

# **SQEezing the jurisprudence out of the SRA's Super Exam: The SQE's Bleak Legal Realism and the rejection of law's multimodal truth**

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## **1. Introduction**

The Solicitors Regulation Authority (SRA), the regulatory body for the large part of the legal profession in England and Wales,<sup>2</sup> has recently proposed a significant change to the way in which people qualify to practice as solicitors that jurisdiction. This consists of a two-stage centralised assessment, the Solicitor's Qualifying Exam (SQE), which has become known in some quarters as the 'super exam'.<sup>3</sup> This paper focuses on one particularly controversial aspect of that change, that is the introduction of a multiple choice examination, which seeks to assess whether candidates possess sufficient knowledge about relevant areas of law to practice (the so-called SQE1). This change is both revolutionary and controversial for many reasons. This paper however will consider perhaps the most fundamental question in this regard, albeit one which is remarkably neglected within the limited work which exists on the SQE,<sup>4</sup> namely whether and how such an assessment is capable of testing legal knowledge. What follows is therefore an exercise in legal theory, in that it posits an account of what makes legal statements true or valid. It is emphatically argued that SQE1, as envisaged by the SRA, embodies a thoroughly impoverished, and indeed largely incoherent, vision of law, termed within this paper 'Bleak Legal Realism', which fundamentally misunderstands how legal truths are created or identified. Due to the *multimodal* and *justificatory* nature of legal reason, there is no brute form of bivalence within legal propositions or putative legal knowledge; legal propositions cannot be said to be either 'true' or 'false' in a simplistic manner, which is what a multiple choice-type examination requires in order to be for purpose in this context.

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

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<sup>2</sup> The organisation was established by the Legal Services Act 2007, which also sets out its regulatory competences and objectives.

<sup>3</sup> For details of the nature and goals of this reform, see the contribution to this issue by the regulators, in particular the section authored by Julie Brannan of the SRA.

<sup>4</sup> For excellent analysis of the process which led to the SQE's introduction, and its potential impact, see Elaine Hall, 'Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: "Comment is Free, but Facts Are Sacred"1' (2017) 51 *The Law Teacher* 364; Eileen Fry and Richard Wakeford, 'Can We Really Have Confidence in a Centralised Solicitors Qualifying Exam? The Example of the Qualified Lawyers Transfer Scheme' (2017) 51 *The Law Teacher* 98.

Upon deeper analysis, legal truth is different to *immanent* or *correspondent* forms of truth due to the fact that legal truth is *constituted* by the modes of argument which lead to the valid proposition. This form of *modal constructivism* means that a multiple choice assessment is incapable of reliably testing legal knowledge. This does not mean, of course, that such an examination is devoid of all value: it must, after all, be testing something, and must, contain its own innate account of what constitutes legal truth. It is concluded that the SQE1 embodies a form of Bleak Legal Realism, in which legal knowledge is reduced to the ability to predict adjudicatory outcomes. This is a grave problem for three reasons. Firstly, it does great violence to the multi-modal nature of legal knowledge, reflecting instead a simplified and simplistic conception of legal knowledge, reflecting none of the reasoning which itself constitutes the proposition being asserted. Secondly, and even more worryingly, this approach to the testing of legal knowledge is incoherent. While legal realism as a broad intellectual movement brought great sophistication to legal knowledge and practice during the Twentieth Century, in its most simplistic form, that found in the SQE1, it is simply incoherent: legal truth cannot be a prediction of legal reasoning, when it is this reasoning itself which generates that legal truth.<sup>5</sup> This method of testing legal knowledge through what is effectively the brute prediction of legal outcomes is being introduced just as this aspect of legal practice is on the cusp of being entirely taken over by the superior ability of artificial intelligence and algorithms to perform this very job. Thirdly, this assessment, if it comes to have a dominant effect on the way in which law is taught and studied more generally in England and Wales, will have an impact not only on the quality of students and the ability of the examination to identify those who are capable of generating legally valid propositions. Due to the law's constructivist nature, the way in which people think about the law has a direct impact on the law itself: its epistemology and ontology are directly and symbiotically linked. Reducing lawyers' thinking to a prediction of their own professions' outcomes will have a detrimental impact on the quality and form of legal reasoning in general, and therefore on the quality of both the performance of those exercising legal services and the content and operation of the law itself. If the legal profession resists this impact, it will be due to the irrelevance of the exam to the broader education, training and selection of future lawyers.

## 2. The theory of law and legal education

What follows is a theoretical discussion about the relationship between legal philosophy and the SQE. However, this paper is not about the role of legal scholarship within legal education, nor the role of legal study as a liberal arts degree. Nor is it about the relationship between 'academic' and 'professional' legal education.<sup>6</sup> It is about the nature of law, or, more precisely, of legal knowledge. This paper explores what it might mean to say that a proposition of law is true, correct or valid, and how we might therefore appropriately test someone's ability to identify and/or construct such propositions. For the purposes of the present discussion, no position will be adopted by the author regarding whether the validity of legal propositions should be the sole or central component of legal education and training. Legal education, training, and legal scholarship more broadly, can and do include various other aspects, such as the social and cultural significance and genesis of law, its history, its professional usage, and so

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<sup>5</sup> This argument of course echoes that famously found in Hart's *reductio ad absurdum* of this same form of legal realism, found in HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) ch 7.

