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## Prometheus, Sisyphus, Themis: Three futures for legal education research

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# 13 Prometheus, Sisyphus, Themis

## Three futures for legal education research

*Paul Maharg*

### I Introduction<sup>1</sup>

To think independently of any relationship is not to think at all.<sup>2</sup>

Legal education research takes many forms: discourse analyses, jurisprudential studies, histories of institutions and movements, studies of educational interventions, empirical studies, theoretical studies and much else. Being a synthetic discipline, comprising at the very least law and education, such variety is to be expected and indeed welcomed. But there are infrastructural problems arising from our research practices. Legal education research focuses predominantly on single empirical projects and theory/practice/policy research. The field as a whole therefore develops haphazardly; there is little attempt to map it by various means and identify gaps in the literature, little co-ordination of research initiatives between academy and regulators on a sustained basis. There is a significant lack of longitudinal studies, very few ongoing and sustained data studies, no meta-reviews. Almost no systematic reviews of research literature are produced, few policy paper series, little in the way of a stream of historical literature on legal education that feeds into current developments and future innovation. Such lack of organisation and the thin historical awareness that it gives rise to, I argue here, constitutes a bar to the development of a rich legal educational research paradigm, and affects our ability to generate, curate and argue from evidence-based data and a richer jurisprudential context.

### II The two David Hamiltons: interdisciplinary historical understanding and legal education

Let us begin not with legal education but with education. During the mid-1980s the Department of Education at the University of Glasgow, where I was working as a tutorial assistant in various arts departments, obtained funding to develop what was then an interesting and unusual project. Concerned about the low number of applications from lower socioeconomic classes to the university from Glasgow, the department sought and obtained funding to set up an outreach project to encourage applications from what was then termed areas

of priority treatment (APTs) – housing zones of multiple deprivation. The project was called ‘The University and its Ways’. Of its type, it was a precursor to other similar projects, ‘Pathways to Higher Education’ and such like.<sup>3</sup> The final word in the title was deliberately ambiguous: it referred to routes into the university, other than the usual routes via school grades. Pupils at schools in APTs were invited to join a summer school lasting around two months, during which they could choose classes from a variety of subjects. If they completed the courses, they could be given access to university, even if they had insufficient or no higher grade examination results.<sup>4</sup> The project as a whole was directed by Dr David Hamilton, who organized outreach information visits to schools, organized the substantive classes (largely in arts and social sciences, but in sciences as well as law), and who developed evaluative instruments. His organizational skills and his intellectual vision for the educational project gave it vibrancy and longevity.

But the project title also referred to the social and cultural ways of higher education (HE). As many educationalists and educational historians have pointed out, arts and social science curricula at school and at university discriminates against students from lower socioeconomic classes who do not have privileged access at home, in schools and elsewhere to the cultural capital prized in universities and often made available to their middle-class peers.<sup>5</sup>

The project therefore held a mandatory class that focused on analyzing the social and cultural aspects of university life and study that students from APTs may find alienating and difficult.<sup>6</sup> The class was designed to assist students from lower socioeconomic groups not just to cope with study skills in first year, but how to act and find their voices in situations where they may have felt disadvantaged by other students’ backgrounds.<sup>7</sup> It lasted almost the entire two months, small group teaching was the norm, and we focused on topics such as research and academic reading (reading with purpose, notating, discriminating argument, building one’s own argument, integrating prescribed and independent reading), cultural discourse, writing, analysis, tutorial discourse analysis, dealing with academic staff, coping with feedback or the lack of it, developing the ability to plan academic study, dealing with feelings of alienation, inferiority and humiliation and, integrating without losing identity or voice. Some classes of those students were the most inspirational I have taught in HE. School pupils who would otherwise have had no opportunity to attend university went on to complete degrees; and to see them grow in confidence and maturity over a short period of time was remarkable. And they did so in relation to each other, forming a community and network that sustained at least some of them.<sup>8</sup>

From those classes I learned important lessons about induction and teaching writing. First, students no matter what their backgrounds arrived as already highly literate, highly skilled persons – HE literacies were just others to be learned. Second, students did not proceed from basic to higher skills in an orderly direction. Learning was much more unordered, personal, task- and person-based, not class-based. Third, transfer of learning was difficult: from one genre to another, and from the context of *The University and its Ways* itself

to the context of first year essay and exam writing. Transfer needed constant practice, from induction to first year, and from first year back to induction. Fourth, many of these personal experiences were confirmed by the contemporary literature on composition.<sup>9</sup>

Down the corridor from David was another Dr David Hamilton. He was about to publish a book on the history and culture of the curriculum, titled *Towards a Theory of Schooling*.<sup>10</sup> A considerable part of it was devoted to historical investigations of educational ideas such as ‘class’, ‘course’, ‘curriculum’, via a methodology that entailed historical exploration of the concepts. Two examples give a sense of its argument. Hamilton analysed the concept of *curriculum*, noting that it was first used in English in the records of the University of Glasgow, in 1633. He glossed its use by the innovator Andrew Melville, whose intention was to create a specifically Calvinist mode of learning, in which structures Ramist techniques of highly formalized teaching were deployed. In that knowledge architecture ‘the “whole life” of each student was to be rendered open to teacher supervision’.<sup>11</sup> As Hamilton put it:

First came the introduction of class divisions and closer pupil surveillance; and second came the refinement of pedagogic content and methods. The net result, however, was cumulative: teaching and learning became, for good or ill, more open to external scrutiny and control.<sup>12</sup>

