

Commentary

HARRY ARTHURS AND THE
PHILOSOPHER'S STONE[©]

BY PEER ZUMBANSEN*

I. CATCH ME IF YOU CAN

A. *Always More Than You Can See*

As would seem appropriate for this occasion, this commentary is but a small attempt to illuminate some central features of Harry Arthurs and his work being celebrated. The strong interconnections between the themes in Arthurs' work are readily apparent. These themes are, for obvious reasons, on the agenda of contemporary (labour, and general) legal analysis and legal reform debates. And yet, this does not render the commentator's task any easier. While it might seem obvious that a short commentary in this context should aspire to be, at best, a brief exposition of the insights and further questions raised by the celebrated scholarship, it presents quite a challenge to take the first suitable steps in this undertaking. The famous "three remarks," "four points," or "five theses" that speakers at comparable occasions usually resort to as a springboard or a safety net for their discussion cannot hide the problem that the chosen, allegedly "central notions," "key concepts," or "guiding questions" might all just be very arbitrary choices. The key notions identified in somebody else's thinking are in fact the very foundations and expressions of one's own restlessness and wonder. Similar to the

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tendency of writing the same book each time again, everything outside ourselves is seen as confirming and supporting all that we have always been wondering about in the first place. Our own preoccupations become those of the world.

B. *Labour Law and The New Economy or The Philosopher's Stone, Lying On The Kitchen Table*

In her article,² Katherine Stone identifies flexibilization, globalization, and privatization as the three key challenges to labour rights in our time. Working with these labels, which could each represent a treasure chest as much as a Pandora's box, Stone unfolds an intricate critique of the contemporary political economy of work and the legal regulatory framework that governs, or still hopes to govern, work.

It is clear from her concentrated parlance that her article is but an elaboration of, an excursion from, and a guide to what is a much larger body of work and scholarship dedicated to the study of the conditions and norms shaping today's workplace. The student of Stone's work on *work* is rewarded by an inside account of a long series of investigations, astute findings, and illuminating reports on the current beleaguered state of labour and employment law.³ And against the background of a conscious or unconscious education through Hannah Arendt's *Vita Activa*⁴ or Karl Polanyi's *Great Transformation*,⁵ her work dwells upon Michael Piore and Charles Sabel,⁶ Lawrence Lessig,⁷ and Arthurs, who represent our guides to the facts and norms of the workplace in the knowledge economy.

² Katherine Stone, "Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in our Time" (2005) 44 Osgoode Hall L.J. 77.

³ See Katherine V.W. Stone, "The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law" (2001) 48 UCLA L. Rev. 519; Katherine Van Wezel Stone, "To the Yukon and Beyond: Local Laborers in a Global Labor Market" (1999) 3 J. Small & Emerging Bus. L. 93; and, most recently, Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004).

⁴ Hannah Arendt, *The Human Condition* (Chicago: Chicago University Press, 1958).

⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, 2d ed. (Boston: Beacon Press, 1957).

⁶ Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984).

⁷ Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

In this light, then, it is apparent that the “challenges to labour rights” as described by Stone and her commentators are as clearly demarcated as they are open to constant refinement and further elaboration.⁸ In this brief discussion, all that seems possible might be to complement these described “challenges” with a number of key words or notions that further elaborate what is already captured by the terms flexibilization, globalization, and privatization. I would like to propose a number of complementary terms in order to sketch a still wider frame of reference for the challenges identified by Stone. Where she employs the labels of her identified challenges as tools, drills, and torch lights to illuminate the complex maze of economic and regulatory transformation that characterizes work and the “law of work” in the knowledge economy, Stone’s labels already point beyond themselves. As such, each term of art becomes suggestive of its continuation and elaboration, but also, of course, of its own contestation.

