

WALKING THE WALK: USING STUDENT–FACULTY DIALOGUE TO CHANGE AN ADVERSARIAL CURRICULUM

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I. INTRODUCTION

The law school curriculum has come under fire for being overly adversarial,¹ hierarchical,² patriarchal,³ distressing⁴ and dull.⁵ Internal critiques of the legal curriculum take their place alongside external pressures for change from both legal practice and higher education sectors, which are undergoing rapid and transformative changes under the pressures of globalisation, competition and developments in information technology.⁶ In this climate, law school curricular reform has become a hot topic across Australia and around the world. Concerns about law student wellbeing, in particular, are generating momentum for genuine change.⁷

Scores of journal articles, theses and books have been written critiquing the legal curriculum and suggesting a wide variety of curricular changes to address the shortcomings. Many legal educators have engaged in thoughtful analysis and explication of what needs to be changed in the law school curriculum.⁸ Few, however, have focused on *how* to gain consensus for any particular change or begin to implement it.⁹ The 'how to' aspect of legal curricular reform is

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- 1 Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing the Law School's Hidden Adversarial Curriculum' (2011) *Monash Law Review* (forthcoming), which argues that the legal curriculum is excessively adversarial.
- 2 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the State* (New York University Press, 2004), which critiques the hierarchical nature of legal education.
- 3 Lani Guinier et al, 'Becoming Gentlemen: Women's Experiences at One Ivy League Law School' (1994) 143 *University of Pennsylvania Law Review* 1, which reveals patriarchal and gender discriminatory aspects of legal education.
- 4 Norm Kelk, Sharon Medlow and Ian Hickie, 'Distress and Depression among Australian Law Students: Incidence, Attitudes and the Role of Universities' (2010) 32 *Sydney Law Review* 113, which discusses research showing that law students experience higher levels of psychological distress than their peers.
- 5 Annan Boag et al, *Breaking the Frozen Sea: The Case for Reforming Legal Education at the Australian National University* (ANU Law School Reform Committee, 2010) iii-iv <www.lawschoolreform.com>, which raises various critiques of the law curriculum, including that it is irrelevant and not engaging.
- 6 Sally Kift, '21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law' (2008) 18 *Legal Education Review* 1, 2.
- 7 See *Law Student Wellbeing: An Educational Imperative?* (2011) 21(2) *Legal Education Review* (forthcoming), a volume which is entirely devoted to issues relating to law student wellbeing.
- 8 See, eg, Kift, above n 6; Lawrence S Krieger, 'Human Nature as a New Guiding Philosophy for Legal Education and the Profession' (2008) 47 *Washburn Law Journal* 247; Roy Stuckey et al, *Best Practices for Legal Education* (Clinical Legal Education Association, 2007) <http://law.sc.edu/faculty/stuckey/best_practices/best_practices-cover.pdf>; David Weisbrot, 'What Lawyers Need to Know, What Lawyers Need to be Able to Do: An Australian Experience' (2002) 1 *Journal of the Association of Legal Writing Directors* 1; David Weisbrot, 'Taking Skills Seriously: Reforming Australian Legal Education' (2004) 29(6) *Alternative Law Journal* 266.
- 9 Much of the education reform literature that does discuss process is not specialised to the law school experience. See, eg, Karen Nelson, Sally Kift and Tracy Creagh, *Implementing a Blueprint for Transition Success* (2007) Queensland University of Technology <<http://eprints.qut.edu.au/8319/1/8319.pdf>>.

generally only revealed by implication. For example, Elena Kagan's description of the much-heralded 2006 reform of the Harvard Law School curriculum describes the content of the reform and leaves the decision-making and implementation process largely to the imagination.¹⁰ Similarly, in his article titled, 'The Law School Curriculum: The Process of Reform', John Weistart maps out trends in curriculum reform and discusses constraints on reform (such as cost), but never actually broaches the subject of how law schools actually accomplish change.¹¹

Nevertheless, the difficulty of implementing sustained reform in law schools is widely acknowledged. Law school culture has been described as 'so powerful and robust that it has fought off almost every major reform effort.'¹² In their critique of law school's culture of competition and conformity, professors Sturm and Guinier suggest that, in order to address deeply-embedded practices, law school reformers need to 'invite all of legal education's constituencies' — including 'students, faculty, alumni, lawyers, legislators and judges' — into the legal educational reform project 'from the very beginning and throughout the process'.¹³ Genuine law school reform, they argue, requires cultural change which may be accomplished and sustained only with the support of all affected.¹⁴