The second example is the word *classroom*. According to the Oxford English Dictionary it was first recorded in minutes of a meeting of the faculty of Glasgow University, discussing the conversion of a ‘chamber’ (living quarters) into a ‘class room’ for the teaching and learning of civil law.<sup>13</sup> For Hamilton the terminology is indicative of a change in fundamental educational practice – ‘the ultimate victory of group-based pedagogies over the more individualized forms of teaching and learning that had been dominant in earlier times’.<sup>14</sup> He traces the shift at Glasgow central to the bodies of educational thought being developed by Adam Smith, Robert Owen, David Stow and others.<sup>15</sup> Hamilton notes how the word described a space where a different pedagogy could be developed around sympathy and emulation (as self-esteem and self-improvement), not emulation and competition (as rivalry and conflict). This was explored in Smith’s *The Theory of Moral Sentiments*, where sympathy is an ethical and social bond, aligned to the philosopher Francis Hutcheson’s concept of the moral sense faculty, itself akin to an aesthetic sense. This was taken up by other local but nationally influential educationalists in and around Glasgow, such as David Stow and Robert Owen.<sup>16</sup>

I read the book and was influenced by many of its approaches, but above all by its understanding of education as stratigraphy, an archaeology of ideas. Hamilton’s historical discourse analysis draws on generations of bibliographies into medieval, renaissance and modern universities. His work is an example of multi-disciplines brought together to work on a project of recovery but also re-interpretation. In the process, he began to link together the weaknesses in

educational research, which led to common (mis-)interpretations of educational concepts, encouraged at least in part by the shape of academic discourses or lenses by which we understand the past. Hamilton recalls how ‘[s]lowly [he] began to appreciate that the weak sense of history shown by classroom researchers was matched only by the weak sense of the classroom shown by educational historians’.<sup>17</sup> Only later did I begin to appreciate how this applies to legal education. There are legal historians, and (many fewer) legal educational historians. There are legal educators and legal educationalists, and the weakness of the two sets of analysts matches the other, like a rhetorical zeugma, in the way that Hamilton describes. We shall explore this idea further below.

For now, though, it is important to observe that this weakness goes to the heart of one of the most profound debates in western and northern education systems in the last millennium, no matter the level of schooling or the discipline involved. Hamilton describes it as a tension between two arguments. On the one hand educationalists argue that ‘schools merely “reproduce” predetermined social structures’, while on the other there are those who argue that schools ‘can shake themselves free of social structure and become autonomous sites of educational innovation’.<sup>18</sup> The first position sees ‘pedagogic change’ as originating outside of school, while the second argues that change ‘stems from the ability of teachers to construct new educational relationships within the status quo’.<sup>19</sup> Hamilton situates himself differently, arguing that such positions set up a dualism where “school in society” is reconceptualised as “school and society”.<sup>20</sup> Hamilton argues for a different standpoint – ‘that schooling and society must be examined in terms of the reciprocal relationships that hold them together across time and space’.<sup>21</sup>

At this point Hamilton’s argument becomes reflexive. If schooling and society must be examined in these terms, then so too must education itself as a discipline. Here he draws a distinction between ‘theorists of schooling’ and ‘theorists of education’, citing the rise of the latter with the emergence of disciplines such as sociology, psychology, cognition and the like. The former use school innovations ‘as a means of co-opting teachers, learners, taxpayers (etc) to a state-sponsored model of the future’.<sup>22</sup> As a result, ‘the pedagogical delivery system is not so much re-examined as retuned. [. . .] School reform becomes a permanent solution. Yet, in the process, deliverance is reduced to delivery’. Hamilton characterizes this as a form of ‘technocratic thinking’. By contrast theorists of education are those who draw upon education’s disciplinary sisters, who think and work beyond the values of state, and for whom learners and teachers are both the subject and the active media of schooling. It is an argument that has been taken up by others, notably Lawrence Stenhouse, the progressive educational movement in the United States in the early 20th century and later in English school education in the post-WWII period.<sup>23</sup>

I would argue that programmes such as The University and its Ways are essential to create diversity and social mobility in HE, and we need many more such outreach programmes that paid attention to identity and voice in community and the necessity to work with what some such as Gergen have identified

as the relational turn in education and philosophy. But alone this is insufficient. We also need theoretical and historical awareness in order to interpret how we are who we think we are. The second David reveals interlocking concepts and systems of education that while apparently opening opportunity for students also constrains them, and reflexively reveals the gap between pedagogic discourse and classroom reality in schools and HE.<sup>24</sup> While wholly different in their methods, the two Davids' projects dovetailed with each other. In the structure and content of *The University and its Ways*, there was awareness of how hegemonic cultures constrain students from certain socioeconomic groupings, and from racialized cultures; and how they needed support not just at induction but throughout their academic and indeed early professional careers. Had there been more focus on such support, the results of the project could have contributed to a dynamic shift for social change, identity and mobility in HE.<sup>25</sup>

Much of this argument applies to legal education. If we are to consider how the reciprocal relationships between legal education and society affect law schools then we must have the breadth of vision that brings together time and space, theory and history. This is not an argument for *grands récits* but for the analysis of *petits récits* and how they construct, consolidate and render inarguable the hegemonic and the status quo in legal education. We also need spaces where such researches and practices are brought together so that they are accessible to anyone wishing to read and learn from it. Currently, this space does not exist in any jurisdiction.

Nowhere is this more apparent than in the history of technology in legal education.

### III **Techne and forgetfulness**

If we understand technology in the widest sense to mean the use of any material object or cultural arrangement then perhaps the first point we should make about technology in legal education is that it is, comparatively speaking, history-less.<sup>26</sup> There is no general history of technology in our discipline. Rather remarkably, neither is there a history of the most prominent technologies in use today, namely digital technologies.

This is in contrast to education generally, where the material culture of education has long been of interest to historians of education. In the last three decades or so there has flourished a stream of research that uncovers the material of educational practices in locales globally.<sup>27</sup> Our understanding of how physical technologies – classrooms, writing tools, digital databases, for example – affect what might be termed conceptual technologies – teaching, timetables, forms of assessment – are key to our understanding of the culture of education we inhabit today.

