

Chapter 4

Analysis of the Research Study Data

4.1 INTRODUCTION

The methodological framework and processes outlined in chapter 3 have been used to generate a set of seven conceptions of *thinking legally*. These conceptions represent the first level of outcomes of this phenomenographic research. The investigative processes involved in this study have enabled the conceptual 'building blocks' associated with thinking legally to be identified, described and substantiated.

Chapter 5 deals with a second level of outcomes as it investigates the interrelationships among the seven conceptions and examines the implications of these for various stakeholders in law and legal education enterprises. The inductive and interpretative approach used in this research has enabled the conceptions to arise out of the rich and diverse qualitative data, in verbatim transcript form, which were obtained from discussion interviews with participants in this project.

The conceptions generated by this research study are:

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| Section 4.2 | Conception A: Thinking Legally as <i>the rule of law</i>; |
| Section 4.3 | Conception B: Thinking Legally as a representation of a <i>personal worldview</i>; |
| Section 4.4 | Conception C: Thinking Legally as a process of justifying <i>personal behavioural space</i>; |
| Section 4.5 | Conception D: Thinking Legally as a process of <i>dealing with dualism</i>; |
| Section 4.6 | Conception E: Thinking Legally as <i>personal processing of contextual and situational data</i>; |
| Section 4.7 | Conception F: Thinking Legally as providing <i>pathways</i> for decision-making; and |
| Section 4.8 | Conception G: Thinking Legally as a <i>pervasive and comprehensive construct</i>. |

Each of these conceptions is described and justified consecutively, using illustrative transcript quotations and relevant graphics that synthesise participants' experience.

4.2 CONCEPTION A: Thinking Legally as *the rule of law*

General Description:

Because of the particular ethics, values and beliefs (4.2.1) of individuals who ascribe power to the *rule of law*, a socially constructed legal framework of 'right' and 'wrong' for society is considered to predominate over each individual's personal frameworks (4.2.2). This systemic or general *rule of law* (4.2.3) is perceived to be the basis for the endorsement or legitimisation of a society's framework for approving and sanctioning actions. Specialist personnel (4.2.4) such as those involved in the executive, legislative and judicial arms of government as well as legal officers and court officials such as solicitors, counsellors, barristers and judges, are seen to play a key role in the continuous development, declaration and increasing definition (4.2.5) of the rules (4.2.6), principles (4.2.7), processes (4.2.8), procedures and boundaries of the constructed laws. Advocacy processes within the adversarial model (4.2.9) of the Australian legal system seek to identify 'truth', especially in its objective, as compared with its subjective, forms (4.2.10). Consequently, there is an overarching emphasis on *legal reasoning* (4.2.11) in its scientific-deductive modes where parties to a conflict either 'win' or 'lose' (4.2.12) their quests for truth.

Discussion:

4.2.1 Ethics, Values and Beliefs

Three interviewees (I₉, I₂₄ and I₃₀) were most lucid in their portrayal of these criteria. All are involved actively in the design and implementation of either Government 'watchdog' enterprises, Government Departments or Legal Services with particular focuses on criminal matters:

- I₂₄: Now that puts all your beliefs, whether it influences your beliefs or not, that quite clearly shows that society as a whole through the legislature, has an opinion on what is 'right' and what is 'wrong'. (413)

There appears to be an acceptance of the democratic processes which operate in the society while at the same time an understanding is evident about the role that each individual's ethics, values and beliefs play in the successful ordering and control of lives. Democratic framework and governmental processes are enshrined in the Australian Constitution which is a foundational piece of social agreement amongst the Australian States, political groups and people. However, it is acknowledged that this does not lead to conformity of views in this society. The democratic processes are considered appropriate for resolving both the tensions and the conflicts amongst people and groups holding different ethics, values and beliefs:

124: It's just the graduations within fairly strict lines. They're all governed anyway by the Constitution which sets the basic framework. (413)

The fact that certain general agreements about an Australian Constitution, legal framework and specific legislation can be generated, attests to the core democratic ethics, values and beliefs held by most Australians. While there is never total agreement on any of the above mentioned, the willingness to tolerate and even promote divergence of views is itself an ethical premise. This is illustrative of the foundational assumptions, presuppositions and general agreements upon which Australian society is based and operates:

129: ... the law itself, the very existence of the rule of law gives effect to an ethical value. The value that like cases should be treated like and that equal cases should be treated equally under the equal protection of the law. It doesn't work that way but it's a noble aspiration. It beats blood in the streets. (145)

In the above quotation, the leader of a Queensland Government 'watch-dog' organisation is beginning to identify illustrative legal principles that are derived from agreements on ethics, values and beliefs. Over the course of Queensland and Australian democratic and legal history, networks of pre-suppositions, assumptions and agreements have been generated. These form the structure and processes of the social frameworks, including political, governmental, legal and individual, that are explicated in legislation, court decisions, government policies, the popular press, and personal actions.

Despite this intricate and complex web of intersecting and interrelating ethics, values and beliefs, there is no agreement that meets both the desires and the aspirations of all members of

the Queensland or Australian society. This results from differing individual and group ethics, values and beliefs as well as from varying interpretations of declared agreements:

I₃₀: Yes, it is not only what was the intention of the legislation but also the interpretation of it. Yes, that is ... (592)

These differing expressions of ethics, values and beliefs in a society as well as varying interpretations of the apparently agreed stances to issues enshrined in legislation, court decisions and community life are the bases that give expression to and application of the '*rule of law*' in society.

4.2.2 Framework for '*Right*' and '*Wrong*'

There is a sense in which equity and equality are key operatives in a democratic society. The very essence of resulting contractual agreements and co-operative relationships is based on mutual respect, equal access and comparable outcomes. The processes for generating and maintaining these social harmonies are the rules used by which a society and its members create and maintain order as well as resolve conflict. A senior lecturer in law stated:

I₅: ... looking at my own kids and others, it seems to me that the appeal to a rule comes very very early. That once you have got two children in the one family and one of them perceives the other as getting some benefit that they haven't got, there's the 'what about me, eh? Robby's got it, why shouldn't I have it?' And implicit in that there's an appeal to the notion that there should be the same rule for both of us. (67)

Associated with this valuing of, and appeal to, rules is the notion of what is perceived to be 'right' and 'wrong'. The result of individual and community consciences is a sense that justice, fairness and personal belief provide a foundation for the development and declaration of each person's sense of both the rightness and wrongness. However, the expression of personal, corporate and community views on 'What is right?' and 'What is wrong?' is pivotal for the successful operations of families, groups and democratic society. This is because it is at the boundaries of one's sense of rightness or wrongness that conflicts occur with others senses of these. Consequently, the law plays a role in assisting with the definition of 'right' and 'wrong' while at the same time providing avenues for the resolution of conflicts over what is to be considered 'right' or 'wrong':

- I₂₄: ... I still see that definitely at the outset of what it is that the individual's actions, what actions the individual does, whatever effect they have on other people, will have to basically be governing what is 'right' and what is 'wrong'. (413)

A tertiary justice studies lecturer expressed some blunt comments on this matter:

- I₁₄: To *think in legal ways* means to think within a straight jacket. We've been talking about legal ... whatever. As soon as you introduce the word legal (whatever) when you're talking about what people have been portraying ideas about these (research) questions if you like. People are thinking within a certain framework. OK! Within a legal framework that we have, we have that 'black' and 'white' thinking where we have 'right' and 'wrong'. We have mitigating circumstances to allow for the areas of 'grey' but generally we have thinking in a straight jacket. (224)

The notion of *personal, corporate and community legal frameworks* is a relevant concept here. It provides a useful tool for considering the context, structure and processing of issues and conflicts associated with 'right' and 'wrong'. Because of differing and intersecting expressions of 'right' and 'wrong', conflicts will occur.

However, not everything is 'black' or 'white'. There are many situations and issues on which it is not possible to draw individual closure, let alone community consensus. Consequently, these contentious issues, situations or relationships are examples of 'grey' areas until they have been encountered, considered and processed into 'black' or 'white' decisions. Participant (I₁₄) acknowledged that humans do not always make reliable decisions in similar recurrences of a particular 'grey' situation. Relativities of time, situation and personal factors cause often different outcomes to be generated in seemingly similar situations. These inconsistencies resulting from unreliable processes are a major cause of difficulty for humans and for society's attempts to resolve them through processes such as the law.

A Years 11 and 12 Legal Studies teacher considered that:

- I₁: ... There were the traffic rules and those kinds of things. I suppose an awareness of the law that it is supposed to be there to protect you. (1)

While protection is certainly one of the key concepts embodied in the law, others such as justice, fairness, conflict resolution and order in society are fundamental. It is not only the nature of the law that is important to individuals, groups and the community but also the structure and processes by which any transgressions might be resolved.

The president of a professional association of Queensland lawyers had the following to say on matters concerning the definition and resolution of 'right' and 'wrong':

- I₃: ... I've always measured my approach by whether I am able to go into a witness box and swear to a set of circumstances which will justify the position I have adopted at first. If I can't do that then it's wrong! (32)

Consequently, the *rule of law* has important interrelationships with community notions of 'right' and 'wrong'.

4.2.3 Systemic Framework and Related Actions

A number of participants in this research including: Year 12 students (SS₁₂), a Years 11 and 12 Legal Studies teacher (I₁), a State High school deputy principal (I₁₄), the senior partner in a law firm (I₁₈), a legal adviser to a Queensland government department (I₂₄), the president of an association of lawyers (I₃) and a senior lecturer in law at a Queensland university (I₂₇); made reference to the operations and structure of the legal system and the resulting actions that flow from interactions with it.

One legal studies teacher who had commenced a law degree prior to transferring to a pre-service teacher education program expressed the view that:

- I₁: ... It's the letter of the law you are always focusing on and when you're there and studying for things, it's the letter of the law that you are all concerned about. What is the line where the law is crossed? Really and that is all that matters. But stepping back from it now, I thought, 'Well, the line's not clear!' (6)

Concern here related to both the nature of the studies being undertaken and the perception that there is so much law to be learnt before one has earned the professional right to practise in it. This teacher perceived the law as providing an explicit line that ought not be crossed if the social good of the Queensland community was to be upheld. The research participants understood that while some issues and situations may appear to be either 'black' or 'white', in fact they are often 'grey'. Situations that may be seen as objective could be subjectively analysed.

A similar comment raised by a deputy principal of a State high school critiqued the ability of participants in the legal system to have an adequate conceptualisation of that system and disinterested view of it. Some participants in the legal system were perceived to be able only to operate within segments of the system without being able to contextualise their experiences in terms of the overall systems operations:

- I14: So lawyers aren't good at looking at the big picture. Some of them are strategists and understand where they want to go. But again it is within the limit of the game. (225)

The president of a Queensland professional association of lawyers was forthright in his assessment of the role of professional participants in the legal processes not only to understand the legal system but also to have competence in their own abilities to contribute to it and to appreciate its strengths and inadequacies:

- I3: I suppose one of the questions that is constantly asked of me is 'How can I act for somebody and defend them in a prosecution when I know they are guilty of the offence?' And of course the answer to that is that you're making sure that the system works to protect the innocent. ... you simply have a responsibility to make sure that the evidence is able to sustain the charge. And if it doesn't sustain the charge, even if the person might be guilty and be acquitted, what you have done is to ensure that the system works because it is much more important that an innocent person is not convicted. (31)

Here, the president is seemingly concerned with structural, procedural, engagement, professional and personal issues associated with working within the system especially in relation to the interests of both client and legal counsel. Unless one is able to 'use the system' to achieve desired outcomes, then naive personal expectations and professional actions are likely to result. This has grave implications for the president's clients who may perceive the 'game' as being about 'winning' or 'losing'. A senior lecturer in justice studies at a Queensland university had the following to say on this matter:

- I14: ... Some (lawyers) clearly take the view that it's all about winners and losers and the truth is irrelevant. Winning is what is important. Others, again depending on their orientation, take a more idealistic view. They aren't so disillusioned by legal positivism which is the dominant sort of paradigm culture. To think that they actually might arrive at the truth, 'What is the truth? and What are they arriving at?' They probably argue 'So what?' (Laughter). (225)

If this is the case, then it is possible to infer that some professional lawyers may be compromising their ethics, values and beliefs for the sake of quick yet short-lived personal gain. The risks associated with such actions would need to be carefully weighed against logical and likely consequences. On the other hand, some individuals are so encultured and reliant on the system that they have little perception of how to use the system to their clients' or even their own personal advantages. The senior partner of a Brisbane law firm commented:

I18: The impacts or consequences of a person's actions in regard to the framework of the legal system is 'you work within the rules'. (Phone interruption) (297)

Conformity to the system of professional expectations rather than deviance from them would seem to be the guiding principle for people holding to these traditions and worldviews. It is true that there are particular traditions and codes of practice to which professionals must comply. However, codes of practice are usually intended to provide secure and manageable grounds for the legal, rather than illegal, operations and activities of the profession:

R: The whole question is 'What is the truth?'. (424)

I24: I'm sure the truth is always a long way away from the courtrooms in most cases! But that is the system that we've got. We have to work with it. (424)

This statement from a police prosecutor casts grave doubts about the real, as compared to the perceived, purposes of conflict-resolution processes which are conducted through court proceedings. If one is using the system, then it is highly likely that naive clients will purposely be kept in the dark so that the tactics of the operator will not be exposed. The following comment from a senior lecturer in law at a Queensland university, who organises pre-service professional development of lawyers, is scathing in his criticism of those who abuse both the system and its clients:

I27: Law is not about justice in one sense. It's a system that you like to think is infused with a high level of justice but I have had just so many cases where I am totally confused. The Will was a good Will and yet I get a peanut judge as it were who says and just incredibly forms a different view. (522-523)

The Year 12 school students who contributed to this research were more constructive and noble in their suggestions that knowledge and experience enable individuals not only to know the system more comprehensively but also to participate effectively and thereby to improve it.

They believed that Years 11 and 12 students could make modifications to the operational systems and rules of their school organisations more efficiently and appropriately than could their younger, and less experienced, colleagues:

SS₁₂: I think we could change them. In Year 8 you like, if you do something 'wrong' you really worry but as you get older you sort of start playing with the system. Yes! (Laughter). (190)

SS₁₂: The rules for the school are important but you have to work with them. They can be changed or you can go along with them if they are OK. (190)

Consequently, legal systems and frameworks that have been developed by a society need to be understood appropriately, ethically utilised and modified in the light of legal, rather than illegal, practices. The egocentric operations of unethical and illegal operators need to be constrained and confronted if the legal systems are to operate in ways that are both constructive and just.

4.2.4 Specialist's Roles and Perspectives

It must be acknowledged that there is an important role for specialist legal personnel in conflict-resolution processes. The following statements from the president of a Queensland association of lawyers (I₇) and a legal studies lecturer (I₈) in a Queensland university indicate some of the complexities of these roles:

I₇: ... The professionals on both sides understand the dynamics and reach that point and lead their clients to it. If you didn't have the professionals doing it then you would have catastrophe. (119-120)

I₈: I see 'legal thinking' in the black letter law way. The lawyers come together and have a legal thinking 'brainstorm'. I've sat in on an appeal to the Supreme Court where three Judges arraigned a Barrister as he sought to have an appeal upheld. I'd see that as a 'legal thinking' activity where they hit him with questions and opened up cases and he had to defend his position. Now that's a fairly limited activity *legal thinking* in the context. (134)

Because of their expert knowledge and specialist experience, legal personnel must know thoroughly both the legal system and the processes which operate within it, if they are use it to efficiently and effectively to their clients' advantage. This leads to ways of thinking which have been described by the participants in this research as *legal thinking*. A Master of Law student (I₂₀) at a Queensland university described this as:

I20: The thrust of *legal thinking* is that you are thinking like a lawyer, judge or someone connected with the law, even the police as well. (344)

A clear articulation of a general view of the role of specialist personnel in the *rule of law* was that of interviewee (I7) who was president of a Queensland association of lawyers:

I7: ... the court isn't concerned with the justice of the case except according to law. So that what the judge might wish to be the result according to the judge's own perceptions of 'right' or 'wrong' are, so it is said on some occasions, immaterial. The judge just has to apply the law. But of course that's taking too clinical and mechanistic a view of the law. ... they have learned over years of university training and years of experience that the law generally accords with what is right. Sometimes it fails and statements are made then that the law can be changed. But in most cases it works in a very mundane and boring way to achieve the right result by a set of rules that are drawn from a set of underlying principles. The rules being the more specific application of general principles. (107-108)

Specialist personnel, therefore, are in a unique position to advise, guide and assist clients through the complications of the processes of the legal system. This is because of their commitment to uphold the legal processes, their duty to uphold what is 'right' in and for society, the financial advantages associated with successful use of the system and the necessity for their clients' need to be met.

4.2.5 Legal Knowledge of 'Right' and 'Wrong'

When participants in the research process were invited to comment on the relationship between notions of 'right'/'wrong' and the law, there were some varying responses. The Year 12 students in a Queensland state high school indicated that:

SS12: It means to think in terms of the law. A lot of people don't know the law and don't understand their rights as well as their responsibilities. They don't know what half the legal terms mean. They don't know their rights as well all the stuff that will help them in their life. (195)

Clearly, there is a deficit model of thinking here in relation to what is perceived as not being known or understood by society. The prominence given to the law and its ability to communicate appropriate behavioural codes of conduct, as compared to a development of the knowledge and skills bases of community members, is, in the opinion of these students, a great detriment to community life. While '*ignorance of the law is no excuse*', a lack of knowledge is a real problem which society should address.

Another perspective of this need for legal knowledge was articulated by a legal adviser to a Queensland Government Department (I₂₄). The knowledge gained through his employment had empowered him personally and professionally:

I₂₄: Clearly what is legalistically 'right' and what is legalistically 'wrong' for me changed considerably with my employment. (Laughter) (413)

The following quote from a Doctor of Law student clearly indicated the application of similar perspectives to the operations of professional lawyers:

I₁₀: OK! 'Right' and 'wrong' professionally in my view is fairly straight forward because there is fairly clear delineation on what the rules are and so the rules on their face should probably be applied. That is the 'right'. Then we need discretion because anything that is black and white won't operate fairly but anything that obviously transgresses those rules is a 'wrong'. But in this profession that is fairly easy because you look up a statute or whether there are rules for applying for a grant or whatever. Society has actually stated expectations. Also it is easy to follow the rules. (153)

The following comment from a Legal Studies lecturer in a Queensland higher education institution expressed views similar to those outlined above:

I₈: I'd see it more like an academic activity, more like a professional activity of legal thinking. You go to a seminar on an aspect of law. (145)

Law, here, is seen in quantum terms. The impression gained by the researcher through discussions with interviewee (I₈) was that the more law one knows, the more one will be able to decide what is 'right' and what is 'wrong'.