<sup>6</sup> On these questions, see the contribution of Anthony Bradney to this issue, and, generally, William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press 1997); William Twining, *Blackstone's Tower: The English Law School* (Stevens 1994).

on. However, most legal education does present such questions as the cornerstone of its curriculum,<sup>7</sup> or require demonstrable knowledge of it to pass onto a second ‘vocational’ stage of training.<sup>8</sup>

At present the solicitors’ profession in England and Wales requires that prospective solicitors demonstrate a sufficient knowledge of the law through a ‘qualifying law degree’, or equivalent, which covers the so-called Foundations of Legal Knowledge. The SRA’s ‘Joint Statement’<sup>9</sup> agreed with the General Council of the Bar, which regulates this matter, is agnostic regarding what *constitutes* knowledge in these areas or how such knowledge is assessed.<sup>10</sup> The SRA’s proposals for a central SQE replace this ‘academic stage’ of relatively unprescribed legal knowledge with an alternative model. SQE1 proposes to assess legal knowledge in a very specific way, moving from the extreme agnosticism of the past to a sudden and fervent evangelism of the newly converted in measuring it in a new, innovative and very specific way. The proposed form of this stage of the centralised SQE is a multiple choice examination in which candidates must select the best single answer of a range of options to questions about selected areas of law. These selected areas are, loosely, a combination of the Foundations of Legal Knowledge and those fields of law deemed important for ‘Day One Outcomes’<sup>11</sup> in the ‘reserved activities’, that is the specific legal services which solicitors are entitled to carry out, and which fall therefore under the SRA’s regulatory function.<sup>12</sup> Leaving aside the important and contested issue of whether these fields are the appropriate ‘Foundations’ of Legal Knowledge, either in general or for a prospective solicitor, this change in the SRA’s approach to qualification has a radical effect. The SRA has come to take a specific stance regarding the nature of legal knowledge and the nature of legal truth: of how we know things about law and how we test this knowledge. However, reading the SRA’s accompanying literature to its original consultation process and subsequent proposals, there is no discussion about the nature of law or how these views on this matter might impact upon how one can or cannot test the truthfulness or validity of legal propositions.<sup>13</sup> It is the assertion of this author in this paper that this has led to an entirely inappropriate form of assessment for legal knowledge. SQE1 is simply incapable of carrying out the role which the SRA assigns to it unless one subscribes to a rather implausible understanding of the nature of law.

A brief word, first of all, on the necessity of this discussion. This is a thesis regarding the nature of law, and therefore is a work of legal philosophy. It is not however a defence, or even a discussion, of the place of the study of legal philosophy within legal education.<sup>14</sup> However, when one assesses a student’s ability to identify, construct or apply valid legal propositions, there is, explicitly or implicitly, a *theory of law* which is embodied within the mechanisms of assessment. That is to say, one must have an understanding of the epistemic models which generate or test the validity of certain propositions, or alternatively, an understanding of the ontologically extant ‘things in the world’ which any such proposition must refer to in order to be correct. This, it is hoped, is not a particularly controversial statement. All fields of knowledge and disciplines of science possess their own methodologies and epistemologies. When one asks the question of the nature of those structures, and their object of study, one is engaging in the philosophy of that field. In law, this question is particularly prominent compared

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<sup>7</sup> The Quality Assurance Agency for Higher Education, *Subject Benchmark Statement: Law* (QAA 2015) 6. ‘The study of law involves the acquisition of legal knowledge.’

<sup>8</sup> ‘Joint Statement by the Law Society and the General Council of the Bar on the Academic Stage of Training’ (1999) <<http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>> accessed 30 September 2018.

<sup>9</sup> *ibid.*

<sup>10</sup> Bar Standards Board and Solicitors Regulation Authority, *Academic Stage Handbook* (BSB, SRA 2014).

<sup>11</sup> SRA Education and Training Committee, *Day One Outcomes Version 2* (SRA 2007).

<sup>12</sup> Legal Services Act 2007. These are currently the administration of oaths, advocacy, conveyancing, litigation, notary and probate.

<sup>13</sup> Solicitors Regulatory Authority, *A new route to qualification: The Solicitors Qualifying Examination (SQE): Summary of responses and our decision on next steps* (SRA 2017).

<sup>14</sup> On this question see CJG Sampford, *Law, Lawyering and Legal Education: Building an Ethical Profession in a Globalizing World* (Routledge 2017), in particular ch 3.

to certain other areas of knowledge, study and practice because of the law's contested nature. More particularly, and pertinently for the purposes of this paper, what characterises the disagreements within modern Western legal philosophy is profound disagreement about what characterises a valid legal proposition.<sup>15</sup> In other words, behind both the aggressive posturing and nuanced development of different schools of legal theory over the past century or so, lies a debate about how one correctly identifies the content of the law. Some of the more prominent accounts of such matters are of course well-known. Such accounts vary quite dramatically: Law as rooted in empirically observable social practice constituting rules which then, in turn, identify other rules of various kinds which constitute legal content;<sup>16</sup> Law as ultimately resting, in its truest form, on the requirements of moral judgment or justice;<sup>17</sup> Law as a practice of interpretation in which past legal decisions are reinterpreted in line with their best moral justification;<sup>18</sup> Law as essentially an empirical question of adjudication, in which fundamentally indeterminate legal grounds are given meaning through their application;<sup>19</sup> Law as a community of interpretive practice;<sup>20</sup> Law as an internal system of logical coherence.<sup>21</sup> This list could be extended in various ways. In particular, this list does not include those numerous accounts which see law as largely or entirely dependent on some other form of knowledge or social practice.<sup>22</sup> Broadly speaking, these disagreements are characterised by the question of how legal truths are generated or located, and to what extent such legal epistemology can be said to be autonomous, that is separate to other forms of thinking or knowledge, such as morality, sociology or economics.

