rules, none of which are things that can be done to oneself, however in stanza 4, law serves to ‘protect’ people from doing these things (‘transgressing the boundaries of common decency and the law’, line 12), which, in stanza 5, lead to punishment (line 14), since consequence is a defining feature of law (line 13). Thus in preventing people from doing ‘wrong to themselves’, law’s function is to protect from its own consequence (again a ‘guide’ theme).

The protect/guide and consequence themes provide a contrast which is resolved through law’s action on itself: law controls its own application through appeal to a basis of literal (procedural) justice, ‘ensuring that law is carried out in the most fair way possible’ (line 20).

**Voice**

**Structure:** Attached (with act evident in stanzas 6 and 7, and concept stanzas 1 - 5)

**Explicit location:** None

**Tone:** Authoritative

**Style:** Formal (‘ranging from’, line 8; ‘transgressing’, line 12; ‘thereby’, line 18)

**Task interpretation / location:** Context interpreted in terms of formal discourse style and in absolute terms (indicated by authoritative tone). There is a distancing of self both through lack of explicit location and through attached structure.
Student 19

Details

White female, educationally advantaged, rating 25, registered for an LLB degree.

Transcript:

1. I think law is man-made concept
2. which forces society to follow a set code of conduct,
3. to ensure that civilisation, as we know it,
4. maintains a smooth working order.

5. The legal system is such a system
6. which promotes the ideas of morality, ethics and fair dealings
7. and in so doing forces societies
8. to accept certain cultural standards.

9. It is the laws of different states
10. that try to pursue greater concepts of civilisation
11. and in so doing, drawing a clearly defined line between the ideas of wrong and right.
12. Therefore causing social behaviour to follow a set formula of rules.

13. When I think of the word law,
14. I associate it with a set of boundaries in which I live my life,
15. knowing that they are there to protect me
16. from the evils of today’s environment in which we live.

17. However, many people are unaware of their rights provided to them by the law
18. therefore allowing people to take advantage of them.

19. I feel it is very important that people are informed of their rights,
20. for if one has a basic understanding of the legal system
21. it can act as a security blanket
22. protecting them from many injustices.

23. Law is not a set system
24. but rather changes with the needs and demands of a society.
25. If the legal system is a fair system it can be very beneficial to its people
26. but if it is corrupt it can destroy a nation.

Themes

There is a duality set up in the structure of this essay, which extends even to the denotative definition of law:

[den - s - r which func - s - e - c and func - s - (e) - r in order to f - s - i - m and f - s - i - b] and [den - s - (boundaries) which func - i - e - prot through bas - j(l)] and nat - v - e/d

The essay positions, on the one hand, the power aspects of law in stanzas 1 - 3, and on the other, the protective aspects in stanzas 4 - 6. In a sense, the paternal and the maternal are set up side by side, with no attempt to integrate them. The relation between the two is outlined in the final stanza: the two need to operate together to benefit the people.
The first three stanzas set up law’s power as follows:

Stanza 1 describes law’s function to maintain (civilization, lines 3 - 4) through the effect of regulation (‘forces society to follow a set code of conduct’, line 2). Stanza 2 focuses on law’s power to define, or function to create, ‘promoting the ideas of morality, ethics and fair dealings’ (line 6) and ‘forcing societies to accept certain cultural standards’ (lines 7 - 8). This tension is addressed in stanza three: whereas in stanza 1 regulation was necessary to maintain civilization, in order to build (‘to pursue greater concepts of civilization’, line 10), the definition aspects (‘drawing a ... line between the ideas of right and wrong’, line 11) must be combined with the regulative aspects (‘causing social behavior to follow a set formula of rules’, line 12).

The distinction between the first three stanzas and stanza 4 is marked by the repetition of ‘I think’ from the first line of stanza 1 in the first line of stanza 4 (line 13). This stanza contrasts with the previous three stanzas firstly by its focus on the individual as opposed to the social, and secondly its move from the determinative function to the much softer protective function. Thus the intention at the individual level is to guide (‘set of boundaries in which I live my life’, line 14), with the function effect of protection (‘they are there to protect me’, line 15). Stanza 5 adds a proviso to this theme: law can only protect through recourse to rights, and peoples awareness of them (lines 17 - 18). The function of this proviso, as seen in stanza 6, is to set up the basis of law (justice); law gains its function to protect (from ‘injustice’, line 22) through a ‘basic understanding of the legal system’ (line 20) and its associated rights (line 19).

Stanza 7 provides the resolution to the contrast between the two aspects of law outlined above, but first sets up variation as a basic nature of law: ‘law is not a set system, but rather changes with the needs and demands of society’ (lines 23 - 24). The use of the word ‘set’ in this context echoes stanzas 1 - 3, where law is described as a ‘set code’ (line 2) and ‘set formula’ (line 12), and highlights the intention of these two lines with the variation theme: law may be determinative (stanzas 1 - 3), but it is not static. The effect of law can differ, however, ‘if the legal system is a fair system it can be very beneficial to the people’ (line 25). This is the crux of the matter: if the power aspects (‘the legal system’) operate with the basis (‘fair system’) the system can be ‘beneficial’ (build society?). If the power aspects operate alone (‘if it is corrupt’, line 26) the effect can be destruction (‘destroy a nation’, line 26).

Voice

*Structure:* Integrated (predominately concept, but evidence of act in line 1, 13 and 19.
*Explicit location:* Object wrt concept
*Tone:* Opinion (explicit in ‘I think’, line 1; ‘I feel’, line 6 and stanza 4, but also implicit in abstract dealing with concept, stanzas 2 and 3)
*Style:* Formal (eg. 'legal system is such a system', line 5; 'therefore', line 12; 'however', line 17)

Task interpretation / location: Context familiarity indicated through style, but also through ability to provide opinion within this style. Works with concept at an abstract level; task is interpreted as reflection.
Student 20

Details

White female, educationally advantaged, rating 31, registered for a BCom degree.

Transcript:

1 Law in my opinion is the basis of civilisations.
2 The laws of a state reflect the social, economic and political ideologies
3 of the people of the time.
4 Law is everchanging and growing with the times.
5 The law is usually drawn up by a body of chosen people
6 considered fit to set it.

7 2//It is the backbone of society
8 the mould for the correct functioning of a population of people
9 to live as a community in a working system.
10 It sets rules and limitations,
11 but, in the same capacity, it creates power and rights.

12 3//The law should be based on the peoples majority of feelings
13 of what should be permitted in the system and what shouldn’t,
14 what is right and what is wrong.
15 It affords certain appropriate punishment
16 for those threatening the societies well-being.

17 4//Law is intended for the protection
18 of the individual in the system,
19 since all want what is fair and just.

20 5//I believe though, that since people make the law,
21 and since people govern over people,
22 the law is not necessarily fair.
23 Law in its power can be horribly abused.
24 Instead of protecting the innocent,
25 it can be a tool for harming the innocent.

26 6//Since there are no set of definite values
27 that all people will agree on worldwide,
28 the law is very much open to trial and error,
29 endless re-evaluation and exploration of various points of views
30 with different results in every area of jurisdiction, or case.

31 7//From country to country,
32 and from person to person,
33 the interpretation of the law is different,
34 but if the law is administered with open-mindedness and logical impartiality
35 many conflicts between people (as they will inevitably occur)
36 can be sorted out to satisfaction.
This essay contrasts as ideal version of law with an actual practice version. The theme structure is as follows:

- den - (basis) with bas - e(v) with nat - v - e and ori - d(r) and func - i - i - g to func - s - i - m and func - s - (e - r and func - s - e - c and bas - j(i and l) with cons - s and func - i - e - prot and nat - v - d

In the ideal version, which is outlined in stanzas 1 - 4, law is defined predominately in terms of basis and function. The predominant themes are expressed in the first three lines (4 in the case of stanza 1) of each stanza; the final two lines of each of stanzas 1 - 3 introduce a different theme and serve a different function (see below). There is a repetition of theme pattern in the stanzas (basis in stanza 1, function in stanza 2, basis in stanza 3 and function in stanza 4) which links stanzas 1 and 2, and stanzas 3 and 4.

In stanza 1, law is described as having basis - values ('reflect social, economic and political ideologies', line 2), with nature - variation - evolution ('Law is everchanging and growing with the times', line 4). These themes connect to the functions outlined in stanza 2: law's intended function is to guide or 'mould' (line 8) (through values) and to maintain or to enable people 'to live as a community in a working system' (line 9) (through evolution).

In stanza 3 the basis - values theme is continued ('what is right and what is wrong', line 14), but this time is linked to a notion of democracy or justice basis ('based on the peoples majority of feelings', line 12). This basis is linked to the function of protection (line 17) in stanza 4.

The last two lines of each stanza are structurally distinct from the rest of the stanza (new sentences), and introduce new themes which nonetheless do connect to the overall theme of each stanza: in stanza 1 origin is introduced in the last two lines connecting to the basis theme, in stanza 2 creation is introduced on the function theme, and in stanza 3, consequence is introduced connecting to democratic values or justice. The structural separation of these lines, however, shows that a different function is being served. Examination of the lines shows a strong justice theme in each: justice underlies origin ('chosen people', line 5), creation ('power and rights', line 11) and consequence ('appropriate punishment', line 15) and is therefore a strong basis for the entire system (at the ideal level). This structure and theme contrasts with the lack of a final two line sentence in stanza 4. This lack is further accentuated by the use of the third line of stanza 4 to effectively summarize the themes of the final sentences in stanzas 1 - 3: 'since all want' (democratic origin, stanza 1) 'what is fair' (appropriate consequence, stanza 3) 'and just' (in accordance with rights, stanza 2).

The break between the ideal version of law and its actual practice is made in stanza 5, structurally indicated by 'I believe' as an introduction, which mirrors the 'in my opinion' of line 1, stanza 1. The contrast that is drawn is between the ideal, justice-based version of law outlined in the previous section, and law in practice as being something that is 'not necessarily fair' (line 22) and which can be used 'as a tool for harming the innocent' (line 25). The themes used in this exploration are the same as those used to establish the justice theme in stanzas 1 - 3, and stanzas 5 and 6 seem to effectively replace the last two lines of stanza 4. Following the previous pattern, the two stanzas connect in their repetition of themes.

The first two lines of each of stanzas 5 and 6 are the negation of the democratic origin theme: 'people make the law and ... people govern over people' (lines 20 - 21), but “there is no set of definite values that all people will agree on” (lines 26 - 27). Appropriate consequence, or fairness, is the theme of the third line of each of the stanzas: 'law is not necessarily fair' (line 22) because it is 'very much open to trial and error' (line 28). Accordance with rights is problematised in the final lines of each stanza: legal application may not be in accordance with rights because the power dimension (power and rights were connected and balanced in line 11) may predominate (line 23). In addition, the differentiated
nature (line 30) and varying interpretations (line 29) of law makes this accordance difficult.

The resolution to the ideal / actual contrast is provided in stanza 7: there is diversity in ‘interpretation’ of law (lines 31 - 33 - the repeat of the variation theme from line 29 connects this to the ‘actual practice’ dimension of stanzas 5 and 6), however, ‘satisfaction’ (line 36) can be obtained if ‘law is administered with open-mindedness and logical impartiality’ (line 34), or, in other terms, if practice is connected to an ideal base.

**Voice**

*Structure:* Integrated (act evident in 'in my opinion', line 1; 'should be', line 12; 'I believe', line 20

*Explicit location:* Within act primarily, object wrt concept

*Tone:* Opinion (explicit, as well as in expression of relative concept values)

*Style:* Formal (eg. 'in the same capacity', line 11; 'affords certain appropriate punishment', line 15)

Task interpretation / location: Discourse familiarity is evident both in style and in way of working with opinion in this style (justification and evaluation strategies used). Task interpretation relates to justified opinion.
### APPENDIX 3: INITIAL THEME TABLE

<table>
<thead>
<tr>
<th>Denotation</th>
<th>Connotation</th>
<th>Function</th>
<th>Origin</th>
<th>Object</th>
<th>Type</th>
<th>Nature</th>
<th>Inverse Function</th>
<th>Identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>regulation</td>
<td>process</td>
<td>ethics</td>
<td>rights</td>
<td>control</td>
<td>protect</td>
<td>build</td>
<td>created</td>
<td>community</td>
</tr>
</tbody>
</table>

369
### APPENDIX 4: THEME TABLE – SECOND VERSION

<table>
<thead>
<tr>
<th>Denotation</th>
<th>Connotation</th>
<th>Function</th>
<th>Origin</th>
<th>Type</th>
<th>Nature</th>
</tr>
</thead>
<tbody>
<tr>
<td>regulation</td>
<td>process</td>
<td>ethics</td>
<td>created</td>
<td>civil</td>
<td>stability</td>
</tr>
<tr>
<td>rights</td>
<td>deal</td>
<td>literal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>intention</td>
<td>order</td>
<td>maintain</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>effect</td>
<td>chaos</td>
<td>guide</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>effect</td>
<td>control</td>
<td>punish</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>effect</td>
<td>protect</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>rules</td>
<td>principles</td>
<td>courts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>government</td>
<td>absolute</td>
<td>relative</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>build</td>
<td>maintain</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>order</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>change</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>stability</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 5: PROFILE ANALYSIS OF THE TRANSCRIPT OF STUDENT 8

Student 8 (example 1)

1. Law is somekind of rules laid by a government to make peace among people.  
   1st order profile: Law is rules ‘laid by’ government to make peace.

2. For example when it was possible for individual person to have his own land,  
   there will be no reason to produce law in that particular area  
   cause he is living alone and can do whatever he wants at anytime  
   not necessary for individual alone  

3. cause he is disturbing no one.  
   But when it happens that a second person is coming to live,  
   certain rules have to be made to make peace between the two.  
   but to avoid disturbance of peace in society

4. //Law is laid to be obeyed by people but also giving them their legal rights and freedom.  
   Law is to be obeyed, but also gives rights and freedom

5. //To maintain peace and unity among the community,  
   people have to follow the orders of law made by authorities or by a government.  
   Government sets law to maintain peace and unity

6. //Whoever disobey the orders of the law is being punished the way he deserve to be punished.  
   He can be fined or put in prison.  
   Deserved punishment comes to those that disobey

Second order profile

denotation - rules  
origin government ‘laid’  
function social maintain peace  
function individual control  
function individual punish
## APPENDIX 6: THEME TABLE – THIRD VERSION

<table>
<thead>
<tr>
<th>Denotation</th>
<th>Basis</th>
<th>Origin</th>
<th>Function</th>
<th>Nature</th>
<th>Consequence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>regulation</td>
<td>process</td>
<td>ethics</td>
<td>rights</td>
<td>norms</td>
</tr>
<tr>
<td>rules</td>
<td>principles</td>
<td>courts</td>
<td>government</td>
<td>absolute</td>
<td>relative</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### APPENDIX 7: PROFILE ANALYSIS OF THE TRANSCRIPT OF STUDENT 10

#### Student 10 (example 2)

<table>
<thead>
<tr>
<th>Sentence</th>
<th>First order profile</th>
</tr>
</thead>
<tbody>
<tr>
<td>1Law is a guideline set by higher authorities as to the lifestyle of its place.</td>
<td>Law is a lifestyle guideline set by authorities</td>
</tr>
<tr>
<td>2It enables us to do the right thing always and to be aware of the consequences should we decide to stray from it.</td>
<td>It enables individuals to make a choice regarding action with knowledge of consequence</td>
</tr>
<tr>
<td>3Though usually found as restricting by people of unlawful ways, it was brought about to enable us to live in harmony with each other</td>
<td>It is restricting, but has harmony as its aim</td>
</tr>
<tr>
<td>4//Law is a way of showing one’s weakness or strength. If you have good laws that are not flexible in any way the basic outcome is a lawful state with very little disruptions.</td>
<td>Good laws are not flexible, and lead to little disruption and strength</td>
</tr>
<tr>
<td>5Take for instance, Japan and China two of the worlds greatly populated countries and yet because of the Laws, have a very low crime rate, if existent at all regardless of all the influential ‘kung fu’ films shown there.</td>
<td>(example)</td>
</tr>
<tr>
<td>6//Therefore law is what determines our lifestyle, it is a way of setting things straight in a given area.</td>
<td>Law is a determining guideline</td>
</tr>
<tr>
<td>7Despite the fact that to an individual at a given time, law may seem to be unfair or unjust, truly it is meant for the best and is set with everyone in mind.</td>
<td>It may be unfair / unjust at the level of the individual, but has good intent at societal level</td>
</tr>
<tr>
<td>8//Basically the above information states clearly what Law is and its purpose to those living under it.</td>
<td>(What law is and purpose given above)</td>
</tr>
</tbody>
</table>
Second order profile

function intention guide
enables choice
has consequence
function intent maintain
determining guideline
which may be unfair
APPENDIX 8: REPRESENTATION OF THEME RELATIONS

Student 4

```
  den-proc
   / \
  /   \
/     \
func-s-i-m func-i-e-p bas-j(l) func-i-e-prot
   / \
cons-s cons-jus(l) func-i-e-pun
```

Student 7

```
den-s-r — func-s-i-m — func-i-e-prot — func-i-e-pun
            |                        \imp-s
```

Student 8

```
den-s-r — ori-i — func-s-i-m — func-s-e-c
            |                        
func-s/i-i-c — func-i-e-pun
```
## APPENDIX 9: CONCEPT RELATIONS AND COMPLEXITY

<table>
<thead>
<tr>
<th>Student</th>
<th>Relations</th>
<th>No. of levels</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>African</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>black</td>
<td></td>
<td></td>
</tr>
<tr>
<td>group</td>
<td>1 and to and and and</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>2 and and and and and and</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>3 of which have and and</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>4 through [through] and [through] and [through]</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>5 [which] and and [and] / [which] and through and</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>6 equals and and</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>7 and and and through</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>8 and and and through and</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>9 which are in order to through</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>10 and and [with and with] and in order to</td>
<td>2</td>
</tr>
<tr>
<td><strong>White</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>group</td>
<td>11 which [and through in order to] and and and and</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>12 needed to through [and and] and and [with] and</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>13 which [and] in order to [and] with through</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>14 [and] in order to and and and with</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>15 with which and and and with which can lead to</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>16 with and [with through] and</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>17 which [and thereby and] and with and</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>18 based on with with which [and] through</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>19 [which and in order to and] and [which through] and</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>20 with with and and to and and and with and and</td>
<td>2</td>
</tr>
</tbody>
</table>
## APPENDIX 10: THEMES USED (AFRICAN BLACK GROUP)

<table>
<thead>
<tr>
<th>Student</th>
<th>denotation</th>
<th>nature</th>
<th>basis</th>
<th>origin</th>
<th>function</th>
<th>focus society</th>
<th>focus individual</th>
<th>consequence</th>
<th>implementation</th>
<th>Unlisted categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>s1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>func(just)</td>
</tr>
<tr>
<td>s2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ori(creation)</td>
</tr>
<tr>
<td>s3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>func-prot (equality)</td>
</tr>
<tr>
<td>s4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>den-proc-study</td>
</tr>
<tr>
<td>s5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>den(basis)</td>
</tr>
<tr>
<td>s6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>func-s-e-c (rights/free)</td>
</tr>
<tr>
<td>s7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Appendix 11: Themes Used (White Group)

<table>
<thead>
<tr>
<th>Student</th>
<th>Denotation</th>
<th>Nature</th>
<th>Basis</th>
<th>Origin</th>
<th>Function</th>
<th>Focus Society</th>
<th>Focus Individual</th>
<th>Consequence</th>
<th>Implementation</th>
<th>Unlisted Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>s11</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s13</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s14</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s15</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s16</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s17</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s18</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s19</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>s20</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: The table is partially filled with √ symbols indicating the presence of themes in the dataset.
## APPENDIX 12: COMPARISON OF THEMES

<table>
<thead>
<tr>
<th>Group</th>
<th>denotation</th>
<th>nature</th>
<th>basis</th>
<th>origin</th>
<th>function</th>
<th>focus society</th>
<th>focus individual</th>
<th>consequence</th>
<th>implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>system</td>
<td>process</td>
<td>practice</td>
<td>variation</td>
<td>authority</td>
<td>substance</td>
<td>form</td>
<td>practice</td>
<td>others</td>
<td>justice</td>
</tr>
<tr>
<td>rules</td>
<td>den-s-r</td>
<td>den-proc</td>
<td>den-prac</td>
<td>den-s-e</td>
<td>den-t</td>
<td>mat-t</td>
<td>mat-f</td>
<td>bas-p(n)</td>
<td>bas-p(c)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>7</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(f)</td>
<td>.12</td>
<td>.03</td>
<td>.02</td>
<td>.02</td>
<td>.05</td>
<td>.05</td>
<td>.05</td>
<td>.00</td>
<td>.00</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td>0</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>(f)</td>
<td>.08</td>
<td>.04</td>
<td>.05</td>
<td>.04</td>
<td>.01</td>
<td>.01</td>
<td>.04</td>
<td>.00</td>
<td>.00</td>
</tr>
<tr>
<td>p</td>
<td>.43</td>
<td>.12</td>
<td>.50</td>
<td>.36</td>
<td>.50</td>
<td>.15</td>
<td>.05</td>
<td>.44</td>
<td>.12</td>
</tr>
<tr>
<td>r1</td>
<td>.03</td>
<td>.10</td>
<td>.05</td>
<td>.05</td>
<td>.10</td>
<td>.10</td>
<td>.10</td>
<td>.10</td>
<td>.10</td>
</tr>
<tr>
<td>r2</td>
<td>.09</td>
<td>.01</td>
<td>.09</td>
<td>.09</td>
<td>.09</td>
<td>.09</td>
<td>.09</td>
<td>.09</td>
<td>.09</td>
</tr>
<tr>
<td>p</td>
<td>.15</td>
<td>.02</td>
<td>.02</td>
<td>.02</td>
<td>.02</td>
<td>.02</td>
<td>.02</td>
<td>.02</td>
<td>.02</td>
</tr>
</tbody>
</table>
INTRODUCTION TO LAW

(LAWS 149)

UNIVERSITY OF THE WITWATERSRAND

2000

Course co-ordinator: [Redacted]
Introduction to Law (LAWS 149)

May we first of all take this opportunity to welcome you not only to this course but also more specifically to the University of the Witwatersrand, Johannesburg and the Oliver Schreiner School of Law.

Introduction to Law is taught in the first semester of the year. This is an independent course and will be fully examined and written off during the June 2000 examinations.

Information relating to Introduction to Law is as follows:

Course co-ordinator:

Lecturers:

Course outline:

The Introduction to Law will be concerned with inter alia the following topics. What is law?, the distinction between criminal & civil law, The South African Court structure and the structure of the legal profession, Sources of Law such as Precedent, Judgements of our courts and legislation including the Constitution, Legal writing skills, an introduction to Jurisprudence and the interpretation of Statutes.
Mark allocation:

Student performance in the course will be assessed as follows:

3 assignments  = 40%
1 portfolio @ 10%  = 10%
1 oral examination @ 10%  = 10%
Mid-year test  = 40%

Total 100%

All assignments should be handed in at room 41 (enquiries office), and should be clearly marked with the student's name and student number, and the lecturer's name. Due dates are final, and extensions will under no circumstances be granted without compelling medical or compassionate reasons.

1. The first assignment of 5% for the course must be handed in on the 21st February 2000. The topic for this assignment is "What is Law?". Students are not expected to research the topic, but rather to write their own ideas on the topic. Only 1 page of writing is required. The main object of the assignment is to assess the student's language performance (English usage, formulation and writing skills) and to provide students with early feedback as to how they are likely to perform at university should they not take advantage of the various help schemes available (advice schemes, academic development tutorials etc.).

2. The second assignment of 15% for the course is due on the 14th April 2000. Students will be expected to submit an essay no longer than 5 five typed pages on a content related topic which will be given to students in lectures 3 weeks before the due date. Whilst students are expected to conduct formal research for this essay, students should view the assignment as a practice exercise in essay writing. This assignment will be assessed on content knowledge, research capabilities as well as essay structure and language formulation.

3. The third assignment is due on 18th May 2000 and will make up 20% of your mark for the course. The topic for this assignment will be the same as that for the first assignment i.e. "What is Law?". For this assignment, however, students should include research and insights drawn from the course itself. Evaluation criteria will include content knowledge, argument construction and independent thinking in addition to writing skills and formulation.
This assignment will, again, be content based and will be a fully researched essay, which should reflect use of the library as a resource in problem solving, basic referencing skills and innovative thinking in addition to essay writing skills. This essay should preferably be typed.

4. The full student portfolio which consists of all three written assignments and the oral mark (see below), should be submitted no later than 31st May 2000. The student portfolio should include copies of all assignments submitted in the course (assignments 1 - 3). The aim of the portfolio evaluation is to determine the progress that a student has made over the course of the semester. Students who received a low result for assignment 1 (language assessment) are thus able, through the portfolio submission, to increase their course results by aiming towards a high ‘development’ score on the portfolio.

Students may also, in addition to assignments 1 - 3, include in their portfolio a document outlining their personal reflections on the course.

6. Oral examinations will take place on Monday afternoons during the double lectures from 1st to the 31st May 1999. The class will be divided into groups of 10 students each. Each individual student will be required to present to the group an argument based on a topic of their choice (the lecturer will provide a list of possible topics), for a maximum of 3 minutes. The assessment criteria for this exercise will be argument construction and oral presentation.

7. The June examination will be the last assessment opportunity for the Introduction to South African Law course, and may include problem solving and/or essay writing on all topics covered in the course.

8. Although this is a taxing course it can be a very enjoyable and a very valuable course for every law student. It is a formative course and you are therefore kindly invited to discuss any problem you might have with the course with your lecturer or the course co-ordinator.

9. We trust that you will work hard in this course and that you will also reap the benefits of attending your lectures and applying your mind to the contents of the course.
CHAPTER I

AN INTRODUCTION TO THE CONCEPT OF LAW

1. WHAT IS LAW?

Law is notoriously difficult to define: philosophers have attempted to do so for centuries, yet today there remains little agreement on the subject. Most people would agree that law has to do with the ordering of society, and that it has to do with prescriptive rules (as opposed to descriptive or scientific rules). Beyond that, there is a great variety of views, and in the field of jurisprudence even the simplest proposition is surprisingly controversial.

For example, it might seem obvious to you that the rules in question - rules of law - are man-made, or 'posited' by humans (this is one of the tenets of 'positivism'). But a school of philosophers known as natural lawyers would disagree, arguing that human laws should be judged against a higher standard of morality ('natural law'); and that human laws which fall short of the standard are not really laws at all. As another example, you might want to describe law as a neutral system of rules agreed on to ensure the harmonious co-existence of a particular society. But a Marxist lawyer would point out that law is not neutral, and that it favours the interests of the ruling class. A final example is the proposition that law is certain, in the sense that the application of a legal rule determines the outcome of a legal problem. But a member of the school of 'realists' would argue that rules alone do not decide legal problems or cases.

One of the reasons why law is so difficult to pin down is that it appears in diverse forms from a variety of sources and embraces a variety of functions. As to form and source, laypersons tend to think of law as something (i) written down (ii) by a group of elected lawyers. But while legislation (such as Acts of Parliament) is an important legal source, law also comes in the form of completely unwritten rules such as custom and customary or indigenous law. In Britain, even the Constitution - the most fundamental law of all - is unwritten. And much law is created by the judgments of courts rather than by elected lawmaking bodies.

In relation to function, various branches of law may have completely different purposes. Laypersons tend to conceive of law in terms of crime and punishment: they think of the police, of prosecutors and defence lawyers, and of prison sentences (and television dramas do nothing to dispel this very one-sided view of law). Thus they tend to view law as having the function of discouraging anti-social conduct. Yet criminal law is only one branch of a much larger system. There are other branches of the law which involve the state, and so are part of 'public' law, but
which have nothing to do with crime: constitutional law, for instance. Then there are many branches of 'private' law, dealing mainly with relationships between citizens, such as the law of contract, the law of property, family law and the law of delict. (The various branches and divisions of law are dealt with in greater detail later on in this course.)

Each of these branches of law has a different purpose. We might say, for instance, that the purpose of commercial law is to facilitate commerce, the purpose of labour law is to regulate the employment relationship and to protect both employers and employees, the purpose of administrative law is to control the powers of public authorities, and that the purpose of delict is to compensate the victims of other people's carelessness.

Once one grasps the many different forms and functions of law, it is easy to see why short definitions of law are inevitably unsatisfactory. One very well-known definition is that of an early positivist, John Austin (1790-1859), who viewed law as something man-made and quite separate from morality and justice (though these concepts could of course coincide). Law, for him, was the 'command' of a political superior or 'sovereign', and was backed by a 'sanction'. But while this definition fits criminal law very well, it fails to encompass many laws which are not laid down by lawmakers, and which can be broken without risk of any punishment in the usual sense (such as the law which requires certain formalities for a valid will); and in modern states, especially democratic ones, it is not always easy to find a 'sovereign'.

2. LAW AND RELATED CONCEPTS

Because of the difficulties noted above, it is probably easier to clarify the concept of law by describing its relationship with other concepts. Law is related to, and sometimes confused with, concepts such as religion, morality and justice.

2.1 Law and religion

Religion is associated with a belief in powers superior to man; powers which are thought to control the course of nature and human life itself, and which may dictate rules of conduct for humans. Law tends to be associated rather with imperfect rules handed down by a human agency. But there is a close link between the two, since the roots of law can generally be traced to custom, and custom is to some extent based on religion. An English jurist, Henry Maine (1822-88), went so far as to say that every system of law was originally bound up with religious ritual.

Certainly it is true that in ancient times there were many societies where the functions of priests, lawmakers and judges overlapped. In ancient Rome, for instance, the king was also the high priest (pontifex maximus) and the supreme lawgiver; and in
ancient Egypt the Pharaoh was regarded as the incarnation of God on earth. Even in modern times, there are societies in which law and religion are hardly distinguishable. The Koran, for example, is both an expression of religious beliefs and of Islamic law; and Jewish law in modern Israel contains reference to rules of worship and religious behaviour.

Most Western societies today tend to resist the overlapping of law and religion, especially in countries where there is no one dominant religion. Law is regarded as something secular imposed by the state, whereas religion involves elements of spiritual belief and is dictated by upbringing and conscience. When law and one’s religion conflict, the Western view is generally that law takes precedence.

2.2 Law and morality

Morality is a system of morals: individual or group beliefs about what is right and wrong. There is obviously a close connection between morality and religion, since many standards of right and wrong are dictated or inspired by morality, since the law is concerned with upholding standards too. The standards of law and morality are not necessarily the same, however. In apartheid South Africa, for instance, a social system internationally regarded as morally wicked was upheld and enforced by law for more than forty years.

As with religion, there are some societies in which law and the prevailing morality coincide to a remarkable degree. In other societies, it is possible to draw a fairly sharp distinction between certain laws and the moral beliefs of many of its citizens. But even then, there remains a large measure of overlap. One reason is that law frequently intervenes in areas in which people tend to hold strong moral opinions: for instance, in questions about contraception, abortion and the death penalty, the status of women, the treatment of children and animals. If the legal rules imposed do not have the moral support of a large section of the community, these rules are in danger of being disregarded.

Law and morals also tend to feed and reinforce each other. The belief that it is wrong to kill others in certain circumstances may induce a lawmaker to enact a legal rule which forbids murder; and that law will in turn reinforce the moral belief that murder is wrong.

Another factor contributing to the overlap is that moral standards inevitably influence judges when they set legal standards in cases. In criminal law this is particularly evident. The idea of guilt or ‘mens rea’ is based on the notion of moral responsibility in most legal systems, so that people who have committed a criminal act while insane (and not morally responsible for their actions) will not be found criminally guilty. In sentencing a criminal, an accused’s moral
blameworthiness is a crucial consideration in determining the severity of the penalty (see eg S v Hartman 1975 (3) SA 532 (C)).

Law and morals have a considerable vocabulary in common, such as 'just', 'reasonable', 'right' and 'duty', but in most societies there are also clear divergences between the two concepts, either because it would be impractical or unrealistic for law fully to enforce the prevailing morality, or because there is no prevailing morality on the topic.

Governments often abstain from setting standards that are too high, or too invasive; or that will be too expensive and burdensome to enforce. In law, one can ignore the shouts of a drowning person unless there is a prior relationship which places on one a legal duty to attempt a rescue. On the other hand, morality would surely require one to attempt a rescue unless this would cause extreme danger to one's safety. Then, most people would agree that cheating of any kind is morally wrong; but in most countries it would be unrealistic for the law to attempt to prohibit and punish every single form of cheating, no matter how trivial. So the law only prohibits serious and socially disruptive forms of cheating, such as theft and fraud. As it is sometimes said, 'de minimis non curat lex'. For reasons of practicality the law also draws morally arbitrary lines when dealing with issues such as drugs and pornography: often it is an offence to deal in these materials, but not to possess them.

As for the idea of a 'prevailing' morality, or a 'moral majority', such a thing does not necessarily exist, especially in heterogeneous societies like South Africa. Even if it does exist, how does one go about establishing what the people's views are? And are those views necessarily the best path to follow? Most people do not have the opportunity or inclination to make carefully considered moral judgments, and their moral views may well be the product of ignorance or prejudice. This is perhaps why, in spite of majority opinion, governments have often had to take the (enlightened) lead in matters such as removing discrimination against women, the abolition of the death penalty, and outlawing cruelty to animals. It is interesting how often public opinion actually changes as a result of such government action. Child labour in England during the industrial revolution was thought by most people to be a perfectly acceptable social institution — until it was abolished by the government of the day.

2 3 Law and justice

One likes to think the aim of law is to deliver justice, and indeed lawyers are always talking about it: the 'administration of justice', 'miscarriages of justice', the 'requirements of justice', and so on. Early on in their careers, lawyers learn the law — an imperfect social construct riddled with political and moral compromises — does not always coincide with common perceptions of justice. But then justice, like any other moral
value, is a contested and highly subjective ideal. One person’s idea of justice is not necessarily the same as another’s, and will very likely depend on their social, political, moral and economic views. Nor is justice an exclusively legal concern. It is inextricably linked with religion, morality and other spheres of human belief and endeavour.

Like most modern conceptions of justice, many ancient versions included that of equality. Both Pythagoras and Aristotle saw justice as being related to proportionality and distribution. But Plato’s idea of justice was rather different, and referred to the appropriateness of arrangements rather than to equality. According to Plato, for instance, it was just for people to do work that they were fitted for — even if this meant that some people had to be slaves, being well suited (by birth, inclination or force of circumstance) for this task.

The modern view is that justice and equality are intimately linked: that justice is a case of treating people in the same way. But in a legal context this can refer to at least two different things. Lawyers often distinguish between ‘formal’ (or procedural) and ‘substantive’ (or distributive) justice. The first implies equality of treatment by the processes of law; it implies the existence of fairly general rules which will be applied impartially to all who fall within their scope. Thus, according to formal justice, it would be unjust to make me pay income tax if people in the same legal category (people earning a specified minimum amount of money) are permitted to keep all their income. It is often said that formal justice amounts to treating like case alike; but it is important to realise that formal justice does not address the justice of the all-important categories which are used to decide whether one case is like another, or the content of the rules.

As an illustration of the importance of categorisation, imagine that the government enacted a law to the effect that blue-eyed women should pay less tax than brown-eyed women. This law would offend the sense of justice of most people, because the categories specified seem unjust to us. But provided that the government applied this law impartially to all affected by it (blue- and brown-eyed women), it would be upholding formal justice. And that is the unsatisfactory kind of justice upheld by the successive governments of apartheid in South Africa. The categorisation of people according to race was deeply offensive — but could be described as formally just.

If we use an example of rational categorisation, it becomes clear that formal justice does not address the content of legal rules. We would all no doubt agree that it is acceptable to distinguish between ordinary citizens and convicted criminals for most purposes, and would thus not object to this categorisation. But if the government enacted a law which sentenced all convicted criminals to be boiled in oil, this — we trust! — would be found objectionable.
Substantive justice addresses the inadequacies of formal justice; it addresses both the categories and the content of the law. In terms of it, rules are just only if their content is just and if they categorise people in valid and appropriate ways. The Bill of Rights in the South African Constitution is an attempt to introduce a measure of substantive justice into our society, and would certainly prevent the examples above from becoming part of our law.

Substantive justice, too, is intimately linked with the idea of equality, and with treating like cases alike. But other factors tend to be relevant too. In meting out rewards or punishment, benefits or detriments, our intuitive response may be to do so according to desert (an Aristotelian approach) or need. Or we may look to past injustice and try to remedy it (which is what some affirmative-action programmes are attempting to do). Or we might try to reward certain virtues, such as hard work. Such standards may be helpful, but of course they do not eliminate the problem of subjective opinions. There may be difficulty in agreeing on which cases are ‘like’ cases, or a lack of unanimity as to what needs, deserts, past injustices or virtues are relevant. I may think that women need more welfare benefits than men because of their vulnerable position; your response may be that women and men are equal, and should be treated equally. I may think that hard work done by street-sweepers merits a special reward, but your response may be that the need of street-sweepers is no greater than of any other low-income group.

Not only is substantive justice a highly subjective concept, but it also tends to be shaped by self-interest. In the above examples, you would be far more likely to agree with my views if you were a woman or a street-sweeper respectively.

One famous modern theorist, John Rawls, has evolved a theory of justice which attempts to eliminate the problem of self-interest. Rawls plays a game in which rational self-interested people, behind a veil of ignorance as to their future circumstances, have to decide on the principles which will govern a future society to which they will belong. Since they do not know whether they will turn out to be rich or poor, sick or healthy, black or white, man or woman, Rawls argues that the people would choose principles which would give them the best possible chance of having a good life even if they are ‘born’ into the worst possible circumstances. Those principles, he argues, are (I) equal rights to the greatest possible amount of freedom and (ii) that social and economic inequalities are to be arranged so that they would be of greatest benefit to the least advantaged. And because these are the principles which would be chosen by rational, self-interested people, Rawls says, we should accept them as objectively just.

Rawls’s theory is open to various sorts of criticism, but it is probably the most respected theory of (objective) justice in modern times.
3. THEORIES OF LAW

OBJECTIVES

By the time you have worked through this study unit, you should
• have a better understanding of what is meant by the theories of law
• be able to outline the main ideas in these theories.