The student completing a Doctor of Law program at a Queensland university also had some understandings very different to those expressed above in relation to the nature, focus and role of law in the delineation of the boundaries of 'right' and 'wrong'. In the following excerpt, the processes of law in terms of making decisions add another dimension to one's understanding of the role that law and legal knowledge play:

I₁₀: Lawyers see the law as a form of deciding and working out what is 'right' and 'wrong' in this society. (169)

This processing notion is a useful construct in the declaration of both content and strategic knowledge so as to establish personal and professional definitions of 'right' and 'wrong'. However, some may perceive these processes in quite different terms:

- I₁₀: *Thinking legally* though, I don't see as that at all. To my understanding of how to *think legally* like our neighbours 'You're going to take legal action'. It means problem. It means aggression. It means courts. It means money. It means all those negative things ... (167)

4.2.6 Rules as the Letter of the Law

Society articulates its views of 'right' and 'wrong' through government legislation, legal processes and through its implicit and overt expressions of community life. However, explicit rules play a very important role for individuals, professionals and community members. A legal studies teacher (I₁), a senior lecturer in law (I₅) and three Year 12 students (S₁₂) had the following to say on such matters:

- I₁: ... In my course the focus was on, 'you just need to know what the law is'. The broader legal issues they sort of come into it occasionally but its not the all important thing. (3)
- I₁: ... The million and one rules, and then there's the million and one exceptions to every rule. ...Really it is the letter of the law that is important not the overall effect or not the overall consequences necessarily. It is the letter of the law that is important. (2)
- I₁: ... Surely we could spend our time better somehow in looking at the issues behind it rather than learning off the content in every single case. I mean there is a place for that. (3)
- I₅: ... I suppose that is one of the first things that students have to learn - that the law is largely about rules, and the simplistic approach is that it is all about rules. (76)
- S₁₂: School rules. (Laughter) No basically, 'right' and 'wrong' are outlined in the school rules and regulations like uniform standards. What we are allowed to do in school and out of school when we are in uniform. (190)

The research participant (I₁) expected community members to know as much as possible of the law especially as it relates to everyday life. However, the role of professionals with expert knowledge of the law, legal rules, processes and philosophy cannot be underestimated. It is inferred that a society needs the ability to interpret its law in both a general sense for the smooth operation of the community and in a technical sense where the experts are able to provide definitions and interpretations that are fine, accurate and detailed.

4.2.7 Legal Principles

In the quest for participants in the legal processes to know, understand, interpret and use the law, both in a general and in a technical sense, there is a dynamic relationship between *legal principles* and the *rules* that apply. A Queensland Government minister (I₁₆) had the following to say on this matter:

- I₁₆: There are two elements to the law. Law is a system of rules to govern human behaviour. But the other element apart from rules is principles. There are principles inherent in the law as well as rules. (255)
Then there are principles. Principles like ... that one should not be a judge in one's own cause. It's a principle of natural justice. That's not written down like a rule. It's a principle which is always there. (256)

Further explanation of the interrelationships between principles and rules was provided by the president of an association of Queensland lawyers (I₇), where an indication was given of how rules are derived from principles and applied to particular situations:

- I₇: ... it applies across the range of harms both physical and economic and from a general principle which the judge who enunciated it in 1932 said it is a lot like the 'love your neighbour' principle. It's just a legal derivative of that. Everybody would agree with that proposition, wherever they lived in the world. So you develop a set of specific rules based upon the principle which then allow you as a judge to as far as possible to forsake your own prejudices and apply the law. Which is of course what is called the 'rule of law' that everybody's rights are determined by the law not by the proclivities of the judge who happens to be sitting to hear the case. (110)

The comprehensive and pervasive nature of the rule of law is an accepted premise in modern society although there are many examples where sections of society perceive that the law has been either misapplied or misinterpreted:

- I₇: It (the rule of law) covers every situation. But whether it's appropriate to dispute your affairs in court in every case is another matter obviously. It's not the case that resort to law is appropriate for everything. Sometimes you should just forget about it. Sometimes you should settle your differences. Sometimes you should do something else. Move away perhaps. (114)
- R: And we are developing all those 'alternate dispute resolutions and procedures' aren't we? (115)
- I₇: They work very well. So you have a number of varieties of ways of dealing with it. But they are just indicative of the fact that you should avoid litigation if you could possible do that. (115)

Professional experience provides a background for advice to be given in relation to the appropriate strategies that could be used to solve particular conflicts. It is the knowledge of the legal principles and rules as well as practical, personal and strategic experience that provide lawyers with the bases for both powerful and effective advice to clients. It takes time and experience to develop expertise in the complex art of legal analysis and conflict resolution. The following comment by the president of a Queensland association of lawyers indicated this:

I7: It's hard to take apart but what you do is you master the facts that then your familiarity with legal principle begins to sort those facts into the necessary categories and they themselves suggest the answer to you just as the judge in the earlier example says 'Well that can't be the law'! (118-119)

The chairman of a Queensland Government 'watch-dog' organisation (I₉) provided some further insights into some of the complexities of legal analytical processes:

I9: Well legal reasoning as you no doubt know is syllogistic. It's classical. Ah! It's really not scientific, not inductive. It proceeds from general principle to the application of that principle to the facts of the case. In many cases the facts are uncertain and have to be ruled on and that happens. (148)

A Queensland Government minister (I₁₆) provided some additional insights on the analysis of the relationships between principles and rules:

I16: So *thinking legally* is firstly to think in terms of rules and then to think in terms of principles. I suppose as well as thinking in terms of rules, you have to think in terms of specific instances of what the rule means. (256)

Consequently, if comprehensive legal argument and debate as well as justifiable decisions are to be developed consistently, it is important for the letter of the law to be investigated and explicated through the examination of the relationships between legal principles and the rules that have been deduced from them. The appeal to, and search for, congruence between these principles and rules are key tenets in the organisation and operation of a society's legal system.

4.2.8 Legal Procedures

Because of the perceived complex nature of the law and its principles, rules and procedures, community members may either disengage from it or rely totally on expert advice when they are involved in a conflict resolution situation. The possible implications of not doing things correctly in many civil and criminal matters can be enormous. A senior lecturer in law at a Queensland university said:

I5: These days, procedures are a very necessary part of the law as you well know and the emphasis on proceduralism gets to the point where it seems to me to be rather humbug. (77)

The implication here is that while there is a necessity for appropriate legal procedures to assist in the smooth operation of a system, often these have been developed over time with no real thought for the design of their overall effect. The strict definitions of many complex elements that are legal lead also to many community members being mystified by the nature and processes of the law, let alone the detail of it. However, it should be remembered that procedures in and of themselves are not the solution to legal conflict resolution. I5 saw the procedures as being essential elements in conflict resolution yet these were insufficient in and of themselves. The senior lecturer's criticism is that, in our society, proceduralism has developed to the point where it is a disincentive rather than an advantage to community members.

The following statement from the president of a Queensland association of lawyers is an example of the conflict resolution tactics that can be employed to deal with procedural and strategic matters:

I7: So you go to court and the other side is all ready to rip into you on the issue that you're in the wrong. And you say 'Yes of course we're in the wrong about that but where do we go from here though'? Obviously we need to do this, do that, ... and you deny them the opportunity to trigger the sense of outrage that I was talking about. You say, 'Well we don't want for them to do that so we'll admit all that and put it aside and run it as a dry legal case or a chat among lawyers. Let's just talk about this as lawyers. Obviously the clients are in the wrong there'. (123)

It is argued by the participants that there is a place for legal procedures. Things have to be done in certain ways if there is to be any expectation that consistent outcomes can be

generated. These procedures must be explicit, accessible and variable in that all cases of conflict resolution will not be similar.

4.2.9 Advocacy and the Adversarial Model

Because of the complex web of laws, principles, rules, and procedures referred to above, many situations, especially court cases, require clients to be represented by legal counsel. Professionals who are knowledgeable, skilled and experienced in the specialty area of the particular case are engaged to act on behalf of their clients. There are many components of advocacy, but it is sufficient here to say that an advocate's strategies are largely determined by the context of the case, the nature of the evidence being submitted and the strategy being used in the particular circumstances. The adversarial approach, as compared with other forms of conflict resolution such as the inquisitorial model, requires particular styles of advocacy to be used:

- I₁₄: As soon people begin to *think legally* because the underlying approach in our society is an adversarial model, it's that. They give in to an adversarial position. It's a case of well, evidence. Who's got the best hammer to hit each other on the head in this court. That is the track it goes down. It's interesting and I would see it as part of the legal culture. (224)

Here, a senior lecturer (I₁₄) in justice studies at a Queensland university articulated the view that the nature of the evidence being used in a particular case largely determined its strategy and outcomes. The trustworthiness of the evidence and the believability of the witnesses' statements are key elements in the overall decision making.

There are many and varied advocacy strategies and tactics that are used by legal counsel to achieve certain outcomes. For example, the president (I₇) of a Queensland association of lawyers stated:

- I₇: You might want to provoke a question in the judge's mind. You can often put it into a situation where you do provoke the very question you want. And you've got the answer ready in a particular style that will tend him in the direction you want to go. So that's advocacy. (122)

Another form of advocacy is that related to law reform. People interested in, for example, engendering social justice objectives in a society and changing the nature of the law or its

conflict resolution procedures, have to advocate their proposals privately and publicly if support for their initiatives are to be both approved and adopted. This form of public advocacy is also adversarial in that the nature of the propositions must be debated and the strength of public opinion gauged prior either to the adoption or to the refutation of the proposals. Advocacy is a key element in a democracy but it takes various forms and approaches depending on both the context and the particular case:

I₁₀: Now the societal view is more likely to obey professional rules. Oddly enough it is these people down here who are more likely to question and 'disobey', they don't believe they are disobeying of course, challenge the actual societal rules. (175)

This comment by a doctoral student (I₁₀) in a law faculty of Queensland university is indicative of the key role that advocacy plays in Australian society. While advocacy has both many and varied aspects to its scope and procedures, its role in conflict resolution cannot be underestimated.

4.2.10 Objective, as compared with Subjective, Standards

There is often a community perception that theory and practice are unrelated. While good theory ought to be derived from the analysis of good practice, good practice should be evaluated in the light of the theoretical base upon which it is founded.

One of the discussions that has plagued the legal profession has been the relationship between the roles of objective and subjective standards in the making of judgments in cases of legal conflict. Varying perceptions of the law, and the diverse approaches and personal abilities of individuals to interpret it, have been the topic of much debate. High on the agenda in this debate has been the identification and definition of objective standards and subjective standards. Some seem to view the law as 'the holy grail', while others consider it to be mere 'humbug' and a necessary schema for the resolution of conflict that naturally arises in human matters.

This situation seems to be exacerbated by the apparent unrelatedness of professional pre-service education and the realities of the world of professional practice. A senior lecturer in law at a Queensland university (I₂₇) explained this as:

I₂₇: But unfortunately, there's not a huge relationship between what we studied at Law School and law as practised. (512)

If I₂₇ is correct and preservice professional education is to be the knowledge, strategies, skills and personal development base upon which to establish one's personal and professional practice, then I₂₇ would appreciate the development of cohesive ties and points of integration of theory and practice, objective and subjective standards, preservice education and professional practice.

Another aspect of the standards debate was expressed by the leader of a Queensland Government 'watch-dog' organisation:

I₉: I think the system works imperfectly! I still think it is important to maintain it and to respect it because the rule of law is a valuable thing to have in a society such as ours which purports to be democratic. I think it is important to have what seems to be an objective standard for the measurement of the conduct of the judiciary. ... And if there is an objective standard which is applied to determine what should be done with respect to the disputes, then it seems to me to be a good thing. It means that the law is not capricious and it also gives effect to a strong intellectual tradition which certainly goes back to Roman times. (146)

The view expressed here is a very practical one in that recognition is paid to the frailties of the human legal system but an appeal is made for the codification and definition of those aspects of the law that are able to be expressed explicitly in as objective a form as possible. While the law is based on strong traditions, it ought to be refined continually in order to improve its definition and efficacy. The constructivist ideology upon which this view is based is but one of the paradigms that operate in legal circles. Other more radical, reconstructionist or post-modern views that are expressed hold to very different assumptions and perspectives of the law. An example of one of these is that expressed by a State high school deputy principal (I₁₄):

I₁₄: The argument from a legal point of view is that they are supposed to be objective and impartial which is just a joke but they still believe that ideology. (223)

The view here is that the tensions among these various perspectives need continual attention if society is to be able to reconcile its differences thus creating greater social harmony as

compared with disorder. The rule of law in society should be flexible enough to cope with the divergence of issues, opinions and values.

4.2.11 Legal Reasoning

One of the key legal processes, that have developed over time, has been that of legal reasoning. A representative of a Queensland law reform commission had the following to say on such matters:

- I23: Ahm! I think it's probably a bit different in that we are talking about legal reasoning. You're really restricting that to a person who is aware of the views of the law which probably wouldn't be of much interest to many people. So once you have been through a law school or some sort of legal training, then you become aware of different views of the law. For example, the doctrine of precedent, one court has to follow the previous decision of a court higher in the same hierarchy and that type of thing which is of no real interest to most people. But if you are working in the justice system, then you need to be aware of that to be able to put your arguments forward. (406-407)

While some of the participants' concepts outlined in this statement seem quite superficial, naive, rationalistic, reductionistic and deductive, they are indicative of the many and various views that are held about the nature, scope and processes of legal reasoning. Legal reasoning, however, is a complex process that has various forms and processes depending on the context of the case being considered. A comprehensive outline of this is included in chapter 2.

4.2.12 Winning and Losing

An implication of the law being a less than perfect human enterprise is that some interested parties and clients under some circumstances will place themselves outside the *rule of law* and thereby experience the full weight of it. Even within the rule of law, there will be some individuals and groups who will be on the 'wrong' side of particular legislation, but also the interpretations of both the law and its decisions. This may result from ignorance of either the various laws or ordinances. It may result from deliberate attempts either to circumvent the law or to confront it with a view to challenging and changing it.

The processes involved in conflict resolution rarely are able to apportion either blame or damage equally. Some activities are deemed to be more lawful than others. Consequently, 'winners' and 'losers' are a logical outcome of the processes. 'Win-win' rarely seems a likely

outcome unless a particular case is thrown out of court. Even if out-of-court settlements are made, financial implications of such action ensures that 'winners' are deemed to triumph over 'losers'. Some clients lose simply because they cannot find either the evidence or the finances to continue their case.

Some 'winners' and 'losers' are innocent victims of the system and legal processes. One senior lecturer in a justice studies department of a Queensland university commented:

- I14: I know lots of lawyers, solicitors, criminal lawyers, ... right across the spectrum, and it depends on the judge on the day. What justice you get depends on what mood he got up in, what his prejudices are in terms of who he is partial to, ... The jockeying to get the right judge, in the right mood, rattling the opposition, getting a couple of credible witnesses, putting up a good case, ... they're all the things that determine whether or not you win. I've seen it operate, time and time again where they'll say 'We've got to get out of this. We can't have this judge. It's just going to be bad news. We've got to get a guy who is more favourable to our position'. (226)

I14 understands that there are inequities in every system but people's lives and their financial viability are often the victims of such actions. While appeal procedures and avenues for compensation may be available, emotional pain and suffering are perceived by this participant to be unacceptable in Australian society in the late twentieth century.

4.2.13 Conclusion

Consequently, the *rule of law* is a powerful force in shaping the nature, structure, scope processes, and outcomes of social interactions in society. Individual members of a community have personal worldviews based on pre-suppositions, assumptions, values and beliefs. These take on both particular forms and observable expressions in each culture, sub-culture and community as customs, traditions and lifestyle. The interplay between different worldviews often causes conflict which must be resolved in socially appropriate ways if the community is to continue to function in harmony and peace.

The rule of law is also an expression of a community as *structural elements* such as legislation, parliament and court systems have been developed as appropriate mechanisms for the resolution of both individual and community conflict. *Procedural elements* such as admissible evidence, advocacy, document registration, court processes and appeals, have also

been created to facilitate the resolution of conflict. *Specialised* government, court and professional personnel have been trained to expedite these resolution processes. However, the developments referred to above are ongoing. This is because of the dynamics in society which lead to continuous change. While the nature and pace of change may vary from community to community, change is endemic to culture as each community processes its philosophies, decisions, conflicts, customs and traditions. The notion of change in culture can be likened to a complex web of continually changing factors seeking to maintain harmony, justice and peace.

The *rule of law* and *thinking legally* play an overt role in culture but may take varying expressions in different communities. For example, a Queensland Government minister (I₁₆) expressed his particular view of *thinking legally* in relation to the *rule of law*:

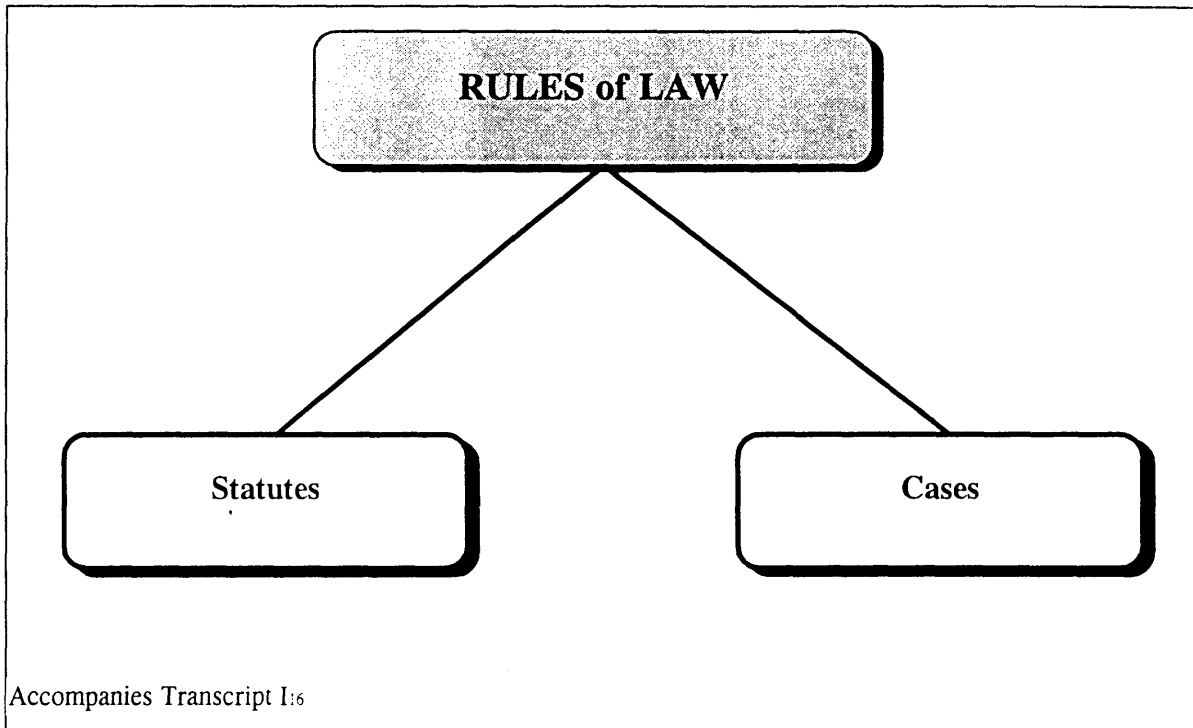
- I₁₆: So *thinking legally* for instance, means thinking in terms of rules and principles. It means thinking in terms of the precedents of the law in order to understand what the rules are. That is what thinking legally is all about. (257)

His view was based on the *rule of law* as being driven, from both instrumental and institutional perspectives, by legislation and systems. The logical corollary to this is that law is what is either 'done unto you' or what you 'do unto others'.