Such questions often strike those interested in putatively 'practical' approaches to law as somehow abstract or ethereal, which might be interesting or important in some way, but largely irrelevant to working out what the law says in a particular field, which is what real, that is to say practising, lawyers need to know. Such opinions, to the extent that they are indeed held, are entirely misconceived.<sup>23</sup> While questions of the grounds of law,<sup>24</sup> such as whether a particular statute is in force, do not require such 'theoretical' accounts in order to generate answer, the question of whether a particular statute should apply in a certain circumstance is can only be answered through what one considers to be a correct way of arriving at the correct content of law in general.<sup>25</sup> The briefest of surveys in this section has shown

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<sup>15</sup> Ronald Dworkin, *Law's Empire* (Balknap 1986) in particular chs 1 and 2; Dennis Patterson, *Law and Truth* (Oxford University Press 1999).

<sup>16</sup> Hart (n 5).

<sup>17</sup> John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1982).

<sup>18</sup> Dworkin, *Law's empire* (n 15).

<sup>19</sup> Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007).

<sup>20</sup> Stanley Eugene Fish, *Is There a Text in this Class?: The Authority of Interpretive Communities* (Harvard University Press 1980).

<sup>21</sup> Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 2012).

<sup>22</sup> See, variously, the ideas contained in Richard A Posner, 'The Law and Economics Movement' (1987) 77 *The American Economic Review* 1; Karl Marx and Friedrich Engels, *The German Ideology* (International Publishers Co 1970); Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561.

<sup>23</sup> This sentiment is most famously and most powerfully expressed by Keynes:

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

John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Macmillan 1936) 383.

<sup>24</sup> Patterson (n 15) 171.

<sup>25</sup> Dworkin, *Law's empire* (n 15) 90. Dworkin expresses Keynes' famous remark in the legal context, and with even more force:

*Any practical legal argument, no matter how details and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one*

that questions of identification of correct legal propositions are extremely contested, perhaps infinitely so. Indeed, this contested nature is currently reflected in the regulatory agnosticism and openness to different approaches found within the loose framework which governs and informs the teaching and examination of law in England and Wales. As well as the lack of prescriptive requirements regarding the Foundations of Legal Knowledge in the Joint Statement, discussed above, there is also the supreme epistemic agnosticism of the Benchmark Subject Statement for law issued by the Quality Assurance Agency for Higher Education (QAA).<sup>26</sup> While the Statement asserts that the study of law covered under its remit is an *academic* matter,<sup>27</sup> it would be hard to understand its reference to the requirement that students develop ‘an ability to recognise ambiguity and deal with uncertainty in law’<sup>28</sup> as anything other than a reference to disagreement about the *content, interpretation and application of the law* and how one properly goes about resolving such matters. It is not a reference to questions of *academic* doubt, but rather the academic study of legal questions of doubt. It is indeed from such questions of doubt that the viability of such diverse perspectives on legal truth emerge. As Ronald Dworkin famously argues, legal reasoning and practice are characterised primarily by *disagreement*,<sup>29</sup> and this in the context of his holistic account of legal content which defends the idea of a *single correct legal answer* to any given legal question. How lawyers resolve such disagreements and arrive at conclusions regarding the content of the law is of course the determinant of what counts as truth in law. In an almost embarrassed manner, legal education in England and Wales, emerging from the shadows and into respectable areas of scholarship and study only during the Twentieth Century,<sup>30</sup> has therefore been characterised by no single clearly articulated method or epistemology. Certain law schools have emerged and grown with different signature approaches to legal learning, and these have added to the wealth of legal scholarship and education. Conversely, many English and Welsh law schools have probably continued rather unreflectingly, through a process of autopoietic curriculum and assessment regeneration, or perhaps, on the part of some, due to the misapprehension that to a far greater level of regulation of their curriculum exists than is in fact the case. No regulatory or overseeing body has ever attempted to prescribe the nature of legal truth within legal study in England and Wales. This has perhaps led to the impression on the part of many practitioners of legal education, in particular of professional legal education, that there is no link between legal theory and legal education. In reality, there has simply been no regulation of that link. Every act of legal education embodies a theory of law.

### 3. Multiple choice tests and the nature of legal truth: Bivalence and Multimodality

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

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*and rejects others. So any judge’s opinion is itself a piece of legal philosophy. [...] Jurisprudence is the general part of adjudication, silent prologue to any decision at law.*

<sup>26</sup> The Quality Assurance Agency for Higher Education (n 7) 6. Section 1.2 of that document explicitly states *The study of law exposes students to a wide range of methods and techniques, some of which are specific to the discipline but some of which are drawn from the humanities and social sciences. The emphasis placed on the range and type of methods varies between law schools. [...] The common denominator is the requirement on the student to apply their understanding of legal principles, rules, doctrine, skills and values. There are many ways of achieving this and different higher education providers will choose different approaches.*

<sup>27</sup> *ibid* (emphasis added).

<sup>28</sup> *ibid* 9.

