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Formal Legal Education: A Few Lessons From The Past, Useful For The Future

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**FORMAL LEGAL EDUCATION:
A few lessons from the past, useful for the future**

By Professor John H. Wade*

Introduction

1. This note suggests (again) that some of the goals of legal education can be discovered helpfully by observing excellent “lawyers” (in their diverse occupations) anecdotally and/or systematically.
2. Repeats the challenging question – what are the causes of a person becoming an excellent lawyer?
3. Summarises a century of criticism of formal university legal education for allegedly failing to contribute “enough” towards the production of a sufficient number of “excellent” or even “competent” “lawyers” (in the diversity of careers which “lawyers” enter).
4. Sets out a quick quiz, to be answered quickly or slowly, to help extract important educational goals and methods from the past for the future.
5. Suggests lessons from the past worthy of regular incorporation into every law school and university ecosystem.

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What is “excellent lawyering”? (within the diversity of “legal” careers)

Presumably the majority of law teachers and educational policy makers have friends who, in our opinions, are model “lawyers”. We respect them for their character, integrity, perseverance, specialised technical knowledge, breadth of knowledge, wisdom, range of skilled and accessible friends, adaptability, humility, assertiveness, humour, courage, listening, speaking and writing skills.¹ We would send our beloved relatives to them for assistance. (Do we tell our law students with pride about these model friends of ours?)

These role models clearly define some of the key ultimate attributes we are seeking to inculcate in law students, and ourselves, as teachers. How often are these long terms goals invisible to both staff and students; or devoured by other intermediate goals of law school such as funding, curriculum “coverage”, grade hunt, and esteem accumulation?

The anecdotal or systematic sociology of “lawyering”, law offices and lawyering excellence, rather than of “law”, is another wave of scholarship and teaching which has hardly touched Australia.²

Causation – what paths to excellent lawyering?

How were these ideal lawyers created? By what diversity of paths? By what combinations of nature and nurture?

What positive contribution did their formal legal education have towards expert or competent knowledge, skills and character? This is an important, though humbling, and mysterious question. Probably one third of the best lawyers I know were not present at Sydney University Law School in either mind or body.³ They were leading busy lives elsewhere for four years. (I know, because they borrowed my notes.) Conversely, some of the worst lawyers I know attended nearly every class. (They also borrowed my notes.) What standard theories on nature and nurture can be recycled from these anecdotes? For example, law school experience has only marginal influence upon the already very “bright” students; and is perhaps of only marginal influence upon the already “failed” in skill and character? If so, why do we labour? Perhaps for the inspiration and enlightenment of the nebulous in-betweens and the “late-blossomers”? Or is law school experience

¹ Note the remarkable number of top measures of excellence which are related to attitude and character. See J O Mudd and J W La Trielle, “Professional Competence: A Study of New Lawyers” (1988) 49 *Montana L Rev* 11.

² eg L M Brown and T L Shaffer, “Toward a Jurisprudence for the Law Office” (1972) *Am J Juris* 125; C D Kelso, “Steps Towards a Lawyer Oriented Jurisprudence: Problems, Promises, Procedures and Pitfalls” (1967) 19 *U Florida L Rev* 552.

³ See more systematic evidence of law student “absence” in Australia and USA in Ziegert, Stephens and the Cramton Report discussed in J H Wade “Legal Education in Australia – Anomie, Angst and Excellence” (1989) 39 *J Legal Educ* 189 at 196-7.

largely irrelevant, as the intensive education of the market-place will quickly push the pre-ordained good, bad and in-between to higher levels of their dormant “potentials”?

Formal Legal Education – what is it?

Formal “legal education” takes place in many contexts – CLE, PLT, daily workshops in law firms and government departments, amongst accountants, valuers, doctors, university law and business faculties, both undergraduate and postgraduate, some psychology, criminology, dental and medical faculties, tape, radio, TV and DVD “law” programs, the proliferation of “legal” internet sites, and a vast industry of “legal publications” for all levels of interest.

Of course, *informal* legal education is occurring each minute in mega-blasts of observation, experience, reflected-upon-experience, questions, chats, reading of internet or hard copy snippets and tomes, TV and film soap operas, and daily newspaper, internet and TV “news” about conflict which has entered a “legal” arena.

A narrow band of formal legal education is that which takes place in universities towards JD, LLB or other degrees.

A century of criticism and perceived “failure”

This above narrow type of formal university legal education in Western countries has been subject to an onslaught of criticism for over a century.⁴ The persistent critics are both insiders and outsiders – law students, reform commissions, law faculty researchers, and government agencies. If the century of critics are even fifty percent correct, how can we hope to “advance” into the future, when on the dominant *published* historical interpretation, we are building on regularly recycled ruins? Why are the critics of this form of university legal education so persistent and harsh? Are our goals too high and too many?