Figure 4.2.1 was prepared by this Queensland Government minister. Its view is simplistic, instrumental, 'top-down', hierarchical and scientifically deductive in style. However, it represents but one view where:

Thinking legally as the rule of law.

Figure 4.2.1 - Interviewee I16's view of the processes of *Thinking Legally*.



4.3 CONCEPTION B: *Thinking Legally as a representation of a personal worldview*

General Description:

People's worldview is based on ethics, morals, values and faith (4.3.1), amongst other criteria, which are sets of premises, presuppositions and assumptions that undergird each individual's experiences and society's knowledge base (4.3.2) as well as ways of thinking (4.3.3). One's philosophies and expectations are expressed in numerous ways (4.3.4) with various sets of benchmarks or standards (4.3.5) being privately articulated and publicly communicated. These benchmarks assist in the promotion of active citizenship (4.3.6), processes through which individuals make personal judgements (4.3.7) so as to guide, inform and evaluate their personal actions (4.3.8). One's representation of a personal worldview is explicated through both overt and covert consideration of these foundational elements. As individuals, groups and a society at large develop perspectives, propositions and agreed stances based on the elements listed above, they are declaring their views and philosophies. The role of personal worldview cannot be underestimated. Every person has one. Its influences are developmental, invasive and pervasive of one's lifestyle. Perspectives on, and processes of, *thinking legally* are essential ingredients in an inclusive personal worldview.

Discussion:

4.3.1 *Ethics, morals, values and faith*

In their discussion of the three key questions associated with this research, some participants were very philosophical about the assumptions or starting points for their views on *thinking legally*. For example, interviewee (I₁), a Years 11 and 12 Legal Studies teacher, focused on personal faith and morals as the main bases for the development of her abilities to *think legally*:

I₁: I suppose it is faith first because it really takes faith to decide to think that way. You don't automatically decide to think that way. So it is faith and morals. Ethical thinking is based on that really. But in a way it is hard to separate them as they are all rolled up together to a certain extent but there's not a lot of easy answers to those things ... (11)

Well I suppose it comes down to your view of human nature, the sanctity or value of human beings. Why we're here? ... (12)

The complexities of the interrelationships among faith, morals and ethics are difficult conceptual issues with which to grapple. Interviewee (I₁) had quite some difficulty expressing these relationships while interviewee (I₃), the president of a professional association of lawyers, seemed more able to interrogate the relationships when the notion of both private and professional values was discussed:

R: What are your thoughts on the relationship between, for example, your private values and your professional values in terms of the 'right' and 'wrong' of this question? ... (33)

I₃: I think it is pretty hard to separate them. Now I think to live with yourself, and I think that's important, you have to maintain the same set of values in your work as you do in your own moral life. Though I've always understood reasonably clearly what was 'right' and 'wrong' as far as ... I come from a Catholic background and I've been very committed to the practise of the religion, more so in the last 20 years than in the 20 years before that when I was too busy. But it still is a case where you have a conscience that says to you as soon as you propose to do something as to whether you're 'right' or 'wrong'. And I don't suggest for one moment that I have always done 'right'. (Laughter) ... (33-34)

I think that certainly my faith as to why I act in the way I do is certainly much more driven by religion than anything else. If I had no religion, I'd have a totally different set of values and I would have a different conception altogether of what was 'right' and what was 'wrong'. (34)

The central role of a personal faith was raised many times during the interviewees' discussions. Interviewees such as the principal of a private girls school (I₄) openly and very explicitly voiced the value and significance of the religious and, in this case, Biblical Christianity, in their upbringing and lifestyle:

I₄: Well I was fortunate to start as a child in a Christian family. Therefore the Ten Commandments, but more importantly, the teachings of the New Testament with Jesus as our teacher were strongly emphasised in the way that the household was run and the way in which my parents dealt with problems within the home. (44)

My mother was mainly required to do that because my father was in the Navy until I was 12. So I have a very strong matriarchal role-model but she used justice, and rightness and wrongness very much related to the context. (44)

My other experiences as I grew as a person were also through the Catholic system with five years there. They are much more open about, and working with the Marist Brothers closely certainly liberated my High Anglican background. But then I've enjoyed coming back into, through the Anglican system for five years, then back here through the Uniting Church and Presbyterian which is quite a dichotomy. It has been very helpful to look through their eyes at rightness and wrongness through dogma or theology. That's one of the reasons I took a Theology degree. To clarify for myself the thinking processes necessary to open avenues of Christ in your life to give the 'right answers'. (45-46)

I have a very strong belief that if you have a Christian faith no matter what brand name and it is a real faith within you, then the way you live is mirrored on the greatest Judge, because He never found anyone guilty. (48)

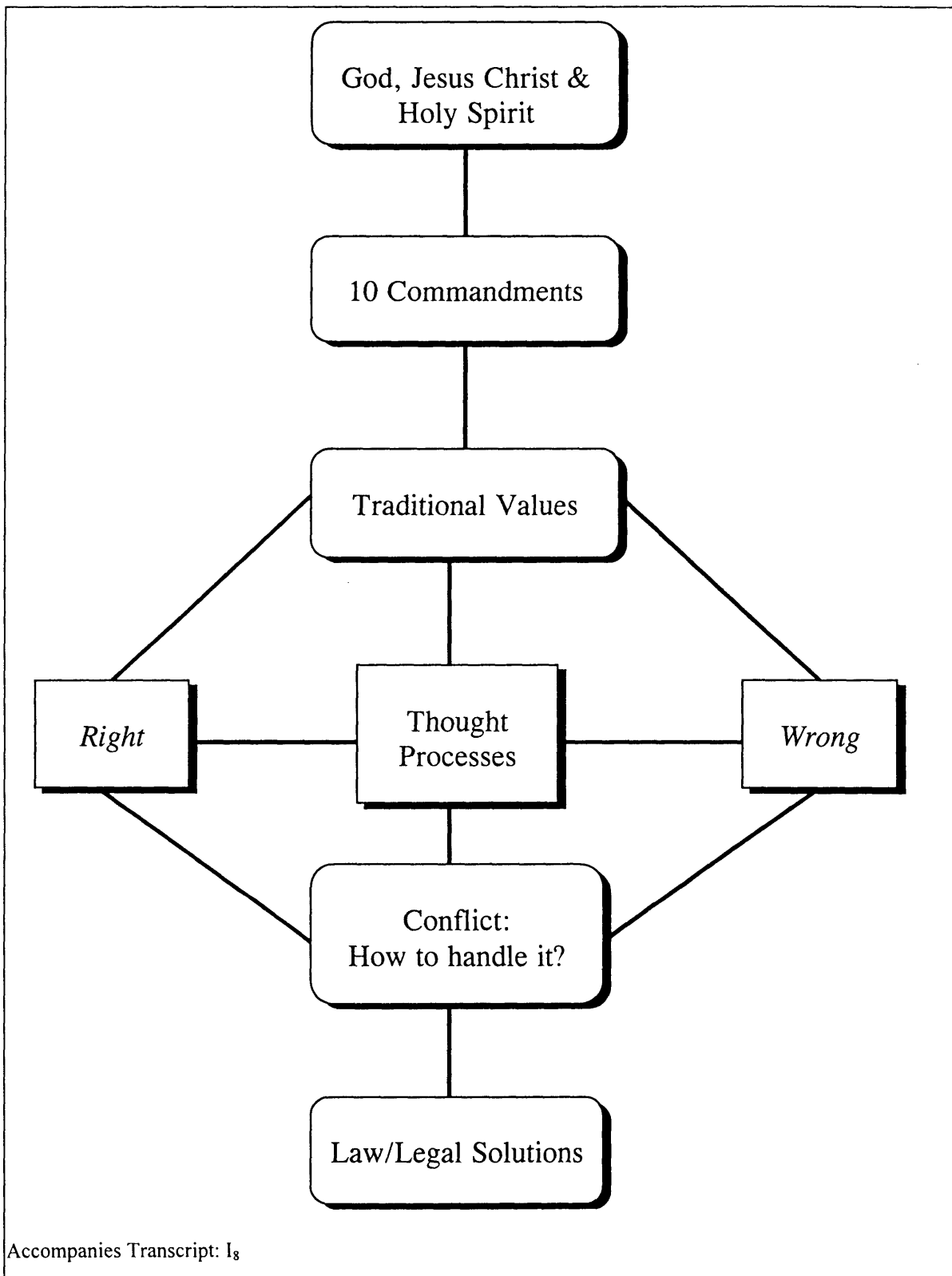
A Legal Studies lecturer (I₈) at a Queensland university held quite similar views to I₄:

I₈: I suppose we need to look at my position as a Christian. I think that is probably important as a starting point. I think it even goes back further than that to my family. Being born towards the end of the World War II there was a traditional set of family values, if you like, and I think that was something that was important. You learnt what was 'right' and 'wrong' as part of the family. Even though my parents weren't strict churchgoers, the kids were sent to Sunday School. That was the philosophy then... (125)

Yes, if you like! I suppose in a sense that's where it came from and it wasn't really until I was in my 20's that I probably came to a real sense of commitment as to what it meant to be a Christian. But what I'd still learnt in those formative years seemed to stand me in good stead. So, you know I suppose, I see the concept of 'right' as being something that is morally good. The concept of 'wrong' as being something that's morally bad, unjust or unfair or whatever. I don't see it in a black and white sense all the time although there are some things that are definitely right and some things that are definitely wrong. But to look at everything from that perspective is not a normal daily occurrence. (125)

This Legal Studies lecturer was able also to articulate views which were expressed in diagrammatic form in [Figure 4.3.1](#). Here, his personal philosophy including the notions of ethics, morals, values and faith are interrelated with cognition, decision making and problem-solving. This represents a clear articulation of both the elements and the interrelationships of the individual's personal worldview. It integrates with and complements his transcript data.

Figure 4.3.1: Interviewee I₈'s views of the processes of *Thinking Legally*.



Similar philosophical and religious views to (I₈) were expressed by the male principal of a private girls school (I₁₁) though there was more comprehensive and appropriate definition of the key elements:

I₁₁: It's a big worldview question! ... The first one is that I think you have to look at this in relation to a moral or ethical code. I have been brought up in a Christian context so my concepts of 'right' and 'wrong' stem from Biblical values. So there is a starting anchor point. (178)

... My parents had very clear conceptions of 'right' and 'wrong'. They were not overtly Christian although they had obviously come out of a Judeo-Christian framework. Theirs were moulded in the school of 'hard knocks', the values of the society of the time. My Dad had very clear views about what was 'right' for a person to do. You know there were certain moral ways you did business. A man's handshake was his word, and that was an ethical imperative for him. (178)

Another participant, a Years 11 and 12 Legal Studies teacher (I₁₅), was able to express quite simple views on what had influenced her personal philosophy:

I₁₅: I think religion has certainly influenced what I believe to be 'right' and sort of has given me standards to live by. (238)

Of course every person does not hold to the tenets of this personal philosophy. Each interviewee openly expressed very private views about these. A senior lecturer in law (I₅) at a Queensland university, for example, held to quite a different personal philosophy of life. However, the appeal to a personal worldview, together with the explanation of it, was indicative of a coherent and logical set of ethics, morals, values and faith commitments that were indelibly woven into the tapestry of his life:

I₅: I guess I'm almost purely utilitarian... (64)

Well, that's the general meaning and what I meant was the hedonistically Benthamite utilitarianism, not just in the sense of what works, but what works to promote the greatest happiness for the greatest number ... (64)

Similar views to these were expressed by a Queensland Government minister (I₁₆) as:

I₁₆: I think that there would be a connection between ethics, morality and law in so far as I would hope that they would be based on the same utilitarian principles. Of course, not everybody is a utilitarian. Many people have other principles entirely. I have great respect for people who have different philosophical views to my own, held sincerely. I happen to think that they are wrong but it's a world in which one has to be tolerant of the fact that different people have different views. (259)

Other research participants, while not using particular philosophical forms such as Christian or Utilitarian, nevertheless had quite strong views and expressed them in different terms. The chairman of a Queensland Government ‘watchdog’ organisation (I₉) expressed his personal philosophy in terms of conscience:

I₉: Well Rob, it’s difficult to give you a considered opinion *ex tempore* but what is ‘right’ is what my individual conscience tells me is right. And I suppose that depends upon my family background, my religious beliefs and the conditioning that has no doubt occurred throughout the course of my life. (143)

... I think one thing you get from the law is to be objective. Otherwise you certainly can’t represent your client properly. And to be honest, not to cut corners in order to secure some advantage. If one is well known to do that in this profession, I do not trust that person. (147)

Similar expressions based on personal integrity and civility were shared by a lawyer specialising in criminal matters:

I₃₀: Firstly there’s the ‘right’ and ‘wrong’ about law and legal issues. There’s the ‘right’ and ‘wrong’ given in the law book but on a more personal level for me what is ‘right’ and ‘wrong’ is that based on certain philosophies for myself. That is whenever I deal with people in situations that I deal with integrity and then also that I deal with people with civility. So that may not mean that politeness but civility makes you want to see integrity in my own sense of morality which may not be a religious morality but it’s allocated with my beliefs about integrity. (584)

Many of the research participants expressed personal philosophies based on moral relativism and other philosophic positions. Some of these included the president of a civil liberties organisation (I₂₅), an education officer with a Queensland law commission (I₁₇) and the owner of a Queensland hardware chain of stores(I₂₂):

I₂₅: So as a result of all that, my wife says for instance that although I have no orthodox Christian beliefs, I’ve got a very deeply rooted spiritual sense of ‘right’ and ‘wrong’, and a very strong personal code of ethics, ... (442)

R: Like personal faith ... (442)

I₂₅: Yes! I guess so. It’s sort of a religious humanism rather than a non-religious one ... (442-443)

I₁₇: Well, I suppose my basic approach to "right" and "wrong" I guess comes from a moral philosophy perspective. ... (263)

I₂₂: Yes! I don’t think life’s worth living unless it in fact has a value base. (375)

One individual, the representative of a law reform organisation (I₂₃), had difficulty dealing with the question of a personal worldview, especially in relation to the cases with which he was required to deal professionally:

I₂₃: I think one problem is that I haven't sat down for any length of time and worked out myself why I think something is 'right' and why something is 'wrong'. (392)

I think in most cases it is a gut reaction but that gut reaction has obviously been conditioned over many years. ... (392)

It might not be morally 'right'. For example, we've done a lot of work here on de facto relationships. When you see the situations that some de facto partners are in as a result of the law, then that's 'wrong' to me. But trying to analyse why it's 'wrong' is very hard. (392)

While many of the participants in the research study were able to express particular views in relation to what they believed to be 'right' and 'wrong', few were able to make direct links with *thinking legally*. Because of the ethical, moral, values and personal faith elements of their statements, these can be taken as being contextual and foundational but not explicitly linked to *thinking legally*. However, there is strong support in their statements that issues related to ethics, morals, values and faith are deeply philosophical.

4.3.2 Knowledge base

One's personal and professional knowledge bases have an influence on one's personal worldview. This is usually developed by the acquisition of propositional and procedural knowledge as well as experientially through life's activities.

A Years 11 and 12 Legal Studies teacher (I₁) and a legal adviser (I₂₄) to a Queensland Government Department were able to voice the following in relation to their own knowledge bases:

I₁: I am still glad I have it (Law School studies) because it has given me a better base and I am better able to look at things and overall issues because I am able to take into consideration more things. I have a better understanding of how the law works and the problems it deals with. (4)

That really everyone has a right to have their say and not to feel 'Well you just can't do anything about it!' People can get involved and not just leave it up to the professionals. But people need to find a professional who can advise them when needed. But people need to be informed and not to feel as though they can't do

anything. To make what you feel be known because if nobody knows about it, nobody will feel it is important or care about it. (9)

They think 'You can't do anything'. It's that kind of thinking about where to go for help. I really think there are plenty of avenues for people to have their say but I think a lot of people just don't know they are there. (9)

I₂₄: ... the law infiltrates almost every part of our lives, when they go down to the shop and buy anything whatsoever, when they make an agreement or a contract between anybody. If they are selling their house, they're agreements will be done up between the parties and certain obligations must be related to the event. (434)

It extends to all fields. There is Anti-discrimination Law. There are people are pushing for Racial Vilification Laws, ... or whatever. So the area is very, very broad. (434)

These two participants were able to express quite philosophical statements about their knowledge bases. They were able to reflect on their life experiences and evaluate them in relation to their current perceptions and worldviews. Their ability, both to articulate and to critique their thoughts on such a matter, is evidence of a well developed sense of worldview. Little evidence of this level of thinking was apparent in the transcripts of other participants. I₂₄ was particularly vocal about the infusion and underlying influence of law in every aspect of life.