<sup>29</sup> Dworkin, *Law’s empire* (n 15) 6–7.

<sup>30</sup> Twining, *Blackstone’s tower* (n 6).

There exists a wealth of literature on multiple choice questions (MCQs) as a form of assessment within higher education<sup>31</sup> and elsewhere.<sup>32</sup> This work is found in both generalist pedagogical science as well as the scholarly research of specific disciplines and their teaching. In law, however, there is very little work on this matter, either in England and Wales or elsewhere. However, the more general research covers all manner of issues, regarding the reliability of MCQs,<sup>33</sup> their impact on questions of equality and discrimination,<sup>34</sup> their vulnerability to plagiarism and other forms of cheating,<sup>35</sup> and so on. Predominantly, however, the work tends to question the effectiveness of MCQs in examining ‘deep’ forms of knowledge within different disciplines.<sup>36</sup> Much work looks at the differences between MCQs and what are often termed in the pedagogical literature ‘constructed responses’, that is long-form narrative or prose-based answers in which the student constructs their own answer in response to a more or less open question, including explanation, justification and references where appropriate, rather than selecting the most appropriate answer(s) from a closed selection.<sup>37</sup> There are a range of conclusions drawn in these papers, and there is no general consensus in this regard. However, there is a general tendency for deeper reflection on such matters through such research to lead to broader considerations of the different orders of knowledge within a given field, and the difficulty in assessing complex forms of knowledge with either single or multiple best answer-based MCQs.<sup>38</sup> This general literature cannot therefore give us any form of transdisciplinary guidance regarding the suitability of MCQs in general, except for the general observation that higher forms of knowledge within a particular field require more intricately constructed questions, which take into account the nature of that complexity. There is nothing inherently ‘wrong’ with MCQs, even in the testing of the ‘deep knowledge’, which the Legal Education and Training Review (LETR),<sup>39</sup> an evaluation of legal education in England and Wales commissioned by the SRA and others and published in 2013, emphasised as crucial in the training of lawyers moving forwards.

The present work seeks to make a different contribution to the literature on MCQs, however, that is on their appropriateness for evaluating only certain types of ‘truth’ or correct answer. MCQs, in particular the single best answer-type proposed by the SRA for SQE1, are potentially appropriate as a method of assessment when the ‘truth’ of a particular field can be understood as *bivalent*, that is to say where

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<sup>31</sup> Richard F Burton, ‘Quantifying the Effects of Chance in Multiple Choice and True/False Tests: Question Selection and Guessing of Answers’ (2001) 26 *Assessment & Evaluation in Higher Education* 41; Paul McCoubrie, ‘Improving the Fairness of Multiple-Choice Questions: A Literature Review’ (2004) 26 *Medical Teacher* 709.

<sup>32</sup> For instance, Leonard B Bliss, ‘A Test of Lord’s Assumption Regarding Examinee Guessing Behavior on Multiple-Choice Tests Using Elementary School Students’ (1980) 17 *Journal of Educational Measurement* 147.

<sup>33</sup> McCoubrie (n 31); Mark G Simkin and William L Kuechler, ‘Multiple-Choice Tests and Student Understanding: What Is the Connection?’ (2004) 3 *Decision Sciences Journal of Innovative Education* 73; Burton (n 31).

<sup>34</sup> Gershon Ben-Shakhar and Yakov Sinai, ‘Gender Differences in Multiple-Choice Tests: The Role of Differential Guessing Tendencies’ (1991) 28 *Journal of Educational Measurement* 23.

<sup>35</sup> Robert B Frary and others, ‘Indices of Cheating on Multiple-Choice Tests’ (1977) 2 *Journal of Educational Statistics* 235.

<sup>36</sup> Jennifer L Momsen and others, ‘Just the Facts? Introductory Undergraduate Biology Courses Focus on Low-Level Cognitive Skills’ (2010) 9 *LSE* 435; Paula P Lemons and others, ‘Questions for Assessing Higher-Order Cognitive Skills: It’s Not Just Bloom’s’ (2013) 12 *LSE* 47; Stephen Buckles and John J Siegfried, ‘Using Multiple-Choice Questions to Evaluate In-Depth Learning of Economics’ (2006) 37 *The Journal of Economic Education* 48.

<sup>37</sup> William E Becker and Carol Johnston, ‘The Relationship between Multiple Choice and Essay Response Questions in Assessing Economics Understanding’ (2008) 75 *Economic Record* 348; Nixon Chan and Peter E Kennedy, ‘Are Multiple-Choice Exams Easier for Economics Students? A Comparison of Multiple-Choice and “Equivalent” Constructed-Response Exam Questions’ (2002) 68 *Southern Economic Journal* 957.

<sup>38</sup> Lemons and others (n 36); Buckles and Siegfried (n 36).

<sup>39</sup> Julian Webb and others, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (Legal Education and Training Review, 2013)

propositions may possess only two states, true or false.<sup>40</sup> In such circumstances, regardless of the potential complexity of constructing questions to test such matters, MCQs are a viable form of assessment, although this is not to take any position regarding whether they are a more or less desirable method of assessment than any other competitor model. Within formal logic, the falsehood of the universality of the so-called law of bivalence of all semantic constructions, found within classical forms of logic,<sup>41</sup> has been overcome through the use of a third broad category for those propositions which have *yet to be determined as either true or false*.<sup>42</sup> Of course, matters of classical or formal logic do not necessarily tell us anything directly about legal knowledge, given law's status as a socially constructed institution, however the notion of bivalence and its transcendence within formal and other accounts of logic are instructive in numerous ways. They point us in the direction of an analysis of legal propositions which can test the suitability of MCQs. What, therefore, is the nature of the truth of legal propositions?

