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'Complicitous And Contestatory': A Critical Genre Theory Approach to Reviewing Legal Education in the Global, Digital Age

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Abstract

It is the content of reports into legal education are subject to comment and analysis, rarely the form, functional discourse markers or rhetorical nature of such genres. In this chapter we describe a discourse framework for understanding the historical development of modern reports into legal education in England and Wales by analysing the textual features of genre markers. We then apply this framework to a specific sub-set of *topoi* within such reports, namely the reporting of digital technologies within legal education.

We shall make three related claims. First, the discourse and rhetorics of reports on legal education has scarcely been analysed in the research literature, and we begin that process here. Second, the culture and context within which digital innovation is reported, analysed and recommended upon in regulatory reports is relatively shallow and theory-lite. We need to draw from the sophisticated insights into our understanding of digital in a variety of disciplines and discourses, eg media, education, and discourse analysis generally, and apply those to legal education. Third, the genre-form of reports on innovation actually inhibit or constrain our ability to develop imaginative, theory-rich and persuasive accounts of digital cultures for legal education. In this regard our case study has implications not just for law schools, but also and more significantly for regulators and accreditors.

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'To consider as potential genres such homely discourse as the letter of recommendation, the user manual, the progress report, the ransom note, the lectures, and the white paper […] is not to trivialize the study of genres; it is to take seriously the rhetoric in which we are immersed and the situations in which we find ourselves.'[1]

'… all discourses of theory […] are ideologically loaded, cultural constructs designed to establish control and a sense of security'.[2]

I Introduction

There is something of a global industry in reviewing legal education.[3] Aside from the internal reviews carried out by institutions and professional bodies, the range of reports that is in the

[1] Carolyn R Miller, 'Genre as Social Action' (1984) 70(2) Quarterly Journal of Speech 151, 155.

[2] HG Widdowson, 'Discourses of Enquiry and Conditions of Relevance' in James E Alatis (ed), *Georgetown University Round Table on Languages and Linguistics 1990* (Georgetown University Press 1990).

[3] This chapter draws on work presented at conferences in Hong Kong, Turkey and the UK, some of which was published. See further Jane Ching, 'The Challenges Facing Legal Services Education in the 21st Century: A Case for Collaboration and Conversation?' in A Nuhoğlu and others (eds), *Legal Education in the 21st Century: Proceedings of the International Conference, Bahçeşehir University and The Union of Turkish Bar Associations* (Türkiye Barolar Birliği 2015) < http://tbbyayinlari.barobirlik.org.tr/TBBBooks/525.pdf > accessed 15 May 2019; Jane Ching, 'Greener Grass and Re-Invented Wheels: Researching Together' (Society of Legal Scholars Annual Conference, Oxford, 6-9 September 2016) <http://irep.ntu.ac.uk/id/eprint/28622/> accessed 20 May 2019; Jane Ching, '"Riding Madly Off in All Directions": Consistency and Convergence in Professional Legal Education' (Directions in Legal Education Conference Hong Kong, 3-4 June 2016)

public domain is staggering.[4] So, for example, in the period 2010-2014 alone, roughly simultaneous reviews were taking place, or reporting, in Australia,[5] Canada[6] (and in

<http://irep.ntu.ac.uk/28240/> accessed 20 May 2019; Paul Maharg, 'The Identity of Scots Law: Redeeming the Past' in Mark Mulhern (ed), *Scottish Life and Society (A Compendium of Scottish Ethnology): The Law (Volume 13)* (Birlinn Press & The European Ethnological Research Centre 2011); Paul Maharg, 'Shared Space: Regulation, Technology and Legal Education in a Global Context' (2015) 6(1) European Journal of Law and Technology <http://ejlt.org/article/view/425/541> accessed 17 May 2019.

[4] Others, excluded from the scope of this chapter, are not reviews of legal education at all, but reports on the efficacy, well-being or anti-competitiveness of the legal professions which, explicitly or otherwise, have implications for education for that profession.

[5] Law Admissions Consultative Committee, 'Rethinking Academic Requirements for Admission' (2010) <https://www.lawcouncil.asn.au/resources/law-admissions-consultative-committee/discussion-papers> accessed 17 May 2019.

[6] Council of the Federation of Law Societies of Canada, 'Common Law Degree Implementation Committee: Final Report' (Federation of Law Societies of Canada 2011) <http://docs.flsc.ca/Implementation-Report-ECC-Aug-2011-R.pdf> accessed 17 May 2019.

particular in Ontario[7]), England and Wales,[8] France,[9] Mauritius,[10] New Zealand,[11] Russia,[12] South Africa[13] and the USA.[14]

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[7] Law Society of Upper Canada, 'Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario' (Law Society of Upper Canada 2012) <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848> accessed 17 May 2019.

[8] Julian Webb and others, 'Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales (Legal Education and Training Review)' (SRA, BSB and CILEx Regulation 2013) <http://www.letr.org.uk/wp-content/uploads/LETR-Report.pdf> accessed 17 May 2019.

Pamela Henderson and others, 'Solicitors Regulation Authority: CPD Review' (Solicitors Regulation Authority 2012) <http://www.sra.org.uk/sra/news/wbl-cpd-publication.page> accessed 17 May 2019.

