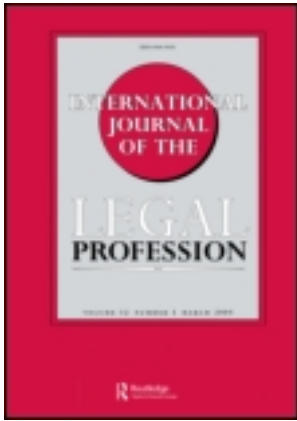


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Publisher: Routledge

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International Journal of the Legal Profession

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/cijl20>

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Version of record first published: 21 Nov 2011.

To cite this article: Paul Maharg (2011): Sea-change, International Journal of the Legal Profession, 18:1-2, 139-164

To link to this article: <http://dx.doi.org/10.1080/09695958.2011.619857>

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Sea-change

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ABSTRACT *In this article Maharg analyses William Twining's inaugural lecture, 'Pericles and the Plumber', delivered at Queen's University, Belfast in 1967. He applies Twining's conclusions to two historical case studies in educational design, one at Columbia in the 1920s, and one at Strathclyde 1999–2010. He argues that, over 40 years later, the lecture is still relevant to many of our current concerns, and suggests that, building upon Twining's conclusions, we should view law schools as design schools, and construct a Pragmatist koine around such a concept.*

Introduction

Inaugural lectures are complex occasions: personal and public, gazing at the past, analyzing the present, peering into future. William Twining's inaugural lecture as Professor of Jurisprudence, given at Queen's University Belfast in 1967 and entitled 'Pericles and the Plumber', is no exception (Twining, 1967).¹ The subject is legal education, which has always been an important subject for him. Over the years since the lecture his articles and books have been essential reading for anyone interested in the subject: it is remarkable how often Twining manages to identify issues that persist as perennial problems for legal educators. His inaugural lecture, for instance, goes to the heart of the contested ground between the academy and the professions that still troubles legal education in all Common Law jurisdictions.² In this article I shall discuss just how prescient the lecture was of legal education's future, and how it indicates what we have yet to achieve. In the process two historical case studies will be discussed, both of them attempts to create alternative futures for legal education. In these case studies we shall focus on issues of curriculum structure and discourse, and their place within a radical future legal education based upon the concept of a Pragmatist κοινή (*koinē*).

The inaugural is a curious piece, at first glance. In the *Law Quarterly Review*, which is where one version of the lecture was published, Twining's text on legal education sits oddly between an article on the early history of the concepts of murder and

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manslaughter and an article on the place of statutes in the conflict of laws.³ It doesn't get any better when we begin to read. The title cites a distinguished statesman from fifth century BCE Athenian politics, closely followed by a plumber (Athenian or Northern Irish, or in Joycean mode possibly both?), in whose wake is a sub-title that matches exactly the startling juxtaposition of the title: 'Prolegomena to a working theory for lawyer education'. Prolegomena are usually reserved for higher status texts than working theories (e.g. Kant's *Prolegomena to Any Future Metaphysic*), and are more usually found in literary or philosophical texts; and this in(ter)discipline is matched by the title of the final section of the lecture – not a predictable Conclusion, but an Envoi, a stanzaic form often used to comment, recursively, on the poem itself.⁴ The sense of dislocation (is this *LQR* or *MLA*?) is heightened by an epigraph from *The Tempest*, where Miranda's breathless words, "O brave new world, / That has such people in't!", are tempered by Prospero's ironic rejoinder, "'Tis new to thee".⁵

If it was all relatively new to the *LQR* in 1967, it was all aptly chosen. Shakespeare's words have an obvious educative dimension – not just for Miranda but for Prospero also, the magus of the play. *The Tempest*, though, is applicable to legal education in at least three other ways. First, the colonialist theme of the play, specifically the early English colonial experience in America, applies in many ways to the historical and contemporary realities of legal education.⁶ Common Law education has been exported across the world, and its reception, as one might expect (and on which Twining wrote, subsequent to his inaugural lecture) has been complex and troubled.⁷ Second, the play is set in an island of curiously vague location, not one of the usual locales Shakespeare employs (Renaissance Europe, early medieval and medieval England and Scotland, classical Roman and Greek sites).⁸ Being nowhere, it has more immediate application everywhere; and this is the effect that Twining's lecture has, particularly in the section entitled 'Four themes in need of development'.⁹ Third, the play deals with a topic rarely the subject of legal education, but of significance for the profession and its educative processes: personal change, and particularly the roles that guilt, shame and forgiveness play in such change (Lansky, 2001). As Nussbaum has pointed out (2003), shame and disgust are evidence of how we hide from our humanity and its animality – symptoms of distancing and the attempt to make ourselves invulnerable. Increasingly, there are calls for such issues to be at the core not just of legal education generally, but ethical education in particular (Maharg & Maughan, 2011, forthcoming).

Twining begins the article with a future-oriented, eminently practical question – what is a desirable education for the prospective lawyer?' (p. 396). If the sub-title speaks of modest ambitions in answering this question [Twining later refers to the lecture modestly as "interrelated observations", (p. 397)], the article goes well beyond first thoughts. Tracking US legal education against the UK's, he identifies the origins of the fissuring between law and other disciplines and between education in legal doctrine and practice (p. 403) in the work of Joseph Story and later Langdell, at Harvard. Twining noted the rise of a cadre of tenured, full-time faculty at Harvard, Yale and Columbia that was associated with the schools' rise to eminence (p. 405), arguing that the undeniable advantages of full-time faculty bring with them the

dangers of a drift from the profession and from social concerns, to the laboratory-library. His intention is strongly teleological: as he put it, “at this moment of time the American experience of the 1920s and thirties seems to be particularly pertinent. Historically the American realist movement was as much as anything a response to the joint stimuli of rapid change and increasing complexity in American life” (pp. 417–418).

Written in 1967, about a movement then 30 or 40 years in the past, these words are still pertinent. The American realist experience, with its emphasis on social context is still an unfinished project, and is relevant to today and to our legal educational future. Note that the title of the article is Pericles *and* the Plumber, not *or*. For Twining, it is a matter of both because the ‘associated life’ of democratic discourse required it.¹⁰ Athenian democracy was of course very different to democratic culture in contemporary coalition UK; and the two figures represent a social spectrum of interests, cultures, work, educational experiences and much else. But it is essential that politician and plumber both understand each other: how else can Pericles appreciate what is in the plumber’s mind when the *ostrakon* is cast in the ballot urn; and how can the plumber, listening to Pericles’ funeral oration, weigh up the direction of Athenian foreign policy and Pericles’ implicit arguments for continued military action.¹¹

Twining’s sympathy with Realism and aspects of its legal educational approaches are of a piece with his views on other aspects of law’s project. In his Epilogue to *Globalisation and Legal Theory*, for instance, he comprehensively set out the challenges of globalisation to our understanding of law. He defined globalisation’s challenges to traditional legal theory as being threefold:

- (1) its attack upon the black box theory of nations and legal systems as closed and isolated entities
- (2) its denial of the separation of municipal state law and public international law
- (3) its challenge to the present conceptual framework and vocabulary of legal discourse (Twining, 2000, p. 252).

He rightly identifies that one implication of globalisation has been to make more relevant and pressing the need for a revival of general jurisprudence, and in a series of ten points he outlines what this might involve.¹² Globalisation’s threefold challenge to traditional legal theory is also a challenge to the future of law schools. As Twining pointed out in 1967, most law schools still do not give radical educational theory and praxis sufficient consideration. Too often pedagogy is dismissed as mere classroom technicism, or a black box imported from another discipline, and regarded neither as law-talk nor talk about law.