Alternative labels, then, are nothing else than expressions of a productive contestation from which an essential element of admiration can certainly never be denied. The proposed terms come from my own “EndNote” database into which I have been storing bibliographical references for several years. And, for all among us who are acquainted with this program or other comparable ones, one of the ever-recurring and yet recurrently difficult tasks is the identification of the most appropriate or adequate explanatory and later identifiable keyword with which a certain work and author should be associated. This naming must be done with great care so that the insertion of the keyword in a later search for stored references actually delivers a usable list of data. If I were, for example, to store publications by Arthurs or Stone under the keyword “law,” their works would likely come up together with many others, without any more concrete acknowledgement of the particular area or field of law or of the specific perspective brought to law by these authors. But if I store their work under the keyword “labour law,” I run the danger of being both under- and over-specific, not to mention the fact that such a classification would be far too reductive and limited. To avoid such dangers, I could add keyword upon keyword, for example, adding employment law to labour law, or industrial relations to the former two.

⁸ See *e.g.* Judy Fudge, Eric Tucker & Leah F. Vosko, “Changing Boundaries of Employment: Developing a New Platform for Labour Law” (2003) 10 C.L.E.L.J. 329.

It is clear that such a classification would fail to capture the wealth of what can be learned from these scholars. Their questions, queries, and again, restlessness, shines through the answers they are struggling with in their work. They are scholars, legal scholars, employment and labour law scholars, feminist lawyers, and legal theorists with a fervent and insatiable interdisciplinary appetite. Their work draws not only on law, political science, sociology, history, and economics, but also on organizational and management theory, legal theory, and cultural studies. What label, then, might best capture the essence of their writings? Clearly, *globalization* offers itself as such a classifying and domesticating term; however, at the same time, we perhaps render the term globalization too diffuse and ultimately meaningless. Furthermore, in light of their work and that of others such as Boaventura de Sousa Santos,⁹ Saskia Sassen,¹⁰ or Alfred Aman,¹¹ we have long been drawn to study the domestic face of globalization, the local production, both in fact and norms, of what had hitherto been understood as an external, floodwave-like force and influence. The internalization of globalization and its study as a politically-effected transformation, the de-politicization of which continues to be the central interest of many scholars today, forces us to lay aside all mono-causal or uni-disciplinary explanations of globalization.

II. *WORK (COMPARATIVE LAW VS. VARIETIES OF CAPITALISM), REGULATORY THEORY AND ORGANIZATION (STATE VS. SOCIETY), AND LEGAL EDUCATION (ELITES VS. DEMOCRACY)*

The following remarks highlight *three* areas that seem to have captured Arthurs' attention. They will be identified as "work," "regulatory theory," and "legal education." These areas can be taken as labels for Arthurs' enduring and encompassing scholarly and political engagement. This last mentioned distinction—between academic and

⁹ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. (London: Butterworths LexisNexis, 2002).

¹⁰ Saskia Sassen, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (New York: New Press, 1998); Saskia Sassen, "Globalization or denationalization?" (2003) 10 *Rev. Int'l Pol. Econ'y* 1.

¹¹ Alfred C. Aman Jr., *The Democracy Deficit* (New York: New York University Press, 2004).

“non-academic” work, between the ivory tower and the political arena—allows us to grasp, perhaps more appropriately, the width of Arthurs’ inquiry. In that respect, each of these three terms, *work*, *regulatory theory*, and *legal education*, are mere labels for larger undertakings and orientations.

A. *Work*

“Work” as keyword and challenge reaches beyond labour and employment law to capture the analytical perspectives on the political regulation of work, the workplace and the system of contract, industrial relations, workers’ representation, and perhaps even co-determination. It also touches on the promises for work today: productivity, proprietorship, and alienation. Work becomes a challenge to the law and politics of the theory of the welfare state just as much as an argument for the strengthening of transnational labour rights for sweatshop workers and other disenfranchised modern-day slaves. Work, then, radically unfolds between different and competing research and policy agendas. A traditional comparative law approach, taken most dominantly by corporate governance scholars around the world, wants to make us believe that a universal convergence of rules pertaining to corporate control and organization is taking place,¹² where little to no room is left for workers’ voices.¹³ However, we can see the unfolding of a competing paradigm. Whereas the comparative law approach disconnects human capital, and with it work and workers, from the business firm,¹⁴ scholars of and around the so-called “Varieties of Capitalism School”¹⁵ reconstruct corporate governance as a

¹² Henry Hansmann & Reinier Kraakman, “The End of History for Corporate Law” (2001) 89 *Geo. L.J.* 439.