[9] Conseil National des Barreaux, 'Réforme de La Formation Initiale Dans Les Écoles d'avocats' (Conseil National des Barreaux 2014) <http://cnb.avocat.fr/Reforme-de-la-formation-initiale-dans-les-Ecoles-d-avocats_a2071.html> accessed 13 February 2019; Conseil National des Barreaux, 'Le Conseil National Des Barreaux s'inquiète de La Qualité de La Formation Des Étudiants, Futurs Avocats, à La Suite de l'avis Du Conseil d'Etat Du 10 Février 2016' (Conseil National des Barreaux 2016) <http://cnb.avocat.fr/Le-Conseil-national-des-barreaux-s-inquiete-de-la-qualite-de-la-formation-des-etudiants-futurs-avocats-a-la-suite-de-l_a2592.html> accessed 13 February 2019.

[10] Jane Ching and others, 'Reform of the Education Structure for the Professional Law Courses in Mauritius' (Tertiary Education Commission of Mauritius 2012).

[11] Andrew Tipping, 'Review of the Professional Legal Studies Course' (New Zealand Council of Legal Education 2013) <http://www.nzcle.org.nz/Docs/Review of the PLSC Report .pdf> accessed 17 May 2019.

[12] Shepelva Olga and Novikova Asmik, 'The Quality of Legal Education in Russia: Stereotypes and Real Problems' (*PILnet*, 2014) <http://www.pilnet.org/public-interest-law-resources/73-the-quality-of-legal-education-in-russia-stereotypes-and.html> accessed 17 May 2019.

[13] Camilla Pickles, 'Research Report on Mandatory Continuing Professional Development Commissioned by the Law Society of South Africa' (Law Society of South Africa 2010) <https://www.lssa.org.za/upload/documents/Research_report_on_MCPD.pdf%3E> accessed 17 May 2019.

[14] ABA Task Force, 'Report and Recommendations American Bar Association Task Force on the Future of Legal Education' (American Bar Association 2014)

The homogeneity of the phenomenon is, however, misleading. There is a finite repertoire, globally, of structural components of a legal education (e.g. degrees, undergraduate and postgraduate; vocational courses; periods of mandatory clinic or work experience; bar examinations and aptitude tests; Continuing Professional Development (CPD)/Continuing Legal Education (CLE). There is also a fair degree of commonality in global concerns (e.g. cost of education and numbers of aspiring lawyers; skills; practice-readiness and the nature of 'competence'; the relationships between stakeholders; ethics and global competitiveness). However, the reviews which evaluate these structures and issues are commissioned by stakeholders with widely varying agendas; carried out by people chosen for very different reasons, vary in method from rigorously empirical to benign expert opinion and therefore in their conclusions and outcomes. Not only is this problematic for general readers of the reports and their expectations, but it also substantially impedes comparative and follow-up work. This chapter addresses this issue initially by proposing four distinct genres of legal education review, largely derived deductively from the substantial 2010-2014 global sample.

Having created a typology of what is present in the field as a whole, the chapter then moves on to problematise a specific and increasingly urgent component of the modern legal education review, that of technology in legal education. When we come to consider how the role of technology in legal education is handled by reviews in the UK in particular, we find quite a different, and very distinct, genre landscape. From an initial base of almost complete invisibility within legal education reviews, legal educational technology reporting has gone through an early phase of information-gathering, followed by a focus upon functionality and

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<http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf> accessed 17 May 2019.

specialist investigation, followed by integration in education reviews. The chapter finishes by drawing conclusions as to the history, current status and future of legal education reviews both as a general endeavour and in relation to the specific topic of legal education technology, in the UK and elsewhere.

We shall start by examining how genre theory provides a useful tool for the analysis of legal education reports.

II The Lens Of Genre Theory

Genre theory is familiar in linguistics, cultural and media studies. A genre is a categorisation of text or other cultural artefact by reference to assumptions and conventions that constitute a 'shared code between the producers and interpreters of texts included within [the genre]'.[15] Such frameworks then allow for intertextuality, or, in our context, the potential for viable comparison between legal education reviews. Acting as a benchmark, they can also be used to identify hybrids, and the occasions on which genre conventions are challenged or deliberately ignored which, in their turn, may lead to changes in the genre itself, or to new genres.[16]

Genre analysts have developed a range of tools by which texts have been analysed. In the work of John Swales for example, genre analysis is a method by which regularities in and between texts can be explained in terms of their shared communicative purposes within

[15] Daniel Chandler, 'An Introduction to Genre Theory' (*Visual Memory*, 1997) 5 <http://visual-memory.co.uk/daniel/Documents/intgenre/chandler_genre_theory.pdf> accessed 17 May 2019.

[16] See for example the sub-genres of novels, for instance science fiction or historical fiction.

discourse communities.[17] The concept of a discourse community — socially situated, reading and producing genres, and judging texts according to expectations, norms, and agendas of the community — is a key concept to the formation of genre critique as a tool of textual analysis. Swales outlined six descriptive characteristics of discourse communities. They have:

1. a broadly agreed set of common public goals;
2. mechanisms of intercommunication among members;
3. participatory mechanisms primarily to provide information and feedback;
4. one or more genres in the communicative furtherance of its aims;
5. a specific lexis; and
6. a threshold level of members with a suitable degree of relevant content and discoursal expertise.[18]

Genre thus sits within a context of community characteristics that operate upon it, and to which it contributes if the genre is to be perceived as a legitimate genre. In terms of legal education reviews the discourse communities tend to be more clearly defined than for reports that are addressed to the academic community. Their genre features are more recognisable as a result, and as we shall see in the four genres below, they can be delineated more easily. We shall also see how the diverse discourse communities are served by the four different sub-genres of reviews. And we shall note how the politics of legal education can be enacted in the ways that genres are manipulated. As Bhatia observed, following on from Swales's earlier analyses:

[17] John Swales, *Genre Analysis: English in Academic and Research Settings* (Cambridge University Press 1990), 24-32. See also John Swales, 'The Concept of Discourse Community' in Elizabeth Wardle and Dough Downs (eds), *Writing about Writing: A College Reader* (1st edn, Bedford/St Martin's 2011).