3.1 Introduction

The study of law involves not only the study of legal rules which are found in statutes, court decisions and other formal sources of law, but also the contemplation of the nature and purpose of law. Various theories of law have been developed over the years by legal philosophers in order to try and explain the concept of law. The following are some of the questions: Is law a system of rules? Can law and morality be separated? What is justice? Should there be a relation between law and justice?

The field of legal theory or jurisprudence is very wide and complex. We have attempted to keep the discussion in this chapter as simple as possible. We will attempt to give you an idea of some of the more significant contributions made in Western legal thought. The following approaches are discussed.

• the natural law approach
• the historical approach
• the positivist approach
• the sociological approach

3.2 The natural law approach

The natural law theories are among the earliest theories of law. Most of the important works of natural law philosophers are pre-19th century writings.

The basic idea of the natural law theory is that there is an ideal system of law, superior to any laid down by human authority, and to which the precepts of "positive law" (ie people-made law) should conform so that there will be "natural" or "fundamental" justice.

The existence of this ideal system of law cannot be demonstrated. It is assumed that this law exists as part of the natural order of things. It is also a higher law which supposedly exists uniformly in all places at all times. Cicero (a Roman orator and philosopher) considered "true law" to be in accordance with nature and that such law is eternal and unchangeable.

The concept of law which is superior to people-made laws is also found in the works of early Greek scholars who refer to things like the "laws of heaven". There has also been a clear connection
between natural law philosophies and religion. There was a belief among some of the writers that the law of nature is both inspired and revealed by God.

In the writings of St Thomas Aquinas (1225-1274) we find an attempted synthesis of the Christian and early Greek philosophies especially those of Aristotle. Aquinas distinguished between four categories of law.

1. Eternal law – which is part of divine reason known only to God and the plan for the universe.
2. Natural law – the law that has been discovered by people through the use of reason.
3. Divine law – the law that has been revealed in the Scriptures.
4. Humanly posited law – law that has been enacted for the common good and supported by reason. This law supplements the natural law in order to solve day-to-day problems.

The most important conclusion of Aquinas’ theory is his position that a law which fails to conform to natural or divine law is not law at all. Such a law which conflicts with natural law loses its binding power and may therefore be disobeyed because it lacks moral authority. Dr Martin Luther King (Jr) used Aquinas’ distinction between just and unjust laws as justification for disobeying racially unjust laws in the struggle for civil rights in the United States.

Marking a new era was the work of Hugo de Groot (1583-1645). He took the view that the reasonable, social nature of mankind was the source of natural law. The rules of natural law, Grotius held, are determined by man through the use of his reason. Though the existence of God is not denied, natural law exists independently of God. Examples of precepts of natural law are:

1. Respect for another’s property.
2. Compensation for damage culpably caused.
3. Sanctions against persons who infringe the rights of others.

The acceptance of a particular theory has very real practical consequences.

Natural law theories have been used over the years to meet the needs of changing social and political circumstances. They have been used on the one hand to justify the power of an absolute sovereign in the state. Thomas Hobbes (1588-1678) living at the time of civil war in England and realising the necessity for stable government, held that power in the hands of an absolute sovereign was justifiable in order that man, by nature “nasty and brutish” would be protected by the sovereign ruler from self-destruction. On the other hand natural law theories have been used to protect fundamental human rights and limit the power of
government. John Locke (1632-1704) through his "social contract" theory came up with the idea that people have certain inalienable rights (that is "permanent" rights) which cannot be taken away by any person or government and that it is the function of government to protect these rights. If a government acts contrary to this purpose, then the community has the right to revolt against it. Locke's writings influenced the English Revolution of 1689 and the American Revolution of 1776. His ideals have also found their way into the American Constitution and the Bill of Rights. They have given a theoretical basis for human rights which has gained international acceptance.

The early 19th century saw a reaction to natural law theories. One of the reasons for this reaction was the French Revolution, which applied natural law theories, and more specifically Rousseau's theory, to justify a revolution notorious for its atrocities. Reaction came first from what is termed the "Historical School" and also from legal positivists. The latter criticised natural law thinkers for, among other things, confusing law with morality. Positivists argued that solutions coming from the typical moral reasoning which natural law thinkers adopted could not be rational or reasoned. Before we discuss the reaction to natural law thinking by some of those who follow what may be termed, for want of a better term, a historical approach, we must point out that natural-law thinking revived in the 20th century. This was more particularly in the area of human rights.

3.2 The historical approach

Here two exponents of the idea of the so-called Historical School may be mentioned, namely Friedrich Carl von Savigny (1779-1861), a German and Sir Henry Maine (1822-1888), an Englishman.

Friedrich Carl von Savigny was the most important exponent of the ideas of the Historical School, which originated in Germany. According to him each nation is characterised by its own "national spirit" the Volksgeist. This spirit is revealed not only in the law of the nation but also, for example, in its language and art.

He stressed the following: (1) that law has no separate existence but is a function of the whole life of the nation (2) that the contents of such nation's law are determined by the history of the nation and cannot be changed arbitrarily. Thus there is no such thing as a universal law applicable to all places and times.

Although German nationalism was stressed, Von Savigny urged that extensive study of Roman law be undertaken. The argument was that Roman legal tradition had been uninterrupted from the late fifth-century Roman Empire until medieval times, and that the German emperors were thus the successors of the Roman emperors.

Sir Henry Maine, who is usually regarded as the founder of the English Historical School, determined that legal concepts should
be evaluated against the background of their origin and history. He contended that historical development is discernible in all legal systems, and saw such development as taking place in stages: (1) the early stage of personal law-making or royal judgments (for example, the dooms of the Anglo-Saxon kings) which crystallise into custom, keepers of which are members of an aristocracy or elite class such as the early Roman priests, and finally (3) the stage known as the Age of Codes, when this minority is overthrown by a majority which then enforces the publication of the law, for example the Twelve Tables of Rome.

Although much of his work has been rendered obsolete by modern research and although the classical evolutionist theories have been discredited, Maine, like Von Savigny, made a noteworthy contribution to the understanding of law as an aspect of the culture (or way of life) of different communities.

3.4 The positivist approach

Legal positivism as a theory of law developed in the early nineteenth century. Most of the early writings were mainly a reaction against natural law theories. Positivists are concerned with law "as it is" and not law "as it ought to be". They do not believe in searching for absolute principles giving rise to value judgments on those legal systems. In other words, Positivists, unlike natural law theorists would not concern themselves with issues such as whether a law is just or unjust, whether it conforms with certain standards of morality or not.

An example of a Positivist definition of law given by Hahlo and Kahn in their book The South African Legal System and its Background on page 3 is as follows:

"Law in the strict sense is the only body of rules governing human conduct that is recognised as binding by the state and, if necessary, enforced."

You will recall from the previous chapter that this is the definition we accepted at least as a starting point in order to determine the concept of law.

If we compare this definition with the definition of natural law given above you will see the following differences.

1. In natural law, positive (ie people-made) law is recognised as binding if it conforms to the ideal system of law. The positivists recognise law as binding if it is recognised by the State.

2. Natural law states that the law must be concerned with justice. This is not a general requirement in positivist theory.

Let us now turn to the work of two legal theorists within the positivist tradition. The first is John Austin (1790-1861) and the other is Hans Kelsen (1881-1973).
Austin is regarded as the founder of legal positivism in England. In defining law, Austin maintained that law is a command issued by a sovereign obliging the subject to follow a particular course of conduct. These commands were coupled with sanctions in case the commands were disobeyed. The sovereign is a person, a king or parliament for example, who is obeyed by the community as a whole.

From this it is clear that law is treated as completely distinct from morality and other values such as justice, equity and so forth.

Hans Kelsen, an Austrian jurist, also developed what he called the "pure theory of law". The theory is regarded as pure because it excludes morality and justice from the concept of law issues. Kelsen, unlike Austin, saw law not as the commands of a sovereign, but as a hierarchical system of norms or "ought" propositions. For example, if Joe steals a bicycle, he ought to be prosecuted.

The rule that Joe ought to be prosecuted is a norm which derives its validity from another norm which lays down the procedure to be followed when a crime is committed. That procedure as a norm, derives its validity from an Act of parliament. Parliament, on the other hand, derives its authority to make law from another norm, for example the constitution of a state. All norms can according to Kelsen be traced back in this way until we get to the starting point of each norm which is the basic norm or Grundnorm. The Grundnorm is the superior norm, highest in the hierarchy of norms. It is different from other norms in that it is extra-legal. Its validity is not dependent on some legal precept, but upon extra-legal factors which may be political, social, economic and so forth. For example, the constitution of a state may be valid because it came about as a result of a political process.

Positivism in South African law

South African law has been greatly influenced by positivist legal theory. Professor John Dugard in a lecture entitled The Judicial Process, Positivism and Civil Liberty (in the 1971 SALJ (South African Law Journal) on p 181), indicated that positivism has influenced the approach of our courts in the interpretation and application of apartheid laws. As explained above legal positivists do not question whether legal rules are just or unjust; they accept and apply the law as it "is" and not as it "ought" to be. The courts were therefore inclined to give full effect to the "intention of the legislature" and were disinclined to interpret the law in such a way that it takes full account of whether such laws were just toward the subjects.

The positivist approach made it morally easier for judges to apply unjust laws. Dugard observed that even in those cases where there was doubt about the correct interpretation of a particular
law, some judges chose the narrow positivist approach which excluded the consideration of basic human rights.

We will be looking at the approach of the courts in the "new South Africa" later.

3.5 Sociological approach

As we mentioned at the beginning of this study unit, its purpose is merely to give some idea of some of the more important theoretical approaches to the idea of law. Later in your studies, particularly in the LLB course on legal theory you will be studying these theories and other jurisprudential or legal-philosophical questions in greater detail. For our purposes we will say something in broad outline about the sociological approach that is expounded in various 20th-century legal writings. Here we will focus upon the work of Roscoe Pound, a famous American jurist.

The sociological theories analyse law as a social science. The emphasis is on the social character of law and its function in society. Some theorists in this field argue that positive law must be tailored in accordance with the economic, sociological and political needs of society. The participants in the process of law-making are seen in a much wider context than other theories admit. They include for example, individuals and economic and social institutions. The judicial organs are viewed as having a greater role to play in shaping the law in accordance with principles of justice and the need of society than would be the case in accordance with a strict positivist approach.

Roscoe Pound (1870–1964)

Pound, one-time dean of the Harvard law school, was one of the leading exponents of sociological jurisprudence in the United States. He maintained that law is a social tool that must be used to shape society. Law for him was a tool of "social engineering". Just as we use the physical sciences to change and improve our condition in life, law can be consciously improved to meet society's needs. The emphasis is on social utility rather than the abstract content of rules.

Pound developed what is called the jurisprudence of social interests. He reasoned that the law brings about social cohesion by identifying and protecting certain "interests". An "interest" is a demand or desire which human beings, either individually or through groups or associations, seek to satisfy. The purpose of social engineering is to construct an efficient society which tries to ensure the satisfaction of the maximum of interests with a minimal waste of resources. The business of the law is to satisfy as many interests as possible and to maintain a balance between competing interests.

For example, if a society needs to decide whether to have a law which permits or prescribes abortion it would have to weigh all
the factors and interests that are at stake and not simply rely on traditional arguments. It would have to look at the interests of the would-be mother. These may include her emotional, physical, social and economic circumstances, or her right to privacy which may include her right to do what she pleases with her body. On the other hand, these rights may be weighed against the interests of society in general. These may include certain moral and ethical issues; the interests of religious and other groups which do not approve of abortion; and whether the foetus has any rights to be protected. If the foetus does have such rights who has the right or duty to protect them? (See eg Christian League of Southern Africa v Rall 1980 (4) SA 821 (O).)

4 CONCLUDING REMARKS

With regard to the theories of law outlined above, it should be noted that it is almost impossible to draw a distinct line between the schools of thought in jurisprudence. A particular legal philosopher is often not an outspoken exponent of any one of the approaches we have summarised above. In the interest of being systematic however, it is a good idea to keep to such classification. Of course, this means that the classification will to some extent be an arbitrary one, in so far as it is possible for certain persons to be classified differently in different works on jurisprudence.

Finally, there is a difference between the way in which legal philosophy is practised in our time and the way it was practised in earlier centuries. Formerly, legal philosophy was simply a branch of philosophy in general. It was not jurists who busied themselves with legal philosophy, but philosophers who dealt with law and other subjects in their philosophical systems. Thus legal philosophy was closely bound to ethics, religion and politics, to mention a few of the subjects which are pertinent to philosophy. It was only in the 20th century that legal philosophy became an independent field of study which was studied by jurists in particular. The explanation for this shift probably lies in the specialisation which is characteristic of our time. The point of departure, too, has shifted. It now lies in the law itself. Legal philosophers now study law from law itself. In the course of their study, they also frequently touch on peripheral spheres of legal science, for example sociology and economics; they also use the methods of other scientific disciplines.
CHAPTER II

DISTINCTION BETWEEN THE CRIMINAL AND CIVIL LAW;
A BRIEF INTRODUCTION TO THE SOURCES OF LAW AND
THE MAIN DIVISIONS OF THE LAW

1. KINDS OF LAW

Law can be divided into many different branches or divisions. These divisions appear in the diagram later on in the notes. An important distinction exists between two main kinds of law, namely, the criminal and civil law.

Criminal law regulates the conduct of all individuals in society and defines the duties owed by individuals to society. In South Africa the state brings a legal action against a person charged with a crime. If he or she is found guilty by the court the person concerned can be imprisoned, fined (made to pay money), or punished in some other way.

Therefore we can say: 'A crime is a wrong against the State for which the wrongdoer (criminal) is punished by the State.'

Civil law regulates relations between individuals or groups of individuals in society. The state is generally not directly involved as a party to cases that result from disputes between private people. (It may, however, be involved as a party if it is suing, or being sued, like a private person for a wrongful act. Examples are where government property is damaged, or a government official injures somebody without good cause.)

A civil case is usually brought by a person (called the plaintiff) who feels that he or she has been wronged (eg injured, or his or her property damaged) by another (called the defendant). If the plaintiff wins the case, the defendant will usually be ordered by the court to pay compensation. Sometimes the court may also order a defendant to do, or stop doing, something (eg to deliver something he has sold, or to stop damaging the plaintiff’s property). Civil cases usually deal with actions for damage to property, injuries to people, commercial disputes about contracts, the renting of houses, consumer problems, employment disputes and family problems.

We can summarise by saying: 'A civil wrong is a wrong against an individual for which the wrongdoer must pay compensation to the injured person.'

Sometimes a person’s act may result in both criminal and civil actions. For example, a person who assaults (wrongfully and intentionally injures) someone can be prosecuted by the state and, if convicted, punished for committing a crime, but he or she could also be sued for damages by the person injured in the assault and made to pay compensation for medical expenses, lost
wages, and pain and suffering. The criminal action for assault will be brought in a different court from the one where the civil action for damages is heard.

1. Exercise on the distinction between civil and criminal law

Cora and Angelo decide to skip school. They take Cora’s brother’s car without telling him and drive to the newest shopping mall in Johannesburg. Ignoring a sign stating “Parking for Emergency Vehicles Only”, they leave the car and enter a radio and TV shop.

After looking around they buy a portable AM-FM radio. They buy some sandwiches and drinks for lunch and walk to a nearby park. While eating they discover that the radio does not work. In their hurry to return it, they leave their trash on the park bench.

When Cora and Angelo get back to the shopping mall, they discover a large dent in one side of their car. The dent appears to be the result of a driver carelessly reversing out of the next space. They also notice that the car has been broken into and that the tape-deck has been removed.

They call the police to report the accident and theft. When the police arrive, they seize a plastic bag containing illegal drugs from under the passenger seat. Cora and Angelo are arrested.

(a) Which of these acts are unlawful?
(b) List the acts that you think are crimes.
(c) List the acts your think are civil wrongs.
(d) List the acts your think may be both crimes and civil wrongs.

2. SOURCES OF LAW — WHERE SOUTH AFRICAN LAW COMES FROM

Before the colonisers from Europe arrived at the Cape, the people of South Africa had their own system of rules by which they lived. This system of rules is known as Indigenous Law or African Customary Law.

In 1652 Jan van Riebeeck arrived at the Cape. He brought with him the law of Holland. This was called Roman-Dutch law. For the next 150 years, Roman-Dutch law was the official law of the Cape.

In the early 1800s the British took over the rule of the Cape from the Dutch. They then introduced and applied English law. This led to the influence of English law, although Roman-Dutch law continued to develop.

South African law today is a mixture of Roman-Dutch law and English law. In certain circumstances, where the parties involved are Africans, Indigenous law will apply.

In South Africa the primary sources of law are:
- The Constitution of the Republic of South Africa, Act 108 of 1996 (referred to as the Constitution);

A constitution is a fundamental law which sets out the power of the State and is the basis upon which state authority rests, and is the ultimate source of law.

Section 2 of South Africa's Constitution provides the following:

"Supremacy of the Constitution:

This Constitution is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

2.2 Legislation

Legislation or statutes are made and passed by Parliament. Parliament is also known as the legislature. Statutes are written laws. A statute is also known as an Act of Parliament. The body that makes laws, consists of two houses, the National Assembly and the National Council of Provinces. Parliament may delegate its law-making authority to other state organs. These include the President, the cabinet ministers, other state officials and organs of municipal government.

The National Assembly consists of 400 members. Two hundred members are elected by a system of proportional representation by voters nationally. A further 200 members are elected from the provinces on a proportional representation basis. The National Council of Provinces is composed of 90 members. There are 10 members from each of the nine provinces.

Statutes or Acts of Parliament are published in the Government Gazette. The statutes of South Africa are collected in the Butterworths Statutes of South Africa, available in the Law Library.

2.3 Judicial precedent

A court decision or judgment is made in one of three ways:

(a) The judges look at the law to see if there is a rule which covers the facts of the case. If there is a rule, they apply it to the case.

(b) Sometimes there is no rule which covers the facts of the case. Then the judges must make a decision based on their own
opinion. They do this by looking at the facts of the case and existing law. The judgment sometimes includes a new rule of law. This is called a precedent.

(a) Sometimes there is a rule which covers the facts of the case, but it has always been applied in a particular way. A person may argue that the rule can be applied in a different way. The judge must then decide if this new approach is correct. If the judge decides that the new approach is correct, he or she has given a new interpretation or explanation of the law. This judgment may then become a new rule of law. This judgment can also be called a precedent.

Section 39 (2) of the Constitution provides:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.

In law precedents are used to guide the courts in future cases. The precedents of the highest court (the Supreme Court of Appeal — except in constitutional matters) must be followed by all other courts, ie the provincial divisions of the High Court and all Magistrates’ Courts. Only Parliament or the Supreme Court of Appeal (in constitutional matters, also the Constitutional Court) can change a precedent which has been set by the Supreme Court of Appeal. The precedents of the provincial and local divisions of the High Court must be followed by all Magistrates’ Courts.

2.4 Common Law

The common law is a set of rules not made in Parliament or written down in statutes. The common law comes from Roman-Dutch law, English law, and sometimes even from ancient Roman law. The common law has been interpreted, developed and written down by judges in the judgments they pass in the High Court.

2.5 Custom

A custom is a long established practice which, through usage, acquires the force of law. It may be difficult to prove that a particular practice exists as a custom.

For custom to become a legal-rule it must meet the following requirements:

* it must be a long-standing practice;
* it must be reasonable;
* it must have been in existence without exception since its origin; and
* it must be certain.

Custom as a source of law must be distinguished from African
Customary Law or Indigenous Law, which is not a primary source of law. In South Africa, Indigenous Law is seen as a subsidiary source of law.
3. THE MAIN DIVISIONS OF THE LAW

International Law
(the law between states — concerned with areas such as:
* boundaries between states
* the law of the sea
* the law of airspace and outer space
* treaties
* diplomats
* humanitarian law (law during war)

National Law
(the law peculiar to a specific land or state — the law enforced within the boundaries of a state)

Substantive Law
(law which deals with creation, operation and extinction of rights and duties)

Conflicts of Law
(how to reconcile disputes where different national laws may be applicable)

Procedural Law
(body of law governing the enforcement of rights and duties of substantive law)

Civil Procedure
(procedures governing the enforcement of civil rights and duties)

Criminal Procedure
(procedures governing the way in which the state prosecutes people for criminal offenses)

Law of Evidence
(the law governing the way in which facts are to be proved in civil or criminal cases)

Private Law
(the law that governs the relations between individuals, and their status)

Public Law
(the law that governs the relations between the state and individuals)

Constitutional Law
(the law that governs the distribution of legal power in the three branches of the state, and the functions of the various organs of government of the state and the rights of individuals that may not be abused by the state)

Administrative Law
(the rules governing how all administrative power is to be exercised)

Criminal Law
(the rules prescribing which conduct is worthy of punishment by the state)

Labour Law
(the rules governing the relationship between the employer and employee, collective bargaining and employment in general)
The Law of Taxation
(provides for the collection of revenue by the state)

The Law of Persons
(rules relating to the definition, classification and status of human beings in law; marriage; parent and child etc)

Mercantile Law
(a collection of different branches of law dealing with commercial matters; company law; the law of negotiable instruments (cheques); the law of insolvency etc)

The Law of Property
(rules governing relationship between persons and things)

The Law of Succession
(rules governing devolution of person’s property on his/her death either in terms of a will or the rules of intestate succession)

The Law of Obligations
(Personal rights having a proprietary value)

The Law of Delict
(rules governing payment of compensation for harm caused by wrongful acts)

The Law of Contract
(agreements which create legally enforceable rights and duties)

Unjustified Enrichment
(rules governing the recovery of benefits received without any valid underlying cause)
APPENDIX 14: COURSE-PACK CHAPTER STRUCTURE

(Introduction): Introduction to Law (LAWS149)

Chapter 1: An Introduction to the Concept of Law
   1. What is Law
   2. Law and related concepts
   3. Theories of law

Chapter 2: Distinction the criminal and civil law; a brief introduction to the sources of law and the main divisions of the law
   1. Kinds of law
   2. Sources of law – where South African law comes from
   3. The main divisions of the law

Chapter 3: The court structure and the legal profession
   1. The court structure

Chapter 4: Sources of Law: (1) Precedent
   1. The doctrine of precedent: advantages and disadvantages
   2. The distinction between findings of fact and findings of law
   3. The distinction between a ratio decidendi and an obiter dictum
   4. Exercises on rationes decidendi and obiter dicta

Chapter 5: Practical Training: (1) Reading Judgements
   1. The first page of a reported case
   2. Reading cases closely

Chapter 6: Legislation and the Constitution
   1. Introduction
   2. The Constitution
   3. Legislation
   4. From Parliamentary sovereignty to constitutional supremacy
   5. Original and delegated legislation

Chapter 6 (duplication in original): Legal writing
   1. Writing paragraphs and essays
   2. Writing a paragraph
   3. Sample paragraphs
   4. Checklist for evaluating or editing paragraphs
   5. Essay questions
   6. Using quotations
   7. Referencing

Chapter 8: The interpretation of statutes
   1. Introduction
   2. Interpretation by the legislature itself
   3. Interpretation of statutes by the courts
   4. Conclusion

Chapter 9: Practical training (3): Some point(e)r)s for oral examinations

Chapter 10: Addendum A: Glossary
Lecture 2

Segment 1: lines 1 – 16
Textual function: Connective
Description: Regulative - assignments and coursepacks

L: OK, good afternoon ladies and gentlemen, um, am I early or what? […] So where is everybody? Are they late? […] OK, we can’t really worry about that then. OK, did you all hand in your assignments at room 41?

Chorus: yes

L: OK very nice, very nice, very good, I like that. I will mark them and give them back to you as soon as possible. Um, we will start with the formal lectures today. The course-pack is not yet available; it will probably be available next week. Please bear with us, take good notes, so that you understand the work. You are not supposed to be fed with the course-pack, so don’t give me that rubbish of your course-pack was not ready. I am one of those keen proponents at this university to scrap course-packs completely. If you are at a university you really don’t need course-packs. You need to do your own research, you need to attend lectures and you need to form your own opinion. You really don’t need a course-pack to tell you what is what.

L: OK. We are going to talk about certain aspects of the law today, as we, as you, will be wont to do. Um. I wonder if I should lock that door?

Chorus: yes.

L: What is the time now? OK, um. Its really, really irritating if people slouch in here…You know there is a Chinese saying, rather dead than late, so you know if you’re not on time, die, and don’t come disturb the class afterwards.

Segment 2: lines 17 – 141
Textual function: Substantive
Description: Concrete concept – divisions of law

L: Ladies and gentlemen, this is a schematic representation of what the law looks like. Now I told you the other day that the law is not an exact science, this schematic representation is the figment of the imagination of a law professor of the middle ages. Please sign the register, I’m circulating the register, please make sure that you sign the register. Um, and it doesn’t mean that law is compartmentalized like this and that it cannot change. This is just an introduction, this is just a suggestion of how we go about to classify the law. You were asked ‘what is the law’, well one simple answer to ‘what is the law’ is of course that law consists of international law and national or municipal law. I strongly advise you to take down this schematic representation. It will help you throughout your studies. The first, you don’t have to have said this in your answer, I’m not looking for this in your answer. This is just one possibility. OK, what is international law? Well that is the law existing between states, the law between state A and state B, the law between South Africa and Namibia, for instance. That is international law. OK. We are not concerned with international law in this course, you will have with Professor Dugard or Hopkins later you will have the opportunity to do international law, international public law that is. You also have a division of international private law, which is something completely different. OK. We are concerned about the national law, we are concerned about our own South African national law, and the national law can be divided into substantive law and adjective law. Substantive law and adjective law. OK if you don’t understand these terms don’t be too worried, just write them down, it will become apparent to you later on what they mean. OK. Substantive and adjective law. Adjective law is a branch of law that assists the substantive law, in other words it assists the real law. Examples of this is of course the law of criminal procedure, the law of civil procedure, the law of evidence and the interpretation of statutes. All these subjects you will be doing in your LLB years and you must think of them as assisting real law, black letter law. OK. What we are mostly interested in, of course, is substantive law, the real black letter law and that is divided into public law and private law. Public law and private law. Public law is very simply where the law is concerned
with the relationship between the State and the individual, public law where the law is concerned with the state and the individual and private law is concerned with individuals amongst one another. Do you understand that?

Chorus: yes

L: [... …] OK, any questions up to so far, especially those of you who came in late, have you got all of this down? OK.

L: OK now, the most important division is public law and private law. Public law is the law concerned with the state and its subjects, her subjects, I don’t know if the state is a male or a female, and private law has got to do with individuals amongst one another. If now I travel in my little German luxury Mercedes Benz, and I bump into a car of a South African police colonel […] what part of the law is that, public or private? […] Ah, she says its public, which is? Wrong. It doesn’t matter whose car you drive into it is between two individuals, ne.

L: Public law is concerned only with the state where it interacts with its subjects, such as constitutional law. If Constable Ndaledi comes into my study one afternoon and he breaks down my study door that I have imported from India and he stalks into my study and he lays siege to my collection of 18

{laughter}, what part of the law is that? yes? [... …] I must say I find it very irritating ladies and gentlemen, what is the reason, why are you so late?

[………]{long discussion about timetable problems – about half the class comes in late}

L: OK, you are all absolved […] {long latin absolution}

L: OK, I’m not going to do the whole lecture over. There seems to have been a misunderstanding. I will sort out the misunderstanding, I don’t know how, I’ll sort out when the lecture starts, at 2:00 or 2:15.

L: Um. We are doing today the divisions of law. We have done the division first of all between national law and international law, which is not really important for our purposes. We then went on to the substantive and the adjective law and I said that the substantive law is the black letter law, is the law that you will find in the legislation and in precedent, and adjective is the law that assists the black letter law. It assists the black letter law and what we have here is the law of criminal procedure, the law of civil procedure, the law of evidence and the interpretation of statutes. OK. Those are all systems of law, all forms of law that assists the black letter law to be interpreted, it gives the rules of the game, it gives the procedure of black letter law.

L: Substantive law is further divided into public and private law. And this is the real difference between the two major branches of the law, Public law is the law where one is concerned with the state and its subjects, where the state interferes with the life of the ordinary citizen, that is called public law, and private law is where two citizens interact with one another. How does these citizens interact? They interact by drafting contracts, they interact by having accidents, for example, in the law of delict where there is a wrongful act between two citizens. The law of succession, the law of property the law of family, the law of marriage all those pieces and branches of the law is simply speaking private law. OK. Public law is the aristocracy {falter over pronunciation} of . Public law is constitutional law, administrative law and criminal law. Those three subjects, those three branches are the foundations of public law. You will see on the transparency that there is a cross – section between public law and private law and that system of law, that piece of law we call commercial law, which is a hybrid between public law and private law. Any questions? Do you know the difference between public law and private law now? … {long wait} Umm? What do you say little one – sweat shirt. You look very unhappy?… […]

L: Mr Lukhele. What do you want to ask?

S: Last time we talked about different theories of the law, philosophies of law. So I want to know which one this is, in terms of philosophies of law?

L: I am using not one of them. This is a new lecture. We are getting to the philosophies of law later. But I suppose if you look at the different philosophies of law, they will have very little influence on these divisions. This is the formal, exact, classification of law. Those philosophies are the speculative, the more argumentative classification of law. OK. So they are not present here.

L: Private law consists of the law of patrimony, which means the law of possessions, the law of money, the law
of possessions. The law of persons, family law, the law of personality. What is the law of personality? I hope
you don’t know everything […]

S: […]

L: Say anything. I wouldn’t expect you to know everything.

S: The law of character?

L: Yes, yes, yes, somebody’s character. If you defame somebody, if you tell somebody that they are stupid or
whatever, if you get involved in somebody’s personality, this is the branch that you will use. The Romans call it
[...] Your dignity, your body or your reputation. If somebody attacks that, you will be in the field of personality
law. This is not the part of the law, as somebody told me in an examination a few years ago, that regulates
beauty contests {laughter}. OK, the personality and indigenous law. Indigenous law in South Africa means
African customary law. That vague and illusive bit of law that everybody is chasing after to … love and cannot
find. OK. The law of patrimony, the law of money, as I said, consists of the following divisions, property law
which you will do next year, the law of things, the law of successions, in other words what happens to your
things when you die, the law of obligations, in other words contracts, delicts, and the law of intellectual
property. What is intellectual property?

S: Books

L: Books. […] Why do you look so tanned? Were you away in Durban for a weekend?

S1: Ya, I was hey.

L: Now I don’t know whether you are serious or whether you are joking.

S1: Ya, I was.

L: And you picked up the accent as well {laughter}. Intellectual property? Yes, what is that? That’s a difficult
one for a surfer {laughter}

S1: Um, I don’t know, anything that stimulates your mind like, um, girls.

L: Anything like ecstasy or something like that? {laughter} This is the ecstasy law? yes?

S: […]

L: Books is quite right, yes, thank you whoever said that. Yes, your opinions. Copyright. Ya, it helps to stay
indoors ne? {laughter} Not only do you avoid cancer but you also get enormously intelligent. Intellectual
property law has got to do with the intellect, trademarks, patents, copyright, know-how. Everybody know what
a trademark is? What’s a trademark? […] yes, the world’s most famous trademark, coke cola, worth billions of
rand, billions of rand, and patent, what is a patent or patent {pronunciation}

S: It’s a formula to make something.

L: No, that’s inaccurate, its not wrong but its not elegantly put.

S: It means someone else can’t copy your product.

L: No, no, no, its much more than that. Give me an example of patent in this classroom.

S: Ball point pen

L: Yes, a ball point pen. That’s a very good example, a ball point pen. We used to write, when we were elegant
scholars, with fountain pens but then there was a bright spark who discovered that if you use air pressure you
could use ball points pens with a kind of very icky sticky gooey thing, and voila, we all start using ball pens.
You understand? That is a patent. This thing that we are looking at the transparency, that is a patent, it is a
technological invention, and you protect your rights to this thing by registering a patent. The person who developed this gets money every time one of these things are made. Copyright? Yes, what is copyright?

S1: It’s, if you, say if you write a book,

L: So if you write a book then?

S1: Then, your name is written on it, someone else can’t use your book,

L: Yes, and? You can’t copy it. You can copy it but you pay. You know how much the university paid to copyright last year? R100 000. Just to copy out your little notes that you’re getting. OK, The law of obligations is finally divided into the law of contract, and the law of delict, and all of these things are interceded by commercial law. Any questions on all these divisions?

S: […]

L: The law of delict as I told you just now is if you bump into somebody else’s car. A wrongful act. OK.

S: […]

L: Unjustified enrichment is a very, very good question. Unjustified enrichment is up here, I would put unjustified enrichment on this level with, well lets take it down one level, I would put it there on that level as … now listen to these wonderful words […] [latin], all other things thou hast in nature belong to this arm of the law […] that is the latin. All other things that we can’t fit in here we put at a little branch here at patrimonial law, unjustified enrichment.

Segment 3: lines 142-148
Textual function: Connective
Description: Regulative - assignment, register

L: OK. Any questions? Have you all handed in the assignment? Please make sure that you hand in your assignment before the end of the day. It will be too late tomorrow. If you have not handed in your assignment by tomorrow you will get zero. No marks. OK. Lets us carry on with this vexing question that we have asked you to write upon. {students talking} You must ask me, not somebody else. He doesn’t know. He is just in the same position as you are. I have five degrees, so I am much better qualified to answer your questions. And besides you are paying me. I am your servant. OK, please sign the register. It is circulating this side. Please sign the register.

Segment 4: lines 149-198
Textual function: Substantive
Description: Distinction between description and prescription

OK. What is law? What is law ladies and gentlemen? What is law? You want to answer that question in an elegant and sophisticated way and we are going to attempt to give you a definition. The first thing that I can say about law is that law is prescriptive not descriptive. OK. Perhaps we should just stop there, before we go on too much. What does it mean when I say law is prescriptive and not descriptive? Anybody that can analyse those two terms for me?… Mmmm?

S: Its, prescriptive, law prescribes what you must do, or tells you what you should do, it doesn’t describe what you might do, shouldn’t do.

L: The second leg is not right, the first leg is a hundred percent correct. The law tells us what to do, the law describes to us what to do, yes?

S: But it doesn’t tell details, small details.

L: No it does. […] The law tells you in minute details what to do. If you look at legislation it tells you exactly
on what day, to pay exactly what time or what licence or whatever, exactly. In minute detail. So that one is wrong.

S: To describe is just a suggestion, and a prescription is a rule that you have to adhere to.

L: [.....] Prescriptive its like your parents, it tells you what you must do. But what is this descriptive? Why is law not descriptive?

S: [.....]

S1: Descriptive is observing what happens [..]

L: Exactly. Can you give me an example of a scientific experiment?

S1: testing,

L: yes testing

S1: testing for acid or something like that.

L: Yes exactly. You don’t know, that’s now a very complicated argument, but say you want to find out at what temperature water boils, ne? What do you do? You take a little pitcher of water, you take the flame, you must have done this at school, you put the water on the flame and [.....] and you heat the water and then you watch the thermometer and you see exactly at 100 degrees, voila, the water starts boiling, what do you do then? you go to the book, if you were now the first person to boil water, you go to the book and you say, eureka, I have discovered something of nature, and I can now describe it to you. Should you wish to boil water, heat the water up to 100 degrees and it will boil. It describes nature to you. That is science, biology, anatomy, whatever scientific subject you wish to study. It describes nature to you. Its not like law which says the water shall boil at 100 degrees. Why can’t it say that? Now I’ve got you. Why can I not say that the water shall boil at 100 degrees?

S: [.....]

L: No, no, no [.....] You’ve seen the water boil at 100 degrees. So why can’t you say, ah, this is a law?

S: [.....]

L: No, why can’t you say that water will, under all circumstances boil at 100 degrees? You haven’t boiled all the water in the world. You don’t know what will happen if you put salt in. You don’t know if you’re at sea level what will happen, do you? You can do all those experiments, and say, under these circumstances, the water will boil at this temperature. You understand? Whereas law, you don’t have to go to each citizen and ask him, listen buddy is it alright if I make this law? Is it alright if I set the speed limit at 120? You can’t ask each citizen that. You go from the prescriptive point of view. The speed limit, the law of the land, is 120kms per hour. Straight. No questions asked. Yes, you understand? You understand the difference between law as a social science being prescriptive, and natural science being descriptive. OK. I’m not going to ask you… yes?

S: But surely at some stage the laws were discussed as to how they should be, they weren’t just prescribed, they were discussed

L: When where they discussed, in parliament?

S: Yes

L: Yes, but I mean, that’s true, you did have some say in it [.....] But its not like water where, before you can say it’s a fixed law you have to follow every single drop of water on earth, and if they all say its true, then you can say it’s a fixed law, OK.

Segment 5: lines 199-249
There is a further division in law, and that is the division between positivism and naturalism. Natural law and positivism. Can anybody tell me what is the difference between natural law and positivism? … Somebody fresh. … What is the difference between natural law and positive law? … {Whistles} Well, lets start with an easy one, what is the natural law? Yes?

S: Its natural, its what happens when there are no laws.

L: No. That’s a very archaic view of natural law. You are the first class of the 21st century at this university, so the 21st vision of natural law, what would that be? Not the archaic version. What you said is right, its {latin}, its natural law. But its come a long way since then. What is natural law?

S: Its like, law of the jungle.

L: No.

S: Its like laws of animals and trees and stuff,

L: No. It doesn’t happen by repeating it faster, its still not right {laughter}

S: […]

L: Yes, that’s right, you must have done the course before or you must be a very clever boy. Because that question of what the law is and what the law ought to be is so complex that you can’t possibly think that out for yourself […]

S: […]

L: Yes, in a certain sense it does, it brings in what into law?

S: Nature

L: What do we call nature? Are governments nature? Who governs nature? God, or whatever, The highest spiritual being. So natural law is the system of law whereby there is a perfect system of law created by the creator of the universe. God’s law. The law that ought to be as our genius friend said here. Natural law is a system of law, where we say that man-made law comes from a perfect system created by the creator of the universe. Isn’t that nice? Yes its nice, because its nice for everybody, Jewish, Hindu, Christian, Muslim, whatever […]

S: […]

L: Very clever. Mr Botha said that it is something like equality, which is a remarkable insight, because equality is one of those laws, equality between people is one of those inalienable unchangeable cornerstones of our law. And that is where you can really see natural law coming to the fore. Natural law is, in other words, almost like a constitution made by god, or the creator of the universe. Every single law is derived from this set of natural laws, and the first one that we get in a country like South Africa is equality. Do you understand that? If your laws are not, if they do not fulfill the requirement of equality, then they are no longer valid laws. In a system where you have natural law, if your laws do not, are not in harmony with equality, then they are no longer laws. Can you think of a law that is not in harmony with equality?