Let us move beyond the restraining confines of formal logic and consider more generally the nature of truth, that is what it is to say that a proposition is *true* or *correct*. Truth is one of the longest standing questions in the canon of Western philosophy, and it remains one of the most central and important, in particular due to its relationship with the equally central questions of knowledge, language and ontology.<sup>43</sup> Broadly speaking, philosophical accounts of the nature of truth, which are not sceptical about the very concept and generally embrace bivalence, can be categorised into two groups. There are those accounts of truth which see propositions as true when they refer to objectively extant facts in the world. Things are true on this view when they can be safely said to correspond to things or states of affairs which *exist*. These accounts can be broadly grouped together as 'correspondence' theories of truth, where propositions are true where they correspond to an *ontology* outside of one's understanding or perception of it.<sup>44</sup> On the other hand, there are accounts which reject such a vision, seeing truth as a more holistic question not of *identity* with facts in the world but rather with other matters of understanding. Such accounts therefore generally understand propositions as true when they fit with our surrounding knowledge in that area. These can be labelled *coherence* theories of truth, in that statements are true when they *cohere* with our broader understanding of things.<sup>45</sup> Such theories therefore see truth as a broadly *epistemic* question rather than a metaphysical or ontological one. If we can find a plausible account of law and the validity of legal propositions which seems to fit with one of these accounts of truth, MCQs remain a theoretically plausible form of assessment for legal knowledge.

How therefore do we generate valid answers regarding legal propositions? There of course exist numerous accounts which are entirely sceptical about any such enterprise within law, which one might label the 'no right answer thesis'. Elements of such an account are found within strands of the legal realist tradition, or at least those parts of it which focus on the indeterminacy of legal standards, and also within elements of the broader critical legal studies movement, in particular those which adopt a post-structuralist or deconstructivist approach. It would seem axiomatic these accounts of law would reject any notion of a single best answer-based assessment. Paradoxically, it will be argued below that it is precisely this form of rule-scepticism which SQE1 does in fact embody. However, if one takes it for granted that some element of legal knowledge is both plausible and also a relevant part of legal

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<sup>40</sup> John McDowell, 'Truth-Conditions, Bivalence, and Verification' in G Evans and J McDowell (eds), *Truth and Meaning* (Clarendon Press 1976); Kenneth F Rogerson, 'Truth, Bivalence, and Realism' (1994) 43 Iyyun: The Jerusalem Philosophical Quarterly 43.

<sup>41</sup> On this question generally see Paul Tomassi, *Logic* (Psychology Press 1999) 123–25.

<sup>42</sup> Jan Łukasiewicz, 'On Three-Valued Logic' in *Selected works* (Studies in logic and the foundations of mathematics, North-Holland 1970) 87–89.

<sup>43</sup> Alexis G Burgess and John P Burgess, *Truth* (Princeton University Press 2011).

<sup>44</sup> Marian Alexander David, *Correspondence and Disquotation: An Essay on the Nature of Truth* (Oxford University Press 1994); Gerald Vision, *Veritas: The Correspondence Theory and Its Critics* (MIT Press 2009).

<sup>45</sup> Ralph Charles Sutherland Walker, *The Coherence Theory of Truth: Realism, Anti-Realism, Idealism* (International library of philosophy, Routledge 1989).

education, such radical rejections<sup>46</sup> of the possibility of such a thing are probably not a suitable starting point to enquire into their nature.

It is necessary to consider whether there *is* any plausible account of the truth conditions of legal propositions, which would be capable of being accommodated within both the contested nature of law, discussed above, and the form of assessment which the SRA is proposing.<sup>47</sup> Such an account might fit within a *legal coherence thesis*, in which there is an agreed ‘way of knowing’ whether a certain legal proposition is true, or a *legal correspondence thesis*, in which there exist knowable facts or states of affairs in the world, which would ‘validate’ a legal proposition as true. Let us consider both possibilities.

For there to be a legal coherence account of truth, there would have to be an ‘immanent’ quality to the law’s content, in that it would have to be found within the law itself. There exist numerous accounts of law of this type, often captured by the family resemblance concept of ‘legal formalism’.<sup>48</sup> Such accounts of law see its operation as autonomous, somewhat scientific and as separate from the vagaries of politics and power, from which law is insulated by its formal nature.<sup>49</sup> For legal formalists of all stripes, it is the very nature of law (its ‘form’) which renders its content intelligible. There are two broad, and in many ways radically different, versions of legal formalism, each compelling in its way. On the one hand, there is the classical form of legal immanence found within the formalism of contemporary authors such as Weinrib,<sup>50</sup> who explicitly see law as a matter of ‘coherence’, in which that ‘coherence functions as the criterion of truth’.<sup>51</sup> The answer to any legal problem will depend on the internal logic or the legal question, and ultimately the answer can be arrived at through a thought process which requires to recourse to any outside standards or non-legal judgment. Such approaches mirror influential accounts of authors such as Hohfeld<sup>52</sup> who attempt to provide a logical framework for the structures of rights and duties which exist within the law. For such authors, law is entirely self-contained: a strong training in the rudiments of legal concepts leads to the potential solution to all legal problems in a near-scientific manner. While this might strike the reader as a circular form of argument, this is the very point of such accounts: they are axiomatic, just as mathematical truths are. Indeed, Weinrib himself embraces the argument of circularity, stating that it ‘is a consequence of the self-contained nature of intelligibility’.<sup>53</sup> Such formalist accounts of law are almost exclusively focused on questions of private law,<sup>54</sup> in which questions can be framed within the Aristotelean account of corrective justice, with its pseudo-mathematical structures. On this view, questions of distributive justice, according to the celebrated Aristotelean dichotomy lie outside law in the central formalist account.