[18] See Swales (n.17, 1990), 26.

> Most often [a genre] is highly structured and conventionalised with constraints on allowable contributions in terms of their intent, positioning, form and functional value. These constraints, however, are often exploited by the expert members of the discourse community to achieve private intentions within the framework of socially recognized purposes.[19]

Framing the legal education review in the context of genre, therefore, serves to illuminate characteristics ('the *what*', 'the *who*', 'the *how'*, 'the *why'* and 'the *what now'* of the review) and expectations that are, at present, partly obscured for some audiences and purposes both within and outside the discourse community.

Academic research, without explicitly acknowledging it, also has its genres, where defining characteristics include methodology; origin (grant-funded versus contract research); and format (peer-reviewed; literature review, article, conference proceedings).[20] Not all of the legal education reviews, however, involve research as academics conceive it, and these variables do not alone address the subtleties of the commissioners' agenda or the politics

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[19] VK Bhatia, *Analysing Genre: Language Use in Professional Settings* (1st edn, Routledge 1993). It is interesting to note that Bhatia, perhaps more than Swales, is sensitive to the ways in which internal switches of point of view can affect meaning within a text. The stance of a researcher, for example, is never only an objective stance: it is constantly changing in subtle ways depending on the topic under analyses, the evidence, the importance of the topic, the views of others in the discourse community around the genre, and many other factors.

[20] For example, see the genre-based analysis of the structure of articles reporting empirical legal research in Girolamo Tessuto, 'Generic Structure and Rhetorical Moves in English-Language Empirical Law Research Articles: Sites of Interdisciplinary and Interdiscursive Cross-Over' (2015) 37 English for Specific Purposes 13.

behind the choice of investigators. Perhaps the closest analogy in this context is Rutherford's genre-based analysis of financial accounting reports, governed by accounting standards, socially constructed industry and sector norms, the agendas of those involved in reporting and the 'interrelationships between the expectations of users and preparers'.[21]

III Genres Of Legal Education Review

A Genre 1: A Collation of Information

The simplest, conceptually, of the genres is a collation of information about the different structures that comprise a qualification and continuing learning framework. These provide taxonomy and a functionalist overview of the sector.[22] They can provide useful data about trends, such as shifts in the relative significance of university study and workplace apprenticeship in common law countries.[23] Such collations, do however, require resources to keep them up to date and obscure cultural factors such as, for example, the depth of feeling about the value of mandatory pre-qualification work experience (articles, training contracts,

[21] Brian A Rutherford, 'A Genre-Theoretic Approach to Financial Reporting Research' (2013) 45(4) British Accounting Review 297, 308.

[22] Konrad Zweigert, Hein Kötz and Tony Weir, *An Introduction to Comparative Law* (3rd edn, Clarenden Press 1998); Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) <http://scholarship.law.duke.edu/faculty_scholarship/1249> accessed 17 May 2019.

[23] David Scott Clark, 'Legal Education' in David S Clark (ed), *Comparative Law and Society* (Edward Elgar Publishing 2012).

internships and similar constructs); concerns about pass rates or cost or the qualitative differences between JDs in the USA, Canada, Australia, Hong Kong and Northern Ireland.[24] The drivers for such collations are, by contrast with some of the other genres, usually transparent and concrete. Some are designed to provide information for students;[25] or for lawyers wishing to practise outside their home jurisdiction. In these cases the information is likely to be provided by knowledgeable insiders and updated regularly.[26] Others represent attempts by a supra-national organisation to collate information about its membership,[27] or by a group of comparative lawyers.[28] These again use data solicited from insiders, which is

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[24] The JD designator is not normally available in the UK. However, the extent of Northern Irish autonomy allows one institution to offer an innovative course that combines the usual UK undergraduate law degree, with a doctoral research degree: Queen's University Belfast, 'Postgraduate Research Course JD Juris Doctor (JD)' <http://www.qub.ac.uk/schools/SchoolofLaw/Study/JurisDoctor/> accessed 17 May 2019.

[25] For example, LawyerEdu.org, 'Steps to Become a Lawyer/ Attorney in Canadian Provinces/ Territories' (2015) <https://www.lawyeredu.org/canada.html> accessed 17 May 2019; National Conference of Bar Examiners, 'Bar Admission Guide' (2019) <http://www.ncbex.org/publications/bar-admissions-guide/> accessed 17 May 2019.

[26] International Bar Association, 'IBA Global Regulation and Trade in Legal Services Report 2014' (International Bar Association 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530064> accessed 17 May 2019.

[27] Conseil des Barreaux Européens — Council of Bars and Law Societies of Europe, 'Continuous Training in the CCBE Member Countries: Summary' (Conseil des Barreaux Européens — Council of Bars and Law Societies of Europe 2016) <http://www.ccbe.eu/document/National_training_regime/1_-_Summary_of_national_continuing_training_regimes.pdf.pdf> accessed 17 May 2019; European Commission, 'Lawyers' Training Systems in the Member States' (*European e-Justice Portal*, 2018) <https://e-justice.europa.eu/content_lawyers__training_systems_in_the_member_states-407-en.do> accessed 17 May 2019.