¹³ See e.g. the recent collection of country studies on the rules governing workers’ co-determination and works councils in corporations. Theodor Baums & Peter Ulmer, eds., *Employees’ Co-Determination in the Member States of the European Union* (Heidelberg: Verlag Recht und Wirtschaft, 2004).

¹⁴ Katherine V.W. Stone, “Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace” (2002) 34 *Conn. L. Rev.* 721; Simon Deakin, “The Many Futures of the Contract of Employment” in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (London: Oxford University Press, 2002) 177.

¹⁵ Peter A. Hall & David Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); Sigurt Vitols, “Varieties of

comprehensive, yet highly dynamic regulatory regime that positions the firm in wider socio-economic, political, and historical contexts.¹⁶ Understood as a challenge to contemporary innovative thinking and regulatory politics, the firm provokes an interdisciplinary and transnational research program. Work in the “New Economy”¹⁷ forms an integral part of our critical inquiry into the political economy of corporate, labour, business, and social law, and it is this perspective to which Arthurs pervasively adheres.¹⁸

B. *Regulatory Theory and Organization*

The terms “regulatory theory and organization” relate and speak to the current transformation of our understanding of what regulation *through* law can achieve and, ultimately, what the law can and cannot do.¹⁹ This discussion, also unfolded as “legal pluralism,” has for a long time been a hunting ground for Arthurs.²⁰ Regulatory theory speaks to the norm-producing dimensions of today’s changing regulatory

Corporate Governance: Comparing Germany and the UK” in Peter A. Hall & David Soskice, eds., (*ibid.* at 337); John W. Cioffi, “Restructuring ‘Germany Inc.’: The Politics of Corporate Governance Reform in Germany and the European Union” (2002) 24 *Law & Pol’y* 355; and Peer Zumbansen, “European Corporate Law and National Divergences: The Case of Takeover Regulation” (2004) 3 *Wash. U. Global Stud. L. Rev.* 867.

¹⁶ Walter W. Powell, “The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise” in Paul Dimaggio, ed., *The Twenty-First-Century Firm: Changing Economic Organization in International Perspective* (Princeton: Princeton University Press, 2001) 33.

¹⁷ Joanne Conaghan, “Labour Law and the ‘New Economy’ Discourse” (2003) 16 *Austl. J. Lab. L.* 9 [Conaghan, “Labour Law”]; see also the concise analysis by Manfred Weiss, “The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool” (2003) 25 *Comp. Lab. L. & Pol’y J.* 169; and Kerry Rittich, *Vulnerability at Work: Legal and Policy Issues in the New Economy* (Ottawa: Law Commission of Canada Research Paper, 2004).

¹⁸ Harry W. Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation” in Conaghan, Fischl & Klare, *supra* note 13 at 471 [Arthurs, “Private Ordering”]; Harry W. Arthurs, “Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture” (2001) 22 *Berkeley J. Emp. & Lab. L.* 271.

¹⁹ An excellent overview of the contemporary discussion is now provided by David Levi-Faur, “The Global Diffusion of Regulatory Capitalism” (2005) 598 *Annals Amer. Acad. Pol. & Soc. Sci.* 12.

²⁰ See Harry W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1988); Harry W. Arthurs, “Governance After the Washington Consensus: The Public Domain, the State and the Microphysics of Power in Contrasting Economies” (2002) 29 *Man & Dev.* 85; and Arthurs, “Private Ordering,” *supra* note 17.

landscape. We find that law-making takes place on all levels, be it domestic or international, and in forms that can no longer be easily associated with either public or private spheres.²¹ Complementing and breaking with these dichotomies, however, is the *transnational* paradigm that suggests a diffusion of our traditional concepts of actors and actions.²² Transnational labour law involves state and non-state actors in the production of norms, which also means that the nature of the norms we are dealing with is changing.²³ We have learned from Arthurs and, for example, from Kerry Rittich²⁴ and Adele Blackett,²⁵ that there is no merit in dismissing corporate codes of conduct simply as non-law. This dismissal would lead to a petrification of our understanding of law and, thus, of our search for adequately responsive and reliable forms of societal self-governance. Instead, we need to reconsider the spectrum of our questions when attempting to assert the legal nature of these new, unofficial, or *soft*, norms. Again, the question will define our answers: what is law supposed to achieve? With this question we can begin to assess the current regulatory landscape.