S: Apartheid.

L: Apartheid. Wonderful. Apartheid. If you have a system where your laws are governed by the colour of your skin then your whole system is not justified. You don’t have a justifiable system of law. Because you have no equality, in the bigger system of things, in the bigger law up there you must have equality. Every law that is not equal is not a valid law. OK. You like, you like? Are you all now natural lawyers? Much better than any other system?
I don’t understand what you are saying now when you say every law that is not justified, I mean that is not natural law, so apartheid, I mean that is not justified.

No, no, listen to me what I said. The law in your paradigm. Every law ought to be equal, equality ought to be an element of every law in the natural law system. If the law is not equal, if there is inequality in the law, then that law is an imperfect law. […]

 […] [the question is about apartheid being justified as God’s will]

No, no, apartheid was the archetypical positivist system. They never said that apartheid was natural law, they were afraid, natural law is a system where you have constitutional democracy. Positivism is where you have parliamentary sovereignty. And the architects of apartheid took parliamentary sovereignty of the minority, and they built this whole system on that, that’s how they justified everything. There is no way in which you can justify apartheid in terms of natural law. No way, hose, no way.

OK. Who can be clever and tell me what is positivism? When must we end this ridiculous lecture that doesn’t start and doesn’t end? […] OK, we’ll end at 3:00 fine. […] No we don’t have a double we have tutorials in the 2nd period which is not yet in swing. OK. What is positivism? Yes?

Positivism looks at how the law is, […] and not at whether its right or its wrong.

No, but what does that mean? That’s now a clever answer, but what does it mean? What does it mean that we look at how law is.

It looks at what it stipulates, I don’t know,

Mmmm {no}, it doesn’t look just at what it stipulates, its more than that. Yes?

The main criterion for positivism is whether the law was launched through parliament in the correct manner. Not whether parliament, as such, is legitimate. That has got to do with the rule of law which we will come to later. But positivism is only concerned with the law as it is, and what does that mean, as Mr Botha’s associate said? What is your name sorry?

Mulder

What did Miss Mulder say, she said that positivism is interested in the law as it is, and what is that ‘is’? It is the law as it was made by parliament. You look at whether all the rules that was set up by parliament was followed. In other words, it is a law driven by formalities. You look whether the formalities concerning the creation of the legislation was adhered to. Did you get all that? Whether the formalities regarding the legislation in parliament was adhered to. That is the question that the positivist asks himself. If you get a natural lawyer and you place a piece of legislation in front of the natural lawyer the question that the natural lawyer will ask is? Is it fair, does this accord with my idea of fairness, with my idea of what natural law is. Yes? You want to ask something?

Aren’t there elements of natural law in positivism?

Yes of course, no, I said just now, this is a broad introduction into this, when we go onto Jurisprudence in your 4th year you will do natural law and positivism in great detail, but for Intro students you must just know the basic definitions, the broad differences between the two. But you are quite right, its far more complicated than I’m trying to say here. The natural lawyer will ask does this accord with the generally accepted concept of fairness, and equality, and the positivist will ask? Yes? …
L: No, he won’t ask nothing. {laughter} What would he ask?

S: This positivist will ask whether the correct way to set the law was followed.

L: You see, not just a beautiful person, but also a brilliant brain. Yes?

L: Do you understand this very good question? In the apartheid years the first thing that the apartheid government did, it took away the votes from the so-called Cape-Coloured people. How did they do it? They tried to pass legislation through parliament, they couldn’t get it through. They needed two thirds majority and they didn’t have enough majority. So what did they do? They increased the Senate, they took it to the appeal court, the appeal court made a decision, they didn’t like the decision of the appeal court, they created the high court of parliament, they increased the Senate and they forced the legislation through. And it was enforceable legislation. The Coloureds were removed. The Coloured people were removed. That is positivism in its most reduced form. So before you can decide to become a positivist just think of that. Thanks to positivism apartheid existed and lived in this country of ours for 40 years.

L: OK. That’s the end of the lecture. One, two, two announcements. I will see you again on when, Friday, Tuesday? Thursday? Two announcements please. You must please see if you can this week attend the library training sessions. If you want to know how the library works, you are welcome to go to the library. Conducted tours will be undertaken everyday at 11:30 and 13:25 at the Law Library. Please, please, please, may I beg of you to see if you can attend those tours, otherwise you are not going to be able to unlock the library for yourself. The second point, the tutorials will probably start next week, this lecture that is following now will be used as a tutorial lecture, I will tell you more about that when I have the details.

L: Thank you.
that is the exact science. The irony is that the exact science makes use of speculation to come to their
deductions, whereas law is very specific, if you do not adhere to the law, if you do not follow the law, then you
are in trouble. OK, those are two of the first characteristics that we find in law.

Segment 9: lines 315 - 484
Textual function: Substantive
Description: Marxism / capitalism discussion

L: We also find this next concept which is a more economical concept of law, um that is the Marxist view, the
socialist view, versus the capitalist or the liberalist or the laissez faire view. Before I try and describe to you
what is the Marxist socialist view I wonder if we don’t have some leftwing Marxists here in the class that could
tell us what is the Marxist view of law? I don’t want to know what is Marxism as such, I’ve done an honours
degree in philosophy so I know what Marxism is, I’m interested in the Marxist view of law. Who’s a Marxist
here, who’s a communist? […] Yes, Mr […]?

S1: I’m not sure what I’m expected to be doing.

L: You’re expected to give a definition of Marxist law. […] Its easy, its not difficult. […] OK, now you have
to think of a slogan, if you have to go and march on the library gardens against new proposed taxi legislation.
What is one of the slogans that you will put out for your comrades? Down with who, up with who?

S1: […]

L: Yes that’s right, so down with what?

S1: I would say capitalism.

L: But now you’re using another terms that we don’t know what it means. Down with what?

S1: […]

L: No, I don’t know whether you are a communist. {laughter}

S: […] and equality, distribution of wealth.

L: Yes, that good. Marxist means equal distribution of wealth, what does that mean in terms of law?

S: I’m sure, in Marxism, that the laws protect the people, the workers, rather than the company owners.

L: Ummmm

S2: Laws would be more for trade unions.

L: Well, laws would allow trade unions, but once you get a law that protects only a certain segment of your
population…

S2: I’m not saying it will protect them only, but it will be in their favour, rather than in the capitalist system […]

L: On an abstract level what would you say?

S3: I don’t know about on an abstract level, but I think that, because of the structure of a Marxist society, they
have to have a lot more laws controlling the economy.

L: Oooooh. Karl Marx is turning around in his grave. No way, no. Do you know what is the ideal of Marxism?

S3: What?

L: A classless and a lawless society. A society that is self-regulating without any rules.
S3: But even in capitalism we have [...] 

L: No, its laissez faire, 

S3: But here they don’t give a damn what happens with industry, they can do whatever they want to, there they have to regulate everything. 

L: No, no, no, no, lets come back to this point of law. Capitalism is free market. It means little intervention by government in the economy. As little as possible. A reduction of central intervention in the economy. No more. [...] Marxism, no class structure, a self-generating, self-regulating society. You want to say? 

S: I want to ask a question. 

L: Yes? 

S: Russia, was that a development of Marxist theory? 

L: Um. Well that is now a long long political story. Marxism was developed by Marx and Engels it was taken over by Lenin and then it was taken over by Stalin and then it was … 

S3: [...] but if there’s no government then how 

L: I’m not saying there is no government, I’m saying it is a self-regulating society, the only law that you find in Marxism is, what is the central law of Marxism? 

S: Equality. 

L: Yes, something more. Equality is true, yes, something more, the central law. Yes? 

S: [...] 

L: No, that’s Stalinism, that’s not socialism Karl Marx style. Marx said, you take 

S: From the rich 

L: No, last chance. You take 

S: [...] 

L: [...] No that’s also not true. You must distinguish between communism in Russia and the Soviet Union and pure Marxism. There is a vast difference. We are talking about pure Marxism here. What does pure Marxism say? Marx said, one of the central, the core, the cornerstone of his economic policy is everybody takes what they need and they give what they can. You give as much as you can and you take as little as you need. Do you understand? That is pure, pure socialism. You all live for the good of society, we put in all our resources, and we only take out what we need. And the surplus is there to enable us to make more such societies, so that the world will one day be a free utopia where we can all work and that we eventually, and this is what Marx said, that we can have more leisure time and less hard work for the workers. That is what Marx said. Those other fools, Lenin and Stalin they took a beautiful philosophy, a brilliant economic philosophy and they adapted it to the Soviet Union and they aborted the whole thing, and they twisted and turned it into what it eventually became, an unmanageable monster. But pure Marxism is pure utopian socialism, in other words the rules of the economy are there so that we can enable ourselves to become freer, so that we have more leisure time, we work as hard as we can for the common goal. We take only what we need. In that sense what the gentlemen here said is true, in a pure social society, the rules, the law would be there, not to protect, but to enable, to empower the workers. To empower the people who work so that they can work to the optimum, so that they can generate all the wealth and so that everybody, including the workers first of all, can enjoy this utopia of leisure time. 

L: OK. Its not a bad philosophy. Unfortunately it doesn’t work in reality. Why doesn’t it work? [...] Why? Everybody is so interested only in themselves, egoism, individualism is so strong that you can never achieve
these lofty ideals, where people will work together in order to get a better world. OK. The capitalist’s view of society is different, it is laissez faire. It means no involvement by the government, the government is not there to regulate the economy, the market will regulate the economy and it is called the freedom society, the society that we get in a place like the United States of America, and the freedom that you have in America is not the freedom that you have, for instance in the freedom charter. The freedom that you have in the freedom charter, does everybody know what the freedom charter is? Who doesn’t know what the freedom charter is? Where were you in 94? The freedom charter is a charter drawn up by the ANC to become their political manifesto when they took over. The freedom of the freedom charter, ladies and gentlemen, is equality. It is not freedom, because the freedom struggle, that everybody struggled so hard for, was not to get freedom, it was to get equality. It was to get rid of apartheid. Real freedom, the freedom in terms of John Stewart Mill, a 17th century economic philosopher, […] that freedom means that you can exploit everything and everybody in the name of the market. In the free market. You can chop down all the little trees in the world as long as you make a profit. You can exploit all the little black and yellow people in the world as long as you make a profit. That is the rule. You must make a profit, that is freedom. You’ve got the freedom, if your name is Nike, or Adidas, who has got Nike or Adidas on? Nike and Adidas, they use child labour, and they use cheap labour in the east to manufacture these ridiculous footwear that everybody seems to like so much. So before you go and but a pair of Nike or Adidas takkies or whatever you call them, think about those poor 3 / 4 / 5 year old children sitting in those sweat shops in the East making these things. That is capitalism. That is the ugliest face of capitalism. And the law as far as capitalism is concerned is subject to the market. Subject to the law of demand and supply. That is the only law that they know, demand and supply. And everything can be sacrificed on that alter. OK. Who disagrees with me? Lots of budding little capitalists sitting here. Who disagrees with me as far as capitalism is concerned. Do you think capitalism is a wonderful system? […] (fairly long piece of interaction)

L: The views that I express, the views that I give you here are obviously extremes. The arguments that that gentleman, what’s your name? Mr?

S: Friedman

L: Ha ha, Mr Friedman has give excellent arguments and I would implore you to listen to him rather than me because he is more objective in this matter. What I’m trying to say to you is that every economic system will have a different way of looking at law. What in which the State looks at the economy or at core values such as freedom and intervention will have a result in the laws that they pass. Not one of these systems are perfect, as you’ve just seen with the debate in class. They are all, if you put them in the absurd form, they are all repulsive, like we’ve seen in Marxism under Stalin. Stalin murdered more people in his own country than Russia has ever killed in all the wars that they have been involved in. There are some brilliant movies about Stalinism that have been released now that the archives are open and Stalin was really an ogre. He was a hideous, terrible, terrible man, and he raped his own country for his own good. And he wasn’t even clever.

L: But the same can be said of capitalism. There as certain things in capitalism that are so repulsive that you don’t want anything to do with them. If you walk into a virgin forest and you think that this is what life was like before the stupid industrialists and the stupid capitalists came and ruined not only the ozone but also ruined the atmosphere and chopped down all our trees, you know you get really cross. But, they are all extremes. There is a midway in all these systems, and of course statecraft and drawing up good laws is the art of combining the best of all these systems. In South Africa, what system do we have?

S: Combination

L: […] Be more specific.

S: Democratic

L: Ya, democratic, but in between Marxism and capitalism, what have we got here?

S: Socialism

L: Noooo. How can you say we’ve got socialism. What is Mbeki doing? He’s privatizing everything. He’s throwing everything away. The airways are going, the SABC is going, the electricity supply companies are going, all the values of the state have been privatized. How can you say its socialism?
S1: I mean its true. It’s the first time I’m able to talk now {laughter}

L: You’re acclimatizing is that what you mean?

S1: The thing is this one is pure capitalism, and when you look at many things about it particularly this
economic empowerment you see that most of the things that have been privatized […], those are the things that
people don’t have, they don’t have access to, they don’t have water, they don’t have electricity, they don’t have
the basic things that people need to have access to. And these are the things that have been privatized, you
know. And if you look at apartheid, they controlled these things and most of the time they had the interests of
the bosses [...] not the workers at heart […].

L: No but the strange thing is […] I’m just trying to argue with you. The strange thing is, my friend, that what
you call the bosses, have become COSATU investing heavily in South African shares on the stock market.
NAIL is supporting, do you know what NAIL is

S1: Yes

L: NAIL is a black empowerment company which has billions of rands of assets, supported and […] by
COSATU.

S1: But that’s the problem that we need to address this one, this black capitalist like […] that’s what is taking
place instead of this […] equal opportunities. These black people are being relieved in terms of the taxes, and
there is nothing happening, nothing in terms of changing their lives. That is important, the relief that is given,
the money should be channelled to other things, to other social development.

L: No but there is a social development programme as well in South Africa. There is the RDP. The whole idea
of building a million houses for people. South Africa’s economy has got strong socialist tendencies. Its not a
socialist economy, or socialist country, but it has strong socialist tendencies. The government is one third
COSATU, one third Communist Party and one third ANC. The ruling government of the day.

S1: But where does our economy lie, you know, the economy just lies in the hands of a few, and what is taking
place it’s […] which has been tainting our economy.

L: No that’s true. But I mean that’s not just our problem it’s all over the world. Anybody else want to take a
chance on what system we have in South Africa. A short answer.

S2: Ya, I think it’s a capitalist system with some few variations of socialist.

L: A mixed system?

S2: […](ya)

L: But is it a good system?

S2: Its not.

L: Its not, really? I thought it was a good system. Yes?

S3: I think probably in South Africa where we are, know working towards probably, I reckon one of the best
balances, you know.

L: In Africa?

S3: Ya, in Africa definitely. America seems to be a bit too capitalist, South Africa seems to have almost the
right combination. They are privatizing things, which is a good thing, because they will be run more efficiently,
and in the end it will end up being cheaper.

L: The question is who will want all this efficiency with the cost of millions of people losing their jobs. Last
question for Mr Friedman.

S4: It is a question. Would you call this a social democracy in this country?

L: No, its not a social democracy. No, we don’t have enough money [...] No. If you want to look at a social democracy, go and look at Sweden. I mean that’s a social democracy. They pay you, where are the ladies, they pay you 8000 swedish kronen if you fall pregnant. And they give you 6, [...] {laughter}, if you have a little Swedish baby you get 8000 as a gift from the state. You get 6 months paid leave to have your baby, your husband get 4 months paid leave to have the baby and support you {laughter}

Ss: [...]  

L: No, that’s right, that’s why I said we haven’t got that in South Africa, because we’ve got small islands of wealth, whoever they belong to, and oceans of poverty in South Africa. So its impossible. OK. Please think of these things. I think we have in South Africa a mixed system. Um, and I’m not going to say which is the best of the two.

Segment 10: lines 485 - 565
Textual function: Substantive
Description: Concrete concept: written and unwritten law

L: As far as law [...] are concerned, I think, after looking at all these more speculative things like capitalism and socialism and positivism and natural law, we must say that law is, law can be a written system, it can be a system that is unwritten, that is made up of customs or of common law. Where in the world do you get the best example of a common law country?

Chorus: England

L: Why?

S: Because they have no constitution.

L: What does that say? I don’t think they haven’t got a constitution

Ss: [...]  

L: They don’t have a written constitution. But what do they have?

Chorus: Constitutional law

L: Constitutional law? Really? What do they have if they haven’t got a constitution?

Ss: [...]  

L: What have they got, where does their law come from?

S: Doesn’t it come from all these common laws developed over the years?

L: Yes, yes and?

S: and the parliamentary intervention

L: But where does the common law, if I ask you go and get me a piece of common law, where are you going to get it?

Ss: [...]  

L: OK, I’ll risk my money, I’ll give you a million bucks, go get me a piece of common law.
S: I’ll bring it tomorrow.

L: No. Forget it. Where are you going to fetch it?

S2: You can’t

L: That’s right, you can’t. Why can’t you fetch common law?

Ss: […]

L: That’s right, its what kind of law? Its unwritten law. The whole English society, Ladies and Gentlemen, is based on tradition. The whole English society is based on unwritten rules. Have you ever been to England?

Ss: […]

L: Shall I tell you a story about my experience in England? I went to the University of Cambridge and, I don’t know if you’ve ever been in a queue in this country. Have you ever been in a queue? […] [long and very funny story about a queue] In England, it is an unwritten rule, you don’t push people out of the way, you say “Excuse me, are you a queue” [accent, laughter] And that is the difference between South African law and English law. English law, a fraction of English law is written down. The whole English society is based on these funny, unwritten rules. If you go there one day you’ll see. The English are all mad. Because they believe in these rules. If you play cricket you’ll know. There a certain things that you do, and certain things that you don’t do, you know, the game is based on unwritten rules. […] Class dominated society. And their laws are all like that. Everything in English law happened in the past. Everything is based on tradition. On the great common law. It is extremely difficult to study English law if you’re not an Englishman, because you don’t understand the society. South Africa is much easier. Everything is written down. We’ve got the most comprehensive constitution in the world. Section 9, what is it? … Section 9. 1 of our constitution talks about discrimination. And it doesn’t say ‘nobody will be allowed to discriminate on whatever grounds against anybody else’. What does it say? … It says ‘nobody will be able to discriminate against anybody on the following grounds’ te te ta te ta te ta – everything written down. The most comprehensive list in the whole world. Did you know that? Not colour, not race, not marriage, not sexual orientation, not gender, whatever the difference may be, language culture, religion, politics de da de da da da da. Everything is written down in South Africa. It’s like paint by numbers. We have a common law, but we refer to the common law only if everything else fails. Our common law was created by our court of appeal, our Supreme Court of Appeal, the appellate division and it’s developed from 1910 up to today, the private law with the working of the common law. Any questions?

S: Do you think the reason why Britain has the common law unwritten is because they didn’t have the problems that South Africa experienced with apartheid and law, and maybe they would prefer to have it written down?

L: Yes, of course, but the reason why Britain doesn’t have a written law or why it is based mostly on unwritten common law is because they are an island. They are all the same. All the English speak the same language, they’re all virtually the same. So it’s not necessary for them to make the laws as clear as it would be for us in South Africa, where we’ve got 11 languages, and we’ve got a myriad of racial groups, and we must make 100% sure that everybody knows the rules. And especially because of apartheid. We never want apartheid again. We must write it down, otherwise people are going to forget. Like just now, somebody is going to say, na, I don’t like these white people, and then we’re going to have apartheid again. Or, you know, we don’t want the Asian people in South Africa. So we must write it down for ourselves, we forget, and we are from different cultures, we must write it down so that everybody knows […] Questions?

S1: I’m from one of the countries in Africa, Swaziland, which also has the same position as Britain, same culture, same language, everything. The problem that we are currently having is that the law is manipulated by the ruling monarch, you see.

L: Are you allowed to say that? [laughter]

S1: Obviously I am not allowed to say that. But I’m saying that I can see the danger of the law that depends on […]
L: Ya, of course, it doesn’t work in Africa. Africa, we don’t work like that. We might have kings, we might have wonderful things, but, that’s wise. My wife’s brothers would never understand when African people talk to one another. What would they do? If you’ve got two African people walking along here they would talk loudly to each other {demonstrates, laughter}. But why, that’s right, so that everybody can hear what they are saying to one another so that nobody will think that they are skinnering, or that they are planning to overthrow the King. Its part of the African culture and its good. Its good, I’ve got no problem with that, well outside my office absolutely, but its attractive, I like it. Africa works very differently from England. In England you have a king and you have a prime minister and through centuries they developed the laws so that there will be checks and balances. They had lots of bloodshed and lots of wars, they are not more sophisticated than we are in Africa, I don’t believe that, they are different. They are afraid of one another. In Africa we are still young, we are afraid of nothing. If someone doesn’t agree with us pshsh. So that’s why it won’t work in South Africa.

[…]

Any more questions. I see we are already over our time we should have had a break now. Do you want a break or should I just carry on.

Chorus: Carry on.

Segment 11: lines 566 - 589
Textual function: Connective
Description: Cohesive - revision of major divisions (plus critique of sociological model as aside)

L: OK. The further… This is what {transparency up}, up to here, this is the division between criminal law public and private law, which we’ve done previously, I’m not going to talk to that again, but if you were extremely clever, which, you know, I’m talking about genius now, this is about what you would have written down on your piece of paper that you would have handed in by the end of Monday. I’m not expecting this, don’t look as if you just had a lemon for breakfast. I’m not expecting this. I’m just saying, this is the model answer of what is law. Law is prescriptive it is not descriptive. Law is a system that can be divided into positivism and natural law. The economic field can be divided between socialism and capitalism, law also, as far as the sources are concerned, you have written and unwritten law, and you also have the division between criminal public and private civil law. That is brief potted version of what law is. And that is what you must carry with you throughout your whole career here. This is what law is, and if I can add something here, perhaps my own personal little slant, that is something that first-year students never, never realize, because they are so full of hormones and so enthusiastic and so energetic, they always think that they can rule the world with law. Or that law is the most powerful instrument in the state household. Please, if you learn something from me this year, you must learn this basic truth. Law is a blunt instrument. You cannot change society with law. Law is not a scalpel that you can do an operation on a sick patient, or on a sick state, to fix it up. We have learnt this the hard way through apartheid. The apartheid regime had everything to its advantage. It had all the possibilities of ruling a country and changing a county sociologically with law. They tried for 40 years, and it was a miserable, miserable failure. I’m not talking about the racism, and the atrocities that came out at the TRC, I’m talking about an ideology, I’m talking about what went on in those poor peoples minds. The fact that they had a philosophy that they could use law to keep people separate. However good or bad that might be, we all know now that it was very bad. But they had in their deranged minds the idea that it could perhaps be good. You can never do that. Don’t ever try to fix up society with law. If you want to fix up society with law you are going to fail like the stupid architects of apartheid. Just put this in your pipe and smoke it as long as you study law. If you want to get rid of guns in society, just for example, {tape ends}

Segment 12: lines 590 - 615
Textual function: Substantive
Description: Abstract concept - positivism

L: The final point that I want to make with this ‘what is law’ is the great English philosopher, well he wasn’t such a great philosopher, but he developed one concept and that is the concept that law is the command of the king. Law is the command of the king.

Ss: […]

L: 1719 – 1859. John Austin. A great English philosopher. Have you signed the register? And he said, when
he was asked by his professor, what is the law? He said law is the command of the king. And I want to know
from you, who have sat through these lectures, what do you deduct from that? What kind of a lawyer is Austin?

S: A bad one.

L: No, no, no, he was a good one.

S: Positivist.

L: Positivist. Austin is a positivist. Can you all see that? The law is the command of the king followed by
sanction. That is his definition of law. That is the classic, classic, positivist definition of law. Second and last
question about Austin. If Austin lived in South Africa today what would he have said? How would he
reformulate this? The law is?

Ss: […]

L: One at a time please, yes?

S: The law is the command of the parliament.

L: No, no, no. How can you say that, what is parliament in this country of ours? Nothing. Parliament is just a
club of fools. What is the highest authority?

Chorus: Constitution.

L: So what would Austin have said?

S: […]

L: That’s right. The law is the command of the constitution followed by sanction. […] Any questions on that?
Mmm? Can I take it away {overhead}. OK. […] {long interaction – student asks what ‘followed by
sanction means’. Lecturer goes round class asking what it means, and why they wrote it down and didn’t ask if
they didn’t know (none did) – ‘followed by penalty’ answer given}

Segment 13: lines 616 - 622
Textual function: Connective
Description: Cohesive - summing up and introducing related concepts

L: OK. Can we go now onto related concepts as far as law is concerned? Um. We’ve now done the definition
what is law. You have a very good idea what is law, and you have an idea of some jurisprudential schools. We
will do the other jurisprudential schools in a little while. Now we look at related concepts and when we did the
little exercise in the three men in the boat, you saw that law is not black and white, but there is a large grey area.
And this grey area is overlapped by things like religion, by ethics and morality. Just giving you a few
definitions here of religion and morality, and you can think about this further and know that last year this was
one of the questions in the year-end exam.

Segment 14: lines 623 - 672
Textual function: Substantive
Description: Related concepts - religion

When we talk about religion, we go to the British historian Henry Main who lived in 1822 – 1888 and he wrote
about the ancient societies. He wrote about ancient societies. One of the greatest books that he wrote was
called Ancient Law. He was interested in where law comes from. And his central thesis is that law comes from
religion. People evolve from chaos and a barbaric state where there is no state, chaos and anarchy, they evolve
through the survival principle into religion. Therefore in an ancient system you will have a system whereby if I
want somebody else’s wife, I go to that person and I kill him, and I take his wife. That is an archaic and a
chaotic situation. To solve that situation, people would get together and say we can’t do this, we must institute
something to prevent us from doing this. And the institution that is evolved from that is usually religion. They
get a token or a totem which they believe is the creator of the universe and from this created or real being they
deduct certain laws of morality, such as, thou shalt not kill, thou shalt not be an adulterator, you will not take
your neighbour’s wife, or his ox or his scarf, or whatever. Moses going up the mountain and getting the ten
commandments from the creator. That is the first step. Obviously later in life, later a civilization evolves, and
then becomes more secular, but all law is related directly to religion. When you do Roman Law this year you
will see that all Roman law can be related to religion. The most important person in ancient Roman Law was
the so called Pontifex Maximus, which means what? Who is called Pontifex Maximus today?

S: Church

L: Not the church. Who is called Pontifex Maximus today?

S: The Pope.

L: The pope. Who said the pope? Are you catholic? Who is catholic? […] The pope today in the Roman
Catholic church, the highest ordained priest in the Roman Catholic Church is called is called Pontifex Maximus,
and the highest, highest official in pre-Republican Roman days was called a Pontifex Maximus. The person in
charge of the legal system was the Pontifex Maximus. OK. Before you could become anything in Roman
society you first had to become a priest, who were the first lawyers in Rome, and eventually the Pontifex
Maximus. People like Julius Caesar, who you will all know probably, was also the Pontifex Maximus before he
became a statesman and a dictator. Coming to law. What does religion have to do with law, besides what
Henry Maine has said about it? Well, in the modern society, you have two different states. In modern society
you have a religious state and can you give me an example of such a state?

S: Iran.

L: Ya, that’s an easy one.

S: The Vatican.

L: The Vatican, ya that’s probably true.

S: Afghanistan.

L: I’ve got to start with the clever one, who said Afghanistan? That’s the clever one. Afghanistan is the most
recent religious state, where the religion has taken over the state completely. I don’t know exactly what they
did, but they did horrible things, like they compelled all woman to wear these veils, and all women were banned
from church, um, out of university, all kinds of strange things that is difficult for us to understand. But the
principle is, the state and the church is one. Not for us to perhaps criticize unless they commit human rights
atrocities, but the state and the church is one. Like in Israel, even in Israel, you have the same principle of
religion and the state being intertwined, not perhaps one, but Iraq, Iran, although in Iran they just had an election
where they decided to keep the state and the church separate, or more separate, but a state where the religion is
very important, you get a close proximity of the state and the church. In other societies you have a clear
distinction between the state and the church, we call these societies a secular society. And those societies are?
Where is the best example of a secular society?

S: America

L: America. Although the president goes to church after he’s … had a cigar [laughter], he’s the head of the
secular state, and he’s, well, from what we can see he’s got no religious agenda. He doesn’t decide matters of
secular importance based on religion. OK. It’s a completely separate state, in other words it’s a worldly state,
the word secular means it’s a worldly state, and the state is only interested in worldly politics and not in religion.
Doesn’t mean that the people who live in such a state is without religion, it only means that there is a very
strong division between the State and religion.
L: OK. Finally, what is the difference between law and morality, this is what the case is about, the three men in a boat. The case is about? Law is not the same as morality, morality is the strong beliefs of a certain group which can or cannot be incorporated into law. It is morally wrong to lie for instance, but there is no law against lying. It is not law to lie, especially when you are not in court and you are not under oath. If you are in court, you are in a very specific situation, and you have taken an oath that you will not lie, sworn not to lie, and binding on your morality or on your conscience, then it is a criminal offence to lie. It is not an offence in South Africa for, well, this is an interesting thing that I have just thought about now, its not an offence for two men to sleep together in South Africa anymore, it’s a very recent development, but now men can sleep together

S: […]

L: Well, not only men, you know, ladies as well (laughter). Its not an offence for people of the same sex to have sex with one another. Is it however morally right or wrong?

Ss: Wrong

L: Ah, well I don’t know.

Ss: […]

L: Why does it depend? You can’t ‘depend’ everything. You must draw the line somewhere. What does it depend on, blue jacket?

S: Personal views […]

L: What does the Christian church say about this? What does the Christian church say about sodomy and lesbianism?

Ss: […] (very loud)

L: It depends on which church? The Christian church. What does the Catholic church say about this?

Ss: […] (louder)

L: OK. So, the church says its wrong. The church says man cannot go into man and woman cannot go into woman. They don’t condone that. But its longer illegal. On the old days it was illegal, if they caught you in the bushes or in the car, boy you’re stuffed. You go to a police station and they beat you up. It was a criminal offence. Gay people had a very hard time in this country. But now, it’s a very gay-friendly country. I don’t know where the change came in.

S: Do you think it is the same thing with prostitution, […]

L: That’s unlawful in this country. […] Uh uh, prostitution is against the law. Well, in South Africa it is still illegal, it is still illegal to be a prostitute, it has not been legalized.

S: […]

L: Oooh, ya, we’re skating on very thin ground now. What do you think about smoking dagga, could that be legalized?

Chorus: yes {loud, laughter}

L: OK. Sorry I asked {laugh}. There is still, just for your own information, it is still highly illegal for you to smoke dagga. OK. Law and morality is not the same as you can see from these few examples. The law is sometimes a step behind morality, and the law is sometimes a step ahead of morality. South Africa, we have a very liberal government, and we have very liberal people making and applying the constitution, and therefore all kinds of things are possible in South Africa that wasn’t possible just a little while ago. It is still morally wrong
according to the churches, but it is no longer illegal. And then you have stupid little things like you can smoke Texan, or what are the other very strong cigarettes, Camel, yes those things, but you can’t smoke marijuana. You know, its strange, you can have alcohol, but you can’t have mandrax. I don’t know what the difference between the two is.

Segment 16: lines 716 – 728
Textual function: Connective
Description: Regulative - library task

L: I would like you to write down this case, state vs Hartman, state vs Hartman, just write it down, 1975, 3 South African Law reports, page 532, Cape. Do you know how to find the case in the library?

Chorus: yes, no

L: I want you all to go and try and find this case. I don’t want you to go and read the case. I want you to go to the library and see if you can find this case. It will take you 5 or 10 minutes. Just go and see. I know you don’t know how to do it, its like a parent sending out their children into the world, so you can go to the party, you know, watch out for these rough boys or rough girls, but, you know, go and see what life is like. Come back and I’ll tell you about the facts of life, but first see what its like out there. I know you don’t know how to read a court case, I’m going to teach you how to read a court case, and I know you don’t know how to use the library, but go and try first. If you are not going to go and try you are robbing yourself of an experiential um, happening. So please, go to the library and see if you can find this case. If you find this case, read just the head-note. Just read what it is about. And I’ll ask some questions about this case next time. OK. Thank you for your kind attention, and have a nice weekend. Bye bye.

Lecture 4

Segment 17: lines 729 – 732
Textual function: Connective
Description: Regulative - missed class

L: Good morning ladies and gentlemen. Please accept my apologies for not seeing you on Monday afternoon. I forgot to tell you that I had a meeting with a Scottish professor, Prof Robin Evans, and what will happen if this meeting was successful, is that we will have an exchange programme, you can listen to me this might be to your own benefit. […] {brief description of the proposed scheme}

Segment 18: lines 733 – 758
Textual function: Connective
Description: Cohesive – introduction to jurisprudence

L: OK, Ladies and Gentlemen, we are going to do today with the speed of light or the speed of thought, we are going to do the theories of law and because I am also one of the lecturers in jurisprudence at this illustrious university you will unfortunately have the benefit of quite a thorough grounding in jurisprudence […] {interlude on lateness} When you approach any legal problem in the course of this year, be it in this course, be it in the examination, be it in the law of persons or law of contract or constitutional law it is first and foremost important that you square your intellectual paradigm. What is an intellectual paradigm? What do I mean by an intellectual paradigm?

S: […]

L: If you have to point to an area of your body where would you point to? Yes that’s the part I’m interested in, above your eyes, your mind. I want your mind, your intellectual paradigm, the way that your mind works. Whatever legal problem you approach, you cannot solve a legal problem if you don’t have a paradigm. You remember we kicked around some ideas last time about communism, capitalism, socialism, things like that. And everybody fell around having emotional and some less emotional um viewpoints on the issue. If you want
to solve those issues like a lawyer you must have an intellectual framework. Paradigm is just another name for framework. A framework, in other words, you must know where you are coming from, you must know where you are going to. If you have a problem here, you don’t attack that problem with your common sense. This is not the streets of Soweto or Hillbrow or Sandton, this is a legal laboratory. It is a legal class, it is a mock courtroom. In other words, if you approach a problem, you must have a philosophical mindset. And that’s what I’m going to teach you this afternoon. The different philosophical mindsets that you use in your approach. You don’t have to use any of these, as long as you have your own philosophical mindset on how to approach the problem that is fine. Just don’t try to become a lawyer if you have no intellectual framework. That’s like trying to light a fire without a match.

L: OK. There are several theories of law and unfortunately, or fortunately for you, we are going to do the natural law period quite extensively and then positivism quite extensively, and then the historical and sociological school only very cursorily. I advise you to take notes as far as natural law and positivism are concerned, so that you can at least have something to fall back on.

Segment 19: lines 759 – 923
Textual function: Substantive
Description: Abstract concept – natural law

Natural law, the natural law approach is one of the oldest approaches that we have in law. It is the approach where man, or where human being, looks for an origin of law outside himself. He looks for the origin of law either in god or in his own rationality. He looks for the origin of a system of law either from god or from his own mind, from his own rationality. And immediately, if you’re a Christian, under natural law, what do you think of? If you’ve read the bible, if you belong to the Jewish or Christian faith, what do you think of?

S: Ten commandments

L: What are the ten commandments? Where do they come from? … Mount Sinai, Moses coming up the mountain, talking to go, getting the tablets and coming down the mountain. Perhaps it’s a fable perhaps, we don’t know, I don’t want to go into your religion, but it’s that kind of thing, a huge mountain with a huge superhuman being giving law down from the heavens to man to organize his life on earth. That is the concept of natural law. The concept originated from a philosopher called Plato, I don’t want to go into much detail as far as Plato is concerned. He was a Greek philosopher of the second century before Christ, and what did Plato say? Plato said, … this is not a true bottle of cool drink. This is just a representation of a bottle. OK. Plato lived in Greece two centuries before the birth of Christ, so he wouldn’t have talked about glass and bottles, but as an example. Plato would have said, and you must write this down in your own words. Plato would have said, this bottle of cool drink is a reflection of the ideal bottle of cool drink which is in the world of the idea. […] What is it, are you confused?

Chorus: Yes

L: Shall I rephrase it?

Chorus: Yes

S: Ten commandments

L: OK, the religious philosopher Plato said, we’re talking about natural law, the Greek philosopher Plato said, this object of earth, every object on earth, is not the ideal object, is not the idea bottle, it is only the reflection of the idea of a bottle. It is only the reflection of the idea ‘bottle’. Now reflection from where?

S: The mind.

L: A reflection from the ideal bottle of cool drink, and where is this bottle of cool drink? In the world of the ideas. Oh please, its not so difficult. I’ve got a copy of all your intelligent IQ questionnaires and […] so please don’t tell me this is difficult. OK. This is what I do with the school children, so we are regressing here. This is, what is this? {draws, laughter} This is a tree. OK. Is this tree, you can draw this tree in your notes. Is this tree perfect? No. Why not? Because it’s got broken branches, and it can die. It is not the ideal tree. This is a broken branch. This is a tree which you will find outside here when you walk out. OK. This, because it is a tree in the world, because it is a physical tree, is not the perfect tree. Where is the perfect tree?
S: In the world of the mind.

L: In the world, this is a reflection of the perfect tree which is in the world of the ideas. This is a philosopher philosophizing 2 to 3 hundred years before the birth of Christ. So he’s talking without our concept of God or of the creator of whatever. The Greeks had the idea of many gods, a god for every thing. So this is a primitive idea, but this is the first trace of natural law. What is the next step if you want to prove law?

S: [...]

L: This is the law stupid {laughter}. This is man-made law. Is this a perfect law? No, what is it?

S: It’s a reflection.