[28] Richard J Wilson, (2010) 'The Role of Practice in Legal Education' American University Washington College of Law Working Paper 21 October 2010 < http://ssrn.com/abstract=1695618> accessed 17 May 2019.

accurate at the point of collation, but may not be updated. A third sub-group, however, is collated by outsiders for persuasive or political ends, for example, a professional body wishing to demonstrate that a proposed change to policy is a global norm[29] or conversely that such a proposal could damage the profession by international standards.[30] Here, of course, there is a risk that the information obtained is out of date, misunderstood, or mistranslated.

The contribution of this genre, therefore, is a mapping of the scope, 'the *what*', of the field. We need to look to the other genres for evaluation of 'the *how*', 'the *who*' and sometimes 'the *why*', and 'the *what now*'?

B Genre 2: Expert Review

It is the second genre that emphasises 'the *who*'. Early reports were necessarily heavily dependent on expert opinions, given the paucity of other data. Twining, for example, describes a report he conducted in the 1970s as

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[29] For example, Solicitors Regulation Authority, 'Qualification in Other Jurisdictions — International Benchmarking' (Solicitors Regulation Authority 2016) <https://www.sra.org.uk/sra/policy/sqe/research-reports.page> accessed 17 May 2019.

[30] For example, Law Society of England and Wales, 'Report into the Global Competitiveness of the England and Wales Solicitor Qualification: An Investigation into the Potential Impact of the SRA's Training for Tomorrow Proposals on the Global Reputation of Solicitors of England and Wales' (Law Society of England and Wales 2015) <https://www.lawsociety.org.uk/support-services/research-trends/global-competitiveness-of-the-england-and-wales-solicitor-qualification/> accessed 17 May 2019.

> reveal[ing] how little solid information there existed in nearly all countries about most facets of legal education, even in respect of elementary statistics. We had to proceed and pontificate on the basis of pooled impressions, biases and extraordinarily patchy information.[31]

In this genre, what is critical is the expertise and credibility of the investigators. How and why they are selected is therefore significant to any understanding of their findings. Rarely is the method of selection transparent.[32] It is usually clear that the panel is intended to be representative of insider stakeholders (e.g. the judiciary, academics, the profession). Lay members, representatives of other professions or foreigners may also be recruited for an outsider perspective; students or consumers, lacking in power, less so. What is also less transparent is the extent to which investigators are recruited for their expertise; because their credibility with a particular audience sector is thought to facilitate acceptance of the recommendations; or even because the commissioners know that they can be relied on to take a particular stance in the investigation.

The investigative process may be a form of enhanced quality assurance exercise, a deliberately defensive exercise[33] or something close to a public inquiry soliciting submissions

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[31] William Twining, 'Developments in Legal Education: Beyond the Primary School Model' (1990) 2(1) Legal Education Review 35, 48.

[32] There are exceptions: Council of the Federation of Law Societies of Canada (n 6) 6.

[33] See for example the approach of the Australian Law Admissions Consultative Committee in 2010, in asking the legal experts attached to a national project to produce national outcome measures to render the law examples as close as possible to those already promulgated by the Council of Australian Law Deans: Law Admissions Consultative Committee (n 5) 1.

from interested parties and visiting sites.[34] To the extent that the review comes to a consensus of conclusions and recommendations (*how* and *what now*), it may operate in similar ways to a Delphi model, but is unlikely to formalise its activities in quite this way. Although it may expect a great deal of panel members, including the possibility that they have access to a panacea, this kind of investigation does, however, lend itself to the close, collegiate, discursive, argumentative and persuasive legal habitus. It is also capable of generating strong conceptual and theoretical models that can have traction, because they are at a comparatively abstracted level, outside their own contexts. The three apprenticeships model found in the US Carnegie report[35] — whilst similar in some ways to the three-stage sequential model of the British Ormrod report[36] — is of this kind.

This genre, then, is inductive, setting questions (which may be open, defensive or politicised) and asking the experts to answer them, possibly with the aid of meetings, workshops and submissions. Its strength is as considered advocacy by a group of individuals in whom the audience is able to place a considerable degree of trust.

C Genre 3: Deductive Consultation Exercise

[34] See the approach taken by the ABA Task Force, which conducted meetings and outreach activities, attended public events and solicited submissions and comments from respondents (including students), ABA Task Force (n 14).

[35] William M Sullivan and others, *Educating Lawyers: Preparation for the Profession of Law* (1st edn, Jossey-Bass 2007).

[36] Roger Ormrod, 'Report of the Committee on Legal Education (Ormrod Report) (Cmnd. No. 4595)' (HM Stationery Office 1971).

By contrast, the principal characteristic of Genre 3 is deductive policy-making where a hypothesis,[37] a policy, a series of options,[38] or a detailed implementation plan[39] is put out for consultation: 'the *how*' or 'the *what now*'. There is no necessity that the commissioners contract outsiders to carry out the exercise. The range of consultees may be wider than in Genre 2 although submissions may be solicited and some element of interviewing, survey, workshops or Delphi groups might be used to obtain them. Nevertheless, this form of consultation is not an empirical activity demanding transparency about the method of analysis; nor, unless there is a very clear preponderance of opinion, a quantitative referendum. Indeed, a researcher's analytical approach might produce different results from those articulated by the commissioner.[40] Genre 3 is a feature of regulatory openness and in that it is to be welcomed, but it is only a testing of the water, and there is no obligation on the consultor to act in accordance with what the consultation reveals.