4.3.3 Ways of thinking

The strategies used in this study enabled participants to engage the research questions in such a way that they sought to make sense of the questions for themselves. Consequently, these questions became a useful device which could expose various types of thinking in the participants. Some of these were:

4.3.3.1 Philosophical thinking

A senior lecturer in law (I₅) at a Queensland university had been affected by the contextualising, focusing and research questions of this study. He was able to reflect on major principles that had been developed in his thinking and how these actually interrelated to each other. Through the interview/discussion process, he had established new interrelationships among philosophy, thinking and his way of life:

I₅: Before I got this (research) question sheet, I had never reflected on how the Golden Rule and the greatest happiness for the greatest number interact with each other and I haven't still reflected a very great deal. (64)

The interesting thing was I read Kant's *Grundlegung* (i.e. Foundations of the Metaphysics of Morality) first. Here he is carrying on as if the whole basis of morality is rationality and it becomes apparent that what he means by rationality is like according to general rules. And then he purports to prove the categorical imperative as a general rule. I read that and thought 'Well, Yes! I sort of agree and yet it's not just rationality'. (66)

Yes! Ahm! Then a bit later I read David Hume, the one on morality, *An Inquiry Concerning the Principles of Morals* and he bases, I mean a good deal of the book is about how we work out what is moral. He's taken this very conservative view of just inferring it from general principles and what you see in the people around you and he is obviously looking at the better kind of people which he equates with 'right-thinking' people. (66)

Closely related to this philosophical thinking is Utilitarian thinking.

4.3.3.2 Utilitarian thinking

Utilitarianism is a particular ideology that attempts to justify actions on the basis of 'the greatest good for the greatest number' (I₁₆'s transcript of interview, page 253). A Queensland Government minister (I₁₆) had the following to say on this issue:

I₁₆: ... I think the 'right' thing is that which leads to the 'greatest good for the greatest number'... (253)

... If you act, it doesn't matter whether you act in the public sphere or the private, one should always act so as to maximise the greatest good for humankind. ... (253)

Yes! In that sense, ethics sometimes precedes law. And law makers try to legislate what were the previous ethical requirements. For example, in Queensland we recently decided to legislate a Code of Conduct for the public sector employees. So there is a clear example of an area that was previously a matter for ethics turning into a matter for law. What you are raising is known in legal philosophy as the debate over legal positivism and legal non-positivism. (258-259)

4.3.3.3 Holistic Thinking

Evidence of the impact of the three research questions on a Years 11 and 12 Legal Studies teacher (I₁) is indicated in the following extracts from her transcript. She was able to integrate previously unrelated and diverse aspects of her life into coherent wholes:

I₁: Ahm! In a way I look at things differently. Ahm! I tend to not get ... (pause) I suppose it has instilled a certain amount of pragmatic thinking in me, Ahm!, which I don't always think is a bad thing but I don't respond to things on an emotional level. I tend to look at more of the circumstances, the practicalities of it in a way and I try to balance that with other things. (4)

Some people really can only see what's there and this is the way it is. They can't spread their thinking across sort of different boxes. They just say 'This is the law' or 'The law can't do anything about that anyway or that's another problem' rather than trying to spread it. I just think that people have trouble thinking across different areas. They need to see the bigger pictures rather than just small problems. (9)

As a Christian, I do this on the basis of Scripture (Bible) initially but the problem is that the Scripture does not cover every scenario. But I think in most cases, practically all, the principles that can be derived from Scripture can be applied. The problem is that different people will still apply what they consider to be the same principles in different ways and come up with different outcomes. But really for me that is how I would really decide. Even if it is not based on an actual Scripture in the Bible it is based on a Christian worldview of Why is mankind on earth? (11)

Here, the participant is attempting both to integrate a wide range of issues that affect her life and to express these in a coherent and logical manner. She also tried to relate her ways of thinking to her personal faith, regarding some vital questions such as 'Why is mankind on earth?' This is representative of holistic thinking in that the participant is drawing on both disparate and diverse aspects of her life and experience in an integrated and holistic manner.

4.3.3.4 Deductive thinking

A judge of the Supreme Court of Queensland (I₁₉) expressed the view that because of the nature and comprehensive scope of the law, it was essential that contextual factors be both identified and described as these have a profound influence on the processes and outcomes of legal decision-making:

I₁₉: You see, the law is a very highly refined, almost you could say, scientific thing because there are so many varying influences, varying things that affect the ultimate result. (321)

4.3.3.5 Influential thinking

In the following extract of transcript, I₆ a Years 11 and 12 Legal Studies teacher underlined the importance and relevance of having studied law at university. Her thinking had been influenced by the tertiary studies she had completed:

I₆: There is absolutely no doubt that the way I look at anything now in professional life or in family life or in just activities with other people, has been fashioned by the Law major that I did. Because as soon as you do X number of subjects in Law, you suddenly start to see that they think in certain rational ways even if it is in issues of Torts, Contracts, ... And you see the way they think. (95)

4.3.3.6 Dualistic thinking

I₃: It should be very interesting because I am sure that the average lay-person has a somewhat different conception of the law to the practitioner. (41-42)

Here the president of a professional association of Queensland lawyers expressed the dualistic view that different groups of people, in this case *lay-persons* and *professionals*, have very different ways of thinking. The term *conception of the law* can be broadly defined here because within the context of the conversation, the participant was expressing a general view rather than one which was narrowly focused.

4.3.3.7 Expert thinking

In the following quote, an education officer (I₁₇) in a Queensland law commission was referring to expert views expressed in the literature. The overall expression, analysis and synthesis of John Rawls' (1971) thesis had had an obvious and profound influence on the education officer's thinking:

I₁₇: I suppose in, you know, the overall concept I find it hard to go past the John Rawls' idea of *justice as fairness*. Since I first read that thesis it has remained attractive to me as a reasonably clear way of trying to get through some fairly tangled thinking. (263)

4.3.3.8 Hermeneutic Thinking

A lawyer (I₂₆) involved in custodial and migration legal matters stated that:

I₂₆: Law's a bunch of words. Words can be interpreted in different ways and you know you're dealing with people and at the end of the day, I mean law is not an empirical science. It is about a bunch of people who make decisions about another bunch of people. You know judges aren't computers. They'll be swayed by their emotions. They'll be swayed by the way that they think about things as much as they are supposed to be even about things, totally impartial, always objective and that sort of thing. At the end of the day they are human beings ... (481)

In this transcript extract, views are expressed about the interpretative processes that are involved in legal decision-making, especially those of a subjective nature. These are considered to be pivotal in applications of the law.

Consequently, there were variations in approaches to thinking which were evident in the research transcripts. The participants enunciated clearly their personal philosophies

in quite diverse yet coherent ways. While it is not claimed that these are a comprehensive schema, the range is nevertheless extensive.

4.3.4 Societal expectations

Participant (I₁₀), a doctoral student of law at a Queensland university, and (I₁), a Years 11 and 12 Legal Studies teacher, made some key propositions about the ways in which law relates to the society as a whole. In the following two extracts, views are expressed about the interrelationships between society and the law:

I₁₀: I mean a professional view of what is 'right' and 'wrong' is 'Is there a rule?' The societal view is 'We'll go as far as we can until we break the law and don't get caught. So their understanding of *thinking legally* then is 'Oh! We got caught!' if you see what I mean. They often see it in a negative, punishment form. ... Well the State and societal view is they see the law as a form of punishment. They don't see it as a form of understanding what is 'right' and 'wrong'. (168)

Here, I₁₀ is expressing a view of conflict that, in her opinion, causes difficulties for society in that varying understandings of the nature, scope and function of law in a society lead from conflicting worldviews to divergent, and sometimes deviant, personal actions. Though the law is designed to protect the welfare of the majority of members in society, there will always be those who either cannot or refuse to uphold or live by it with unlawful behaviour:

I₁: Ahm! I mean, I guess it does come down to 'What is the law trying to do?' The law is there to try to protect the good of the majority of people as much as it can. Thinking legally is really trying to, Ahm! think in such a way as to advance that as much as you can really, trying to work out how the law can best serve that type of purpose rather than just thinking 'What the law is'. You try and think, 'What should it do?'. Then you start to get into all the ethical, moral and 'What should it do and what shouldn't it do?' questions. (7)

Societal views are expressed often in philosophical statements such as that by I₁ above. Here, an expression of the perceived purposes of law is indicative of the thinking that ought to be ongoing in a society if it is to clarify progressively and redefine the boundaries between what is considered to be 'right' and 'wrong'. Consequently, difficulties occur not only in the processes of defining 'What is the law?' but also in the subsequent decisions about what to do with unethical, immoral and unlawful behaviour in that social setting.

4.3.5 Societal benchmarks

I₂₈: Well, when I was growin' up, we'd go out stealin' together. I'm talkin' about the age of around of 15 onwards. Ahm! He'd (his father) been brought up that way himself. So how did I decide at that time what was 'right' and 'wrong'? I couldn't really. I was taught through my parents, my father especially, we used to go out thievin' together. We'd go out fishin' and if we didn't catch any fish, we'd go back to St Kilda marina and go ramblin' through the boats and find out what we could steal. (530)

That was the way I was brought up. So at that time I didn't really, I knew it was 'wrong' to murder someone. I knew it was 'wrong' to steal because you'd get caught but I didn't know it was 'wrong' to steal morally. So I didn't understand. I just thought that everyman had to get the best you can out of life. (530)

This statement from a male ex-prisoner (I₂₈) who had spent 7 years in Pentridge Gaol is a good example of the difficulties that were faced by society in its attempts to define and monitor acceptable social behaviour. The variance between personal and family boundaries or benchmarks and those of the society in which this ex-prisoner's family operated is evident. The very bases for the development of consensus are so disparate and disjointed that without radical modification, it would be almost impossible for society to function if everyone, like this family, was totally absorbed in self-gratification and self-interest at the expense of others. The family's culture was a major factor in the continuation of its members' lifestyles of illegal actions.

The deputy principal (I₁₃) of a Queensland State high school attempted to address this issue by proposing the development of a *community standard* by which the community could define what is acceptable behaviour. The issues related to the developmental processes, educative strategies and monitoring tactics of this community standard are, however, not addressed:

I₁₃: But you know I firmly see the law as linked to the community. The community must really decide what the law should be, what it ought to want to achieve over time, how it is going to change, is the law going to be justified. (202)

To me that is the other thing, you need a general code of conduct in the general aspects of community. But you also need a fairly detailed set to handle the circumstances where somebody is driving, for example, over the limit. That's the contrast in the system. (202)

What I was going to suggest was that for me, *thinking legally* has also got a lot to do with equality with things and the justice of the circumstances. But people have to accept that that is the community standard of what goes on and I think in this community that I am involved with now it refers to itself as being the 'better side of the highway'. Now the 'better side of the highway' means that they have a different set of rules to the 'other side of the highway'. (208)

As change occurs in Australian society, it seems that the amount of common agreement about corporate values is decreasing and a *community standard* on which to obtain consensus is becoming more elusive. The goal of common agreement of a community standard is a noble one, but the grounds on which this agreement might be negotiated seem to be diminishing. The male principal (I₁₁) of a single-sex private school (Years 4-12) had the following to say on this matter:

I₁₁: ... I believe there is a structural side of 'rightness' and 'wrongness' which is really the corporate values that go with people living together, in this society, Queensland, Australia, in the 1990's. This whole set of dimensions governs to some extent what is interpreted as 'right' and 'wrong'. I think we see a lot of this now in the tensions between things like the gay movement, liberation of drugs, sex and attitudes of people towards their employment, children wanting to divorce their parents. All of these are dimensions of emerging concepts of 'rightness' and 'wrongness'. You have very clear almost generational divisions of people who say 'No! That is not in my code!' And this other group is saying 'Why not? You know it is part of mine!' . (179)

Yes! And Maslow's hierarchy and all the rest of it you know. It's all an expression of how you explain the terms 'right' and 'wrong'. Anything that strays too far away from that starts to become wrong because it threatens people's well-being. So I think that while you have these shifts at times, there always seems to be something that brings you back. Like sexual liberation was constrained by Aids. You see these things and say 'That's not for the common good!' If you've got a spiritual background, you say 'That is God at work in my life!' If you're a humanist, you say 'It's man's search for rationality'. It's another dimension you move to when you move away from self-gratification to having empathy with your fellow being. And so always it's this same concept that there is some magnet there, indefinable, but which works. (180)

So that's why I believe there's a counterbalance all the time at work. But it is like Adam Smith's 'invisible hand', you really can't define it. (180)

This very optimistic view of the oscillations in the community standard and the analogy of the 'invisible hand' is very noteworthy but it is not a view shared by a fellow female principal (I₄) of a Years 6-12 private school for girls. Her more pessimistic view was expressed as:

I₄: Well obviously we have a framework and I believe the framework is fair but is demanding. Because I also believe that this generation has lost its benchmark. Somewhere to know 'This is what is acceptable to society and this is desirable for me as a person'. And that failure is not a devastating thing. Making a mistake is not a problem unless you don't learn from it, if you can't dissect it, look at it and move on from that. If you just take guilt with you, it is a heavy burden but it doesn't actually achieve anything. (46)

The need for appropriate processes for the development and implementation of agreed *benchmarks or community standards* is acknowledged as a major issue with which the law

must grapple. However, the issues are not as clear-cut as it might seem to be at first glance. A lawyer (I₂₆) specialising in migration matters raised a question that deserves serious attention:

I₂₆: Oh I don't think ... 'legal' and 'illegal' is a totally different concept. It's got nothing to do with 'right' or 'wrong'. Ahm! I think most people can look at something and just say 'Well, that's 'fair' or that's not 'fair'.' Just an inherent sense of fair play, I guess. (470)

The relationships between 'legal/illegal' and 'right/wrong' are very tenuous. Indeed major tensions in the operation of the law in society are its ability to give expression to the community standard as well as the policing of individuals' behaviours in relation to that every changing standard. Consequently, a society together with each of its members need to know both what is acceptable to it and what is desirable for each individual within that social setting.

4.3.6 The need for active citizenship

Several participants in this research study pursued the notion of either *community standard* or *benchmarks* in interesting ways. While these participants did not propose strategies for remediating issues such as those addressed in 4.3.5 above, they raised points of view that gave insights into their understandings of the relationships between community standards and the law.

The male principal (I₁₁) of a single-sex private school (Years 4-12) addressed the problematic issue of the values base from which a notion of community standard might be developed:

I₁₁: But then you see if you take the educational theories down to base roots, they become statements of faith virtually because there are very few absolutes. (186)

The development of any community standard involves educative processes which in and of themselves do not have guaranteed outcomes. The human sciences are not exact in their accuracy or processes. This issue was addressed by (I₁₀) a doctoral student in law at a Queensland university:

I₁₀: The problem that we have of course is that if you do educate them, so that they will not disobey, but they won't disobey intelligently. They'll just say 'I'll do this and I know I'm right!'. (175)

An additional problem to the educational one mentioned above is that on the changing nature of a dynamic society and the expression of its laws. This was clearly enunciated by three Year 12 students (SS₁₂) at a State secondary school:

SS₁₂: ... (20 seconds of silence) ... We talk about these Legal Studies things with our parents a lot. They enjoy it too. My Dad really likes to discuss it with me. We go round telling him all the new stuff about the law and he says "No! That's not right". The law does change all the time. (197)

Consequently, there is an active role for citizenship to play on these matters if a society is to address the issues raised above. A proactive stance to citizenship rather than reactive or non-active ones raises the concept of an organismic community where inputs, interactions and relationships together with mutual contributions and support are promoted. To do nothing on these matters is to try to absolve one's self from the inherent responsibility of being a contributing member to community and society rather than a collection of rugged individualists. How this might be achieved, however, is a matter with which local communities would need to deal.

4.3.7 Personal benchmarks

In the previous two sections, an examination has been made of the concepts of social benchmarks (4.3.5) and active citizenship (4.3.6). The concept of an organismic community is based on assumptions such as the need for order in a gregarious social structure, the identification and use of processes which both promote and encourage individual participation and the mutual dependency of individuals on each other. The understanding of one's role in, and contribution to, a community is both an individual's right and an obligation or responsibility. A society without individuals is not a society at all. Conversely, individualism without community is decadent chaos.

The focus in this section is on personal standards and individuals' contributions to community. This is sometimes referred to as *communitarianism*. The following quotations from a Years 11 and 12 Legal Studies teacher (I₁), a female lawyer (I₂₆) specialising in migration matters and an ex-prisoner (I₂₈) from Pentridge Gaol give expression to a number of issues that are of significance here:

I₁: It does mean that I can still use what I have learnt but I can use it in the way that I am more interested in. I am more interested in looking at the 'big picture', the issues, the overall effects of these issues rather than every nook and cranny of the law. So it has worked out well for me. (3)

R: I think the issue that a number of people have thrown at me that actually the notion of 'right' and 'wrong' in a 'black' and 'white' sense, is not the total picture. There is a lot of 'grey' between these extremes of 'right' and 'wrong'. Do you have any comments on that sort of a notion in an increasingly complex, technocratic and dynamic society? (471)

I₂₆: ... I know people say that all the time. They say 'There's not just 'black' and 'white', there's 'grey'!' I just think that 'gray' is a reason for excuses really. (471)

... I don't think questions of what's 'right' or what's 'wrong' necessarily do. Ahm! It may well be that what's 'right' for one person is 'wrong' for another person. But in terms of an individual's ability to judge in their own belief system what's 'right' and 'wrong', I don't think there is that much room for 'gray'. I think most things are pretty straight forward. (471)

and

I₂₈: Yea. The consequences like, 'don't get caught' you know because you could end up in prison eventually but I really at that time in my life, did not quite understand what was 'right' and 'wrong'. I remember many years later when I did start to understand what was 'right' from 'wrong'. (530)

I would go into a shop and start to steal something, I actually did this. I put it away underneath my coat or whatever, but I never thought anything of that in the past. But as I walked out of the shop I started to realise that I had done somethin' 'wrong'. They had worked for that. That's when I started to think what was 'right' from 'wrong'. (530)

So that first question that's how I was brought up that way. So I didn't know apart from the obvious things like robbin' a bank, killin' someone that was 'wrong'. I knew they were 'wrong'. (530)

These statements portray very different yet complementary perspectives in relation to personal benchmarks for appropriate social actions by individuals. The '*I am more interested in looking at the 'big picture'... rather than every nook and cranny of the law*' statement is a very profound one in that it outlines succinctly I₁'s perspective in relation to life in general as to her place within it. However, I₂₆ sees things in a very different way. Her '*grey is a reason for excuses really*' quote especially when it is followed up by the '*what's 'right' for one person is 'wrong' for another person*' and the '*I don't think there is much room for 'grey'. I think most things are pretty straight forward*' quotations are indicative of a person who has very firm views on most matters. This is in stark contrast to the ex-prisoner (I₂₈) who had commenced life with a particular set of life principles but later in life realised that these were

erroneous. The change in his personal positions, or benchmarks, to 'right' and 'wrong' were most marked and life changing.