Does it matter that we have a weak sense of our history? Surely the avalanche of digital technologies sweep away all prior analogue analogies and metaphors? I would strongly disagree. As I argue elsewhere, the research literature on media transformation reveals the extent to which innovators

depend upon the cognitive categories associated with the older media within which meaning is communicated, and migrate them over time to the affordances of a new media.<sup>28</sup> Margaret Smith, for instance, showed that the common understanding among researchers that printers of early books in the 15th century simply copied manuscripts because they wanted to preserve the uniqueness of the manuscript for economic reasons or because it was simply the only literate form available, was simplistic. By examining the relationship in detail she concluded that printed books did not imitate but *emulated* manuscripts, and largely for genre reasons.<sup>29</sup>

What we see in this and many other examples is not a sudden switch, manuscript to book, but printers, publishers, authors and readers making incremental shifts from one communications platform to another. It is nothing less than the gradual emergence of new media objects, cultures, economies out of the old; and in that change lies the transformational intermediation of media and knowledge migration.<sup>30</sup>

The same is true of legal education within digital media, but in a very much more compressed timescale. Take the example of digitally recorded lectures, which is rapidly becoming a norm for many institutions, though inconceivable two or three decades ago. The literature on this is sophisticated and growing.<sup>31</sup> Over a decade ago, Patricia McKellar and I carried out a study of the implementation of recorded lectures that replaced two face-to-face lecture series in civil and criminal law.<sup>32</sup> They were developed for a professional legal education programme called the Diploma in Legal Practice.<sup>33</sup> The results in general showed that students were very much in favour of the innovation; and that they made considerable shifts in their learning habits and practices, negotiating the changes on a personal level. One of the interesting themes was the effect of webcasts upon the emergence and construction of personal knowledge. More specifically in the context of this chapter how is it that a new form of media representation of knowledge, a webcast, can bring about the emergence of learning?

In the interviews and logs it was clear that there were many habits and forms of learning that were adapted from earlier patterns, in which students negotiated the still relatively new forms of data presentation that they encountered, and the following are examples of some of them. In pilots, students told us clear navigation down to the most granulated concepts, definitions, questions and back up again (rather like the rhetorical Jacob's ladder, beloved of medieval rhetoricians) was absolutely critical; and we built that into the software, using maps of webcast nodes, as well as a linear index of links to the webcasts all of which were brief (most less than 15 minutes in length). For updating the law we used jump-cuts where possible – again, an ancient rhetorical device, and, arguably, practised visually in 13th-century glossed manuscripts.<sup>34</sup>

Several students commented on their use of the webcast as an aural mnemonic. They simply listened to the webcast as a podcast while travelling or in the house, and used it as a revision tool by speeding up the speaking pace of the presenter. On the subject of writing up or typing up notes, webcast note-taking was always going to be very different process from taking notes at lectures. The procedures

that students adopted varied from traditional pen-and-paper solutions and approaches to more electronic dialoguing with the on-screen resources.<sup>35</sup>

When I did the first few I was writing absolutely everything out and I hadn't really – because quite a lot of people [in the computer lab] were looking at the screen and were writing down what was on the screen and working their notes around that. I wasn't doing that I was writing everything out and that took ages. So it was like well I'll just write down what's on the screen and then write my own notes.

All students were glad of the printout resources that were available. However one student commented that the presence of more bullet point slides in the Civil webcasts than in the Criminal webcasts made her study pattern less not more effective:

In [the Civil webcast environment] I just became very passive [. . .] because it was all very much in front of me. But in [the Criminal webcast environment] I was very active about taking notes and if I had missed a few words I went back and made sure I had exactly what he was saying, so I have quite comprehensive notes for that.

The same student commented on the effect that the bulleted style of information summary had on her note-taking method:

Maybe it's just me, but I found it quite hard to work from the PowerPoint slide presentation that was on the lecture slides. It highlights what [the presenter] was just saying – so it is quite difficult then to think back and think, what context was it in, or what was the first part of that sentence or what was the last few words of the sentence. There was one point where I thought, I can't remember if that flows on from the thing above so I started to draw arrows on to it to make sure that I knew the sentence was one and it flowed rather than thinking of things as distinct parts as bullet points.

Such detailed experiential comment was invaluable to us for design of the webcast environment. Forms of presentation seemed, for some students at least, to induce less not more engagement. Giving students the opportunity to print three-to-a-page 'slides' with five blank lines opposite each bordered slide made it more, not less, difficult for some students to form knowledge objects of legal argument.<sup>36</sup> This print format also forced students to take notes in a way that marginalised their own notes while foregrounding the presenter's notes. Ideally, we needed a design in which students could print out the information in a form that suited their own unique forms of note-taking; or better still, assist them to take online notes with visualisers and applications that supported legal argumentation, then choose for themselves which methods they used. We also wanted

to enhance agency by developing ways in which students could share their notes with each other, ask questions to tutors and keep a bank of the answers. Such methods would, in Hamilton's terms above, move from delivery to deliverance. But our research project had to end before we were able to build that functionality (which was a considerable coding task) into the environment, and test it with students.

Much has been made more recently of webcasts and recorded lectures as being supplementary of face-to-face lectures. But if lectures are abolished as they were in our project and replaced with webcasts, then they become something quite different, a study environment online that affects conventional forms of teaching, assessment, the organisation of curriculum and administration of syllabus. And though they seem to be information-push environments, they can also stimulate collaborative working. Recall that the student above only altered her technique of note taking by observing others. This is an example of what Edwards and D'Arcy called 'relational agency' – not simply collaborative action on an object but 'the capacity to recognize and use the support of others in order to transform the object', and there were other examples of that happening in our research.<sup>37</sup> Note too, that certain forms of information presentation assisted or baffled learners – at a granular level, we discovered, the relations between digital text, image, context and concept required much more investigation.

Since this research (well over a decade ago), there has been little detailed empirical research into law students' use of such environments. There is, to be sure, much more research generally on how students use online study environments including lecture recordings and webcasts; but almost none specific to law. And the vast majority of webcasting that occurs happens not as carefully constructed learning environments, but as capture of live lectures. Moreover the technologies by which such capture is created, and the e-learning middleware environments such as Articulate or Echo360 by which the majority of video, audio and textual and other resources are designed and created are now provided by digital education corporations. The means of digital production thus lie increasingly in their hands, and less in the hands of law schools, individual faculty or students.