D Genre 4: Deductive or Inductive Empirical Investigation

The principal characteristic of the final genre is its approach to analysis of 'the *why*'. Although many professional bodies and academic organisations collect and publish statistics

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[37] For example, that the Hong Kong solicitors' profession might adopt a bar examination of some kind: Jane Ching and others, 'Consultation on the Feasibility of Implementing a Common Entrance Examination in Hong Kong' (Law Society of Hong Kong 2014).

[38] Canada (n 7).

[39] For example, the detailed proposals and business case for a national examination in Canada: National Admission Standards Project Steering Committee, 'National Law Practice Qualifying Assessment Business and Implementation Plan' (Federation of Law Societies of Canada 2015).

[40] Elaine Hall, 'Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: 'Comment Is Free, but Facts Are Sacred'' (2017) 51(3) Law Teacher 364.

on, for example, pass rates or diversity, quantitative investigation in the legal context is rare.[41] Qualitative empirical investigation may capture similar themes to those uncovered in Genres 2 and 3. Where Genre 4 differs is in matters such as consciousness of the representativeness of samples, of representing the range of opinion as well as the scope of opinion, recognition that what is being investigated is opinion and perception, and in transparently systematic analysis that is usually thematic in nature. It is also, we suggest, more likely to be inductive and question-based than deductive and hypothesis based. By contrast with Genre 2, however, the investigators may have been recruited for their qualities as researchers rather than their credibility with the audience, and consequently may have to work harder to achieve a result that is credible tor the professional audience.

IV Intertextuality, Misreading And Digital Reports

What we have focused on so far is the extent to which a legal education review genre is formed by the organisation of its investigation. There are, however, many other textual features that contribute to our sense of genre, and notably that of intertextuality — the relationships between texts, that is, in our context, the reports that the different kinds of investigation generate. The word was coined by Julia Kristeva as meaning the ‘intersection of textual surface’ where ‘[a]ny text is constructed as a mosaic of quotations, any text is the

[41] Evaluation of competences or work types is, however, sometimes quantitative: National Conference of Bar Examiners, 'A Study of the Newly Licensed Lawyer' (*National Conference of Bar Examiners*, 2012) <http://flsc.ca/wp-content/uploads/2014/10/admission4.pdf> accessed 5 June 2014; Federation of Law Societies of Canada, 'National Entry to Practice Competency Profile Validation Survey Report' (Federation of Law Societies of Canada 2012) <http://flsc.ca/wp-content/uploads/2014/10/admission4.pdf> accessed 17 May 2019.

absorption and transformation of another'.[42] Texts always tend to intersect, overlap, spill out into other texts; but Kristeva goes beyond this in her elaboration of the term. It has become associated with a number of critical theorists: Bakhtin (from whom Kristeva derived the concept of 'dialogism' and developed it), Derrida, Foucault, Barthes, Lacan Riffaterre and Greimas, to name a few.[43] It has thus acquired the status of a discourse marker in critical theory across a range of interpretive disciplines. It has generated its own critical lexis, as Fewell and Boal and Mai point out, such as 'echo', 'trace', 'intratextuality', 'interautorialité', 'interdiscursivité' and the like.[44] Because intertextuality opens up latent, marginalised or hidden textual meaning this way, it is possible to use it to explain and engage with the ideological complexities of powerful texts and ways of reading within legal education reports — and of course, other legal texts.

A key critical figure in this regard is Harold Bloom. For him, meaning in texts was highly contested, and much of his criticism analyses how that comes about. He agreed with Borges

[42] Julia Kristeva, *Desire in Language: A Semiotic Approach to Literature* (Leon Roudiez ed, Thomas Gora and Alice Jardine trs, Revised, Columbia University Press 1980) 65, 66.

[43] Earlier critics had similar ideas. T.S. Eliot, for instance, observed that on account of the 'introduction of the new (the really new) work of art ... the *whole* existing order' of previous texts 'must be, if ever so slightly, altered', TS Eliot, 'Tradition and the Individual Talent', *Selected Essays* (3rd edn, Faber & Faber 1951). For a semiotic definition of intertextuality, see Algirdas Julien Greimas and Joseph Courtés, 'Intertextuality' in Larry Crist and others (trs), *Semiotics and Language: An Analytical Dictionary* (Indiana University Press 1982).

[44] Hans-Peter Mai, 'Bypassing Intertextuality: Hermeneutics, Textual Practice, Hypertext' in Heinrich F Plett (ed), *Intertextuality* (De Gruyter 1991).

that ‘every writer *creates* his own precursors’. [45] He describes how, for writers ‘[t]o deconstruct a poem is to indicate the precise location of its figuration of doubt, its uncertain notice of that limit where persuasion yields to a dance or interplay of tropes’.[46] He defines as trope ‘a stance or a ratio of revision; it defends against other tropes’.[47] One such illustration is the *clinamen* or creative swerve that later or ‘belated’ poets take around the strong figures of earlier predecessors, for example, Shelley, who was such a ‘strong’ figure for Yeats. The conflict leads the belated poet to misread the earlier, in an attempt to escape, in the title of one of Bloom’s celebrated critiques of poetic canon theory, the ‘anxiety of influence’.