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<sup>46</sup> In fact, however, the ‘no right answer thesis’ often in fact overplays its hand, failing to perceive in its own account of the operation of law that it locates ‘true’ legal propositions within some other observable or otherwise knowable phenomenon, such as inchoate power structures, discourse, economics or single acts of adjudication based on subjective judgment. Some classical accounts of this nature can be found in Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457; see also Duncan Kennedy and Karl E Klare, ‘A Bibliography of Critical Legal Studies’ (1984) 94 The Yale Law Journal 461; A more genuinely ‘open’ version of the no right answer thesis can be found in AD Wootley, ‘No Right Answer’ (1979) 29 The Philosophical Quarterly (1950-) 25.

<sup>47</sup> For an excellent and original attempt to understand the relationship between law and truth, see Patterson (n 15). Patterson also examines the possibility that legal truth might be modal in nature, albeit in a different form to the account presented here.

<sup>48</sup> For a survey of this concept see Morton J Horwitz, ‘The Rise of Legal Formalism’ (1975) 19 The American Journal of Legal History 251.

<sup>49</sup> Brian Leiter, ‘Legal Realism and Legal Formalism: What is this Issue?’ (2010) 16 Legal Theory 111.

<sup>50</sup> Ernest J Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1987) 97 Yale LJ 949.

<sup>51</sup> *ibid* 972.

<sup>52</sup> Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 The Yale Law Journal 710.

<sup>53</sup> Weinrib (n 50) 974.

<sup>54</sup> Weinrib (n 21).



A similar account of legal immanence is found within the interpretivist proto-natural law models of theorists such as Ronald Dworkin.<sup>55</sup> Dworkin rejects out of hand the brute ‘logic’ of private law formalists such as Weinrib, and instead builds an account of internal legal reason which builds precisely on those elements of legal practice which would seem to disprove it. Much of Dworkin’s ingenious work focuses on the inability of the *grounds* of law alone to solve legal disputes, or lead directly to clear legal propositions: Dworkin argues that such problems demonstrate the inability of perceived legal rules of whatever genesis to resolve legal problems. For Dworkin, however, legal practice is characterised by the use of deeper legal ‘principles’,<sup>56</sup> to use the vernacular of his earlier work, which are, broadly, moral notions located within the legal system itself. In his later work, Dworkin comes to argue that these moral aspects of law are to be found through the interpretation of past-legal practice (ie that is previous legal decisions, legislation, etc) in the light of their best moral justification.<sup>57</sup> In this way, Dworkin also perceives law as an autonomous form of reason which possesses a form of immanence; in his later work he labels this law’s *integrity*,<sup>58</sup> a near-synonym for coherence, with an additional moral connotation. While Dworkin sees law as a special form of institutionally bound moral reasoning,<sup>59</sup> his account is one which can be classed as formalistic, in that it sees law, just as Weinrib does, as separate from politics, or as Dworkin’s celebrated early work would have it, ‘policy’.<sup>60</sup>

If therefore, either of these accounts, or some similar account, is correct, there is a certain viability in the MCQ-based approach of SQE1. On reflection, neither seems particularly plausible, and both seem far from the open and ecumenical nature of legal education discussed within this paper. The problem with formalist and immanent theories of legal knowledge is that they misunderstand the nature of legal reason in two important ways. Firstly, they put forward an account of law which is focused on *one* form of reason or argument which appears familiar to lawyers. In the two versions which we have examined here, these are the logical forms of reasoning based on the consequences of core legal concepts and the moral forms of reasoning based on the imaginative reinterpretation of the grounds of law. It is true that both of these forms of argument are indeed familiar to lawyers, and are indeed found within both the everyday practice of solicitors attempting to understand the law in front of them, and the detailed reasoning of an appellate judge. Such arguments, however, do not constitute the ‘end of the story’ in any case. They are always part of a rich tapestry of competing modes of reason,<sup>61</sup> some of which might be equally ‘formalist’, while others might be based on extrinsic matters to legal form, but nonetheless a recognisable part of legal argumentation. These might include historical accounts of past events, such as legislative intention or the evolution of the usage of the laws in question, or pragmatic or instrumental considerations, such as the consequences of a certain outcome. Accounts such as those of Weinrib and Dworkin are infinitely valuable because they help us to understand certain forms of reason which lawyers utilise in a legitimate way to reach legal conclusions. However, they tend to overstate their case because they fail to recognise that such accounts are in fact *modal* forms of reason, that is to say certain forms of *qualifying* argument, in order to add sophistication to legal thought.<sup>62</sup> While it is true that it is a powerful legal argument to point out that, from a certain point of view, or taking a certain *modal* approach, the logical correlative of a claim right in a certain area of private law is a duty on another party, such as Weinrib would have it, this would rarely if ever be seen as the *end* of the argument. On the contrary, other *modes* of argument intervene at this point, such as the moral interpretation discussed

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<sup>55</sup> Dworkin, *Law’s empire* (n 15).