L: It’s a reflection. Of what? Of the perfect law. Where is the perfect law? In the world of the ideas. And the world of the ideas is not a theme park in America. It is a concept that Plato devised for heaven. OK. Do you understand this concept of natural law now? This bottle of cool drink is not perfect, because it’s got all kinds of things in here that is not nice and it will go off if you leave it here for, there’s no preservatives in here, no preservatives, no sugar. It won’t last. It won’t last a week. Then it will start bubbling and carrying on. But in the world of the ideas, there is a perfect bottle of cool-drink. That will never go off. And this is just a reflection of that bottle of orange juice. OK. Do you understand now or not? OK. Fine. Now from Plato the theory of natural law goes to the 16th century. And it goes to a philosopher with the name of John Locke. Let me first show you John Locke and tell you something [...]. OK. That, my dear friends, is a contemporary portrait of John Locke. John Locke had a very interesting life and career, but I’m not going to bore you with his life and career, save to tell you that he spent most of his life being a private secretary of a very influential politician in England and the only thing that I think you will be interested in to know about John Locke’s life is that he entered into what is called, according to rumour, a ménage a trios with his employer and his employer’s rather luscious and beautiful wife. And they lived happily together for the rest of their lives as men or husbands and wife. So although he might not look it as you look at him there, a very gentlemanly and a very conservative old man, he was also it seems quite a dirty old man. I don’t know, perhaps you don’t think that ménage a trios are such a bad idea.

L: OK. Now, let us go through the philosophy of John Locke. Please try and take it down, um, not every word that I tell you, but take it down cryptically, because otherwise you’re not going to be, you’re going to have too much information. OK. John Locke said in his way to explain government and law, he said that the state of nature, in other words, there is a state of nature before there was law, was the state of perfect freedom within bounds of the law of nature. This is the kind of organization that you have in primitive societies. The noble savage. That Rousseau called Africa in the 17th century. In other words, the state of nature, it is a state where people live in harmony with one another, and they live according to the dictates of nature. OK. Have you got that one? This state of nature includes a state of equality, in other words, in this ancient, in this ancient primitive tribe, everybody is equal. Nobody is higher or lower than anybody else. And here comes the funny thing. All people, unless the mighty lord, in other words, god, has the will to grant domination and sovereignty upon some of his equals. You don’t get it? Everyone is equal, unless god wills some people to be more than others and to become dominant. Have you got that? Ladies and gentlemen, this is 17th century philosophy, I’m not saying that this is modern philosophy, you can find it attractive, it is very simple and perhaps a little foreign to your highly developed 20th century minds. One of the contemporaries of Locke, a person called Hooker, said that equality plus love plus duty equals justice and charity. You don’t have to write that down, that’s just for interest sake, to bind the two philosophers together. OK. The main criticism that is brought up against John Locke is of course, in this state of nature you will always have chaos, because people will fight with one another. John Locke said, his argument against this is that is no, the state of liberty is not the state of license. You don’t have the license to do what you will. The state of nature is not the state of license where you can do what you will. The state of nature is governed by reason. It is governed by reason. Isn’t that wonderful. This guy was thinking in the 17th century, 1632 – 1704 and this is quite advanced thinking for those times. The state of liberty does not include the liberty to kill or destroy anybody else, because that would be abhorrent to reason.

L: Is that beautiful? Very balanced argument don’t you think? Can you follow the elegance of the argument? Or is it just me? You just wrote it down to get through this nonsense?

S: [...]

425
L: Locke says, of all gods creatures, nobody is subordinate, and nobody would authorize the destruction of one another. Of all god’s creatures nobody is subordinate and nobody of gods creatures would authorize the destruction of one another. And that is how humankind preserved. This is very naïve reasoning, especially if you look at what’s going on in Chechnia […] What’s going on in Chechnia at the moment? You don’t know and you don’t care? Or what’s going on in Bosnia? What’s going on in Bosnia? […] What is happening? Who cleansed who?

S: Serbs

L: Yes the serbs, what did they do, what religion do they belong to?

S: Russian orthodox.

L: Greek orthodox, yes. And they are the enemies of? […] The muslims, yes. And what did they do with the muslims?

S: Put them in work-camps.

L: Worse things than that, they killed them. Not just in work camps, they killed them. If you see what happened in the 2nd world war, if you see what’s going on around you at the moment, if you see what the serbs did to the croats, and the croats did to the serbs, you would be, you would not be so endured by John Locke’s philosophy that all god’s creatures, nobody is subordinate and would authorize the destruction of one another. Obviously he didn’t have Herr Adolf in mind. OK. Very naïve philosophy, but it was before the second world war and you can see. OK. Let us go to the question of punishment. Everybody, everyone in this state of nature has the right to punish transgressors of law and of equality. Very good rule, very good rule. You have now seen that law and equality and reason are all bound up in the works of John Locke. It says here he justifies punishment by saying everybody has the right to punish transgressors of the law of equality, the law of nature, the law of reason, to such a degree as would hinder its violation. Wonderful balanced elegant argument. You go back this evening and you go and sort out this argument out for yourself, you can see it will flow like a flow chart, one argument into the other one. To detect the state of nature one must have the power to execute the law of nature and whatever you do in the name of the law of nature you must have the right to do so. And this is the most compelling argument that you use against the death sentence. The state will never have the right to take the life of one of its citizens, because that’s against the law of nature, it’s too much. Never mind what that citizen did, never mind how abhorrent his crime was, the state may never do the same. Because it’s abhorrent to the law of nature and the state has no right to do so. I don’t know why people find the death penalty so difficult to understand, John Locke understood this 4 centuries ago.

S: Sorry, but then why are they allowed to have abortion, because it’s going against the natural law of […]?

L: No, they are allowed to have abortion because they have the right to terminate the life of something that was not yet born, it’s as simple as that. It does not go against the grain of the law of nature. If the mother doesn’t want the child and there is no provision for the child then rather than create a human being, terminate it before it becomes a birth… No you don’t have to agree with this, that’s how John Locke would have argued. That’s how he would have argued. It’s the whole thing. So what is your view? That according to the law of nature there is no abortion?

S: Ya, if they say that you shouldn’t kill another human being, then in the case of abortion they’re actually, they are […]

L: No, but I mean its just a couple of cells drifting around there.

S: They’re taking away that right to life.

L: Its, you know, a potential life, its not a life.

S: But it could have been.

L: Yes, right, and I mean, I could have been prime minister, but it didn’t happen. […] {long interaction which touches on euthanasia, but moves back to abortion again} OK. Finished with punishment. In the state of
nature one person power over the other, but no arbitrary or absolute power of one person over the other, only for
retribution, in other words to prevent this law of nature going haywire. To prevent the law of nature being...

S: abused

L: abused, being, abused is not the right word, being unbalanced, you have to punish people who transgress that
rule within bounds of rationality. Please always remember that, within bounds of rationality. No arbitration, no
absolute rule, but punishment done in calm, reason and [...], reparation and restraint. OK. Very elegant
argument. {interaction on register} Any more questions. Lets do paragraph 10. Yes, yes, it carries on, it’s a
big thick book that you’re doing here. Violation of the law of reason. Yes you may ask something.

S: The numbers, what are those?

L: Those refer to paragraphs. This little thing in front means a paragraph and it means the paragraphs where I
got it in the original work of John Locke. So you number it yourself, this is just as a source material. Violation
of the law of reason is an injury to others, the violation of the law of nature, and reparation is in order to make
satisfaction for harm suffered by human kind. In other words, have you all written that little piece down now?

[...] No, but here its much better explained in this little theme, the law of nature equals he who sheds mans
blood by man …shall his blood be shed. [...] This is the difficult formulation, and that is the easy formulation.
The last one there. In other words, if you shed somebody’s blood, then your blood will be shed. Within reason.

S: So thats the death penalty?

L: Noooo. It doesn’t mean that the death penalty is acceptable. The death penalty is abhorrent to reason.

S: But then what about [...]?

L: You go to jail. You pay in kind. Hey, have you ever heard of poetic license? {laughter}. It doesn’t mean
you must shed blood physically. If you kill somebody you will pay with your liberty. Your liberty is at stake in
the way you go to jail. That is the blood you shed. You don’t shed blood if you go to the electric chair either.
Or if you hang. There is no bloodshed whatsoever. Don’t be ridiculous. OK. Let us go to point 12 here. You
can also punish lesser crimes against the state of nature, and here the important thing is the measurement of
crimes or punishment in the state of nature is you must use so much severity as to make the ill-bargain for the
offender. In other words, you mustn’t make it worthwhile for the criminal to steal. You must make it
worthwhile not to steal. That is the dictate of reason. That is the state of nature. OK I know this is a little bit
contrived and difficult, but do you have a vague feeling of what John Locke is talking about here? He’s talking
about generally, we came from an era where we lived in chaos and we created all out of this chaos with our
minds and with our minds and our reason we effect our punishment and this is how we govern people. The state
of nature means that you govern people with your reason. With your mind. Yes?

[ [...] {long interaction on different reasoning and different cultures}

L: Yes, of course, its different, States are different, they reason differently. But in essence if you use your mind
to get to the result, to govern people, and its not arbitrary, its not against what the majority of people in that
country thinks is rational, then it’s acceptable. That is natural law [...] I don’t know if you are satisfied, but
fortunately now it’s the break for me, I don’t have to argue with you any further. You can take a break for 15
minutes, I’ll see you at 12:30. And we will then do positivism.

Segment 20: lines 924 – 942
Textual function: Connective
Description: Regulative - tutorials, register, assignments

L: OK. We have two household announcements. Yes household announcements. The tutorials will start on the
6th March and your tutor, or my tutor, or the tutor doing this class is called Desia Colgan, and her office is just
lower down in this corridor. I think she will have two or three sessions. One Monday afternoon, the second
lecture, and then two or three lunch-time, because we need tutorials of 25 to 30 people, so there are about three
tutorial groups out of this class. The tutorials are for people who are, first of all struggling with the course, who
wishes to do some more exercises, if you wish to be more exposed to the course material, people struggling to
write, people having problems with essay writing etc. If you are a genius and you have been to a private school
and you've attended one or two of the tutorials and you find the tutorials are boring and you don't want to attend
them, and your mark is above 95 (laughter), then please don't attend the tutorials. You are then welcome to not
attend the tutorials. But for the rest of us mere mortals you must please attend the tutorial. Has everybody
signed the register? So why did you not sign it. Where is Mr Chen, L.?

S: He's not in our presence.

L: He's not in our presence. I hope he's still alive (laughter). Mr Hillus, Is there a Hillus amongst us? [...] I
see that the class is becoming more spacious now in the second lecture. That's good, that's good, I like that.
You see what you're going to do, you're just going to force me to put the register through in the second lecture.
OK. The assignments. The essays. Are not marked yet. [laughter] Those that I have marked are exceedingly
... mediocre [laughter]. No, they are like curate's eggs. Neither good nor bad. I will endeavour, because you
are such a large class, I will endeavour to have them back, perhaps Monday, but that will ruin my whole
weekend, but perhaps. If not Monday, I will get them to you on Thursday. [...] OK. Any questions.

Segment 21: lines 943 – 1007

Textual function: Substantive
Description: Abstract concept - positivism

L: OK gentle friends, let us carry on with our little endeavour here today. We have done natural law and we
carry on with the positivist approach. [...] OK. The positivist view, the positivist approach, is a reaction
against natural law... OK. The slogan of the positivists has always been, we are interested in law as it is, and
not in law as it?

S: could be.

L: We want law as it is, and not law as it ought to be. What is the difference? What is the difference?

S: They're looking at it pragmatically instead of idealistically.

L: Ah. What does pragmatic mean?

S: [...]?

L: Well, give us your best shot if you're not sure. Try anything.

S: [...]?

L: No [...] What is pragmatic? Try anything.

S: [...]?

L: Pragmatic according to Ms Bean over here is 'I don't know'. No, that is wrong. Pragmatic is in accordance
with pragma. What is pragma? Practice. It is the practical approach to law. Not the idealistic approach, not the
high-falling approach, but the practical approach. [...] Do you understand the difference? Not law as it ought
to be, not law with all these rational things and all this… ten commandments handed down by god, and the
finger of god writing and things like that, but law as it is. On the law books. Practical law. OK. No
judgmental or moralistic views. And the only person that we're going to do there is a very boring Englishman,
highly boring, and he's only remembered today because he was at the right time at the right place, and that is
our friend John Austin. Very poor lawyer, very poor practical lawyer, a very poor theoretical lawyer, but he
said one thing that struck a chord, and we will forever remember him by that. John Austin said, law is a
command issued from a sovereign, the king, or the constitution as we have it today. The subject is obliged to
follow the command, otherwise he will be visited by sanction. By punishment. Law is a command issued from
the sovereign, or king, or the queen, or the constitution, or parliament, or whatever, and the subject, the
individual will follow that command because there will be a sanction, punishment, if he or she does not follow
that command. How does this philosophical view of law strike you? What kind of a view of law is this? Yes –
with the lime green shirt!
OK. Back to apartheid with you. You [...] what do you think of this? I’m asking you to think, I’m not asking you to prepare or anything. What do you think?

S: It’s totalitarian.

L: Totalitarian is a bit strong. It’s like calling a fly a monster. Not wrong, but it’s a bit strong. Because you can take the king away and put a constitution there, and that’s not totalitarian. [...] OK. Heintz Kelsin is the second philosopher that we are going to look at. Heinz Kelsin had a theory, which was called the stufen theory. What does stufen mean?

S: Steps

L: Yes correct, thank you. Heintz Kelsin said, ladies and gentlemen [...] that law is like a [...] a flight of stairs. Thank you. Is there anybody else who would like to take over the lecture? [laughter]. Law is like a flight of stairs, like a staircase. The question that you ask, [...] Peter steals Paul’s bicycle. What’s the first step? There was a deed. He did something. OK. The deed was done, Peter stole Paul’s bicycle. OK, what is the second thing? [...] Yes, he is prosecuted? OK. What is the next step? [...] The first thing is he takes the bicycle, the second step is the prosecution and everything that goes with the trial, the judgement, everything, what is the next thing that you ask yourself?

S: Punishment

L: Not the punishment. [...] The next thing you ask yourself is, was this trial fair? What is the law that was used in the trial?

Ss: [...] {a lot of talking and loud laughter}

L: What I’m trying to tell you is an approach to law, not the story. I’m not trying to tell you the story. Of course the fairness of the trial has brought in all the procedural fairness and everything, but to establish whether the law that we have used was good law. That is the next step. What this stupid theory does is that it brings you closer every time you take a step to the top and the top is? The root law. The constitution, the law, the king, the queen, the parliament. So from there, where the bicycle was stolen, to the constitution, you have certain steps that you have to take, to get to root law. Don’t push it on me, it is not my philosophy, it is the philosophy of a German called Hans Kelsin. Any questions about Kelsin’s theory?

Ss: [...] {lots of talking}

L: That is what Hans Kelsin looked like. Very boring little man. OK. The root law is the superior norm which ought to be followed. Extralegal. Is not dependant on other norms, such as the constitution. In other words, the law is not what it ought to be, but what it is. The root law is the constitution, is outside the law, it is extralegal and it is not dependent on other norms such as the constitution. The ordinary law is not dependent on it. Do you understand? OK this is a difficult theory, if you don’t understand it, don’t break your heads, you will get notes, perhaps if you read it again you will understand it. Please write this down, 1971, South African Law Journal, page 181, article by Prof John Dugard, The Judicial Process, Positivism and Civil Liberty. I need you to read the summary of this article. You will see that there is a précis in the law journal, a summary of this article, and I need you to go and read that. [...] {repeated}
L: OK. This is quite an easy way to approach law. It says that law is a social process, it is a social science, of course exaggerates the role of the social science aspect of law. And he says that law is not an independent science or a sui generis science, it is a science that meets the economical and political needs of society. It must take into consideration the economical and political needs of society. What does this mean? Law is a tool, according to Professor Pound, law is a tool for social engineering. This is, of course, a very American way of looking at law, if you’ve been trained in the civil tradition of roman law and of a common law, of a civil law tradition, then you will see that law is far from just a social tool to do social engineering. Law brings together certain interests, and the interests are not the same as you earn on your money in the bank. It means power groups that you can put in brackets next to interest, power groups. And the function of law is only to bring together all these power groups and balance their interests between the competing power groups, or the competing interests. You know … I’ve lost you. I’ve just got one word for you – abortion. Do you understand it now? You’ve got an abortion. Who’s involved in that abortion?

S: The mother.

L: Ya OK, I’m talking to the blond lady upstairs there. Who is involved in the abortion?

S: The mother and the child.

L: The mother and the child and who else.

S: The doctor.

L: The doctor perhaps yes.

S: God.

L: Ya god, you can bring him in if you can find him. The church in other words, ya, who else?

S: The father

L: Ya, the father, the mother

S: The community. The law.

L: yes, the community, yes, the law, yes. Who else?

S: I don’t know, what you’re trying to say is that there are different groups involved.

L: Yes. What you’ve done now is exactly what Roscoe Pound said you must do. You must get all the people who are interested in an aspect, such as abortion. Law is not there just to lay down the rules. It is not a command by god or command by the king and must therefore be obeyed. You must get everybody together. You must see what everybody’s interest in this matter is. You must even, if you can, get a representative to represent the little boy or girl in the mothers womb. They must all sit together and their interests must be weighed up. If the majority of the interest says, away with this foul foetus, then you can have an abortion. If the interest group says, no protect this darling dear, then you have no abortion. That is the sociological approach. Its not difficult is it. Do you follow? Would you like to explain to us? Uhhuh. Yes?

S: […]

L: If you come together and you have consensus, you know a balancing of the interests of this abortion, how can that be a misunderstanding? How can there be confusion?

S: […]

L: No, but you’re using another system now to attack this system. You must use the sociological approach to attack the sociological approach. If you say that the church has got nothing to do with what my girlfriend carries in her womb, then I can say, yes, then now we can talk. Now you are taking the sociological approach.
It's not so easy by just saying, oh ja but law is confusing and this doesn't work. I see that this is a metaphor to you. Law is confusing therefore none of these approaches work. Now he doesn't want to talk to me anymore.

Yes?

S: How do you know whose interests are more important?

L: No. I think the mothers interest is more important than the fathers interest if they are not married, or even if they are married, but the fathers interest is not unimportant, it must be taken into account.

S: [...]

L: No there is a hierarchy, there is definitely a hierarchy. I think it is more important to take the parents view into account than the church's view. But I think you must consult the church. You must ask what do these people believe in? I think if you go and read this case, Christian League of SA vs Rawl, have you written this case down, you're going to get this case in your tutorial, so you might as well just write it down. Christian League of SA vs Rawl, 1984, SA Law Reports 821 Eastern Cape, what happened there is, well I don't want to tell you the case but its obviously an abortion case, and the abortion was not legitimized in old South Africa, and you had to get the permission of the magistrate and a couple of doctors, and what happened in this case is, all the formal requirements were met, there was a girl that wanted an abortion, the magistrate said she could have an abortion, the two doctors signed, everything was in order, and then the church came, these Christian league people came and said whoa, we are also an interested party. What about us, and then they brought an interdict against Rawl, the parents of this girl to stop the abortion.

S: So the final decision rests with the court then?

L: Yes, in this case it rested with the court. But it doesn't always rest with the court.

S: So is that not the sociological approach?

L: No the sociological approach would say, the court is the recourse in the last instance. You must try and solve it between the interested parties. Yes the court is one of the ways in which you bring the interest groups together, but it's the last one. First mediation, counselling, talking to one another, family talking, whatever.

Anybody that doesn't like the sociological approach? I don't know why you're getting so fidgety, its long to the end of the lecture. Isn't it? [...] Yus, you okes, its only 1:00 now man, we can go on till 1:15. [...] Last question yes?

S: I just want to know, does it work?

L: No. Law is a blunt instrument my dear, you remember that beautiful lecture that I gave you last time. Criticism against Roscoe Pound is no, it doesn't work. You can't use law as a tool. Law is a blunt instrument.

S: [...] 

L: Yes, a jury is more in line with the sociological approach than our system is, that's why they have a jury in America, where this guy came from.

Ss: ssshhh

L: No, make a noise, you can go now. Ciou, have a nice weekend.
## APPENDIX 16: LECTURE SEGMENT OVERVIEW

<table>
<thead>
<tr>
<th>Segment</th>
<th>Textual function</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1: lines 1 – 16</td>
<td>Connective</td>
<td>Regulative - assignments and coursepacks</td>
</tr>
<tr>
<td>2: lines 17 – 141</td>
<td>Substantive</td>
<td>Concrete concept – divisions of law</td>
</tr>
<tr>
<td>3: lines 142 – 148</td>
<td>Connective</td>
<td>Regulative - assignment, register</td>
</tr>
<tr>
<td>4: lines 149 – 198</td>
<td>Substantive</td>
<td>Distinction between description and prescription</td>
</tr>
<tr>
<td>5: lines 199-249</td>
<td>Substantive</td>
<td>Abstract concept, natural law</td>
</tr>
<tr>
<td>6: lines 250 – 294</td>
<td>Substantive</td>
<td>Description: Abstract concept - positivism</td>
</tr>
<tr>
<td>7: lines 295 – 302</td>
<td>Connective</td>
<td>Regulative - library, tutorials</td>
</tr>
<tr>
<td>8: lines 303 – 314</td>
<td>Connective</td>
<td>Cohesive - revision of prescriptive / descriptive distinction</td>
</tr>
<tr>
<td>9: lines 315 – 484</td>
<td>Substantive</td>
<td>Marxism / capitalism discussion</td>
</tr>
<tr>
<td>10: lines 485 – 565</td>
<td>Substantive</td>
<td>Concrete concept: written and unwritten law</td>
</tr>
<tr>
<td>11: lines 566 – 589</td>
<td>Connective</td>
<td>Cohesive - revision of major divisions (plus critique of sociological model as aside)</td>
</tr>
<tr>
<td>12: lines 590 – 615</td>
<td>Substantive</td>
<td>Abstract concept – positivism</td>
</tr>
<tr>
<td>13: lines 616 – 622</td>
<td>Connective</td>
<td>Cohesive - summing up and introducing related concepts</td>
</tr>
<tr>
<td>14: lines 623 – 672</td>
<td>Substantive</td>
<td>Related concepts – religion</td>
</tr>
<tr>
<td>15: lines 673 – 715</td>
<td>Substantive</td>
<td>Related concept – morality</td>
</tr>
<tr>
<td>16: lines 716 – 728</td>
<td>Connective</td>
<td>Regulative - library task</td>
</tr>
<tr>
<td>17: lines 729 – 732</td>
<td>Connective</td>
<td>Regulative - missed class</td>
</tr>
<tr>
<td>18: lines 733 – 758</td>
<td>Connective</td>
<td>Cohesive – introduction to jurisprudence</td>
</tr>
<tr>
<td>19: lines 759 – 923</td>
<td>Substantive</td>
<td>Abstract concept – natural law</td>
</tr>
<tr>
<td>20: lines 924 – 942</td>
<td>Connective</td>
<td>Regulative - tutorials, register, assignments</td>
</tr>
<tr>
<td>21: lines 943 – 1007</td>
<td>Substantive</td>
<td>Abstract concept – positivism</td>
</tr>
<tr>
<td>22: lines 1008 – 1085</td>
<td>Substantive</td>
<td>Abstract concept – sociological school</td>
</tr>
</tbody>
</table>
APPENDIX 17: LECTURE SEGMENT ANALYSIS

Segment 1: Connective - regulative (assignments and coursepacks)

This section provides, in function, an introduction to the lecture, but is remarkable for the absence of formal structuring of the interaction: rather than being explicit about what is to be covered in the lecture a very cursory reference to the day’s activities is provided in line 11 (“We are going to talk about certain aspects of the law today, as we, as you, will be wont to do.”). Stressed in this section is the instructional regulative function of ‘housekeeping’. The section, in addition, serves a strong positioning function through explicit value placed on aspects of ‘studenthood’: a good student hands in their assignment on time (“very nice, very good”, line 4), attends lectures, is not reliant on the course-pack (lines 6 - 8), does research and forms their own opinions (lines 8 - 10), and is not late (lines 14 – 16). Note the contradiction here between expectations on students and lecturer commitments: no time frame is given for the marking of the essay, and the course-pack is not ready on time. Students are directly addressed, in this segment and throughout much of the interaction, as “ladies and gentlemen” (line 1).

Segment 2: Substantive (concrete concept - ‘divisions of law’)

This section begins coverage of the concept ‘law’ by reference to the concrete concept and its subdivisions. To some extent, this placement of the concrete prior to the abstract could be expected to foreground this coverage, however, this foregrounding is reduced in impact due to lack of value priority accorded to aspects of this section (“We are not concerned”, line 27; “don’t be too worried”, line 32). There is a stress placed in this section on concept imprecision (“the law is not an exact science, this schematic representation is the figment of the imagination of a law professor of the middle ages”, lines 18 - 19). There is one explicit reference to the essay task is this section: students are informed that the ‘simple answer’ to the question is that law ‘consists of’ a division between two main forms of law (national and international, Lines 22 - 23). Emphasis is however placed on the distinction between public and private law through repetition of this distinction (lines 38 - 39, again 44 - 46, again 71 - 73). Explicit value is placed on this distinction (“the most important division”, line 44), and the distinction is supported by an example (line 50 - 52). In contrast to the emphasis accorded to this distinction, there is very light treatment of all other distinctions and subtopics, with the exception of that concerned with ‘intellectual property’.

Also of interest in this section is an explicit disconnection of the abstract and concrete concepts in response to a student question (lines 81 - 84). The opportunity is not used to ensure that students understand the distinction between the concrete and the abstract understandings of the concept, rather, the fact that there is a difference is simply affirmed, and the point is closed.

In the interactional level, this segment serves the function within the broader text of encouraging student participation: the lecturer moves students from the chorused ‘yes’ responses of segment 1 to a more extensive ‘risk-taking’ interaction (asking questions, making mistakes). This is achieved through directing questions at specific students using dress (lines 76 - 77) or names (line 78) as identification. The lecturer explicitly invites students to make mistakes (line 89), and checks student understanding (lines 42, 78, 133). Humour is employed (with laughter at lines 52, 95, 106 - 112). Lecturer responses to student contributions are predominately positive (lines 91, 111, 121, 137)

Within the interaction there are also positioning moves evident. Explicit value is placed on what the lecturer regards as, and thus models as, ‘fine things’ (Mercedes Benz cars at line 46, imported doors and 18th century Chinese pornography at lines 50 - 52). The word ‘elegance’ is used, both of person (line 121) and text (line 117). This word is used frequently throughout the interaction with strong positive value associations. As students, students are positioned as not expected to “know everything” (line 89). A very interesting move occurs in lines 102 - 109: this section serves both to
convey a positive value of someone who stays indoors reading rather than ‘being a surfer’, and to confront a particular student’s lack of seriousness by confronting him and closing down his ironic tone.

**Segment 3: Connective - regulative (housekeeping)**

This segment serves to divide the substantive contents ‘divisions of law’ from the description / prescription discussion that follows. There is, however, no structuring move within this section: the brief structuring move appears rather at the beginning of the next segment. This segment is regulative in substance (handing in of assignments, lines 142 – 144), in interaction (shutdown on students talking, line 145) and in positioning, drawing a sharp divide between students who don’t know (line 145) and the lecturer (who has “five degrees”, line 146).

**Segment 4: Substantive (distinction between descriptive and prescriptive ‘laws’)**

This segment covers a discussion of the distinction between descriptive and prescriptive laws. The purpose of this discussion within the broader topic is not clear: although the distinction is a valid one in terms of the ‘what is law’ question, topic, the notion of a descriptive law is unfamiliar to students, and the resulting dialogue reveals student confusion (lines 153 – 166). The term deduction, essential to understanding the notion of a descriptive law is not used at all in this section although it is used in segment 8 in a revision of this section. The difficulty of the concept is reinforced by the lecturer himself in this section, with statements such as “Perhaps we should just stop there, before we go on too much” (lines 151 - 152), “that’s a very complicated argument” (line 171), and “Now I’ve got you” (line 179).

Interactivity within the segment is high, but negative responses are frequent. Although the interaction is fairly informal, there is no humour within the section. The segment arises as a result of the lecturer checking student understanding on the prescriptive / descriptive distinction. Although there is an understanding check at the end of the section (lines 187 - 190), the question is asked in manner that does not encourage response (“you understand? You understand the difference…”, lines 190 - 191) and is followed by a shutdown on a question (strong regulation on multiple questions from a single student in “I’m not going to ask you”, line 191). The question that is allowed (lines 192 - 193) indicates that the student has misinterpreted the explanation that was provided regarding not ‘asking citizens’ (lines 187 - 188), the response to this question is not clear, and the segment thus ends on a confusing note.

**Segment 5: Substantive (abstract concept, natural law)**

The following segment moves directly into a discussion on the natural law approach. The abstract nature of the concept is not fore-grounded in the lecturer’s introduction to the topic: he refers to the “further division” (line 199) rather than distinction between natural law and positivism (these two terms repeated three times in two lines, lines 199 - 200), and asks, not what the understanding of law in this approach is, but rather “What is the natural law?” (line 202). The repetition in these lines serves to convey the importance of the section. This is further conveyed through his whistle at the initial lack of response to the question.

The section of interaction which follows this is interesting for its apparent disconnection from both previous and forthcoming content. Students first interpret natural law as ‘what happens when there are no laws” (line 203). This could have provided a useful platform from which to launch a discussion on Locke’s work, but the lecturer instead closes this down with the comment “That’s a very archaic view of natural law” (line 204). Students then make the connection to “law of the jungle” (line 207), an idea which seems to fit with the ‘survival of the fittest’ notion that was discussed in the previous lecture. This answer is also rejected. The answer that is accepted finally is a reverse definition of positivism. There is an interesting contradiction in the lecturer’s response to this
answer where he suggests that the student must have done the course before or ‘must be very clever because the question… is so complex” (lines 212 - 214): the section was however launched with the comment “let’s start with an easy one” (line 201 - 202). The phrase may refer to the lecturer’s intent with the section: the content is dealt with in a simplistic manner: natural law is linked to religion and through this to equality, but in a fairly unproblematic manner. The concept is dealt with in a concrete manner in such phrases as “in a system where you have natural law” (line 231), and “natural law is a system where you have constitutional democracy” (line 246). The one difficult question from a student on apartheid being justified as God’s will is shut down without full discussion (lines 244 - 245). The tone, on the whole is very informal, and there is a marked lack of the type of precision with regard to concept definition that might be expected of ‘legalese’.

The lecturer’s own values with regard to this approach to law are made evident in this segment through direct statement (“Isn’t that nice? Yes, its nice, its nice because its nice for everybody”, line 222; “You like, you like? Are you now all natural lawyers? Much better than any other system”, lines 237 - 238), and through his reward of ‘correct’ student answers as “clever” or as “remarkable insights” (lines 212 and 225). Interactionally thus, a specific value with regard to the concept is modelled. The strong interaction patterns begun early in this lecture are continued in this segment: this is evidenced by the repeating and rephrasing of the question in lines 204 to 206, by the use of humour (line 210) and by the address of students directly by name (line 225). Although students are encouraged to participate, the frequent negative responses, as well as the shut-down on the apartheid question, indicate that this is not a dialogue in the true sense, but rather that the lecturer is attempting to move students to his view of the topic. Students are directly positioned in this segment as “the first class of the 21st century” (line 204). A second positional move is evident in the discussion on religion, where religious inclusivity is valued (“it’s nice for everybody, Jewish, Hindu, Christian, Muslim, whatever”, lines 222 - 223) despite the fact that the notion of different beliefs is hard to reconcile with a system based on a single central value.

Segment 6: Substantive (abstract concept – positivism)

Segment 6 begins with a very short regulative move on the length of the lecture (“Isn’t that nice? Yes, its nice, its nice because its nice for everybody”, line 222; “You like, you like? Are you now all natural lawyers? Much better than any other system”, lines 237 - 238), and through his reward of ‘correct’ student answers as “clever” or as “remarkable insights” (lines 212 and 225). Interactionally thus, a specific value with regard to the concept is modelled. The strong interaction patterns begun early in this lecture are continued in this segment: this is evidenced by the repeating and rephrasing of the question in lines 204 to 206, by the use of humour (line 210) and by the address of students directly by name (line 225). Although students are encouraged to participate, the frequent negative responses, as well as the shut-down on the apartheid question, indicate that this is not a dialogue in the true sense, but rather that the lecturer is attempting to move students to his view of the topic. Students are directly positioned in this segment as “the first class of the 21st century” (line 204). A second positional move is evident in the discussion on religion, where religious inclusivity is valued (“it’s nice for everybody, Jewish, Hindu, Christian, Muslim, whatever”, lines 222 - 223) despite the fact that the notion of different beliefs is hard to reconcile with a system based on a single central value.

Segment 7: Connective (regulative – housekeeping)

Segment 7 forms the end of the first lecture, and its content relates primarily to student attendance of library tours. A strong positive value is placed on these tours (“please, please, please, may I beg of you to see if you can attend those tours, otherwise you are not going to be able to unlock the library for yourself”, lines 296 - 299). The lecturer should, perhaps, have indicated to students that the
referencing system in a legal library differs from that with which they may be familiar; however, the value is nonetheless strong.

A further feature of this segment is the lecture’s uncertainty regarding both the date of the next lecture (lines 295 – 296) and the organization of the tutorials (lines 300 – 301). This follows the trend, begun in segment 1, of lack of reciprocal responsibility-expectations between lecturer and students.

(Tape 3) **Segment 8: Connective (cohesion)**

Segment 8 provides the introduction to the third lecture. The segment provides a cohesive link between lectures by revising one of the topics covered in the second lecture (prescription / description), this time including the term ‘deduction’ which was lacking in the first lecture. There is on confusing element in this segment: the lecturer talks about “two characteristics” twice (lines 305 and 314), and it is not clear which characteristics he is referring to. The link to the next topic is set up through a simple “we also find this next concept” (line 315), with no clear concept relations established. Positionally, this is the only segment in which students are referred to as an object of law (lines 306 and 313 - 314: “if you do not adhere to the law, if you do not follow the law, then you are in trouble”).

**Segment 9: Substantive (Marxism / capitalism discussion)**

Due to the lack of established relations between concepts in the previous linking segment, it is not clear whether the topic covered in this segment is being presented as a related concept, a philosophical approach to law, or as a types-of-law exercise. Although the lecturer begins from the Marxist “view of law” (line 318), and specifically requests the abstract view (line 339) for much of the remainder of the interaction (lines 332, 359) the search seems to be for a concrete type of law. The discussion, moreover, does not really get beyond the Marxist / capitalist distinction: the connection with types or views of law generally is tenuous. The discussion is again confusing: the lecturer replies negatively to a student’s suggestion that there may be “more laws controlling the economy” in a Marxist system (lines 342 - 349), when the student pushes the point that there is little intervention in a capitalist system, the lecturer says no, but substantively agrees. The issue is not resolved. The lecturer places explicit negative value in this segment on capitalism (lines 494 - 404), but negates this somewhat following student comments (line 411 - 412). Although similar, the style in this segment is not a return to the true Socratic style of the first lecture, since lecturer values are in this instance explicit. The discussion in this segment (covering America, Russia and South Africa) reaches quite far into politics, but at the expense of ‘law’.

There is a lot of interaction in this segment, and much of it is genuine exchange of views, rather than the search for one-word answers. Strategies for ensuring student involvement continue (lines 365, 427). There is an interesting exchange where a student indicates that he is able to speak for the first time (this may have been done in terms of a cultural norm to identify self and right to speak prior to speaking, a common interaction pattern in indigenous cultures): there is student laughter at this but the lecturer’s response is gentle (“You’re acclimatizing is that what you mean”, line 435). The level of 2nd language speaker involvement in this segment is high. The lecturer concludes this segment with “please think of these things”: a connection to the positioning move in segment 1 of students as people who think. There is some, humorous, positing of students as potentially communist people who “march on the library gardens” (line 323).

**Segment 10: Substantive (concrete concept – written or unwritten forms)**

This segment moves from the imprecise discussion of the previous segment to a fairly simple and precise distinction between written and unwritten forms of law. The segment is far longer than the distinction warrants (a long section of the transcript has been omitted), and is marked by informality, interaction and anecdote. The segment ends with the lecturer shutting down on an interesting
question from a student wishing to compare the British and Swazi systems, by referring only to cultural differences.

**Segment 11:  Connective (cohesive, plus critique of the sociological model)**

This segment serves to revise concepts that have been covered thus far in the course. The lecturer, in a brief paragraph, mentions divisions of law, forms of law, the prescriptive / descriptive and natural / positivism distinctions and ‘divisions’ in the economic field. The task itself is mentioned (“if you were extremely clever, which, you know, I’m talking about genius now, this is about what you would have written…”), lines 567 - 568) to obvious student distress (“don’t look as though you just had a lemon for breakfast”, line 570). As is typical in segments of this nature, there is no interaction, and no checking of student understanding.

The lecturer, in this section, provides what appears to be a digression, on the nature of law as a ‘blunt instrument’ for change. This digression is, in fact, a critique of the sociological view of law, but is not presented as such. The critique is couched in strong language and is presented as a ‘truth’: “…learn this basic truth. Law is a blunt instrument. Law is a blunt instrument.” (line 579). As in the positivism segment, negative value is assigned to this approach through linking it with apartheid.

**Segment 12:  Substantive (abstract concept – positivism)**

Segment 12 returns to the topic of positivism, without specifically foregrounding it as such. Rather, the topic is introduced simply as a “final point” (line 590) that the lecturer wishes to make. The segment is not overtly linked to the previous discussion on positivism, but the lecturer builds on understandings developed in that segment through asking students to identify the “kind of lawyer” (line 596) that Austin is. The response given, “a bad one” (line 597) does not appear to be intentionally funny, and may be a signal that students have picked up the values explicitly expressed with regard to this approach in the earlier segment. The lecturer’s response: “no, he was a good one” perhaps signals the distinction between personal and theoretical value. The lecturer’s subsequent contextualization of this approach to the South African situation signals an important core value in a legal cultural model: the most important thing in this country is not parliament (“a club of fools”, line 608), but rather the Constitution.

Although the proportion of interaction in this segment is high, it is entirely of the form of seeking the correct answer. There is one notable interaction in this segment: a student asks the meaning of ‘sanction’, the lecture goes round the class asking for the meaning, and then chastises students for having written down a term that they do not understand without asking its meaning (lines 613 – 615). The value of participation is thus reinforced.