As Dewey reminds us, however, philosophy and education cannot be treated as separate disciplines or as distinct categories of thought.¹³ Viewed in this way, education presents a perennial challenge to us, and the nature of the challenges can be defined in terms close to Twining’s threefold definition of globalisation’s challenges to traditional legal theory. Thus, education and educational research denies the ‘black box’ of the legal classroom: the class is part of a complex web of experiences for students and must be treated as such. Second, the separation of legal education itself from other aspects of professional life and wider social issues cannot be

sustained. Finally, educational theory challenges the conceptual framework of the law school, its structure (both material and human) and its conventional discourse, not least the scripts with which staff explain their professional lives to themselves, and the scripts that students create around their emerging professional identities.

It might be argued that education is also used to create discourses that seek to mitigate or even stifle these three challenges. Education is, after all, a highly political process. The key problem, identified in Twining's article, is the issue of change that these challenges bring: what change, and how it can be brought about in law schools. Twining was not the only legal academic to realise that change was necessary, even in the 1960s. The literature evinced an unease with the contemporary landscape of legal education. Even in the heart of the Langdellian establishment, Dean Griswold of Harvard Law School, writing contemporaneously with Twining, could write:

For some years now I have been concerned about the effect of our legal education on the idealism of our students. [...] They bring to this school a large measure of idealism. Do they leave with less? And if they do, is that something we can view with indifference? If they do, what is the cause? What do we do to them that makes them turn another way? (Griswold, 1967, p. 300)¹⁴

As we shall see in the following case study, philosophy and education has always been at the heart of change in the legal curriculum. We can appreciate this by considering the Realist educational initiatives at Columbia Law School in the 1920s that involved, rather surprisingly, two figures from the university's Teachers College, namely John Dewey and Edward Lee Thorndike.

Case study 1: Dewey, Thorndike and the Realists

John Dewey

In 1922 Dewey moved from the University of Chicago to Columbia University, taking up a joint position in the Philosophy department and Teachers College.¹⁵ Quite soon after his arrival he was invited to contribute to the realist pedagogical innovations taking place in the Law Faculty, under Dean Harlan Stone. His Faculty contact, Edwin Wilhite Patterson, was instrumental in engaging Dewey to give a 'Special Conference' on 'Logical and Ethical Problems in Law'.¹⁶ Later, they gave jointly the course of seminars on legal logic in the period 1925–30. From this Dewey published a paper first in the *Philosophical Review*, then in the *Cornell Law Review*, and later in *Philosophy and Civilization*.¹⁷ In addition to the staff seminars, Dewey and Patterson taught students in the Law Faculty a course entitled 'Logical and Ethical Problems of the Law'.¹⁸ In these published articles and unpublished course papers we can see Dewey develop with Patterson and use in the course a Pragmatist form of legal logic where, across interpellated readings of legal case and of philosophy (Mill, William James, Bergson, Croce, for instance), legal rules are defined as being "working hypotheses needing to be constantly tested by the way in which they work out in application to concrete situations" (*MW*, 15, pp. 75–76).

Dewey's work in the Law School, hitherto relatively neglected, is an interesting by-product of the Realist endeavour at Columbia for which he helped to create a logic "*relative to consequences rather than to antecedents*" (his italics). The progressive, social and profoundly democratic direction of the logic is key. Dewey's concern to create a Pragmatist logic for legal analysis dovetailed with Realist ambitions to reform the doctrine of *stare decisis* and the technical account of the doctrine developed at Harvard. It was of a piece with his own work in educational theory and practice. Much later, in an essay that is a general defence of Pragmatism, Dewey strikingly used the same language of social ameliorism and evolutionary reform:

[p]ragmatism . . . does not insist upon antecedent phenomena but upon consequent phenomena; not upon precedents but upon the possibilities of action. And this change in point of view is almost revolutionary in its consequences. An empiricism which is content with repeating facts already past has no place for possibility and for liberty. (*LW*, 2, p. 33)

In an unpublished memo to Dean Stone, Herman Oliphant outlined why a radical approach such as Dewey outlined could be useful to the School: "the organization of the curriculum must be more in terms of the human relations dealt with and less, as largely now, in terms of the logical concepts of the conventionally trained mind" (Oliphant, 1923, p. 6). Oliphant sketched out how such a curriculum could be organised along lines of domestic, business and political relations. His plan was one of a number of attempts not just to re-organise content, but to rethink the intellectual ordering of legal concepts. As he put it, "[n]either [in the case method] nor in the making of case-books will a substantial contribution to legal education be made by continuing or attempting merely 'to outharvard Harvard'" (Oliphant, 1923, p. 4).

The period of early planning in the Columbia curriculum took place while Dewey was in contact with the Law Faculty. As Twining points out in his lecture, the planning and rewriting of the entire curriculum by Columbia faculty was a huge and ambitious project.¹⁹ Staff focused largely on the creation of new syllabi and resources, the formation of a sociological jurisprudence and the re-organization of curriculum content around functionalist principles.²⁰ Their efforts went into the development of a legal logic that was based upon more than precedential analysis, and led to the development of curriculum resources – new forms of casebooks, and the like.

Yet while Dewey participated, his key role in American education as a remarkably innovative educational designer was curiously overlooked. Dewey had, after all, founded and directed the innovative Laboratory School at Chicago University – a school based upon principles of 'demonstration, observation, and experimentation' where new practices and educational concepts could be tried, evaluated and evolved (Tanner, 1997, p. 16). In the school, six-year olds worked with 10-year olds; thinking was categorised not within separate subjects but as cross-curricular problem-solving; the complex relation between slowness of thought and depth of thought was explored; school activities fostered development in projects that stemmed from real-life actions – building, creating, disassembly, use of skills and knowledge in real-life contexts. Nor was Dewey's influence limited to fostering radically new forms of learning. Dewey and his staff (notably his wife Alice and general

supervisor Ella Flagg Young) also created an approach to administration, supervision, planning and peer review that was co-operative rather than authoritative. Dewey's approach to organizational change, as Tanner describes it, was organic rather than mechanistic – in Dewey's words: 'the tendency to magnify the authority of the superintendent, principal, or director is both the cause and the effect of the failure of our schools to direct their work on the basis of cooperative social organization of teachers.' (Tanner, 1997, p. 96, citing Mayhew and Edwards, 1936, p. 371)

Contrast this with Langdell's oft-quoted concept of the library-as-laboratory. Under this dispensation a law school's educational practices were not generally subject to the principles of university research practices. In this simple elision, a move performed in many ways in other jurisdictions, we can trace many of the problems associated with legal education practices, and the difficulty of changing those practices. The Columbian reformers never quite understood this important educational issue, either in their methods of reform or their aims; and as a result the opportunity to use Dewey's innovations was lost.

Edward Lee Thorndike

At the same time that Dewey was engaged with the Law Faculty, another education-
alist was drawn into the planning process by Dean Harlan Stone. E.L. Thorndike was Director of Columbia University's Teachers College Institute of Educational Research. Both Dewey and Thorndike were on the progressive wing of American education, believing that the development of education as a discipline was essential for the improvement of educational practice in schools. There were, however, major differences in their outlook. Thorndike was primarily an educational psychologist, a remarkably accurate and creative experimentalist; Dewey was a philosopher and educationalist. Where Dewey was interested in the arc between experience and the world, Thorndike analysed what he perceived as the dyadic relation between mind and world. Dewey emphasised learning ecologies, advocating a Pragmatist approach to learning, where prior learning and contextual ways of knowing were foregrounded. Thorndike focused on teaching strategies and, with his development of the laws of effect, recency and repetition, was adopted as the precursor of a behaviourist approach to learning. He was followed by Watson, Skinner and Gagné, and later the outcomes movement. Dewey was followed by Kilpatrick, Bruner, and the standards, constructivist and social constructionist movements.

