

TEN WAYS TO ENLIVEN LEGAL EDUCATION

by

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Introduction

Lord Denning's judgements have an enduring vivacity. An aliveness that textbook authors almost never emulate even when writing about the same legal issues. This article is a search for how that aliveness can be replicated in the teaching of law, an investigation of how to make legal education a more enlivening experience for both teacher and student.

This paper is in three parts. Part I considers eight specific achievable ways to enliven the teaching of law. Part II considers incentives for excellence in teaching. If management want certain conduct from employees or government from citizens, each consider increasing incentives for that conduct and there will be meaningful change in legal education when law schools follow suit. Finally, for initiatives to flourish the institutional framework must be supportive, and so Part III looks at law schools as institutions and their role in the 1990s.

In addition to Lord Denning, the other voice which illumined my years of undergraduate education was that of John Maynard Keynes, the economist. The study of Keynes' theories was an intellectual adventure without parallel. We studied Keynes' original writings and the works of other Keynesian economists. However, the latter were dull with little of the liveliness or interest of the original.

Why do the words of Lord Denning and JM Keynes live? Why do the words of their interpreters lie lifeless? Part of the answer is that both Denning and Keynes knew that aliveness matters. In the words of Lord Denning, "The parties come in with a living problem. I try to make my judgment live - so that it can readily be understood - by the parties in particular, and by others who hear it."¹

JM Keynes knew the power of ideas. It is clear that in his writing Keynes quested for an aliveness and inner music which would cause his ideas to echo down through history, as they have. Indeed, the last words of his classic work reflect his belief in the power of ideas and display the poetical prose in which he cast them:

"... the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachments of ideas ... soon or late, it is ideas, not vested interests, which are dangerous for good or evil."²

So that their ideas would be powerful and live, Lord Denning and John Maynard Keynes strove for freshness and vivacity in their writing. Just as we must in our teaching.

I: Eight Ways to Enliven the Teaching of Law

(a) Origins and Context

The first drafts of this paper were written as South-East Queensland endured its longest dry spell for over a century. We had tank water, enough for quick showers not baths. Yet as I lay

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¹ Lord Denning *The Family Story* Butterworths London 1981 at 207.

² JM Keynes *The General Theory of Employment Interest and Money* Macmillan London 1967 at 383-384.

spreadeagled atop my rain water tank measuring with a stick the precious inches left, I had a revelation which inspired me, Archimedes-like, to run naked down the street dripping water and shouting Eureka! But, alas, I was clothed and dry.

I had been idly contemplating the figure pi which I had to use in calculating the volume of water left in the tank. Pi is about 3.141. I have always wondered about this figure. Where did it come from? As it was treated with reverence by primary school mathematics teachers I had assumed its origins were shrouded in a deep and ancient mystery.

My revelation this morning was that if you draw a circle inside a square, the area of the square is the length of one side multiplied by the length of the other, ie, the diameter of the circle squared. The formula for area of a circle is pi multiplied by the radius squared. As the radius is one-half the diameter, the radius squared is the square of the diameter divided by four. Pi, then, is simply the figure which when divided by four produces the proportion of the area of a square occupied by the largest possible circle within it. In other words, the largest circle in any square will cover slightly over three-fourths of its area.³

No oracle gave us pi. A child with a compass, a ruler and some finely squared graph paper could have made a decent estimate. Yet don't we often teach law as my maths teacher taught me the area of a circle?

For a contract to exist there needs to be offer, acceptance, consideration, and an intent to create legal relations. Why? Scottish lawyers chuckle at our concept of consideration and civil lawyers decidedly guffaw about it. Why are these elements of a contract presented as inviolable writ? One answer is that not everything can be taught at once and education is a process of coming to grips with bite-sized chunks of knowledge. This is true to a point. However, I don't believe it aids the understanding of a student to present something out of context:

"Law cut adrift from the historical moorings of a culture is a law without a compass. Law is organic, the product of a specific time and an actual place. (However brilliant and progressive the design, if law fails to accommodate itself to the spirit of its people, it is in constant danger of being merely an irrelevant ornament)."⁴

So often in teaching law we teach what the law is, not why it is that way⁵. Yet for the preparation of future practitioners and the general liberal education of students, a deep understanding of legal principles and their origins far outweighs in value a grasp of detailed rules standing alone. In my experience the most able practitioners are those who have developed a deep understanding of the "whys" of the law. Their library reliably answers the question of what the law is, but it is their understanding of the history of law in that field and the forces which shaped it which allow them to predict how that law will be applied to the facts before them. And the study of law for all students, whether or not bound for legal practice, should surely be part of a general liberal university education, one purpose of which is to develop the capacity to ask intelligent "why" questions, so as to encourage the pursuit of a life filled with learning.