Bloom also applies his insight into the process of misreading poetry to a theory of critical interpretive misreading. In a sense, Bloom can hardly avoid moving from a theory of poetic misreading as this is enacted between strong poets, to a theory of reading as this is enacted between strong critics. The reading process and the anxiety of influence are after all, fundamental to both groups. Bloom went on to define tradition or canonicity itself as a trope within the map of misreading. Tradition thus becomes the effect of misreading.[48]

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[45] Jorge Luis Borges, 'Kafka and His Precursors' in Donald A Yates and James East Irby (eds), André Maurois and Sherry Mangan (trs), *Labyrinths: Selected Stories & Other Writings* (New Directions 1964) 201. Cited in Harold Bloom, *Yeats* (Oxford University Press 1970) 4.

[46] Harold Bloom, *Wallace Stevens: The Poems of Our Climate* (Cornell University Press 1980) 386.

[47] ibid 39.

[48] Harold Bloom, *Kabbalah and Criticism* (Seabury Press 1975) 97. As Alastair Fowler perceptively commented in a celebrated article on the subject, there are a variety of canons existing within any single domain. He identified at least six: see Alastair Fowler, 'Genre and the Literary Canon' (1979) 11(1) New Literary History: A Journal of Theory and Interpretation 97.

There are many parallels here to the canon of legal educational reviews. That there is such a canon in each jurisdiction can never be in doubt. In England, the Robbins Report[49] was a powerful education report, created in part by engagement with it by subsequent reports. In legal education in England, the Ormrod Report[50] was one of the most influential in modern times, and each subsequent report has benchmarked its influence and sought to swerve around it. In Australian legal education, the report on uniform admission requirements based upon prescriptive areas of academic legal study, produced by the Law Admissions Consultative Committee (LACC) is another such example.[51] Misreading, like intertextuality, opens up latent, marginalised or hidden textual meaning in such documents, and it is possible to use it to explain and engage with the ideological complexities of powerful texts and ways of reading within hegemonic legal traditions.

The debates around intertextuality, misreading and the anxiety of influence apply to genres of legal education reviews as much as they do to literary canons. As we shall see, they also apply to the history and current status of legal education technology reports. This also allows us to explore the historical development of reports situated in several of the four basic genres outlined above.

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[49] Lionel Charles Robbins, 'Higher Education Report of the Committee Appointed by the Prime Minister under the Chairmanship of Lord Robbins' (HM Stationery Office 1963).

[50] Ormrod (n 36).

[51] Law Admissions Consultative Committee, 'Review of Academic Requirements for Admission to the Legal Profession' (Law Council of Australia 2014) <https://www.lawcouncil.asn.au/files/web-pdf/LACC docs/01.12.14_-_Review_of_Academic_Requirements_for_Admission.pdf> accessed 20 May 2019.

V Genre Theory and Digital Legal Education Reports

As Maharg points out, the Ormrod Report of 1971[52] makes almost no mention of the use of technology, in spite of the fact that both radio and television had been used for Open University programmes since 1969; and there were earlier examples of distance learning use of technologies in other jurisdictions (e.g. in Australia). The same is true of the Marre Report of 1988,[53] which had a wide remit as a basis for its reporting. As Maharg puts it, however, '[t]he problem lay in how the remit was interpreted by the Committee members. From its absence one can assume that technology was simply not part of a recognisable legal educational landscape worthy of gaze and analysis'.[54] In part this was a function of the genre. Those reports described 'a complex social educational system as if it were a legal system comprising rules, personnel, actions'.[55] There were no debates around educational methods (at a time when there was intense debates in school education reports around the status of the school curriculum in England) or around the emergence of new technologies.

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[52] Ormrod (n 36).

[53] Committee on the Future of the Legal Profession, 'A Time for Change: Report of the Committee on the Future of the Legal Profession (Marre Report)' (General Council of the Bar and the Law Society 1988).

[54] Maharg, 'Shared Space: Regulation, Technology and Legal Education in a Global Context' (n 3) 6.This was in spite of the early pioneering work done at Chicago-Kent Law School in 1983, and well-publicised in US legal education. This work was ongoing — each year the law school conducted an annual survey of computer technologies in use by the 500 largest law firms in the USA. In addition to this initiative, a number of conferences sprang up to support the emerging field — for example the international series of Substantive Technology in Law Schools (SUBTECH) Conferences (Richard Jones, 'Second International Conference on Substantive Technology in the Law School' (1993) 7(1) International Review of Law Computers & Technology 237.) Chicago-Kent's work was an inspiration for the BILETA Reports, below.

[55] Maharg, 'Shared Space: Regulation, Technology and Legal Education in a Global Context' (n 3) 6–7.

The first reports to take digital learning seriously in the UK were the three British and Irish Legal Education Technology Association (BILETA) Inquiries.[56] The reports were clearly Genre 1 in our categories above, shading into Genre 2, in that they largely presented snapshots of digital provision in law schools. Part of the motivation was political, in that BILETA as an organisation dedicated to the promotion and use of digital technologies, realised that the issue of invisibility and lack of knowledge had to be addressed urgently. The reports also set standards for such provision. However their discussion of educational, media, technological or sociological theory was thin at best, and as Maharg puts it, 'although [the reports' standards] were seen as minimum standards only, the recommendations arguably did not support those who wished to think more creatively and interdisciplinarily about the relationships between law, education and technology'.[57]

The Advisory Committee on Legal Education and Conduct (ACLEC) Report of 1996 was the first report in England and Wales to take seriously the role of technology in legal education.[58] In the field of technology it made use of the first and second BILETA reports, and cited

[56] See British and Irish Legal Education Technology Association, 'Report of BILETA Inquiry into the Provision of Information Technology in UK Law Schools' (British and Irish Legal Education Technology Association 1991); British and Irish Legal Education Technology Association, 'Information Technology for UK Law Schools: The Second BILETA Report into Information Technology and Legal Education' (British and Irish Legal Education Technology Association 1996); Phil Harris and Martin Jones, 'A Survey of Law Schools in the United Kingdom, 1996' (1997) 31(1) The Law Teacher 38.