More recently, the subject of webcasting and more particularly the capture of live lectures has presented new issues for faculty. At the 2018 British and Irish Law Education Technology Association (BILETA) conference in Aberdeen, concerns were raised about the use of such recordings by institutions, in particular the mandated capture of lectures and their mandatory use by institutions, for example their possible use during strike action by faculty. There are also other concerns arising from the surveillance culture that is part of lecture capture, and the role that data protection and Article 8 privacy rights may play in offering faculty remedies for the re-use of lectures without consent in such circumstances. In the recent case of *Antović and Mirković v Montenegro*<sup>38</sup> the European Court of Human Rights decided that a breach of Article 8 had occurred when lectures were re-used during strike action without a lecturer's

consent, but the majority opinion was a narrow one.<sup>39</sup> The majority judgments reflected the extent to which, in Europe at least and perhaps in other jurisdictions too, the legal arguments centre upon a change of purpose in the way that the recordings are deployed from that for which they were originally created (i.e. a shift from educational design – increasing accessibility for students, or improving learning – to use as strike cover). As a result, the BILETA Executive is currently drawing up guidelines for a Teaching Recording Policy, which will sit alongside recently updated UK Joint Information Systems Committee (JISC) guidelines.<sup>40</sup>

What this case study demonstrates is the extent to which a new technology, a digital video presentation of legal data, is still emergent, still in the process of being shaped by technologists, designers and HE institution, but increasingly by corporations. That process by which over the last two decades law schools have gradually lost agency in the technological choices that they make as they bend to the pressures of the corporatized marketplace, is one of many narratives that needs to be researched and brought to light. As a result there are changes to student learning practices and to faculty workplace practices that require much more research, analysis and comment than has hitherto been produced in legal education. We also need to know under which conditions the published general guidelines on the use of webcasts and recorded lectures apply specifically to law as a discipline, and where they do not.<sup>41</sup> Other narratives matter too. There are intersecting narratives between education, cultural commentary, jurisprudential critique and technological analysis – for example the links between jurisprudential analysis and the place of technological and educational theory in legal education; or the effects of a networked society in an information age upon the deep educational structures of legal knowledge, legal reasoning and the learning and application of both in our curricula.<sup>42</sup>

And yet, while these narratives grow in profusion all around us, and we are living through transformations as profound as any in the past such as the scholarly revolution of the 13th century, the moveable print revolution of the 15th century, the industrial print revolution of the 19th century, we cannot represent or interrogate them for ourselves and for others with the sophistication that they merit. To be sure, there are many isolated accounts of projects, pilots and developments in articles, book chapters and books; but no histories, one updated bibliography, few policy papers, no map of interdisciplinary analyses of the field and only a single systematic summary of the research covering a fraction of the field.<sup>43</sup>

Not only are there no histories of the changes we undergo: we have no central records of the technologies that have been in use in our legal curricula. In no jurisdiction is there a detailed record and archive of digital technologies, nor a history of their development and use across jurisdictions. Even the primary texts are disappearing. Webcasts that need close interrogation are dependent on software, operating systems and hosting servers that have brief lives of less than a decade; digital textual formats online, perhaps even less. The detailed, meticulous research carried out by Margaret Smith on the textual practices of publishers

in their migration from manuscript to printed book cannot be carried out on early digital texts, because they no longer exist.<sup>44</sup> They are constantly evolving, and because we have little sense of how they are used by learners, in that chartless, unanalysed becoming, we have become amnesiac and inarticulate about our use of digital technology.

As a result, the research literature that does exist on technology and legal education lacks the quality and rigour that we need to understand the field and to guide our practices. Hamilton's perception of a 'weak sense of history shown by classroom researchers' applies here, and is matched by a 'weak sense of the [legal educational] classroom shown by educational historians'. Lacking strong models and evidence bases, our understanding of the power of digital in legal learning is too easily captured by slicker, more apparently persuasive discourses such as those around digital natives, disruption, artificial intelligence, and practice-ready law students. It also cannot function as a strong challenge to the hegemony of the status quo in the legal academy: innovation too easily withers as digital methods are co-opted into versions of 20th-century curricula, aspects of which would not look out of place in a 19th-century classroom.<sup>45</sup> The dovetailing of theory and practice, the two David Hamiltons, cannot easily be accomplished in such a context.

What is true *in extremis* about digital technology can also be said to be true about legal education more generally. In England the Legal Education and Training Review was tasked *inter alia* to create a literature review on nine topics in professional legal education stretching back over 40 years.<sup>46</sup> We reported on poor or non-existent data, on research that was not sufficiently robust in methods, on the lack of research organisation and, since our remit was to take into account other jurisdictions, we could see the same was true there. Apart from the project carried out by the UK Centre for Legal Education around 2009 to create a taxonomy of legal education, there has been few sustained, longitudinal attempts to map the field. In short, there is little to guide our thinking about the historical moment we find ourselves in, and less to shape our thinking about the future.

#### **IV Three rival futures of legal education research: Prometheus, Sisyphus, Themis**

If we turn our gaze to a sister discipline, medical education, we see quite a different landscape. There are professional bodies such as the Accreditation Council for Graduate Medical Education (ACGME) in the United States, and the Association for Medical Educators in Europe (AMEE), originally a European now a global organization.<sup>47</sup> AMEE has a global conference, an initiative to promote teaching alongside research as a measure of excellence (called ASPIRE), is a founder member of the Best Evidence Medical Education Collaboration (BEME), its members produce AMEE Guides to key topics and issues in medical education (121 to date), it offers Essential Skills in Medical Education (ESME) courses and accreditation, and through MedEdWorld offers a platform

and international network for medical schools and others to share expertise and collaborate with each other.