The question of regulation has been reformulated as a far-reaching inquiry into the possibility of sustaining the paradoxes of public and private freedom,²⁶ and of listening to the heartbeat of civil

²¹ Peer Zumbansen, "Transnational Law" in Jan Smits, ed., *Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) 738.

²² See especially the groundbreaking work of Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956). See also Harold Hongju Koh, "Transnational Legal Process" (1996) 75 *Neb. L. Rev.* 181; Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential of Transnational 'Private' Litigation" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds., *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004) 287.

²³ Harry W. Arthurs, "Labour Law Without the State" (1996) 46 *U.T.L.J.* 1 [Arthurs, "Labour Law"].

²⁴ Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer Law International, 2002). See also Kerry Rittich, "Enchantments of Reason/Coercions in Law" (2003) 57 *U. Miami L. Rev.* 727.

²⁵ Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8 *Ind. J. Global Leg. Stud.* 401.

²⁶ See generally Jürgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge: MIT Press, 1996); A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Economy* (Cambridge: Cambridge University Press, 2003); and Peer Zumbansen, "Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law" (2004) 15 *E.J.I.L.* 197.

revolutions in an era of periodicizing and reassessing the rule of law,²⁷ the interventionist state,²⁸ and the welfare state.²⁹ This inquiry takes place in the midst of a post-modern, post-regulatory experiment and in a radically de-territorialized, post-national, global regulatory environment.³⁰ Reaching beyond the disciplinary confines of the field, Arthurs mobilizes labour law as a radical force to deconstruct the allegedly universal story of global progress, the end of history, and the supreme law of the market. With labour law under siege, law finds itself with its back against the wall, constantly pressed to find a good reason of why it should be there at all.³¹ Transforming this constellation into one of asking whether and why we care about law, the existential defence provokes further existential questions.³² Where law reconstitutes itself as force and imaginative practice, it now must do so in light of a radically transformed socio-economic, global environment. What the law can do appears inseparable from what non-law can do. While the lessons of legal pluralism and legal anthropology³³ have barely reached the sanctuaries of mainstream law school curricula, let alone the legal profession, their struggle for survival against the omnipresent, allegedly all-encompassing, self-explanatory, and usurping forces of law and economy already runs full speed ahead. With our continuing *search for law* after the regulatory aspirations of the democratic welfare state,³⁴ and in face of the persisting conundrum of social self-governance, even

²⁷ Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 *Yale L.J.* 566; Allan C. Hutchinson & Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987).

²⁸ Michael Stolleis, "Die Entstehung des Interventionsstaates und das öffentliche Recht" (1989) 11 *Z.N.R.* 129.

²⁹ Niklas Luhmann, *Political Theory in the Welfare State*, trans. by John Bednarz Jr. (Berlin: Walter de Gruyter, 1990).

³⁰ Arthurs, "Labour Law," *supra* note 22.

³¹ Conaghan, "Labour Law," *supra* note 16.

³² Harry W. Arthurs, "The World Turned Upside Down: Are Changes in Political Economy and Legal Practice Transforming Legal Education and Scholarship, or Vice Versa?" (2001) 8 *Int'l J. Leg. Prof.* 11.

³³ Sally Falk Moore, "Law and social change: the semi-autonomous field as an appropriate subject of study" (1973) 7 *Law & Soc. Rev.* 719; Sally Enlge Merry, "Legal Pluralism" (1988) 22 *Law & Soc. Rev.* 869.