Happily in light of this, it is the "why" questions which are the most stimulating for faculty and student alike. Whether a matching offer and acceptance are necessary as independent elements of a contract, or merely serve as a practical check to ensure there has been a meeting of the minds, is a fascinating investigation. The level below the surface is why most of us are teachers; it is this level that seduced us. Why not share it with students?

3 At this stage, I give thanks to the vast distances between disciplines in the modern academy for sparing me the laughter of any scientific type into whose hands this paper might fall.

4 *Statement on Prelegal Education of the Association of American Law Schools* 1953 at 116 in Appendix B to 'Law Schools and Professional Education' Report and Recommendations of the Special Committee for a Study of Legal Education of the American Bar Association 1980.

5 Some, perhaps many, of the law schools in Australia tend to teach legal rules and the techniques of black letter law at the expense of teaching law in its context: M Le Brun and EE Clark 'The Growth of Legal Education in Australian Secondary Schools: Implications for Tertiary and Secondary Legal Education' (1989) 1 *Legal Educ Rev* 217.

So this is suggestion number one for enlivening the teaching of law: explain why the legal rules are as they are and encourage a critical attitude which asks how they might be improved. Teach the law in the context of its origins, not as a bundle of rules from a source both sacred and unquestionable.

(b) Originality

As we have seen, the words of Lord Denning and JM Keynes live today with power in part because the authors strove consciously to make their writings come alive by expressing them with rhythm and inner poetry. Another reason is that each author in writing was involved in an act of creation. The judgments of Lord Denning and writings of Keynes are deeply original works (as evidence, witness the decades of discomfort Lord Denning caused the House of Lords and the new school of economic thought to which Keynes gave his name).

So how do law teachers teach original material - must we make up the law? (It would at least save on preparation.) While my experience is limited, it is sufficient for me if my understanding is deepening as I teach. My teaching lives when my teaching and learning go on simultaneously. As a younger teacher I have plenty of opportunities for this happy symbiosis and it works.

This answer is also of use to the mature teacher. The quest for ever deeper, more profound perspectives on an issue is lifelong. However, it would be reasonable to expect the rate of deepening insight, and hence the enlivening tendency, to decrease over time. One counter to this trend is to change subjects, or at least take a break from them, periodically. A year or two's absence from an area allows one to return refreshed with new questions to be answered. Another approach is to completely change the form of teaching the same subject. A move from lecture/tutorial format to three hour seminars centred on problem-based learning completely recasts familiar subject matter.

(c) Expectations

Assume it is a Saturday morning. Tomorrow the beach beckons. Today is for chores. There is a car to be washed, clothes to be ironed, a sliding fly screen door to be fixed. Based on past experience you anticipate that after washing the car will look great and be a pleasure to drive, but after ironing the clothes will still have wrinkles, and the door you just **know** will be difficult to make slide smoothly.

What do you attempt first? And with how much enthusiasm?

“Our expectations of success largely determine our enthusiasm. As to increasing academic motivation ... a particular action needs both to be associated with something personally valued, and to stand a reasonable chance of success. Not valuing success, or not expecting success however valued, will leave the student unmoved ... (For high motivation) both value and expectancy need to be high.”⁶

There are at least two methods by which students can be given reasons to personally value what is happening in class. First, show them that the material being mastered and the skills being learned are applicable and necessary in their likely future careers.⁷ Legal skills are powerful problem-solving tools and by using realistic tutorial problems which place students in the position not only of legal adviser but also marketing director, businessperson, accountant etc students can witness the broad applicability and usefulness of such skills.⁸ Second, make the fact patterns emotionally involving and challenging.⁹

Likewise, there are at least two methods by which students can be given a reasonable prospect of success in their studies. First, explain the learning experience in that subject as one in which

6 JB Biggs 'Teaching for Better Learning' (1991) 2 *Legal Educ Rev* 133 at 141.

7 The skills, if not most of the substantive knowledge, learnt in studying a law degree are of direct applicability in the many other disciplines law graduates pursue.