Dean Stone employed Thorndike to address two concerns: the problem of the burgeoning assessment burden on staff, and the number and quality of students entering the Law School. Innovation in true/false questions was piloted by Young B. Smith in Torts and by others, assisted (under Thorndike's supervision and with the approval of President Butler) by T.D. Wood, a professor in the Teachers College.²¹ The trials were undertaken, but it would appear the assessment method was not adopted generally in the School thereafter. The issue of entrance fitness, however, was of more serious concern to Stone. His view of entry criteria, as he made clear in an *ABA Journal* article, was conservative, even by the standards of pre-New Deal America.²² Thorndike had already worked on the subject in high schools, and had

ambitions to extend this to college education.²³ The entry examinations constructed by Thorndike, termed ‘General Placement Examinations’ were trialled over three years, 1925–27, upon successful completion of which Thorndike guaranteed to provide the School with “annual tests, different in content, but equivalent in significance and difficulty, for use, under suitable restrictions, by any institution desirous of exact information concerning the calibre of its student body” (Thorndike 1931, p. 99). His examinations were, of course, early versions of LSATs, trailing with them all the problematic issues of predictive values and bias in gender, racial and cultural values that have been the focus of much research in the last half century.²⁴

In the end, after years of planning, and the involvement of both Dewey and Thorndike, little was achieved in spite of prodigious effort. At the deanship crisis of 1928, when Stone resigned, many of the key reformers took up posts elsewhere, notably at Johns Hopkins Institute of Law, and Yale. Those who remained carried forward reforms into projects much less ambitious than the original reformers intended.

For all his collaborative work, Dewey had little effect on the changes that took place in the Law Faculty. There are a number of reasons why this was so:

- (1) Dewey was employed to work on legal logic, not on legal curriculum practices. His well-articulated and sophisticated educational approach to problem-solving was relatively ignored by the Realist reformers.
- (2) The focus of the reformers was largely on sociological jurisprudence and legal logic rather than pedagogic practices.
- (3) Thorndike’s SAT solutions to problems of diversity and quality of entrant, with their emphasis on scientific rigour, were seen as more effective educational interventions.
- (4) As Gardner *et al.* (2010) point out, innovation needs to be designed for sustainable development from the start of a change project – this was rarely part of the Realist agenda at Columbia.
- (5) The basic design process needed to be collaborative, not a function of one element of the community alone. We might compare the Realists’ intense efforts in the development of new legal logic and curriculum content to Dewey’s planning of the Laboratory School at Chicago where, broadly speaking, he set the educational template and approach with teachers and superintendents, who then developed curriculum content. In spite of their avowed aims, the Realists still inhabited the prison of the Langdellian Library when it came to pedagogic design.²⁵ There was little of the truly collaborative work involving policy-makers, practitioner communities, educators, other professionals that took place both in the Laboratory School and Jane Addams’ social initiatives at Hull House.

The change process, then, and a rethinking of the basis of both legal philosophy and education did not take place at Columbia. As Twining points out (p. 418, n. 55) it is essential that both are considered in any radical reform of the legal curriculum, no matter the jurisdiction or the period. In the next case study we shall look at an innovation closer to the present, namely the founding of a joint graduate school in

Scotland, the Glasgow Graduate School of Law (GGSL). To date in the UK there have been few such collaborations, perhaps the closest being the Oxford Institute of Legal Practice, with whom the GGSL participated on a joint venture project (though the infrastructure of the Institute was quite different from the GGSL). This case study will analyse some aspects of its development, and how it tried to deal with some of the issues outlined in points 1–5 above.

Case study 2: the Glasgow Graduate School of Law (GGSL) and transactional learning: institutional change and innovation

In the late 1990s both the Dearing and the Anderson Reports advocated the dovetailing of provisions and services between higher education institutions that were in relatively close physical proximity to each other.²⁶ The University of Glasgow's Strategic Plan of 1997 noted agreement with this strategy, as did the University of Strathclyde Strategic Plan for 1997–2001.²⁷

Following independent discussions between the heads of the two law schools, Alan Paterson and Joe Thomson, the two universities determined to establish the GGSL in 1999 as a joint Graduate School between the Law Schools. The joint school was initially underwritten by the then-titled Scottish Higher Education Funding Council (SHEFC) through Synergy, a strategic alliance initiative between Glasgow and Strathclyde that was part of SHEFC's Strategic Change Initiative.²⁸ The Synergy alliance, which lasted for three years, was signed by the Principals of both universities in September 1998. As the Synergy initiative points out in the following bullet points on its website, the initiative offered institutions many advantages:

- larger critical mass for research
- facilitating infrastructure that would not otherwise be affordable
- research excellence in new combinations of research areas
- larger presence in internal research networks, increasing influence and research opportunities
- economies of scale in teaching and administration
- improved efficiency of existing programmes
- improved content of existing programmes, increasing attractiveness to students
- possibility of new programmes
- more effective use of space
- higher quality and better recruitment through joint promotion of programmes
- more effective partnership than through other forms of collaboration because mutual commitment is stronger²⁹

GGSL was thus very much a local initiative, and grounded in the joint vision of the two law school leaders. However the causal relationship between fusion strategies advocated in Dearing and Anderson Reports and the creation of the GGSL should not be underestimated. It is clear that without this policy direction, and the implementation of the policy by SHEFC in funding Synergy, for instance, it would have been considerably harder for Glasgow and Strathclyde law schools to have set up the GGSL. High-level policy can be a powerful spur to institutional management

and ground-level innovation. One might compare the remarkably swift adoption of ADR by Japanese law schools following recommendations made by the Japanese Diet under the new regulations of 2004 (in force in 2007) whereby, according to Saegusa and Dierkes (2005), institutional isomorphism was thus weakened, and the development of sustainable innovation was made more possible than would otherwise be the case. Legal jurisdictional cultures are very different, of course; but it is fair to say that enlightened policy that offers opportunities and seeks to engage with academic cultures and negotiate change within those cultures is more likely to succeed than the imposition of change by policymakers through more coercive means. The opportunity itself can serve to weaken institutional isomorphism; and this is what happened in the case of the GGSL.

Once formed, the GGSL Management Committee, consisting of senior academics and administrators from the two Schools, were well aware of the difficulty of enabling participation by both law schools in so political an act as the founding of a new joint school; and made plans for the joint school to be embedded within the two law schools. The School was sited in custom-built accommodation on the main campus of Strathclyde University funded primarily through sponsorship from large law firms and a loan from Strathclyde University; but having the joint school set up at one of the two law schools' sites (Strathclyde) rather than on a separate and neutral third site did cause difficulties between the Schools.

Not all of the GGSL's original plans for communications and embedding came to fruition. Early blueprints for a virtual private network (VPN) between the two schools and for other web activity were not successful in attracting users or fusing the schools. In its way this initiative was symptomatic of the web strategies of the early years of the millennium, when universities began to experiment with online communications, and even online universities and large-scale Web presences. While other universities were involved in ambitious online initiatives in the UK, for instance, Strathclyde University at this time set up the Clyde Virtual University (CVU), with funding from JISC. CVU was set up not just to host programmes from Strathclyde but to liaise with staff on teaching programmes from other universities. Given that virtual learning environments such as Blackboard and WebCT were then in their infancy the technical problems associated with these initiatives were not inconsiderable. So too were the cultural problems encountered by the CVU team, who worked on conceptual frameworks to overcome barriers faculty face in developing Web-based materials (Littlejohn & Sclater, 1999).³⁰

The same problems were encountered by Glasgow and Strathclyde Law Schools but were not resolved, and the VPN remained largely unused. Despite this setback, collaboration between the two law schools increased, from the initial joint Diploma in Legal Practice (DLP – the equivalent in Scotland of the LPC), and later the PCC (Professional Competence Course) to joint Masters programmes (eg Human Rights, Criminal Justice and Commercial Law). The plans to integrate both institutions' Masters programmes eventually foundered on issues of reward, since each institution operated completely different financing models. At its peak the collaboration extended to opening up each institution's Honours classes to students from both campuses as well as lecturers in the two schools teaching classes in the other

institution. There were even efforts to dovetail the recruitment of staff in the two schools to reflect the respective strengths of each institution, and at one time tentative discussions began on merging the two schools. However, gradually personnel and circumstances changed and the momentum was lost. Old concerns re-surfaced and the tide for collaboration began to ebb.