An organization such as AMEE could not exist without extensive funding (based largely on individual and institutional subscriptions); but even more essential is the commitment to produce research for the benefit of the community – a quality that is emphasized strongly on many AMEE webpages. Also binding the community together are shared research methodologies with, at their core, a scientific bias that reflects medical research. The statistical basis to much of medical education stems of course from educators' training in basic science and medical science. But this bias is also contested within the field by those sub-disciplines such as medical humanities that adopt quite different approaches to medical education, and where views on, for example standardization within assessments, are quite different to those who hold to a more scientific approach. AMEE accommodates and encourages these debates.

There is much that we legal educators can learn from medical education and its organization and community focus. The method of research review is fundamental to the way medical education organizes its research – not just meta-reviews that rely on statistical content, but systematic summaries of research, policy summaries, analyses of prior research, educational debates, and much else.<sup>48</sup> These research genres are forms of reflection upon the corpus of research and they are essential not just for educators in the discipline, both newcomers and experienced practitioners, but also for others such as accreditors, regulators, policymakers and those in other disciplines seeking to understand key issues and methods in medical education.

Such research mapping takes place in disciplines other than medical and science education, for example education itself, where it is essential to the formation of theory as well as practice. Indeed it would not have been possible for David Hamilton to have written a theoretical text on the history and cultures of northern and western schooling and curriculum without the research summaries, bibliographies and other research tools that he relied upon. To have done this for legal education, and particularly in the modern period, would have been even more difficult, not just because of the weaknesses that he identifies, but because the secondary organization of research is simply not present for researchers in the field.

It is time we took steps to remedy the situation. And it is in this respect that some of us are putting together an initiative we have called the Themis project. It is an online space for collaborative, cross-disciplinary, inter-jurisdictional research into legal education and the profession. It will have the capacity to host original research but also systematic reviews of the changing profession and market for legal services, and developments, theory and practice in legal education and training. It will develop research training resources. It will create syntheses of research – for example on the research into the consequences for legal education of regulatory, organizational or technological changes in legal services. Regular updating of research into regulatory literatures, to take another example, would be invaluable to legal education regulators and accreditors

globally. The project will be capable of databanking for evidence-based policy-making. We plan to develop a platform for Working Paper Series, Systematic Review Series and Methods Series, all open-access. Medical education organisations such as AMEE will be models for us, but our methods will of course be adapted to our own discipline; and we shall use open source referencing tools where possible to build libraries of research materials.<sup>49</sup>

These proposals are innovative in that they attempt to provide a platform for the organization of our practices, our theory and our research worldwide. They are an attempt to create a community of jurisdictional initiatives that brings us together globally – a network of networks.<sup>50</sup> In this sense they attempt to change the narrative of our research; and they can be represented in narrative, too. We often see our research role as Promethean – to uncover new knowledge, to make it available for the benefit of others, as Prometheus brought the gift of fire to humankind. But Prometheus, a Titan, is an isolated figure; there is no community in the core mythos around him, and he pays a heavy price for his actions. Moreover his actions are isolated – there is no community action around them. Contrast him with the figure of another Titan, Themis, the goddess of custom and order, achieved through her daughters *Eunomia*, law's order, *Dike*, justice, and *Eirēnē*, peace, and, with her prophetic skill, a sometime oracle at Delphi. Community, and the processes that bring about and sustain community, are central to her *mythos*. And in final contrast to the creative, isolated Prometheus and the community and order of Themis is the isolated, repetitious labour undergone in an ever-present punishment by Sisyphus, a clever and deceitful mortal.<sup>51</sup>

These three contrasting figures hold many contrasting and yet interlocking narratives for us. The Promethean and Sisyphian stories are pathologies, extremes of their type to be sure; but creativity and idealism, habit and repetition are core to much legal education research. Indeed the figures are dark and disturbing mirror images of each other: the idealism of Prometheus, the deceitfulness of Sisyphus, the similar endless torments to which they are condemned by their actions. Prometheus often seems to exist outside historical lifeworld, an atomistic figure; but bring him closer to our lives and we can see the compulsion to be original, unique, new, forced upon us systemically by research managers and audits, and by governmental policies and strategies, of which the REF 2020 in the UK and ERA in Australia are only two examples. No place here in the assessment of research items for the careful tending of scholarship: all must be innovative thought, radical world-beating invention. In the process we carry out far too much repetitious, Sisyphian work in our research that could be made much more productive were we to carry it out not just for ourselves and our individual Promethean research projects, but for the sake of the wider community – a Themistic approach from which we would all benefit.

Themis represents that relational turn, embodied in the project work of the first David described above, and in the analyses of schooling by the second David. The Themis project is an attempt to bring about a sense of order and community in legal education research that other disciplines such as medical education have well understood and enacted in their work. Themis thus

represents an impulse to order that is for the good of the community, for order of any kind is impossible without memory and without histories and the interpretive, reflexive turn that such narratives bring – qualities that, as we saw in the field of our historyless *techne*, are urgently required. Themis brings to our research, too, the resonance of communitarian values, and a belief that by organizing our past work we may be able to better understand the present, and gaze further into the future.