[57] Maharg, 'Shared Space: Regulation, Technology and Legal Education in a Global Context' (n 3) 7.

[58] Lord Chancellor's Advisory Committee on Legal Education and Conduct, 'First Report on Legal Education and Training (ACLEC Report)' (Lord Chancellor's Department 1996).

theoretical overviews such as Abel on legal professionalism,[59] Peter Clinch's work on law libraries,[60] and took account of the detailed fieldwork undertaken by Harris et al.[61] In spite of this, however, there was little integration of education and technology theory; and there was little of the growing sophistication of fusion in new media theory and education generally that was occurring in other educational reports.

Yet in ACLEC we see the emergence of technology as a separate sub-genre in the legal educational report, a process that was continued in the Legal Education and Training Review (LETR) of 2013, an example of Genre 4, where not only was digital theory discussed in some depth, but the literature of adjacent digital educational domains, in education itself and in medical education, were referenced and discussed in the main report[62] and literature review.[63] In addition a separate report was commissioned from Richard Susskind.[64] What we have in LETR is an intertextuality that had not appeared before, and which found the space it did in part because of the BILETA Inquiries, but also because of earlier reports on specific

[59] Richard Abel, *The Legal Profession in England and Wales* (Blackwell, 1988).

[60] Peter Clinch, 'Practical Legal Research the Cardiff Way' (1994) 28(3) The Law Teacher 270.

[61] Phil Harris, Steve Bellerby and Patricia Leighton, *A Survey of Law Teaching* (Sweet & Maxwell 1993); Harris and Jones (n 56).

[62] See for example Webb and others (n 8), paras 2.99, 3.59, 3.74, 3.86ff. There are many other examples throughout the report.

[63] Julian Webb and others, 'Research Phase Literature Review (Legal Education and Training Review)' (SRA, BSB and CILEx Regulation 2013) <http://letr.org.uk/literature-review/index.html> accessed 17 May 2019, chapter eight, paras 44-63. Immediately after this section the authors addressed a subject not hitherto discussed by any legal education report, but of central importance to the use of technology, namely the issue of curricular *and* technological change processes in legal education (paras 68-81).

[64] Richard Susskind, 'Provocations and Perspectives (Legal Education and Training Review)' (2012).

technologies — Paliwala's reports on IOLIS,[65] and a decade later Maharg et al's report on SIMPLE.[66]

More recently, we see new forms of reports arising on technology — *Legal Futures*' roundtable reports on technology, innovation and the professions, for example.[67] Such reports focus on specific technologies and though theory-lite, at least try to cover Genres 1 and 2 above. More significant is an initiative such as Dan Linna's Legal Services Innovation Index, based in the USA, which is an attempt to create an index of legal-service delivery innovation, based upon indicia of innovation in law firms and also in law schools -- effectively Genre 1. Linna's focus starts not from law schools, but from innovation itself, and by shifting the narrative point of view and the content focus of the report, he creates a new sub-genre of report for digital technologies in legal education.[68] Most of the data was scraped from law school websites, and Linna readily admits there are many more granular innovations within law school curricula that are being missed in his index. Nevertheless, the project is significant as a report in that it sets out data that was otherwise entirely missing from earlier reports such as BILETA or ACLEC. Not only does Linna expose what law schools do in their curricula, but also in the future intends to measure law schools' use of

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[65] Paliwala A, 'Co-operative Development of CAL Materials: A Case Study of IOLIS',1998 (3)*The Journal of Information, Law and Technology (JILT)*. <http://elj.warwick.ac.uk/jilt/98-3/paliwala.html>. New citation as at 1/1/04: <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_3/paliwala/>

[66] Helyn Gould, Michael Hughes, Patricia McKellar, Paul Maharg, Emma Nicol, *SIMulated Professional Learning Environment (SIMPLE). Final Programme Report*. (JISC, np, 2008).

[67] Legal Futures, 'Reports' (*Legal Futures*, 2019) <https://www.legalfutures.co.uk/reports> accessed 17 May 2019.

[68] Daniel W Linna Jr, 'Legal Services Innovation Index' (*Legal Tech Innovation*, 2019) <https://www.legaltechinnovation.com/> accessed 17 May 2019.

social media.[69] What is missing is the rich genre contextualising of education and technology that is present in the IOLIS or SIMPLE reports (arguably Genre 3), or in sections of LETR. A future direction for technology reports should be the fusion of these genres; and we would argue that until the genre form of reports on technology and legal education become more intertextual and interdisciplinary, until they begin to open to the anxiety of influence and the play of readings and misreadings, they will continue to inhibit or constrain our ability to develop imaginative, theory-rich and analytical accounts of digital cultures for legal education.

VI Summary

The march of the legal education review will not be halted.[70] It is true, as a rare comparative review of reports in England and Wales, the USA, Australia and Hong Kong, concluded recently, that, ‘Legal education reviews tend to be indifferent in investigating new methods to enhance students' learning.’[71] The point is that it is rarely their remit to do so. The taxonomy of genres developed in this chapter is a first step to dispelling misunderstanding and

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[69] Linna (n 68).