Nonetheless, for the best part of a decade GGSL made a major impact on professional education for lawyers in Scotland, in part because the joint Diploma was responsible for educating nearly half the Diploma students in Scotland, and in part because of the innovative approach taken to the design of the course. Once again, circumstances presented interesting opportunities for improving rather than merely converging activities that had hitherto been duplicated (but not replicated) by each School. The senior law school staff, Paterson and Thomson, who can be regarded as the founders of the GGSL, took advantage of a new DLP curriculum that had been developed by the Law Society of Scotland, and was due to be implemented in 2000 (more of this below).³¹ They argued, rightly, that a curriculum focused much more on professional skill development would require considerable resources if it were to be properly implemented, and would need more development funding than the fee income of either school was able to support at that time. If students from both law schools attended, with a sprinkling of students from other law schools in Scotland, then the fee from the larger cohort would make available the funding to employ a range of staff – academics, tutor-practitioners, administrative and technical staff – that neither Law School could have afforded to employ on its own.³² It would also finance the purchase of technology, both AV and computing equipment, that became important to the development of pedagogy in the GGSL.³³ It also enabled GGSL leaders to build an experienced team of visiting professors who contributed substantially to the success of the GGSL.³⁴

Pedagogic design itself was central to professional learning in the GGSL, and for a number of reasons. From the start, we were faced with the problem of integrating two separate Diploma programmes, from Glasgow and Strathclyde, which ought to have been relatively close in form and content to each other but which were actually quite different in almost every respect. The issue was not one merely of syllabus structure, resource organisation and curriculum drift: the cultures of the two programmes differed significantly, too. The dilemma forced a question upon us: would Glasgow's or Strathclyde's model predominate? We answered this by arguing that neither was suitable for the foundation of the new School and the opportunities it offered us; and instead we set out to design a new curriculum for professional education.

The new Law Society curriculum, as indicated earlier, was focused on skills-development, but the mapping of skills to curriculum content was minimal – individual syllabi were described in terms of objectives rather than outcomes. There was no statement of standards of performance; the links between undergraduate and post-graduate education were not formulated, nor were the links between DLP and traineeship (or continuing professional development) described in any detail. Above all, there was no meta-level ground of ethical statement that would serve as an overall aim for professional legal education in Scotland.³⁵

The GGSL's new curriculum needed to describe and build these elements. Our approach to pedagogic design was largely though not wholly Deweyan and constructivist in orientation. We needed to build a new concept of the Diploma that would bridge academic and professional domains, and bring practitioners (especially our tutor-practitioners) much closer to the educational design work of the core academic team. We worked within the constraints of our situation, both liberated by the resources of place and technology and constrained by the envelope of annual budgets and the necessity to run programmes year on year.³⁶ This last constraint we turned into what became one of the strengths of the programme: in effect, the programme became the testing ground or laboratory for innovation. Design projects were often articulated in terms of two- or three-year project timelines.³⁷ Throughout, we needed to redesign our fundamental pedagogical approaches to professional learning. We also needed to identify a research methodology that would enable us to analyse our work. I shall describe briefly these two points below.

Designing fundamental pedagogical approaches to professional learning: transactional learning (TL)

Over a period of five years or so we developed a pedagogical approach that is still undergoing revision, but the main elements of which are reasonably stable.³⁸ This grew from, on the one hand, the necessity to move away from academic forms of educational encounter, and on the other the need to call upon the body of academic learning that students brought with them from their undergraduate studies. Clinic and other forms of direct client-based work would be ideal in this respect, but could not be organised for all subjects on the Diploma, and for the numbers of the joint cohort of Glasgow and Strathclyde University students joining us in the GGSL. We therefore began to develop simulation approaches to legal education; and we worked upon a pedagogy of 'transactional learning', the main features of which are as follows:

active learning
 through *performance in authentic transactions*
 involving *reflection in & on learning*,
 deep *collaborative learning*, and
 holistic or *process learning*,
 with *relevant professional assessment*
 that includes *ethical standards*
 (Barton & Maharg, 2006)

As a design heuristic TL operated at a curriculum-wide level, involving designers and students. It was, on one level, an educational recipe for operationalising a legal transaction within a simulation context.³⁹ On another it was a constructivist, situated learning approach to legal education. At a third and deeper level, it embodied the Pragmatic approach to participatory social education that Dewey advocated. Indeed in his radical reading of European epistemology Dewey defined the interactions of human thought and the world as 'transactions'. Experience is "a product,

one might almost say a by-product, of *continuous and cumulative* interaction of an organic self with world” (*LW*, 10, p. 224), and the word transaction described the inescapable moment of experience.⁴⁰ TL therefore taps directly into the Deweyan concept of active and participative learning and the implications of this not just for the learner, the learning institution or the profession, but for society itself. As Dewey put it, such learning develops “the character, skill and intelligence that are necessary to make a democratic social order a fact” (*LW*, 11, p. 161).

If TL grew out of the local conditions of the GGSL it is not limited to them. There are many directions in which TL can be taken, not just in the GGSL, not just in Scotland, but in any Common Law jurisdiction.⁴¹ In 2004 the Law Society of Scotland, aware of growing dissatisfaction with the skills-based curriculum developed in the 1990s, consulted over a new curriculum which was developed over the last seven years and which will begin in September 2011. One of the key elements of the accompanying Curriculum Guidelines for providers is that of TL.⁴² It will be interesting to see how the idea will be developed in the replacement for the Diploma in Legal Practice – Professional Education and Training 1 (PEAT 1).

Situated practice, situated research

But if TL were to be a recognisably distinct approach to legal education it required research and publication on methods and results. When one considers the scale of professional legal education in most Common Law jurisdictions, the amount of research that the enterprise has generated is disappointingly small. As commentators have observed of regulatory bodies in England and Wales (e.g. Webb & Boon, 2010), the establishment of professional schools to teach vocational law programmes such as the LPC has not encouraged the development of research into professional legal education. Teaching staff are generally employed by law schools to meet the standards of the regulatory bodies, the SRA and the BSB, who set detailed curricula and delivery standards, and monitor programmes closely. Under such monitoring, staff have little freedom to innovate in pedagogy on these programmes – indeed it could be said that such detailed regulation has stifled pedagogical innovation in England and Wales.

The appointment of practitioners to staff professional education programmes without concomitant training in research methods has resulted in a cadre of staff in the law school with a quite different culture and aims to those of mainstream law school staff – professional education tutors, lecturers and practitioner-supervisors (Chandler, 2011, forthcoming). There is almost no research arising from this body of staff, and very little that sheds light on the place of such staff in the law school.⁴³ It would be fair to say that the concept of the teacher-as-researcher, stemming from the educational tradition of Lawrence Stenhouse and others on the progressive wing of educational policy, is not part of the *grundnorm* of professional legal education in the UK. Nor have professional legal education centres or units, treated often as revenue centres by law schools, on the whole shared their practices widely. There are of course forums and seminars – the Legal Education and Training Group (LETG) organised by a consortium of larger law firms, the Vocational Teachers Forum set up by UCLE and later part of the Learning in Law Annual Conference

(LILAC), for instance (part of UKCLE's strategy to try to help professional legal educators integrate with academic law staff) and professional legal conferences such as KM Legal. Beyond these discussion platforms there is little in the way of collaborative sharing and development of pedagogy. While research on the cultures and values of such schools and units is sparse, it is probably fair to say that they share more of a managerial than a collegial culture (Bergquist, 1992).