## Notes

- 1 This chapter is a version of the plenary address given to the UNSW Legal Education Research Conference, held December 2017. My grateful thanks to Alex Steel and the Conference Committee for the invitation to speak at the conference.
- 2 Kenneth J. Gergen, *Relational Being: Beyond Self and Community* (Oxford University Press, New York 2009) 366.
- 3 See, e.g., the High Scope method of pre-school education, one of the first major studies of transition into an educational system, and itself the product of a long tradition in US education stretching back into the 19th century, and including the educational practices and philosophies of John Dewey and Jane Addams. Scheinhart and Weikart note in the early studies a turn from a pre-occupation with IQ to ‘a broader perspective on young people’s experience in school and community’: see Lawrence J. Schweinhart and David P. Weikart, ‘The High/Scope Perry Preschool Study. Implications for Early Childhood Care and Education’ (2008) 7 *Prevention in Human Services* 109, 110. The literature on transitions from school to university, within university and from higher education (HE) to the world of employment beyond was really only beginning to be published at this period. Tinto’s Model of Institutional Departure was one of the key early models. See Vincent Tinto and John Cullen, *Dropout in Higher Education: A Review and Theoretical Synthesis of Recent Research* (Columbia University Press 1973). Others such as Yorke pointed to the higher rate of withdrawal by students from low socioeconomic groupings, mature students and disabled students. See Mantz Yorke, *Leaving Early: Undergraduate Non-Completion in Higher Education* (1st edn, Routledge, Abingdon-on-Thames 1999).
- 4 Highers are the Scots equivalent of English A-levels for entrance to HE. They are normally studied in fifth year in secondary school, with more advanced grading now available in sixth year at Advanced Higher level (which is generally regarded as a qualification beyond A-level in complexity and sophistication).
- 5 And by cultural capital I mean in the broadest sense the deep learning of certain views of history, art, social practices, nationhood, politics and economics. See, e.g., Henry A. Giroux, ‘Liberal Arts Education and the Struggle for Public Life: Dreaming about Democracy’ (1990) 89 *South Atlantic Quarterly* 113. This includes the development of attitudes in learners regarding new knowledge and its integration that require, as Barnett has pointed out, a degree of epistemic flexibility. See Ronald Barnett, ‘Conditions of Flexibility. Securing a More Responsive Higher Education System’ (The Higher Education Academy 2014). Flexibility and transition, both highly Brunerian in focus, were important to us teaching on the programme. See, e.g., Jerome Bruner, ‘The New Educational Technology’ (1962) 6 *American Behavioral Scientist* 5.
- 6 There is extensive work on this. See, e.g., David Harvie, ‘Alienation, Class and Enclosure in UK Universities’ (2000) 24 *Capital & Class* 103; Rolf Becker and Anna E. Hecken, ‘Why Are Working-Class Children Diverted from

- Universities? – An Empirical Assessment of the Diversion Thesis’ (2009) 25 *European Sociological Review* 233. For theoretical work, see Giroux (n. 5).
- 7 First year was the crux, particularly the period several months in. During this transition Whittaker noted the need for a range of support that was not just academic but also social and personal, and this was out of experience too, in following up with those students who did withdraw in first year – Ruth Whittaker, ‘Quality Enhancement Themes: The First Year Experience. Transition to and during the First Year’ (Quality Assurance Agency for Higher Education 2008). Yorke points out that ‘roughly two thirds of premature departures take place in, or at the end of, the first year of full-time study in the UK’: Yorke (n. 3) 37.
  - 8 On relational agency, see especially Anne Edwards and Carmen D’Arcy, ‘Relational Agency and Disposition in Sociocultural Accounts of Learning to Teach’ (2004) 56 *Educational Review* 147. Edwards acknowledges her work is based upon the foundational work of Gergen.
  - 9 Sylvia Scribner and Michael Cole, *The Psychology of Literacy* (Harvard University Press 1981). David Bartholomae, *Facts, Artifacts, and Counterfacts: Theory and Method for a Reading and Writing Course* (Heinemann, London 1986). Linda Flower, ‘Detection, Diagnosis, and the Strategies of Revision’ (1986) 37 *College Composition and Communication* 16.
  - 10 See David Hamilton, *Towards a Theory of Schooling* (1st edn, Routledge, Abingdon-on-Thames 2014). The book was first published in 1989.
  - 11 *Ibid.*, 49.
  - 12 *Ibid.*
  - 13 *Ibid.*, 76.
  - 14 *Ibid.*, 77.
  - 15 The context of Adam Smith’s professorial lectures in Glasgow University, including those on jurisprudence, are adduced by Hamilton. In a forthcoming book on modernising legal education my chapter describes a similar movement from a different perspective, citing the valuable work of the legal historian John Cairns on 18th-century legal educators such as Adam Smith and Henry Home, Lord Kames. Smith’s new definition of rhetoric, expanding from the classical tradition of persuasive eloquence to treat of all forms of contemporary communication, was critical to the new rhetoric. See Paul Maharg, ‘Same as It Ever Was? Second Modernity, Technocracy and the Design of Digital Legal Education’ in Catrina Denvir (ed), *Modernising Legal Education* (forthcoming, Cambridge University Press, Cambridge 2019).
  - 16 Thus Hamilton observes how Smith’s arguments ‘in favour of natural liberty and against artificial restraint’ gave legitimacy to disrupt the traditional practices of mercantile and craft guilds. See Hamilton (n. 10) 78. Among them was James Watt, whose work on steam engines required the development of specialist skills in measurement and instrument-building that simply could not be accommodated by the then current craft guilds such as the Hammermen.
  - 17 Hamilton (n. 10) 2.
  - 18 *Ibid.*, 150.
  - 19 *Ibid.*
  - 20 *Ibid.*, 151.
  - 21 *Ibid.*
  - 22 *Ibid.*, 153.
  - 23 Lawrence Stenhouse, *Authority, Education and Emancipation* (Heinemann Educational Publishers, London 1983). There are many still unrecognised influences and connections between radical theorists of learning across related disciplines. Cole, an extraordinarily interdisciplinary researcher in reading and writing, has written on the parallels between Dewey and his circle and sociocultural theorists. See Michael Cole, *Cultural Psychology: A Once and Future Discipline* (New edn,

Harvard University Press 1998). See also the conceptual treatment of literacy in media literacy (James Paul Gee, *Teaching, Learning, Literacy in Our High-Risk High-Tech World: A Framework for Becoming Human* (Teachers' College Press, New York 2017); the work of the New London Group in Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (Rev edn, NYU Press 2008) and multimodality theory in Gunther Kress, *Multimodality: Exploring Contemporary Methods of Communication* (1st ed, Routledge, London 2009). See also the passage of ideas regarding networks between complexity theory and cyber-economics and network economics in Gregory Bateson, *Steps to an Ecology of Mind: Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology* (University of Chicago Press 2000); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2007); and between cyber-ethnology and ethnology see, e.g., Tom Boellstorff, *Coming of Age in Second Life: An Anthropologist Explores the Virtually Human* (Rev edn, Princeton University Press 2015). Note the reference in Boellstorff's title to Margaret Mead's famous anthropological study, *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation*, where the subtitles after the caesura of the colon tell us much about the differences between digital and pre-digital ethnology.