³⁴ Jürgen Habermas, "The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies" in Jürgen Habermas, ed., *The New Conservatism: Cultural Criticism and the Historians' Debate*, ed. and trans. by Shierry Weber Nicholsen (Cambridge, MA: MIT Press, 1989) 48.

“after privatization,”³⁵ we find ourselves now engaged in an inquiry that is interdisciplinary, transnational, and in light of the recent challenges to the notoriously fragile “international” law,³⁶ ever more important.³⁷

The second half of our keyword couple, *organization*, gives expression to ongoing explorations into the constitution of the firm and applicable management theories, from traditional and hierarchical to post-modern, heterarchical, and intercultural concepts of management. Here we are concerned with the worker as member of the firm, a complex institution of ongoing societal learning.³⁸ The firm is no longer merely a private actor, but what is it? Path-dependencies in our conceptualization of state and society, public and private, political and non-political, stand in our way of adequately understanding the new nature of the firm. As it has increasingly assumed public functions, particularly in the context of privatization, the firm sheds its allegedly private nature and transforms into a hybrid public-private social organization. The firm, certainly, is not the only organization undergoing such changes. Upon closer view, we see convergence in supposedly private studies of corporate management theory and work done in administrative law and administrative science, where regulatory bodies that rely existentially on private, societally-fragmented knowledge place a high demand on organizational and management

³⁵ Gunther Teubner, “After Privatization? The Many Autonomies of Private Law” (1998) 51 *Curr. Legal Probs.* 393.

³⁶ Martti Koskenniemi, “‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law” (2002) 65 *Mod. L. Rev.* 159; Martti Koskenniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16 *E.J.I.L.* 124; and Ed Morgan, “The Other Death of International Law” (2001) 14 *Leiden J. Int’l L.* 3.

³⁷ See the discussion in Andreas L. Paulus, “The War Against Iraq and the Future of International Law: Hegemony or Pluralism?” (2004) 25 *Mich. J. Int’l L.* 691.

³⁸ See Dirk Baecker, *Postheroisches Management: Ein Vademecum* (Berlin: Merve, 1994); Michel Crozier, *L’entreprise à l’écoute: Apprendre le management post-industriel (1989)* (Paris: Seuil, 1994); Simon Deakin, Tom Goodwin & Alan Hughes, “Co-operation and Trust in Inter-Firm Relations: Beyond Competition Policy?” in Simon Deakin & Jonathan Michie, eds., *Contracts, Co-operation, and Competition: Studies in Economics, Management and Law* (Oxford: Oxford University Press, 1997) 339; Paul K. Edwards, John Geary & Keith Sisson, “New Forms of Work Organization in the Workplace: Transformative, Exploitative, or Limited and Controlled?” in Gregor Murray et al., eds., *Work Employment Relations in the High-Performance Workplace* (London: Continuum, 2002) 72; Christiane Prange, “Interorganisationelles Lernen in, von und zwischen Organisationen” in Jörg Sydow, ed., *Management von Netzwerkorganisationen* (Wiesbaden: Gabler, 2001) 151; and Peer Zumbansen, *Innovation und Pfadabhängigkeit: Das Recht der Unternehmensverfassung in der Wissensgesellschaft* (Habilitation thesis, University of Frankfurt 2004) [forthcoming 2006].

theory.³⁹ The *contractualization* of knowledge transfers between civil society and the agencies of the regulatory welfare and post-welfare state resembles in many ways the production of knowledge within large, boundaryless corporations.

C. *Legal Education*

Finally, the theme of legal education in Arthurs' work eventually succeeds, while potentially embarrassing us for our own lack of a comparably tireless struggle for reform,⁴⁰ in inspiring and empowering us in our daily attempts to strike the right balance of "distance and care," "freedom and constraint," "experiment and guidance," and "innovation and routine." In our continuing search for the optimal mix of solid education, professional training, and life long critical learning,⁴¹ Arthurs powerfully reminds us of the overriding value in constantly questioning our practice and underlying assumptions, in "doing the research," instead of repeating half-heartedly the same mistakes that were made yesterday. These reminders continue to inspire, to intrigue, and for some, perhaps, to irritate.