<sup>56</sup> Ronald Dworkin, ‘Hard Cases’ (1975) 88 Harvard Law Review 1057.

<sup>57</sup> Dworkin, *Law’s empire* (n 15).

<sup>58</sup> *ibid* 176–275.

<sup>59</sup> Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 400–15.

<sup>60</sup> Ronald M Dworkin, ‘The Model of Rules’ (1967) 35 The University of Chicago Law Review 14.

<sup>61</sup> Patterson (n 15) 128–50; Philip Bobbitt, ‘Is Law Politics?’ (1989) 41 Stanford Law Review 1233.

<sup>62</sup> In logic, a modality *qualifies* a statement or proposition in some way.

by Dworkin, or any other form of legal mode. Legal reason allow for different forms of qualifying proposition or statement to arrive at conclusions.

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

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

Before dismissing out of hand the SRA's proposal however, it is necessary to consider the possibility that a *correspondence* form of truth might lie within SQE1's account of law and offer an alternative plausible defence of the use of MCQs. Such would be the case if it could be argued that the truth of a legal proposition were clearly dependent on some external fact in the world. Numerous accounts of legal truth of this nature exist, ranging from efforts to locate legal content in the empirically observable social practices of a society<sup>63</sup> to theories which seek to recast legal reason as some other form of truth or logic which can be identified outside of law.<sup>64</sup> Such accounts avoid the hubris of accounts of legal immanence, but thereby exhibit another flaw: they reject entirely the notion of the autonomy of legal reason or knowledge, effectively making an assessment of the truth of a legal proposition dependent of something extrinsic to law. If one posits that 'the law' simply is, to take some random but influential examples, the economically most efficient outcome, or the morally most appropriate conclusion, the very notion of *legal truth* becomes redundant. This is not to make any sort of argument related to the social locatedness of law or the complex relationship between law and other forms of thought or reason. However, the correspondence theory of truth would seem to have very little going for it in terms of an account of law which might justify SQE1. More fundamentally, even where such accounts of factors extrinsic to law enter into legal reason, which they of course do on a regular basis, they do so in the *modal* form described above. That is to say they do so as part of a multimodal justificatory form of reason which constructs a legal outcome. While an economic analysis of a question of liability in an appellate court might be influential in leading to a radical redrawing of an area of private law,<sup>65</sup> there is

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<sup>63</sup> Hart (n 5).

<sup>64</sup> Posner (n 22); Finnis (n 17); Evgeny Pashukanis, *Law and Marxism: A General Theory* (Ink Links 1978).

<sup>65</sup> A classic example of this kind of thinking being present within judicial reasoning is *Hunter v Canary Wharf* [1997] UKHL 14.

no sense in which a legal proposition is true *simply by virtue* of an analysis of Pareto efficiency in a particular transaction or area of economic activity for example. Such arguments, to the extent that they are part of the identification of legal truth are *modal* in nature and *justificatory* in function, ie from the perspective of such an argument, a particular proposition would seem justified. While extrinsic factors therefore come into legal reasoning, there is no sense in which the bivalence of legal propositions can be established through their correspondence or identity with something extrinsic to law. Of course, certain extrinsic facts in the world are often part of a process of establishing the validity of legal propositions in very obvious and central ways, such as the passing of a particular piece of legislation, or a previous judicial decision. However, these are *grounds* of law which might form the basis of a subsequent multimodal form of legal reasoning to take us *from* that ground *to* the legal proposition. While the modality of legal truth makes space for all manner of extrinsic ‘facts’, ‘events’, states of affairs and conclusions from other areas of knowledge, law cannot simply be *reduced* to those things. They need to be presented in the characteristic modal form of legal argument which then constructs the valid legal proposition.

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

#### 4. The Bleak Legal Realism of SQE1 and the role of lawyers

The preceding discussion is not a prescriptive one about the form of assessments within law in general or the appropriateness of a centralised examination in qualifying to become a practising lawyer. It is a measured and meditative attempt to underscore some of the often unstated reasons why the ecumenical approach towards legal learning has persisted within legal education and training within England and Wales. The ‘academic stage’ of legal learning is valuable for many reasons, *some* of which will of course be retained by the ‘graduateness’ requirement in the SRA’s envisaged changes. However, this academic stage has acted as a forum within which the multimodal nature of legal reason and truth could

be learned and assessed in all manner of creative ways. Indeed, it is not even a logical consequence of the arguments presented here that MCQs be excluded from the summative assessment of legal knowledge. They must, however, be combined with elements of constructed response which allow for the multi- and metamodal arguments which justify the asserted propositions.