By contrast, the leaders of GGSL made it a policy that academic staff organizing the professional programmes should be research-active, and RAE-active in the area of legal education. In addition to designing the DLP programme and its resources, and training and organizing practitioner-tutors who taught most of the programme, academic staff researched the implementations they designed. Our methods were derived from situated action research, and from the 'design experiments' that were developed by the educational psychologists Ann Brown and Alan Collins, whose empirical studies of education moved educational fieldwork from the laboratory to the classroom (Brown, 1992; Collins, 1992). In so doing, Brown and Collins were developing organic theory of cognition and learning from results obtained by working with teachers and students. Teachers, indeed, became co-researchers, in the tradition of Stenhouse and others, and on occasion students would become so, too. This is precisely what happened in our own research (Maharg, 2007a; Barton & McKellar, 2011; Barton & Westwood, 2011, forthcoming).⁴⁴ The approach has a long history: Dewey's Laboratory School in the University of Chicago was structured and planned along the same lines, as were some progressive English schools in the 1960s (Tanner, 1997; Burke, 2010), and some specific forms of kindergarten education.

Collaboration and research, therefore, were built into the fundamental structure of the GGSL, and were part of its ongoing strategy. With developing strengths in technology-enhanced learning, for instance, the School formed joint partnerships in England with the Oxford Institute of Legal Practice, and with the College of Law, as well as with UKCLE in the two-year development of SIMPLE (SIMulated Professional Learning Environment); and in Scotland with the Society of Writers to the Signet in Edinburgh, and Stirling University. Internationally we liaised in the Netherlands with the government-funded RechtenOnline Foundation; in the USA with Georgia State University College of Law and the University of New Hampshire Law School; with Hong Kong University; with Kwansai Gakuin University and the University of Kobe in Japan; and in Australia with the Australian National University at Canberra. The subjects were always educational design and implementation projects, but in addition to this practical work we would seek to publish our research with our research partners – Maharg 2004 and 2007b are examples of this.

Most of these projects were based on mutual advantage for the GGSL and its partners. The project with the University of New Hampshire School of Law, for instance, involves splicing two innovative simulation heuristics, namely SIMPLE simulations and the use of Standardised Clients (based upon the use of Standardised or Simulated Clients in medical education). To date, this has not been attempted anywhere; and our research will detail how the heuristics enable students to learn and practise professionalism and ethics within a capstone project in New Hampshire's JD programme that offers students exemption from the New

Hampshire Bar Exam (Barton *et al.*, 2011, forthcoming).⁴⁵ Such a radical regulatory step requires fundamental change to the structure and heuristics of professional education; and experiential approaches such as SIMPLE and SCs enable that change to come about.

The GGSL experiment was an attempt to abolish the conventional academic infrastructure of the Diploma curriculum in Scotland, and to replace it with a significantly new educational structure, at once academic and professional. It attempted to replace the hegemonic culture and values of professional education in the jurisdiction; and in this at least, was quite unique in Common Law jurisdictions.⁴⁶ Where Twining's article was a delicate balancing act, an oscillation between the separate poles of Periclean culture and practical plumbing, the GGSL was an attempt to find another way of creating a Deweyan approach that would fuse both; that would bring together academic and practitioner-tutors, academic and professional curricula, in interdisciplinary activity where the values of Pragmatic education could be enacted with the play of identity formation.

It could be argued that a Pragmatic approach was not necessary to many of the innovations in the School's professional education programme, of course; and this is certainly true. I would submit, however, that it helped to bond the individual components together in a laminated structure that gave the whole coherence that exceeded the sum of its parts. It complemented the approach taken by Dewey to oppose the isolationism of university departments, of universities from each other (even in the same city), and to bring together professional and academic knowledge and understandings of a discipline.⁴⁷ Its chief value, though, was to help us envisage a radical future for legal education, one where student engagement could transform into civic engagement through the renewal of professionalism in the law curriculum. Indeed many of the GGSL innovations found their origins in educational literature that recently have focused on principles of active learning in higher education. A good example of this is the National Survey of Student Engagement (NSSE), funded by the Pew Charitable Trusts. George Kuh, whose research was closely allied to the NSSE, described the Survey in terms that derive from Dewey's 'instrumental' approach to education:

[a]ctive and collaborative learning is an effective educational practice because students learn more when they are intensely involved in their education and are asked to think about and apply what they are learning in different settings. Collaborating with others on academic work and problem solving prepares students to deal with the messy, unscripted situations they will encounter daily during and after college. (Kuh, 2003, p. 13)

In a study of high-impact undergraduate educational practices, Kuh outlined eight that contributed to student engagement and effective learning:

- (1) First year seminars and direct experience of academic staff
- (2) Learning communities
- (3) Writing-intensive courses
- (4) Collaborative assignments and projects
- (5) Undergraduate research

- (6) Intercultural and global learning
- (7) Internships
- (8) Capstone courses and projects⁴⁸

Of these, 1 and 5 refer specifically to undergraduate education and are not relevant to the work of the GGSL. Of the remaining six, four were practised extensively in the Diploma in Legal Practice (2, 3, 4, 8) while 6 and 7 were practised intermittently.

The end of the initiative

The academic year 2009/10 was the final year of the GGSL initiative. The practical context of such collaborations is often complex, and not merely a matter of matching cost against benefits.⁴⁹ The benefits that the GGSL brought to students, staff, pedagogy, innovation and much else were undeniably successful; and in professional education this was partly due to the decision to adopt neither the Strathclyde nor the Glasgow model of the Diploma, but to design anew. However towards the end of the decade different institutional policies were formulated at senior management level; and for this and for other reasons the School Management Committee decided that the joint initiative had run its course, and the School was dissolved by mutual consent.

Change and legal education

What can we learn from the Realist experiments at Columbia and the initiative of the GGSL that will help us develop our law schools in the future? There are many issues, not least those itemized above, but for the purposes of this article we can group them as issues of structure and discourse of knowledge, and of School. The Realists tended to skirt analysis of educational philosophy and the pragmatics of educational discourse, focusing instead on the creation of new content based upon sociological jurisprudence that attempted to re-design the formal categories of law and introduce the discourse of social understanding into the legal curriculum. These were massive projects, requiring greater time and resources than they had at their disposal. The GGSL initiative, by contrast, was much more modest. Following Dewey (but without ignoring Thorndike where applicable) GGSL attempted to create an educational philosophy built in part upon Pragmatist principles – successful in the limited sphere of professional education and in the timespan of the School's existence, but in the longer term needing a more secure position between and within the two law schools to be further developed. Nor should we be surprised at the length of time such initiatives require. Curriculum structure is intimately bound to knowledge structure: in turn, disciplinary discourse cannot be easily prised from educational discourse. The Law Society of Scotland's new professional programme, which includes aspects of Deweyan practice, recognises this implicitly, and consequently there is within it an emphasis upon a renewed, cumulative and deepened understanding of discourse in the profession, particularly that of professionalism itself. Such an initiative, not without its controversial aspects, may bring about structured change in this regard for professional legal education programmes in Scotland.⁵⁰

The Realist experiment, particularly based upon a Deweyan and Peircean base, has much to offer legal education. Pragmatist educational discourse emphasises the anti-foundational nature of knowledge, the contingency of epistemological comprehension, the holistic nature of experience, the essential role of that experience in learning. In the Pragmatist world we are always already in the inescapable here and now, full of values, laden with bias, in some community with specific or with vague purpose. But Pragmatism is not relativist: it is contextual. As Peirce put it, one always starts out “laden with an immense mass of cognition already formed, of which you cannot divest yourself if you would” (Peirce, 1998, p. 336). If we were to take these premises seriously, the law school of the future would look very different from one formed on classic liberal law school principles, for it would question fundamental *educational* practices that arise from such principles, and would be founded much more upon the concept of engagement, both academic and civic, that lies at the heart of Dewey’s educational theory and practice.