If the last 100 years of university legal education have allegedly been so bleak with only momentary glimpses of light, why not the next 100 years also? What has changed?

To remind you of the bleak century of comment – university law schools are criticized (even more voluminously in the last two decades):

- on *goals*: too focussed on ephemeral rules; unnecessarily dividing theory and practice; being amateur sociologists, economists, historians, logicians and psychologists; isolated from “learned” disciplines, physically, emotionally and intellectually; uncertain what shibboleths

⁴ See Appendix A for a “few” of the standard references critiquing a century of university legal education.

like “thinking like a lawyer” even mean; dictated to by ignorant and ephemeral practitioner groups or “customer” students; neglect or nominalism in key areas such as ethics, service of the poor, cross cultural sensitivity, international law, and especially skills; goal platitudes copied into vision statements; student culture focussed on grades, not learning; academic culture focussed on bulk research productivity, not good teaching, or a helpful educational ecosystem.

- On **methods**: boring after first semester; intimidatory; humourless; ignorant of and disinterested in learning theory; isolated from practical experience; individualistic; minimal group or cooperative learning; neglecting insights from practitioners; replicating mistakes of the past; teacher-centred talking; insensitivity to multiple learning styles; driven by powerpoint and potted summaries; restricting admission to the already “bright”, thereby increasing chances of status and success; isolation of teachers and students and undue individualism; learning by anecdote, devoid of systematic data (eg the “litigation explosion”)
- on **resources**: under-funded; trapped by the Langdellian model of large classes and cheap casebooks; a cash-cow for the university; talent diverted by “publish or perish” and the pursuit of research funding; talent lost to a highly paid private sector.
- on **feedback**: little ongoing feedback to students; lack of resources or training for feedback; reduction to ranking by written issue-spotting exams; resistance to student feedback about “the system”; little openness to constant student feedback in order to discuss and implement changes.
- on **educational ecosystem**:⁵ increasingly managed by short-term, top down, bonus-driven, shoot-the-messenger bureaucrats; with paying students demanding value-for-money; staffed by ageing academics; managing increasing cultural and linguistic diversity; expecting more for less; possibly widening ranges of incoming educational “talent”; institutional incentives to pursue research funding; increased expectations upon staff; more part-time staff; increased staff cynicism and distrust about “change”; constant marketing; propaganda and deception towards students and research funders; pseudo and real staff accountability to funders; competitive pursuit of “esteem indicators”; gradual and allegedly “efficient”

⁵ The complex factors interacting in any educational environment are occasionally systematised as an “ecosystem”(pond or swamp). See outstanding translation of educational theory and practice for university teachers in P Ramsden, *Learning to Teach in Higher Education* (London and New York: Routledge, 1992); and J Biggs, *Teaching for Quality Learning at University* (Buckingham: SRHE and Open University Press, 1999).

separation of research and teaching; preoccupation with “economic rationalism, efficiency and the generation of income”; and attempted accountability on those same measures⁶; resistance to change due in part to inertia, ageing, distrust, poor resources and perceived increasing workloads.⁷

Despair?

Is the law school glass half full, or half empty? It is certainly relative deprivation when law schools are compared around the planet.⁸

The avalanche of criticism, of course, implies multiple moderate or high expectations and possibly increasing “enlightenment” of both staff and students. Are these expectations too high? What is a realistic quota of core competencies (beyond propaganda) for a university law school?

My own subjective impression is that the quality of legal education at my own law school is higher (momentarily?) on all measures, in contrast to the various law schools I attended and taught at in Australia, Canada and USA between 1960s and 1990s.

A quick quiz for legal educators

Set out below is a quick quiz to assist law teachers to clarify next semester’s goals, methods, resources and feedback.

1. What are your current five greatest books ever written on law, which you would recommend to every law student to read several times? (How many times have you read each of these?)
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.....
.....
2. What are your current five greatest books on legal education which you would recommend to every law teacher to read several times? (How many times have you read each of these?)
.....
.....
.....

⁶ R Collier, “We’re all socio-legal now? Legal education, scholarship and the ‘global knowledge economy’ – reflections on the UK experience” (2004) 26 *Sydney L Rev* 503; M Thornton, “The idea of the university and the contemporary legal academy” (2004) 26 *Sydney L Rev* 481.
⁷ M Keyes and R Johnstone, “Changing legal education: rhetoric, reality and prospects for the future” (2004) 26 *Sydney L Rev* 537.
⁸ W Twining, “Developments in Legal Education: Beyond the Primary School Model” (1991) 2 *Legal Ed Rev* 35.