Gaining and sustaining the support of all law school constituencies for any particular program of reform is no mean feat. Academics are notoriously independent and resistant to change; leading them is frequently compared to herding cats.¹⁵ Similarly, the interests and needs of legal practitioners, legal and non-legal employers, and students are diverse and sometimes conflicting. Further, the questions relating to what future lawyers will need to know and how best to teach them are value-laden questions whose answers will differ based on the mission, history and ambitions of the institution and its students. The question of how to effectively engage all of the law school's constituencies into the process does not have an obvious answer. Law faculties are familiar with the idea of consulting the profession about the legal curriculum.¹⁶ They are also familiar with conducting surveys of alumni and, perhaps, focus groups with employers and judges.¹⁷ These consultative processes are undoubtedly helpful in providing information for decision-makers and in building support for particular reforms. Consultative processes frequently fall short, however, as they fail to change the views of the various constituencies, resolve conflict or build consensus.

This paper does not propose to resolve the question of how best to choose and implement curricular reform. Instead, it draws on the recent experience of a student–faculty dialogue retreat focused on student wellbeing and curricular reform, and suggests that student-faculty dialogue contributes positively both to curricular reform efforts and to general student wellbeing.

10 Elena Kagan, 'The Harvard Law School Revisited' (2010) 11 *The Green Bag* 2d 475.

11 John C Weistart, 'The Law School Curriculum: The Process of Reform' (1987) *Duke Law Journal* 317.

12 Carrie Menkel-Meadow, 'The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering' (1999) 72 *Temple Law Review* 785, 809.

13 Susan Sturm and Lani Guinier, 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60 *Vanderbilt Law Review* 515, 550.

14 *Ibid.*

15 See, eg, Geoff Carrett and Graeme Davies, *Herding Cats: Being Advice to Aspiring Academics and Research Leaders* (Triarchy Press, 2010).

16 See Consultative Committee of State and Territorial Law Admitting Authorities, *Uniform Admission Requirements: Discussion Paper and Recommendations* (1992).

17 See, eg, Molly Townes O'Brien and John Littrich, 'Using Assessment Practice to Evaluate the Legal Skills Curriculum' (2008) 5(1) *Journal of University Teaching and Learning Practice* 61.

II. A DIALOGUE PROCESS

In 2009 a study by the Brain Mind Research Institute (BMRI) concluded that law students suffer from higher levels of depression than their peers.¹⁸ The study presented a powerful indictment of legal education: law study is creating measurable psychological harm; it needs to change. At the ANU College of Law, where we had already implemented a first-year mentoring program and where counselling was readily available in the University Counselling Centre, we wondered whether it was possible that our law students might not exhibit the level of psychological symptoms of distress shown in the BMRI study. But if our students were distressed, what would be the best institutional response?

In 2009–10, Kath Hall, Stephen Tang and I surveyed students at the ANU College of Law on various measures of wellbeing.¹⁹ We also looked at data relating to student thinking styles and motivations for attending law school. Our results were consistent with a growing body of research indicating that legal education may have a negative impact on law students' wellbeing beginning in the first year of law study.²⁰ These results challenged us and moved us to begin thinking deeply about the reform process.

A. *The Need for a Deliberative Process*

Many law students want to be involved in law school reform — and, in fact, are clamouring for a voice in curricular decision-making through established student organisations²¹ and through ad hoc organisations that make use of the internet to share their ideas about reform.²² The usual methods of consulting with these organisations — holding a focus group, conducting surveys, or allowing one or two student representatives to speak at curriculum committee meetings — are important and can give students a voice; but they are not without problems. Students do not necessarily agree on what reforms are needed.²³ They may not have enough information to make good choices. The representative process of law student societies may provide greater voice to some students and leave others feeling left out. Further, even after student views have been canvassed, law faculties may not take law student views seriously.²⁴ Law faculties and law school administrators are the traditional decision-makers in legal education. Collectively, law faculties have vast expertise in law, legal practice and curriculum reform. It makes sense that the views and values of the faculty should be given great weight. On the other hand, a reform process that is imposed on students by the faculty may reproduce some of the aspects of

18 Norm Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain & Mind Research Institute, 2009) 12.

19 Our work was generously supported by a Vice-Chancellor's Teaching Enhancement grant and by the Dean of the ANU College of Law.

20 Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 19, nn 5–8, which cites decades of work showing the negative impact of law study on student wellbeing. See also Colin James, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education' (2008) 18 *Legal Education Review* 123, which correlates lawyer wellbeing issues with legal training; Paula Baron, 'Thriving in the Legal Academy' (2008) 17 *Legal Education Review* 27, which discusses wellbeing issues that affect legal academics.