- 24 He references the work of scholars such as Anthony Grafton and Lisa Jardine in textual and humanities studies. Grafton and Jardine point to the capacity for humanist education to teach 'a properly docile attitude towards authority', an authority that comprised 'closed governing elites, hereditary offices and strenuous efforts to close off debate on vital political and social questions'. They observe that it is only from the Enlightenment onwards that there develops a rhetoric of liberation and liberal values applied to humanist education. See Hamilton (n. 10) 51; Anthony Grafton and Jardine, *From Humanism to the Humanities* (Harvard University Press 1986) xiv.
- 25 To be fair to The University and its Ways, project funding was directed only at induction activities, and not for substantial ongoing support either during subsequent university years or in early professional careers. Dr David Hamilton, the project director, was instrumental in organising what support could be arranged, given tight budgetary constraints.
- 26 My wide definition of technology is in part a social constructionist view; but also a common account of the term in the literature of new media. See Lisa Gitelman, *Always Already New: Media, History, and the Data of Culture* (MIT Press, Cambridge MASS 2008).
- 27 See, e.g., Annemarieke Willemsen, *Back to the Schoolyard: The Daily Practice of Medieval and Renaissance Education* (1st edn, Brepols NV, Turnhout 2008); Ian Grosvenor (ed), *Silences & Images: The Social History of the Classroom* (1st edn, Peter Lang AG, Pieterlen 1999).
- 28 See Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (Routledge, London 2016).
- 29 Ibid., 120–1; Margaret M. Smith, 'The Design Relationship between the Manuscript and the Incunable' in Robert Myers and Michael Harris (eds), *A Millennium of the Book: Production, Design and Illustration in Manuscript and Print 900–1900* (St Paul's Bibliographies, London 1994).
- 30 An example from 16th-century legal education in the Netherlands is discussed in Paul Maharg, 'Disintermediation' (2016) 50 *The Law Teacher* 114.
- 31 See, e.g., Husam Aldamen, Rajab Al-Esmail and Janice Hollindale, 'Does Lecture Capturing Impact Student Performance and Attendance in an Introductory Accounting Course?' (2015) 24 *Accounting Education* 291; Jared Danielson and others, 'Is the Effectiveness of Lecture Capture Related to Teaching Approach or Content Type?' (2014) 72 *Computers & Education* 121; Martin R. Edwards

and Michael E. Clinton, 'A Study Exploring the Impact of Lecture Capture Availability and Lecture Capture Usage on Student Attendance and Attainment' (*Higher Education* 2018) <https://doi.org/10.1007/s10734-018-0275-9>; Johanna Inman and Simuelle Myers, 'Now Streaming: Strategies That Improve Video Lectures' (2018) IDEA Paper 68/2018 [www.ideaedu.org/Portals/0/Uploads/Documents/IDEA%20Papers/IDEA%20Papers/PaperIDEA\\_68.pdf](http://www.ideaedu.org/Portals/0/Uploads/Documents/IDEA%20Papers/IDEA%20Papers/PaperIDEA_68.pdf); Frances V. O'Callaghan and others, 'The Use of Lecture Recordings in Higher Education: A Review of Institutional, Student, and Lecturer Issues' (2017) 22 *Education and Information Technologies* 399.

- 32 There are of course many forms of recorded lectures, either visual and aural or simply aural, as podcasts. They are frequently recordings of live lectures posted in a variety of formats on the web in institutional VLEs. Our study, described below, entailed a different approach, recording a talking head, and splicing that with bullet-point summaries, texts, cases, legislation, handbooks and much else. The environment was thus much more of a planned study environment. It was designed and built by the technology team in the Learning Technologies Development Unit in the Glasgow Graduate School of Law, later maintained by Strathclyde Law School.
- 33 Now titled the Diploma in Professional Legal Practice, and part of the Professional Education and Training programme of the Law Society of Scotland. Our research, carried out in 2004, aimed to discover:
- The variation in student learning
  - The quality of student learning

on the two procedural courses. The aims were of course influenced by the project methodology, which was phenomenographic in design. We tracked variation and quality in learning using the following instruments:

- Selection of 14 students to track closely throughout the year (11 completed the project);
- Students filled in and submitted weekly logs when they used the webcast resources;
- Focus group discussion late in semester one;
- Individual interviews in early/mid semester two and post-examination;
- Questionnaire issued to the group of 11 students;
- End-of-year evaluation data derived from whole-year cohort.

Over 100 pages of qualitative data were collected and qualitative responses were arrayed in a thematic coding-frame by two raters, with relatively high inter-rater reliability. Results and discussions were published in Patricia McKellar and Paul Maharg, 'Virtual Learning Environments: The Alternative to the Box under the Bed' (2005) 39 *The Law Teacher* 43, and in Maharg (n. 17) ch. 9.

- 34 For a description and examples of video jump-cuts, see [www.youtube.com/watch?v=p2BqEvoiX04](http://www.youtube.com/watch?v=p2BqEvoiX04). A glossed manuscript often comprised a two-column *textura* sited centrally but often around a third of the way down a page. It was surrounded by glosses, a collection of short, dense, highly abbreviated explicatory passages, often attributed to scholars by initials. These comments were not fixed, and of course the gloss invited further gloss. They tended to be in slow flux, as rebuttals of earlier comments gained ground in a scholarly community, and one gloss might replace another. What we have, in effect, are slo-mo versions of the video jump-cut.
- 35 In this sense the students were moving, in Laurillard's learning types, between acquisition of knowledge, inquiry and production (of notes, knowledge objects, and the like). See Diana Laurillard, *Rethinking University Teaching: A Conversational Framework for the Effective Use of Learning Technologies* (2nd edn,