The identification of varying stances to, or standards of, acceptable social behaviour and the decision-making that facilitates considered personal actions is so problematic that individuals are responsible for their own situations. However, this must be done within the context of acceptable codes of community behaviour. Consequently, each individual is considered responsible for linking personal benchmarks of acceptable behaviour with societal ones, especially within the context of a liberal democratic society.

4.3.8 Changes in personal action

A male Years 11 and 12 Legal Studies teacher (I₆) further explored issues such as those raised by I₂₈ in 4.3.7 above. His perspective was that the educative processes through which he both accessed and operated within society provided a personal pathway or processes for increased understanding and implementation of change in his thinking. His explanation of the notion of *legal consequences* is indicative of higher order understandings, especially those that were related to *foreseeability* and *personal implications*:

I₆: Having done three and a half years of that (study of law), you think differently than I did before. ... Other people will come to me with a particular problem, and straight away you can see the legal problem as compared to the social problem. Straight away you know that you won't do X and you need to take care of Y but they can't see that, yet you know that that has to be done ... (95)

R: Because Y has consequences ... (96)

I₆: They have legal consequences and the legal consequences could be against the individual (i.e. you). So you are very aware of that. It allows you to foresee stuff. That foreseeability type stuff and rolling through the issues is extremely important to me. I can see that now. (96)

The experiences one has in life together with one's family and societal cultural influences provide a set of dynamics that influences a person's thinking and behaviour. Consequently, dynamic change is endemic to any consideration of the interrelationships between personal benchmarks and those of society. The processes of change affect one's personal worldview as expressed through one's thinking and behaviour.

The difficulty for society is that each individual member's personal worldview and society's general philosophy, if not philosophies, are dynamically linked to each other. Any changes in one result in consequential but unique change in the other. While there are particular philosophical positions such as naturalism, egalitarianism, existentialism, liberalism, democracy and post-modernism, to name just a few, each of these is a general philosophical position rather than a specific one. In practice, individuals hold varying personal philosophical positions within espoused theories and personal theories.

4.3.9 Conclusion

In Section 4.3, particular attention has been paid to the nature, role and function of *personal worldview* in assisting individuals and society to *think legally*. It is acknowledged that there are various factors that influence the particular expression and processes of development of one's personal worldview. The same is true of the society at large in that common values, traditions, culture, lifestyle and change are pivotal factors in these.

This is exemplified by the education officer of a Queensland law commission (I17) who, in expressing his own personal view on this matter of worldview, seemed to provide a useful summation of this concept when he said that:

- I17: Yes! *Thinking legally* I suppose, yea, ... would be much closer to analysing the legal thinking and thinking about legal thinking, if that's not tautological, from a different perspective, maybe whether we take that back to justice and fairness, whether we take that back to some the bases of ethics or jurisprudence or whatever, but it's analysing what's happening within that legal thought and the kind of analysis which lawyers traditionally seem trained to do. (278)

The stance described here is but one statement of a *personal worldview* about *thinking legally*.

Consequently,

Thinking Legally as a representation of a personal worldview.

4.4 CONCEPTION C: Thinking Legally as a process of justifying *personal behavioural space*.

General Description:

Individuals, as members of families, groups and their society, need to develop personal definitional clarity (4.4.1) of socially acceptable behaviours within various settings if they are not to be sanctioned by their peers. This clarification is accomplished usually by the continual processing of life's knowledge, skills and experiences which establish personal boundaries that define the limits of one's accepted practices (4.4.2). Personal codes of either overt or covert practice are developed by individuals when these boundaries of behaviours are defined (4.4.3.). However, this is not done in isolation. One must live within one's community and according to its expectations no matter how diverse these might be. Social codes of practice, often enshrined for example in culture, traditions, taboos, practices and legislation, are proposed, debated, defined and endorsed in a ongoing manner (4.4.4) as each community deals with its expectations as well as its practices of both acceptable and deviant behaviour by its participating members. The negative consequences of unacceptable outcomes (4.4.5) must be dealt with individually and collectively if a society is to maintain its coherence and integrity. Often unexpected developments and outcomes (4.4.6) arise which cause the community, its agencies and members to resolve conflict while attempting to maintain equality, justice, fairness and social order. Within these processes, a degree of discretion (4.4.7) must be exercised by all community members if social cohesion and harmony are to be maintained.

Discussion:

4.4.1 Definitional Clarity

A number of interviewees in this research study expressed views on the relationship between their personal philosophies and individual practices. Particular reference was made to the roles that personal philosophy and faith had played in the establishment of personal boundaries of what the individual considered to be acceptable, as compared to unacceptable, behaviour. However, it was acknowledged by the interviewees that society in general, as well

as individuals and groups within it, had difficulty establishing definitional clarity in relation to the boundary between what was considered to be 'right' and 'wrong'.

Interviewee, I₁₄, a senior lecturer in justice studies at a Queensland university expressed this in the following manner:

I₁₄: I came from a Christian background so it was a very strong sense of the Bible, a sense of 'right' and 'wrong', a set of standards. That has certainly been the basis on which I developed my philosophy, if you like. Probably as time has gone on the more ideological view of that or the purist view of that has been somewhat battered by the realities of life. Things don't fall into neat categories as much as we would like them to these days. At least that has been my experience. (217)

I mean one can blame post-modernism for that if you want to get into the theory side of things. All the bad that every happened came about because of the sixties, you know and the revolution in Paris in 1848 when post-modernism was supposed to have come upon the stage, so that ... I think it's true. Again, one can see it as an erosion of those very firm boundaries, those very firm value statements. Ahm! (219)

Similarly, one's ability both to participate in and respond to a rapidly changing society seemed of particular concern to interviewee I₁₈. As a senior partner in a large Queensland-based law firm, he expressed concern about the ability of individuals to deal with the complexities of relating private and professional life to the prevailing public culture within which one operates. This was expressed as:

I₁₈: So what's your perceptions of 'right' and 'wrong' and how they change. Sure they change, but at the end of the day my view of it is the more you see of it, it comes back to a fundamental concept of morality and influenced by the reality of just the experiences of day to day life and what you see happening in society. It's not 'black' and 'white' but at the end of the day you have to get both professionally and personally a bottom line. (292)

A judge of the Queensland Supreme Court (I₁₉) was most eloquent on the difficulties faced when attempting to develop strict definitions of morals, values and ethics that would both inform and guide personal practice. In the following quote, he aptly expressed his views on this when he referred to the relationships between objectivity and subjectivity:

I₁₉: Well, I've been thinking about that. It's something that the philosophers have been writing thousands of books about for centuries and it's impossible to get a strict definition because what's 'wrong' to one person might be 'right' to another. You can question whether something is objectively 'right' or 'wrong' or subjectively 'right' or 'wrong', what society might regard as 'right' I might personally regard as 'wrong' and wouldn't do it. (313)

People have to know what the law is with a certain degree of certainty. (313)

The results are that you have to have something which is much more objective. Consequently then views of 'right' and 'wrong' are on two different planes. One a personal one which is idiosyncratic of course which is the subject of a lot influences that one has in one's life. Often ones that you don't recognise. Sometimes you do recognise them. And Ah, that's the idiosyncratic side where you have your own personal views developed by the influences you've had in your own personal thinking and philosophy. (313)

Then on the other hand you have what is called 'right' and 'wrong' which is a social view of things which is the view that the law takes of these matters. It's much more standardised so that people can understand it. (313)

I might mention that in respect of *legal thinking* what's morally 'right' and 'wrong' is not essentially what's legally 'right' or 'wrong'... (314)

This notion of objectivity and subjectivity was further elaborated by participant I₁, a Years 11 and 12 Legal Studies teacher. She discussed these concepts as 'black' and 'white' (objectivity) as compared to 'grey' (subjectivity) as:

I₁: It's more black and white for them because they knew their law better. For me it was kind of grey because I was unsure about some of those things. Whereas if I had a strong legal knowledge, it would become more clear. I mean, the line does shift too. It's not a permanent thing. It's constantly changing. Probably to a certain extent, the more you know the clearer the line is and the more you know where there are holes in the line. (7)

The law does struggle with the private-public thing. Can it regulate, just in the area of contracts for instance, does it see agreements between family members as binding generally legally binding? But some times they are going to be so you still have to try and find that line. When is it a private thing and when is it not? (14)

The value of personal and family perspectives on this question of definitional clarity is illustrated by interviewee I₁₀ who is a doctoral student in a law faculty of a Queensland university. She was able to articulate clear understandings of the personal boundaries that had operated in her family. She described this as:

I₁₀: ... My family background is such that you never got into trouble if you told the truth, even if the truth gets you into trouble if that makes sense. Telling the truth won't get you into trouble as such even if what has happened is going to get you into trouble. (156)

Similar views were expressed by the Year 12 Legal Studies students from a Queensland State secondary school:

Ss₁₂: The things you get punished for, you know, the things that are 'right' or 'wrong' let you know what you can and can't do. (189)

I think like, when you look at a problem like there are two 'rights' and two 'wrongs'. There is the 'right' and 'wrong' in the law and then there is the 'right' and 'wrong' at home. (190)

Several other participants in this research study gave examples or illustrations of where they had had life experiences in which it has been possible to work within quite strict definitions or boundaries that had been established for them. I₁₃, the deputy principal of a Queensland State secondary school and I₂₉, a housewife and part-time music teacher in a co-educational private college, expressed views that had been developed as a result of their professional and personal activities. While I₁₃ was challenged by the guidelines given to teachers in California, I₂₉ was most eloquent about a particular personal experience as an eight year old child. These were expressed as:

I₁₃: The other probable influence for me was looking at, over 10 years, what happened in a couple of countries I visited, looking for example in California at the Hire Legal Codes for Teachers. The first thing that I did when I worked in California was that I was given a 430 page booklet which was called 'Teachers and the Law: Teaching in the State of California'... They were very big issues in terms of knowing what you were doing. They are certainly big issues in urban California. (210)

That's really a pretty sad reflection on the fact that teachers as individuals are being told that the law is the parameter for your job. Not your job is the parameter for the law. That to me is fairly sort of scary about what sorts of things could go on. (210)

I₂₉: Yea, it really was and I really think that it must have been when I was about 8 at the time. But even as a small child, I knew first of all how much money I should have spent. I knew what was acceptable and what wasn't but I crossed the boundary thinking that I would get away with it. But then when it was really pushed to the extreme, I knew that I couldn't make this man suffer because I'd ... (554-555)

Other participants on the other hand viewed the law as being rather personally distant from them unless they transgressed it. For example, a Master of Law student (I₂₀) in a Queensland university considered the law to be remote from him and outside his boundaries of acceptable personal behaviour:

R: So we can probably say that there is a sector of society who say that the law is always 'out there' rather than of any real meaning to them personally until one transgresses the boundaries or whatever, of acceptable behaviour. (339)

I₂₀: Yes I think that's probably true. The law is this thing and as I said before, in my personal life I view it as that way myself because if the law doesn't touch you, you keep away from it and it is not part of your life. (339)

An alternate view was expressed by a senior legal adviser in a Queensland Government Department (I₂₄) who considered it important to understand the nature, scope and limitations of the experiences within one's personal and professional boundaries:

- I₂₄: ... There are some things that you will know for a fact are within the boundaries that you are looking at. That's not going to change but there will always be graduations within those boundaries that you can't put a pinpoint on. (422)
- R: Do you think the more you've got to know because of your experiences and studies, that the boundaries have stretched or have the boundaries of the issues firmed up for you in many ways? Or have they narrowed? (422)
- I₂₄: No! They've probably stretched because you realise that the boundaries are wider. They're not a tunnel-visioned. You take a more encompassing view. (422)

Statements such as these raised serious questions about the contexts within which *thinking legally* ought to be considered. Various views were expressed in the research interview/discussions, but interviewees (I₁₁), the male principal of a private single sex school, (I₆), a male Year 11 and 12 Legal Studies teacher, and (I₃₀), a criminal lawyer formerly employed by the Aboriginal Legal Service, seemed to express views that were indicative of various perspectives about *thinking legally* that were related particularly to the issues of *definitional clarity*. These related to the need for personal boundaries which provided a framework for living, keeping one's self out of trouble in society and being non-judgmental, even tolerant, of others. Their following statements deal with these issues:

- R: Do you have a couple of sentences on the last questions? What does it mean to *think legally*? (186)
- I₁₁: I haven't thought about that. (Laughter) Isn't it awful! I haven't thought about what *thinking legally* is? (186)
- I think to me it is thinking within boundaries. Thinking within constraints that you have established for yourself, one way or another, consciously or unconsciously. Where you have a framework of living, of understanding and then you direct your thoughts within that framework ... There are shifts from culture to culture and from time to time. So *thinking legally* is working within the framework that you have accepted and adopted in your area at your point in time. Then holding to a set of presuppositions about 'rightness' and 'wrongness' that you have established, developed or have had belted into you. To the point where they become part of the *raison d'etre* for making decisions, the essence, the substance of decision making. (186)
- I₆: Thinking legally is keeping yourself out of trouble. Thinking legally to me is making sure that, given the sparse knowledge that you may have of what is contained in the common law or in legislation, it is to make sure that certain government bodies or private citizens do not have a chance to get at you in a court of law or through the legal processes. That to me is thinking legally ... (96)

I₃₀: Ahm! I think that my upbringing was really with a feeling of tolerance. And although, if there's anything I am intolerant about it's intolerance! (Laughter) That's quite a cross to carry. (587)

If you can be non-judgmental and be tolerant, tolerance requires you to respect the choices of others. That has the other side of it of being intolerant about intolerance ... (588)

4.4.2 Processing behavioural boundaries

If individuals want to participate in a society, they need the maturity, education, and life experiences to understand *what* processes to use, *how* to use these processes as well as *when* to use particular approaches and tactics. The Year 12 Legal Studies (Ss₁₂) students in a Queensland State secondary school were cognisant of these matters:

Ss₁₂: Yes. Because when you're young, you do exactly what they want but as you get older you decide by your own experience what is the 'right' thing to do. (190)

A personal values base is a key element in the ability of each individual to participate meaningfully and effectively in the social processes. These operate at the personal as well as the public levels of one's participation in society. A doctoral student of law at a Queensland university (I₁₀) commented on this matter as:

I₁₀: ... It's very hard for young people to see who is right. But then you still have not only the unemployed but those who unfortunately have terrible self-esteem problems. Because they have a sense of 'right' and they should be working. And not working nearly kills them. So the problem that you are going to face as a parent I think is 'Do you engender a sense of right in your child because they are constantly going to hit these barriers that make them just hurt or do you allow them to be expedient in their behaviour?'. (160)

R: It is sort of like the notion in parent-education of training the children to know where the boundaries of their morality are as distinct from knowing what is 'in' the territory bounded by those boundaries. I think society has put up those boundaries but hasn't done the educative process to enable them to know in one sense, why those boundaries exist and I think that is a major dilemma for me. (160-161)

I₁₀: A difficult problem you have with that of course is that its a shrinking perception of the society that actually looks at those boundaries. (161)

R: It's interesting to know that when you do it with your children, sometimes they take a position that is even stronger on certain values than you might take. My 18 year old son sometimes comes out with things that cause my wife and I to say to each other 'Where did that come from?' It's not an extreme view but it's a much more assertive view than we have probably ever expressed in our home. (162)

I₁₀: But in fact that is important! Because they are the people who are going to move the boundaries and make society a better place... (162)

These public boundaries are usually defined in a society through socially approved processes which encourage discussion, debate and definition leading to the declarations of the consensus which is reached. A legal adviser to a Queensland Government Department expressed this as:

- I₂₄: That's where the courts play a reasonably important role. But once again, the courts it must be accepted ... are extremely influenced by the individuals who make the judgments. I don't think that it would be unfair to say that you can within the same court as the body of the court have extremely different judgments between the judges that constitute that particular court. (415)
- R: Because they're given certain discretionary powers too. How they play those roles or outwork that discretion within the context of a particular case can vary from one extreme to another. But they must be within the limits of discretionary powers. (415)
- I₂₄: Once again they have, just like the whole of society, they have boundaries within which they must work, and they do. You'll get those who work to one side and others who work totally on the other side but they always remain within the boundaries. So I think any decision that is made is at least on the overall perspective not totally ridiculous. (415)

While particular reference here has been made to court processes, in many societies other strategies such as community conferences and parliaments, to name but a few, are used to process decisions about acceptable and unacceptable social boundaries, especially to public matters. Once these consensus decisions have been made, then it is incumbent on each individual within that society to know and uphold these. Often individuals try to test these decisions in order to establish their validity. The only other alternatives are for the transgressors to face the consequences of non-compliance, initiate processes to change what they may view as unjust decisions, or remove themselves from the society in which these decisions have been made. The deputy principal of a Queensland State secondary school (I₁₃) outlined one of his personal experiences:

- I₁₃: Only recently I was involved in a situation where, not a student, but an outsider assaulted me in the school grounds. I followed the process through of the law. That involved a very interesting and traumatic experience which involved a group of community people which was done for two reasons. One, to make sure that some sense of justice was followed through and also to make sure that the practical example of that when you are spat on and the person invades the school property, ... that the person doesn't get away with it. And we haven't had that problem since. And so it was like drawing a line. The line was drawn and the law came into operation. The processes of law were followed in order to try to get some sense of justice for the school in general terms and for me personally. (206)

The discussion about rights and responsibilities or obligations is a very vexatious one. It is often difficult to gain consensus on particular, let alone wide-ranging, issues when individuals