21 The Australian Law Student Association provides a network for law student associations across Australia: see <<http://www.alsa.net.au/>>.

22 One such group, Law School Reform, has a website at <<http://lawschoolreform.com/>>.

23 Contrast the recommendations made in Boag et al, above n 5, with the recommendations in ANU Law Student Society, *Response to the Law Student Reform Report* (23 May 2011) <http://www.anulss.com/documents/LSS_LSR_Response.pdf>.

24 I make these observations based on 17 years of teaching at six different law schools in two countries. I should note that student views are taken quite seriously at the ANU College of Law, where I currently teach.

legal education that are the targets of contemporary critique — by stifling creativity, reducing students' feelings of self-efficacy, and reinforcing a culture of conformity.²⁵

Legal scholars seeking to build a model for an effective remedial process in public disputes in the US have suggested that deliberative processes, multilateral decision-making, consensus-building processes and community dialogue hold promise resolving for multi-constituent reform issues.²⁶ Similarly, recent research by political scientists demonstrates the potential of deliberative forums for reaching consensus and for providing better policy outcomes.²⁷ In their review of empirical data relating to new environmental regulations, for example, Freeman and Langbein found that consensus-building processes yielded better rules.²⁸ The higher quality results of face-to-face deliberation may be attributable, in part, to superior information production, and to the ability of the participants to educate each other, to pool knowledge and to share expertise.²⁹ Deliberative processes hold promise not only for generating better reform decisions, but also for creating and sustaining support for those decisions.³⁰ The reform process itself may also model some of the reforms that are needed in legal education, bringing greater transparency about legal educational goals and sense of self-efficacy to students — thus decreasing their sense of anxiety and distress.

In light of the findings of our research — that students experienced increased symptoms of psychological distress as early as the first year of law study — we sought a process that would allow us to examine the law student experience and explore the ways that the pedagogy, substance and context of legal education impact a student's self concept, development of professional identity, and wellbeing. More importantly, however, we hoped to design a process to provide an opportunity for students and faculty to collaborate and to articulate ideas for curricular reform. Ultimately, we chose a dialogue methodology.

A 'dialogue' is not a fixed, specific process. Instead, dialogue is a flexible format for deliberation and discussion that can be adapted in a variety of ways to provide an integrative understanding of real-world problems and/or to provide a process for finding and implementing solutions. Dialogue is well-suited to situations where it is important to synthesise knowledge from a variety of sources or disciplines and build a comprehensive understanding of a complex problem.³¹ It is also adaptable to provide a collaborative platform for multi-constituent problem-solving or conflict resolution.³²

Patricia Romney explains:

Dialogue is focused conversation, engaged in intentionally with the goal of increasing understanding, addressing problems, and questioning thoughts or actions. It engages the heart as well as the mind. It is different from ordinary, everyday conversation, in that dialogue has a focus and a purpose. Dialogue is different from debate, which offers two points of view with the goal of proving the legitimacy or correctness of one of the viewpoints over the other. Dialogue,

25 Sturm and Guinier, above n 13.

26 Michael A Rebell and Robert L Hughes, 'Schools, Communities, and the Courts: A Dialogic Approach to Education Reform' (1996) 14 *Yale Law and Policy Review* 99, 113–19; Susan P Sturm, 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown Law Journal* 1355, 1427–34.

27 John S Dryzek and Aviezer Tucker, 'Deliberative Innovation to Different Effect: Consensus Conferences in Denmark, France, and the United States' (2008) 68 *Public Administration Review* 864; Simon Niemeyer and John S Dryzek, 'The Ends of Deliberation: Metaconsensus and Intersubjective Rationality as Ideal Outcomes' (2007) 13 *Swiss Political Science Review* 497.

28 Jody Freeman and Laura Langbein, 'Regulatory Negotiation and the Legitimacy Benefit' (2001) 31 *Environmental Law Review* 10 811.

29 Susan L Carpenter and W J D Kennedy, *Managing Public Disputes* (Jossey Bass, 2001) 124–6.

30 Freeman and Langbein, above n 28, 10 814.

31 David McDonald, Gabriele Bammer and Peter Deane, *Research Integration Using Dialogue Methods* (ANU E Press, 2009) 1–3.