We can see this if we consider the work of the NSSE, described above, and Kuh’s high-impact practices, numbers 5–8. These practices, as Randy Bass pointed out, need neither a conventional curriculum nor a *specific physical locale*.⁵¹ Indeed what one might regard as a normal curriculum could be categorised as *low-impact*. By facilitating technology-enhanced learning, it is possible to design what one might call an exo-curriculum – one which, like an exo-skeleton, exists not as an embedded structure within a school, but one accessible from outside, supporting activities such as NSSE 1–8. As Bass pointed out, we would be best advised to model our curricula around high-impact practices (e.g. constructivist learning tools, inquiry-based and participatory learning – Gee, 2003; Francis, 2010), rather than attempting to shoe-horn high-impact practices into outworn curricular structures.

In much the same way that Dewey’s Laboratory School in Chicago University radically re-imagined school educational practices and processes at the turn of the nineteenth century, so we need to transform our own practices, a century later. Twining’s prescient choice of epigraph to his inaugural lecture expresses this dilemma well. *The Tempest* has at its heart the necessity of transformation in human affairs. In the words of Ariel’s song we undergo a sea-change, a transformation into something rich and strange. In the play’s context, Ariel finds Ferdinand, son of the King of Naples, on the shore, grieving for his father whom he assumes drowned; and leads him by means of his haunting song inland, towards a new future with Miranda, with whom he will fall in love. The song speaks of transition, and gives expression to the changes that must happen if Miranda’s brave new world is to come about.⁵² Such transformation is never easy – it was not for Patterson, Underhill Moore, Oliphant and their colleagues in Columbia Law School in the 1920s, any less than it was for staff in the GGSL eighty years later.

Conclusion: a portrait of the law school as design school

This article is in part an exploration of the critical acuity of Twining’s inaugural lecture.⁵³ It is also partly an answer to the issues he raises, after the historical *excursus* in US legal

education in the first half of the lecture, which he sees as essential for the future of legal education generally. The themes he sets out there can be summarised as follows:

- (1) The development of a “sociology of the legal profession” (pp. 419–420).
- (2) Breaking down the “rigid stereotyped thinking”, e.g. the dichotomies that are set up between education and training, and liberal and vocational approaches (pp. 420–421).
- (3) The development of educational methods – Twining cites “simulators, clinics, programmed learning and other devices” (p. 423). He notes how much we can learn from other disciplines and occupations, “perhaps even from those connected with the training of real plumbers” (p. 423) and emphasises in particular the need to reform assessment practices.
- (4) The need of a “comprehensive working theory” that is based on “systematic study of the profession”, that had a “developed terminology” and is open to “a willingness to learn from those who know something and care about education and training” (pp. 424–425).

Nearly half a century later we still have some way to go on all four issues. Our contemporary sociological literature is more substantial now than in 1967 (though there are concerns about its empirical bases);⁵⁴ but there is little comprehensive study of how this has affected legal education. Dyadic thinking, particularly along lines of liberal and vocational learning, still exists, as a recent special edition of *The Law Teacher* demonstrated.⁵⁵ Educational methods have improved considerably in scope and quality, but much still needs to be done to achieve the fundamental transformation that has been attained in the medical profession, for instance, in the last 50 years. Above all, we have done little to develop working theory that will change the hegemony of the signature pedagogy (Gurung *et al.*, 2009). Twining is entirely right on the issue – there is little developed terminology in legal education. Rather than a single ‘working theory’ however, I would argue that we need to develop new forms of understanding about the complexities of educational practice – a type of *koine* or common speech. Other disciplines have developed similar communications patterns. Galison (1997) for instance describes how, in the field of microphysics, individual members of very large project teams (experimenters, instrument designers and fabricators, politicians, architects and many others) could meet, share theory and experience and collaborate. Galison analysed the pidgins and creoles of documents whereby the collaborating disciplines attempted to understand each other’s essential concepts and communicate them to each other. He called such convergences ‘trading zones’, where it was possible for “trading partners [to] hammer out a local coordination despite vast *global* differences” (1997, p. 783; original emphasis).

Our legal educational *koine* needs to be developed in and around such trading zones. Twining points us to this in the final stage of the historical summary in his lecture – not centred on a specific figure, but on a conference, where academics and practitioners converged on legal educational issues, problems and solutions. Our curricular designs need to converge Periclean politics and plumbing so that a *koine* is possible in which we can express the lessons of curricular design (learned from Columbia and many other innovations) and the lessons of founding new

institutions (learned from exemplars such as the GGSL). TL, developed out of the convergence of Glasgow and Strathclyde Law Schools, is one example of theory arising from practice, but it is the merest of beginnings. Much more is required. The trading zone and its *koine* are critical because the practical problems, the theoretical and policy issues of legal education, are quite simply not solvable by any one stakeholder (e.g. regulators) or indeed any one discipline. The sociotechnical context of learning and teaching is a good example of this. The Internet, wholly unknown in 1967, is now commonplace in developed countries and its associated digital revolution is transforming technology-enable learning. As a global platform emerges through use of the read/write Web, we have powerful tools whose affordance we must develop for our discipline and our curricula. Internetworked technologies, however, required trading zones and a *koine* of theory and practice, the formation of which, as Twining said of legal education itself, is “socially important and intellectually exacting and [...] worthy of sustained reflection, dispassionate inquiry and creative thought” (p. 425). Twining has set us a challenge, no less difficulty now than it was in 1967. Taken seriously, the challenge may well lead to a remarkable transformation, a sea-change: the lawyer as Periclean plumber.

Acknowledgements

I am indebted to Karen Barton and in particular to Alan Paterson for their comments on the GGSL case study.

Notes

- [1] Unless otherwise stated, all future page references to Twining’s work refer to this lecture.
- [2] It was a topic he returned to several times, notably in Twining (1982). Many subsequent commentators have taken up the polarization, which was discussed contemporaneously by Dean Erwin Griswold of Harvard Law School (Griswold, 1967). Griswold notes that the centenary of Langdell’s appointment to Harvard in 1870 was soon to be celebrated; and reminded his readers that the Law School of Boston University was founded by faculty who left Harvard in protest against Langdell’s introduction of the case method. Griswold also quotes a popular text on lawyers by Martin Mayer in which the author observes that US law schools were “torn as to whether they [were] training physicists, engineers, or plumbers” (Mayer, 1967, p. 92).
- [3] There are at least two published versions of the lecture. The *LQR* article is an abbreviated version of the original lecture, which was also published as a pamphlet by Queen’s University.
- [4] Read retrospectively this is ironic, given that the lecture outlines what will be key themes for Twining in the next 47 years.
- [5] The dramatic reference is sustained throughout the lecture, with figures who appear and recede – in addition to Pericles and the plumber there is the “cultured gentleman . . . the wise ruler . . . and the scholar researcher” (p. 398). The choice of Shakespeare’s late plays is also apt, since like the landscapes of *The Tempest* and *A Winter’s Tale*, the figures of Pericles and the plumber bear little resemblance to actual figures, as Twining readily acknowledges (p. 399). Nevertheless, as we shall see below, there are intriguing depths to the analogies that he draws.
- [6] The literature is extensive – for a summary, see Skura (2000). Fuchs (1997) argues that the play describes Elizabethan colonization of Ireland, which in many respects was the pattern for future seventeenth century colonization in America and elsewhere.