**Segment 13:  Connective (cohesive)**

This segment closes down of the ‘what is law’ discussion by informing students that “we have now done the definition what is law” (lines 616 - 617). It serves also to introduce the following segments (related concepts): the content of these segments is, however, reduced in importance through the closing down strategy, effectively removed from the definitional understanding. There is a link in this segment to the example used in the first lecture (three men in a boat): again, the use of this link to something which was prior to course content proper places the segments to come at a distance from the concept. The importance of the section is, however, reinforced through reference to the previous year’s mid-year exam (line 622).

**Segment 14:  Substantive (religion as related concept)**

This fairly short segment covers the relationship between law and religion. Two aspects of this relation are discussed: the historical linkage of the concepts, and the modern secular / religious state
distinction. The former is discussed through the work of Maine, and is presented as an origin of law theme. The latter is discussed in terms of current affairs, specifically, the situation in Afghanistan (note that this was before 9/11). Of note is the fact that the example of a religious state picked up on is one which is subject to controversy, and that the discussion is presented in a critical tone (“they did horrible things”, line 657), although overtly it is stated that we should not criticize “unless they commit human rights atrocities”. The interaction in this section is characterized by one-word answers.

Segment 15: Substantive (morality as related concept)

The relation of morality and law is discussed in this section, not in terms of theory, but rather from the experiential, with regard to controversial topics. Thus the topic coverage in the segment includes lying, homosexuality, prostitution, and drug use. The distinction between the concepts is made simply in “Law is not the same as morality, morality is the strong beliefs of a certain group which can or cannot be incorporated into law” (lines 675 - 676), and is reinforced in the subsequent discussion of the controversial topics.

The section is characterised by high interactivity (unfortunately due to high student noise the audibility of the tape in this section is poor, and student answers and queries could not be transcribed in full), and much laughter. The lecturer, in this section, responds to student uncertainty by indicating that “you can’t ‘depend’ everything’. You must draw the line somewhere” (line 687): a modelling of the skill of argumentation.

Segment 16: Connective (regulative)

This lecture ends, as did the last one, with a library task. In this instance students are directed to specifically look for a particular case in the library to see whether they can find it. There is strong positioning of students in this segment, where students are compared to children: “it is like a parent sending their children out into the world…” (lines 721 - 723). Although the task reinforces the positive library skills value introduced in segment 7, the task is unfortunately not picked up in the following lecture.

(tape 4) Segment 17: Connective (regulative)

The fourth lecture begins with an apology from the lecturer for having missed a class. This missing of class again emphasises the lack of power balance in the situation. Although the transcription does not include the full speech with regard to the reason given for the missed lecture this reason includes the setting up of a student exchange scheme in the field of Roman law with a Scottish university: a strong positive value with respect to the study of Roman law is transmitted in the process of explanation.

Segment 18 Connective (cohesive)

Segment 18 provides the introduction to the substantive content of lecture 4. This content deals three approaches to law: the natural approach, positivism and the sociological school. Although these areas have been introduced before (two explicitly and one implicitly) there is no link back to the previous discussion. The brief structuring move that outlines material to be covered in this lecture appears at the end of this segment: note that the lecturer’s intent was to cover the historical school also, but that this was not reached in the lecture.

There is a marked difference in the language used in this segment from that used in previous segments. Language is more formal, contains more complex terms (“illustrious university”, “thorough grounding”, lines 734 - 735), and shows evidence of the type of (almost poetical) grammatical complexity typical of legal academic discourse (for example “When you approach any legal problem in the course of this year, be it in this course, be it in the examination, be it in the law of
persons or law of contract or constitutional law, it is first and foremost important that you square your intellectual paradigm”, lines 736 - 738). There is one instance of interaction in this segment, in contrast to the lack of interaction in all other segments of this nature. The student response, in this instance, is inaudible, but is clearly one word and incorrect: the interaction is thus negligible. There is strong modelling of an appropriate problem-solving approach in the following section of speech:

“If you have a problem here, you don’t attack that problem with your common sense. This is not the streets of Soweto or Hillbrow or Sandton, it is a legal laboratory. It is a legal class, it is a mock courtroom. In other words, if you approach a problem, you must have a philosophical mindset.” (lines 748 - 750)

A sharp divide between lay and legal person is thus established in this segment and the connection between law and philosophy evidenced in the course-pack is reinforced.

Segment 19:  Substantive (abstract concept - natural law)

Segment 19 returns to the theme of natural law. The segment bears little surface relation to the earlier discussion on natural law: although in both instances religion is invoked, in this case religion is clearly used as the origin of natural law (the word ‘origin’ is used three times in lines 760 - 761). In this section, it is not only religion which is seen as a possible source for the ideal, but also rationality. The question of law as it is, and law as it ought to be, is not set out in simple terms, but is buried within a discussion of Plato’s notions of the perfect world of the ideas and the imperfect physical world. The discussion passes from here to the work of Locke and natural equality. The discussion is complex and the amount of teacher-talk is high. The lecturer’s value of this particular legal philosophy, and of Locke’s work in particular, is made explicit through his referral to this argument as ‘elegant’ and ‘balanced’ (line 837). This is however negated by his assertion that the content (rather than the argument itself), is “simple” (line 827), and “ naïve” (line 842 and 856). The value on the form of the argument itself is stressed in the section in lines 861 - 863: “Wonderful, balanced, elegant argument. You go back this evening and you go and sort this argument out for yourself, you will see it will flow like a flowchart, one argument into the other”.

For the initial part of the discussion in this segment interaction is limited to one-word replies. Students are frequently cast by the lecturer as lacking knowledge, thus he asks in lines 774 – 775 “What is it? Are you confused?”, he provokes students in lines 784 - 785 by saying “Oh please, its not so difficult. I’ve got a copy of all your intelligent IQ questionnaires… so please don’t tell me this is difficult”, and in line 796 he calls a student ‘stupid’ (“This is the law stupid”, said humorously). His understanding check after the section on Locke again suggests that students may not have understood: he asks “can you follow the elegance of the argument? Or is it just me? You just wrote it down to get through this nonsense?”, lines 837 - 838).

Just over halfway through the segment the tone and style of the lecture change. This change follows the lecturer’s attempts to get students to relate Locke’s ideas to current world affairs (Bosnia), but seems to be more directly the result of a student question on abortion. The question is shut down, but the discussion continues: there seems, in this section, (lines 870 - 884, with a break in transcription) to be an attempt by students to take some control in the situation and to frame the knowledge in their own terms (note that student contributions in this section are unsolicited). The lecturer attempts to regain control in lines 885 - 894. The interactions which follow (death penalty in lines 903 and different cultures, line 918, portion omitted) are valid queries from students although they do divert the discussion somewhat. The lecturer’s relief at the end of the lecture session is evident: “I don’t know if you are satisfied, but fortunately now it’s the break for me, I don’t have to argue with you any further” (lines 921 - 923).
Segment 20: Connective (regulative)

The lecture begins the following session by recourse to the regulative. Information is given about tutorials which all students should attend unless they are obtaining more than 95% in the course: “for the rest of us mere mortals you must please attend the tutorial” (line 933). Students are thus recast in the position of non-experts. The checking of the register in this segment is a further indication of lecturer’s attempt to regain control. The essay is referred to: the lecturer informs students that those he has marked are “mediocre” (line 940), and again emphasises the power imbalance in the relation by saying that an attempt to finish marking by Monday would “ruin (his) whole weekend” (lines 941 - 942). The floor is then opened for questions, but none are forthcoming.

Segment 21: Substantive (abstract concept – positivism)

Segment 21 revisits the concept of positivism discussed earlier in the course. Although, as in the natural law discussion, two theorists are covered in this section, the concept itself is much simpler (and is explained in much simpler terms), the section is much shorter, and is discussed in a far more informal style. The discussion adds to the previous discussion of this concept the ‘step’ theory of positive law: the lecturer calls this theory “difficult” (line 1003) and refers students to their course packs for further reference. The lecturer’s negative valuing of this section is evident in his use of the word “boring” (line 962 and again in 999), and in his characterisation of Austin as a “poor lawyer” (line 963). The section ends abruptly (lines 1004 – 1007) with a referral of students to a library task: in this instance the substance of the article they are to find is of importance to the course.

The interaction in this segment shows a return to the style used in the first lecture: there is a strong encouragement of participation through encouragement (“give us your best shot if you’re not sure. Try anything”, line 952), and through calling on specific students (“lime green shirt”, line 970). Non-participation is criticized (“back to apartheid with you”, line 972), and a strong value is placed on student thought (line 972, also evident in the lecturer’s response to a student “I don’t know” in line 956).

Segment 22: Substantive (abstract concept - sociological school)

The final segment in this transcript deals with the approach of the sociological school. The basic principle of this school of thought, that law is a “tool for social engineering” (line 1014 - 1015) is explained in a single speech segment (“paragraph”): the remainder of the section is used to discuss the example of abortion from the perspective of this approach. Interaction within the segment is high, and is of a mixed variety. Of interest however in this section is a regulation on a student contribution which was inappropriate to the topic: the lecturer responds “no, but you’re using another system now to attack this system. You must use the sociological approach to attack the sociological approach” (lines 1048 - 1049). This provides a further modelling of appropriate argument structure. The section is linked to the previous critique of this model in lines 1079 – 1080, and ends abruptly at line 1085.
APPENDIX 18: SECOND ESSAY TRANSCRIPTS

Student 3

The Introduction

1/In my mind, I have this picture of myself seating at the highest point of some mountain. This very
same point that I am seating on, is at the core of El Nino. This is actually the first time that I have
come to realise all the aspects of the whole process of this great natural phenomenon called El Nino.
This depicts exactly what I have went through at Law School in my Introduction to Law class.

2//I have never before in my life come to think that Law could be such a great phenomenon. To the
man in the street who does not know this, it could actually take some time for him to realise that every
move we make or do, has at least a single aspect of legal implication. I was also fascinated by the
image that I had in my mind of Law being a powerful thunderstorm cloud, brewing the moment you
attempt to carry on with your daily life. This cloud is actually brewing around you waiting to punish
or protect you and to expose you to all the legal consequences.

3//I would not hold anything against the man in the street if he fails to conceptualise all this, neither
would I think that it is because of his ignorance that he does not know this. Even great past
philosophers have attempted to put a finger on it and it resulted in different opinions and theories
being formulated on what Law is. One of things that this course has helped me dispel is the confusion
one initially has when one looks at the subject at hand. It has broken down the intensity and diversity
of all the departments Law. It was also very difficult to have an overall grasp of all the concepts of
Law because of this.

4//The purpose of this assignment is to answer the question on what Law is. Prior to stating what my
perception of Law is, I think it is necessary that we look at the history and background of the Law we
have. This is concerned with South African Law in particular.

The history and background of our law

5//South African law started developing in 1652, when the first Dutch colonisers arrived. They
brought with them their system of Law known as the Roman-Dutch Law. This is not to imply that
there were no laws in Southern Africa before this. There were indigenous laws formulated by the
different tribal chiefs. Even this Roman-Dutch law was first developed in ancient Rome. There were
different stages of development of law in Rome.

//1. Monarchy

6//Rome was discovered by Romullis in 753BC. The people were ruled by a king / rex. The first four
were Romans but after this there were Etruscan kings elected. The kings abused their power and in
509BC the last Etruscan king, Tarquinus Superbus was expelled from Rome. There was to be no sole
ruler allowed in Rome.

//2. The Republic

7//After this, Rome was ruled by Senate. Executive power was in the hands of the Consules. There
had to be two of these and as a last resort, power would be vested on the Commitia Centuriata. An
assembly of higher class or patricians. There were fights between plebians and Patricians and in
287BC these fights ended. The plebian assembly acquired rights / legislative rights and this resulted
in the codification of Roman Law. Rome defeated surrounding tribes and had extended to be masters
of Italy and the whole of the peninsula. Rome had now changed from strictly agrarian community to one that was very commercially oriented. After this Rome was ruled by a triumvire of Julius Caesar, Crussus and Pompey. Crussus died while he was away on a battle somewhere. Caesar defeated Pompey after defeating the Gauls. Caesar was murdered in 44 BC by members of the Senate. They exploited the Romans fear of a sole ruler and formed a conspiracy against him. After this there was war and Rome was then ruled by the second triumvire of Marcus Antonius, Octavius and Lepidus. Octavius got rid of both of them and was the sole ruler of Rome.

///3. The Principiate

Octavius changed his name to Imperator Caesar Augustus after becoming sole ruler by pretending to be ruling in collaboration with Senate. He would play a role in being a princeps or ‘first-citizen’. Roman empire became known as the principate. After this there was war but Hadrian restored peace. In 284AD Drolletian made clear the nature authority and was then the absolute ruler or Dominus.

///4. Dominate (284 AD - )

The core and gravity of Rome moved to Constantinople after the barbarians started conquering Roman territory. The Eastern empire until 1455AD. When Constantinople (named after its founder, rule Constantine) was conquered by the Turks, this was identified as the end of the Great Roman Empire. The Roman Law has been preserved for humanity largely because of Justinian, who was ruler in Rome from 527 to 565 AD.

///Take South Africa for example, there is too much social diversity for law to do Social Engineering, be able to balance between social interest and still ensure the satisfaction of maximum of interests with a minimum waste of resources.

///There is on the other hand, the historical approach to law. There are two notable concepts to the historical approach to Law theory. One is by Friedrich Carl von Savigny and the other is by Sir Henry Maine (1822 - 1888). They both present facts which one can relate to and are generally true. When you take a look at all the nations / countries in the world, you will notice that there is that one thing that makes them different from other. It is also this thing that they take great pride in, as a nation, because it makes them different. It is also because of this that I find it hard to believe that there could be a law that is applicable at all places and times. If this is difficult to understand. Then you should look at South Africa’s present constitution. You would notice that the history of South Africa has played a big role in the formulation of its constitution. This proves that Sir Henry Maine, is right when he says that historical development is discernable in all legal studies.

///Then again, you can not totally shut down the concept that laws come from a higher power. However untrue this sounds, it is a fact because some all have been developed from custom but then again custom is governed by a higher power. There are these who can say that the natural law theory best describes what Law is. It is also the opinion that of Cicero that, there is ‘true law’ which is in accordance with nature. This law is said to be eternal and unchangeable.

///The concept that I have most identified with also the closest to describing Law is the positivist approach theory. It states clearly law’s position as far as morality, religion and justice are concerned.
This theory states law as being the only body of rules governing human conduct that is recognised as binding by the state and if necessary, enforced. This approach does not differentiate between just and unjust law. The law is viewed as being given by a Sovereign or Parliament and is obeyed by all the members of its Community.

I therefore conclude by saying that there seems to be interlinks and parallels amongst all these theories. Even though John Austin’s theories has its own drawbacks it is closest to being correct. I found it very difficult and confusing to mention all the departments especially civil law, public law, delict etc. These laws could all be explained using the positivist approach.
What is law? When researching this assignment I found I was not the only one trying to get to the root of what law really is, not the only one trying to define it. I've found that not only academics have attempted, but so have ancient and current philosophers alike.

Not much is known about by the general public, what they perceive law to be generally stems from what they read in newspapers, and what they read and hear on television and the radio. This is usually dramatised and romanticised, and the real portrayal of how law really is is not depicted honestly. This is why in this assignment I plan to show my understanding of what law is.

Law is the only set of rules governing human conduct or behaviour, which is recognised by the state as binding. This is best said by George Findlay (1948) when he describes it as a 'body of principles, an immense string of propositions expressed in words'. Law also brings about the principle of order and regularity, where simple things can lead to results of consequence in the law.

The prominent feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional but are in some sense obligatory. An example of this is when a man is forced to perform some task not necessarily by physical force but by being threatened. Adding to this negative feature, Marx and Plato have argued that law is an evil thing, which mankind would do well to get rid. Many academics feel that law is one of the great civilising forces in human society.

You also find laws are found side by side with moral codes. This link is very important in human society. In the earlier ages law, morality and religion were treated as inevitably interrelated. Law givers in ancient times tended to be treated as mythical, semi-divine, or heroic figures. A characteristic view of the ancient Greek approach to law giving occurs in the opening passage of Plato's Laws, where the Athenian puts this question to the Cretian: 'To a god, or to some man?' To this the man of Crete replies: 'Why, to God, indubitably to a god'.

This was influenced by Greek and Hebrew - they in particular can be said to have brought this contrast between divine and human life into prominence, in ways which have influenced Western concept of law. Hebrew for instance, recognised Kings who were regarded as lawfully anointed of the Lord and therefore enjoyed divine sanctity. Greek philosophers on the other hand were aware that human laws which actually operated in different societies differed greatly from one another and that many of these were either against reason or certainly not fully justifiable on rational grounds.

There is also a belief in moral duty to obey the law. The foregoing discussion is that law and morality are interrelated upon one another in a highly complex way. It may be said that law and morals must necessarily coincide either because the moral law dictates the actual content of human law.

There is an approach which treats the autonomy of each of the spheres of law and morality as exclusive, so that neither can resolve questions of validity except in its own space. This theory is commonly referred to as 'legal positivism'. This link between law and religion is also strongly integrated in people's beliefs because morals do play an important role in one trying to uphold the law, especially if they are highly religious.

The factor is when lawyers argue their cases, they see them subjectively, how wrong or right they believe the action to be. Judges also have a problem in this instance because some tend to judge the cases with their perception of morality in mind, although this is not supposed to be the case, because you are only supposed to apply the law. On the other hand, this could work out horribly, as is the case in the Nazi-regime, where the Nazi's slaughtered millions of Jews because they believed them to be inferior - this is what they believed to be morally right.
This move to legal positivism was influenced by the idea of the Utilitarians in that they created a climate for the move. The notion of natural justice or natural law may take up different attitudes towards the 'nature' as a concept. On the one hand, nature may be regarded as simply the way man behaves by reason of his 'psycho-physical make-up' - Lloyd (1973)

Justice is also paired with the law, in that people tend to believe it is one in the same thing. This obviously differs considerably because people's idea of what justice is, is a perfect entity - made to restore human faith to believe in something. This could be due to the fact that we've all heard this enough whether it be from radio or the television, the idea that justice will prevail and so forth. This theory that law and justice are always linked together makes sense because if you were to ask someone what connotations first comes to mind when they think of law - justice will almost always come up first.

Many ancient versions of justice was of the idea of equality. Aristotle and his mentor Plato both saw justice as being directly related to proportion and distribution. Plato's idea of justice though was a bit different in that he referred to the appropriateness of arrangements rather to equality.

Lawyers make the distinction between procedural and substantive justice. Procedural justice has to do with everyone being treated equally by the process of law. Substantive justice also has the same idea although the difference comes in when we look at things like reward, punishments- and also rewards etc.

Next will I discuss is the historical approach. This originated in Germany and later moved on to the West. Two different ideology's when it comes to the historical approach, are expressed. These come from Friedrich Carl van Savigny (1779 - 1861), a German, and Sir Henry Maine (1822 - 1888) an Englishman. Their different cultural, traditional and language backgrounds obviously influence the way they take a view to this approach.

Friedrich Carl van Savigny was the head of the historical school which originated in Germany. He believed each nation is characterised by its own national spirit, the German word being Volksgeist. He wanted it to come across that law is not a separate entity from the function of the whole nation, and also that the contents of such nations law are determined by the history of the nation and cannot be charged, wherever time is decided.

This illustrates the fact that there cannot be a universal law applicable to all places and times, because also of political background he also stressed German Nationalism.

Sir Henry Maine, known as the English founder of the historical came after von Savigny as he determined that legal concepts should be looked at against the background of their origin and history. These two made a huge contribution to the understanding of law as an aspect of the culture of different communities.

There are a variety of laws, the content of laws, the range of application and the modes of origin. These factors don't necessarily explain to us what law is, but they do give us an idea. On that note I now conclude my assignment, and I hope I have effectively shown what my idea of law is.
Philosophers have been trying for centuries to describe exactly What is Law? but even today there is little agreement on this issue. What, then, is this 'Law' which plays such an important role in the Community? The terms 'law' and 'laws' are used in a variety of meanings. We speak of the 'law of the courts' but also of 'economic law', the 'laws' of physics and chemistry, 'moral law', of cricket, croquet and chess.

The feature common to all of them is the principle of order and regularity. Laws in the broadest connotation fall into two groups. Scientific laws and practical laws. Scientific laws are empirical generalisations stating principle of uniformity in the Physical universe or human society. Into this category fall, for instance, the laws of Psychology.

Practical laws prescribe a course of action for rational human beings. Into this group fall the laws of the lawyers, of ethics of honour and etiquette of bridge and football. The principle of order and regularity which scientific laws describe exists, independently of our wishes. We can make use of scientific laws but cannot 'break' them. Practical laws, on the other hand, do not state what is, but what we, as rational human beings, 'ought' or ought not to - 'norms'. While everyone should obey the laws of the land, we all know that they are frequently broken. The notion of truth or falsity applicable to scientific laws, has no place with normative rules.

Theories of law

Natural law approach has a moral dimension - the law is not only that which is given positive content but what ought to be. The characteristic feature of this theorie is that there is a moral code or a set of moral principles that exist irrespective of human interaction or position. These are 'higher norms' against which human positive law can be judged. If positive law conflicts with these norms it is unjust. An unjust law is no law at all.

Positive law is directly in conflict with natural law. It does not look at what ought to be but at what is. According to this theorie it is irrelevant whether law is just and fair. Morality and law are distinctly separated from each other, since they can be empirically distinguished from each other. Law is what is set down in statute books, in rules and in court decisions. This approach is positivistic because only those rules that are given positive content can be regarded as law.

Grotius to Hume, one of the pioneers of natural law said, “the order of the precepts of the natural law is according to the order of natural inclinations. Because in man there is first of all an inclination to good in accordance with nature which he has in common with all substance, inasmuch as every substance sees to the preservation of its own being, according to its nature and by reason of this inclination, whatever is a means of preserving human life and of warding off its obstacles belongs to the natural law.

Sociological theories analyse law as a social science. The emphasis is on the social character of law and its function in society. Some theorists in this field argue that positive law must be tailored in accordance with the economic, sociological and political need of the country.

Historical approach is based on the background of the nation in question. Friedrich Carl van Savigny (1779 - 1861) one of the champions of historic approach said 'each nation is characterised by its own 'national spirit' the Volksgeist. This spirit is revealed not only in the law of the nation but also, for example, in its language and art.
Law and Morality. Both the legal and moral norms which regulate human conduct are couched in language which has a common basic terminology, for example, 'obligation and duty', 'right and wrong'. This correspondence in language would seem to indicate an interrelationship between law and morality.

Moral reproach too has attached to those who do not honour bargains. It is not surprising to find that such actions have also fallen within the purview of law through legal rules directed against assault, theft and breach of contract respectively. Indeed, the moral code of the community has seemed to presuppose an underlying legal order. It is not surprising, therefore to hear people say that law reflects the moral convictions of the community.

Law and Justice - justice, as already seen, is but one of the moral values. The emphasis on justice is fairness. In this way law need to be applied fairly and equally to everyone. One famous modern theorist, John Rawls, has evolved a theory of justice which attempts to eliminate the problem of self-interest. Rawls plays a game in which rational self-interested people, behind a veil of ignorance as to their future circumstance, have to decide on the principles which will govern a future society to which they belong.

Law and religions is the belief associated with power superior. There is no much difference between moral and religion because both of them they are mainly concerned with what is right and what is wrong. In religion you had to obey to the unquestioned authority of a moral code, such code owing its origin either to god, or to divinely inspired human beings. Law is very much related to religion, in the sense that it aim to make people aware of what is right and what is wrong.

Philosophers view on law

Benjamin N Cordoze describe law as the expression of principle of order to which men must conform in their conduct and relationships as members of society, if friction and waste are to be avoided among the unity of the aggregate, the atoms of the mass.

The great German Philosopher, Immanuel Kant (1724 - 1804) defined law as the sum total of conditions upon which the arbitrary will of one person may be reconciled with the arbitrary will of others in accordance with a general law of Freedom.

J. Bentham, of law in general - specific view is that every law is a declaration of sovereign will, which in its directive aspect imposes duties or action or abstention, but the sovereigns command (or rather 'mandate') may make the imposition of a concrete duty condition on some further acts of some person other than the sovereign, as in the case of a command that every person if he makes a covenant with another, shall keep it.

In my conclusion, I can describe law as a framework of the Social Machine, and if a sufficient number of instructed, free and fertile thinkers could set themselves to ask in the light of our modern knowledge of history, politics and psychology, what means those purposes can be attained, an incalculable improvement in human relations might result.
There are many misconceptions surrounding the topic above. The ordinary person has a one-sided view as to exactly what law is, many think the law is about law and order, with policing aimed at keeping criminals off the streets. While criminal prosecution is a big branch of law, it is not the only one.

Admittedly I too held some of these misconceptions that was before Introduction to Law, of course. I'll attempt to dispel some of these theories by sharing my newly found knowledge.

Law is multi-dimensional and forever transforming, therefore making it difficult to characterise in a single term or phrase. It has many divisions and branches which cater for a different purpose and services.

As hard as it may be to define it, law has distinct history-roots. And it is important to first discuss these roots through it source if one is to understand law.

Law sources have help to mould the modern legal system and ours is no exception. Our law is strongly influenced by African Customary Law or Indigenous Law. Before the colonisation of the Cape the people of the South Africa used their traditional customs to ensure peaceful co-existence of its Tribal community.

The colonisation of the Cape by Dutch explorer Jan van Riebeck, saw the introduction of Roman-Dutch Law. And in the early 19th century Britain took over the Cape and so common law came into effective.

Our modern legal system also gets its sources from the constitution (legislation, judicial precedence).

The importance of customs as a source of law is not entirely confined to the early stages of social growth, existing customs may contain conflicting principles with the rule of law.

Roman Dutch Law also attributes an important function to customs, it is consistently recognising its effect substantively. But also to its assigned secondary position as compared to Common Law hence English Law.

Common Law is consistently passing through transformations, its inherent rigidity is consistent with claim of flexibility.

The South African constitution gives rise to legislation and judicial legislation as a possible source of law. Legislation must come from the product of 'popular conscientiousness' or the 'will of the people'.

Also entrenched in its history are varied definitions of law and the difficult experienced in trying to define it fully.

Philosophers have all different definition, all of which conflict by definition and are classified accordingly. Positivists believe that law is only binding if it is recognised by the state. Principles of morals do not necessarily to filter in the equation.

Naturalists base law on the highest standard of morality and moreover the law of the land should coincide with the universal plan of God. If this is not the case then is not binding.

Neutral believe in a system of rules which enable society to co-exist based around peace and
harmony between individuals.

Marxists however believe that law should not favour the ruling or wealthier class. Based on the teachings of Karl Marx.

Mainly philosophers like Sir Henry Maine; FC Von Savignity, take the historical approach: A nation is determined by the history of the nation, there are no universal theories applicable to all places. We all do not share the same history.

Needless to say the legal practitioners, philosophers all have different views as to what law should be or what it should be based on. The argument is also perpetuated when different aspects of it are brought to the fore.

Aspects such as religion and morality. We all have different beliefs with regard to religion of what is moral. Therefore how does the law accommodates everyone by finding common ground.

Often the manner in which legislators answer these questions, will ultimately define what law is for their subordinates. 'Law fosters law-making opinion yet there is in society a prevailing current or opinion which necessarily and fundamentally influences in the spirit of legislation' - DICEY.

There must exist harmony between legislative enactment and the dominant trend of public opinion for it to be effective. A dominating element of any modern legal system is its constitution. The role the constitution in any modern legal system plays, helps define it.

English Law has no concrete or documented constitution, but constitutionality plays a dominant role in common law (Westminster). The United States on the other hand has a documented constitution like South Africa.

South African Law today is centred around the supremacy of the constitution. It regulates the co-existence of individuals on the state by passing statutes through parliament. In modern doctrines parliamentary enactment is absolutely unlimited in scope and authority.

It delegates authority through its subordinate state organs namely municipal government and national government.

The constitution prescribes the matter in which statutes are passed or made into law, the powers of its delegates which also includes judicial officers. All of these rights and duties are stipulated in Administrative and Labour Law.

Judges deduce formulated general rules of law, the principle applicable and they also reason from particular cases to a general principle appropriate to the matter at hand.

Precedence applies - Rationes decidendi - the reasons for the decision rather than obiter dicta - remarks in passing.

There are distinct branches, the top layer being International Law and National Law. The second layer is mainly concerned with enforcing and protecting rights - Substantive, Conflict, Procedure law.

Law that governs the state when dealing with civil rights, criminal prosecution, criminal Law and Law of Evidence.

Public and Private law governing the relationship between state and individual and individual and individual respectively.
Next being the Law of Taxation, Law of Persons, Property, Succession, Obligation and Mercantile Law, dealing with the Statutes of humanes in their capacity as marriage partners, children or parents; proprietary values respectively.


Law enforcers use several approaches to help them interpret the legislation in the manner intended by the legislator: Literal; functional; teleological; Historical approach, clearing ambiguity or shedding any vague legislation.

These enforcers work in different courts, namely the highest court the Constitutional Court, Supreme Court of Appeals, High Court and magistrate Court (Small Claims Court).

As dimensional as law is or unique to every country or state there are some universal characterists, law developed within society of its own vitality; its spontaneously growing and independent of one dominant factor.

Law is not merely statutes passed through parliament, it carries a legacy our history, tradition and customs and under that light I view it as a culture, a way of life.
‘A law ought to be just and reasonable - both in its matter, for it prescribes what is honorable and forbids what is base; and in its form, for it preserves equality and binds the citizens equally.’ - Johannes Voet in his Comentarius ad pandectas

The quest for an answer to what law is began at the beginning of society and continues to plague mankind. Countless answers have been given resulting in various philosophies but no answer has pleased the entire population therefore the search continues. The Oxford Dictionary defines law as a 'body enacted or customary rules recognised by a community as binding'. However this is just one of the dictionaries definitions there are several more. As one can see there is no clear-cut definition to this quandary.

The reason why it is so hard to define law is due to the diverse nature of humans. Every person has a different expectation from law. Some people believe that law should deliver justice others believe that 'Justice is incidental to law and order'. It is also believed that law should be linked with equality but it is of another opinion that law, morality and justice are all separate and should not bind one another.

In order to come to a solution to this universal problem, it is important to analyse the many philosophies surrounding this question. Most people would agree that the fundamental of law is creating an ordered state. It is the questions that deal with where the law should come from and what it ought to constitute that result in the real dispute.

Although Religion is a type of law and lay’s down the basis for law, (this basis being the ten commandments i.e. thou shalt not murder etc.) it cannot be considered law. There are so many religions in the world, which one would prevail? Henry Maine believes that every system of law originated from religion and culture. In the Western world, law is secular and is considered to take precedence over religion.

It is a misconception that law must deliver justice. Justice is subjective and law is not, this makes it difficult for the two to be co-mingled. In History it can be seen that Law does not always result in justice. Justice is often linked to equality and throughout the centuries equality has certainly not triumphed. This can be seen in our own country where the apartheid regime survived 43 years despite its complete disregard for Justice and equality.

Another misconception people have, is that law and morals are tied closely together. Once again the two are not necessarily bound by one another however if they coincide they reinforce each other. Also it is important that the laws of a country appeals to the majority of the nations morals otherwise the law will be disregarded.

Law, justice, religion and morals are not necessarily allied. The truth is that law is separate from justice, morality, and religion however many countries choose to base their law on these three values. In the western world laws are based on upholding standards and respect for individuals however this is not always achieved. It is important to realise that law is often not just and is fallible. The question that arises is: Is it law if the rules are unjust and go against human rights?

There are two schools of thought on this issue - There is the positivist approach and the naturalist approach. The naturalists believe in Natural law. This philosophy stipulates that there is an ideal system of law, which exists. Man made law should conform to this superior system. If law goes against what is natural it is not law, as it has not conformed. Natural law believes in equality and human right principles. The ideal standards of natural law are versatile however the main principles remain the same. Professor Friedmann sums up these principles by saying - “The most important and lasting theories of natural law have even inspired by the two ideas of universal order of governing all
men, and of the inalienable rights of the individual'. John Locke - a follower of natural law - believed that one of the most important aspects of law was that law should protect the right to life, freedom and property. He went on to say that if any law abused these rights instead of protecting them, the people had a right to rebel. As one can see, natural law would not support laws that are unjust.

On the other hand there is the positivist approach. Their philosophy is that law should be seen 'as it is', not 'as it ought to be'. Positivists believe that law is separate from morals and justice and that the law should not be confused with morals and justice. Their philosophy is based on the fact that the law is binding if it is recognised by the state. This approach to law allows for unreasonable laws to be passed and acted as a catalyst in the creation of Nazi Germany and the apartheid regime in South Africa.

The conflict between natural law and positive law is demonstrated in Sophicles play 'Antigone'. Antigone had to choose whether she would obey positive law or if she would obey her moral (natural) law. This play was redone in France during German occupation to promote a rebellion against their rulers. This shows us that the conflict between positivists and naturalists is ancient and still continues to this day.

There are other schools of thought pertaining to what law is. Legal philosophers such as Friedrich Carl von Savigny and Sir Henry Maine gave birth to the historical approach. This approach is characterised by its principle that law should be determined by the nations history. Hence there is no such thing as universal law. Another principle of this approach is that the law must be a function of the nation. This approach was very popular in Germany.

The sociological approach is another viewpoint on the topic. This approach takes a look at law as a social character and its function in society. It is felt that laws should be tailored according to the social needs and the principles of justice. Roscoe Pound believes that the law should protect societies interests and that 'law is a social tool'.

According to John Dugard most lawyers see law as a set of rules, which protect the liberties and equalities of an individual. This is in line with natural law. He feels that equality should come before the law and it is the lawyers job to promote this. The state is seen as existing for the individual not the other way round.

In each nation, law will have a different definition that is why it is important to look at the roots of the nation's law. In South Africa we have a mixture of Indigenous Law, Roman-Dutch law and English common law. Together with a splash of South African input combine to form the law that governs us. South Africa today is a naturalist society, which promotes equality and justice. It goes as far as to encourage remedying past injustice. This can be seen with the affirmative action laws and even the TRC.

The philosophers and jurists who are responsible for our legal system backed liberty and equality before the state. Most countries, whose background is the same as ours, managed to develop a natural state that advocated liberty and equality, a long time before us. It is a wonder with our liberal heritage that the apartheid was able to materialise. (This is if you do not take into account our countries history and position at the time.)

Many people believe that law is only concerned in the criminal branch as this branch is glorified and romanticised in the movies. However there are many branches to law. The two main branches are civil law, and criminal law. Criminal law deals with wrongs against the state. Here the state punishes the criminal. Civil law is where the crime is committed against an individual and the criminal in this case gives compensation to the victim.

To understand law it is also important to understand the different sources of law. Some countries
like South Africa and the United States have a Constitution that is the fundamental of the countries
law. The Constitution is the ultimate source of law. It sets out the powers of the state. The
Constitution determines where the power is to be found, who holds it and how it must be exercised.
The Constitution is very difficult to change. This is important as it prevents megalomaniac people
from making rash, harmful laws. If the Constitution is fair and just it paves the way for a righteous
future.

Other countries like Britain do not have a written constitution but instead have an unwritten 'Rule
of law'. The rule of law ensures that government does not possess illogical power over an individual.
It also requires that all members of society are equally responsible to the law. These two principles
are the centre or 'Rule of law'. The rule of law ensures that government does not possess illogical
power over an individual. It also requires that all members of society are equally responsible to the
law. These two principles are the centre or 'Rule of Law'. The 'Rule of law' offers the same benefits
as a constitution. However if 'The Rule of Law' becomes distorted and warped, problems with
equality may arise. This can be seen in South Africa in 1948 when unjust laws were allowed to be
passed.

These two sources of law are not the only sources of law. They are the heart of the legal system.
Other sources of law include legislation, common law and custom. Legislation or statutes are written
laws passed by parliament. Common Law is a set of rules based on past judgements. This law is
derived from Roman-Dutch Law, English law and ancient Roman law. A custom is a long established
ritual, which through its continuous practice has acquired the power of law. There are many sources
of law, which characterise what law is.

No single answer can be etched into 'the sands of absolute' to the question 'what is law?' There are
merely perceptions and images of law that have been derived from years of philosophising. The
philosophising probably began ever since law was born and continues to this day. In order to make up
ones mind one must study all the different approaches as discussed in this essay, look at the history of
law and examine the different sources of law. Only after that, is one fully equipped with the
knowledge to make up ones own mind. Law to me is a blend of its history, philosophy and practice.
Law is not an easy concept to define and its actual meaning has eluded many great philosophers. It has such a broad and inclusive function that to try and explain it in a few, short sentences would be impossible.

The law is related to all areas of our lives and governs almost every action. Many people have at one time or another broken the law and for most this comes with a sense of guilt; even if prosecution is not forthcoming.

Law can be interpreted in many ways. It is by strict, literal definition the rules that govern a state or other geographically defined place. But the law is comprised of countless different divisions and functions and relates to every part of our lives.

The roots of our law (and of most other countries) can be traced back to Roman times. The writings of the great philosophers are the cornerstones of the legal system. When South Africa was founded as a colony, Dutch law became our law as well. Therefore when we speak of Roman-Dutch law we are referring to the historical basis of our laws. English law also forms a base of our laws because when South Africa was a British colony we had to abide by British laws, some of which have not been altered.

Natural law can also be called God's law. It is the law that ought to be. This is the law that is judged on a higher standard and is what we could call our human rights, any law that does not live up to this ideal can be theoretically dismissed because it is not a proper law. Equality can be seen as a natural law.

Positivism is based on parliamentary sovereign; the man-made rules that must be followed simply because they are written down. Morality or 'the right thing' is not taken into account. In South Africa, apartheid flourished under this philosophy because the laws made by a biased parliament had to be followed. John Austin once described law as 'the command of the king followed by sanction'.

The historical approach to law, made famous by Friedrich Carl von Savigny, is the idea that each nation is categorised by its own national spirit or Volksgeist. This spirit is revealed in its laws, as well as its languages and arts. He felt that extensive study of Roman law was required in order to understand modern laws.

Roscoe Pound was a leading figure in the sociological school of thought. He felt that law was a social tool that could be used to engineer society and that the law could be improved to meet societies needs. He theorised that the law brings together certain interests or power groups and must then strike a balance between them and provide for the social, political and economic needs of that society.

Marxists also have their own ideas about law. For them the law should be a system that empowers the workers. Each individual should give as much as they can and take only what they need. This type of law is based on Socialist ideologies and is often contrasted with Capitalism.