3. What are the current ten themes in each subject you teach which will be eternal, even as ephemeral case law and statutes in that subject ebb and flow? What percentage of your past or current students can recite at least 7 of these 10 themes by rote?

.....

4. What are your current five best law journal articles written in the last 100 years which you would recommend to every law teacher and student to read multiple times? (How many times have you read each of these?)

.....

5. What are the five classical “types” of law teachers?⁹ Where do you fit at present in those five types? Why? Do you tell your students regularly your where and why typology?

.....

6. What were the features of the best personal educational experiences which you have had? Why were they so good? Which of those features are replicated in the classes which you currently teach?

.....

7. What were the features of the worst educational experiences which you have had? Why were they so bad? Which of those features are replicated in the classes which you currently teach?

.....

⁹ Traditional legal textbook scholar; practitioner-scholar; clinical law teacher; interdisciplinarian, activist teacher – see E G Gee and D W Jackson, “Bridging the Gap: Legal Education and Lawyer Competency” (1977) *Brigham Young U L Rev* 695.

8. What did you learn from your students last semester?

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.....

9. Which parts of your current work do you love?

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.....
.....

10. Who was the best “lawyer” you have ever worked with (in whatever capacity)? What attributes made him/her so good? Which of those attributes do your colleagues and students say are present in you?

.....
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.....

Did you have difficulty answering these questions? You are not alone.¹⁰

Another question:

11. Why are these questions so difficult to answer? Speculate – would other “disciplines” of university study have more or less difficulty in answering an equivalent quiz?

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Basic lessons from the past for the future of formal legal education

Amidst the constant babble of the critics, are there any basic lessons to give university educators and policy makers some realistic goals and methods? Here are a few lessons from the past. There are no quick fixes here, especially no technological quick fixes. Rather the hard work of implementing “old” truths. Each lesson ends with a “therefore....” and leaves the reader to attempt to fill in what changes or stability might be needed in your teaching, at your law school and university (ie the “ecosystem”). This is a form of budget-cutting, self-help, unsupervised, distance learning.

¹⁰ For the writer’s current personal answers, see appendix B.

The range of law school educational experiences which are most likely to “succeed” (ie cause progress towards lawyering excellence) for the largest number of students:

1. Usually occur during voluntary non-assessable common tasks which involve hard work, fun and relationships – clubs, societies, mooting, sport

Therefore.....

2. Usually occur during informal conversations in corridors or over meals between students, and between respected staff and students

Therefore.....

3. Usually occur where teachers add to the ecosystem the following established qualities of “good teaching”

- Wanting to share your love of the subject
- Making the material stimulating
- Working at the student’s level
- Using clear explanations
- Making it clear what has to be understood and why
- Showing concern and respect for students
- Encouraging student independence
- Using teaching methods that require students to learn actively and cooperatively
- Using appropriate assessment
- Giving high quality feedback
- Learning from students about the effects of teaching¹¹

EXERCISE

Put one or more ✓ next to the above practices if you think they are already occurring; one or more ? if you think they are missing.

¹¹ P Ramsden (1990-91) 2 *Leg Ed Rev* 149, 151.

Therefore.....

4. Usually occur where the following practices systematised in Africa in the fifth century AD are incorporated into the ecosystem.
- Respect students
 - When students demonstrate ignorance, inform obliquely as though **another** asked a question
 - Offer questions – ask how they would deal with a situation
 - Hurry slowly?
 - Teacher’s life must be an example
 - NB. Begin with what student knows in his/her own life ($x + 1$)
 - **Do not** make the task too daunting ($x + 7$)
 - Do not **bore** the wise; tell them you will run quickly over what they already know
 - Each class, look for feedback from students and then adapt method and content
 - **Enthusiasm** of a teacher is essential
 - Speak in slang in order to “reach” hearers
 - And yet language must also be **polished** and pleasant
 - The learner’s curiosity and love for the subject should be “sparked”. Without this, teaching is useless.
 - Change position, style and method regularly to combat weariness
 - People learn best by “doing”
 - Excellence is learned by being in the presence of excellence
 - Sometimes, learning takes place best by random wandering of ideas and questions (ie **no** structure at all). This produces a certain tension and frustration, which may lead to a requested **exposition**. To expound early is to avoid the preparation of the necessary tension and frustration.
 - “Do not rely too much on authority, especially mine.” “Have the confidence to find your own knowledge.”

- Informal learning, in the corridors, on walks, and while working is far more memorable than formal learning
- A teacher should express joy at intellectual liveliness of students
- A teacher should be constantly learning **as** (s)he teaches¹²

EXERCISE
Put one or more ✓ next to the above practices if you think they are already occurring; one or more ? if you think they are missing.