- Routledge, London 2001). In our design we followed the research on notetaking, e.g., Kenneth A. Kiewra, 'Notetaking and Review: The Research and Its Implications' (1987) 16 *Instructional Science* 233.
- 36 Noel Entwistle and Ference Marton, 'Knowledge Objects: Understandings Constituted through Intensive Academic Study' (1994) 64 *British Journal of Educational Psychology* 161.
  - 37 Edwards and D'Arcy (n. 8) 150. Edwards derives the concept in part from Gergen's account of relational being.
  - 38 Application no. 70838/13, 28 November 2017; [2017] ECHR 365.
  - 39 For detailed comment see Lilian Edwards, Laura Martin and Tristan Henderson, 'Employee Surveillance: The Road to Surveillance Is Paved with Good Intentions' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3234382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234382)>.
  - 40 The UK JISC Guidelines are available at <[www.jisc.ac.uk/guides/recording-lectures-legal-considerations](http://www.jisc.ac.uk/guides/recording-lectures-legal-considerations)>. It is indicative of the interest in these issues now, in the light of recent extended strike action during 2018 by staff on the subject of USS pensions, that these guidelines were last updated in July 2010.
  - 41 Hilary Putnam has pointed out Dewey's insistence that 'by creating new observation-concepts we "institute" new data'. This is true of the emergence of new forms of academic media convergence, and our relationships with them. See Hilary Putnam, Ruth Anna Putnam and David Macarthur, *Pragmatism as a Way of Life: The Lasting Legacy of William James and John Dewey* (Harvard University Press 2017).
  - 42 The jurisprudential debates regarding technology and legal education are central to our theory and practice, for regulators as well as educators, and take in figures as different as Bruner and Manuel Castells, *The Power of Identity: The Information Age – Economy, Society, and Culture: 2* (2nd edn, Wiley-Blackwell, Hoboken 2009). For discussion of the regulatory context, see Paul Maharg, 'Shared Space: Regulation, Technology and Legal Education in a Global Context' (2015) 6 *European Journal of Law and Technology* <<http://ejlt.org/index.php/ejlt/>>.
  - 43 For the updated bibliography, see Pearl Goldman, 'Legal Education and Technology II: An Annotated Bibliography' (2008) 100 *Law Library Journal* 415. For the systematic summary see Paul Maharg and Emma Nicol, 'Simulation and Technology in Legal Education: A Systematic Review and Future Research Programme' in Richard Grimes, Edward Phillips and Caroline Strevens (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate Publishing, Farnham 2014). BILETA made an early attempt to map the field, but this was discontinued. See the following three BILETA Reports: British and Irish Law Education Technology Association, 'Inquiry into the Provision of Information Technology in the UK Law Schools' (University of Warwick 1991); British and Irish Legal Education Technology Association, 'Information Technology for UK Law Schools: The Second of Law Schools in the United Kingdom, 2004' (BILETA 1996); Phil Harris and Sarah Beinart, 'A Survey of Law Schools in the United Kingdom, 2004' (2005) 39 *The Law Teacher* 299.
  - 44 For Smith's work see endnotes 15 and 16 above.
  - 45 See, e.g., Jos Boys' perceptive comment that applications such as a learning management system were 'taking hold precisely because it enables institutions to avoid difficult questions about how they organise themselves': Jos Boys, 'Managed Learning Environments, Joined up Systems and the Problems of Organisational Change' (2002) JISC Report, 21 <[www.tinyurl.com/2bpoftr](http://www.tinyurl.com/2bpoftr)>, accessed 11 November 2018.
  - 46 Julian Webb and others, 'Setting Standards. The Future of Legal Services Education and Training Regulation in England and Wales' (SRA, BSB, IPS 2013) <<http://letr.org.uk>>. Our review was 299 pages in length and drew upon a cited reference database of over 2,000 items in Zotero. The review and the reference

- database was made public online at our project website, <<http://letr.org.uk/literature-review/index.html>>, but five years later, and contrary to our request, the references have not been updated by the regulators who instructed the Review.
- 47 'ACGME Home' <[www.acgme.org/](http://www.acgme.org/)>, accessed 16 September 2018; 'An International Association For Medical Education – AMEE' <<https://amee.org/home>>, accessed 16 September 2018.
- 48 See, e.g., Adam Cheng and others, 'Using the METRICS Model for Defining Routes to Scholarship in Healthcare Simulation' (2018) 40 *Medical Teacher* 652. In this article the authors applied a new model of scholarship that described seven patterns of scholarship, and applied this to a dataset of 432 articles on simulation from four established journals in the field of healthcare simulation. The resulting array enabled the researchers to map the forms of research used in the field, the gaps, and in the case of two authors, how the patterns that emerged 'would influence their approach to future scholarly activities'.
- 49 Project documentation on file with Maharg. By the time of publication of this book our website should be publicly available.
- 50 They are however supplemental to the arguments and outcomes of the Nuffield Inquiry on Empirical Legal Research in England. See Hazel Genn, 'Nuffield Inquiry on Empirical Legal Research – Law in the Real World | Nuffield Foundation' (*Nuffield Foundation* 2006) <[www.nuffieldfoundation.org/nuffield-inquiry-empirical-legal-research-law-real-world](http://www.nuffieldfoundation.org/nuffield-inquiry-empirical-legal-research-law-real-world)>, accessed 15 September 2018.
- 51 The figures of Prometheus and Sisyphus figure more prominently in northern and western literature than Themis, who is of course represented as the blind figure of Justice and thus associated with courts, litigation and punishment rather than the original and much more sophisticated qualities of her mythic origins. Shelley's long poem 'Prometheus Unbound' is an example of Promethean literature; while the Scots poet Robert Garioch writes a portrait of Sisyphus as a working-class man (who himself nudges the boulder at the top of the hill and follows it down to begin again, 'shair of his cheque at the month's end'), while Carole Ann Duffy gives us a scathing portrait of Sisyphus as a workaholic husband in *Mrs Sisyphus*. See Robin Fulton (ed), *Robert Garioch: Collected Poems* (Polygon, Edinburgh 2004); Carol Ann Duffy, *The World's Wife* (Reprints edition, Picador, London 2010).