8 Skills such as logical reasoning, identification of relevant issues from a mass of information, and the application of rules to facts, to name a few.

9 See the next two sections of this Part entitled Enthusiasm and Ethical Issues respectively.

a series of principles and skills are mastered in a step-by-step manner. For many students teaching legal problem-solving in a framework such as MIRAT is very reassuring as it gives them a concrete structure within which to work.¹⁰ Second, show the student their prospect of success is high. The pass rate for the subject is often a good place to start. Another technique I have used is to require students to grade exam answers from a past examination. This facilitates consideration of what constitutes a good answer and models such answers for students.¹¹ It also allows students to see for themselves how mediocre is a pass answer - often a reassuring experience. If we are to have enthusiastic students we must create expectations in students which promote enthusiasm.

(d) Enthusiasm

The traditional two hour lecture and one hour tutorial provides the opportunity, at least in the tutorial, to solve legal problems: to create solutions. It is commonplace that this creative process is more enlivening for teachers and students than the straight delivery of material in a lecture.

However, the traditional tutorial poses morally neutral, ethically non-contentious questions. Why? Enthusiasm and involvement are hallmarks of good students. Why serve up dry, flat, fact patterns when we could give students problems with which they could identify? Problems which would stir their hearts and kindle their sense of injustice. The question is rhetorical. The answer, involving as it does issues of what is perceived to advance academic careers and law schools' prestige, is beyond the scope of this paper.

However, the challenge is clear. Why involve only the students' heads when it is their hearts which generate enthusiasm? And why shut our teaching off from the real ethical dilemmas of practice when to do so shuts us off from our students' enthusiasm? The success of a legal education is a direct function of the enthusiasm a student brings to it. Yet the enthusiasm of law students is one of the most under-utilised resources of most law schools. I am not suggesting that tutorials should involve a steady diet of soul-searing scenarios and deadly dilemmas. But even the British tired of bangers and mash and Yorkshire pud. English pub food is now surprisingly good. Can not we teachers of the law burden the mass of our tutorial problems with a little of the spice of life?

(e) Ethical Issues

Emotion invoking fact patterns will often involve ethical issues. This is to be welcomed. In the era of The Fitzgerald Inquiry and WA Inc we cannot afford to relegate the teaching of ethics to a four week course. It should be integrated into the curriculum and can be quite easily. A few minutes reflecting on ethical implications in each of many tutorials throughout a degree will be far more effective than considering "Ethics" as a bundle of rules in a supposedly stand-alone subject.

Is it surprising that the legal profession is criticised for a lack of ideals, when ideals are like poison on the law teachers' lips? Is it surprising that lawyers are criticised for narrow self-interest, when altruism is one of the few words of latin origin never spoken in law school?

As evidence of the strange results a compartmentalised view of ethics can produce, I give you the following quotation from Joel Jay Finer, a law professor trained at Yale. In giving the welcoming address to a class of students entering his law school, he said:

"While you are here (at law school) the most important thing you find will be yourself. What will you find? Certainly changes will have occurred in your value system as legal and professional values become part of your personal moral code."¹²

10 JH Wade 'Meet MIRAT - Legal Reasoning Fragmented Into Learnable Chunks' (1990-91) 2 *Legal Educ Rev* 283.

11 It is a paradox that the tradition in legal education is to expect students to be masters of skills such as legal problem-solving without ever modelling such skills or examining what constitutes a good piece of legal analysis and why. My experience is that over a third of students in their second semester of their LLB cannot even distinguish between high distinction and credit answers when asked to grade them.

12 JJ Finer 'Finding Yourself in Law School' (1989) 37:4 *Cleveland State Law Review* 585 at 587.

Professor Finer cited Jesus saying, “Inasmuch as ye did it unto one of these my brethren, even these least, ye did it unto me”¹³ and continued:

“Think of that the next time you hear that accused drug pushers or accused murderers should have no rights. It would also mean that accused securities defrauders or public officials caught with their hand in the till should have no rights either. Time after time throughout your law school experience, you’ll learn to appreciate the interplay between the concept of “justice” and the idea that the rights we afford to the most despicable of our citizens will determine the rights received by the most admirable.”¹⁴

And so we have securities defrauders or corrupt public officials held up as “most admirable” citizens. Well might this professor have taught at the Queensland Police Academy or in a Western Australian course: Ethics for Politicians, Lawyers and Businessmen.