[70] Nederlandse orde van advocaten, 'Consultatie Toekomstbestendige Beroepsopleiding Advocaten van Start' (2017) <https://www.advocatenorde.nl/nieuws/consultatie-toekomstbestendige-beroepsopleiding-advocaten-van-start> accessed 24 July 2017; Hook Tangaza, 'Review of Legal Practitioner Education and Training' (Hook Tangaza 2018) <http://www.lsra.ie/en/LSRA/20180928 Review of Legal Practitioner Education and Training - Final version.pdf/Files/20180928 Review of Legal Practitioner Education and Training -Final version.pdf> accessed 17 May 2019.

[71] Wilson WS Chow and Firew Tiba, 'Professional Legal Education Reviews: Too Many ‘What’’s, Too Few ‘How’’s' (2013) 4(1) European Journal of Law and Technology < http://ejlt.org/article/view/183> accessed 17 May 2019.

misplaced expectations amongst the wider audience including in particular those who wish to compare reports with each other. It may also assist commissioning bodies in understanding the implications and likely outcomes of the kind of investigation that they ask for. It has the potential not simply to inform, but to shape the discourse community.

The taxonomy of the kinds of review that do exist, also serves to highlight the kind of report that is missing. We have, particularly in Genre 1, snapshots. Genre 2 provides us with informed opinion and advocacy on pressing questions of the moment. Genre 3 collates opinions on very specific items of policy. This means that, with rare and honourable exceptions, we lack longitudinal data;[72] data that compares the outcomes of different educational interventions;[73] or the predictive value of different kinds of assessment. Here we are at a considerable disadvantage to our colleagues in medical education who regularly

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[72] But see Michael Shiner, 'Entry into the Legal Profession: The Law Student Cohort Study Year 4' (The Law Society 1997); Bryant G Garth and others, 'After the JD' (*American Bar Foundation*, 2019) <http://www.americanbarfoundation.org/research/project/118> accessed 17 May 2019; Melissa Hardee and Hardee Consulting, 'Career Expectations of Students on Qualifying Law Degrees in England and Wales: A Legal Education and Training Survey' (Higher Education Academy 2012) <https://www.heacademy.ac.uk/system/files/resources/hardee-report-2012.pdf> accessed 17 May 2019.

[73] And see the comparison between a vocational course and articles in The Law Society of Upper Canada, 'Report to Convocation' (The Law Society of Upper Canada 2016) <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/p/pdc-pathways-pilot-project-evaluation-and-enhancements-to-licensing-report-sept-2016.pdf> accessed 17 May 2019; and the comparison between two different modes of vocational education in Alli Gerkman and Elena Harman, 'Ahead of the Curve: Turning Law Students into Lawyers' (Institute for the Advancement of American Legal Systems 2015) <http://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdfhttp://iaals.du.edu/sites/default/files/documents/publications/ahead_of_the_curve_turning_law_students_into_lawyers.pdf> accessed 17 May 2019.

interrogate the effectiveness of what they do, and follow the effects into medical practice. Indeed, there seems to be some reluctance to believe that this kind of activity could, or should be adopted, or adapted for legal practice.[74]

When we turn to the sub-genre of digital legal education reports, we see, historically, the movement for technology of *any* sort, and especially digital technologies, to be recognised as worthy of detailed analysis. We see how thin that analysis is because of the early paucity of interdisciplinary feed-in, and the invisibility that stemmed from the lack of interest in the relationship between education and technology.

Throughout all this, many of the more sophisticated debates around technology recognise the double-edged nature of digitisation. There is no good news or bad; simply better ways to build, and more efficient and ethical ways to use technology educationally. But we also see, as the digital commentary grows in complexity, so too does the necessity to read, misread and read beyond previous reports' treatment of technology. We need to recognise that such technologies are actually institutions:[75] in Swales's powerful description of language, they have the chilling capacity to be at once 'both complicitous and contestatory';[76] and our

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[74] 'In contrast with studies about predicting grades, research on predicting attorney effectiveness is limited, particularly with respect to the ways in which success as a lawyer can be defined and measured.' Marjorie M Shultz and Sheldon Zedeck, 'Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions' (2011) 36(3) Law & Social Inquiry 620, 623.

[75] A point made by Giddens: Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (MacMillan 1979); and quoted in John M Swales, 'Genre and Engagement' (1993) 71(33) Revue Belge de Philologie Et D'Histoire 687, at 692.

[76] The phrase belongs to Swales, Swales (n 75). There, he describes how in structuration theory 'human agency and social structure are implicated in each other rather than being opposed. Human agency constitutes social

reports must investigate that ambivalent, protean quality of digital culture and its technologies. They can support neoliberal tendencies in legal education or they can educate ethically and transformationally; they can be used to suppress student agency rather than liberate it. It is in our hands to persuade regulators and others that we need sophisticated reports (at the very least Genre 4) into the nature, current use and future of such technologies if we are to understand how to design and deploy them well for our discipline and our profession; and that such reports require careful attention to genre structure, including many of those aspects we have analysed above.

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structure, while social structure is the medium of human agency'. He observes how his own use of standard English reinforces the symbolic orders and forms of communications he analyses — hence his honest acknowledgement of the moment's complicitous and yet contestatory qualities. It is a quality that pertains to most, if not all, regulatory reports, and especially those on, or containing sections upon, digital technologies in legal education.

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