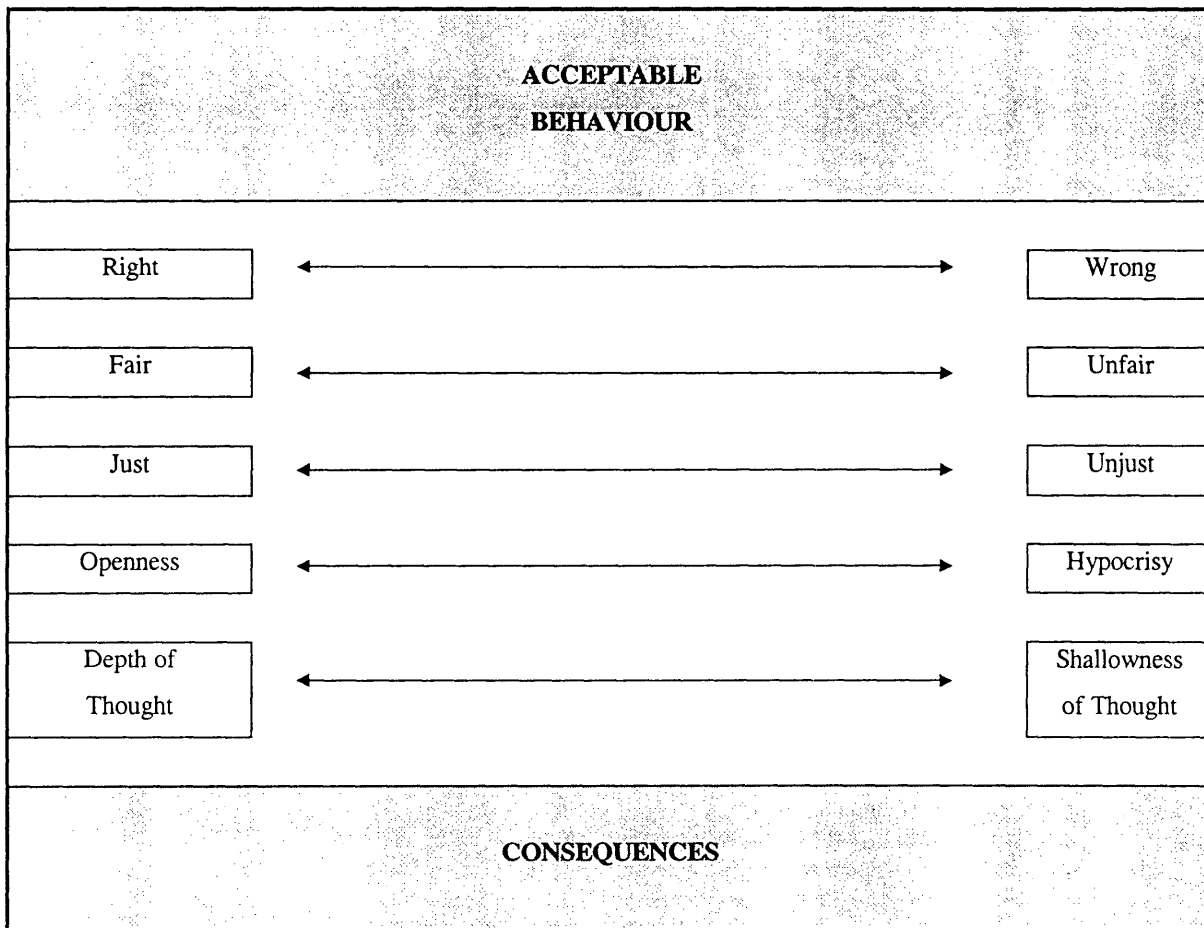
and groups hold strongly to particular positions. I₂₂, the owner of a major Brisbane chain of hardware stores, raised this matter in relation to school students:

I₂₂: Yes! School kids these days, I understand who have a very good idea of their rights often say ‘Oh! you can’t hit me! You can’t do this or do that!’ Yes, they have a good idea of their legal rights. (384)

I don’t really mind that. There is a certain amount of rudeness there of course in the case I am talking about. But having said that, people ought to know their legal rights but those legal rights ought to be realistic. They always run a political agenda in the broad sense. They should understand that a good thump can be justice too. (384)

The following diagrammatic representation of the complexities of deciding acceptable behaviour and the consequences of non-compliance were illustrated by interviewee I₂₂ in Figure 4.4.1. The figure also indicates a sample set of criteria that might be used when making such decisions. It provides an illustrative set of criteria that could be used to ascertain either the acceptability or the unacceptability of particular human behaviours with a corollary that there are logical and natural consequences that follow from certain courses of human action.

Figure 4.4.1 Interviewee I22's Criteria for Deciding Acceptable Behaviour and Consequences.



Accompanies Transcript I22

The education officer of a Queensland Government legal service (I17) was interested particularly in the definable relationships between private boundaries and public ones. These boundary relationships come into force when an individual's personal behaviour is either demonstrated in public or has consequences of a public nature. Some private decisions, for example, have public ramifications while the reverse is also true. He commented on this situation as:

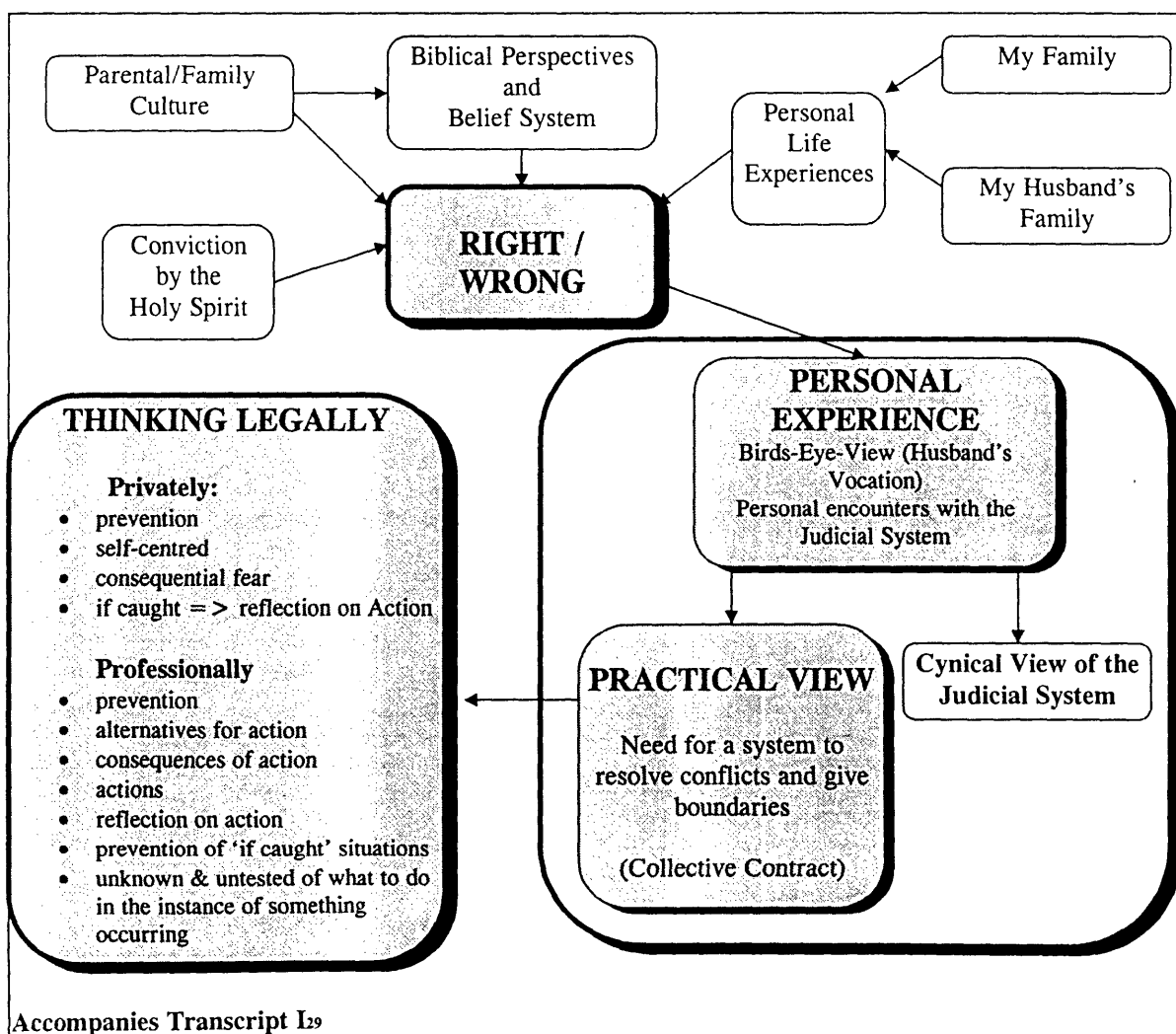
I17: So it's trying to seek some kinds of balance and trade-offs about what's OK for me and what's OK for people I live with, people I love, people I relate to. All of those things I think come into that because that's got to do with I guess, those obligations I was telling you about. Part of being free one's self is allowing others their own freedom. (264)

This topic was further elaborated by I₂₉, a housewife and part-time music teacher at a co-educational private Year 1-12 college. She focused on the need for individuals to develop knowledge of their personal boundaries and the consequences that result from certain courses of action. She described this as:

I₂₉: I think apart from knowing the boundaries, I think the thing that's important when we *think legally* is knowing the consequences, I think an up front laying out of the consequences. That takes a lot of thinking through, doesn't it? And as teachers in a classroom, the more situations you come across, you think, 'Next time I will do this! Or this now is my standard for that'. (578)

These concepts were further elaborated by I₂₉ in Figure 4.4.2 as she sought to establish a schema for her personal definition of the boundary between private and professional legal thinking. Her schema included major personal influences on her life:

Figure 4.4.2: Interviewee I₂₉'s Views of Private and Professional Legal Thinking



4.4.3 Personal Code of Practice

As individuals both grow and mature, they develop sets of personal values, morals, attitudes and beliefs that influence their lifestyles, decisions and personal actions. This could be referred to as a *personal code of practice* which relates to the individual's view of acceptable social practice within his/her developing behavioural boundaries, referred to in 4.4.2 above.

A senior lecturer (I₅) in a law faculty of a Queensland university referred to the values of a private personal code of practice:

- I₅: It's interesting that a lot of people will express that (being caught), yet the very self-same people when they're discussing some wrong that has been done to them or even discussing the antics of Mr Skase or Mr Bond or so on, will make expressions of outrage which make it quite clear that deep down inside they think there is more of a code than just not getting caught. (70)

There is an interrelationship between a person's private and public codes of practice. The implicit linkages between an individual's value base and the approved or accepted community standard were explained by a Year 11 and 12 Legal Studies teacher (I₆) of a Queensland State secondary school. One's personal background and family upbringing provide bases such as the Ten Commandments and family rules upon which to establish personal codes of practice:

- I₆: How have I sorted out 'right' from 'wrong' in life? Because of things like, thou shalt not murder, thou shalt not steal, ... in the Commandments, a lot of those just flow right through to your everyday life, your work life, your leisure activities, etc. And therefore it has been fairly easy to a degree. (91)

- R: Then you really become aware of your own ethics, values, philosophies, ... in how they are being worked out in your life ... (92)

- I₆: I'm not sure you become 'aware' of them but certainly the values are there. You know what is of a certain standard. You know what is a high standard and what is a low standard. Whether you actually physically say 'these are my ethics, these are my values, these are my morals, and so on', you probably don't do that but certainly just the way you live your life reflects the type of, Ahm, values that you have and where you place your values. It reflects to a degree your morality ... (92)

I think, unless something drastic happens to your value base, I think your value base to a degree is absolute because, in my case fairly well grounded in life, and, Ahm, then you just use whatever elements are in that value base to operate in the new mix that you find yourself fronting, whatever that may be. (93)

However, the principal (I₁₁) of a single sex Year 4-12 private school expressed some clear propositions about the ways in which these codes of practice are developed. The experiential

nature of life provided a developmental context within which one's code of practice is defined experientially. The environment of the home implicitly and explicitly educated individuals in the family code of practice:

I11: I think it was experiential! I think it was the society of the time. We are talking about immediately post second world war at this time. There was a very strong concept of mateship and of national development and growth, and 'we must do this together' and there were all those sorts of bonds. So the whole societal thing was there. (178)

My mother was a strong Christian person and she had well-developed concepts of what she saw as 'right' and 'wrong' in terms of behaviour, moral standards and relationships and how you govern relationships. If you borrowed money, then you repaid money. There was no second thought about it. You repaid it on the due date or you went and apologised, you know, because that was the code of the day, the code of ethics of the society. (178)

The Year 11 and 12 students (S_{S12}) in a Queensland State secondary school further explored this concept of a *personal code of practice* when, in relation to family life, they compared their parents' implied and explicit values:

S_{S12}: Not really! They say it in a way but they don't say it in words. It is really what they want you to do. I sort of have my own values and beliefs but they pass on theirs and I interpret them. When I don't have any values of my own I follow what they want. (190)

However, there is not necessarily a congruence between personal and public codes of acceptable practice. Often there is a clash as differing values are given expression in varying personal and public practices. The Queensland manager (I₂₁) of an Australian insurance company expressed this as:

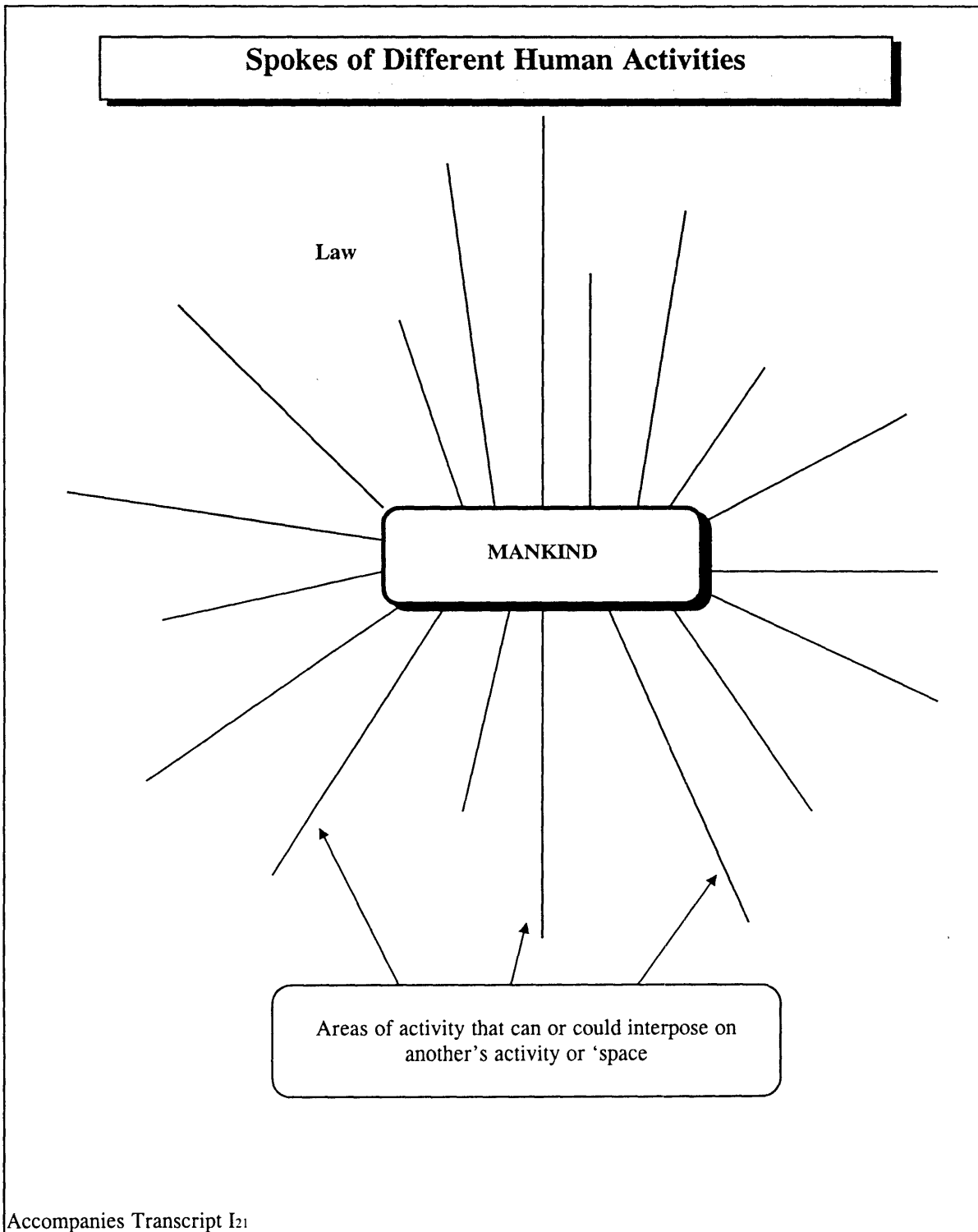
I₂₁: ... Most people are law abiding so it's not a problem. I guess for the arch-villain out there, he's always probably thinking about it and how he might circumvent the law. (367)

R: And he's probably *thinking illegally* very well from a street perspective. (367)

I₂₁: He knows what he can get away with. He knows for example that he can go and tell the policeman to 'rack-off'. He knows that he can do it and, yes I think most people would not have a good appreciation of the law. They don't know what mechanisms work or really much about it at all.

In [Figure 4.4.3](#), I₂₁ diagrammatically illustrated the interplay between personal and public codes of practice. He identified the significant role of law in regulating the interactions between individuals and others in a community.

Figure 4.4.3: Interviewee I₂₁'s Views of Private and Public 'Space'



Accompanies Transcript I₂₁

An ex-prisoner from Pentridge Gaol (I28) expressed quite different perceptions of the personal codes of practice. His view, as expressed in the following discussion, was that many prisoners were more interested in unacceptable codes of social practice that were ‘beyond the law’:

R: What were your inner private thoughts while all this was happening? (533)

I28: Towards stealin’ and all that? (533)

R: Yes, these notions of ‘Am I doing the ‘right’ or ‘wrong’ thing? Where’s this going to lead me and what might be the consequences of it all?’ (533)

I28: I think when you, that life that I was leadin’ then you don’t think. You don’t say ‘I won’t get caught’. OH. That’s ... (534)

R: Do you think you’re beyond the law? (534)

I28: Yes, everyone sort of does that. All the prisoners I speak to, they all think that. They all get out there (in the prison yard) and they really believe that they can outdo the Police, they really do ... (534)

Consequently, each individual has an implied or explicit *code of personal practice* but there is not necessarily direct congruence between personal codes and what is considered the acceptable social code of practice for their particular community.

4.4.4 Social Code of Practice

A number of interviewees expressed interest in relationships between the law and society. While some sought to define these relationships in terms of social perception or technological developments, others saw them as social order, community cohesion and common values.