So don’t flinch from posing tutorial problems which challenge your students’ values lest your legacy to Australia is an even “finer” JJ Finer, Esquire.¹⁵

(f) A Partisan Perspective

A principal activity of law students is reading cases. The natural tendency in reading a case is to see it from the perspective of its author: the judge. Yet ask a barrister considering promotion to the bench and chances are one of their chief concerns is often that judicial life will be less enlivening than advocacy. Sober judicial impartiality requires a tight rein on emotions, a tight rein which the typical law student ingests as one critical component of “thinking like a lawyer”.

This bland impartiality ingested subconsciously makes for dull teaching. Encourage students to put themselves in the shoes of the lawyer for one side: “If you were the barrister representing Sally what would be your argument against that proposition?”

In discussing his technique for teaching case analysis, Paul J Spiegelman, with the true American’s disregard of the definite article, said “... my first questions ... are: What was plaintiff’s problem? What did plaintiff’s lawyer do about it? What was defendant’s problem? What did defendant’s lawyer do about it?”¹⁶

A partisan perspective, properly used, can bring a small group alive as students identify with different parties and make their respective cases. Such a perspective should also be encouraged as good assignment and exam technique. Approaching a problem from one party’s position can serve to uncover many new issues and lines of argument. Finally, a partisan perspective more closely replicates real life lawyering than treating students as trainee-judges. In the words of William Twining:

“In so far as university students, in the process of learning to think, are served appellate judgments as their staple diet, they are being taught to reason in a manner more suited to the work of appellate judges than to that of private practitioners, especially solicitors.”¹⁷

(g) Realism and Relevance

We have already considered how realistic fact patterns can help increase student enthusiasm. The standard counter-argument is that more life-like tutorial problems take longer to consider. They are less apt teaching tools as greater realism is only bought at the cost of learning fewer rules. However, both this dedication to black letter rules of law and the belief that life-like scenarios are slower to analyse are questionable.

¹³ Matthew 25:40 (American Standard 1901,1929).

¹⁴ *Supra* n.12 at 588.

¹⁵ Perhaps the author is here taking a too literal approach to Professor Finer’s writing and, in doing so, revealing the strict logical literalism of his own training in law. A literalism too ready to convict on technical evidence.

¹⁶ PJ Spiegelman ‘Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake’s Ladder in the Context of Amy’s Web’ (1988) 38 *J Legal Educ* 243 at 260.

¹⁷ W Twining ‘Pericles and the Plumber’ (1967) 83 *LQR* 117 at 120-121.

It is easier in practice to research a legal rule than to uncover the broader societal context in which it was formulated (and which is one of the major predictors of how a court today might apply it). It is easier in practice to turn up a case on point than to learn how two areas of the law interrelate. And finally, it is easier in practice to devise a scheme to avoid the imposition of stamp duties than it is to develop the values to determine whether the scheme is ethical.

In my own experience realistic fact patterns produce more enthusiastic students, better prepared, and so the learning process is swifter. However, even if my experience proves atypical, realism in teaching allows the transmission of other skills which should not be squeezed out by a dedication to mastering legal rules and their manipulation. In the words of a Victorian silk:

“It is highly desirable that at as early a stage as possible the student should see that the law operates within a matrix of facts and that, unlike the analysis which appears to take place in appellate court judgments, that matrix of facts has to be determined in the light of human foibles and on the basis of evidence and credibility.”¹⁸

In my teaching, the result of realistic, emotionally involving tutorial problems (judging from student feedback in formal staff assessment) has been a more coherent and deeper understanding of the total subject being studied: a more complete framework in which to place the rules. In short, students thrive on realism and emotion, at least so they report on anonymous questionnaires.

Furthermore, realistic fact patterns challenge one of the student body’s dearly held beliefs: that most of what they learn is irrelevant. This belief is a powerful soporific. Why study hard when hardly any of it is relevant? Telling students it is relevant appears to achieve little except confirm their view of the teacher as out of touch. So show them it is relevant: show them by having each problem they solve be one they might encounter after graduation. (And if some problems fail that test, perhaps one might question why these topics are covered in any depth in the course.)