Under a capitalist system, the law is there to protect the rights of the individual from the collective, while not getting too involved in the individual's business. The object is to exploit all resources and make a profit. In this case the law is subject to supply and demand and is based on the principles of liberalism.

Laws can be in the form of written or unwritten rules. Legislation is made by the government and written down as acts or statutes, but in some countries much of the law is customary. In England the law is based on class and everything is done according to tradition; even the constitution is unwritten. This is a type of common law and most of the law is created in the courts by way of judgements that
are handed down.

12/The law is generally seen, by the public, in terms of criminals being sent to jail as a punishment for a crime that they've committed. The law does deal with criminal cases, but the vast volume of cases in court are civil.

13/There are many branches of law in the justice system. The main division is between public and private law. Public law is between an individual and the state. Criminal, constitutional and administrative cases all come under the heading of public law. Private law is the settling of disputes between individual members of the public; it can involve all manner of arguments and it covers a wide variety of cases.

14/The law, because it is so difficult to define, is often confused with other concepts. In the cases of justice, religion and morality; the law is related to and is a part of these concepts.

15/Justice, in most cases, is the ideal result of the law. The well-known phrase “Justice is blind” is an example of this. The law however is not blind and human lawyers and judges do make mistakes. The law is not infallible and justice may not always be served.

16/Justice can also be in the 'eye of the beholder'. One person's justice is another's downfall. The perception of justice is highly subjective and the individual's class, gender, race, religion and social background all influence their ideas about what is just. In this way, a country's ideas of justice may be influenced.

17/In South Africa during the apartheid years our laws were laid down and followed by the various legal institutions. Equality was not guaranteed and according to many our legal system was not just. It was however the law and as such it had to be obeyed. In this case justice and the law were not inter-related and the ideal did not match the reality.

18/There is a difference between formal and substantive justice. Formal or procedural justice is when the process of law is carried out impartially according to categories. It's said that it 'treats like case alike'. It does not question who falls into these categories or how they were constructed. In this type of legal system it would be considered just to treat black people differently to white people as long as all black people were treated the same way. It was under this system that apartheid was justified.

19/Substantive or distributive justice is concerned with both the categories and the content of the law. In other words, the law is only valid if the rules it makes ensure equal justice for everyone. South Africa's new constitution tries to ensure a measure of substantive justice in our legal system.

20/Substantive justice does have its flaws, in that it is highly subjective and is often motivated by self-interest. John Rawls, a modern theorist devised a way of counteracting this problem by using the selfishness to his advantage.

21/Rawls plays a game where individuals do not know what their future circumstances will be and must make the rules that govern society, because they have no knowledge of their future they will make the rules that give the maximum benefit to everyone. The rules will ensure equal rights and the greatest possible amount of freedom, and will ensure that social and economic inequalities are arranged so that they are of the greatest benefit to the least advantaged.

22/While Rawl's theory is often criticised it is also the most respected. It allows a type of objectivity into a very subjective ideal.

23/In some countries religious law is the only law. In many Muslim states the Koran (the holy book) is the only source of law and whatever is written in it must be obeyed. In these religious states the
church and the law are inextricably intertwined.

24//In the West, religion and law are kept as separate as possible; although as Henry Maine once said 'every system of law is bound up in a religious ritual'. Secular states ensure that there is a clear distinction between the state, the laws and it's religion(s). When laws and religion clash, the Western view is that law takes precedence.

25//Religious law can be traced back to ancient Rome where the priests were the first lawyers. The head of the church was also the head of the state. He was called the Pontifus Maximus. This is the same principle in present day England where the head of the Royal Family, the Queen, is the head of the Church of England.

26//Morals are a system of beliefs by an individual or specific community about what is right and what is wrong. Many moral standards are a result of religious beliefs. The law and morality are linked by some of the same standards. For most it is morally wrong to steal and the law upholds this through legislation. In this case, law and morality coincide and reinforce one another.

27//This does not always happen. The church can denounce certain actions that the law upholds. In the Catholic religion, divorce is seen as morally wrong and is often not recognised by the Church; but it is legally binding.

28//The government when creating a law does not want to set too high a standard or invade the rights of an individual. To do this would be too time-consuming and expensive to enforce.

29//Morality is a highly personal and subjective thing; it varies widely, and to try and enforce one person's morality by law could be an affront to someone else. Morality also changes with the times and public opinion. Slavery was once thought of as a perfectly acceptable practice which was regulated by certain laws. Nowadays we find it morally reprehensible and condemn all who owned slaves as cruel and inhumane.

30//The law is viewed in different ways by different people and because of this diversity no law will ever be agreed to be everyone. Law is what stops our rights from being trampled and prosecutes those who try to do so. It is not a perfect system, but it does endeavour to right the wrongs that are inflicted on individuals.

31//The law cannot be classified under any one title and a single definition that fully encompasses it has not yet been found. The law changes and evolves with society and reflects the values and traditions of any given time and place. It is a product of the people it serves and as such it reflects the characteristics of entire nations. The law can be a powerful tool for both the common good and for great evil, it all depends on the people who control it.
The meaning of law is debatable, there is no globally accepted definition of law. This is generally due to the vast differences between the governments and legal systems of the world’s countries. Law may come in written form, such as statutes, or law can be prevalent in society through non-material means such as custom. The Oxford dictionary defines law as a 'body of enacted or customary rules recognised by a community as binding'. This definition tends to be limiting, as law is a subject that is too extensive and complicated to be confined to one sentence. However it has been discerned that law is prescriptive (opposed to descriptive), and that it is a genuine normative system.

Law and morality are two significant prescriptive norms of society. Morality (in a personal and communal sense) interrelates frequently with most society’s laws. The correspondence in language between the two systems seeks to further establish their interrelation. The most predominant difference between the two is that moral choice is voluntary while legal rules are indiscretional and if opposed are reinforced by strict sanctions imposed by authoritative bodies. Another distinction between the two is that law can be regarded as authoritative, external, objective and formal while morality is characterised as being dispositional, internal, nonobjective and unofficial.

Morality is subdivided into individual morality and communal mores. Individual morality is concerned with a being's internal thoughts and ideals which constitute his conscience. The victor of the inner conflict between an individual and his conscience will determine his actions. If a person does not conform to his private morals he can undergo self-punishment such as guilt.

Although an individual's morality may conform to numerous aspects of the law not everyone's ethics are represented in the law. Furthermore the law does not recognise personal morals as deciding factors in determining the lawfulness of an action. Community mores have a more influential effect upon a societies law. These mores express a communis opinio populis on social issues. An individual within a community is by an unspoken mutual agreement responsible to the rest of the members of his society. Consequently general views possessed by a community have a persuasive effect upon the systems that regulate it, such as law.

However law in society is not completely governed by a singular community's mores as some mores have no practicality in the legal system or they interfere with other communities ideals. This is the case in our legal system, as South Africa possesses a distinctly heterogenous society. Nonetheless society has its own means of imposing sanctions against transgressors of community mores and ideals. For instance a transgressor may be punished indirectly by being publically ignored or, in more extreme circumstances, ostracised by the whole community. Attempts have been made to substantiate weather violations of communal mores should be made criminal offences. The theory devised by John Stuart Mill is that harm should be the decisive criterion for determining if a socially disapproved.

Individual morals and community morals are commonly fashioned by religion. Therefore we can presume that religion has an influential effect upon legal rules and law as a whole. There are strongly visible similarities between religion and law, for example both systems possess rigid procedures and formal ceremonies. This is chiefly due to customs large involvement in the development of law and legal rules, and as custom is commonly derived from religion, the link between the two can be substantiated.

Religions role in law can be evidently portrayed in religious states such as Saudi Arabia. In Saudi Arabia the Islamic religion is followed by a staggering majority of the population and consequently the countries laws are derived from the Islamic holy text, the Koran.

However, Western nations believe that law and religion should remain mutually exclusive. Nonetheless, in these liberal nations the freedom to participate in religion is protected.
One of the ideal functions of law is the preservation of justice. However there is no presiding singular definition of justice. Justice, like law, is subject to the changing opinions of society and current authoritative bodies. This forces us to ask the question: does justice always manifest itself in the law?

Equality is regarded as the essential ingredient in the composition of justice. Nonetheless not everyone should be treated as equal before the law as there are individual differences that need to be taken into account to attain justice. Aristotle outlined two noteworthy concepts concerned with justice and equality, namely distributive and corrective justice. Distributive justice is the equal distribution among equals before the law. The aim of corrective justice is to restore inequalities.

When concerned with the fairness of an employed legal rule we need to distinguish between in a formal sense and justice in a substantive sense. Procedural justice involves the correct application of legal rules and is used in determining the result of a legal case in court, i.e. the administration of the law. For Substantive justice to be employed successfully, legal rules need to reflect basic fundamental rights and to be flexible to the needs of society. Therefore the lawgiver cannot promote justice if he does not operate within the scale of values acceptable to the governed. This scale of values varies from community to community and consequently so does the interpretation of justice.

Another of the ideal functions of law is that it is predictable. This aspect of law is known as legal certainty and pertains that law should be applied in a consistent manner and should have a secure content. Nevertheless this aim of law is impaired by some predominant factors.

Firstly, legal rules are laid down in words. Words have to be interpreted as to attain their meaning in a legal sense. Due to the complexity a variety of words meanings, an element of uncertainty is created in the law. Secondly, society’s values are constantly changing, and together with developments in technology can cause legal rules to become ineffective and in need of replacement. Thirdly, judges have discretion in applying law, which is hence influenced by subjective prejudices and attitudes.

In order to explain the notion of law, legal experts and jurisprudential philosophers have developed certain approaches to the law. These approaches tend to clash with each other due to their opposing views and individual shortcomings. One of the most widely supported legal theories is that of the Natural school of law.

The underlying noesis of natural law has, since early times, manifested itself in legal history, philosophy and jurisprudence. The principle behind natural law ideology is that there is a higher legal order that endures irrespective of human interaction.

The higher legal order has been previously been interpreted as the Divine laws of God but since the 16th century it has been regarded by the majority of the natural law philosophers as the product of human reason. Natural law in application pertains that the law should not only be administered as it is, but as it ought to be. This proposition causes us to ask the question: should a law be obeyed if it is believed to be unjust? Several legendary political figures such as Ghandi and Martin Luther King used the natural law approach to justify their disobedience of the law in the aim to achieve equality. The natural law theory has, throughout history, had an intense functional effect on various legal systems and governments and is regarded as setting the foundations for Human Rights. A distinguishable facet of natural law thinking is that it does not separate law from morality.
This characteristic of the natural law theory is the chief distinction between itself and the positivist theory. Positivism pertains that law and morality should remain separate issues. Furthermore positivists such as Bentham, Austin, Kelsin and Hart emphasised that law as it is, and law as it should be, are distinctly separable.

Although there are several theoretical standpoints in positivist theory, the predominant view is that the importance of a systematic composition of a body of rules far outweighs the justifiability of the legal rules. Issues such as justice are believed to be too speculative and uncertain.

Another school of law that has contributed to the comprehension of law is the Historical school of law. The German scholar Friedrich Carl von Savigny postulated the theory that law is an inherent function of a nation and that the law of the nation is intricately linked to its history. Another noteworthy legal scholar, Sir Henry Maine, took a different approach to historical law as a theory. He compared historical legal systems and developed a system of stages that legal systems undergo throughout their development. He concluded that legal concepts could be judged against the setting of their history.

Sociological theories also deserve mention as they have large support in today's world. The sociological approaches law as a social science, factors such as economics and social institutions are regarded as playing a substantive role in the workings of law.

My personal approach to the law is one which combines both positivist theories and natural law theories. I believe that the strict application of the law is of monumental importance but that legal rules should consist of basic human rights and should support the majoritarian view of the society without infringing on the basic rights of the minority.
Law cannot be defined in one clear, precise dictionary definition, as the word law may be viewed in a number of different ways and for a number of different purposes. The problem of defining the term law may be approached from the point of view of the theologian, the historian, the sociologist, the sociologist, the philosopher, the political scientist or the lawyer. Most lawyers will approach the problem from inside a particular legal system, therefore their investigation may stop where the legal system provides authoritative tests for recognising law from not law. Hence we find lawyers defining the law as, 'the rules recognised and acted on by courts of justice'. However, how can a decision be made according to law, when the term is unclear? A definition of law should establish clear distinctions between rules of law and rules of ethics, between rules of law and social rules such as positive morality and of etiquette. It is important to note that although the law is vast and fairly ambiguous at times, it can be divided into two main branches, such as criminal (public) and civil (private) law.

Criminal law occurs when a crime takes place, which is a wrong against the state for which the wrongdoer is punished by the state. Criminal law is essential to a community as it regulates the conduct of all individuals in society. If the person charged with a crime is found guilty by the court it results in a punishment such as imprisonment, a fine or punishment in some other way.

Civil law occurs when a civil wrong is brought against an individual for which the wrongdoer must pay compensation to the injured person. Civil cases usually deal with actions for damage to property, injuries to people, commercial dispute about contracts, the renting of houses, consumer problems, employment disputes and family problems. A persons act may result in both criminal and civil actions.

Sources of law help us to understand the concepts of law, as it shows us where we obtain the knowledge of our law. It indicates the ultimate authority, which gives the force of law, i.e. the state, the sources of law also recognise the organs through which the State either grants legal recognition to rules previously unauthoritative, or itself creates new law. South Africa's main sources of law are the constitution, legislation, judicial precedent, and custom.

The South African constitution is the most authoritative source of law in this country. It sets out the power of the state and is the basis upon which state authority rests. It is considered the supreme law of the Republic. For lawyers the constitution is important because it identifies the 'rules of recognition' on which the validity of the whole legal system is based, and it indicates the juridical status of the constitution itself within the legal system.

Legislation or statutes are made and passed by Parliament. Hence the fact that parliament is known as the legislature. Statutes are written laws, they are also known as an Act of Parliament. Statutes or Acts of Parliament are published in the Government Gazette they are also collected in the Butterworths Statutes of South Africa. Legislation is the most important source of constitutional law.

Judicial precedent is the courts decision or judgement on cases. Judges look at the law to see if there is a rule that covers the facts of the case. If there is a rule, they apply it to the case, if there is no rule, which covers the facts of the case, then the judges must make a decision based on their opinion. They do this by looking at the facts of the case and existing law. The judgement may include a new rule of law, which is called a precedent.

Common law is a set of rules, which is not made in Parliament or written down in statutes but comes from Roman-Dutch law, English law and occasionally from ancient Roman law. However the common law has been interpreted, developed and written down by judges in the judgements they pass in High courts.
Custom is a long established practice, which can acquire the force of law. For custom to be recognised as a legal-rule, it must be a long-standing practice, reasonable, must have been in existence without exception since its origin, and it must be certain.

The sources of law and the divisions of law are fairly easy to understand, however the concepts of law and their goals are less structured and accessible. Law as a concept is concerned with advancing the welfare of the public, resolving disputes, and maintaining social control. It is often confused with other concepts, which in a degree relate to each other, such as religion, ethics, morality and justice. So closely connected are these topics with those proper to jurisprudence, that many of the older works on the subject are occupied as much with the laws of God, or nature, as with proper law.

Religion is the belief that there are powers superior to man, powers which impose rules on mankind by a God or Gods, this is known as Divine law or 'laws of God'. Whereas we view the man-made concept of law as imperfect rules passed down by a human agency. The link between religion and law is that the roots of religion can be traced back to custom and custom can largely be based on religion. In ancient times the functions of priests, lawmakers and judges overlapped. However most Western societies tend to avoid the overlapping of law and religion, mainly in countries where there is no one dominant religion.

Ethics is the study of supreme good. Ethics concentrate on the individual rather than upon society. Law is concerned with the social relationships of men and women rather than the individual excellence of their characters and conduct. Man is free to accept or reject ethics, but legal duties are imposed on the individual without his consent. It has been suggested that law creates both duties and rights, whereas ethics can create only duties.

Where ethics deals with the absolute ideal, morality is made up of actual standards, which are adopted in the life of a particular community. Morality can be similar to law as it emphasises social conduct, and it is imposed on an individual from without, with the effective backing of public opinion. Law is shaped by the values or morals people have - the values of those who are able to affect the development of law. In relation law has an impact on moral attitudes. While law may reflect prevailing moral opinion, its restrictions do not necessarily correspond to sound moral principles. According to natural law there can be no unjust law. This claim appears to be paradoxical, for it seems to say something that is law (unjust law) is not law. It must be noted that the Nazis had law even though it was very bad law and embodied an immoral legal system, which is true about the Apartheid legal system that was experienced in South Africa.

The purpose of law may be defined as 'the body of principles recognised and applied, by the state in the administration of justice'. Law and justice are so closely related that it could be said that law is an instrument by which justice can be achieved. However, law is different from justice, as justice is a matter of the correct or best theory of moral and political rights, imposed by a persons own conviction, of what these rights actually are. Law is a matter of supposed rights, which supply a justification for using or withholding the collective force of the state, because they are included in or implied by actual political decisions of the past.

However besides law and concepts of law, there are also theories of law, which help to define what law is and the purpose of it. There are various theories of law, which have been developed over the years by legal philosophers and legal schools of thought. The most significant findings made in the Western legal thought are found in the following approaches: the natural law approach, the historical approach, the positivist approach and the sociological approach.

Natural law is seen as the law of God, an approach to this law is that it favours equality. The origin of Natural law comes from God, which is given to man for direction and guidance. Cicero, a Roman orator and philosopher considered 'true law' to be in accordance with nature and that such law is eternal and unchangeable. People through the use of reason have discovered natural law.
The historical approach to law is that law has no separate existence but is a function of the whole life of a nation and that the contents of such a nation's law are determined by the history of the nation and cannot be changed arbitrarily.

The positivist approach developed in the early 19th century, it focuses on law 'as it is' not how it 'ought to be'. It was a reaction against natural law, as its approach to law follows no judgmental or moralistic views. South African law has been greatly influenced by the positivist legal theory.

The sociological approach to law follows the idea that law is a social science that must be adapted to the social economical and political needs of a society. Law is seen as a tool for social engineering.

Levy-Ullmann states that a definition of law should have two aims: firstly to make precise the meaning of law, and secondly to call up in the mind of the reader a true picture of law. Law is not an ideal justice, but human justice defined by those who are in control of it. There are two sides of law. On one side it is an abstract body of rules and from the other it is a social process for compromising the conflicting interests of man.
APPENDIX 19: COMPARATIVE ANALYSIS OF INDIVIDUAL STUDENT TEXTS

Student 3

a) Textual features

The two essays presented by this student are similar in appearance. Both essays are handwritten very neatly, in full capitals: the writing in the second is much smaller, but both are neat. The second essay is presented with a separate cover page, in contrast to the first, where the information was given on the same page as the essay proper. Information given in both cases includes student name and number and course title. For the second essay, information given includes the addition of the lecturer name and assignment number, however, in contrast to the first essay no actual essay title is given in this instance: by focussing on the assignment number rather than on the title, a greater focus has been placed on the summative aspects of the task.

The grammar in the first essay does not contain many obvious errors. In contrast, there are many instances of clumsy formulation in the second essay. Some of these formulations could be the result of second-language usage (for example, the double subject in “To the man in the street who does not know this, it could actually take some time for him to realize that every move we make or do, has at least a single aspect of legal implications” (paragraph 2) or the missing connective in “The concept that I have most identified with also the closest to describing law is the positivist approach theory” in paragraph 15), some may be careless (for example the sentence break in paragraph 12: “If this is difficult to understand. Then you should look …”). These formulation errors are found throughout the essay, and do not apparently link with content coverage. Throughout the second essay the word ‘law’ is frequently, although not consistently, capitalized, perhaps indicating the value that the student feels it necessary to place on the concept.

The tone of the first essay is personal, and the style, although not informal (evidenced by words such as ‘therefore’ and ‘perceive’), is not characteristic of academic prose. The second essay is similarly difficult to classify in terms of style. Although the personal account offered in paragraphs 1 – 3 would suggest an informal style, there is again evidence within these paragraphs of word usage that is more appropriate to a formal discourse. The word “depicts” in paragraph 1, for example and the phrase “fails to conceptualise” in paragraph 3 seem to indicate that the student is grappling with an attempt to put his personal impressions into formal language. Paragraph 4, which concludes this section of the essay and provides the structuring move for the next section, although retaining the personal approach, shows some evidence of academic style in the discourse marker “prior to” and in the stance marker “I think it is necessary”. There is an interesting word usage in this paragraph where the student says that the “purpose of the assignment is to answer the question on what law is”: the word ‘on’ focuses attention on the task set in the course rather than on the topic itself, and again places emphasis on the summative dimension of the task.

The following section, which runs from paragraph 5 to 9 has a knowledge-retelling factual tone. There is no personal reference within this section and no explicit evidence of informality, however, the short sentence structure and lack of positional markers do not convey the impression of academic prose but rather give the text the feel of a school text-book or children’s reference book. Of interest in this section is the connection drawn between indigenous law and Roman-Dutch law in paragraph 5 (“There were indigenous laws formulated by the different tribal chiefs. Even this Roman-Dutch law was first developed in ancient Rome”). A speculative interpretation of this link might be that ‘South Africa had indigenous law before colonisation, and indigenous law is not that bad because even Roman-Dutch law was originally indigenous’. The student’s intention, however, may have been to
disconnect the concepts, as in: ‘although Roman-Dutch law began as indigenous law it progressed through different stages of development’, with the statement that “South African law started developing in 1652”, and the theme of the development of Roman Law (and omission of development of indigenous law) in the following four paragraphs, supporting this interpretation. The use of the word ‘discovered’ in paragraph 6 (“Rome was discovered by Romullis…”) again conveys the sense of a children’s textbook and may be indicative of a colonial theme, although this is not supported elsewhere in the text.

The final section of this essay (paragraphs 10 – 15) deals with course content in the form of the philosophies of law. This section returns to the highly personal tone of the first section and combines this with a more informal style. The sequential markers in paragraph 12, for example, address the reader directly (“when you take a look at”, “then you should look”, “you would notice”), the logical sequence markers for the paragraphs have an oral feel (“on the other hand”, paragraph 12, “Then again” paragraph 13). Specific phrases used that reinforce the sense of oral prose include “he also mentions” (line 59); “I find it very impossible” (line 61); “Take South Africa for example” (line 63); and “one can relate to” (line 68).

The second essay followed by a ‘Bibliography’ on separate page; however, there is no reference in the text to the 6 works cited. The referencing technique used in this bibliography is not correct, but is adequate to convey the details of the texts used. The texts themselves are primarily drawn from recommended reading lists.

b) Logical structure

Essay one follows a simple three paragraph structure, with the first paragraph clearly performing an introductory function and the last performing a concluding function. The middle paragraph is linked in content to the first and begins with a topic sentence (“Upon asking myself questions like these, I have come to perceive law in my own way”). This is little link between this paragraph and the final one.

The second essay has a similarly clear macro-structure, with a four-paragraph introduction. The introduction does serve a pre-structuring function, stating that the student’s intent is to provide his perception of law after having sketched its history. There is again a strong link between the introductory paragraph and the substantive section that follows it: the introduction states the need to “look at the history of the law” (paragraph 4), which is followed by the use of a heading at the beginning of the body of the text (“The history and background of our law”). There are four sub-sections, with sub-headings, to this section of the essay, all relating to the history of Ancient Rome. The use of headings to mark sections does not continue for the remainder of the essay.

The body of the text breaks at paragraph 10 from history of law into jurisprudential understandings of law. There is no lead-in or heading to this section. With the exception of paragraph 11, which stands as an example of the ideas put forward in paragraph 10, each paragraph of paragraphs 10 - 14 covers a different approach to law, with no attempt made to relate these to each other. The sentence structure in this section is shorter than it is in the Introduction and there appear to be more grammatical and ‘typographical’-type errors than in the introductory section. The lack of macro-structuring in this section possibly indicates a struggle with the content; however, paragraph-level structuring (the ‘topic sentence’ rule) is still evident.

The final paragraph (paragraph 15) presents the conclusion to the essay. This conclusion talks about “interlinks and parallels” between the approaches that were not made explicit in the text, and, although reiterating the student’s position, does not attempt to summarise the argument made.

The structure of the introduction and conclusion to the two essays shows remarkable similarity: both
essays begin with a reference to ‘mind’: the first essay begins with the sentence “It has crossed everybody’s mind that there are things that we can and can’t do” (essay 1, line 1), whilst the second begins “In my mind, I have this picture…” (essay 2, line 1). The structuring moves in the ‘introductions’ to each essay (stanza 2 in essay 1 and paragraph 4 in essay two) clearly set out the task that the student attempts to address in each instance: in the first, to set out his views (“I have come to perceive law in my own way”, line 5), and in the second, to explore the origin of law prior to locating his view (“Prior to stating what my perception of law is, I think it is necessary that we look at the history and background of the law we have”, lines 19 - 20). Both essays have in their conclusions a reference to the concrete object law: in essay one, the student claims to be interested in studying law because “these rules change and increase as a result of more people being in contact with each other” (lines 20 – 21). In contrast, in the second essay, the student “found it difficult and confusing to mention and the departments especial civil law, public law, delict etc” (lines 89 – 90).

c) Concept elucidation

There is no evidence in the first essay produced by this student of any prior knowledge of the concept, as it is understood from the lecturer’s perspective.

A considerable portion of the second essay is spent on the ‘origin and development’ of law, with a lengthy discussion on Roman law (2 out of a total 5 pages), which is marked by the lecturer as irrelevant to the discussion. The theories of law covered in the course are each discussed in a paragraph. Although there is no foregrounding to this section, it is apparent that this section attempts to locate the student’s personal position (evident in statements such as “I have to admit that my personal initial understanding…”, line 57; “I find it hard to believe”, line 71; and “The concept that I have most identified with”, line 81), and through this, is an attempt at argument construction. However, since there is no critique offered of any school with the exception of the sociological school, the resultant choice appears as opinion, justified by its ‘correctness’. This suggests some confusion between the levels of interpretation of law as an abstract concept and law as practice. The ultimate position adopted by the student, that of positivism, is adopted because it is ‘clear’ and can ‘explain’ law.

Although the philosophies of law are given value through the weight accorded to this section (two pages), and through the phrase ‘great philosophers’ in the introduction, there is very little depth in the discussion of these philosophies. Specific theorists are mentioned only with regard to the sociological and the historical approaches. There is an evident confusion of the two theorists mentioned in the historical school.

The ‘forms of law’ distinction is raised only in the conclusion to the essay. Sources of law are not mentioned at all. There is no reference to the related concepts of religion, morality and justice (except within the section on positivism, which is seen as ‘clearly stating’ law’s position with regard to these concepts).

d) Thematic analysis

The thematic structure of the two essays produced by this student is remarkably similar. In the first essay, the broad theme play was choice - identity - origin, and then implementation - identity - variation, with the hinge in the middle being provided through denotative definition. A comparison with the second essay shows the similar pattern of themes prior to the hinge: in the first essay the introduction (first two stanzas) moves through the ‘choice’ theme, established through the sentence “it is not that we cannot do these things but it is just that we are not allowed to” (essay 1, lines 2 – 3), to identity “I have come to perceive law in my own way” (essay 1, line 5). The introduction to the second essay implicitly recognizes choice, but moves the emphasis from choice to consequence.
(“law) is actually brewing around you waiting to punish or protect you and to expose you to all the legal consequences”, essay 2, lines 10 – 11), and then begins to set up identity (“Prior to stating what my perception of law is...”, lines 19 - 20). The theme of origin which, in the first essay follows the identity theme, is continued in the second essay through the description of Roman law origins (a content level shift from the “early days of man” in essay 1, line 6).

The ‘hinge’ in essay one is provided through the denotative definition: “Law would therefore be the study of these rules which everybody would be familiar with in order not to disobey them” (essay 1, lines 10 – 12). The structure of the second essay mirrors the hinge pattern (with paragraph 10 providing the crucial break between the redundant history section and the theories of law section); however, the hinge itself reflects a crucial development in understanding: “I have to admit that my personal initial understanding of law was along the lines of ... the sociological approach ... I am however convinced to shy away from accepting this concept of law as being correct...” (lines 57 - 60). The development is not necessarily in the rejection of the sociological approach, but rather in the understanding of the previous denotative definition as being representative of a sociological understanding. This understanding requires an additional level of abstraction from the previous understanding.

The theme play in the first essay following the hinge was implementation - identity - variation. In the second essay, the implementation theme has been entirely replaced by the understandings / theories of law theme. The other two themes are, however, structurally retained: identity in paragraph 14, “The concept that I have most identified with...”, and variation in paragraph 15. This variation, which in the first essay was established through diversity and evolution (“rules change and increase”, essay 1, line 20), is in the second essay established through form (“difficult and confusing to mention all the departments”, essay 2, line 89).

e) Voice

The student positions himself strongly as a ‘student’ in both essays. This is stated explicitly in essay one (“the reason why I am a law student”, line 18). In essay two, this is established explicitly through reference in the introductory section of the essay to the course itself (“what I have went through at Law School in my Introduction to Law class”, line 5) and implicitly in the personal approach the student brings to the task in essay two: he critiques his earlier personal understanding and attempts to develop a new understanding. The focus that he brings to the task is thus on the activity of learning, rather than on the object of that study. In this strong personal approach he provides a very honest evaluation of this learning, effectively admitting that he has not understood much of it (“It was also very difficult to have an overall grasp of all the concepts of law because of this”, line 17; “I found it very difficult and confusing to mention all the departments especially civil law, public law, delict etc”, line 89).

The strong student location and concept uncertainty evidenced in essay two do not allow the student to establish a strong authorial position. Although external authority is referenced, this is not cited in the text, and no authority is therefore drawn from these sources. The lack of clear logical structure, and the attempted position taking without having developed an argument, further contributes to a picture of uncertainty. In contrast, in essay one, where the student explicitly sets out to give his opinion, the text is clear and logical.

This picture of uncertainty is emphasised in the second essay in the most prominent feature of this essay: the metaphor of law as a “powerful thunderstorm cloud brewing” (line 9) around him. The experiential value conveyed by this metaphor is that of overwhelming danger. The value of the difficult of law expressed in the course itself appears to have manifested in this instance as student confusion: even though the student expressly states that “the course has helped me dispel … the confusion” (line 15), confusion remains evident throughout the essay.
There is an implicit preference evident in the student’s first essay for the orderliness of clearly defined ‘rules’. This appears to have followed through into the second essay in his search for ‘correctness’. The lack of precise definition and the concept indeterminacy expressed in the course appear to have contributed to this confusion.

**Student 4**

a) Textual features

The first essay written by this student is handwritten in a fairly untidy writing. There is a fair amount of information presented on the page, which contributes to the ‘untidy’ impression. In contrast, the second essay is typewritten in a very big font: there is not too much information on a page. There are no corrections, and the overall impression conveyed is neat and ‘matter-of-fact’, but sparse (the essay is 3.5 pages long). There are two footnotes in the second essay (correctly referenced) and there is a bibliography (which includes the two references cited in the footnotes, plus four others not specifically mentioned in the text).

The spelling, in both essays, is good. The grammar, in the first essay is relatively free of surface error, although fairly unusual, with a high reliance on duality within a sentence (e.g. “justice can, and God willing will”, line 9; “I’m not sure that I’ve identified or was even able to fathom”, lines 20 – 21). The grammar in the second essay displays errors scattered throughout the essay; these appear to occur with a higher frequency within paragraphs 6 to 9, the section on law and morality. These surface errors, on the whole, are not acute enough to render the text incomprehensible. It is clear, however, that this is the writing of a second language speaker (for example, “on the other hand” and “on the one hand” are used in lines 41 and 46 respectively; line 23 states that “this was influenced by Greek and Hebrew”, with an article or noun missing).

The style of the first essay presented by this student is predominately informal (strong use of first person singular, use of phrases typically associated with informal prose, such as “a great example”, line 17, and “I’m not really sure”, line 20), set within an opinion tone. The style of the second essay, with the exception of the first two paragraphs and paragraph 11, is not specifically informal, but the attempt at formality is not entirely successful. The first two paragraphs, comprising the introduction, show strong usage of the first person singular, and both in content and form differ from the paragraphs which follow. Thus, for example, in paragraph 2, the student speaks of radio and television and suggests that “(t)his is usually dramatised and romanticised and the real portrayal of how law really is is not depicted honestly”(lines 5-6), in sharp distinction to, for example, lines 12 – 13 “(t)he prominent feature of law at all times and places is that its existence means certain kinds of human conduct are no longer optional but are in some senses obligatory”. Paragraph 11, which introduces the justice theme, revisits both the theme of radio and television and the more informal style, for example in “if you were to ask someone what connotations first comes to mind when they think of law – justice will come up first” (lines 52 - 54). The appeal to the reader (“you”) in this extract is also found within the more formal sections, for example in lines 17 and 41. In both of these instances, the use seems to be a slippage out of the formal style.

Despite the slippage in these and other instances, the text, particularly in paragraphs 3 to 10, does evidence recognition of discourse requirements. This is evident through word choice (such as “prominent feature”, line 12, or “inevitably interrelated”, line 18), though structural markers (“an example of this”, line 13, “the foregoing discussion”, line 29) and through the use of stance markers (“in some sense”, line 13; “tended to be”, line 19; “it may be said”, line 30). These features are less evident in paragraphs 12 to 17: in these paragraphs the student is dealing with justice and approaches to law, and the text shows a summary style with less authorial presence. Structuring moves are,
however, attempted (“Next will I discuss”, line 62; “This illustrates the fact”, line 72).

b) Logical structure

Essay one from this student follows a simple four-paragraph structure. The introduction sets out the student’s intent not to define, but to describe law as she sees it. The following two paragraphs elaborate, and the final paragraph concludes by indicating the student’s own perceived lack of understanding of the concept (or the “ideology behind the concept”). The introductory paragraph of the second essay almost seems to continue from this essay: the student has found that she is not the only one who has struggled to define the concept: academics and philosophers have similarly “attempted” (line 3).

The paragraph length in the second essay is fairly short, although the use of the large font does not make this immediately apparent. There are no section headings. The structure of the paragraphs in this essay follow very closely the instructions outlined in the course-pack: the paragraph begins with a topic sentence, which is followed by a set of sentences which ‘build out’ the idea expressed in the topic sentence. Although linking between the paragraphs is not always well established, it has been attempted in a number of places.

The overall essay structure is also very clear. The introduction is contained in paragraphs 1 and 2: although it is brief, it does establish the context and the aim of the essay (defining law in academic and philosophic terms and providing personal understandings of the concept). The body of the essay (paragraphs 3 - 17) is an attempt at an ordered sequence of the related concepts. In this regard, the student has attempted to link not only the themes of religion, morality and justice, but also to integrate this discussion with the ‘theories of law’ section (the attempt is ambitious, and is not always well-sustained, but it does highlight a fairly sophisticated understanding of how the concepts inter-relate). The final paragraph of the essay provides the conclusion. The theme of the conclusion is ‘variety’, but rather than relating to the variety of understandings which the essay sets out, in the final instance the student resorts to variety at a concrete level: variety of laws and their contents.

c) Concept elucidation

Although this student does not specifically address any of the topics raised in the course in her first essay, she does make the statement that “justice, judgement, fairness, reasoning… are all a part of someone’s belief of what law really is” (line 10). There is a foregrounding of at least some of the course content in this statement.

The student begins her concept exploration in essay two in the same manner as is done in the course-pack: paragraph 3 talks about rules functioning to create order, and paragraph 4 deals with the prescriptive nature of these rules (they are “in some sense obligatory”, line 13). These concepts are explored in the student’s own terms.

The following section outlines the relation between law, religion and morality (paragraphs 5 - 7). As in the course-pack, the connection between law and religion is explored through origin (in paragraph 5); however, the separation of the concepts in modern Western societies is not specifically established in the essay. Rather, a distinction between rationality and divinity is drawn in paragraph 6. The relationship between law and morality is dealt with in paragraph 7. Although the relationship is described as ‘complex’ (line 30), this complexity is not explored except in so far as the two “coincide” (line 31, taken from course-pack terminology).

The separation of law and morality is discussed in paragraph 8 through reference to the positivist approach: the student in doing this attempts to weave ‘theories of law’ into the ‘related concepts’
section. This attempt is not particularly successful though: the final sentence of this paragraph, which brings back the connection between law, religion and morality, makes no apparent sense in the context of the paragraph. It is possible that the student intended this sentence, and the paragraph that follows, as a critique of the positivist approach.

In paragraph 10: the student talks about a “move to legal positivism” (line 44) in a way that suggests that the student is working with the theories of law at an either/or concrete (definitional) level, without understanding the level of discussion of the different approaches. The concept of natural law is raised in this paragraph, but with no connection to the previous discussion on religion or morality.

Paragraph 11 introduces the concept of justice (with the marked switch to informal language in this section). The theme is continued in paragraphs 12 and 13, with paragraph 12 introducing the Plato / Aristotle distinction, and paragraph 13 introducing the procedural / substantive distinction. The two are not linked in the text, and the explanation given of substantial justice shows a lack of understanding of the distinction. Neither structural, nor logical, distinction has been drawn in this account between “theories of law” and ‘related concepts’.

The following four paragraphs deal with the historical approach to law. There is no reference to the sociological or Marxist approaches to law. Divisions and sources of law are not mentioned in the body of the essay, but are briefly referred to in the conclusion.

The student has, in her discussion, picked up on the concepts given greatest weight in the course: related concepts, particularly morality and justice, and theories of law are the focus of the essay as they were in the course-pack. Her discussion, however, fails to adequately distinguish concepts and levels of analysis, and shows a lack of depth: although she has not demonstrated competence in dealing with these topics, in making them the subject of her essay, the student demonstrates recognition, if not realization, of the course content requirements.

d) Thematic analysis

The second essay begins, as the first essay did, from the establishment of an identity perspective. Unlike the first essay, however, in the second essay the perspective is not isolated (the student’s focus in the first essay was on herself with no broader reference group). In the second essay, the student is “not the only one” (line 2) grappling with the topic; there is a broader group of academics and philosophers (“ancient and current”, line 3) engaged in the same activity, and with whom the student can identify. The student emphasizes this new identification by the technique of distancing herself in stanza 2 from the “general public” (line 4), whose ideas on the topic are uninformed and misled.