For example, (I1) a Year 11 and 12 Legal Studies teacher from a private Year 1-12 college focused her attention on the apparent or implied ability of the law to reflect society’s expectations about issues, such as homosexuality and prostitution, which have legal and social implications. In the following transcript extract, she outlined her perceptions of the relationship between law and social practice, especially in the context of dealing with complex or controversial issues in society:

I1: ... But I think these days it is becoming more reflective of society or descriptive if you want to use that word. Ahm! And it can be sometimes very slow in catching up with social practices. Sometimes it may even come along a bit sooner than some people would like. For example the legalisation of homosexuality, prostitution, and all those kinds of things. Ahm! To a certain extent those kinds of things are reflecting what most people seem to think. But there are a lot of people who still don’t think that way

and probably never will. So it is not entirely reflective but I think mostly it is. Sometimes the cart does come before the horse. (8)

A doctoral student (I₁₀) in a law faculty at a Queensland university focused on the differing, and sometimes contentious, values that underlie community practices. In the following extract, her concerns were with community values and the apparently inconsistent manner in which individuals deal with personal and public issues of practice:

I₁₀: And also there was a very strong sense of community values. It was a community in which it was important to do good for the society, for society needs someone to do good. (156)

... So you have a real problem because the ever burgeoning sections of the society that work simply on the fact of 'If I don't get caught, I didn't do it'. (161)

Another proposition developed by a Legal Studies lecturer (I₈) in an education faculty of a Queensland university was that of the community processes which enable order to be developed and maintained in a society. The perceptions of the role of law in a community and the relationships between personal and public implications of behaviour were of interest to him:

I₈: ... I suppose it's a compliment that they don't see law as something that's there to punish you if you do wrong but as society expressing itself as a group of people living together. (130)

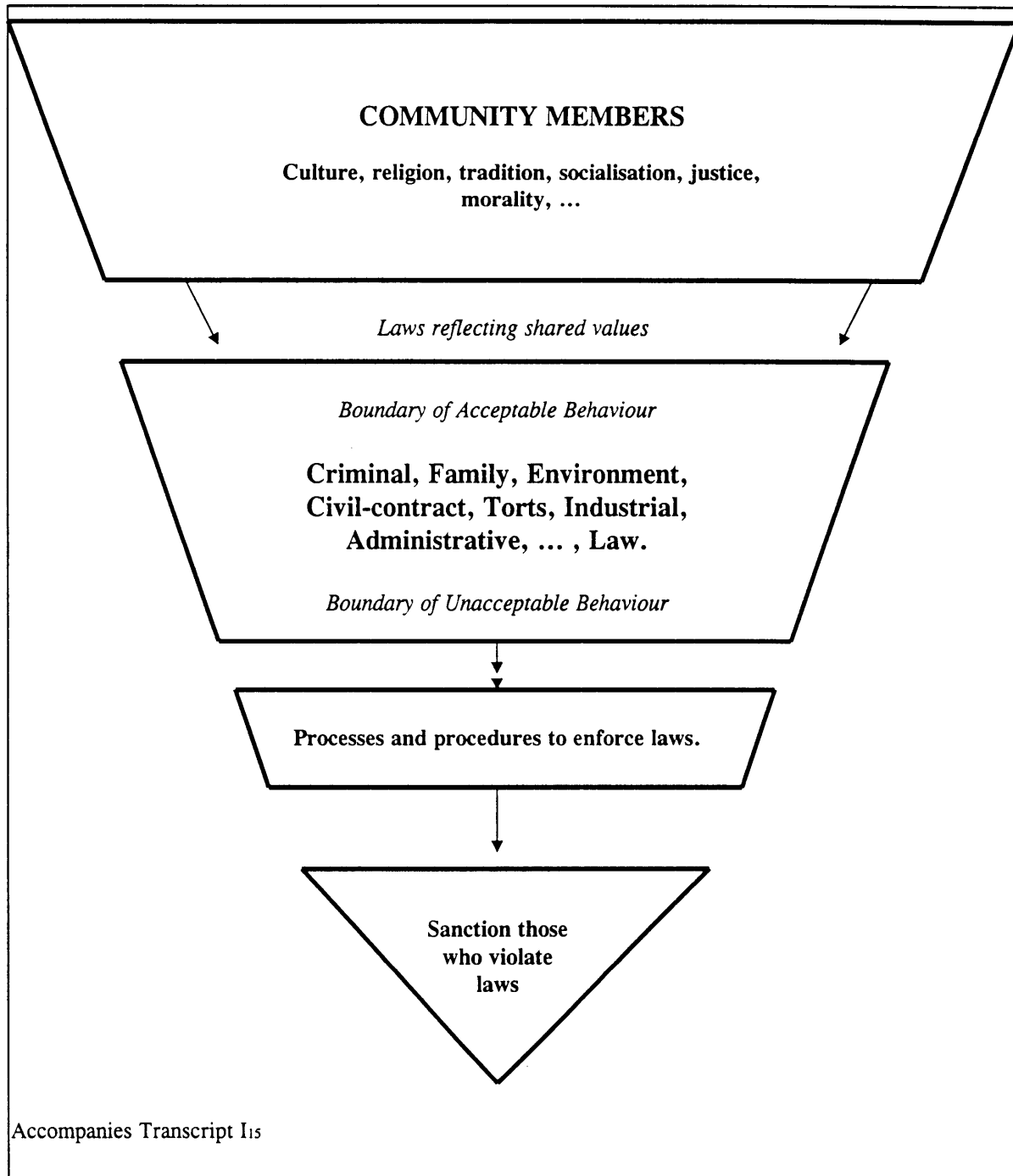
But I suppose from the social perspective, I think more socially in terms that the law and legal processes are just part of bringing some sort of order to society and it is not really about punishment as the media makes out. It's more about how do we live together. (131)

A Legal Studies teacher (I₁₅) at a private Year 4-12 girls college was concerned particularly about the need for laws as expressions of community values:

I₁₅: I think it probably is for the law breakers because the way ideally it has developed is from the general community's values and attitudes. So the bulk of the community would probably think that the law was OK and wouldn't step over the boundaries because it's against their moral values anyway. (246)

These concepts were further elaborated by I₁₅ when she developed the following diagram (Figure 4.4.4) which interrelates the concept of *shared values* with concepts of *acceptable and unacceptable social codes of practice* which are either endorsed or sanctioned by a society. This integration results from the symbiotic relationship between individuals and their society as notions of acceptable and unacceptable behaviour are processed and publicised.

Figure 4.4.4: Interviewee I15's Views of Law as Reflected Shared Values



4.4.5 Consequences of negative actions

One of the negative consequences of breaking a code of acceptable social practice relates to the possibility, though not necessarily inevitability, of ‘being caught’. I₈, a Legal Studies lecturer in an education faculty of a Queensland university had the following to say on this matter when dealing with the personal impacts, that may be of a negative kind, of the law on one’s life. The punishment of the wrongdoer is a major implication and consequence of contravening or transgressing community boundaries of acceptable behaviour:

I₈: It was interesting when I was trying to think about this (research) question. There’s not a lot of direct types of experiences that have been negative ones that we could look at. I can think of one when I taught in Rockhampton of being caught in a radar trap... (128)

At the time I was annoyed, probably with myself, but annoyed with them that they had picked a spot where it was obvious. (128)

... I suppose initially I would have come from that position of you know when you think legally you think of punitive measures, ‘if you don’t do this there is a penalty’. The more you do the wrong things the bigger that penalty in a criminal sense is. (131)

And you know, I see that legal thinking seems to have been and still is that if something is wrong then you punish the wrong-doer as a way of solving the problem. (131)

... Whereas I don’t think the average citizen thinks along those lines. I think that if they have a problem, they look for a non-legal solution to it. Often to their detriment, by the time they get so deep into the problem only then is a legal answer the way out. (133)

Other members of society such as I₂₈, an ex-prisoner from Pentridge Gaol, viewed unacceptable social behaviour as developmental in that ‘being caught’ was not viewed as an appropriate deterrent for unacceptable social behaviour. His parents played a key role in this educational process when they taught him the values and attitudes that eventually led to a life of crime:

I₂₈: Mum went along with me. Mum was, she didn’t go and steal but she just went along with the whole thing. (531)

...
So my mother wasn’t against it she probably knew it was ‘wrong’ but because she would get stuff like glowmesh we would give her stuff like that she would think ‘that’s alright’. (531)

R: Where did this all lead in the context of you’re developing notion about ‘right’ and ‘wrong’? (532)

I₂₈: Well, I believe it led me, people mightn't believe this, but I believe it just led me to a life of crime, a full-on life of crime which ended in prison on two occasions. But it led me into thick full-on crime which was massage parlours I owned, I became a heroin addict, a mask over my head and 44 magnums and 22 magnums and holdin' up people and you know that's what it led to. I believe that with my heart because somethin' can grow and grow and grow. That's what I feel it led me to do. What started off small, and me thinkin' it was OK because my father taught me to do it. Goin' out with my father and then it ended up where I ended up. (532)

Yea, and kept goin' and goin' and goin'. It just progressively got worse and worse, and worse. You know and my father was the cause of a lot of it because one of the first times, or the second or third time I got in trouble with the Police, I assaulted a couple of policemen lookin' after my father ... (532)

Faith in the system for monitoring the codes of acceptable and unacceptable social practice was an issue raised by I₂, the dean of students at a co-educational private Year 1-12 college. She was aware of the social and legal processes as well as having an overt Christian faith that seemed to compensate for her lack of faith in the system:

I₂: ... But now it is more like sitting back and thinking 'Well is it really going to be worth it, the emotional cost, the financial cost?' I sort of made me sit back and think 'Well, in one way just leave it in God's hands and let vengeance be the Lords.' You know what I mean in that way because I have lost faith in the system in a way... (24)

Consequences can be very influential in affecting social behaviour, provided that their impact is sufficient to cause the individual concerned to both think through and reflect upon the consequences. I₂₉, a housewife and music teacher at a co-educational Year 1-12 private college expressed this as:

I₂₉: We want to speed, but the fear of the fine or the fear of losing the points on the licence prevents us from doing it. That's how the law is meant to work. I think that in part why they increase the fines is not necessarily to increase their revenue, although I am cynical about that, (Laughter) but in increasing the fine, they increase the consequence and therefore the action is more carefully thought through, the hopeful process. (562)

4.6 Unexpected Outcomes

Three of the interviewees expressed opinions about the tacit or unexpected nature of experiential and professional knowledge. Some personal experiences, such as venturing into the use and sale of drugs and the invidious positions in which some people find themselves, apparently could not be explained by the interviewees. For example, I₂₈, an ex-Pentridge prisoner, said:

I₂₈: I just think everyone's got their own 'grey' spots. That could be 'wrong'. Like when I started to get onto heroin, I was smokin' marijuana and all that sort of stuff and a guy

brought some heroin into the parlour one day. I used to think smokin' dope was OK because it made you passive. It made you calm down. It stopped you from fightin' where alcohol didn't. So I used to think that was OK but heroin was a No No. That's what I thought and I even bashed the guy that bought the stuff in there. I gave him a hidin' and took it all off 'im. But that was my downfall because I sat there a couple of days later and thought 'What does this stuff do?'. (532-533)

That led me to being a heroin addict for over 4 years of my life. (533)

A legal adviser (I₂₄) to a Queensland Government Department, in commenting on 'knowledge can be dangerous', made the following statement to explain his views of the pitfalls of the legal system:

R: Your knowledge on one hand, because that empowers you, caution on another; because the more you know the more you realise there are pitfalls to avoid. (421)

I₂₄: You can never really ... the knowledge isn't, doesn't make you more secure in your actions. Probably it makes you more insecure. (422)

After years of experience working with the social and legal problems of prisoners, I₁₇, an education officer with a Queensland law commission, expressed concern of the expectations that society places on parolees, for example, in its delineation of acceptable parolee behaviour when he said:

I₁₇: It's like a double jeopardy situation. We expect people to be better than good when they are required, in a sense of exhibited difficulty, to achieve the basics. There are lots of examples like that. People on probation and parole face that problem. They're on probation and parole because they've demonstrated a degree of immaturity, social ineptitude or whatever, yet their probation and parole orders specify behaviour that no one else can guarantee to keep. Like their orders say 'You will not break the law'. Now everyone else breaks the law with relative impunity but if you're a known offender then well the law is much heavier for you. That's another example of where the law seems to have taken over from what other people call common sense ... (287-288)

These three interviewees were expressing concerns about particular aspects of the legal system and its operation that were of personal interest to them. While the law has been called a *seamless web*, there are times when it seems that there are as many *loopholes* as there is cloth.

4.4.7 Discretion

I₂₉, a housewife and part-time music teacher at a co-educational Year 1-12 private college seemed concerned particularly with the implications for her students when they have

transgressed, in particular settings and situations, beyond the declared social boundaries of acceptable practice. Her concern was for rescuing students so that they could be assisted to learn from the experiences that has caused them such trouble and pain:

I₂₉: ... 'you've crossed the line, these are the consequences of what you have done, but maybe this is the first time you've done this. Therefore having faced that consequence this then is the allowance that's made for you'. (563)

This personal position of compassion and concern for students is not unlike society's willingness to give Magistrates and Judges *discretionary powers in sentencing*.

4.4.8 Conclusion

Section 4.4 of this chapter has provided an analysis of the research study participants' views of *thinking legally as a process of justifying 'personal behavioural space'*. Various aspects of the sub-topics of this conception have been explored using interviewees' statements. Particular attention has been paid to definitional clarity, codes of personal and social practices, overt behaviour, and the consequences and impacts of unacceptable social behaviour when either the implied or the explicit boundaries of practice have been transgressed.

Law is a mechanism for assisting society to declare its negotiated boundary between what is considered either acceptable or unacceptable behaviour by its community members. While the law cannot attempt to be exhaustive in this codification, nor should it, the boundaries of acceptable practice need to be both discussed and renegotiated continuously as society's expectations change.

A representative (I₂₃) of the Queensland law reform commission made the following comment which applies to the processes of defining and justifying *personal behavioural space*.

I₂₃: Yes! I think if you are talking about a person who is not legally trained, then to *think legally* would be to be aware of the law related to the situation that you are in. A lot of people aren't. If you're telling someone to *think legally*, you're telling them to make themselves aware of the legal relationships at law or the consequences of your behaviour at law ... (404)

***Thinking Legally as a process of justifying
personal behavioural space.***

4.5 Conception D: Thinking Legally as a process of *dealing with dualism*.

General Description:

Any consideration of *dualism* must identify the criteria used to establish the differential perspectives (4.5.1). Particular philosophies such as idealism and pragmatism (4.5.2) are often used as a basis for expressing personal values and for making decisions. Many factors influence the perceived power of an individual, group or society (4.5.3) and each factor expresses itself because of differing values within selected contexts as social changes occur (4.5.4). People are often *re-active* rather than *pro-active* to these changes but education is one avenue for ameliorating this difficulty (4.5.6) especially when personal ways of *knowing* need to be related to one's *actions* (4.5.7). The application of this knowledge and resulting actions needs to affect various aspects of life such as personal and professional (4.5.7), contextual (4.5.8), rights and obligations (4.5.9), individual and community (4.5.10), and fantasy and reality (4.5.11).

The processes of law (4.5.12) are a bridge which assist individuals, groups and the society at large to resolve their conflicts and deal with difficulties that result from dualistic values, perspectives and processes. However, the educative strategies and tactics used by a society are fundamental to the development of understandings of these dualisms. Access to these processes will assist in the resolution of the resulting conflicts.

Discussion:

4.5.1 Criteria for defining 'the line'

A senior lecturer (I₁₄) in justice studies at a Queensland university was particularly interested in the processes that ought to be used for making appropriate legal distinctions within particular contexts and situations. Of particular note in the following quotation is the emphasis that is placed on these processes and the appropriateness or inappropriateness of the distinctions that result. This lecturer saw the issue of *defining 'the line'* not so much in terms of 'the line' but in the processes of *defining*, categorising or describing what 'the line' should be in a particular situation or context. His concern here was for the development of both

guidelines and principles that would enable people to make distinctions within a context applying to the situation in question:

I14: To *think legally* means you become imbued with the legal culture because of the adversarial model rather than as a fundamental view of life. So it becomes a worldview. I mean, I see *legal thinking* as where people learn to dichotomise even the most meaningless things. Everything is taken to bits, you know, in an argument point by point. (224-225) ...

What becomes critical in *legal thinking* is making distinctions. That's why the sort of people who make those distinctions are probably lawyers more than anybody else. Because they are used to this highly rationalistic approach of saying, I don't necessarily call that reason because it may not be all that reasonable, but certainly lawyers and the legal world are very highly intellectually powered beings. There is very high intellectual demand. But the intellect is all directed to making categories of distinctions about things. Again, if they're doing that to the jugular vein of making distinctions to nail their opponents to the cross or making those distinctions to think they are going to get more approximations to the truth, but either way, the process of legal thinking or going about things legally is making distinctions. I would argue sometimes these are fairly meaningless distinctions. (228) ...

R: So this isn't just pure analysis *per se*. It has to be within a selected context. (230)

I14: Analysis is meaningless without the context. It's like decontextualised statistics. What the hell would they mean? Anything you want them to mean, you know. So that the thing that becomes important, from my point of view, is the fundamental distinction between substantive law and procedural law. OK! That's a useful distinction. What I am arguing for is that distinctions are inevitable. We all make them all the time. Life is full of distinctions. But the issue is 'what distinctions are more useful than others? How far do you make the distinction down to the point where you are chopping off an ant's legs? How relevant is all of that?' (230) ...

So the value of *thinking legally* is that it does teach people an intellectual rigour to be able to dichotomise, to make distinctions, to therefore follow a line of argument through. I think that's its value. If there is one thing that is important it is for people to be able to do that and for people to present a case. (231)

Probably it's I see *legal thinking* within a larger context ... I think that the notion of *legal thinking* in gaining the elevation of the intellect is primary and fundamental. You can ... If you are going to look within the legal system then what you get is that sort of adversarial model and that becomes part of how that part of the diagram is dealt with. But the intellect is primary though there are many ways in which you could express intellect. I think that the thing that is the idea of distinctions ... So making distinctions and I mean, if there is anything that describes legal thinking more, it's that sort of dichotomous thinking, categorising and those kind of words. (234-235)

The Years 11 and 12 Legal Studies students (Ss12) in a Queensland Secondary school introduced another criterion to assist them in the processes of 'how to get what you want'. They seemed to understand that particular contexts are directly related to the personalities which are involved in them. Consequently, they placed emphasis on the different character and personality of each of their teachers when they said:

Ss12: You learn to work out too how to get what you want for each teacher because they are all different. (194)

Other interviewees, however, saw the processes of 'defining the line' in quite different terms. I1, a Years 11 and 12 Legal Studies teacher, saw the law as being the processes of defining either the difference or the boundary between what was 'right' and 'wrong' in a particular community or social setting. She was interested particularly in the definitional and locational issues associated with 'the line' and the implications that this had for her personal, and the public's, decision-making:

I1: I suspect that when you are in that practical situation that the line may become a bit elusive even because you are wanting to put that line where you want it. In a way it is sort of you're not so concerned where the line actually is as in where you can put it, where you can put your client in relation to that line, whether you can pull it a bit this way or that. (7) ...