One example which may prove instructive is of a contracts problem which dealt with the sale of an art work by an aborigine to a Singapore businessman. The problem concerned the possible illegality of the export contract. In five tutorial groups the students assumed the sale occurred in Australia. The result was different if the sale occurred in Singapore. When asked why they had not addressed that possibility most students hurriedly rechecked the facts. Some looked embarrassed but only one blurted out the truth behind the assumptions of all: “Because aborigines don’t travel overseas”.

This was a good problem in that it showed students how easily unwarranted assumptions can creep into and sabotage legal analysis. I believe it was also a good problem in that it showed how unwanted prejudices can have an equally damaging effect. And to highlight the racist assumption required all of one or two minutes, literally, of class time.

(h) The Form of Teaching

Australian law teaching is dominated by the lecture.¹⁹ In the hands of some teachers, 55 minute lectures positively fly by amid the excitement of learning. If such teachers have read this far, stop, go directly to Part II. Your form works for you. Keep with it.

The weight of opinion in the literature²⁰ would suggest that such gifted lecturers are few and that in the hands of most law teachers a lecture is an inefficient and boring method of teaching in which most learning has ceased after twenty minutes and all that remains is mindless notetaking. From the teacher’s perspective lectures are safe. The absence of real opportunities for questions and the high degree of control over the proceedings makes for a comfortable cosiness. However, safety and control are the enemies of aliveness, the opposite of being in the flow and responding to one’s students’ needs. Let’s face it, for most teachers delivering lectures is hardly exciting. It is almost as dull presenting them as it is for students listening.

¹⁸ G Nash Q.C., ‘Should Law Schools Produce Lawyers?’ (1991) 76 *Victorian Bar News* 38 at 43.

¹⁹ With, to the knowledge of the writer, the exception of the law schools at Macquarie and UNSW.

²⁰ G Gibbs *Twenty Terrible Reasons for Lecturing* Educational Methods Unit Oxford Polytechnic Occasional Publication No 8 January 1982.

This need not be so. It is not this paper's purpose to chronicle all the interesting things one can do in a lecture. That has already been done, comprehensively and well.²¹

It is sufficient here to note that educationally the wrong person is doing all the work in lecturing. Most people learn best by doing; by being actively involved in the learning process. By this test lectures must be arranged for the benefit of the faculty not the students. All of the techniques available to supplement or replace lectures involve more participation from students than listening to lectures and all are apt to produce more new and interesting insights for the lecturer than their well-worn lecture notes. Everyone benefits - it simply requires one person to relinquish an attachment to safety and a degree of control.

Responses to Some Arguments Against the Above Techniques

(a) Time Limitations

To the argument that each of these ways to enliven teaching would consume valuable time I would ask, what is the highest use of class time? The literature seems overwhelmingly to decry lectures as highly inefficient for the communication of information. Reading carefully selected and edited course materials makes for more effective learning for most students than listening and note-taking.²²

"Law teachers (must) work out what can be done most effectively outside class, and what can best be done in class. Participative teaching methods can be used in class by teachers who ... restructure their courses to focus on methods to promote independent learning outside class."²³

(b) The Teacher's Role

One objection to these suggestions may be that their implementation will require teachers to reveal more of themselves and their own values to students and hide less behind the role of an academic, narrowly defined. If that flows from these suggestions, it is a consequence I welcome:

"*Who we are* matters as much as what we are and what we think. It is important to teach our students that there is a "me" in the law, as well as specific rules that are animated by our experiences."²⁴

(c) Value Neutral

Law schools profess to be value neutral.²⁵ However, the professional life of the lawyer is one of making value judgments: Is it worth pursuing this appeal? Is a jury likely to convict my client on this evidence? Does this arrangement effect a fraud on the minority shareholders?

In the words of Roger Cramton, a former Dean of Cornell Law School:

"Our indifference to values confines legal education to the "what is" and neglects the promise of "what might be". It confirms a bias deeply ingrained in many law students - that law school is a training ground for technicians who want to function efficiently within the status quo.