32 Geoffrey Cowan and Amelia Arsenault, 'Moving from Monologue to Dialogue to Collaboration: The Three Layers of Public Diplomacy' (2008) 616 *The ANNALS of the American Academy of Political and Social Science* 10.

unlike debate or even discussion, is as interested in the relationship(s) between the participants as it is in the topic or theme being explored. Ultimately, real dialogue presupposes an openness to modify deeply held convictions.³³

Niemeyer and Drysek explain further that ‘authentic deliberative engagement requires an open mind in a spirit of reciprocity.’³⁴ Although it may not yield perfect consensus or ‘the right’ policy choice, it results in a kind of inter-subjective rationality that ‘can legitimately claim superiority to the extent that individuals have taken into account all the relevant considerations’.³⁵

We considered a dialogue process to be particularly appropriate for several reasons. Because of the sensitivity of the topic, we wanted to create a forum that would not only shed light on the wellbeing of law students generally, but also contribute in a positive way to the wellbeing of the participating students and faculty. A dialogue has the potential to build relationships, to empower students, and to create a platform for further student–faculty interaction. Dialogue can also allow participants to express their experience through stories,³⁶ and empower them to become the authors of new stories.³⁷ We also chose dialogue as a buffer against the adversarial and ‘debate’-style discussions that are stereotypical of law school discourse.³⁸ Dialogue was chosen to model a different way of relating and communicating, allowing participants to embrace new ideas and acknowledge differences of opinions without having to be ‘right’.

B. *Observations from the Dialogue*

We held a two-night, one-day faculty–student dialogue retreat at the ANU’s Kioloa Coastal Campus, a 348-hectare field station extending from the high-tide mark into bushland on the southeast coast. We had 18 students and 10 faculty participants, who engaged in a multi-session process that involved story-telling, re-imagining legal education, brainstorming reform and sharing ideas. The process also involved sharing meals and social times. The results of the dialogue retreat, including specific ideas for curriculum reform that were generated there, are reported at length elsewhere.³⁹ In this section, I seek to illuminate why and how a dialogue process is likely to lead to meaningful curricular change. I argue that, because dialogue has the potential to reveal the hidden curriculum, to address matters that are not easy to talk about, and to build relationships, it helps both faculty and students develop an improved understanding of the need for reform and generates support for the reforms proposed.

1. *Revealing the Hidden Curriculum*

What students learn is not limited by what teachers intend to teach. The hidden curriculum is informed not only by the choice of course material (what is taught and not taught), but also by the pedagogy, materials and context of the class.⁴⁰ Teachers are often unaware of the subtext

33 Patricia Romney, ‘The Art of Dialogue’ in Pam Korza, Barbara Schaffer Bacon and Andrea Assaf (eds), *Civic Dialogue, Arts & Culture* (Americans for the Arts, 2005) 57.

34 Niemeyer and Drysek, above n 27, 500.

35 Ibid. Deciding what all of the relevant factors are is a determination made by meta-consensus. A meta-consensus requires ‘agreement on the domain of relevant reasons or considerations (involving both beliefs and values) that ought to be taken into account, and on the character of the choices to be made’: at 500.

36 Richard A Krueger, ‘Using Stories in Evaluation’ in Joseph S Wholey, Harry P Hatry and Kathryn E Newcomer (eds), *Handbook of Practical Program Evaluation* (Jossey-Bass, 2004) 404.

37 John J Osborn, ‘Bleak House: Narratives in Literature and Law School’ (2008) 52 *New York Law School Law Review* 339.

38 O’Brien, above n 1.

39 Molly Townes O’Brien, Stephen Tang and Kath Hall, ‘Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum’ (2011) *Legal Education Review* (forthcoming).

40 Kathleen P Bennett and Margaret D LeCompte, *The Way Schools Work: A Sociological Analysis of Education* (Longman, 1990); George J Posner, *Analyzing the Curriculum* (McGraw Hill, 1992).

of their classes — and may, in fact, deny that there is any subtext when they are confronted. Nevertheless, it may be the subtext of the curriculum rather than what we intend to teach that is at the core of student distress.

In dialogue with students, the subtext of teaching can become explicit in a way that it would not in a curriculum committee meeting or in a regular office consultation between a student and faculty member. In one dialogue session, for example, participants (both students and faculty members) were asked to describe the impact that law study had on them, their personalities and their thinking styles. Participants took time in small groups to think about the impact of what they had learned. When they returned, one student remarked, '[I]aw school teaches that we should be able to answer any question in 20 minutes'. The student then explained that he had learned that he should appear confident and be superficial in his analysis of legal issues because he never had more than a few minutes to analyse a question on an exam. Faculty members in the group objected, saying that they did want students to take time to engage in in-depth analysis. They had to acknowledge, however, that the traditional exam format favours quick analysis over in-depth treatment of issues. This opened the door for discussion of the pressures and constraints of legal teaching that often result in assessment through a timed, in-class exam.