The theme play is the following paragraph is similar to that of the following stanza in the first essay, but shows two differences. In the first essay, these themes in this stanza were that law is implicitly a process (den-proc) which functions to maintain equality (func - s - i - m) through consequence (cons - s). In the second essay, law is described as a system of rules (den - s - r) which function to regulate (func - s - i - r: “the principle of order and regularity”, lines 10 -11) through consequence (line 11). The ‘process’ to ‘system’ shift may not be significant, however, the shift from maintenance of equality to regulation (maintenance of order) does seem to have a broader relevance within the essay as a whole.

The prescriptive nature of legal rules is dealt with in paragraph 4: the theme of authority - determination is thus incorporated: this theme was not raised in the first essay. This determination is connected to consequence - sanction (“man is forced to perform some task .... by being threatened”, line 14), which is seen as a “negative” and “evil” thing (line 15). This is interestingly contrasted with the academic view of law as a “civilizing force” (line 16).
The function of protection mentioned in the first essay is not repeated in the second. The first essay moves from this into justice - literal, and from there to justice - ideal, connecting this at the level of “belief” to what law “really is” (line 12 of essay 1). The ‘belief’ theme from the first essay, is retained in the second essay, but the focus of the content has moved from justice to morality and religion. In particular, belief is connected to “moral duty to obey the law” (line 29). The disconnection from justice at this level is established in this section through the understanding provided by the Greek philosophers that laws may be “against reason or certainly not fully justifiable” (line 28): this is a shift from the first essay where justice and reasoning had been firmly connected.

Belief is also linked to religion (and law and religion are linked because morals and religion are linked) in the next paragraph: the setting of this understanding alongside the discussion of positive law is, however, strange. Paragraph 9 does nothing to clarify this confusion: the student links subjectivity and morality, which is a “problem” (line 39) in application of law. Application of law alone, however, is also a problem (“could work out horribly”, line 41), because law and morality (and subjectivity) are connected (line 43). The explanation of positive law, and the distinction between this and natural law (picked up in the next paragraph) is thus not clear.

The justice theme which was so strong in the first essay is picked up in paragraph 11. Justice is connected to belief in this paragraph, but only at the level of lay-persons’ understanding: understandings drawn from “radio or the television” (line 51), where according to paragraph 2, “things are not depicted honestly” (line 6). Justice and equality are explored in paragraph 12. Whereas in the previous essay these two themes were intrinsically linked, here they are linked only through “ancient” ideas (line 55). Equality is linked to procedural justice in paragraph 13, but this discussion is not linked to anything else, and the discussion on substantive justice is insufficient to be meaningful.

The following four paragraphs cover the historical approach. There is no connection within this discussion to previous themes raised, however, the point that there “cannot be a universal law applicable to all places and times”, strictly speaking a nature - variation theme, seems to connect to the subjectivity - variation theme of paragraph 9.

It appears that the student’s identity movement from ‘general public’ to the ‘legal academic / philosopher’ domain has entailed a rejection of the rational justice ideal. In its stead is a variation theme, strongly connected to an attribution of subjectivity to the entire legal endeavour. The overall impression is one of disillusionment: this ideal construct, or “safety net” (line 7, first essay), has become a “negative feature” and “evil thing” (line 15). It could perhaps be the case that the student’s battle with the substantive content of the essay results from this disillusionment.

The student concludes her essay by returning to a personal location. This is set within a form - differentiation theme (function / form / origin topic). The variation aspect, at a different level, is again stressed.

e) Voice

Although there is strong reference to the personal in this student’s first essay, the placement signified by this reference is not easy to read. There is no explicit reference to a student placement, but some implicit reference to an ‘outsider’ community is indirectly evident in the student’s acknowledged lack of expertise “I’m not really sure that I have identified or was even able to fathom the ideology behind the concept…” (lines 20 – 21, essay 1). However, within the opinion tone and informal style adopted in the essay, the student speaks strongly about her own perceptions.

The student explicitly positions herself in both the first and last paragraphs of essay two as a law
student. She does this by beginning the essay with the assignment question (“what is law?”, line 1) by explicitly addressing the assignment task (“in this assignment I plan to show…”, line 7), and by concluding with reference to this task (“On that note I now conclude my assignment…”, line 79 - 80). The explicit reference group adopted at the beginning of the essay is that of the academic community (line 3); however, there appears to be some distancing from this group in the later parts of the essay (see below).

The informal style of essay one is picked up in the informal lapses in style in essay two. However, the sense of confidence within that style is not as evident. To some extent, the student’s moves backwards and forwards between the use of an informal and a formal style in essay two seem to indicate an attempt to link formal course content with her own knowledge: the informal style is often coupled with a direct appeal to the reader and takes the form of a common knowledge appeal.

Within the formal segments of essay two there is a movement from an initial authoritative tone to a less confident student placement. In paragraphs 3 to 5 she uses authority (references) to establish authority and speaks assertively (for example in “the prominent feature”, line 4, and “this link is very important”, line 17). This follows an explicit distancing of herself from the “general public” in paragraph 2. However, her strong reference to the negative features of law in paragraph 4, with the juxtaposed ‘academic’ view, which she does not explicitly adopt, appears to be a distancing strategy from the concept. In paragraph 11 she appears to associate herself with the general public (“we’ve all heard this”, line 50), and her use of the word ‘lawyers’ in paragraph 13 serves to confirm her distancing from this group (“Lawyers make the distinction between procedural and substantive justice”, line 58). If this interpretation is correct, the student is struggling to locate herself within the context, and to make the choice between insider and outsider positioning.

**Student 7**

**a) Textual features**

Both essays submitted by this student are handwritten: the second essay, however, conveys a more professional impression than the first. The handwriting itself is neater, there are fewer errors in the text, and the essay has a cover sheet, which contains essential information with no embellishment.

Paragraph and sentence length, in both essays, is predominately short. There are many spelling errors in the first essay (for example “intrest”, line 3 and “perpetrates” for perpetrators, line 5). There are also a number of the types of grammatical errors typical of second language text: the use of a double subject in one sentence (“There is no way we can go wrong if all of us we can adhere to the rules”, line 15), a tense error in another (“The court used the enacted laws…” line 10), and a difficulty with the use of plural forms of verbs and nouns (for example, in line 4, “all this binding rules”, and in line 11 “Law also help to…”). In contrast, the spelling used in the second essay is predominately good (although ‘theory’ is spelt as ‘theorie’ throughout). The grammar also appears markedly improved, although there is evidence of the same type of error as in the first (for example a double subject in line 58: “both of them they are mainly concerned…”, and a plural error in line 61: “it aim to make people aware…”).

There is little evidence of informal style in either essay. However, in essay one a number of clichés are used (“at the end of the day”, line 7; “land up in hot water”, line 14; “wrath of justice”, line 18) which, perhaps unintentionally, lend an informal tone to the text. Nonetheless there is some recognition of the formal Discourse requirements in particular word and phrase usage (for example, in paragraph 6, where the community has decided “to engage themselves in something”, rather than do something, and where they should know the “attachment of the law” rather than what the law is). The conclusion to this essay, in content as much as form (“no way we can go wrong”, lines 15 and 17),
also has an informal feel. There are no similar clichés used in essay two, and only paragraph 2 has an informal tone, primarily created through the use of a direct question and a personal pronoun (“What then is this law….? …We speak of …”, lines 4 – 5, with the latter part of this sentence - laws of “cricket, croquet and chess”- having an oral tone, but possibly having been drawn from a textbook).

In all other respects, however, the second essay evidences a formality of style, through word choice (for example, “characteristic feature”, line 19, “tailored in accordance”, lines 35 - 36), through textual marking (most evident in the use of section headings), and through the factual tone with which it is presented.

Both essays are couched in a present-tense categorical mode. Particularly in the case of the second essay, this lends a very factual feel to the work: ‘the law is’, ‘positive law is’, ‘justice is’ are expressed in very definitional terms. This style does not display the hedging typical of academic Discourse, but is typical of student writing. Recognition of other academic Discourse conventions is, however, displayed in some form in this essay in the absence of authorship throughout the substantive sections and in the strong use of reference to authority.

The first essay presented by this student is clearly researched rather than simply opinion: the first stanza of this essay is an un-attributed quote from a common textbook. There is no referencing in this essay however. The second essay is followed by endnotes and a bibliography. The referencing style not correct, but there is a very thorough attempt to reference all ideas drawn from texts to the specific pages in which they appear in those texts. However, there are no quotation marks in the text itself, and certain extracts appear to have been drawn directly from the texts to which they are referenced (for example, the text in paragraph 14 which is not typical of student writing: “if friction and waste are to be avoided among the unity of the aggregate, the atoms of the mass”, lines 64 - 65).

b) Logical structure

The first essay provided by this student is structured into five paragraphs. Paragraphs are typically one or two sentences long, and in sequence express a logical progression of ideas; each paragraph however simply states the idea, without the supporting justification or elucidation typical of academic writing. The introduction is in the form of an un-attributed definition of law that is expanded on in the body of the text. The conclusion to the essay bears little relation to the discussion or definition but is rather an expression of personal sense making.

There is a strong attempt in the second essay to formally structure its contents. Although the introduction and the conclusion do not pre-and post-structure the content of the essay they are clearly distinguished. The introduction is four paragraphs long and is separated from the body of the text by a heading; the conclusion is a single paragraph that is signalled by the words “in my conclusion” (line 71). Within the introduction (paragraphs 3 and 4) there is a fairly sophisticated explanation of the distinction between scientific and prescriptive laws. The body of the text is broken into three sections and each are headed: ‘Theories of law’, ‘Law and its related concepts’, and ‘Philosophers view on law’. Within each section each paragraph has been used to discuss a different topic. The topics are indicated not by topic sentence, but rather by a form of sub-heading use, for example, the first line of paragraph 10 reads “Law and Morality. Both the legal and moral norms which regulate human conduct….”.

Despite this attempt at macro-structuring, there is no linkage at all between paragraphs within sections, and no attempt to structure the essay as a whole by signposting or summarizing what has been said. As a result the essay gives the overall impression of being a series of (paragraph-length) points, rather than a constructed whole. Although there is a clearly marked conclusion (“In my conclusion ...”, line 74), the content of this conclusion does not relate to that of the body of the essay.
c) Concept elucidation

None of the concepts in the course are touched on in the first essay.

The second essay begins, in paragraph 3, from the distinction between scientific and prescriptive rules. The student, however, (perhaps in an attempt to put this into his own words) has used the word ‘practical’ rather than ‘prescriptive’, although the explanation that is given in line 10 is an adequate description of prescriptive laws (“Practical laws prescribe a course of action for rational human beings”).

The ‘theories of law’ section of the essay (paragraphs 5 – 9) covers the natural, positive, sociological and historical approaches. There is a quote used (in paragraph 7) to expand on the natural law concept. This quote is out of order in the text, falling between the positive and the sociological approaches. In all other respects, however, and although specific theorists are not mentioned (with the exception of van Savigny), this section provides very adequate, although short, understandings of the approaches.

The section on ‘law and its related concepts’ (paragraphs 10 – 13) covers morality, justice and religion. However, it is interesting to note that, instead of establishing the distinction between these concepts and law, this section establishes the commonality. Although the content of this section has been drawn from the course-pack itself in summary fashion, there is content deletion within that summary which allows the relation, rather than lack of relation, to be established. The final section on ‘philosophers view of law’ (paragraphs 14 – 16) introduces the view of three philosophers not covered in the course itself. Whilst the section itself is not irrelevant to the general discussion, the fact that ‘philosophers’ view of law is set aside from the ‘theories of law’ section may indicate a misunderstanding of the nature of the ‘theories’ discussion. The conclusion suggests that “if a sufficient number of instructed, free and fertile thinkers” could apply their minds to this problem, “incalculable improvement in human relations might result”: an idealistic solution to a complex issue.

There is no reference within this essay to the concrete concept ‘law’.

d) Thematic analysis

This student starts and ends his two essays in a similar manner: the introductions are both definitional, and the conclusions, idealistic. With the exception of the first theme addressed in the first essay, there is no relation in the body of the second text to the themes explored in the first.

The first essay uses two lines, and an un-attributed quote, to establish a denotative definition of law as ‘binding rules’. In the second essay, this theme of ‘denotative definition - binding rules’ is explored within the introductory four paragraphs: the question of definition is established as a philosophical one (paragraph 1), different types of laws are distinguished (paragraph 2), the “principle of order and regularity” (line 6) underlying all laws is explored in paragraph 3, and the distinction between different types of laws is explored (paragraph 4). The ‘binding’ aspect of the rules is established in paragraphs 3 (see quote above) and 4: these laws “prescribe a course of action” (line 10): they can however be “broken” (line 15). The term “community” is used in the descriptions in both essays; in the first as the body that recognises the rules as binding, and in the second, as the arena wherein the rules play an important role.

The first essay moves from this definition to an exploration of the functions of law. The second essay, however, moves straight from this into theories of law. This move from what law does, to what law is, seems almost complete in this section: the only exception to this being in the section on sociological understandings on law, where, rather than focusing on law as a social construct, the
emphasis is switched to the function of law in society.

The following section in the essay, on law and its related concepts, similarly shows little reference to the functional aspects. The first three paragraphs (in fairly complex syntax) discuss morality and justice: justice, which was not raised in the first essay, is discussed briefly, with reference to Rawls, but not to the substantive / formal distinction. The final paragraph in this section (with a notable shift in syntax) discusses law and religion, and here reverts to the functional view: “(law) aims to make people aware of what is right and what is wrong” (line 61). Although function is raised in the final section of the essay (“philosophers view on law”, paragraphs 16 - 18), for example, the function of social regulation in the paragraph on Cordeze, this seems incidental, more as a result of sources consulted than as an exploration by the student (sections of this text appear to be copied from elsewhere).

The final paragraph of the essay has a similar tone to the final paragraph of the first essay. The final stanza of the first essay, somewhat romantically, suggests that ‘there is no way we can go wrong if we all adhere to the rules’ (lines 15 - 18 paraphrased). The final stanza of the second essay suggests, again romantically, that if sufficient people considered the question of what law could do, “an incalculable improvement in human relations might result” (line 77). There is thus an appeal, in the final stanza of the second essay, to a functional definition. No further thematic overlaps between the two essays could be found.

e) Voice

There is an interesting contrast between this student’s use of the word ‘we’ in the first and second essays. In the first essay, the word is used to signal the student’s membership of the ‘community’. Thus, in stanza 2, “(i)t is essential for all members of the community to adhere to all this binding rules”, and in stanza 7 “(t)here is no way we can go wrong if all of us we can adhere to the rules”. In the second essay, ‘we’ is used twice within the introductory paragraphs. In the first instance, the reference is clearly to an insider version of ‘we’: “we speak of law” (line 4) conveys both a sense of ‘we’ being the kind of people who speak of law and ‘we’ as the kind of people who have a right to speak of law, a reference possibly to the legal academic community. In the second instance, although the reference is broader, it still establishes identity of a specific group: “we can make use of scientific laws” (lines 12 – 13) is less an activity of the general community than it is of the academic community.

The insider community adopted in the second essay allows the student to establish a strong authorial presence in writing. Within the body of the text, the authorial presence in the writing is further established by the use of reference to authority (texts) to establish authority. This reference is extensive throughout the text. The student thus speaks with and as authority. However, although he does not explicitly locate herself as student in the context, the present tense – categorical style and summary strategy that has been used are typical of student placement. The authority in writing that is evident is this case could thus either be the development of authorial authority, or it could be an authority artificially drawn from the context due to an association of authority with this educational context. Although the latter interpretation would be hard to substantiate, it is to some extent suggested by an examination of the first essay produced by this student: in this instance also a very authoritative tone was used, even though the style used in this instance was informal. Student placement could thus perhaps be read in this instance as a student positioning within a perceived authoritative context.
**Student 9**

a) **Textual features**

There is a vast difference in the presentation of the two essays submitted by this student. The first is a single handwritten page, with student details and assignment topic at the top of the page, neatly justified left. The writing itself is very neat, and there are no spelling errors. Although the grammar is in some places clumsy (often through the kind of informality that one might expect of oral rather than written text, such as in “My definition of law though is that yes, law is a science…”), it is adequate to express the student’s ideas.

The second assignment is typewritten, with a cover page (containing student name, number and assignment number, and with the course name and code and the assignment title double underlined). The essay itself, however, lacks the neat appearance of the first. This is primarily through the overuse of paragraph breaks: paragraphs are typically one or two sentences long, and where there is a second sentence within the paragraph it is frequently started on a new line (without the line break that indicates a paragraph break). Sentence construction in this essay is marked by a high frequency of error at all levels. As a result, the fluency and coherency evident in the first essay is lost in the second. Further the errors in sentence construction, punctuation and word usage are sufficiently frequent and of such a nature that the meaning of the text is obscured. For example, paragraph 10 (in its entirety) reads as follows: “Common Law is consistently passing through transformations, it’s inherent rigidity is consistent with claims of flexibility”.

Many of the errors in the text may be those of a second language speaker: the double subject in line 10 (“as hard as it may be to define it, Law…”), the lack of explicit subject and the unexpressed object and incorrect form of the adjective in lines 31 - 32 (“Also entrenched in its history are varied definitions of law and the difficult experienced in trying to define it fully”) may be examples of this. Other errors, such as that in paragraph 10 cited above, may have arisen from the student’s attempts to research the topic, and may be pieces of text which she has felt unable to paraphrase and thus has copied inappropriately. Both sets of errors indicate that the student is battling conceptually with the course, and is struggling to express course content in a simple and meaningful way.

Due to the convoluted nature of the text, it is difficult to ascertain whether the student is attempting to use the grammatical structures of academic Discourse. Some of the words used would seem to indicate that this may be the case: the first sentence of paragraph 3, for example, reads as follows: “Law is multidimensional and forever transforming, therefore making it difficult to characterise in a single terms of phrase”. The words ‘multidimensional’ and ‘transforming’, the connector ‘therefore’ and the verb ‘characterize’ in this sentence are typically associated with formal academic prose. However, there are frequent instances of informal style throughout the essay, marked by the beginning of sentences on a conjunction (“And”, lines 10 and 17), the use of the collective personal pronoun (“our”, line 19), and the use of cliches (“will of the people”, line 29; “peace and harmony”, line 38). It therefore seems likely that if the student is attempting to formalise her text, she has not fully recognised the rules for that formalisation.

The oral tone of the first essay is evident in the second text only through the author-embedded style in certain portions of the second text: this is most apparent at the beginning (paragraphs 1 – 5 and 7) and the end of the text (paragraph 36), with some reference to the personal also found in paragraphs 17 and 19. The personal thus frames the text as a whole, and appears to serve the same function in the middle of the text, ending off the ‘philosophies’ section (paragraph 17), and beginning the ‘related topics’ section (paragraph 19). Much of the text, however, is author-detached, in contrast to the strong use of the personal in the first essay, which does indicate some recognition of the Discourse rules of the task context.

There is a bibliography on last page of the text, which contains two references not mentioned in the
text, and which is set out in humanities, rather than legal, style. There is one quotation within the text (lines 51 - 52), which is in quotation marks and has the name ‘Dicey’ attached to it, but which is not included in the bibliography.

b) Logical structure

The student’s first essay is five paragraphs long. Although each paragraph appears to be an appropriate length, the handwriting is large, and closer examination reveals that each paragraph is comprised of only one sentence. There is a logical flow to the essay: the first paragraph covers the dictionary definition of the term (note that in marking this has been crossed through with the word ‘no’). The second paragraph moves from this to the student’s own definition. The third paragraph acknowledges weaknesses with the ‘own’ definition, but reiterates it, the fourth builds further on the theme, connecting the ideas expressed in paragraphs two and three, and the final paragraph critiques the dictionary version and modifies it in line with the student’s own definition. This essay thus contains a rudimentary argument structure.

In contrast, the second essay is not clearly structured. Although there is an identifiable introduction (paragraphs 1 and 2), this introduction purely sets out the topic of the essay and the student’s intention to “shar(e) her newly found knowledge” (line 6). The lack of proper paragraphing in the body of the text makes it difficult to follow the student’s line of thought. However, there are some structuring moves evident: Paragraph 4 sets up her intention to discuss ‘roots’ and ‘sources’. The student has conflated these topics and the resulting discussion in paragraphs 5 to 12 evidences the confusion between history and authority. The next section is fore-grounded by the sentence “Philosophers all have different definition” (line 33) in paragraph 13; different philosophies of law are then discussed each in single or double sentence paragraphs from paragraphs 13 to 17. Paragraph 18 sets up the ‘related topics’ theme: the paragraph itself conflates the related topics discussion with ‘forms’ and ‘divisions’, and the paragraphs which follow address all three topics. The essay is constructed in point-, rather than argument-, form. The conclusion to the essay is provided in a single sentence that attempts to state the student’s own position, however, there is little connection between this and the body of the text.

c) Concept elucidation

There is no reference in the first essay provided by the student to any of the concepts covered in this course.

The instructions for essay two include that “students should include research and insights drawn from the course itself” (course-pack, page ii). This student has taken this instruction literally, and rather than simply identifying the first part of the course (chapter 1 and 2 in the course-pack) as being relevant to the question, this student has attempted to cover most of the substantive content of the course in her essay. Thus paragraphs 4 - 11 relate to chapter 2 of the course-pack, paragraphs 12 - 19 cover chapter 1, paragraphs 20 - 25 cover chapter 6, paragraphs 26 - 27 cover chapter 4, paragraphs 28 - 32 return to chapter 2, and paragraphs 33 - 35 cover chapter 8 of the course-pack. Whilst there is nothing wrong with this approach to answering the question “what is law”, and it is in intent at least, more thorough than focusing purely on the contents of chapter 1, the enormity of the task that the student set for herself perhaps proved overwhelming. Concepts are thus dealt with at a superficial level, there is a huge amount of concept agglomeration, and an evident subsequent confusion (it is worth noting that the lecturer himself in marking does not seem to have understood what the student had attempted to do in her essay, and has accordingly marked her down).

The student begins her essay, in the first three introductory paragraphs, from the point of the difficulty of definition (this point is fundamental to the course-pack exploration of the topic), and relates this
difficulty to the numerous divisions of law. However, she follows this, not with an exploration of division, but rather with a discussion on sources. She uses the term ‘source’ both in the sense of origin and in the sense of authority: paragraphs 5 and 6 work with origin, paragraph 7 moves to authority. Within this paragraph concept agglutination is evident: the student suggests that “our … system gets its sources from the constitution” (‘sources’ seems to be used in the ‘history’ sense here rather than in the authority sense) and she links other sources (authorities) with the constitution in a manner that suggests lack of differentiation of the subtopics (“from the constitution (legislation, judicial precedence)” (lines 19 - 20). Paragraphs 8, 9 and 10 again show the confusion that has arisen due to the origin / authority conflation. Paragraph 11 repeats the lack of differentiation of the ‘sources’ subtopics (“The South African constitution gives rise to legislation and judicial legislation”, line 28), and is substantively incorrect, both in this agglutination and in her assertion that “legislation must come from the product of ‘popular consciousness’ or ‘the will of the people’”.

The following section covers philosophies of law: the positivist and “naturalist” approaches are each covered in 2 sentences. The student then adds the incorrect category of “neutral” (paragraph 15), possibly as a personal attempt to reconcile the positivist and natural approaches. Marxism and the historical approach are then also covered in 2 sentences each (the sociological approach is not covered). The discussion in these instances is insufficiently complete to judge the student’s understanding of the topics. The student moves from this to the ‘related concepts’ theme. Her exploration of this point, however, simply raises the question of how one deals with religion and morality (paragraph 19). Paragraph 20 appears to be the student’s attempt to answer this question: in her view “Often the manner in which legislators answer these questions will ultimately define what law is for their subordinates”. She appears thus to have converted the abstract to the concrete: legislators will take decisions on these broader matters, and from there concrete law will derive. Morality and the constitution are bound up in paragraph 21, paragraph 22 brings in forms of law with constitution and paragraph 23 continues the constitution theme, again with a misunderstanding of the relationship between the constitution and other sources. ‘Divisions of law’ is returned to in paragraph 28 and the discussion continues to paragraph 32: these paragraphs show complete misunderstanding of these divisions and a very literal interpretation of the table in the course-pack. Although there is a conclusion in paragraph 36, this conclusion is couched in terms of the student’s own view of law (as a ‘culture’), not in terms of the theories presented, which is a misinterpretation of the essay task.

d) Thematic analysis

There is little overlap between the two essays presented by this student in terms of the themes addressed. Although there is some evidence of similarity in the introductions and conclusions to the essays, the functional hierarchy that was set up in the body of the text in the first essay is not mirrored in any way in the body of the second text. The similarity between the two introductions is one of tone rather than content: both essays use reference to authority as a base from which to begin. In this first essay this authority is the dictionary and its definition of law, in the second essay this authority is the legal community (which stands in contrast to the “ordinary person” in line 1). The first stanza in essay 1 is followed by an identity establishment: “my definition” (line 4 of the first essay), as opposed to the dictionary definition of the first stanza. The second essay mirrors this pattern: “Admittedly I too held some of these misconceptions...” (line 5).

The only other similarity between the two essays is found in the conclusions: the first essay establishes basis - ethics(morals) as a personal understanding of law (“(law is the) moral fibre that binds us together”, line 21 of the first essay); the second substitutes the direct reference to morals by an indirect reference to the same theme through “culture”: “I view it as a culture, a way of life” (line 90). This ‘cultural’ understanding, evident in the first essay in the repeated use of the word ‘community’ is a strong theme of essay 2: in this instance it is raised in the sense of cultural difference (for example “(w)e all do not share the same history”, line 44; and “we all have different beliefs”, line 48).
There is strong reference to the personal in the first essay provided by this student, but the location that she has adopted in this essay is difficult to categorise. A strong opinion tone is used: this opinion is not specifically cast as an ‘outsider’ opinion, but seems, from the predominately formal tone and from the personal position taken within a recognisable argument structure, to be an insider location.

Although the student does appear to adopt a ‘student’ position in the second paragraph of the second essay by explicitly referring to the course itself (line 4), there is little other evidence of this placement in the essay. Her brief coverage of substantive topics does not seem to be speaking directly to a lecturer and does not appear to be aimed at demonstrating competence over basic issues. This impression may arise simply as a result of the student’s misunderstanding of the concept itself, but, for example, in paragraph 10, the discussion about the rigidity or flexibility of common law is beyond what is discussed in and necessary to the course. Similarly, paragraph 11, in its discussion of legislation coming from the “will of the people” is both incorrect and additional to course content. The addition, in the theories section, of a “neutral” approach is a further example, in this instance of a fabricated category. The student appears to be speaking with authority and expertise, but has not established her claim to that authority either through reference to external authority, or through competent discussion of the basic topics.

This apparent ‘insider-authority’ stance adopted by the student appears also to be at odds with the group identification that she adopts in the essay. Although in the first paragraph of the essay, she distinguishes herself from the “ordinary person” who “has a one-sided view” (line 1) of law, the use of the first-person plural in certain instances in the essay suggests a different placement. Although the use of the word ‘our’ in paragraphs 5 and 7 could be in reference either to the legal community or the broader community, the inclusive ‘we’ used in paragraphs 17 and 19 is strongly suggestive of a broader community identification. The issue of ‘community’ is clearly important to the student: this was a strong theme in essay 1 and is continued in essay 2 through references to “will of the people” (lines 29 - 30), “peace and harmony” (line 38), accommodation of cultural differences (paragraphs 19 and 19), and her view of law as a “culture” (paragraph 36). This understanding of community as basis for law that the student appears to hold seems to be interfering with concept acquisition in this case: whether this is a direct interference or has occurred through reinforcement of her beliefs in essay 1 (for which she received 50%) is impossible to say.

The two essays presented by this student are similar in appearance: both are typed and neatly presented. However, the first essay is not presented with a cover sheet, whilst the second is. This cover sheet contains, in addition to student information, a quote, justified centre and in bold font (which appears in transcription at the beginning of the essay).

The first essay is short, containing only four paragraphs spanning half a page (probably the equivalent of one full page hand-written). The second essay is considerably denser, covering three and a half pages (single space, font size 12). The grammar and spelling in both essays is good on the whole, although similar errors can be found in both: these typically are in the use of possessive rather than plural forms (for example, “idea’s”, line 4 essay 1 and “lay’s”, line 19 essay 2), and in punctuation. There is a fluency of expression in both texts, combined with an ease of use of fairly complex terms that marks the text as being that of a first-language speaker (and possibly as one whose home language has a fair amount of overlap with academic Discourse).
The first essay provided by this student shows a literary style, evident, for example, in the visual imagery with which the essay begins: (“Imagine a society…”, line 1; “… visions of anarchy, mayhem and disorder”, line 2), and in idealistic expression (such as “not destroy(ing) individualism and creat(ing) automatons”, line 25). Although the style of the second essay is predominately formal, this is marked by sections that have a similarly informal and literary tone (lines 81 - 83, for example show a similar idealistic expression and informal style: “It is a wonder with our liberal heritage that apartheid was able to materialise”). The second essay begins with a quotation, which is not inappropriate, but which again has a dramatic tone. The literary tone is further conveyed through phrases such as “(justice has) not triumphed” (line 26 – 27); “paves the way for a just and righteous future” (lines 94 - 95); “heart of the legal system (line 105) and “sands of the absolute” (line 106) and through the reference to a theatrical production in line 55. The use of direct questions in the text (lines 21 and 37), although normally associated with informal text, appears in this text to again be used for dramatic effect.

There is clear evidence of academic grammatical features within the text of both essays, particularly in the structural marking of the text. Phrases such as “in order to” (essay 1, line 12), “the reason why” (essay 2, line 10), “it is also believed (essay 2, line 12), and “there are two schools of thought” (essay 2, line 38) are common, and display also the passive voice typical of this discourse (the only personal reference in the second essay is in the last line of the essay, where the student states her own position on the question, having established her authority to take that position, lines 113 – 116). However, the lapses into the informal-literary style mean that this discourse is not expertly maintained throughout the essays. Moreover, the use of short sentence structures in the second part of the second essay (the sentence structure from paragraph 12 is noticeably shorter than in the first part of the essay, or in essay one) provides a strong knowledge-retelling tone to the essay: the impression conveyed through this tone is that the student evidences recognition of the Discourse, but uses it as a student, rather than as an expert.

Footnotes are used throughout the second essay, both to reference direct quotations and specific ideas drawn from the source. The final page of this essay contains a bibliography which contains the same references as given in the footnotes.

b) Logical structure

The first essay provided by this student has four paragraphs. There is no clear introduction / conclusion structure, but the essay does have a ‘flow’ of ideas. The paragraph structure of the second essay, rather than following the free-flowing form of the first essay, follows the model provided in the course-pack, and does this successfully. Each paragraph begins with a topic sentence, which is then explored in the remainder of the paragraph. Each paragraph also connects very clearly to the one following it. The essay as a whole is thus clearly structured and easy to read.

The use of the strong connections between paragraphs in the second essay does make it difficult to distinguish the introductory section from the body of the text: if the overall intent of the paragraphs is studied, however, it appears that the introductory purpose is served by paragraphs 2 - 4 (with paragraph 2 serving to broadly define the concept, paragraph 3 serving to introduce the concepts to be used in the essay, and paragraph 4 serving to set up the fundamental question that the essay attempts to address). If this reading of the text is correct, then the student has structured the essay at both micro and macro levels: not only at the level of the paragraph, but also at the level of the text as a whole. There are some useful structuring moves within the text itself: paragraph 8, for example, serves both as a ‘conclusion’ to paragraphs 5 - 7 (on related concepts), and as an introduction to paragraphs 9 - 14 (on theories of law). Paragraph 14 serves as a conclusion to the preceding section (theories), and paragraph 15 serves as an introduction to the following section (sources, functions and forms of law). Although these moves are fairly sophisticated, a cursory reading of the essay might
lead one to believe that the essay was repetitive, and that ideas were used out of sequence. The conclusion of the essay provides an overview of the content of the essay, but phrases this in a more literary form than is used in the rest of the essay.

c) Concept elucidation

There is no reference in this student’s first essay to any of the concepts covered in the course, with the exception of a mention of the justice-as-ideal concept. The second essay, in contrast, covers almost all of the concepts outlined in the course-pack. It does not necessarily follow the same order as the course-pack, and does not use the same terms of explanation. However, it does provide a very concise account of the relevant topics.

Paragraphs 5 to 8 deal with the religion / justice / morality themes. Paragraph 5 very succinctly explores the problems inherent in using religion as a basis for law, religion as an origin of law, and the distinction between the two concepts in Western society. Paragraph 6 explores the ‘justice’ theme: the account given here is a little inadequate. Justice is described as ‘subjective’ (line 24) as thus distinct from law: the distinction between formal and substantive justice is not explored, and Rawls’ model of dealing with the subjectivity problem is also not mentioned. The complexity of the relation between law and morality is, however, adequately explored in paragraph 7. Paragraph 8 serves the function of summarizing the ideas expressed in paragraphs 5 to 7, and framing the philosophical debate to be raised in the next section.

Paragraphs 9 and 10 serve to outline the natural and positivist understandings of law. Within the natural law section, although the explanation presented is clear, there is no reference to the religion / reason distinction. A quote drawn from a text outside of the course, is however used effectively. The explanation provided for positivism is brief, and does not explore different theories within this concept. Paragraph 11 uses an example (the play Antigone) to illustrate the difference between the two. Paragraphs 12 and 13 cover the historical approach and the sociological approach respectively; the discussion in these instances is again very brief, but adequate.

Paragraphs 14 to 16 are difficult to place within the essay structure. It seems that the student is attempting in these paragraphs to classify South African law using the theories of law as ‘models’. Thus, in paragraph 14, she uses Dugard to show what a natural law system would comprise, in paragraph 15, she uses the historical approach, as well as sources of law and examples of attempts to create equality in our society, to reach an understanding of what our current system is based on, and in paragraph 16 she finds a contradiction within her integration of historical and natural approaches, but resolves this again through using the historical approach (“Most countries, whose background is the same as ours, managed to develop a natural state that advocated liberty and equality, a long time before us. It is a wonder with our liberal heritage that apartheid was able to materialize. This is if you do not take into account our countries history and position at the time”, lines 82 - 83). If this interpretation of this section is correct, it shows that the student has not quite grasped the concept of theories of law, but is attempting to use these theories in a concrete fashion.

Paragraph 17 looks at divisions of law, highlighting only the criminal / civil distinction, and paragraphs 18 - 20 examine sources of law, with the Constitution covered in paragraph 18, legislation, and common law and custom covered briefly and adequately in paragraph 20. Paragraph 19, although located within sources of law and continuing with the discussion on constitutions, is actually on forms of law (written or unwritten), and seems to indicate inadequate differentiation of these topics.

d) Thematic analysis

Although not strongly evident, there are some links in the themes addressed by the student in the two
essays submitted. Thus, the first essay contrasts social control in the first stanza with individual control in the second. The second essay again uses the social / individual distinction in the first two paragraphs, but rather than linking these to a control theme, uses these dimensions to examine the concept of a definition of law. In the first paragraph (paragraph 2 in transcription, as a quote is used to introduce the essay as paragraph 1), the search for a definition of law is explored as a social search for meaning, and in the second paragraph, individual diversity in expectation is used for the same purpose. This variation theme picks up a strong variation theme from the first essay, although in the first case the individual variation theme was strongly linked to the theme of variation in law.

In both essays, a strong social - intent - maintain theme (lines 12 - 13 in the first essay, lines 16 - 17 in the second essay) follows an individual / social distinction. This leads in the first essay to a denotative definition of law (rules which guide and control, lines 13-14). The second essay replaces the denotative definition with a more sophisticated understanding of the nature of the problem: “It is the questions that deal with where the law should come from and what it ought to constitute that result in the real dispute” (lines 17 - 18).

The choice theme, which was used as resolution to the social / individual contrast in essay one is reiterated in essay two - this time as a personal choice between accepting positive or natural law (stanza 11). The only other theme that continues from the first essay into the second is the justice theme: in essay one this is set as a basis or condition for law’s acceptance by individuals (stanza 3). Essay two, in paragraph 6, repudiates the notion of justice as a general basis for law, but re-establishes it as an aim for South African law, in paragraph 15.

e) Voice

The two essays submitted by this student have a similar style and tone: both present an opinion in an argument form and a formal style, which includes the use of academic grammatical features (such as author-evacuated text). The confident use of this discourse suggests an identity positioning as a member of the academic community.

However, as a slippage out of formal legal academic style, the student uses literary phrases within both texts: these provide a personal feel to the text and it appears that the student uses this device to connect her own knowledge to the content she is conveying. An examination of the phrases used shows that they are in all instances idealistic statements about law. There are two possible interpretations of the contrast produced in the text as a result of the use of this strategy: it may be that the student is not yet adept at legal academic discourse, and that the lapses in style mark her as an idealistic aspirant member of this community. It may, however, be the case that she has positioned herself as a member of the academic community (note that although she uses authority to establish authority in her writing in an appropriate manner, authority in the text is not strong), but not necessarily of the legal community. This interpretation may be supported by the lack of obvious legal discourse markers in the second text.

Student 16

a) Textual features

The first essay presented by this student is handwritten in a fairly untidy script, whilst the second is typed and appears neater. Both essays are accompanied by a cover sheet: additional information, in the form of the course name and course code, is given on this sheet for the second essay. The first essay is exactly a page in length; the second is fairly short at three and a half page, although the appearance is dense (small font, single space). The final page of the second essay contains a
bibliography with only one reference, which is to the course-pack. There is no footnoting.

Although certain paragraphs are short, the grammar, spelling and punctuation are virtually error-free throughout both essays. Both essays have a fluency of expression which conveys a sense of ease with the language used. The style of the first essay is informal, conveyed primarily through its use of the first person singular to convey personal feelings and opinions on the topic. The second essay, by contrast, does not use the first-person singular in any instance, although the first person plural (‘our’) is used in paragraphs 2 and 30: both of these paragraphs evidence some of the personal opinion tone and informal style displayed in the first essay (although the use of a formal style is more apparent in the second essay even within these paragraphs. Compare, for instance, lines 3 – 4 of the first essay “All aspects of our lives are touched by the law, and the penalties for those who break it can be harsh”, and paragraph 2 of the second essay “The law is related to all areas of our lives and governs almost every action. Many people have at one time or another broken the law and for most this comes with a sense of guilt; even if prosecution is not forthcoming”). The remainder of the second essay does not show this use of tone and style.