The aim of all education, even in a Law School, is to encourage a process of continuous self-learning which involves the mind, spirit, and body of the whole person. This cannot be done unless larger questions of truth and meaning are directly faced ... Law schools and legal educators are inevitably involved in the service of values. For most part they serve

21 G Gibbs S Habeshaw & T Habeshaw *53 Interesting Things To Do In Your Lectures* Technical & Educational Services Ltd Bristol 1987; D Newble & Cannon *A Handbook for Teachers in Universities and Colleges* Kogan Page New York 1989 pp1-23; LW Andresen *Lecturing to Large Groups - A Guide to Doing It Less But Better* Tertiary Education Research Centre UNSW Occasional Publication No 24 February 1984.

22 R Johnstone 'Rethinking the Teaching of Law' (1992) 3 *Legal Educ Review* 17 at 54-55.

23 *Ibid* at 56.

24 JM Culp 'Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy' (1991) 77 *Virginia Law Review* 539 at 543.

25 In only the most superficial sense do they succeed. The unconscious inculcation of the conservative world view of the faculty, other students, and the profession is part of the socialisation process of virtually every law school.

as priests of the established order and its modern dogmas. The educator has an obligation to address the values that he is serving."²⁶

Conclusion to Part I

Part I of this paper has consisted of an examination of techniques which can assist in bringing legal teaching alive. It will conclude with a glimpse of the promised land from the lofty heights of a spiritual autobiography.²⁷

The autobiography is of the Trappist monk, Thomas Merton. The teacher is Mark Van Doren who taught Merton eighteenth century English literature at Columbia University. Merton describes the seventh storey of the teacher's "Seven Storey Mountain" as follows:

"Mark would come into the room and, without any fuss, would start talking about whatever was to be talked about. Most of the time he asked questions. His questions were very good, and if you tried to answer them intelligently, you found yourself saying excellent things that you did not know you knew, and that you had not, in fact, known before. He had "educated" them from you by his question. His classes were literally "education" - they brought things out of you, they made your mind produce its own explicit ideas. Do not think that Mark was simply priming his students with thoughts of his own, and then making the thought stick to their minds by getting them to give it back to him as their own. Far from it. What he did have was the gift of communicating to them something of his own vital interest in things, (and) the results were sometimes quite unexpected ... casting lights that he had not himself foreseen."²⁸

II: Incentives for Good Teaching

Why should teachers want their teaching to be enlivening for themselves and their students? There is the personal satisfaction of achieving something difficult and doing a job well. Against this is weighted all the effort needed to use new teaching styles and implement interactive techniques in lectures and re-work the course materials. There is a heavy weight favouring inertia. What incentives do universities provide by way of rewarding excellence in teaching? In the US there have been a number of studies on this issue²⁹ and each have concluded that in faculty promotion decisions published scholarship far outweighs excellence in teaching. The evidence available in Australia³⁰, although merely anecdotal, would appear to lead to the same conclusion. "While all may notionally accept that teaching is important, in fact it is largely ignored for (the) purposes of ... staff selection, confirmation and promotion."³¹

This is changing. The law schools at Queensland University of Technology and Bond University have a stated policy that teaching excellence is to rank equally with scholarship as a criteria for promotion. Both schools are also notable for their provision of staff development training aimed at improving the teaching performance of their academics. Recognising teaching excellence as an important criteria for promotion and assisting faculty to achieve that excellence are two changes which cannot be implemented too soon if Australian law schools are to realise their potential as educational institutions.

26 R Cramton 'The Ordinary Religion of the Law School Classroom' (1978) 29 *J Legal Educ* 247 at 262.

27 T Merton *The Seven Storey Mountain* Harcourt Brace Jovanich Inc New York 1948.

28 *Ibid* at 139.

29 MR Scordato 'The Dualist Model of Legal Teaching and Scholarship' (1990) 40 *The American University Law Review* 367 at 373. RH Abrams 'Sing Muse: Legal Scholarship for New Law Teachers' (1987) 37 *J Legal Educ* 1 at 11. JS Elson 'The Case Against Legal Scholarship or, if the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J Legal Educ* 343. DJ Turner 'Publish or be Damned' (1981) 31 *J Legal Educ* 550. DH Vernon 'Ethics in Academe - Afton Dekanal' (1984) 34 *J Legal Educ* 205 at 210.