Therefore.....
.....
.....
.....

¹² G Howie, *Educational Theory and Practice in St Augustine* (London: Routledge, 1969).

Appendix A

References to Repetitive Critiques of Legal Education

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Appendix B

One example set of (fluctuating) answers to the Quick Quiz in “Formal Legal Education”

1. *Five Greatest Law Books?*

- K. Llewellyn, *The Bramble Bush* (New York: Oceana, 1930)
- W. Twining and D Miers, *How to do Things with Rules* 4th ed. (London: Butterworths, 1999)
- T.E. Atkinson, *Law of Wills* (St Paul: West, 1953)
- D. Pruitt and S. Kim, *Social Conflict: Escalation, Stalemate and Settlement* 3rd ed. (New York: McGraw Hill, 2003)
- ??

2. *Five Greatest Education Books for Legal Educators?*

- P. Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992)
- J. Biggs, *Teaching for Quality Learning at University* (Buckingham: SRHE and Open University Press, 1999)
- Cramton Report, *Law Schools and Professional Education* (Chicago: ABA, 1980)
- W. Twining, *Law in Context: Enlarging a Discipline* (Oxford: Clarendon Press, 1997)
- R.F. Mager, *Preparing Instructional Objectives* (Belmont, California: David S Lake, 1984)
- McCrane Report, *Legal Education and Professional Development* (Chicago: ABA: 1992)

3. *Ten eternal themes in your subjects?*

Eg Recurrent Themes in Family Law

- Female poverty
- Private and public obligations to support families – the shifting balance
- Commercial versus family interests
- The movement from discretion to rule (and back again)
- Violence in the home
- Self help, contempt and enforcement dilemmas
- Responding to pluralism, and the unorthodox.
- The unified Family Court – grasping a vision
- Conflict management – a smorgasbord of approaches
- Power over children’s lives

4. *Five Best Law Journal Articles?*

- W. Twining, “Pericles and the Plumber”, (1967) 83 *LQR* 396
- M. Galanter, “Reading the Landscape of Disputes” (1983) 31 *UCLA Law Rev* 4
- R. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce?” (1979) 88 *Yale L J* 950
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5. *Five Types of Law Teachers?*

- Traditional legal text-book scholar
- *Practitioner - scholar*
- Clinical law teacher
- Interdisciplinary
- Activist

Practitioner - scholar because this is interesting; challenging; enables reflective writing and examples in classroom. Yes, I tell students this.

6. *Best personal educational experiences?*

Eccentricity; funny; jokes; weird-clothes; drama; mastery of subject; succinct; excellent memory; classical "scholar"; multi-linguist; promotes alternative views; interactive; small groups; fun; realisation of other ways to learn; student motivation ("I want to be here"); stinging comments which prompt me to achieve; make me believe I can achieve; obvious love of subject; interested in me; "opens new world to me"; casual encounters with teachers; sense of accountability; modelled what is expected; feedback and chance to try again; high expectations.

7. *Worst education of experiences?*

Diet of lectures; no active participation; lack of expertise of teachers; institutional pressures to give courses to inexperienced teachers; felt uncared for; no "options"; zero feedback; disinterested in subject matter and students; kept "busy" writing notes; vastness of classes; anonymity; "coverage" of course: assumed prior knowledge which did not exist; loss of confidence cycle; failure to attach "new" knowledge to existing knowledge; constant note-taking; teacher not interested in what is being done; cynicism of other students.

(All these factors can be fitted into Biggs' *Ecosystem of Learning*.)

8. *What did I learn from my students last semester?*

Keep summarising; giving concrete illustrations; chat in corridors; define *goals* of each class more clearly.

9. *Which parts of my current work do I love?*

Practising as a mediator; writing reflectively on these experiences; my colleagues; most of my students; finding excellent interdisciplinarians.

10. *Who was best lawyer I have worked with? Why?*

My first master solicitor; my second law dean; two commercial law partners, one family law partner in Sydney and Brisbane.

Good listeners; enjoyed people; patient; high standards of personal behaviour; energetic; good sense of humour; meticulous about detail in documents; well-connected; memorised by rote some broad legal principles; prodigious workers.

11. Why are these questions so difficult to answer?

Perhaps because we do not ask them frequently? Also legal studies often appear to be a mass of facts and shifting rules; isolation means little sharing of joint “themes” and little self reflection on grand themes; or classics. Perhaps some other disciplines would have more established “classic” works and stages of development to answer questions 1-4. Questions 5-11 would be equally difficult or easy in other disciplines?