In this kind of discussion, the hidden curriculum of law classes can be revealed. In dialogue, faculty members who generally focus on the *content* of their instruction, may hear about the full variety of factors that shape student learning. Many of these factors involve faculty choices, such as the format of assessment tasks, the amount of time that is devoted to collaborative projects, or the kind of feedback that is returned to students. As faculty members hear about the unanticipated and undesirable consequences of their choices, the need for reform becomes clear. They are converted to the cause of reform.

In dialogue, students can gain insight in a similar way into their teachers' unrealised goals. Informed of the pressures and constraints that led their teachers to make certain pedagogical choices, students' suggestions for reform become more reasonable and informed. Students and faculty members can then re-focus the reform discussion based on a more explicit understanding of the values, goals and constraints on both sides. This understanding provides better information to support reform ideas and greater motivation for faculty members to change practices that are not producing the learning outcomes they hope for.

2. Understanding and Addressing Issues That Are Not Easy to Talk About

The dialogue revealed sources of student distress and provided more information than a typical curriculum reform survey. In dialogue, participants were willing to reveal their perception that law school lowered their self-opinion and sense of efficacy. They attributed their greater sense of insecurity to a number of factors, including being away from home, being part of a cohort of high-achievers, lacking guidance, receiving negative feedback, and competing in a perceived adversarial context that made it more difficult for them to relate to other students.

Open, emotional discussions have the potential not only to generate understanding and empathy among the participants but also to serve a therapeutic function as well. Students who are able to articulate their feelings and participate in a discussion about how law school has changed their thinking are engaging in a metacognitive process. Metacognition (that is, learning about or reflecting on one's own mental processes) may have an important role to play in psychological wellbeing. For instance, a person's tendency to avoid thoughts and feelings is a common feature in psychopathology.⁴¹ On the other hand, a person's ability to reflect on, narrate and make sense of her or his thoughts, feelings and experiences is associated with wellbeing and psychological

41 Neharika Chawla and Brian Ostafin, 'Experiential Avoidance as a Functional Dimensional Approach to Psychopathology: An Empirical Review' (2007) 63 *Journal of Clinical Psychology* 871.

flexibility.⁴² Further, when students are listened to, taken seriously, and responded to, their own sense of value and efficacy is enhanced.

3. *Building Mutual Understanding and Respect*

In addition to producing ideas for reform, the dialogue led to better relationships among participants. During the final session, one student remarked about the faculty members who participated, ‘I used to see you as robots who just showed up and lectured. It’s nice to know you as people.’ Another student wrote this comment following the retreat:

I feel now that, even if none of the ideas we discussed eventuate, I have nevertheless benefited enormously from the experience. I have renewed appreciation for the efforts put in by teachers, and I now feel I can approach staff and understand better what goes on in the law school, so the weekend has had significant benefit for my own education if nothing else.

III. CONCLUSION

Across Australia, law school curriculum reform is increasingly seen as an imperative. The problems to be addressed, however, are not the kind that can be resolved by merely adding a new course or changing the approach to a few subjects. Instead, thorough, insightful and meaningful change that reaches not only the official curriculum but also the hidden curriculum and the culture of the law school is required. But cultural change is slow, and it may be difficult to implement a process that can generate meaningful change. As professors Sturm and Guinier point out:

Law school culture is largely taken for granted; indeed, it is invisible unless explicitly confronted and contested. Yet, it mediates and shapes the meaning of every programmatic innovation.⁴³

A dialogue process, involving both students and faculty, has the potential to generate faculty support for, and understanding of, the need for changes in the stated and unstated curriculum. It also holds promise for generating better ideas for specific reforms. Finally, and perhaps most importantly, it is an empowering process for students who engage in it.

If we hope to provide an education for lifelong learners who have ‘robust intellectual capacities beyond mere technical knowledge and narrow vocational training’,⁴⁴ it is not enough to ‘talk the talk’ of student engagement. We need to ‘walk the walk’ by creating reform processes that model the values that underlie our educational goals. If we want students who participate, who engage in thoughtful deliberation and who collaborate, we need to encourage those qualities through our own approaches to pedagogy and our work towards reform. It is not enough to say that we will listen to students and consult with them; the reform processes we choose should actively engage, empower and contribute to student wellbeing.

42 See, eg, Jack J Bauer, Dan P McAdams and Jennifer L Pals, ‘Narrative Identity and Eudaimonic Well-Being’ (2008) 9 *Journal of Happiness Studies* 81.

43 Sturm and Guinier, above n 13, 549–50.

44 Kift, above n 6, 1.