Today, the struggle for democratic access to higher education continues.⁴² At the same time, change has long been coming with respect to the demographic and territorial transformation of today's student

³⁹ Karl-Heinz Ladeur, "Privatisierung öffentlicher Aufgaben und die Notwendigkeit der Entwicklung eines neuen Informationsverwaltungsrechts" in Wolfgang Hoffmann-Riem & Eberhard Schmidt-Assmann, eds., *Verwaltungsrecht in der Informationsgesellschaft* (Baden-Baden: Nomos, 2000) 225; Peer Zumbansen, "Vertragsregimes im 'Dritten Sektor': Zur Verortung des Verwaltungsrechts angesichts des Zusammenwachsens privat- und öffentlichrechtlicher Handlungsformen" in W. Rainer Walz, Karsten Schmidt & Hein Kötz, eds., *Non Profit Law Yearbook*, vol. 2 (Köln: Heymanns, 2003) at 61.

⁴⁰ See Harry W. Arthurs, "Poor Canadian Legal Education: So Near to Wall Street, So Far from God" (2000) 38 *Osgoode Hall L.J.* 381; Harry W. Arthurs, "The Spider, The Bee, The Snail And The Camel: Legal Knowledge, Practise, Culture, Institutions and Power in a Changing World" (Keynote address at the Canadian Graduate Law Students Conference, Osgoode Hall Law School, Toronto, May 2005), online: [Comparative Research in Law and Political Economy <http://www.comparativeresearch.net>](http://www.comparativeresearch.net).

⁴¹ See *e.g.* the contributions to McGill's recently embraced theme of "transsystemic legal education" for its curriculum reform: (2005) 50 *McGill L.J.* [forthcoming 2006] (with contributions by Harry Arthurs, Rod Macdonald, Susan Drummond, and others); see also the strategic plan for Osgoode Hall Law School, with a strong emphasis on reconceiving legal education in a global and critical perspective [2005].

⁴² See the excellent discussion by Susan Boyd, "Corporatism and Legal Education in Canada" (2005) 14 *Soc. & Legal Stud.* 287.

(and faculty) bodies. With prospective students likely to be more mobile and de-territorialized in their selection of higher education institutions, the same may be true with respect to their employment opportunities after graduation. Questions regarding the direction and content of curricula might have progressed to reflect a higher degree of the law school's nervousness as a complex institution and its responsiveness to the "needs of the market." Yet, contemporary, frantic attempts to adapt the university to market demands lack a wider-scale assessment of the conditions, role, and function of education and learning as such.⁴³ With national traditions and trajectories proving to be very influential in shaping future thinking about education and university reform, much remains to be done to bring together these distinct, national, or segregated discourses. Arthurs' call for a radical approach to understanding legal education as a wide-reaching program in social and political studies⁴⁴ gives testimony of his standing commitment to think more encompassingly. Discussing, then, legal theory from the perspective of the "political economy of (legal) education," the formation and training of lawyers becomes a crucial inquiry into the democratic accessibility of university studies and the training of elites. This endeavour gives rise to questions of power and exclusion, of identity and of finding oneself again.⁴⁵

⁴³ Roderick A. Macdonald & Jason MacLean, "No Toilets in Park" (2005) 50 McGill L.J. [forthcoming in 2006] [Macdonald & MacLean, "No Toilets"]; see especially Section B: Identity, Power, Hierarchy, in which the authors argue for a radical set of questions pertaining to the goals and objectives of legal education, that is itself defined as "interpretive practice"; and see also Roderick A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dal. L. J. 211.

⁴⁴ See Harry W. Arthurs, "Where Have You Gone, John R. Commons, Now That We Need You So?" (2000) 21 Comp. Lab. Law & Pol'y J. 373; Harry W. Arthurs, "The Political Economy of Canadian Legal Education" (1998) 25 J.L. & Soc'y 14; Harry W. Arthurs, "The State We're In: Legal Education in Canada's New Political Economy" (2001) 20 Windsor Y.B. Access Just. 35; and Harry W. Arthurs, "Madly Off In One Direction: McGill's New Integrated, Poly-Jural, Trans-Systemic Law Program" (2005) 50 McGill L.J. [forthcoming 2006].