Without this justificatory modal framework, MCQs embody a very particular theory of law. Given what was argued previously regarding the lack of bivalence within legal propositions, in the absence of justificatory *modes* within the structure of assessment which render any answer ‘true’ or ‘false’, all potential answers come to possess the ‘third’ quality of propositions within formal and temporal logic: that is to say, *not yet determined whether true or false*. The selection of the answer is therefore a *prediction*: a prediction of someone else’s adjudication on such a legal matter. Of course, predictions can be extremely valuable in all forms of learning and professional practice, including within law. They can also form the basis of MCQs where this is their aim. One could for instance, have a multiple choice exam regarding the outcome of a football match to take place in the future. When the football match concludes one would very objectively be able to calculate the candidate’s ability to predict its outcome. This is the account of law which SQE1 embodies. It is, in short, a form of *Bleak Legal Realism*, of the sort often pastiched by critics of legal realism in general. Legal realism of this kind, often labelled American Legal Realism, finds its roots in the celebrated work of Oliver Wendell Holmes<sup>66</sup> and Karl Llewellyn,<sup>67</sup> which takes as its starting point the idea that law is effectively inert regarding its eventual application due to the open-textured and indeterminate nature of legal sources such as rules and principles. It is, in short, a rejection of a romanticised vision of law of the type described in the preceding section as an *immanent* or *formalist* theory of law. However, rather than seek to locate the numerous justificatory modes which characterise legal argument, legal realism of the type in question seeks to find objectivity elsewhere, that is in the actual decisions made in the courts and empirical questions of adjudication more generally. Brian Leiter has more recently described legal realism’s impact as one of ‘naturalizing jurisprudence’,<sup>68</sup> in that it makes the study of law and its content akin to the natural sciences, where hypotheses must be empirically tested. The upshot, for theorists who subscribe to the Holmesian account of law, is that any proposition of law can, at best, be seen as a prediction of an adjudicatory outcome. In this sense, through its lack of space for justificatory modes, SQE1 embodies such an account of law. It is a *Bleak Legal Realism* because it reduces and essentialises legal knowledge to a hunch about future actions of others, and permits no sophistication or justificatory argument which might temper this vision of law. Of course, in the MCQ itself, it is not the judge’s outcome which is being predicted, but rather the question setter’s. It is a form of legal realism without even the redeeming feature of being located within the empiricism of the social or natural sciences, and indeed law’s deep social situatedness.

This paper has attempted to present in a reasoned and informed manner the nature of legal truth and the validity of legal propositions. This is a fraught field, and it could be that the reader does not feel prepared to accompany the author all the way along his meanderings through modal, multimodal and metamodal reasoning, or through the justificatory modal constructivist account of legal knowledge. However, this account has been constructed here to *make sense* of a rather simpler proposition, that is that *the exercise of a recognisably legal form of reason or argument is inherent within the practice of law*, and, more particularly in the *identification, articulation and application of valid legal propositions*. The modal account given here attempts to accommodate the rather unambitious and hopefully uncontroversial claim that law’s nature cannot simply be reduced to something else which is easily knowable, nor to a

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<sup>66</sup> Holmes (n 46).

<sup>67</sup> Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Quid Pro Books 2012). The work of these American Legal Realists is in fact far more sophisticated than the pastiched version which is often presented. Legal Realism as a broader family of theories is of course an extremely nuanced account of the social function and locatedness of law and its operation.

<sup>68</sup> Leiter (n 19).

form of logic. If this were the case, it would hardly seem appropriate to test legal knowledge among prospective lawyers rather than knowledge of that other thing or their ability to reason logically. The structure of SQE1 reduces law and the truth of legal propositions to the ability of a candidate to predict the application of legal thought by others.

Legal knowledge on this view becomes an instance of *predictive justice*. This is a curious time for prospective lawyers to be tested on this, at least in terms of their future job prospects, given that we are on the cusp of a revolution within the provision of legal services in which the predictive aspects of the legal profession will be far better carried out by artificial intelligence (AI) and algorithm than by human beings.<sup>69</sup> This is precisely the type of task which AI thrives at when compared to humans. While the development of AI's role within law and legal services is a complex and potentially controversial matter, there is little chance that such aspects of the legal profession (effectively the parsing of reported previous legal events and identifying patterns to predict future outcomes) will not be effectively handed over to AI. Equally, however, there is a more worrying potential knock-on effect of the theory of law embedded within SQE1. *If* its advent has a more general impact on the nature of legal education and learning,<sup>70</sup> future lawyers will be trained to think about law in the bleak realist mode presented here. Due to the constructivist nature of law, as discussed in the previous section in relation to multimodality and its construction or creation of law through its justificatory nature, this will have a serious practical impact. One does not have to subscribe to the multimodal account of legal reasoning provided here to understand the force of this point. Law is constructivist in nature merely through its status as a social practice driven by the participants' understanding of it: if the nature of that practice changes, by definition the law also changes. The inability of lawyers to reason in multimodal and justificatory ways, and indeed to express those forms of thought, will have a dramatic impact on the quality of lawyers, of legal services, and, eventually, the quality of the law. Perhaps the gatekeepers of the legal profession: judges, law firms, law schools, existing practitioners, various other stakeholders, and even the market for good quality legal services, will not allow this to happen. However, this would be *despite* an inappropriate form of assessment which fails to identify those candidates which are best able to construct valid legal propositions. The consequences of such a failure can only be empirically measured, and do not fall within the remit of the present work. However, an examination which fails in its attempt to differentiate between candidates' ability to do the very thing which it is seeking to examine is unlikely to have its intended impact.

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<sup>69</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction To Your Future* (2 edition, Oxford University Press 2017); Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (2nd edn, Oxford University Press 2010).

<sup>70</sup> The author is not asserting that this is *inevitable* in any way. Universities, law firms and others are of course still 'free' to set curricula as they see fit. Whether this happens under the proto-regulatory pressure of SQE is an example of a proposition in formal logic whose truth is *yet to be determined*.