- [7] For information on the export of US legal education recently, see Brand (2009). For examples of critical analysis, see Pue (1995), arguing for a historical understanding of the complexities of the process in early Canadian legal education; Silver *et al* (2008) on the effects of cross-border practices on legal education; Sharafi (2007) on the role of Common Law legal education as a tool for cultural translation in the formation of colonial identities.
- [8] The locational uncertainty is mirrored in the name of Prospero's daughter. 'Miranda' was unknown to Shakespeare's audience before they heard it, new-minted, in the play. It may not be too much to draw a comparison between the mesocosmic potential of place and names in the play, and Twining's own career and writing. He has been a "wandering jurist", a "foreign correspondent" on the geographical periphery as well as in the centre of the Common Law (Twining, 1997, p. 2); and his intellectual interests similarly encompass areas that are still, in research terms, relatively peripheral (legal education) as well as more central concerns (jurisprudence, evidence, for instance).
- [9] Again, the playful literary reference, this time to Pirandello, is hard to miss. *Six Characters in Search of an Author*, like *The Tempest*, begins with the unexpected arrival of people, the 'Characters'; but the play's director is much less in control of the subsequent drama than Prospero – not so much a magus as someone just trying to get on with his job, and who seems to have understood little of what has happened in the impromptu play within the play. Pirandello's play, which amongst other topics concerns the nature of dramatic invention and realism, is a fascinating parallel to Twining's lecture, which deals *inter alia* with the nature of educational invention and realism in legal education, and the necessity for us to develop and understand our own espoused methods and working theories.
- [10] As Dewey put it, "[i]ndividuals will always be the centre and consummation of experience, but what the individual actually *is* in his life experience depends upon the nature and movement of associated life" (*LW*, 14, p. 91).
- [11] Pericles' *epitaphios* is of course Thucydides' construction. For discussion of the relation of historian to politician, see Bosworth (2000).
- [12] Twining is analysing globalisation and its effects; but it is interesting to note that in the Epilogue's section on 'general jurisprudence', if we should replace those two words with 'general education' throughout the ten points, we have a picture of how educational theory might affect and be affected by, globalisation.
- [13] Dewey would have appreciated the possibility of debate between plumber and statesman on key political issues as critical to the health of a democracy, whether fifth-century BCE Athens or twentieth-century America.
- [14] Like Twining, Griswold similarly recognised that the surface anxiety betrayed a deeper malaise – he expressed it as the "exaltation of rationality over other values which are of great importance to our society" (Griswold, 1967, p. 300). Twining took a more nuanced view of the situation, as we shall see.
- [15] This section summarises chapter four of Maharg (2007), which gives a more detailed account of Dewey's and Thorndike's involvement with Columbia's law faculty in the 1920s.
- [16] Other seminar leaders included Roscoe Pound and W.W. Cook. According to Nathan Isaacs who attended the course, there was a strong similarity between Dewey's course and the text that Dewey published in 1910 entitled *How We Think*, in that the subject of the course was the professional thinking of lawyers, and how legal thinking was distinguished from ordinary patterns of understanding (Isaacs, 1923).
- [17] 'Logical Method and the Law', (*MW*, 15, pp. 65–77). All references to Dewey's works are to the definitive Carbondale edition, where *MW* refers to *Middle Works*, *LW* refers to *Later Works*). As I point out (2007, p. 81), the textual evidence in Stone's unpublished papers at Columbia supports the view of Ann Sharpe, textual editor of the Carbondale edition, that the course and article were closely related (*MW*, 15, p. 438). For the complex textual history of Dewey's article, see *MW*, 15, pp. 437–439. A history of Dewey's extensive emendations to two later versions of the article is listed at *MW*, 15, pp. 450–455.
- [18] Located at Stone, 1923–24, Miscellaneous Papers, Box 66. The title sheet is headed "Readings in Legal Philosophy by John Dewey and Edwin W. Patterson (Prepared for the exclusive use of students in the course in Col. U. known as Logical and Ethical Problems of the Law: An Introduction to Legal

- Philosophy. Philosophy 130)". It would appear that these papers remain unpublished in the Dewey *oeuvre*.
- [19] Twining quotes Brainerd Currie that these studies "constituted the most comprehensive and searching investigation of law school objectives and methods that has ever been undertaken" (p. 408; quoting Currie, 1951, pp. 333–334).
- [20] See Twining (1973), Duxbury (1995) and Schlegel (1995).
- [21] As Underhill Moore makes clear in an unpublished memo to Stone, the experiment was carefully planned, with Woods ("Prof. Thorndyke's [*sic*] right hand man") conducting an analysis of the School's grading systems, attending class meetings for a whole semester, and reviewing students' prior knowledge of legal content (Moore, 1923).
- [22] And quite some distance from the social and philosophical views of Dewey, his wife Alice, Jane Addams and their circle. See Stone (1921).
- [23] For an overview of the complex issues as he saw them, see Thorndike (1921).
- [24] See for example Weinstein (2001), Henderson (2004), Edwards (2006). For an interesting alternative assessment, see Sternberg (2010), and the discussion of Sternberg's work at *Inside Higher Education*, available at: www.insidehighered.com/news/2010/09/28/sternberg.
- [25] Other initiatives at Columbia University were more innovative in learning design. It is interesting to note that, under President Butler's enlightened and innovative hand, Columbia entered the 'home study' or distance learning market. Butler saw the venture largely as the university's social service to adult education, though at its height in 1930 the venture made an annual profit of \$349,000. The initiative lasted from 1921–1937. Its strategy was in part due to Butler's own caution in committing the university to an educational sector that was already well-served by private institutions, though there is an argument that had Columbia been more entrepreneurial, their pedagogic designs may have succeeded in the market in the long term (Hampel, 2010). The initiative contrasts strongly to the dot com boom a decade ago, when Columbia joined a number of other top-tier universities in a consortium called Fathom; and invested \$20M in it, only to see the venture collapse several years later when the student sign-ups did not materialize (Kirp, 2003).
- [26] In their Preliminary Response to Scottish Solutions to the White Paper on Higher Education, the Association of University Teachers Scotland noted, with reference to research, that the White Paper "endorses increased research selectivity including the prospect of mergers, formal synergy agreements and increased collaboration". See <http://www.polfest.org/business/committees/historic/enterprise/papers-03/ecp03-04a.pdf>.
- [27] As noted in GAELS (Glasgow Allied Electronically with Strathclyde) Original Project Proposal, http://gaels.lib.strath.ac.uk/project_info/proposal.html, which was another joint university initiative. Under SHEFC's Strategic Change Initiative the GAELS projects were supported by services such as the Centre for Digital Library Research – see Nicholson (2000).
- [28] SHEFC is now the Scottish Funding Council, <http://www.sfc.ac.uk/>. Synergy successfully bid for a grant of approximately £1.4M over three years, which was received in January 2000 (<http://www.gla.ac.uk/services/synergy/shefcreports/>).
- [29] See the Synergy website, at <http://www.gla.ac.uk/services/synergy/developasynergycollaboration/#d.en.53854>. Local links were strengthened in a variety of ways – for instance Joe Thomson, Regius Professor at Glasgow University School of Law, was appointed by Glasgow as the University's representative on the General Convocation of Strathclyde University. The Synergy site is also frank about the difficulties in setting up joint partnerships – for example, the problems of integrating cultures, of enabling staff throughout one department to liaise fully with another, the infrastructural problems, and above all the problems of sustainability – many of which were encountered in the life of the GGSL.
- [30] For an account of another similar local initiative see Creanor & Littlejohn, 2008.
- [31] The two key senior law school staff involved in the setup of the GGSL were Professors Alan Paterson (Strathclyde) and Joe Thomson (Glasgow).
- [32] See <http://www.gla.ac.uk/services/synergy/synergycollaborations/teaching/glasgowgraduateschooloflaw/>. At its maximum, the Diploma cohort numbered 282, then just under 50% of the intake of students into the profession in Scotland. Working with students were five administrators, the equivalent

of around three full-time academic staff (chosen by Paterson for their educational expertise), four visiting professors (more of whom below) and around 150 part-time tutor-practitioners, drawn from the profession in and around Glasgow and the central belt of Scotland. Throughout most of this period the author (who was with the GGSL at its founding until its dissolution in 2010) was co-Director of Professional Legal Courses, along with Leo Martin, a solicitor in Glasgow and founding partner of the firm of Giusti Martin.