⁴⁵ See Macdonald & MacLean, "No Toilets," *supra* note 42 at n. 143, with a pointed reference to Peter Goodrich, "Law and the Courts of Love: Andreas Capellanus and the Judgments Of Love" (1996) 48 Stan. L. Rev. 633. In his article, Goodrich writes (*ibid.* at 675): "Legal training teaches the subject to separate the personal and the legal, demanding the repression of emotion and the privileging of the objectivity of rules over the subjectivities of truth—Aristotle's wisdom without desire." Goodrich goes on to say: "[I]t draws the subject into a network of relations and an institutional environment modeled upon *legal* definitions and valuations of persons, actions, and things. It is an environment which, by its nature, is competitive, antagonistic, and frequently destructive. ... [L]awyers will tend to find love or relationship elsewhere—either in a past that came before the law, or in a spectral domain outside the law, tenuously, if not tenebrously, exterior to the

This dialectical process is painfully felt throughout one's academic career, so it is no surprise that it has repercussions already in the first stages of legal university training. The ambiguity of technical terms, legal concepts, and principles coincides with the daily challenge to position oneself and one's work.⁴⁶ This is particularly felt where academic research, writing, and teaching is so intertwined with real politics, as is the case when working in labour law.⁴⁷ The open-endedness of the category "labour law" allows us to make visible "national traditions" of labour law scholarship,⁴⁸ and these traditions again are intertwined, non-linear, disputed, and contested. How could this not be otherwise?⁴⁹ It is the constant challenge of the researcher and the teacher to work in light of this complex history in order to carefully help shape the future. Whether keywords, suitable for database archives or for bullet-pointed speech outlines, capture the wealth of complex history hiding behind simple formula, matters less than whether they are taken as invitations to dig deeper into the history and the sociological, political, economic, and legal discourses through which these keywords have come to prominence. While such an undertaking inevitably will

individual persona. It is a love sought elsewhere, a lawyerly *amour lointain* attached to exteriorities, a byproduct of commodities, or of the mirroring function of status. In Freud's terms, such love is either pre-Oedipal, the repetition of a primary attachment, or a species of narcissism. In whichever form, it is likely to be unconscious unless the legal persona has had the advantage of considerable therapeutic help. In the end, my analysis leaves one question: If I give so much of my time to the law, how much of the law speaks through me? [Emphasis in original]."

⁴⁶ See, for the terms "economic law" and "social law," Rudolf Wiethölter, *Rechtswissenschaft* (Frankfurt: Fischer, 1968) at 168.

⁴⁷ See Harry W. Arthurs, "National Traditions in Labor Law Scholarship: The Canadian Case" (2002) 23 *Comp. Lab. Law & Pol'y J.* 645.

⁴⁸ *Ibid.* at 646.

⁴⁹ See the discussion in H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2d ed. (Oxford: Oxford University Press, 2004). See also H. Patrick Glenn, "In Search of the Transsystemic: Legal Systems and Legal Traditions" (2005) 50 *McGill L. J.* [forthcoming 2006]. Glenn writes, "Tradition conceived as information has no borders. Groups defined by adherence to tradition may create borders for themselves, but this will be the product of particular traditions only, such as that of legal systems. So, tradition, as a general concept, can have no underlying idea of territorial supremacy. Tradition *is* a general idea, but allows itself to be particularized to everyone's particular way of life. Tradition is therefore not a hegemonic idea, though cannot itself prevent the development of hegemonic traditions. The relations between traditions are thus in principle relations of influence and persuasion, as opposed to conflict and dominance. ... Teaching the merits of different laws, in a dialogical process in the same classroom, must therefore be based on their traditional and normative character. The process is not one of description, but rather of engagement."

illuminate local, regional, and national history, it will also highlight the connections, interdependencies, and parallels between different national and transnational discourses. Why not use keywords such as “work,” “regulatory theory and organization,” and “legal education” to reach for a better understanding of the law—and of ourselves?