30 See B Boer & J Sassella 'Teaching Methods' a paper delivered at the 1981 AULSA conference, at 3 (copy on file with this author); and R Johnston 'Evaluating Law Teaching: Towards the Improvement of Teaching or Performance Assessment?' (1990) 2 *Legal Educ Rev* 101 at 113.

31 Johnston *Ibid*.

At a more fundamental level than changing promotion criteria and providing educational training to faculty, the accepted role of a legal academic as both teacher and scholar is open to question on the grounds of efficiency. MR Scordato in his excellent article, "The Dualist Model of Legal Teaching and Scholarship", considers many of the costs associated with the model which predominates in Anglo-Australian legal education of requiring every legal teacher to be a scholar and every scholar a teacher. Outlined below are some of the costs he identified.

(a) Over-specialization

The reward of scholarship over teaching and the need to publish encourages teachers to become expert in ever more narrow topics, few of which are of relevance to an undergraduate law school curriculum.

(b) Stress and Lack of Personal Investment

The need to function as both a teacher and scholar is a source of considerable stress to an academic juggling the demands of each role and often leads to the individual identifying themselves primarily as either teacher or scholar and doing merely enough to get by in the other area.

(c) Effect on Curriculum

Perfectly understandable attempts by faculty to harmonise their teaching and scholarly fields can result in an excess of overly theoretical and abstruse points of law in an undergraduate course. If these attempts fail, as often they do, the scholar researches and writes upon what s/he doesn't teach and teaches outside his/her own areas of interest and expertise. (Hence one of the most cited benefits of the teacher-scholar model, its alleged synergy, is not realised.) Our research interests may live for us but too often, in this writer's experience, they lead merely to "curriculum creep". Over the years our particular interest may grow by small accretions to consume more and more of the content of the course.

(d) Effect on Effort Invested in Teaching

In this writer's opinion this is the principal cost of the dual teacher-scholar model. In Scordato's words:

"The incentives ... are such that the opportunity cost to law school professors of developing and improving their courses beyond the point necessary to prevent open complaints by their students exceeds the practical benefits to be derived from any incremental improvement in those courses. As a result law professors operating within the dualist model face powerful practical incentives to develop their courses only to the point where students are not openly complaining, and to then devote the remainder of their personal resources to producing published scholarship."³²

The classic argument for the dualist model of the scholar-teacher is that the person who is researching in their discipline makes a more alive teacher; that the subject lives more for the ardent pursuer of truth. However, the first systematic study into this issue in Australia has come to the contrary conclusion. In 1989 Ingrid Moses and Paul Ramsden surveyed 890 staff in the universities and former colleges of advanced education and the results surprised the researchers. In the words of Ramsden:

"Teaching and research, far from being complimentary activities, appear to be either completely unrelated or to be in conflict with each other. *The most productive researchers have the least favourable attitudes to teaching whilst the least productive are the most committed to teaching.*"³³

32 Scordato *supra* n.29 at 374-375.

33 P Ramsden 'Teaching and Research: Are They Complimentary?' (1991) *Australian Campus Review Weekly* August 22-28 at 14.

The requirement that those whose natural bent is towards teaching the law also publish³⁴ means that Australian legal education which began with part-time law teachers drawn from the ranks of practitioners³⁵ has now evolved to the heights of using part-time law teachers drawn from the ranks of legal scholars.³⁶

III: The Role of Law Schools

The historical role of Australian law schools has been to equip students for legal practice by ensuring they know a bundle of rules of law and have the skills to manipulate those rules and discover others.³⁷ It has been a modest ambition, and perhaps quite well realised. In its historical context, the use of a four year degree to achieve such modest ends may have been questionable. Today it is indefensible. A law degree is used as a respected, general educational preparation for a diverse array of careers. Law schools are no longer only (or perhaps even primarily) training fledgling practitioners.