R: Do you think there is any relationship between thinking legally and working out what is right or wrong in life? (14)

I1: Yes, I think there is because, I mean, really the law is meant to be the decider of what is right and wrong. So you can't really separate what is right and wrong from what is the law. And I think that is one of the big difficulties I had with the law in that you just sort of have to try because, well for me, getting through the law degree that wasn't the issue. It was 'On which side of the legal line is this?' So that is what becomes a difficulty. But I don't think really you should separate them. (14)

I8, a lecturer in Legal Studies at a Queensland university, saw the law as being relatively insignificant or irrelevant to the individual, until some problem or issue arose that was at the boundary of one's awareness. He seemed to assume that personal confidence in making decisions was related to one's mastery and awareness of the personal values and morals, but that these were challenged in the public arena when individuals interact with each other in the various domains of life. The concept of legal brinkmanship is implicit in the following statement in that linkages were being made between issues of social and cultural, as well as those of legal, significance:

I8: I mean, I look back to a student some years ago who had a Greek background. Her parents wanted her to marry their selected person and she sort of reacted to that. It wasn't a 'thinking legally' situation. It was cultural and social. I can remember saying to her at one point 'look you may need to finally seek a legal solution to this if you can't convince your parents'. Now that was talking pretty desperately to get to the final solution. The situation was thankfully resolved without going to the law but for the first time she was challenged to think legally about the problem. Until then it was cultural, emotional, ... So maybe we don't need to think legally unless issues come up

which require going in that direction. Whereas someone with legal knowledge and background can be challenged to think legally about issues more easily. (137)

The chairman (I₉) of a Queensland legal watchdog organisation added to this understanding by raising the notion of legal principles that are used when applying processes for resolving difficulties or making decisions:

I₉: A lot of law, ... I have some books over there. They are enunciations of certain principles. There are quite a few areas which are not entirely separate and where attitudes of mind or beliefs are undoubtedly influenced in judgments. A friend of mine said that 'law is not value-free'. That's entirely true when it comes to areas of the law which touch upon the relationship between the citizen and the State such as Constitutional Law, Property Law, ... (149)

I₁₅, a Years 11 and 12 Legal Studies teacher at a private girls college, added to the understanding of her processes of 'defining the line' when she raised the issue of the relationship between morality and the law. Where there was lack of congruence between these, other processes, such as political ones, would need to be employed to declare, debate and resolve the difficulties:

R: What if there's an incompatibility between your moral code and the law? What if you think "This is an unjust law!" The situation might be OK for you but the law is unjust in one way or another. What would happen then? Would your process still work? (245)

I₁₅: Ahm! I think it would work well for looking at the issue and looking at the law but I think I'd have difficulty applying the law to the issue because morally I would think "That is wrong". So when I got to that step of applying the law, I would see that what I want is not going to happen. So then I would probably go somewhere else to voice that opinion and say "That's not on!" Not that I would probably get very far but at least I would feel like I'd done something to voice my opinion on it. (245)

A lawyer (I₂₆) involved in immigration matters challenged the usual deductive scientific model of legal processing when she argued for a focus on both personal and situational goals in particular settings:

I₂₆: Then you look at the law and sort of say 'Well OK. What's likely to happen legally with this?' Ahm! But that's only one step as well. Then you work out what you want to do. In terms of what I think, one of my Professors at Queensland University once said to me and I didn't understand it at the time and I thought he was being silly and factious but it's become really, and I only really realised it when I got into third year. In Law School, you are taught to start with the law. Work out what it is and apply it to the facts and that will give you the answer on 'What will happen?' One of the Professors at University said, 'That's just rubbish. What you do is work out what result you want and then you make the law fit it'. That's basically what you do in your

mind. You say to yourself 'Well what do I want and how do I make it happen? How do I interpret the laws?'. (480)

These interviewees expressed a range of criteria that should be taken into account when making decisions about *defining the line* or the boundary between the key issues and ideas that indicate a *dualism*.

4.5.2 Idealism and Pragmatism

Several interviewees were interested particularly in the apparent discrepancy or dualism between the theory and the practice of law. For example, I₁₇, an education officer with a Queensland legal service, was very vocal about the need for society to see the law as its law. In the following extract, he was referring to a recent discussion he had had with Aboriginal women leaders about the need for ownership of the laws that applied to the issues that were being discussed:

I₁₇: I'd rather them see it as *their law* something that they can use. Ahm! And something they see as having the possibility of some negative connotations but being a much more positive and active kind of force in their lives which they can say 'Well this law it's not just there to act against me, it's there for me. I can use it to achieve some of my goals. I can achieve a modicum of protection for my interests, if I wish.'. (270)

I₁, a Years 11 and 12 Legal Studies teacher, indicated a dualism between what the law intended to do and what it actually did. In the following segment of her transcript, she was dealing with a difficult concept in that her sense of idealism had not been appropriately worked out in practice. In her mind, there was a gap between what she thought was the ideal and that which was eventually implemented and practised:

I₁: I suppose, Ahm, my conception of what the law did and what it really achieved differed. Really now I guess I see the law as basically a pragmatic device to try and maintain order in society and safety for most people if it can. Really it is pragmatic in that the ideals, they're kind of there but almost always subsumed by practicalities, like a law is no good if it can't be enforced really. So that's the bottom line. It's really that pragmatic element. What's going to be 'good for most of the people most of the time' is really how it works. (2)

R: Is the law really an ass?

I₁: It can be in certain circumstances, but not always. I think it tries its best but, Ahm, it can't achieve the perfect result every time. (2)

A senior partner (I₁₈) of a Brisbane law firm also considered that there was a divergence, but he expressed this in terms of the ‘reality of the law and legal issues’ and ‘what the public thinks that law and legal issues might be’. The contrasted with I₁’s expression above, there was a distinction between ‘what the law did’ and ‘what it really achieved’:

- I₁₈: Since I suppose, undertaking that career, my view of the law and legal issues has clearly become one that there’s a great divergence between the reality of the law and legal issues, and what the public thinks that the law and legal issues may be. My view is that our legal system gives a determination of legal rights which may or may not be the same thing as people regard as justice or a just result or right result, proper result or fair result or whatever you would like to term it. In other words the lay person’s concept of the law and what their legal rights should be is quite often quite different to how the legal system works and how it determines legal rights. (297)

When the researcher raised the question of the *idealism/pragmatism* in relation to developments being undertaken in technology and bio-technology with I₂₀, a Master of Law student at a Queensland university, the following discussion raised questions about the law’s ability to deal with difficult social developments such as technology and bio-chemical developments. The following extract is illustrative of the discussion that ensued:

- R: Especially taking things like technology and in-vitro-fertilisation developments where ethics committees in hospitals and research projects are having nightmares trying to resolve the questions involved in sperm banks, surrogate children and all those sorts of situations. There is an incredible degree of experimentation going on with technology and the bio-technical areas. The law seems to be in one sense, not trying to reflect what is out there, but is waiting until the issues get resolved in some way or until a conflict arises in which they have to come in and make a decision. (342)

- I₂₀: In most cases the decision-making is based on some cheesy old property theory that hardly relates to the situation where you have a baby in a test tube. I mean that’s true and there is a distinction there.

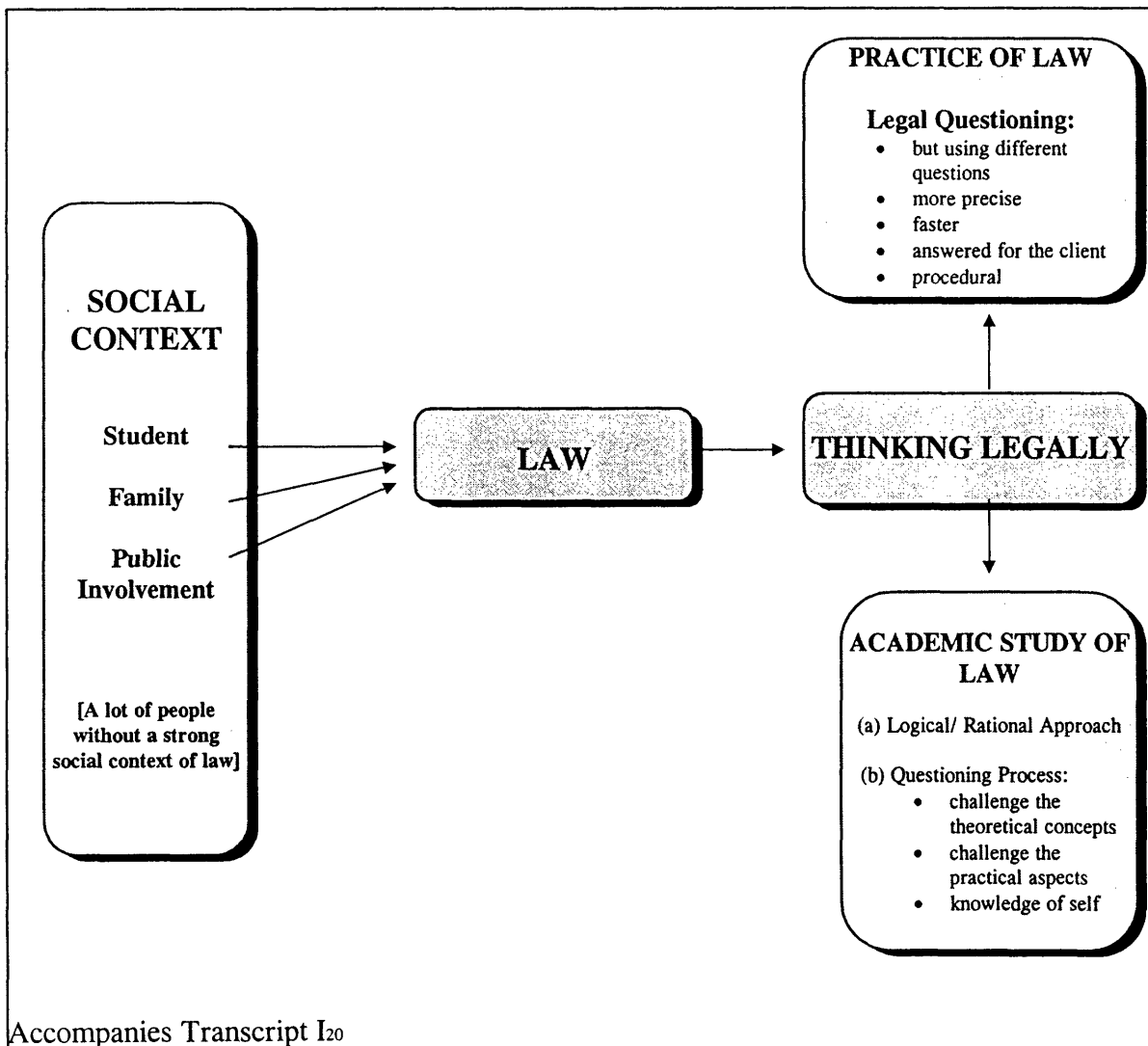
Yes. I do agree with that. It should distance itself. There is the generation thing, I was trying to think of, and it is perhaps true in those kinds of cases. Technology has leapt ahead and no one has thought of the repercussions ethically, morally, ... so now people expect the courts to tell them and I don’t think that is what the courts are there for specifically. (342)

The courts are there to deal with the laws that we have. Parliament should be deciding what happens in those situations and of course Parliament in decided by us. So eventually we have really decided. So it should then work through ethics committees which then don’t go in the opposite direction to society. (342)

It’s a strange thing for them to say really. Other than the fact that they are Judges, I really don’t know that they have the power to do that. I mean I agree with quite a few of the things they have done and that is a good way of hurrying Parliament along but traditionally the approach was to decide according to the law you have and to strongly state however that Parliament should do something. I know the High Court got sick of saying that so they did it themselves. *Mabo* is a good case of this. (342-343)

Figure 4.5.1 is a schema developed by I₂₀ and indicates two dualisms. These are expressed in terms of (i) the social context and the law, and (ii) the practice of law as distinct from an academic study of it. These result from the dichotomies that participant I₂₀ perceives as being among the law and its social context, academic study and practice. The first dualism exists between law and its social context. I₂₀ perceived a slippage between what people perceived as being the law and its actuality. The second dualism related to the disparity between the practice of law and its academic study. Figure 4.5.1 therefore represents explicit evidence of the disparity between *idealism* and *pragmatism*:

Figure 4.5.1 Interviewee I₂₀'s View of the Relationships among the Law and its Social Context, Practice and Academic Study



A lawyer dealing mainly in immigration matters (I₂₆) expressed a very different perspective on this *idealism and pragmatism* issue. Her concern was that ‘what should happen has nothing to do with the solution of the problem’:

- R: How do you go past ‘what did happen’ to ‘what should have happened’ and then ‘how might you reconcile, arbitrate, mediate, compensation, rectification, or whatever else?’. (480)
- I₂₆: Ahm! ...(pause)... What should have happened almost has nothing to do with the solution to the problem. I guess it has more to do with ...(pause)... What should have happened is almost irrelevant in terms of solving the problem. Ahm! (sigh and pause) OK! Well, I sort of do my *factual analysis* and I do my legal analysis. That’s often very easy. As I said, in real life, what is often most difficult is the *factual analysis* and actually working out ‘what the hell happened’. I guess in the circumstances working out what happened but what can I prove basically which is again a whole lot of questions. There is sort of all these different layers to everything. (480)

Consequently, several interviewees were able to voice dualistic perspectives about theory-practice relationships.

4.5.3 The Perceived Power of Influence

Another factor which relates to the *dualisms* being investigated in relation to *Conception D* is that of the perceived power of certain groups in society. Several interviewees were quite assertive in their discussion of various factors that were believed to affect this.

The manager of the Queensland branch of an Australian insurance company (I₂₁) was quite explicit about the ‘power game’ that his company plays with clients, especially those making claims. His company sets the contract, conditions and premiums of a particular insurance policy and, at the same time, acts as the arbiter of claims made on that policy. The following statement is his elaboration of this:

- I₂₁: I try to conduct my business as ethically as I can. There are some, I guess, I wouldn’t necessarily say in business one puts one’s heart on one’s sleeve all the time. Maybe one ought to, but it’s certainly not expedient from a business point of view. For me personally, I don’t believe I would, compromise personal values. I am confronted with that quite regularly because I work for a large organisation, there can be a lot of bluff! I mean, ...(pause)... we’ve got the money, you haven’t. So I’m in a very powerful position and I can put you through a lot of heartache if you want to get some money out of the company. (356)

A similar issue to this was raised by the Years 11 and 12 students (S_{S12}) who were attempting to explain the perceived power of teachers within a school community. A 'them' and 'us' mentality seemed to be on their minds when they were discussing the perceived power of certain individuals in society:

S_{S12}: You think, they've got heaps more power, I'd better obey them. (195)

I think you think that they and the law are on one side and the community is on the other. (195)

R: Could you explain that a little more? (195)

S_{S12}: It is like two boundaries between them and the law. The law is between them. If they do wrong, the law says you have to be dealt with in this way. I don't know ... like just obey that like ... it's supposed to help us. (195)

In a similar manner, the dean of students (I₂) at a private co-educational Years 1-12 college discussed her husband's experiences that were associated with this issue of power and influence. He, as a plumbing subcontractor, has to put up with the demands and perceived power of employers who control both price and payment:

I₂: My husband even with his plumbing business, when a builder has done the wrong thing it's like the more money there is the more power they've got behind them, whether they are right or wrong, they can make you feel like you have done something really wrong. Like when you are returning something (to a shop) they ask 'Did you wear it?' It's not just accepted as much. I've found that is the hardest thing because I have always had that respect for the law and then suddenly you feel like you are the guilty party. That you have done something wrong. It makes you question yourself and so I think that if ever you wanted to go to court you'd have to really have your facts and be able to prove beyond, that you were absolutely certain you were absolutely innocent. (23) ...

Absolutely! Yea! Then you hear the comment that the more money you have the better lawyer you can afford the more you'll get off. That's wrong! (23)

I₁₉, a judge of the Supreme Court of Queensland, was explicit about a community's perception of the power of Judges on matters such as their discretionary powers in sentencing. He was adamant that judges were in the best position to determine the severity of sentences, because they were in a position to hear all the evidence presented to the court and had access to all the judgements that had been made by judges in similar previous cases. In the following statement he dealt with judge's discretionary powers in sentencing:

- I19: Consequently people, from time to time, criticise the courts and say "Oh the Judges are letting these people off too quickly and they're not giving them adequate sentences" and that sort of thing. But in the first instance, they usually haven't heard the details of the particular case and all the factors that go towards establishing that there should be some grounds for leniency in that particular case. Equally they get carried away by the emotions of the particular matter concerned. It's a matter where the law has to, in its approach to 'right' and 'wrong' relating to matters of that description, it has to avoid as I say, succumbing to the pressure, and there is a lot of public pressure on the Judges in relation to fashionable modes of thinking. Take for example in the present situation extreme feminism or extreme other features ... (314-315)

The above are but a few selected examples of a community perception of the ability of certain individuals or groups to obtain or assert influence in a community.

4.5.4 Differing Values and Social Change

An example of the changes that have occurred in the values of a community was expressed by I22, the owner of a chain of hardware stores, when talking about the values system in which he had been raised as a child in the early 1930's:

- I22: On this site! And we'd be about over it now. If you went to her (his mother's) place on a Sunday, you couldn't run around and shout or throw a ball. You knew you couldn't do that on a Sunday. I imagine the shops were shut. There weren't many shops. There were a couple of grocery shops. I imagine they were all shut on a Sunday anyway. There was no argument about it. The few people who had motor cars could drive to the beach. I suppose down there they could buy ice creams and things but we've reached the stage now where Sunday trading is OK. Certainly throwing a ball, I mean great international football matches are held on Sundays. So all that sort of thing has happened. (374)

Now you are forced to think about at what stage does this constitute evil. If you think about that and you go back to what the ancient Jews believed, they had rules about how far you could walk on a Sunday, what you could carry, if your cow fell down a well you could pull it out, but there were certain things you couldn't do. They codified all that. And I suppose the ultimate question from there is, but do you love your neighbour? (374)

The topic of differing social values was further explored by I4, a doctoral student in law at a Queensland university. She was particularly concerned with the relationships between private and public morality, and the affect this has on children in today's society. This was evident in the following statement in which she discussed her views on these relationships:

- I10: If people's public and private morality is not the same, that's where you get children being raised with a confused sense of what is 'right' and 'wrong' who mightn't get into trouble at school because they do something that they thought they could get away with but they were caught. And they might be quite confused about it. (159)