- [33] The physical School was built on a floor of what later was renamed the Lord Hope Building on Strathclyde's John Anderson campus (after Strathclyde's Chancellor, Lord Hope). The floor had earlier been a Faculty of Engineering project centre. The design of the learning spaces and their furnishing is a case study in itself – there are many interesting parallels between the design process and the architecture of schools, for instance. See Maclure (1984) and Saint (1987).
- [34] The team, brought together by Paterson, included Mike Jones QC, John Sturrock QC, Scott Slorach and Charles Hennessy. Sturrock worked closely with the author on the design of an innovative programme on professional skills and values called the Foundation Course, and on mediation resources and classes. Slorach, now a Director in the College of Law, worked with the author and Karen Barton on multimedia, and on skills development, curriculum design and tutor training. Hennessy developed skills resources, webcasts with Patricia McKellar, and simulation resources, and later became a key author and designer on the Foundation Course.
- Paterson also planned the recruitment of technologists to support the work of academic designers and practitioner-tutors. In time this became the Learning Technologies Development Unit, comprising two Web designers, two applications developers and a Unit Manager (Scott Walker), under the direction of the author. LTDU was responsible for almost all the ICT innovations at the GGSL. Paterson's plans for personnel recruitment took full advantage of the opportunity raised by the GGSL. The unique lamination of personnel expertise addressed many though not all of the law school personnel issues raised by Twining in his inaugural lecture (especially at p. 405). Paterson's role in this was crucial – as was Dean Stone's role in recruitment to Columbia Law School in the post-war years.
- [35] It should be pointed out that all these points, and many more, were addressed in the subsequent development of the Society's new curriculum, 2004–2010, which will start in the academic year 2011/12.
- [36] There was other development work being carried out at the same time. For example the design of the PCC started with a consultation project commissioned by the Law Society, followed by pilots at the GGSL and later the creation of accreditation documentation and the accreditation by the Law Society of PCC providers, including the GGSL.
- [37] These were often described in Internal Working Papers (IWP's – on file with the author), which often described the outlines of an innovation, the resources required, the lifecycle of the educational product or asset, and the use to be made of it by staff and students.
- [38] Its elements were constructed from a core of three, to seven. We may alter this in the future. We do not see this as problematic. No educational heuristic is timeless, being always a product of its time and place; and a heuristic that is closely allied to one of the fastest-changing learning environments ever, namely the Internet, is bound to alter swiftly. There are of course many other directions in which TL can be developed. Westbrook (2009) has indicated how TL, with a different definition, can be implemented in US legal education. On a practical level the concept can be taken into the field of economics – for example it is possible to use TL as the basis of student experimentation with the Coasian concept of transactional costs, and to introduce this into a syllabus where simulated transactions are the focus of student learning.
- [39] And therefore something that may have been of use to Columbia's Realist experiment. Dean Griswold observed in his address to Harvard Faculty (and following a remark by a colleague) that "staff might do better to teach less of the case method and more of the actual cases, the vast majority of which never see a court"; and he advocated the compilation of "cases", based on office records and experience, so that our students could learn from carefully reproduced real materials what actually goes on in law offices" (Griswold, 1967, p. 303). What is missing from this and many similar statements is of course what was missing from the Columbia reforms, namely the detailed

method by which students would learn from such resources – a method that Deweyan education provided.

- [40] While much of his epistemology was, as West puts it, a deliberate and creative evasion of European metaphysics, Dewey wished to emphasise aspects of what Heidegger was later to describe as the unrepeatable ‘thrown-ness’ (*Geworfenheit*) of existence, the always being in the midst of experience (Heidegger, 1980, p. 321).
- [41] The approach could, for instance, comfortably accommodate the Coasian notion of ‘transactional cost’ (Coase, 1991), particularly as defined by Williamson (1996, p. 379).
- [42] See *Professional Education and Training Stage 1 (PEAT 1): Accreditation Guidelines for Providers*, available at: http://www.lawscot.org.uk/media/39767/peat_1_guidelines_-_final.pdf, in particular Appendix B. I was appointed by the Society to draw up outcomes for professionalism, professional relationships and professional communications; and to draft brief curriculum guidelines that could be used by institutions seeking accreditation as PEAT 1 providers.
- [43] Cownie’s study of law teachers explicitly focused not on professional education staff but on those engaged “in the traditional academic tasks of teaching, research and administration” (Cownie, 2004, p. 19).
- [44] A more detailed account of this will appear as chapter five in the prosopographic account of the GGSL in a forthcoming monograph provisionally entitled *A Genealogy of Legal Education*.
- [45] It is interesting to note that many of the GGSL innovations were enhanced by close co-operation with the Law Society of Scotland; and in turn results from the innovations were fed into the development of the Society’s new professional regime. The New Hampshire exemptions could not have come about without even closer collaboration with the Supreme Court of New Hampshire.
- [46] There are other transactional projects with broadly similar ambitions – Westbrook (2009), for instance – but none with the same focus on technology-enhanced resource bases. Its institutional managers were ambitious for its success, much as Columbia’s President Nicholas Butler was ambitious for his Law School at Columbia (a point made clear in the correspondence between Butler and Dean Stone).
- [47] Tanner notes how Dewey’s Laboratory School was influenced by Dewey’s experience with teachers in the 10 years prior to its opening. Dewey had numerous contacts with teachers in elementary and secondary schools in his earlier post as head of the philosophy department at Michigan University (Tanner, 1997, p. 14).
- [48] The basis for this is the substantial work carried out by the Centre for Postsecondary Research at Indiana University, of which Kuh was until recently Director – see Kuh (2009). The validated survey instrument was re-validated as the Law School Survey of Student Engagement (LSSSE) – see <http://lssse.iub.edu/> and the survey instrument at http://lssse.iub.edu/pdf/2010/LSSSE_2010_Survey%20Instrument.pdf (note that at point 5, ‘Undergraduate research’, Kuh refers to the practice of involving undergraduates in academic research carried out by academic staff). Latest (2010) results for law schools are summarized at http://lssse.iub.edu/pdf/2010/2010_LSSSE_Annual_Survey_Results.pdf and make fascinating reading for all Common Law legal educators.
- [49] The cost-benefit relation in its simplest form was described by Hunter-Taylor (2001, p. 13), quoting Scott (1999): “overall, if people find that the cost to them continues to be outweighed by the benefit they are more likely to persevere with a change effort”.
- [50] See for example the Society’s PEAT 1 Accreditation Guidelines documentation for providers, available at: <http://www.lawscot.org.uk/members/legal-reform-and-policy/education-training-policy>.
- [51] If one were to found a new GGSL today, it would be based less upon specific physical locale, and more upon a digital and distributed curriculum model. This is not a return to a distance-learning model of education (such as Columbia flirted with, briefly, in the 1930s, as we have seen); but a recognition that such a distributed model enables powerful lamination between academic and professional learning, and both integration with and challenges to the wider social context of legal learning.
- [52] Full fathom five thy father lies,
Of his bones are coral made:
Those are pearls that were his eyes,

Nothing of him that doth fade,
 But doth suffer a sea-change
 Into something rich, and strange:
 Sea-nymphs hourly ring his knell
 Hark now I hear them, ding-dong bell. (*The Tempest*, I.ii.460–68)

- [53] In this respect it is interesting to compare the lecture with a contemporary account of legal education, namely Dean Griswold's Hamlyn Lectures, *Law and Lawyers in the United States*, published three years earlier than Twining's inaugural lecture. In chapter three Griswold (1964) gives an historical account that parallels Twining's, in that both describe the importance of Story and Langdell as seminal figures in US legal education. Griswold's account, however, is broadly descriptive, while Twining's narrative is more critical, particularly in its final section, 'Asheville 1965', which describes sophisticated collaborations between academics and practitioners at a key conference, and thus gives us an indication of how some of the problems endemic to common law legal education may be better understood.
- [54] See Genn *et al.*, 2006 and the Nuffield Inquiry website at <http://www.nuffieldfoundation.org/nuffield-inquiry-empirical-legal-research-law-real-world>; Hillyard (2007).
- [55] 2008, 42(3).

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