Increasingly the legal system and profession are under attack.³⁸ The public wants simpler, quicker and less expensive justice and yet there is no empirical research (to the author's knowledge) on the costs of Australia's legal system or the costs of alternatives such as those encompassed under the rubrics of alternative dispute resolution or judicial case management to name but two.³⁹

Law schools seem unwilling to consistently address the larger issues of what is wrong with our law and legal system, and how these should be changed to better serve the public. Indeed the exposition of the law is the crowning research achievement of most Australian law schools.⁴⁰ Yet in the opinion of Derek Bok, former Dean of Harvard Law School:

"... law faculties ... should welcome the chance to motivate their students by giving them a larger vision of their calling, a sense of what a life of leadership in the bar might entail, an awareness of the urgent problems of the profession that they could help to resolve."⁴¹

Whilst it is not within the scope of this paper to judge whether the balance is skewed in our law schools between exposition of the law on the one hand, and criticism and generation of new approaches on the other, it must be self-evident that there is much of interest (and of relevance particularly to those students who do not intend to practice) in a more critical, searching approach to the law than is the norm in its teaching in this country.

After the first year or two, rule mastery and manipulation must seem tedious and irrelevant to the law student intent on a career in business, government or the arts. However, if law schools

34 Conversely, the requirement that natural legal scholars also teach imposes many costs on legal scholarship which Scordato ably chronicles (*supra* n.29 at 383-392) but which are beyond the scope of this paper.

35 J Goldring 'Distance Teaching in Law: Possibilities for Commonwealth Cooperation' (1990) 2 *Legal Educ Rev* 83 at 88.

36 This is unfair to the many able and dedicated teachers of law for whom teaching is their first priority. However, with the exception of those few willing to renounce writing for publication and focus solely on teaching (and presumably remain content with their present position on the totem pole) it is true to say that there are no full-time legal teachers in Australia (with perhaps the exception of those teaching legal studies in high schools).

37 JH Wade 'Legal Education in Australia - Anomie, Angst, and Excellence' (1989) 39 *J Legal Educ* 189 at 202.

38 For but two examples of the criticisms see 'Rorting the Law' *The Sunday Mail* September 8 1991 p13 col 1 and 'Lawyers Under Fire Over Fees' *The Sunday Mail* September 15 1991 p1 col 5. For an example of a typical defensive response by the legal profession see 'Attack on Lawyers Threat to Rule of Law' *The Australian* September 18 1991 p6 col 8. While many of the points raised in the defence are well made, there is a distinct opportunity and a crying need for academic lawyers to research new, cheaper solutions to old problems.

39 Acknowledgement generally for these ideas is due to D Bok 'A Flawed System of Law Practice and Training' (1983) 33 *J Legal Educ* 570. For the paucity of such empirical research in the US see PH Shuck 'Why Don't Law Professors Do More Empirical Research?' (1989) 39 *J Legal Educ* 323.

40 DC Pearce, E Campbell & D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission Canberra AGPS 1987* at s9.185. The Arthurs' Report in Canada found more than 80 per cent of research in that country to be of an expository or doctrinal nature: Arthurs 'To Know Ourselves: Exploring the Life of Canadian Legal Scholarship' (1985) 23 *Osgoode Hall LJ* 403.

41 Bok *supra* n.39 at 584.

accept they are preparing students for a diverse array of careers (as other humanities faculties have always known) this could lead the curriculum into greener, more interesting pastures for *all* law students and their teachers.

Conclusion

This paper has ranged from ways to make the teaching of law more stimulating and enlivening to the role of a modern law school both educationally and in society.

The great challenge facing law schools is to effect these changes within the financial stringency of their current environment. However, it is a mistake to always assume change costs money. Usually it requires courage, hard work and a willingness to take risks. None of the specific ways suggested in this paper to enliven legal teaching is necessarily more expensive than current practices.

The changes individual teachers can make to enliven their teaching are clear: eight have been suggested here. The changes needed within institutions to encourage and reward excellent teaching⁴² and to well serve their students and society are less clear and less easily attainable. In this regard the aim of this paper has been primarily to provoke considered debate.

If one or more of the eight suggested approaches leads to greater aliveness in legal teaching this paper has justified the trees felled to print it. If this paper encourages a law school somewhere to implement institutional reforms to reward good teaching, to serve the educational needs of all its students or to fulfil its duty to society as an agent of change, well, that much impact, that much aliveness, is almost frightening. However, it has primarily been fear and inertia which have perpetuated the teaching of law in Australia by essentially unchanged methods. We each must face and move through our fears of change and the unknown if legal education in this country is to realise its potential.

42 With more than a certificate and hand shake.