There are two maxims used in the second essay which give also an informal feel to the text, both are found in the section on justice. One of these is repeated from the first essay (‘justice is blind’ line 9, essay one and line 54, essay two), whilst the second is used only in essay two (the modified maxim “justice is in the ‘eye of the beholder’”, line 57 in essay two). In all other respects, however, the style of the second essay is formal, and displays typical academic discourse marking. This marking is both structural, with the lead sentence to every paragraph providing clear signposting of the intention of the paragraph, and conventional, displaying the explicitness characteristic of this discourse (evident for example in the sentence “It is by strict, literal definition the rules that govern a state or other geographically defined place”, lines 7 – 8). The text thus displays recognition, and at least a partially competent realisation, of the textual requirements of the discourse.

There is, however, an over-reliance in the text of the second essay on the present tense categorical mode (for example, “natural law …is”, line 16; “positivism is”, line 20; the historical approach … is”, line 24; “justice is”, line 54) that conveys a sense of a reproductive mode of operation. This is supported by the lack of connections drawn between content concepts (see concept analysis below), which suggests that the students has used a summary strategy in the essay. The present tense categorical mode used leads to a very ‘factual’ feel in the text. This, combined with the author-detached formal style of the essay, provides a text that conveys no expression of personal stance.

b) Logical structure

The brevity of the paragraphs used by this student in the first essay is evident in the number of paragraphs in the essay: six paragraphs are used in a handwritten single-page submission. This use of very brief paragraphing is evident, although not as strong, in the second essay; also evident in this essay, however, is that the paragraphing is an attempt to structure in the required manner. Thus, the student does use a topic sentence for each paragraph, with the remaining sentences in the paragraph linked to this topic sentence. She has attempted to use only one main idea per paragraph, and the use of the short paragraph structure is perhaps the result of overdoing this attempt. She has not managed to provide links between the paragraphs, in either this essay or the first, leading to an overall sense of a series of points, rather than a whole. The lack of sequence of the content in many places in the second essay further highlights this impression. Beyond this very distinct structuring flaw, there is little similarity in structure between the first essay and the second.

The first essay relies for its introduction on a definition of law (as “rules that ordinary people live by everyday”, lines 1 – 2). There is little connection between this paragraph and the body of the essay that follows. The conclusion to the essay is couched in terms of personal motivation, and again shows no relation to the body content. The introduction to the second essay is not clearly defined, either
structurally or in terms of content. It seems likely that paragraphs 1 - 3 are intended as the introduction: however, as with the first essay, this introduction does not perform the functions that the course-pack outlined. The conclusion to the essay (paragraphs 30 - 31) similarly does not perform the function outlined in the course-pack.

The body of the second essay moves from the introduction to the history of law (paragraph 4), and then to approaches to law (paragraphs 5 – 10). This section is not in any way fore-grounded, and there is no connection between the paragraphs, so the ideas expressed appear to be isolated concepts rather than sub-topics within a section. This is followed by ‘types’ and ‘forms’ of law in paragraphs 11 – 13. The body of the text contains one strong structuring move at paragraph 14. This paragraph serves to introduce the section that follows on justice, religion and morality (‘related concepts’, paragraphs 15 - 29). Although paragraphs in this section are still short, they are better linked than in the previous section, and there is more ‘flow’ to this portion of the essay. Paragraph 30 raises a diversity theme that follows from the previous discussion on morality, but seems to serve a broader function in the text of personal location of the author (this paragraph has the opinion tone / informal style of the first essay) as a means of concluding the essay. The conclusion is completed in paragraph 31.

c) Concept elucidation

There are two concepts in the first essay provided by this student that are connected with course content. The first is the concept of justice, which is used inappropriately in this essay (‘justice is blind’, stanza 3). The second is the connection between law and governance, linked to the constitution (stanzas 4 and 5), again, this concept is used in this essay in a superficial manner.

The second essay, for the most part, follows the content outline provided in the course-pack. The introduction to this essay raises the idea that law can be interpreted in different ways (paragraph 3): this understanding is however linked in the paragraph to the concrete concept law (the “strict, literal definition”, line 7, is contrasted to “countless divisions and functions”, line 8, rather than to philosophical understandings). The notion of philosophy is mentioned in line 1 of the essay; however, the student appears to be misinterpreting the philosophical quest as a search for the correct answer (“(the) actual meaning (of law) has eluded (the philosophers)”, line 1). The understanding of law as “rules that govern” (line 7) is provided, and the complexity of the topic is related to its numerous “divisions and functions” (lines 8-9); the distinction here being somewhat superfluous since the words are used interchangeably in the course-pack text.

The following section of the essay introduces the topic of the “roots” (line 10) of law: although the broad history of law is touched on in this section, the section does not move into sources of law as it might be expected to. The following paragraphs each outline one of the major theories of law. Since there are no structuring moves to this section it is difficult to see how the student intended this section to fit within the broader essay structure, but given the introduction to ‘divisions and functions’, the introduction to ‘roots’ in paragraph 4, and the return to the themes of form and function in paragraphs 11 - 13, it seems that the theories section has been substituted for a section on sources of law (which are not subsequently addressed in the essay). This interpretation (the attempt to put a meta-concept at the level of a concept) would be supported by the search for ‘actual meaning’ in the introduction. Although the concepts expressed in this section are not incorrectly conceived, they are dealt with in a very brief manner, and there is no attempt to link the concepts.

The ‘forms of law’ topic is dealt with in paragraph 11, and ‘divisions of law’ is dealt with in paragraphs 12 - 13. In both instances this is done in simple point form, and no structuring is provided. A distinction is drawn in paragraph 12 between criminal law and civil law without definition of these terms; in paragraph 13 a distinction is drawn between public law and private law, and an attempt is made to relate these concepts to the previous distinction. Thus criminal law is described as an aspect
of public law. The civil law/private law connection is not explored.

The following very long section, from paragraph 14 to paragraph 29 deals with the ‘related concepts’ topic. ‘Justice’ is accorded the most weight in this section, spanning paragraphs 16 - 22. Following from the first essay, justice is set up as an “ideal result” of law in this essay (paragraph 15), in contradiction to course teachings. This ideal result is, however, contrasted to subjective understandings of justice in paragraph 16. There is no link from this discussion back to a distinction between law and justice. Paragraph 17, through the example of apartheid South Africa, equates justice with the equality ideal: although the following section deals with the distinction between formal and substantive justice, and specifically mentions that the apartheid system was justified through application of formal justice, this understanding has not been carried through to the justice and equality argument in paragraph 17. The subjectivity issue is revisited in paragraphs 20 - 22 through a discussion of Rawls’ theory. This discussion is of itself fairly detailed, although again, it is not linked back to the earlier discussion on subjectivity and thus does not evidence any complexity of concept connections.

Religion is dealt with in paragraphs 23 - 29. In this section a distinction is drawn between religious states and secular states. There is an attempt to incorporate in this discussion the theme of religion as origin of law (from the course-pack). The student has however not connected this at the level of religion as origin-basis of law, but rather has attempted to deal with this theme as the origin-of-religious law (line 90). The section which follows (paragraphs 26), however, connects morality to religion through origin, and morality to law through their appeal to the “same standards” (line 96). The following two paragraphs continue the morality and law comparison, in much the same way as the course-pack does, whilst paragraph 29, perhaps a little out of place, returns to an examination of morality itself, linking to the previous theme of subjectivity.

The conclusion to the essay stresses the indeterminacy theme: in this section as throughout this essay, the concept is dealt with at a concrete level. The essay thus, in overview, displays a conflation of concept levels, and a lack of connection between concepts which may result from the summary strategy used, or may evidence disconnected concept relations.

d) Thematic analysis

There is a strong relation between the two essays presented by this student in thematic structure, although not necessarily in content. In the first essay this student begins by defining law as a system of rules with consequence (stanza 1). The second essay problematises definitions of law in paragraph 1, moves briefly through a consequence theme in paragraph 2, and then moves back to a denotative definition of law as ‘rules’ is paragraph 3, qualified with the understanding that “law can be interpreted in many ways” (line 7).

The first essay moves from this into a basis - value theme. The second essay, however, moves into ‘roots’ of law (line 10): the student’s use of the word ‘basis’ in this section suggests a movement from basis – value to basis – origin. The discussion on philosophies of law that follows and is not structurally distinguished from this section also seems to follow a ‘basis’ theme: she explores theories of law in terms of what they are “based on” (line 20).

The substance-imperfect theme which follows in the first essay in stanza 3 is repeated in essay two in paragraph 15: the fallibility of law, specifically with regard to human error, is explored in each essay in the same terms, although the language used in essay two is more formal. In both essays this is used to introduce the justice theme. In the first essay, however, the concept is limited to literal justice (formal equality); in the second essay, the distinction between formal and substantive justice is explored, and the substance-imperfect theme is used again within the substantive justice topic to introduce the thinking of Rawls.
Although not specifically related to one of the major themes identified in analysis of the first essay, the concept of impact is addressed by the student in the final stanza of the first essay. This ‘impact’ theme re-appears in the pen-ultimate paragraph of the second essay in the sentence “Law is what stops our rights from being trampled and prosecutes those who try to do so” (lines 109 - 110). The final phrase of the first essay (“without it we would be truly lost”, line 23) was in interpretation read as a reference to an absolute value basis of law. The second essay again makes reference to value in closing, but this time to a relative value basis, with a variation evolution/diversity theme: “The law changes and evolves with society and reflects the values and traditions of any given time and place” (lines 113 - 116).

e) Voice

In the first essay submitted this student establishes authority in her writing within the opinion stance that she has taken: she appears confident in writing because what she is expressing are her own views. There is less authority established in the second essay: although the text of this essay is phrased in the formal, author-evacuated style of academic discourse, the student does not appear to have positioned herself strongly as an insider to the field and has not used techniques such as referral to external authority to establish her own position within the text. Rather, the text has a reproductive feel, and uses a summary rather than argument structure. This locates the student ‘as student’ in the context. The lack of value attachment to any topic discussed, with the exception of the justice topic that is weighted by the length of this discussion, is noticeable.

The student’s handling of the discourse is, however, competent, which suggests that the lack of strong personal positioning in the context may be the result of choice rather than lack of recognition of the requirements of the Discourse. This interpretation is supported by the student’s use of the possessive pronoun “our” in paragraphs 2 and 30, in both instances to mark a broader societal, rather than a legal, Discourse community membership.

Student 17

a) Textual features

The first essay presented by this student is handwritten and presented without a cover sheet. In contrast, the second essay is typed and has both a cover sheet and a contents page: in the latter sections of the essay are enumerated and their page numbers are detailed. In addition, endnotes are used in the second essay, with the correct referencing technique. A number of texts additional to the course reading have been consulted and cited. The second text thus presents a professional and discourse-appropriate appearance.

There are a few spelling errors in each essay. Both essays display an attempt at fairly complex sentence structure. Although, for the most part, the attempt is successful (with the complexity more thoroughly sustained in the second essay), there are instances of clumsy formulation in both (for example, the double subject in stanza 3 in the first essay, and the unusual sentence structure in lines 82 - 84 in the second).

The first essay provided by this student used an opinion tone set within a formal style. There is strong personal location in the account both in its tone (“I believe”, line 1) and in its content (“why I have chosen to study law”, line 13). In the second essay, the personal reference is entirely removed, but the style used in the first essay is developed further. This style is developed in the second essay: the student again situates the essay as an opinion tone / formal style, but the opinion provided in this
instance is less personally referenced (fewer references to the first person singular), and has a stronger discourse location in its formal style. The most striking feature of the second essay (not strongly evident in the first essay) is the word choice used in its construction: strong adjective – noun combinations are used throughout the essay. Examples of this include “decisive criterion” (line 33), “evidently portrayed” (line 40), “subjective prejudices” (line 70), “distinguishable facet” (line 86) and “distinctly separable” (line 92). These word choices both act as stance indicators and as a means of authority establishment: the student very explicitly indicates what he means to say, and the strength with which he says it reduces any possibility of interrogation. This word usage, together with the use of other stance markers (for example, the reduced stance marker in “This is generally due”, line 1), structural markers (e.g. “firstly” and “secondly” in paragraph 13), a passive, author-evacuated style (e.g. “it has been discerned”, line 6) and a formality of tone (e.g. “Nevertheless, this aim of law is impaired by some predominant factors”, line 64), marks the text as ‘academic’. Moreover, a Latin phrase is used in one instance in the second essay, correctly italicized, which shows some familiarity with legal academic Discourse.

b) Logical structure

The first essay written by this student is structured into four paragraphs. Each paragraph has a main theme and there is, at content level, some linkage between the paragraphs which provides a ‘flow’ to the essay. An introduction and conclusion are provided, the first based on personal definition, and the second, on personal hopes.

The introduction of the second essay, as in the first, again deals with definition, in this instance dictionary-based rather than personal, and the essay again ends on a personal note, this time couched not in terms of hopes, but rather in terms of personal approach to law (paragraph 21). As in the first essay, the second essay has a fluency resulting from the connection of ideas between paragraphs (with paragraphs often beginning on a logical connective, such as “although”, paragraph 4, and “however”, paragraph 5). However, the essay lacks clear signposting structurally: there is no fore-grounding or summary of content and neither the introduction nor the conclusion serves the function that it should in this regard.

Although the paragraphs in the second essay are long they are broken into ‘sub-paragraphs’ by the technique of starting a new idea on a new line without using a blank line to indicate new paragraph. [Note: in transcription, these sub-paragraphs have been numbered as paragraphs, with their status as a sub-paragraph indicated by means of indenting the paragraph.] Although both larger and smaller paragraphs do tend to have a main theme, this is not clearly discernable from the topic sentence, and the technique of ‘sub-paragraphing’ used adds further complexity. As a result, it is difficult to follow the structure of the essay. It appears, though, that the essay is constructed in a more discursive than argument-based style: the essay seems to pick up an idea and follow it through, rather than tightly structuring each concept within an overall argument theme.

c) Concept elucidation

Morality is the only concept from the course which is touched on in the first essay submitted by this student. The other main theme covered in this essay, which is that of the changing nature of law, is not related to course content.

At a content level, the second essay achieves depth in some areas, perhaps at the expense at breadth in others. Divisions and forms of law are mentioned only very briefly in the introduction (lines 2 - 4), and ‘sources of law’ is not mentioned at all. The prescriptive nature of law is explored in some depth in a comparison drawn with morality in paragraph 2. The concept of morality (the only concept from the course mentioned in the first essay) is accorded the greatest weight in terms of length within the
essay, and is explored extensively in paragraphs 2 - 5. Some of the ideas used to explore this concept are not drawn directly from course material.

The link between religion and law is drawn in paragraph 6. This link is established through morality (religion influences morality which influences law), through visible similarity (formality and ceremony, an idea not explored in the course itself), and through custom. It is through the latter that an origin theme is established in this relationship. The secular / religious state distinction is briefly discussed in sub-paragraphs 7 - 8.

The justice concept, as an “ideal function” (line 45) of law, is discussed in paragraphs 9 to 11. The distinction between formal and substantial justice is drawn, in conjunction with the Aristotelian distinction between distributive and corrective justice. The two distinctions are not compared however, but rather are used in a manner which suggests that they entirely overlap. Rawls’ method of dealing with subjectivity is not mentioned.

Certainty, as another ideal function of law is discussed in paragraphs 12 - 13. This concept is an addition to those specifically addressed in the course.

Paragraph 14 serves the function of introducing the discussion on approaches to law. Much of the focus of this discussion (paragraphs 14 - 16) is on the natural law approach, and there is a detailed understanding of this approach evidenced in this discussion. The reason / religion sub-distinction is drawn in the discussion. Positivism is discussed in the following section (paragraphs 17 - 18) primarily in terms of its distinction from natural law. Two theorists not cited in the course itself are mentioned, but not explored, in this section. Paragraph 19 briefly but adequately covers the two approaches of the historical school, and paragraph 20 very briefly mentions the sociological approach, but without depth.

It is noticeable that is the prioritisation accorded to concepts in this essay in terms of the length of the discussion of the concept is close to that of the lecture discussions: thus, the ‘related concepts’ topic is accorded weight, and within this, the morality subsection the highest weight, and the ‘approaches to law’ topic is accorded weight, and within this, the natural law approach the highest weight. The concrete object ‘law’ is downplayed in both course and essay. The concept values espoused by the student are thus very close to those mediated in the interaction.

d) Thematic analysis

The student, in the first essay, set up a denotative definition of law as a ‘basis’ (of civilisation, line 1-2, essay one), with the social-intent function of prevent, and the individual-intent function of control. The second essay begins by disputing the possibility of a definitive definition of the concept. The function aspects picked up by the first essay in stanzas 1 and 2 are to some extent alluded to in essay two with the discussion of law and morality as ‘prescriptive norms of society’ (line 8). The predominant difference between the two that is highlighted in the paragraph in essay two is that of volition and determination: this perhaps mirrors the contrast between the functions of prevention and control that were the theme of the first essay. The distinction is, however, carried through into content: in the first essay, law was seen as something that ‘directs the lives’ (line 7) of individuals (interpreted as an individual-intent guide function), in the second essay law is seen more in terms of its control effects (‘authoritative, external, objective and formal’, line 13), whilst it is morality that picks up on the softer guidance functions (‘dispositional, internal, non-objective and unofficial’, line 14). The further discussion on morality in paragraphs 3 and 4, which distinguishes between individual and communal morality, picks up the social / individual tension from essay one; in essay two, however, the distinction is explored with no apparent discord.

The connection of law to a values basis, established through an evolution theme in essay one (stanza
3), is explicitly explored in the second essay both in terms of morality’s effect on law (lines 24 - 25), and in terms of a connection with religion as an origin of law (stanza 6). The dynamism that was associated with the evolution theme in essay one has however been significantly downplayed in essay two. This is emphasized by the focus in essay two on the predictability of law (explicitly discussed in stanzas 12 & 13, and connected in this case to a substance-imperfect theme not mentioned in the first essay).

e) Voice

This student, in his first essay, evidenced clear recognition of the Discourse context and appeared to situate himself easily within this context. In the second essay, there is little doubt that this student has established authority in his writing. The first sentence is strong and confident (“The meaning of law is debatable, there is no globally accepted definition of law”, line 1). External authority is drawn on regularly in the text, but to support statements, and thus establish the author’s authority, rather than as knowledge or authority sources in their own right. Authorial authority is further established in the text through the use of an authorial ‘we’ (e.g. “therefore we can presume”, line 6, also evident in lines 46 and 52): the use of this device allows the student to personalise the text (set an opinion tone), without detracting from the formal academic style displayed throughout the text in word choice and phrase structure. The use of this formal style, and the use of a Latin phrase (line 22) and words such as ‘mores’ (line 5) and ‘pertain’ (line 12) are evidence, not only of academic discourse recognition and use, but also of legal academic recognition. The discourse recognition evident, and the authority established, position the student, not as student, but as a contributor to the field and an insider to the discourse.

Student 19

a) Textual features

The first essay presented by this student is hand-written, with titling on the same page as the essay proper. The essay is neat, but does contain some spelling errors (“forceses”, “injusticeses”, lines 7 and 22). This neat appearance is considerably enhanced in the second essay: the essay is typewritten; it has a cover sheet; the first page of the essay begins by repeating the topic, in bold font, centred, and underlined; the essay is 4.5 pages long, with double spacing, and is justified. This formality of presentation underscores the formality of the tone of the essay. The spelling errors found in the first essay are not repeated in the second.

The first essay presented an opinion in a personal tone (the first-person singular is used three times in the essay), but couched within a formal style (evident, for example, in the use of phrases like “in so doing”, lines 7 and 11). The sentence structure is complex (for example, stanza 4), and although a few grammatical and punctuation errors are evident (e.g. “drawing” instead of draw in line 11, the use of the comma is line 5), there appears to be an ease with the language which suggests first-language familiarity. Moreover, although the personal tone used is not characteristic of academic discourse, rudiments of this discourse are evident throughout the text, in word choice (e.g. ‘ensure’, line 3), in logical progression markers (“therefore”, line 12; “however”, line 17), in the overall essay and paragraph structure (where ideas are logically introduced and explored).

The second essay maintains the formal style of the first. The personal reference of the first essay is however, downplayed in the second: there is no use of the first-person singular and only two instances of the use of the first person plural (“us”, line 22 and “we” line 55). The overall tone is author-detached, in passive voice (e.g. “it must be noted”, line 73, “it could be said”, line 77): in this it is typical of academic discourse. The complex sentence structure of the first essay, although evident in
b) Logical structure

Essay one from this student contains four paragraphs. Although the introduction and conclusion of the essay are intuitively recognisable as such (with the introduction beginning the essay with “I think”, line 1, and the conclusion moving from the specific to the general with the broad statement “If the legal system is a fair system it can be very beneficial to its people but if corrupt it can destroy a nation”, lines 25 – 26), these do not perform the function that they should in an argument structure: content is not fore-grounded or summarised, rather the ideas flow one into the other. Paragraphs in this essay do each deal with a main theme which is explored in the body of the paragraph and there is some content linkage between paragraphs, lending the essay a sense of flow.

The student has attempted, in essay two, to structure the essay more closely to course-pack requirements. The main theme of the essay, which is the distinction between the abstract and concrete concepts is referred to in the introduction (“law may be approached from (different) point(s) of view”, line 3, and “distinctions (must be drawn) between rules of law and rules of ethics …”, line 9), and in the conclusion of the essay (“There are two sides of law…”, line 102). Paragraph topic in each instance is easily identified from the leading topic sentence, although overuse of this strategy in some instances leads to unclear linkage between paragraphs. Paragraph length varies, with a noticeable decrease in length in the paragraphs dealing with theories of law (paragraphs 16 – 19).

Within the essay, structuring moves are evident in the form of introductory lead-ins at the beginning of each section, outlining the different elements to be explored in that section. Thus, for example, the introduction to this essay (paragraph 1) serves the function not only of introducing the overall content of the essay, but also of providing the introduction to the first section covered (‘divisions of law’,
c) Concept elucidation

The first essay presented by this student contains, in rudimentary form, many of the concepts associated with the topic in the course. Morality and ethics are mentioned, form differentiation (divisions of law) dependent on nationality is mentioned (“laws of different states”, line 9), and some of the difficulty in definition at the concrete level is alluded to in the statement “Law is not a set system…” (line 23).

The student begins her second essay by suggesting that conceptions of law may differ depending on the disciplinary perspective from which one approaches the question. Philosophy is mentioned as one of the possible means of exploring the question. This understanding moves beyond that which is provided in the course-pack, which is limited to different philosophical understandings of the topic.

The essay covers, briefly, all of the major content areas outlined in the course-pack. In addition, the student has included the concept of ethics, distinguished from morality in terms of ideals versus standards (paragraph 13). It begins by introducing divisions of law, and the primary distinction between criminal and civil law. It continues through an exploration of sources of law. Concepts related to law are then discussed (religion, ethics, morality and justice). Within the religion section, the link is explored primarily through origin. The discussion on ethics and morality is well researched and goes beyond the course-pack understandings. Within the morality paragraph, however, is a critique of natural law, which is out of place in the essay. Justice is explored in the student’s own (researched) terms, however, the distinction between procedural and substantive justice is not mentioned.

The major jurisprudential schools of thought are all mentioned in the final section of the essay, although these are dealt with very briefly; the brevity possibly indicating some concept uncertainty. The section on natural law, in particular, is a little confused: although the student attempts to distinguish between natural law based on religion and reason (a distinction not often referred to by other students), this distinction is not drawn clearly. Other approaches to law are covered in a sentence or two and although the discussion is not inaccurate, it has very little depth.

The distinction between the concrete and abstract object ‘law’ is a recurring theme in the essay: it is mentioned in both introduction and conclusion, and is echoed in the distinction drawn in paragraph 15 between “law”, “concepts of law”, and “theories of law” (line 83). The student has had no conceptual difficulty is drawing this distinction, which may have built on from her own initial understanding that law “is not a set system” (essay 1, line 23). She similarly shows no confusion with the distinction between the concepts of ‘origin’ and ‘source’ (with origin being explored in paragraph 11 and source
in paragraph 4). The overall impression created is that the student has competently integrated course concepts into her own knowledge structures.

d) Thematic analysis

The structure of the second essay, for this student, does not clearly mirror the structure of the first essay. There are, moreover, very few links that can be found in the use of themes in the two essays. In the first essay, in the third stanza, law is defined as a nationally-defined system of rules which clearly distinguish between right and wrong (lines 11 and 12), and which serve to promote morality and ethics (line 6). The introduction of the second essay picks this up, after establishing that law can be viewed from multiple perspectives, by defining law as a set of recognized rules (line 7), but then suggests that a definition of law should clearly distinguish between law, ethics and morality.

From this introduction the second essay makes a clear break into a discussion on forms and sources of law. There are no themes within this section which pick up on themes used in the previous essay. The discussion of law and morality / ethics is picked up again in paragraph 10, but merely to re-emphasize the distinction between the concepts. Of interest in the comparison between the essays is the sentence within this discussion on the distinction between ethics and law: “It has been suggested that law creates both duties and rights, whereas ethics can create only duties” (lines 64 - 65). This links to the following thematic play in the first essay, which emphasizes protection and rights (and protection of rights).

The justice and rights theme from the first essay is briefly addressed in the discussion on justice in the second essay (paragraph 14): once again, the purpose of the discussion in merely to disconnect the concepts. The suggestion in this paragraph that legal rights are merely a ‘justification for using or withholding the collective force of the state’ (lines 81 - 82) seems in some way to undermine the resolution found in the first essay between the power and the protective aspects of law: rather than the balance between the two aspects suggested as necessary in the first essay, this sentence seems to tip the scales in favour of the power dimension. That the previous resolution may have been a somewhat idealistic interpretation seems to be confirmed by the raising in the final paragraph of the second essay of a substance-imperfect theme (not raised in the first essay): “Law is not an ideal justice, but human justice defined by those who control it” (lines 101 - 102).

e) Voice

The two essays provided by this student are similar in the straightforward and to-the-point tone adopted. The one instance of hyperbole in essay one (“the evils of today’s environment”) is not repeated in essay two, nor are there any other instances in this essay of dramatic or poetic language. The strong personal location of the student in essay one is also not evident in essay two: the two references to the first-person plural in the second essay both signal a legal Discourse community membership (“shows us where we obtain the knowledge of our law”, lines 22 - 23, and “we view the man-made concept of law…”, lines 55 - 56). There is some personal location evident in paragraph 10 of the second essay, although this is written in author-distanced style: the student says that “sources … and divisions of law are fairly easy to understand however the concepts of law and their goals are less structured and accessible”: this statement could be read as a statement of fact, it is more likely to indicate the student’s own perceptions of the topics.

The strong personal location of the first essay suggests that the student has adopted a position as student in the context. The reduction of this personal location in the second essay makes the positioning less easy to read. The device of knowledge demonstration used in this essay suggests that the student has adopted a ‘student’ position; however, the fact that she has dealt competently with the concepts in her own terms suggests some development of authority in writing. This authority is
further evidenced in the strong ‘factual’ statements made in the essay (see for example, line 1: “Law cannot be defined in one clear, precise dictionary definition”), and in the use of appropriate authority to establish authority (referencing technique). Her signalling of community membership through the use of ‘we’ and ‘our’ further indicates her development into this community, and that she student is comfortable with this community placement. The location signalled thus appears to that of a competent legal student moving towards community membership.
APPENDIX 20: BRIEF OVERVIEW AND COMPARISON OF CHANGES FOUND IN STUDENT TEXTS

a) Textual features

At the textual level, the shift from the first essay to the second essay to Discourse-appropriate textual forms was evident to some degree in all student texts. Formality, of both presentation and grammar, was the strongest indicator of this Discourse shift. Formality of presentation of the essay was found to increase for all students; in the case of student 9, however, the attempt was not well achieved, and the overall impression of the second essay was considerably less ‘neat’ than the first. Surface grammatical errors were found to increase for three of the four African black students in the sample (perhaps indicating a struggle with concept complexity): the increase in surface error was most noticeable in the case of student 9, where the number of errors affected the overall coherence of the text. Student 7 was the only student in this sample who showed a decrease in surface error, although in this instance, this decrease did not appear to be significantly related to content coverage. Three of the four white students showed no marked improvement or decline in surface error. The lack of significant change in these instances undoubtedly stems from the fact that these students are first-language speakers: few instances of error were found in either the first or the second essay for these students. The one exception to this rule within this group was student 19 who showed, along with an increase in formality of presentation, a decrease in surface error in the second essay. These dimensions are probably not unrelated (just as the strong increase in surface error for student 9 probably contributes also to the overall impression of decreased presentation formality).

An increase in the formality of grammar used between essays one and two, and associated increase in the use of academic grammatical features, was found in all cases. In instances where a personal tone had been used in the first essay (students 3, 4, 9, 16, 17 and 19), this increase in formality was found to be associated with a decrease in the personal-ness of the account presented. For African black students, the increase in formality was evident primarily in word and phrase choice, through a more author-evacuated style, and through the use of some sequential and stance markers. The formality of style, however, tended not to be sustained throughout by students 3 and 4 (and was not well achieved by student 9); student 7, however more competently achieved this. In comparison with the African black group, white students, in general, showed more evidence of formality of grammar in their first essays, and the second essays from this group showed clear evidence of academic grammatical features. In one instance within this group however (student 11), the clear recognition of the appropriate academic style was somewhat confused with the literary tone that was adopted. All other students in this group showed ease with the grammar two features of academic Discourse. Student 17, in addition, used some of the grammar two features of legal academic writing in his text. Referencing (another aspect both of formality and of Discourse appropriate style) was done by all students: however, the technique used in referencing was not entirely correct in all instances.

b) Logical structure

Most students used basic structuring techniques in their first essays that primarily involved the use of clear introductory and concluding paragraphs (except in the cases of student 9 and 11). However, in most instances, these structures did not perform the functions of pre- and post-structuring required of an argument structure. Increased attempts to structure content were evident in the second essay in all cases except one: along with an increase in surface error, student 9’s attempt at structuring in the second essay was less successful than in her first essay. Introductions and conclusion were used in all instances in the second essay, and, in general, the pre- and post-structuring functions that these structures should perform were more evident than in the first essays. Two students (students 11 and 19) used the technique appropriately for both introduction and conclusion; two (students 3 and 4) used the technique appropriately for the introduction but not the conclusion. Other students did not achieve this macro structuring.
Other attempts to formally structure the macro-text of the second essay were evident in most cases, although not always competently achieved. Students 3 and 7 attempted the use of section headers to structure content: in both of these cases, however, the overall structuring was not well achieved. Many students used the technique of foregrounding content to structure their essays; in only two instances, however, was this done thoroughly throughout the essay (students 11 and 19). Attempts at formal paragraph structuring were also evident in most cases. The leading topic sentence was the primary means of this organisation (students 4, 11, 16 and 19). For most students, linkages between paragraphs in the second essay were less successfully established than in the first essay: in seven cases, the use of the leading topic sentence seems to have detracted from paragraph linkage and essay flow (notably, students 11 and 17, who did not rely strongly on the leading topic sentence rule and used a more discursive style in the second essay, achieved greater linkage and flow). This lack of linkage between paragraphs, in many instances, led to a lack of linkage between sub-concepts (e.g. student 16). The point-form structure that resulted was exacerbated in many cases by the use of content summary strategies, often used with a present-tense categorical mode of writing (students 7, 16 and 19). Particularly in the case of student 9, but evident also in others, a content deletion strategy further contributed to the ‘point-form’ feel of the text, and lent incoherence to the discussion.

c) Concept elucidation

At the content level, few topics that were subsequently to be dealt with in the course were raised by students in their first essays. The topic most frequently raised was that of justice, raised by three students (one African black and two white), only one of whom spoke of justice as an ideal of law. The concept of morality was raised by two students. Other topics raised included the constitution (one student), and form differentiation (one student). One student (student 16) raised two topics to be covered in the course (justice, and the constitution); only student 19 raised a significant number of course content topics (4 in total): it is notable that in both of these latter instances, concept coverage in the second essay was comprehensive and well-connected.

Concept coverage in the second essay was handled in very different ways by different students. Student 9 went considerably beyond the immediate scope of the essay, at the cost of relevance; student 3, to a lesser extent, did the same. Most students did not attempt comprehensive coverage of all course topics and subtopics, and the content summary and deletion strategies commonly used further reduced the scope of the coverage. Whilst all students covered topics related to the abstract concept, most failed to adequately draw a distinction between the abstract and concrete concepts, and many worked with the abstract concept in a concrete manner (with only student 19 clearly drawing the distinction). All students provided coverage of the ‘theories of law’ section and most covered the ‘related topics’ section. Although all white students managed to distinguish between the two, the two African black students who discussed the ‘related topics’ section (students 4 and 7) conflated this with the ‘theories’ section, and the other two African black students (students 3 and 9), although raising the ‘related topics’ section did not discuss this in any depth. Many students did not discuss topics related to the concrete object in any depth. Students 3, 4 and 17 mentioned, but did not discuss ‘divisions of law’, and ‘forms of law’, student 7 did not mention these topics at all, or the ‘sources’ topic, which was also not mentioned by students 3, 17 and 16 (with a brief mention only by student 4). The lack of breadth in the accounts that did not go into the concrete object was not always substituted by depth in other areas. Student 17 is a notable exception to this: although this student did not mention any of the concepts connected to the concrete object, discussion in other areas went considerably beyond course requirements.

Within topics, the subdivisions most commonly omitted were the division between substantive and procedural justice (mentioned by only two students), and the distinction between natural law based on religion and that based on reason (mentioned only by students 17 and 19). The Western notion of religion-as-origin of law rather than as (authoritative) source of law was mentioned by all white students. For African black students, the origin / source confusion was evident in the case of student
d) Thematic analysis

Thematic analysis of the two essays shows a range of strategies adopted by students. Although content shifts are clearly evident in all cases, in five instances the thematic structure used in the first essay appears to be, to some extent, mirrored in the second. This was strongest in the case of student 3, where five of the seven themes raised in the first essay were repeated in sequence in the second. The two themes that shift in this instance are a denotative definition ‘rules’ to a meta-theorizing of the previous position as ‘sociological’, and a shift from an implementation theme to the ‘theories of law’ section. Student 4 followed a similar thematic structure in the second essay to her first, although not all themes were addressed. Notable in this essay was a shift from the first essay theme play of ‘process that functions to maintain equality through consequence’ to the theme play ‘rules which function to regulate through consequence’. Also evident was a move away from a theme of protection and of justice: justice was significantly downplayed in the second essay, perhaps due to the disconnection of justice and rationality. Student 11 also did not re-visit all themes from the first essay, but the themes that remained (social-intent-maintain, definition, choice and justice) were used in the same order as in the first essay. Student 16 very closely followed the thematic structure of the first essay in the second, with a shift from basis-value to basis-roots, and in closing, from absolute value to relative value. Whilst broad thematic structure for the two essays of student 17 followed similar patterns, the ‘guidance’ function of law in essay one was modified to a ‘control’ function in essay two (with the less determinative features associated rather with morality). The strong variation theme from essay one (evolution of law) in essay two was overshadowed by a focus on the predictability of law. Students 7 and 9 had similar introductions and conclusions to their two essays, but showed little evidence of thematic overlap, and student 19, although picking up on content themes that were addressed in the first essay, similarly did not show any thematic pattern recurrence.

At a group level, it is not possible in this research to definitively establish what the impact of differing previous knowledge or task interpretations on learning are within the very small sample that has been used. As only two of the African black students used similar themes in the second essay to those used in the first, and as one of these students was atypical of the group in the themes he used in the first essay, it is not possible to determine whether themes identified as significant for that group, either in terms of frequency of address or in terms of placement in the contrast, played any role in the construction of the second essay. Similarly, although overlaps in themes used between the two essays were found for three of the white students and overlaps in content used for the other, for this group also themes addressed in the second essay tended to be those that related to course content, and the precise role of the theme itself is not clear. It must be noted that contrasts themselves were not the subject of analysis in the second essay; however, there is no direct evidence at this level that the social power / shield contrast for African black students, or the social power / relative value contrast identified for white students is continued in the second essay.

For both groups it appears that where themes overlap with content, this content tends to replace the thematic (naive) understanding. For example, the origin theme, which was used with a high frequency in the first essay by African black students, was replaced by the topic origin in the second essay. For white students, the topic justice replaced the justice theme from the first essay in the second essay. The only other finding of relevance at the group level with regard to themes is that the function theme, which was a significant component of the first essay for both groups of students, is significantly reduced (almost eliminated) in the second essay.

e) Voice

An examination of the positions adopted by students in their writing shows that in their second essay, all students to some extent associated themselves with the academic community (either as ‘student’ or
‘insider’). The two students who most strongly identified with an ‘outsider’ community in their first essays (students 4 and 7) both located themselves in context as ‘students’ in the second essay. However, in both cases, this ‘insider’ placement is not sustained through the essay, and conflict in positioning between the broader community placement and the legal academic placement is obvious.

Of the four students who, in the first essay, placed themselves (implicitly or explicitly) as students in the context, three maintained this position in the second essay (although one of these showed signs of moving from a student to a more expert position). In one of these instances (student 3), the maintenance of this ‘student’ position was reinforced by the conceptual difficulty that the student was having with the course (explicitly acknowledged). In the other instance (student 16), the student did not appear to have any difficulty or conflict in position that reinforced this location; rather in this instance the lack of personal involvement necessary to move from student to expert position appears to have been the result of student choice. Student choice appears to be evident also in the writings of student 11: in this instance the student’s ease with academic grammar and Discourse did not appear to be a problem, however, the student appears to have chosen a literary, rather than legal, genre of this Discourse.

An examination of the development of authority in writing shows different patterns in the African black and white groups. For white students, the development of this authorial presence is clearly linked to an increasingly ‘insider’ positioning. Student familiarity with the grammar and the argument structure of this Discourse, and their ability to use and convey authority, allows for an increasing situation of self-in-context in a context appropriate manner (for example, students 17 and 19). For African black students, however, a misreading of the nature of authority in writing, such that authority is drawn from context and used in an inappropriate manner, appears almost to have a detrimental effect of learning. Students 7 and 9 both battled with this dimension and used authority without having established their Discourse credentials to do so. The search in another instance in this group (student 3) for ‘correctness’ may be an indication of a similar misreading of the nature of authority in this context.